Chakrabarti Law Journal

A Multidisciplinary Research Journal

Peer-Reviewed Journal

(Annual Publication)

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College of Law, Bijulibazar, Kathmandu, Nepal

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Message From the Chairman Cum Campus Chief

Chakrabarti Habi Education Academy (College of Law) is proud to provide a **peer-reviewed** journal named **Chakrawarti Law Journal.** The journal contains scholarly articles that encompass a rich variety of topics related to law and useful to all readers.

This journal plays a vital role in shaping legal thought and practice. In addition, it encourages readers to meet the challenges of the legal profession with competence and integrity. The articles offer varied perspectives, covering new legal developments alongside enduring legal questions. Diverse articles help to bridge the gap between theory and practice by addressing contemporary legal issues.

The successful publication of this journal would not have been possible without the tireless efforts of the Editorial Board. I also sincerely wish that the team will be able to maintain the standard and regularity of the Journal in the years to come. I sincerely appreciate the active involvement of the journal's executive committee and the insightful contributions of the reviewers, whose efforts ensured the smooth publication of this issue. I am grateful to everyone involved in the process.

I am confident that issues of the journal will be in a more improved version.

With best wishes!

Prof. Devendra Bahadur Bhandari
Founder Chairman cum Campus Chief

Editorial

It is amply recognized that law journal has a particular bearing in law education and research. It provides incentives for the development of new ideas and insights of both academia and students. In terms of contents and analysis, there is no universally accepted common purpose and standard format for law journal. Each journal presents its own identity and ideals. Since the publication of *Pennsylvania Law Review*, originally named as *The American Law Register*, as considered to be the first law journal in the world in 1852, thousands of law journals and law reviews have been published in both hardcopy and online versions. The development of technology has provided new impetus in the field of scholarly publications.

The law journal represents vision, values, principles and approaches of the particular law education institutions and publishers. Likewise, the **Chakrabarti HaBi Education Academy** with its full commitment to providing strong foundation for law education and development of knowledge decided recently to publish a scholarly publication **Chakrabarti Law Journal.** It is, indeed, a welcome decision and needed serious deliberation and thought to articulate the path of ever-first publication, as said "प्रारम्भे ज्योति: पश्यति" in Sanskrit (meaning morning heralds the day). This remarkable journey was initiated with the aspiration of making valuable significant contributions to the domains of law and social science and social enginering, literature, human discoveries and intellectual achievements. Its pious hope of scholarly mission is to promote academic excellence and contribute to the advancement of legal scholarship.

A systematic and evidence-based scholarly writing would serve in objectivity, logical reasoning, and verifiable analyses. Academic writing and research are well recognized as mutually reinforcing disciplines. Our valuable contributors and researchers articulate original arguments, critically analyse contemporary issues, and substantiate their conclusions through rigorous investigation and credible sources. They demonstrate their interdisplinary long experience and academic disciplines as jurist, teacher, law professor and former diplomat and young scholars and students. They enjoy freedom in adopting suitable methodology and collecting evidence as required. Afterall, the main goal is to put their writing for the benefit of readers and scholars to add new perspectives and perceptions in their respective areas of writing. We believe they serve our purpose of publishing a qualitative multidisciplinary and research-oriented academic journal committed to fostering scholarly discourse and intellectual development.

Chakrabarti Law Journal would become a credible scholarly publication developed in accordance with internationally recognised principles, ethical standards, and best practices of academic research and publication. This peer review journal is an outcome of a rigorous process to ensure transparency, academic integrity, and fairness. The maiden issue of the Journal comprises original research articles in both Nepali and English, reflecting the journal's commitment to promoting bilingual academic scholarship and broader dissemination of legal research.

The Editorial Board expresses its sincere appreciation for all highly valuable scholarly contributions made by authors and their trust and confidence on **Chakrabarti Law Journal**. We are profoundly grateful to all those who got involved in initiating the process, writing articles, making observations and reviews, facilitating all this entire cycle of the publication. The Editorial Board also extends its heartfelt gratitude to **Chakrabarti HaBi Education Academy** for its generous institutional support, financial assistance, and unwavering commitment to the Journal publication. The Academy's leadership deserves our special mention. We express our sincere appreciation to the printing and technical professionals for their dedication, expertise, and meticulous attention to design, typesetting, and production to ensure the publication of this journal in a professionally presented and internationally acceptable format.

The Editorial Board looks forward to the continued cooperation, scholarly engagement, and constructive support of researchers, authors, reviewers, academic institutions, and readers in advancing the mission of **Chakrabarti Law Journal** as a distinguished platform for legal research and academic excellence in the years ahead. We also look forward to receiving any comments, feedback and suggestions on any aspect of the Journal for further improvement in its next issue.

May 2026

(Prof. Dr. Ram Babu Dhakal)

Editor-In-Chief

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Statute of limitations on Rape Cases in Nepal: Whether the Statute of Limitations be extended or eliminated?

Dr Gyan Basnet*[1], AR Joshi[2]**

Abstract

In the context of Nepal, the statute of limitations on rape cases is a complicated issue as it can both help foster accountability and stand in the way of justice at the same time. This article aims to explore the various barriers to justice for victims of rape and offer comprehensive suggestions to improve their access to justice. Inadvertently protecting offenders, Nepal's limited reporting window exacerbates the difficulties faced by survivors, adding to their stigma and practical obstacles. International bodies' criticism highlights how urgent reform is, and this is supported by activist movements and domestic legislative efforts. However, simply repealing the statute of limitations is not enough. To break down systemic barriers and promote accountability, a comprehensive strategy that includes legal reforms, awareness campaigns, and survivor-centric policies is needed.

1. Introduction

Rape is a serious issue of global concern.[3] It is a criminal act that has plagued societies throughout history, causing immeasurable harm to victims and communities. The act of non-consensual sexual intercourse has been condemned by moral codes, religious teachings, and legal systems across cultures[4]. Physically forced or otherwise coerced penetration - even if mild - of the vulva or anus using a penis, other body parts, or an instrument is the definition of rape given by the World Health Organization[5]. It does not, however, fully convey the complexity and breadth of rape as a crime and a human rights violation. The majority of modern laws, dispersed over many jurisdictions, come to the

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[2] ***Mr Joshi holds an LL.M degree in human rights law at Chakrabarti Habi Law College.*

[3] Rape Statistics by Country 2024, https://www.datapandas.org/ranking/rape-statistics-by-country (last visited Sep 7, 2024).

[4] Columbia University, Center for American Studies, *History of Sexual Abuse and Harrassment | Freedom and Citizenship*, https://freedomandcitizenship.columbia.edu/gender-equality-history-2021 (last visited Apr 15, 2024).

[5] World Report on Violence and Health, (World Health Organization ed., 2002), https://iris.who.int/bitstream/handle/10665/42495/9241545615_eng.pdf?sequence=1, (last visited July 1, 2024).

conclusion that rape, in general, include sexual activity that is both unwelcome and involves the use of force. The parallels stop there, though, as there is disagreement about what qualifies as "penetration," "force," and "consent"—the three main components of the legal definition of rape[6].

A stranger or an acquaintance, even a family member or close partner, might commit the offense. It may be driven by a variety of emotions, including desire, rage, hatred, retaliation, dominance, humiliation, or prejudice. It may occur in a variety of locations, including homes, offices, schools, streets, jails, conflict zones, and even online. Anyone can become a victim of rape, regardless of their age, gender identity, sexual orientation, race, ethnicity, religion, financial situation, or handicap.[7]

Rape survivors have been proven to experience deep and enduring effects from the experience. It may result in physical harm such as bruises, cuts, bleeding, fractures, infections, sexually transmitted diseases [8] , and unwanted pregnancies, abortions, miscarriages, fistulas, infertility, or even death[9]. Psychological trauma can also result from it, including depressive, anxious, fearful, dissociative, nightmares, flashbacks, poor self-esteem, guilt, humiliation, and suicide thoughts or attempts.[10]

In addition to being a crime against people, rape violates their human rights. According to the Universal Declaration of Human Rights (UDHR), everyone has the right to life, liberty, and security of person and all human beings are born free and equal in dignity and rights.[11]

The States Parties are required under the UDHR and other international human rights agreements to uphold, defend, and provide the rights of every individual, including victims of sexual assault. Accordingly, the States Parties are required to protect the human rights of rape victims from being violated, to stop and punish other people from infringing those rights, and to offer appropriate remedies and compensation when someone else violates those rights. However, many States Parties fail to fulfill their human rights obligations towards rape victims. One of the main obstacles to carrying out these duties, according to the Office of the High Commissioner for Human Rights (OHCHR), is the existence of a statute of limitations on rape cases.[12]

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[6] Paul Pressau, *Rape, Legal Definitions of: Encyclopedia of Women in Today's World*.

[7] Sexual violence myths & misconceptions | ACESDV, (Sep. 18, 2014), https://www.acesdv.org/about-sexual-domestic-violence/sexual-violence-myths-misconceptions/ (last visited Aug 12, 2023).

[8] Gina M. Wingood, Ralph J. DiClemente & Anita Raj, *Adverse Consequences of Intimate Partner Abuse among Women in Non-Urban Domestic Violence Shelters*, 19 AM. J. PREV. MED. 270 (2000).

[9] PATRICIA A. RESICK, *The Psychological Impact of Rape*, 8 J. INTERPERS. VIOLENCE 223 (1993).

[10] *Id.*

[11] United Nations, *Universal Declaration of Human Rights*, UNITED NATIONS, https://www.un.org/en/about-us/universal-declaration-of-human-rights (last visited Apr 15, 2024).

[12] OHCHR-Nepal Representative urges end to 35-day limit for filing rape charges, to mark International Women's Day (8 March) - Nepal | ReliefWeb, (2008), https://reliefweb.int/report/nepal/ohchr-nepal-representative-urges-end-35-day-limit-filing-rape-charges-mark (last visited Aug 13, 2023).

Statute of limitations is a legal concept that sets a deadline on when victims can file complaints or when prosecutors can start a prosecution for a criminal offense[13]. The logic behind statute of limitations is that it plays an important role in safeguarding rights of both victims and defendants as it helps to ascertain that evidence used in court is reliable and defendants get a fair trial.[14] However, such temporal restrictions also have negative impacts on victims of rape. They add hurdles in the path of victims seeking legal action when they are ready or have the capacity and means to do so.

The statute of limitations on rape cases is different in different countries and jurisdictions. Some countries, such as South Africa[15], have already abolished it. They recognize the gravity of the crime and the various challenges faced by victims in reporting it to authorities and seeking justice in the legal system. Other countries, such as the UK, Nepal, India and, meanwhile, have prescribed different lengths of time and conditions for statute of limitations on rape cases, ranging from one year to none. Factors such as age of the victim, the degree of the offense, and the availability of evidence determine the temporal restrictions on filing of such cases.

These differences can be attributed to the difference in legal traditions, social norms, and political philosophies that influence the law-making and amending process in different countries. This variation in different countries raise several questions and challenges for the protection and promotion of the basic human rights of rape victims.

This raises fundamental questions about the adequacy of legal frameworks in addressing sexual violence and upholding human rights. Recently the rape cases have been tremendously increasing not decreasing in Nepal. Many have been arguing eg. CEDAW Committee[16], Human Rights Council[17] and Amnesty International[18] that Nepal needs to come up with legal provisions to eliminate the whole Statutes of Limitations on rape cases. In this context, the study seeks to explore whether extending or eliminating the

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[13] STATUTE OF LIMITATIONS Definition & Meaning - Black's Law Dictionary, THE LAW DICTIONARY (2013), https://thelawdictionary.org/statute-of-limitations/ (last visited Aug 12, 2023).

[14] James Herbie DiFonzo, *In Praise of Statutes of Limitations in Sex Offense Cases*, 41 HOUS REV 1205 (2004).

[15] L v Frankel, *CRIMINAL PROCEDURE—STATUTES OF LIMITATIONS—SOUTH AFRICA REMOVES STATUTE OF LIMITATIONS DISTINCTION BETWEEN RAPE AND OTHER SEXUAL OFFENSES.—Levenstein v. Estate of Frankel 2018 (8) BCLR 921 (CC). In The# MeToo Era, Statutes of Limitations Bar Survivors from Access*.

[16] UNITED NATIONS COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN
71st Session of the CEDAW Committee, 22 October – 9 November 2018

[17] *Nepal: Contribution for the Special Rapporterur on Violence Against Women annual Report to Human Rights Council*, 31 Dec. 24

[18] *Nepal: Overly restrictive Statute Limitations on rape and other Sexual Violence must be removed.* Amnesty International Press release on 26 May, 2022. available at https://www.amnesty.org/en/latest/news/2022/05/nepal-overly-restrictive-statute-of-limitations-on-rape-and-other-sexual-violence-must-be-removed/#:~:text=Under%20the%202017%20penal%20code,particular%2C%20victims%20of%20child%20rape, (Last visited at 3 August 2024)

Statutes of Limitations on rape cases alone can significantly increase survivors' access to justice or several other measures need to be taken to do so.

2. Definition and Understanding Rape and Sexual Violence

2.1. Definition and Elements of Rape

The concept of rape as a crime has evolved across different cultures and legal systems in different ways. The dissimilarities reflect the societal norms, legal definitions, and the understanding of what 'consent' means.

Historically, the definition of rape often included only penile-vaginal penetration ('carnal knowledge') without consent. For example, laws in the Czech Republic and Namibia, only deemed vaginal penetration as rape, and other forms of sexual assault were classified differently.[19]

During the recent years, however, lawmakers around the world have adopted the idea of general broadening of the legal definition of rape to include non-penetrative acts of sexual violence, recognize males as victims, and address psychological coercion at the same time. For example, a German law in 1998[20] expanded the definition of rape to include acts of sexual violence in addition to the traditional penile-vaginal penetration. It also for the first time accepted that both men and women could be perpetrators and or victims. This change is considered a milestone in inclusive and comprehensive legal frameworks related to sexual crimes, acknowledging the diverse circumstances under which sexual violence may take place.

The International Criminal Tribunal for Rwanda in 1998[21] stated that rape "involves physical invasion of a sexual nature"[22] committed under coercive circumstances. This definition highlights the essential components of coercion and the invasive nature of the act, distinguishing it from other forms of sexual contact. Additionally, it expands the context in which rape can be recognized legally by specifying that it must occur as part of a widespread or systematic attack targeted at civilians, and on discriminatory grounds such as national, ethnic, political, racial, or religious differences. This definition aims to address situations of sexual violence in conflict and crisis settings, where rape can be used as a tool of war and oppression, stressing the importance of context in the classification and prosecution of such acts. Additionally, the legal treatment of rape victims has also evolved. Historically, and still today in some areas, the crime of rape is viewed as an offense against a male guardian or the state rather than against the individual woman, reflecting long standing views of women as property or secondary victims.[23] Legal

[19] id

[20] German Criminal Code (Strafgesetzbuch – StGB), (1998), https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1717 (last visited Jan 28, 2024).

[21] **3**1 International Criminal Tribunal for Rwanda (ICTR), The Prosecutor v. Jean-Paul Akayesu (Trial Judgement) (1998), https://www.refworld.org/jurisprudence/caselaw/ictr/1998/en/19275 (last visited Apr 13, 2024).

[22] **id**.

[23] **"**History of Sexual Abuse and Harrassment | Freedom and Citizenship."

distinctions based on the victim's age[24] also continue to influence how rape is defined and prosecuted, with many jurisdictions setting specific ages below which consent cannot legally be given, reflecting societal attempts to protect minors.

The changing legal landscape around the definition of rape marks a shift from viewing rape through a lens of property and chastity to recognizing it as a severe violation of personal autonomy

and bodily integrity. This transformation may be attributed to broader societal changes towards understanding and addressing the nuances of sexual violence.

In the context of Nepal, the law on rape is comprehensive[25] as it recognizes that rape can be committed even with slight insertion of male organ or anything else. However, it too has its shortcomings. The law defines the act of rape as, a man having sexual intercourse with a woman without her consent or with a girl child below eighteen years of age even with her consent.[26] It goes on to say that consent obtained by "coercion, undue influence, intimidation, threat, misrepresentation, or kidnapping or taking of hostage"[27] or at the time when the woman is in an unsound state of mind is not considered consent. Also, the penetration of the penis into the anus or mouth or vagina or the insertion of any object other than penis into vagina is also considered rape.
The above definition suggests that in Nepal, rape is only committed by men. Nepal's law does not
recognize women as being capable of raping men or women. This could be attributed to the fact, as
mentioned above, that traditionally, the crime of rape is viewed as an offense against a male guardian
or the state rather than against the individual woman and that women are viewed as being weak and
incapable of violence.

As India and Nepal share culture, tradition and history since times immemorial, it is not surprising

that the Indian law also defines rape in a similar fashion. According to Indian law[28], which encompasses various non-consensual sexual acts committed by a man against a woman, rape includes the penetration of the man[29] penis into the vagina, mouth, urethra, or anus of

[24] Nikunj Kulshrestha, *A Critical Analysis of the Standard of Consent in Rape Law in India*, OÑATI SOCIO-LEG. SER.

[25] Ministry of Law & Nepal Justice, *The National Penal (Code) Act, 2017*, (2017), https://www.moljpa.gov.np/en/wp-content/uploads/2018/12/Penal-Code-English-Revised-1.pdf.

[26] id

[27] id

[28] Ministry of Law & Government of India Justice, *The Indian Penal Code, 1860*, (1860), https://lddashboard.legislative.gov.in/actsofparliamentfromtheyear/indian-penal-code.

[29] Id

a woman, whether directly or by coercion involving another person. Moreover, the crime is defined to include the insertion of any object or any other (non-penile) part of the body into the woman's[30] vagina, urethra, or anus under similar coercive conditions.

Furthermore, it says that rape can occur also through the manipulation of any part of a woman**'**s body to cause penetration of her vagina, urethra, anus, or any body part, again including scenarios where she is forced to perform such acts with others. Finally, it includes instances where a man applies his mouth to a woman**'**s private parts or compels her to engage in such acts with him or another person[31]. This comprehensive list highlights the multiple forms that sexual violence can take, emphasizing the violation of consent as central to the crime of rape.

Rape has long been a prominent topic in legal debate, and it has changed dramatically over time to reflect shifting society values, shifting viewpoints, and changes in the law. Five essential components were traditionally included in the definition of rape: penetration, force and resistance, non-consent, and *mens rea*.[32]. But when legal frameworks change and public perceptions of sexual assault change, these components have been modified or even dropped in favour of victim-centered, inclusive strategies.

2.2. Forms of Rape

Rape is a diverse and intricate crime that can take many different forms, all of which involve the breach of bodily autonomy and non-consensual sexual activity. Here are a few examples of the various types of rape:

Acquaintance Rape*:* A friend, acquaintance, love partner, or coworker is the typical perpetrator of acquaintance rape, which is often referred to as date rape or non-stranger rape.[33] Situations when permission is ambiguous or compromised because of compulsion, deception, or incapacitation are common in this type of rape.

Stranger Rape*[34]*: When the victim is not familiar with the attacker, stranger rape happens and usually entails an attack by an unidentified person. This type of rape can take place in private settings, such house invasions, or in public places, like streets or parks.

Marital Rape*:* Sexual activity without the agreement of one's husband or intimate partner is referred to as marital rape, also known as spousal rape or intimate partner rape. Marital rape was not formerly considered a crime in many places, but legislative changes have made it more of a crime.[35]

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[30] Id.

[31] Id

[32] MARY ZEISS STANGE, CAROL K OYSTER & JANE E SLOAN, ENCYCLOPEDIA OF WOMEN IN TODAY'S WORLD (2011)

[33] MARK COWLING, DATE RAPE AND CONSENT (0 ed. 2018), https://www.taylorfrancis.com/books/9780429860584 (last visited Jun 8, 2024).

[34] Mary P. Koss et al., *Stranger and Acquaintance Rape: Are There Differences In the Victim's Experience?*, 12 PSYCHOL. WOMEN Q. 1 (1988).

[35] Martin, Taft, and Resick, "A Review of Marital Rape."

Drug-Facilitated Rape[36]: When a perpetrator gives a victim drugs or alcohol to make them incapable of resisting or refusing sexual advances, this is known as drug-facilitated rape. Alcohol, ketamine, GHB, and Rohypnol (roofies) are often used substances in drug-facilitated rape.[37]

Gang Rape[38]: Sexual attack against a single victim by several assailants is known as gang rape. This type of rape frequently takes place in situations when there is collective violence, including armed battles, riots, hazing rites, or social events where onlookers may assist or join in the attack.

Statutory Rape: Even when there is permission, having sex with someone under the legal age of consent is considered statutory rape.[39] While it varies by jurisdiction, consenting adults usually need to be between the ages of 16 and 18. The purpose of statutory rape legislation is to shield adolescents from exploitation and abuse, even if they don't think the sexual conduct was consenting.[40].

Custodial Rape*:* When someone in a position of authority or trust—such as a teacher, jail guard, law enforcement officer, or healthcare provider—abuses that position to compel or force a victim into engaging in sexual intercourse, it is known as custodial rape[41]. This type of rape frequently makes use of power imbalances and weaknesses.

War Rape*:* Rape and other types of sexual violence perpetrated during armed conflict or war are referred to as war rape, also known as wartime sexual violence or conflict-related sexual violence. War rape is frequently employed as a tactic to intimidate and demoralize people, establish control, and cause unrest in neighbourhoods.[42]

Cyber Rape*:* Cyber-rape refers to any form of sexual assault or harassment that is made possible by digital technologies. Examples of this include revenge porn, sextortion, online grooming, and virtual sexual assault in virtual reality settings. [43]. This type of rape takes use of the accessibility and anonymity provided by internet platforms to cause harm.

These are but a few instances of the various types of rape, each with unique dynamics, situations, and effects on survivors. It's critical to acknowledge that rape is a complicated

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[36] Laura Jane Anderson, Asher Flynn & Jennifer Lucinda Pilgrim, *A Global Epidemiological Perspective on the Toxicology of Drug-Facilitated Sexual Assault: A Systematic Review*, 47 J. FORENSIC LEG. MED. 46 (2017).

[37] *Id.*

[38] Richa Sharma & Susan Bazilli, *Violence against Women: What's Law Got to Do with It? A Reflection on Gang Rape in India*, 3 INT. J. CRIME JUSTICE SOC. DEMOCR. 4 (2014).

[39] ENCYCLOPEDIA OF RAPE, *supra* note 28.

[40] *Id.*

[41] Soumya Ranjan, *Custodial Rapes in India*, 2 JUS CORPUS LJ 952 (2021).

[42] *supra* note 31.

[43] Asaf Harduf, *Rape Goes Cyber: Online Violations of Sexual Autonomy*, 50 UNIV. BALTIM. LAW REV. 2 (2021).

social and legal issue that calls for all-encompassing solutions, such as support services, prevention, and holding offenders legally accountable.

Gender neutrality and rape: Gender equality, justice, and human rights are major topics that are intersected by the complicated and divisive matter of gender neutrality in rape legislation and debate. Rape laws have historically been written in a way that upholds patriarchal standards and presumptions around gender and sexuality. Arcane laws against rape sometimes defined it narrowly as a crime committed by a male against a woman, perpetuating the idea that men are the aggressors and women are the passive victims.[44] This gendered response to rape discredited positive stereotypes of sexual assault, disenfranchised male survivors, and denied legal rights to non-binary and transgender people.[45]

In the recent years, lawmakers around the world are increasingly recognizing the significance of statute of the limitations on gender-specific rape laws and are pushing for gender neutrality when it comes to describing sexual violence. These gender-neutral laws take a view on rape based on the absence of consent rather than what is the gender of the victim or perpetrator. This kind of approach incorporates a broader range of sexual acts and identities.[46] They recognize that anyone, regardless of their gender, can play the role of victims or perpetrators.

Gender-neutral approaches to rape imagine the variety of experiences and vulnerabilities that victims and survivors may go through. They not only adopt an inclusive tone and language, but also provide legal frameworks that follow the same mantra. They also attempt to address systemic inequalities and intersectional forms of oppression prevalent in society that contribute to sexual violence. This approach recognizes that gender-based violence intersects with other forms of oppression and discrimination, such as racism, ableism, and homophobia. It seeks to address these intersecting factors in prevention of and response against sexual violence.

Gender neutrality in rape legislation is important, but translating it to practice is rife with difficulties and challenges. Gender-neutral law, according to some opponents, may dampen the distinctiveness of gender-based violence which could further embolden sexism and patriarchy.[47]

2.3 Act of Rape beyond the Criminal justice system

Sexual assault is a pervasive issue that transcends the jurisdiction of the criminal justice system, particularly in cases of rape. Understanding and paying attention to the underlying reasons, societal norms that support sexual aggression, and the limitations of punitive

[44] Nguyen, *supra* note 41.

[45] Philip NS Rumney, *In Defence of Gender Neutrality within Rape*, 6 SEATTLE J SOC JUST 481 (2007).

[46] Id

[47] Id

methods are all necessary for developing comprehensive strategies to prevent sexual violence.[48]

To understand why anyone commits sexual violence. it is essential to consider a multitude of factors such as psychological, social, and environmental. Significant among them is the dynamics of power. It is often believed that rape is less about sexual desire and more about exerting control and dominance over the victim.[49] According to psychological research, those who rape others often feel the desire to control them, and this may have its origins in their own traumatizing or helpless experiences. [50]

Moreover, other things that contribute to this are: cultural conventions and media portrayals that frequently objectify women and reinforce sexist beliefs. They also tacitly endorse violent sexual behaviour. [51] Where such attitudes are pervasive, potential perpetrators may feel emboldened to commit acts of sexual violence. Peer pressure and social dynamics can further worsen this behaviour, especially in young males who want to exhibit their manhood and get the favour of their peers. [52]

Sexual aggressiveness is heavily influenced by cultural attitudes and social standards. Many cultures have normalized male dominance and female submissiveness, which contributes to a power imbalance that can result in sexual violence.[53]. For example, traditional gender roles often portray men as assertive and women as passive, which can create a sense of entitlement among men and a reluctance to assert boundaries among women.[54]

The way relationships and sexuality are portrayed in the media exacerbates this problem. In movies, TV series, and pornography, forceful sexual approaches are frequently portrayed as attractive or even acceptable[55]. These representations have the potential to legitimize coercive behaviour and distort views of consent. Furthermore, victim-blaming

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[48] Richa Sharma & Susan Bazilli, *Violence against Women: What's Law Got to Do with It? A Reflection on Gang Rape in India*, 3 INT. J. CRIME JUSTICE SOC. DEMOCR. 4 (2014).

[49] SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN, AND RAPE (1975).

[50] Julia Metz, Kristen Myers & Patricia Wallace, *'Rape Is a Man's Issue:'gender and Power in the Era of Affirmative Sexual Consent*, 30 J. GEND. STUD. 52 (2021).

[51] JAN JORDAN, TACKLING RAPE CULTURE: ENDING PATRIARCHY (1 ed. 2022), https://www.taylorfrancis.com/books/9781003289913 (last visited Jun 10, 2024).

[52] CARMEN M. CUSACK, CRIMINAL JUSTICE HANDBOOK ON MASCULINITY, MALE AGGRESSION, AND SEXUALITY (2015).

[53] Julia Metz, Kristen Myers & Patricia Wallace, *'Rape Is a Man's Issue:'gender and Power in the Era of Affirmative Sexual Consent*, 30 J. GEND. STUD. 52 (2021).

[54] Karolynn Siegel & Étienne Meunier, *Traditional Sex and Gender Stereotypes in the Relationships of Non-Disclosing Behaviorally Bisexual Men*, 48 ARCH. SEX. BEHAV. 333 (2019).

[55] Shireen Bernstein et al., *Pressure, Preoccupation, and Porn: The Relationship between Internet Pornography, Gendered Attitudes, and Sexual Coercion in Young Adults.*, 12 PSYCHOL. POP. MEDIA 159 (2023).

mindsets are pervasive in many countries and deter survivors from coming forward with assault reports and pursuing justice, which feeds the cycle of impunity and silence.

Criminal law has inherent limits. It is a crucial instrument in combating sexual assault as it punishes offenders and gives victims a feeling of justice. But the system only responds after a crime has been committed rather than working to prevent them. Due to its reactive character, by the time legal action is taken, the damage has already been done.[56]

In addition, survivors may experience new trauma during the judicial procedure. Many survivors may decide not to pursue legal action due to the adversarial nature of court procedures, the necessity for them to provide a detailed account of their experiences, and the possibility of victim-blaming.[57] Furthermore, there is a heavy burden of proof in criminal trials, which frequently leads to a low conviction rate for sexual offenses. This may give offenders the impression that they are getting away with it while giving survivors a sense of unfairness.

Developing and implementing preventive ways to address the underlying causes of sexual assault is essential, especially in light of the limits of criminal legislation. In this sense, education is an effective instrument. Comprehensive sex education programs may dramatically change attitudes and behaviours by covering topics like consent, respectful partnerships, and healthy relationships.[58] Such programs should start early and continue throughout an individual's educational journey to ensure that these values are ingrained from a young age.

Initiatives to make the public aware about the gravity of these issues is another way of addressing the issue. They can raise awareness about negative stereotypes, contribute to the cause of gender equality, and call for witnesses to act when they see such a crime happen before their eyes. They have the power to change cultural norms and lower the incidence of sexual assault.

For example, recent global campaigns such as "Me Too" have raised awareness about sexual harassment and assault on a worldwide scale, leading to extensive social and cultural transformation.[59] In addition to educational and awareness efforts, community-based approaches can also be beneficial. Creating safe spaces for dialogue and support to victims, particularly for marginalized groups, can empower individuals and communities to take action against sexual violence. Programs that bring on board men and boys to

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[56] Julian Molina & Sarah Poppleton, *Rape Survivors and the Criminal Justice System*, VICT. COMM. AVAILABLE HTTPSVICTIMSCOMMISSIONER ORG UKDOCUMENTRAPE-SURVIV.---CRIM.-JUSTICE-SYST. 3 APRIL 2023 (2020).

[57] Negar Katirai, *Retraumatized in Court*, 62 ARIZ REV 81 (2020).

[58] Nicole Haberland & Deborah Rogow, *Sexuality Education: Emerging Trends in Evidence and Practice*, 56 J. ADOLESC. HEALTH S15 (2015).

[59] Judy E Battaglia, Paige P Edley & Victoria Ann Newsom, *Intersectional Feminisms and Sexual Violence in the Era of Me Too, Trump, and Kavanaugh*, 42 WOMEN LANG. 133 (2019).

discuss topics about masculinity, respect, and consent are particularly important in addressing the cultural norms that promote sexual aggression[60].

Rape as violation of sexual autonomy

Unquestionably violating a person's sexual autonomy, rape is one of the worst transgressions against their physical integrity, dignity, and basic rights. It takes away the freedom to make decisions about one's own body and sexual experiences as well as agency and autonomy.

The foundation of sexual autonomy is the notion of consent, which upholds a person's freedom to make conscious and voluntary decisions about their bodies and sexual experiences. This idea is sharply at odds with rape, which involves forcing someone to do sexual actions against their will, destroying the victim's autonomy and preventing them from having the option to participate in sexual activity.[61] The degradation of autonomy in rape situations is compounded by power dynamics, when offenders use their authority, dominance, or physical strength to intimidate and dominate their victims. Because of these power disparities, victims are helpless to defend themselves or stop the attack and are instead open to coercion, threats, or open physical violence.[62]

Furthermore, rape disregards the victim's sovereignty and bodily integrity, transgressing their sacred limits. Victims' freedom to choose who and how to touch them is violated when perpetrators intrude into their emotional and physical space. A deep sense of fear, mistrust, and loss of control over one's own body are engendered by this transgression.[63]

Rape not only causes severe physical harm but also has a profound psychological impact that may never fully heal for the victim.[64]

Contexts that are social and cultural are crucial in sustaining sexual autonomy and rape. Rape culture encourages attitudes, beliefs, and behaviours that weaken survivors' sense of agency by normalizing and trivializing sexual assault. Victim-blaming narratives, damaging stereotypes, and societal stigmatization all contribute to the loss of autonomy by reiterating oppressive and unequal patterns.[65]

The manner that rape laws and institutions are handled has a big impact on how survivors feel about themselves. It may either support or undermine their rights. Insufficient legal

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[60] Julia Metz, Kristen Myers & Patricia Wallace, *'Rape Is a Man's Issue:'gender and Power in the Era of Affirmative Sexual Consent*, 30 J. GEND. STUD. 52 (2021).

[61] Shireen Bernstein et al., *Pressure, Preoccupation, and Porn: The Relationship between Internet Pornography, Gendered Attitudes, and Sexual Coercion in Young Adults.*, 12 PSYCHOL. POP. MEDIA 159 (2023).

[62] Susan A Lentz & Robert H Chaires, *Sexual Assault Statutes Targeting Authority & Power Imbalances: A Step Forward in Rape Law Reform*, 3 FREEDOM CENT. J 1 (2011).

[63] Burge, *supra* note 116.

[64] *Id.*

[65] *Id.*

frameworks, callous law enforcement tactics, and prejudiced court cases can exacerbate the trauma endured by survivors and sustain oppressive institutions. On the other hand, survivor-centered strategies that put an emphasis on empowerment, permission, and secrecy can be rays of hope, confirming survivors' right to self-determination and easing their path to rehabilitation.

Rape as gross violation of human dignity

Rape stands as an egregious affront to human dignity, epitomizing one of the most severe assaults on an individual's inherent worth, integrity, and fundamental rights. In exploring the depths of this violation, let's look at how rape constitutes a profound infringement upon human dignity. The understanding of each person's intrinsic value and respect, regardless of gender, colour, or any other trait, is the foundation of human dignity. However, rape blatantly violates this fundamental idea by treating the victim as a simple object of desire or possession.[66] Rape dehumanizes the victim by taking away their autonomy and using them as a tool, undermining their sense of dignity and value. [67]

The right to physical integrity and protection from mental and physical damage are included in the concept of human dignity. Rape, however, breaches these rights since it subjects the victim to violence, compulsion, and unwelcome sexual contact.[68] The psychological and physical wounds cause the victim to lose confidence in their own abilities to manage their own body and emotions as well as their feeling of safety.[69] The disintegration of dignity in circumstances of rape is further compounded by dynamics of power and control. Victims are denied agency and autonomy when perpetrators use their physical strength or positions of authority to enslave and overwhelm them. This abuse continues the degradation of human dignity by supporting oppressive and unequal regimes.[70]

The freedom to freely and unambiguously grant or withhold permission is essential to human dignity. Rape, however, violates this ideal by taking advantage of the victim's incapacity or lack of permission to provide it freely. Via threats, physical force, or the use of weaknesses, those who commit crimes deprive victims of their autonomy and cause them great humiliation.[71] Rape has a profound effect on a victim's sense of self-worth, identity, and trust, extending beyond the immediate trauma. Survivors may be afflicted

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[66] Roy F. Baumeister, Kathleen R. Catanese & Harry M. Wallace, *Conquest by Force: A Narcissistic Reactance Theory of Rape and Sexual Coercion*, 6 REV. GEN. PSYCHOL. 92 (2002).

[67] Avigail Moor et al., *Rape: A Trauma of Paralyzing Dehumanization*, 22 J. AGGRESS. MALTREATMENT TRAUMA 1051 (2013).

[68] Rape victims worldwide denied justice and dignity, AMNESTY INTERNATIONAL (2010), https://www.amnesty.org/en/latest/press-release/2010/03/rape-victims-worldwide-denied-justice-and-dignity/ (last visited Aug 27, 2023).

[69] Vars, *supra* note 14.

[70] Lentz and Chaires, *supra* note 160.

[71] Dorothy E Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI-KENT REV 359 (1993).

with feelings of shame, remorse, and self-blame, which deprive them of their dignity and capacity to live without fear or stigma.[72]

The degradation of human dignity is further exacerbated by societal and cultural attitudes that are ingrained in the rape culture. Sexual assault is normalized or excused by society, which feeds negative stereotypes, victim-blaming stories, and the stigmatization of survivors.[73] These viewpoints undermine human dignity structurally by marginalizing and silencing survivors as well as by sustaining violent cycles.

Rape as crime against humanity

Rape can also be classified as a crime against humanity, particularly when it occurs in the context of a larger, organized assault on the civilian population. This acknowledgement is based on human rights principles and international humanitarian law, which denounce sexual assault as a serious breach of human dignity and an infringement on people's fundamental freedoms.

The Rome Statute of the International Criminal Court (ICC)[74] defines a crime against humanity as any of the following actions, when carried out as part of a systematic or widespread attack against any civilian population: rape, torture, sexual slavery, forced prostitution, forced pregnancy, forced sterilization, murder, extermination, enslavement, deportation or forcible population transfer, incarceration or other severe loss of physical liberty, or any other equivalent form of sexual abuse.[75]

The International Criminal Tribunal for Rwanda in 1998[76] stated that rape involves a "physical invasion of a sexual nature"[77] committed under coercive circumstances. This definition sets it apart from other types of sexual contact by emphasizing the fundamental elements of compulsion and the intrusive character of the act. By stating that rape must take place as part of a widespread or systematic attack directed at civilians and on the basis of discriminatory grounds such national, ethnic, political, racial, or religious differences, it also broadens the context in which it can be legally recognized. This definition emphasizes the significance of context in the classification and prosecution of such actions, with a focus on sexual assault scenarios in conflict and crisis contexts, when rape can be used as a instrument of oppression and war.

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[72] RESICK, *supra* note 5.

[73] Laura Sinko et al., *Internalized Messages: The Role of Sexual Violence Normalization on Meaning-Making after Campus Sexual Violence*, 30 J. AGGRESS. MALTREATMENT TRAUMA 565 (2021).

[74] Mahnoush H Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT. LAW 22 (1999).

[75] How the Court works, https://www.icc-cpi.int/about/how-the-court-works (last visited May 8, 2024).

[76] *supra* note 31.

[77] International Criminal Tribunal for Rwanda (ICTR), The Prosecutor v. Jean-Paul Akayesu (Trial Judgement) (1998), https://www.refworld.org/jurisprudence/caselaw/ictr/1998/en/19275 (last visited Apr 13, 2024).

Rape must be a part of a broad or organized attack against the civilian population in order to be considered a crime against humanity. This suggests a pattern of coordinated and planned behavior by state or non-state actors with the aim to carry out widespread acts of sexual assault on civilians, selecting victims according to their identity, affiliation, or perceived weaknesses.[78]. Because of the severe effects that rape has on survivors' physical, psychological, and emotional well-being as well as the wider societal fallout, it is regarded by international law as one of the most serious crimes. In addition to the pain endured by survivors on an individual basis, rape also has wider ramifications for families, communities, and future generations, making it a serious crime against humanity.

Rape is frequently used to terrify, humiliate, and oppress civilian populations—particularly women and girls—as a tool of war, terrorism, or political repression.[79] Rapists may purposefully target victims in wars and mass violence scenarios based on their gender, race, religion, or other identification markers. They may accomplish this by using rape as a tool to establish their supremacy over whole communities.[80]

2.4. Statute of Limitation, rape and victims

2.4.1. Understanding and defining statute of limitations

The Statute of Limitations refers to a time limit that people have to claim their rights; if that time limit passes, the person's claim is legally terminated. The statute of limitations is one of the important considerations the court considers before taking a case, along with jurisdictions and *locus standi,* which is why it is sometimes referred to as *"prima facie"* in legislation that place time restrictions on pre-existing rights of action.

The timing of the start of legal proceedings is important since there is a greater likelihood of witnesses, evidence, and memories deteriorating with the passage of time. This emphasizes how crucial it is for individuals to file lawsuits within a certain window of time in order to ensure their right to prompt justice. The proverb "Justice postponed is justice denied" highlights the necessity of taking legal action as soon as possible. People are encouraged to seek justice as soon as possible by the Statute of Limitations since delaying it might result in the loss of their rights.

Since the Statute of Limitations is seen as a legal problem, the court may discuss it at any time. In the event that a complaint is filed with the court after the Statute of Limitations has passed, the court may dismiss the case for that reason. Statutes of limitations is believed to play a crucial role in the legal system by setting a time limit within which legal proceedings [81]must be initiated for a particular offense. Advocates of this approach assert that it facilitates prompt judicial proceedings, enabling conflicts to be settled while

[78] Rape and sexual violence: Human rights law and standards in the International Criminal Court, *supra* note 135.
[79] Id
[80] ENCYCLOPEDIA OF RAPE, *supra* note 28.
[81] Vitiello, *supra* note 27.

witnesses and evidence are still available and memories are still clear. This encourages accuracy and impartiality in court cases. In a similar vein, it shields defendants from ongoing judicial proceedings. It gives people a feeling of closure and finality by removing the ongoing fear of being sued for things they did in the past.

Furthermore, statutes of limitations contribute to judicial efficiency by setting deadlines for the initiation of legal actions. It encourages prompt conflict resolution and keeps court dockets free of stale claims.[82] Another common defense is that it motivates plaintiffs to vigorously pursue their claims and avoid needlessly postponing legal action. This facilitates the speedy settlement of conflicts and guards against the exploitation of the legal system through pending or baseless lawsuits.[83] It is thought that statutes of limitations strike a compromise between giving legal certainty by clearly defining the time restrictions within which lawsuits must be filed and permitting some leeway in extraordinary situations where the deadline may be tolled or extended.

However, there are also those who are opposed to the idea. There are also several downsides of a statute of limitations[84]. They contend that although statutes of limitations have useful functions in judicial systems, their application to instances of past injustices can provide moral conundrums. These restrictions might make it more difficult to pursue justice, exacerbate existing suffering, and cast doubt on our moral duty to right historical wrongs. Victims of previous injustices may not receive justice if a statute of limitations is imposed. It restricts people's capacity to demand justice for wrongs done to them, even when the injustice's consequences continue for a long period.

Additionally, a statute of limitations can prolong the consequences of previous injustices by placing a deadline on requests for rectification. It may make it difficult to recognize and right historical wrongs, which would enable injustices to persist unchecked. Some contend that moral obligations should never expire, particularly in situations involving serious injustices like crimes against humanity. Setting a deadline for rectification requests might compromise the moral need to confront and right historical wrongs. Furthermore, it may become more difficult to adequately address allegations of unfairness as time goes on. But merely enacting a statute of limitations might not be sufficient to handle all of the subtleties and difficulties involved in redressing historical injustices.[85] [86]

The cause of action hypothesis states that the moment the cause of action accrues is usually when the victim's clock starts to run for filing a lawsuit. When all the components required to establish a legal claim—such as the commission of the wrongdoing, the harm

[82] James Herbie DiFonzo, *In Praise of Statutes of Limitations in Sex Offense Cases*, 41 HOUS REV 1205 (2004).

[83] Id

[84] Rodney C. Roberts, *The Morality of a Moral Statute of Limitations on Injustice*, 7 J. ETHICS 115 (2003).

[85] Roberts.

[86] Roberts, *supra* note 105.

or injury that results from it, and the identification of the person who caused it—come together, a cause of action begins to accrue.[87]

In rape cases, the cause of action typically revolves around the violation of the victim's bodily integrity and autonomy. The survivor may have various legal avenues to pursue justice and seek redress for the harm suffered. Although the cause of action is usually where the Statute of Limitations begins, there are situations in which the plaintiff learns of the harm after the statute of limitations has passed. The Statute of Limitations is reset in certain situations by the Discovery Rule[88], which takes effect upon the discovery of the damage rather than the cause of action.

A common scenario is that an injury is found after the time period allowed by the Statute of Limitations has passed. The court might or might not take this into consideration.

The discovery rule presents a problem in rape cases since the plaintiff usually learns of the sexual conduct at the scene, which results in the accrual of the cause of action and the start of the Statute of Limitations. It is, however, impossible to claim in court that the plaintiff only recognized the rape occurred after some time had elapsed.

The idea of *nullum tempus occurrit regi,* or "time does not run against the monarch," is another exception to the Statute of Limitations[89]. According to this common law theory, crimes or wrongs done against the sovereign are exempt from the Statute of Limitations, which means that the state may continue to pursue someone even after the statutory deadline has passed. This notion is based on the idea that the monarch has the power to bring legal action against those who have wronged the sovereign since he is the guardian of public rights. In essence, *nullum tempus occurrit regi* ensures that the state retains the power to prosecute individuals who may have evaded legal consequences due to the passage of time. This doctrine serves as a safeguard to preserve public order and uphold the integrity of the legal system, allowing the state to hold accountable those who have violated the law, regardless of the elapsed time since the commission of the offense.

2.4.2 Provisions of Limitations on Rape in International Jurisdictions

In South Africa, until 2018[90] there was a 20-year prescription period for prosecuting rape and sexual offenses. However, on June 14, 2018, in the case of *Nicole Levenstein and others v The Estate of the Late Sydney Lewis Frankel and others*[91], the Constitutional

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[87] Jonathan LT Chu, *"Continuing Cause of Action" Revisited* (2024).

[88] George Rutherglen, *Statutes of Limitations: Claims Forgotten, Forgiven, or Foregone?*, 72 RUTGERS UL REV 1 (2019).

[89] Sigmund D Schutz, *Time to Reconsider Nullum Tempus Occurrit Regi-The Applicability of Statutes of Limitations Against the State of Maine in Civil Actions*, 55 ME REV 373 (2002).

[90] v L Frankel, *CRIMINAL PROCEDURE—STATUTES OF LIMITATIONS—SOUTH AFRICA REMOVES STATUTE OF LIMITATIONS DISTINCTION BETWEEN RAPE AND OTHER SEXUAL OFFENSES.—Levenstein v. Estate of Frankel 2018 (8) BCLR 921 (CC). In The# MeToo Era, Statutes of Limitations Bar Survivors from Access.*

[91] Id

Court ruled that even if a long time has passed since the crime of rape or sexual offense, criminal prosecution against the offender can still proceed.

This ruling took into account the possibility that the victim's reluctance, social stigma, lack of knowledge about the offense, and the psychological trauma experienced by the victim might prevent them from coming forward immediately. Additionally, it recognized that child victims of sexual offenses might take many years to understand that they were victims and to feel the need to report it.[92]As a result, the court removed the time limitation from the "prescription category" under Section 18 of the Criminal Procedure Act, 1977[93], ensuring that no time limit applies to these offenses.

When the court made its decision to remove the prescription (time limit) for sexual offenses, it did so based on the following grounds:

(a) Sexual offenses can cause long-term psychological issues for the victim, not just physical harm.

(b) At the time of the ruling, the existing legal framework in South Africa was not fully aligned with its commitment to protecting women and children.

(c) It was deemed necessary that there should be no distinction between adult and child victims in these cases.

(d) There are valid reasons why victims of sexual offenses might be unable or unwilling to file a complaint or discuss the offense with others.

(e) Child victims of rape often only gather the courage to file a complaint or disclose the offense after receiving support from someone. Psychological trauma can lead victims to blame themselves, keep the incident secret, and experience fear and guilt.

(f) Punishing someone who has committed a sexual offense in the past does not necessarily cause unjust repercussions, as there is no doubt under the applicable law that the offender has committed a heinous crime. The time limit should not imply that the offense was not committed.

In South Africa, for sexual offenses, the previous 20-year prescription period was suspended by the court for 24 months.[94] During this 24-month period, the parliament was instructed to make necessary amendments to the law regarding sexual offenses, which ultimately led to the removal of the prescription period altogether.

In Canada, the legal provisions for statutes of limitations in cases of sexual offenses vary from province to province. In the provinces of British Columbia, Alberta, Saskatchewan, Nova Scotia, Newfoundland & Labrador, New Brunswick, Manitoba, Ontario, and

[92] Id
[93] Id
[94] Id

Yukon[95], there is no statute of limitations for sexual abuse cases, meaning claims can be filed at any time.[96] In the Northwest Territories, the statute of limitations applies depending on the nature of the case, while in Quebec[97], there is a statute of limitations. In Prince Edward Island[98], there is no statute of limitations only if the victim was a minor at the time of the abuse.

In the case of M.K. vs. M.H. (1992)[99], the petitioner, who had been sexually abused by her father, filed a lawsuit in 1985 at the age of 28, claiming damages for the abuse and breach of fiduciary duty by her parents. The jury found that her father had indeed sexually abused his daughter and awarded her $50,000 in damages. However, the judge's decision was contrary to Section 45 of the Limitation Act, 2012[100]. In this case, the court considered the following grounds:

(a) Whether incest constitutes a breach of fiduciary duty by a parent that is not subject to any limitation period.

(b) According to the Reasonable Discoverability Rule, the statute of limitations only applies once the victim becomes sufficiently aware of the harm and its possible cause. (Incest is both a tortious assault and a breach of fiduciary duty.)

(c) The statute of limitations does not apply until the victim is reasonably able to recognize the wrongful nature of the defendant's actions and the connection between those actions and the victim's injury.

(d) The limitation period only begins to apply once the victim realizes they have been harmed, which in this case, occurred only after the appellant began therapy. The appellant filed the lawsuit shortly after this realization, leading to the conclusion that the statute of limitations applies only after the victim becomes aware of the harm.[101]

In the United Kingdom, the Sexual Offences Act 2003[102] defines sexual assault, rape, and sexual assault by penetration. Section 1 of this Act defines rape and prescribes a penalty of life imprisonment for this offense. Section 2 defines assault by penetration and also prescribes life imprisonment as the penalty for this offense. Section 3 provides the definition of sexual assault, which carries a penalty of imprisonment ranging from six months to ten years. Section 4 defines[103] the offense of causing a person to engage in sexual activity without consent, also prescribing a penalty of imprisonment ranging from

[95] https://shorturl.at/k0E7i
[96] Id
[97] id
[98] id
[99] (accessed September 9, 2024)
[100] Id
[101] Id
[102] Arfan Khan, *Sexual Offences Act 2003*, 68 J. CRIM. LAW 220 (2004).
[103] Id

six months to ten years. Additionally, for offenses involving minors under the age of 13, Section 5 encompasses four offenses: rape, assault by penetration, sexual assault, and causing or inciting a person to engage in sexual activity, all of which are subject to strict penalties.

In the United Kingdom, the Limitations Act 1980[104] does not prescribe a statute of limitations for any sexual offenses. Victims, especially children, may find it difficult to disclose or understand the injustice they have faced, and they might not be in a position to report the abuse to anyone. Therefore, there is no statute of limitations for such offenses. Similarly, in relation to sexual offenses conducted through electronic means, the Sexual Offences Act 2003 provides penalties for offenses involving children, such as child sexual communication, exposing a child to sexual material, voyeurism, and extreme pornography. There is also no statute of limitations for these offenses.

Unlike civil cases, in India, where specific time limits govern the filing of lawsuits, most jurisdictions in India do not impose any limitation period for criminal offenses like rape[105]. This means that victims can report instances of rape at any time after the incident, allowing for the pursuit of justice regardless of when the offense occurred.

The common law doctrine of *nullum tempus occurrit regi* meaning "time does not run against the crown," holds significance in criminal proceedings. It signifies that crimes committed against the state are considered offenses against the sovereign authority itself. Consequently, the state, represented by the government, retains the prerogative to initiate criminal proceedings at any time, with sovereign immunity shielding it from limitations. However, this doctrine is gradually waning in civil suits. Section 26 of the Limitation Act, 1908 [106] , introduces a distinction in the limitation period for suits against the government.[107] While the ordinary period for filing suits, including those related to easement rights, is 20 years, an extraordinary period of 60 years is mandated when initiating proceedings against the government.

In India, serious offenses like murder, rape, and robbery typically have no limitation period in India, certain summary offenses, categorized as less serious offenses, may be subject to limitations in specific jurisdictions.[108] For instance, offenses such as the unlawful use of a driver's license may be barred by limitation in certain states. However, grave offenses remain exempt from such limitations, emphasizing the gravity of crimes like rape and the pursuit of justice without temporal constraints.

[104] Limitation Act 1980, c. 58, § 11 (UK). Available at: https://www.legislation.gov.uk/ukpga/1980/58.
[105] Titus et al., "Statute of Limitation for Criminal Prosecution in India."
[106] Supra note 104
[107] Id
[108] Government of India, the Limitation Act 1963.

3. Statute of limitations on Rape crimes in Nepal

3.1. Trend of Sexual Assault in Nepal: Increasing Culture of Rape and Impunity

According to the data maintained by Nepal Police Headquarters, the number of cases related to rape has steadily increased over the past few years. Data suggests that 912 rape cases were registered across the country in 2071/72 (2014/15).[109] The number rose to 2,380 in 2021/22. In 2079/80 (2022/23)[110], district government attorneys across the country pressed 69,259 cases related to crime of which 7,343 (around 10 percent) of the crimes were related to rape.[111] While 773 cases related to rape were under trial across the country, conviction was pronounced only in 60 cases, the accused was not found guilty in 40 cases. However, the number of pending cases stood at a staggering 669. This shows that although the number of reported cases is rising in Nepal, the investigative and judicial processes are lengthy and verdicts take a lot of time.

There also have been several reports where police officials attempt to force the parties to reach an out of court settlement against the law. Also, there have been incidents in which the police have denied filing complaints or failed to provide security to the victims. As a result of this, they are forced to turn hostile. In addition to this, the statute of limitations imposed on rape cases has made it difficult for survivors to seek legal help as they are unaware of such provisions.

3.2. Constitutional & Legal Provisions against Rape and Sexual Violence

Nepal's legal landscape concerning rape and sexual offenses has evolved over time. The Muluki Ain (General Code) of 1854 represented the initial codification addressing rape and related offenses, distinguishing between two age categories and imposing varying penalties based on caste, without any statute of limitations.[112]

While the Muluki Ain has historically shaped Nepal's legal response to crimes such as rape, scrutiny reveals certain provisions criticized for their limited scope, gender bias, and insufficiency. Section 132 narrowly defined rape as non-consensual sexual intercourse between a man and a woman other than his spouse[113]. A significant oversight in the Muluki Ain was its failure to criminalize marital rape. By confining rape to instances where a man engages in sexual intercourse with a woman outside marriage, the law

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[109] NEPAL POLICE, *Annual Fact Sheet on Gender-Based Violence*, https://www.nepalpolice.gov.np/media/filer_public/bc/d0/bcd064f5-284a-492a-b424-def0a6800de2/fy-2078-79-annual-infographics-en.pdf (last visited June 8, 2024).

[110] Id

[111] OFFICE OF THE ATTORNEY GENERAL, *Annual Report of the Office of the Attorney General*, https://ag.gov.np/storage/postFile/Annual%20Report%2007980_1706021784.pdf (last visited Jun 8, 2024).

[112] RAJAN KHATIWODA, SIMON CUBELIC & AXEL MICHAELS, " MULUKĪ AIN" OF 1854: NEPAL'S FIRST LEGAL CODE (2021).

[113] *Id.*

disregarded the prevalence of sexual violence within marital relationships, perpetuating harmful stereotypes and denying justice to numerous survivors.

In 1963, a revised Muluki Ain was introduced, introducing a 35-day statute of limitations for rape cases, including those involving custodial rape. However, the definition of rape excluded oral or anal penetration, limiting legal protection for survivors and failing to address the full spectrum of non-consensual sexual acts.[114] This narrow interpretation not only overlooked survivor experiences but also hindered efforts to combat all forms of sexual violence.

Another significant oversight was the Muluki Ain's failure to address rape perpetrated by women or by persons of the same sex. By framing rape exclusively as a crime committed by men against women, the law overlooks the diverse realities of sexual violence and fails to provide adequate protections for all survivors, regardless of gender or sexual orientation.

Moreover, the Muluki Ain lacked provisions addressing the issue of consent and its nuances. Consent lies at the heart of any meaningful discussion on sexual violence, yet the law fails to provide clear guidance on how consent should be defined, understood, and upheld in cases of rape. In addition to these shortcomings, the Muluki Ain did not provide for aggravated forms of rape or enhanced penalties for particularly heinous acts of sexual violence. This failure to differentiate between different degrees of rape undermines the severity of the crime and may result in lenient sentencing for offenders. Furthermore, the Muluki Ain failed to adequately protect the identity and dignity of rape victims. Survivors may face stigma, discrimination, and further harm due to the lack of provisions safeguarding their privacy and well-being.

The first major reform in the laws on rape and sexual crimes in Nepal came after the democratic movement of 1990. The Constitution of Nepal (1990) recognized the right to equality and non-discrimination as fundamental rights[115]. The Constitution also ratified various international human rights treaties and conventions that dealt with rape and sexual crimes. The Muluki Ain (Amendment) Act (1992) introduced several changes in the Muluki Ain to deal with rape and sexual crimes more effectively. It increased the punishment for rape from 10 years to 15 years imprisonment of seven to 10 years in case a victim is above the age of 10 and under the age of 16 years and imprisonment of five to seven years in case a woman is 16 years or above.

Similarly, an amendment brought in 2006 expanded the definition of rape from the traditional one that only recognized complete penile penetration. It also defined consent and said that consent given when the victim isn't in the right senses can't be considered consent. Similarly, penetration into the anus and mouth or any other foreign object. In the Sapna *Pradhan Malla vs Nepal Government* Case the Supreme Court ordered a revision to

[114] Nepal Law Commission, *supra* note 69.

[115] Mara Malagodi, *Challenges and Opportunities of Gender Equality Litigation in Nepal*, 16 INT. J. CONST. LAW 527 (2018).

the Statute of Limitations. In 2015, it was extended to six months. It was later amended to two years.

3. 3. Judicial Insites on Statute of Limitations on Rape cases

In the case of Sapana Pradhan Malla[116], the petitioner, in her petition to the Supreme Court, argued that the statutory limitation of 35 days, as prescribed in section 11 of the chapter on rape in the Muluki Ain of 2020, is insufficient. Malla contended that in numerous instances, victims failed to file complaints within this timeframe, and the survivors' rights as enshrined in the constitution and other laws were curtailed. She argued that on the other hand, the perpetrators were emboldened to commit crime as they could get away with it with the passage of 35 days, and this could potentially lead to impunity. Thus, to deter such egregious crimes and to uphold justice for women while safeguarding human rights, the statutory limitation for rape cases should be extended.

The government retorted that the constitution grants legislative authority to the parliament. The ultimate power to enact and modify laws rests within the purview of the parliament, and the issuance of a Mandamus writ is not intended to compel or pressure the parliament into legislating. The defendant urged the court to dismiss the petition, arguing that the 35-day statutory limitation does not result in situations devoid of sanction. The court had two important legal questions to resolve: Is the 35 days Statute of Limitation as per sec 11 of chapter of rape is substantially enough or not? Should the court issue a writ stating that the laws should be amended to increase the statute of limitation?

In answering the above questions, the court stated that rape is undoubtedly a grave crime and is prosecuted by the government in Nepal. Given that the government handles prosecution for rape offenses, the burden of proof rests with the government itself. However, the court noted that the legal system heavily relies on the confessions of the accused, leading to many acquittals due to lack of compelling evidence beyond reasonable doubt. Moreover, the requirement for victims to testify in court exposes them to fear and delays in filing cases. Many rape victims refrain from reporting due to unawareness of the 35-day statutory limitation. The court also recognized the advantage that the statute of limitations aids criminals.

Addressing the second question regarding the court's authority to issue directives to amend laws related to statutory limitations in rape statutes, the court asserted that the objective of criminal law is to uphold social order, with the state prosecuting serious criminal offenses. However, the prosecution requires sufficient time to gather evidence, and the inadequate statutory limitation period often hinders this process. Considering the 50-year history of prosecuting rape cases in Nepal, the Attorney General's Office should prioritize evidence collection within the current statutory limitation period. Additionally, the court emphasized that the constitution grants Nepali courts the authority to conduct judicial review and issue writ orders for amending statutory limitations in rape statutes.

[116] *Sapana Pradhan Mall et al V. Nepal Gov* (Dn. No: 8038)

The court therefore affirmed that the statute of limitations prescribed by sec 11 of the Muluki Ain, 2020 is insufficient. Therefore, the it directed government to frame laws to extend the statute of limitations in rape offences. This landmark petition marks the first instance in Nepal where the court has directed the government to amend the statutory limitation in rape statutes.

A writ petition filed by Jury Nepal[117], an NGO, represents a crucial milestone in the Supreme Court's jurisprudence concerning the Statute of Limitation. It also addresses the doctrine of tolling, referred to earlier, the precedent set emphasizes the importance of "legislative wisdom" in determining the Statute of Limitation, underscoring the role of lawmakers in such matters. In the writ petition, the petitioner argued that sexual offenses against women, including rape, constitute extremely grave, antisocial, and immoral crimes, universally condemned and punishable by law. Referring to Article 30 of the interim Constitution of Nepal, 2063, the petitioner highlighted the provision stating that no discrimination shall be tolerated against women and that any actions contrary to women's physical, mental, or other aspects shall be subject to punishment.

The petition further emphasized that according to the "Crime Victim Reach for Justice: A Brief Study Report, 2070" published by the Nepal Judicial Council, victims who file First Information Reports (FIRs) are often not given due consideration by investigating authorities due to gender stigma and fear of political party workers. Additionally, the petitioner reiterated that Section 11 of the rape chapter of the Muluki Ain, 1963, which stipulates a statute of limitation of 35 days for rape offenses, infringes upon the rights of victims to access justice and requires amendment. The petitioner also highlighted the discrepancy between the statute of limitation for bestiality, set at one year, and the 35-day limitation for rape, which is deemed insufficient and discriminatory against women and children. Moreover, the non-utilization of Section 40 of the court management chapter of the Muluki Ain, 1963, raises concerns about the lack of sanctions in rape cases. Section 40 provided that if a person required to file a lawsuit is under 16 years of age, the statute of limitation begins after reaching the age of 16. If the child dies before turning sixteen, the near relatives can file the case on behalf of the deceased, with the statute of limitation being 35 days after the child reaches sixteen. This provision applies to all cases involving children, and rejecting its applicability in heinous crimes like rape lacks justification.

The petitioner argued that Sections 11 and 40 have never been interpreted harmoniously, with Section 11 being mechanically interpreted, leading to the rejection of investigations and prosecutions after the 35-day period, particularly concerning child victims. Furthermore, the petition stressed that the Statute of Limitation for survivors who have not reached the legal age of majority can be tolled through the doctrine of tolling, as practiced in various countries. The petitioner urged the court to issue a mandamus order, asserting that the then 35-day Statute of Limitations on rape cases was inadequate and obstructed the pursuit of justice, advocating for its extension. They also requested the application of

[117] *Raju Prasad Chapagain V Nepal Govt* (Dn. No: 9547)

Section 40 of the Court Management Act, pertaining to rape offenses against children, thereby declaring Section 11 of the rape chapter void. Additionally, they sought directives for expediting amendments to align the Statute of Limitations with international standards, as it violates children's fundamental rights. Furthermore, they urged criminalization of actions such as refusing to register FIRs, causing unnecessary delays in investigations, and obstructing prosecution processes.

In its judgment, the court declined to apply Section 40 of the Court Management Act to rape cases, emphasizing its relevance solely to civil matters and equitable tolling. Additionally, the court dismissed the "Model Code for Post-Conflict Criminal Justice," stating its applicability to post-war criminal cases only. Consequently, the court refused to issue a mandamus order. Regarding the sufficiency of the 35-day limitations for rape cases, the court acknowledged the stigma faced by rape victims and the efforts of perpetrators to exploit limitation rights. Criticizing the government's lack of initiative, the court directed the extension of the Statute of Limitations.

Regarding the disparity between the limitations for bestiality and rape, the court highlighted the petitioner's argument but asserted that determining the statute of limitations is a matter of legislative wisdom. Thus, the court mandated the legislature to address this issue.

This precedent is important in a sense that in its precedent the court mentioned that in some cases the traditional way or the mechanical way of the interpretation of statute of limitations in rape offence is unjustified. In another case[118] a 14-year-old claimed that the defendant was his father's friend and he raped her under coercion and threat. She reiterated that because of the frequent rape she also gave birth to a female child. The defendant appealed to the Supreme Court that the criminal case be declared null and void on the grounds that it was set in motion after the Statute of Limitations of 35 days had expired. The defendant asked the court to set the cause of action date on the date when the rape was committed. The Supreme Court while adjudicating if the rape against the victim was committed or not mentioned in the judgement that the accused Amar Bahadur Bogati had confessed to raping the victim and also having sexual intercourse twice with the victim's consent. The court held that the defendant committed rape because as per the prevailing law, if a person has a sexual intercourse with a child below 16 with or without their consent, it amounts to rape.

While adjudicating the issue of whether the case was set into motion, the court held that the case was set into motion with the stipulated statute of limitations of 35 days because the defendant had confessed committing statutory rape and the FIR had been filed within 35 days of statute of limitations time. The Statute of Limitations cannot be calculated from the first rape committed date.

[118] *Amar Bahadur Bogati V Nepal Govt (Dn. No: 9623)*

The most important rationale given by the Supreme Court was that even if the defendant claims that the last rape committed by him was before 35 days, it still wouldn't make any substantial difference in the case. The court further reiterated that it need not be compulsory for the victim to file an FIR. There are instances where the victim cannot file FIR because of societal shaming, rape stigma, threat from the perpetrator, consciousness level and various societal and family situation and the police have to carry out investigation and file charge sheet. In such instance, the statute of limitations in heinous crime like rape should not be adhered to in a conservative way.

The full bench court continued that the issue of whether the crime was committed or not was more important than the question of whether the FIR was filed immediately or not. The court mentioned that there are different reasons for the FIR to not be filed on time. The geographical situation, the remoteness and the distance from the victim to the police station, the educational level of the society, societal situation, long term effect on the victim's life, undue threat and coercion in the victim's life etc may cause the late filing of the FIR. Therefore, heinous crimes like rape where the central issue is the woman's chastity, the filing date of the FIR should not be treated as the absolute indicator for aggravating and mitigating rape offences. Just because the FIR was not been filed in the right stipulated time doesn't mean that rape offence isn't established.

3.4. Society Divides: Should the existing limitations be eliminated?

A fundamental component of legal systems across the world for a considerable amount of time, the statute of limitations for criminal charges shields defendants from prosecutions based on out-of-date evidence and ensures the prompt administration of justice. But there has been increasing discussion in recent years about whether certain serious crimes—rape in particular—should be subject to similar temporal restrictions. Using Nepal as a case study, this section looks at the reasons for and against removing the statute of limitations in rape prosecutions.

Like in many other nations, Nepal has a deadline for filing allegations of rape. The revised Criminal Code Act of 2017[119] states that the maximum duration is three years. Although this legislation is a little improvement over the previous 35-day limit, campaigners and survivors who advocate for the total removal of such limits still have a lot more requests to make. The notion that rape cases have a statute of limitations is being viewed increasingly negatively for a number of reasons: the nature of trauma, which means that survivors of sexual assault often need time to process what happened to them and may not be ready to take legal action right away; social stigma, which stems from the fact that victims of sexual assault often experience strong social pressure to come forward quickly; power dynamics, which involve perpetrators having positions of authority or influence over their victims, potentially making it years before survivors feel safe enough to report

[119] Ministry of Law & Nepal Justice, *The National Penal (Code) Act, 2017*, (2017), https://www.moljpa.gov.np/en/wp-content/uploads/2018/12/Penal-Code-English-Revised-1.pdf.

the crime; and advancements in forensic technology, which cast doubt on the traditional justification for statutes of limitations.

Notwithstanding these defenses, there are several drawbacks to doing away with the statute of limitations. Trial integrity may be compromised over time if physical evidence deteriorates and witness memory is less trustworthy. The right of defendants to a fair trial may be violated by statutes of limitations that have been extended or removed since it is harder to build a strong defense as time goes on. The court's already meagre resources may be further depleted by looking into and prosecuting earlier cases, maybe at the cost of more recent instances. Some contend that eliminating deadlines would make false allegations more likely, even though data indicates that fraudulent complaints of rape are uncommon.

The discussion around the statute of limitations for rape is especially relevant in Nepal, where campaigners have launched well-publicized efforts to amend the legislation. Cases including 13-year-old Nirmala Pant[120], who was sexually assaulted and killed in 2018, provoked protests across the country and redoubled calls for legal change. The offenders were never prosecuted despite widespread indignation, in part because of delays in the investigation that caused the case to be past the statute of limitations. The Nepalese Supreme Court ruled in 2020[121] that the one-year statute of limitations for rape breaches basic rights protected by the constitution in response to similar instances and persistent activist pressure. Although specific reforms have not yet been put into effect, this judgment has opened the door for future legislative revisions.

The discussion in Nepal over the rape statute of limitations is representative of a larger worldwide trend. Numerous nations have previously acted to increase or do away with these deadlines. Some states in the US have eliminated their rape statutes of limitations[122], while others have greatly extended them. Some nations, including the UK, and New Zealand, do not have with the statute of limitations for severe sexual offenses. When rape is part of a widespread or systematic attack, it is considered a crime against humanity under international criminal law, as codified in the Rome Statute of the International Criminal Court[123], with no statute of limitations. These global experiences serve as useful role models for nations contemplating comparable changes, such as Nepal.

The statute of limitations for rape was removed, which signifies a dramatic change in the way that judicial systems view sexual assault. Despite the difficulties, there are strong reasons to support this move, especially in light of our growing understanding of trauma, the consequences of sexual assault on survivors over time, and the delayed sharing of

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[120] Shiva Rijal, *Political Demonstrations, Nepali Youths and the Politics of Mourning: A Semiotic Analysis*, 6 SCH. J. ARTS HUMANIT. 28 (2024).

[121] Sapana Pradhan Mall et al V. Nepal Gov (Dn. No: 8038)

[122] Lawteryx Editor, *Sexual Assault Statute Of Limitations (Criminal & Civil) By State*, LAWTERYX (2021), https://www.lawteryx.com/blog/criminal-law/statute-limitations-sexual-assault/ (last visited Apr 10, 2024).

[123]

information. The way forward for Nepal and other nations dealing with this issue probably entails a careful balance of conflicting interests. All measures must be supported by larger initiatives to deal with the underlying causes of sexual assault, enhance the quality of the investigation process, and offer all-encompassing assistance to victims.

3.5. Analysis and Innovation for Change

Advocating for legal changes to statutes of limitations in rape cases represents a crucial innovation for addressing systemic barriers to justice and accountability for survivors of sexual violence. Here we explore the feminist rationale behind such advocacy, emphasizing the importance of recognizing power dynamics, validating survivor experiences, promoting accountability, empowering survivors, and fostering structural and systemic change within the legal system.

Firstly, analyses of sexual violence highlight the inherent power imbalances, gender inequality, and social norms that contribute to the perpetration and silencing of rape. Statutes of limitations can exacerbate these power dynamics by imposing arbitrary time constraints that prioritize the interests of perpetrators over the rights and needs of survivors. By advocating for changes to statutes of limitations, we must aim to challenge systems of oppression that perpetuate sexual violence and address underlying inequalities in access to justice.

Secondly, changing statutes of limitations in rape cases validates survivor experiences by affirming the significance of their trauma and the complexities of seeking justice in a hostile legal environment. Extending or eliminating statutes of limitations acknowledges the long-lasting impact of sexual violence on survivors' lives and recognizes their right to pursue legal recourse at their own pace, without arbitrary time constraints hindering their access to justice.

Furthermore, the society must emphasize the importance of holding perpetrators of sexual violence accountable for their actions and preventing impunity for crimes of gender-based violence. Changes to statutes of limitations enable survivors to pursue legal redress and seek accountability for perpetrators, promoting a culture of deterrence and prevention while sending a clear message that sexual violence will not be tolerated or excused. Empowering survivors to come forward and seek justice is another central aspect in addressing sexual violence. Changes to statutes of limitations provide survivors with greater flexibility and autonomy in deciding when and how to pursue legal action against their perpetrators, removing barriers to accessing the legal system and facilitating survivors' agency, self-determination, and healing journey.

Legal changes to statutes of limitations are part of broader efforts to dismantle systems of oppression, challenge rape culture, and promote gender equality and social justice. These changes signal a commitment to structural and systemic change within the legal system, addressing institutional biases and discriminatory practices that disproportionately affect survivors of sexual violence, particularly marginalized and underserved communities.

To sum up, in Nepal's context, the society itself demands changes to temporal restrictions in the name of statutes of limitations on rape. Following a spate of hi-profile cases, it seeks to promote justice, empowerment, and systemic change for survivors.[124] If the lawmakers further extend or eliminate such restrictions, they can acknowledge survivors' experiences, hold perpetrators to account, and send a message to the world that the country is committed to ending impunity for perpetrators of sexual crimes. These changes represent a step towards creating a more just, equitable, and survivor-centred legal system.

4. Conclusion and Suggestions

In the field of justice, time frequently has two sides. It acts as a mechanism for accountability on the one hand, making sure that those who commit crimes are held accountable for their deeds. However, it may also act as a roadblock, making it difficult for victims of horrible crimes like rape to get justice.

The statute of limitations for rape cases in Nepal is a striking example of this contradiction, since the limited time frame for reporting rape incidents presents formidable obstacles for victims seeking redress. Although there is a strong lobbying for the repeal of this act, a more thorough study shows that doing so might not be enough to ensure that people have better access to the legal system. By analyzing the intricacies associated with this matter and contrasting it with perspectives from India's experience, we disentangle the complicated web of difficulties and suggest comprehensive remedies to create a fairer community. The statute of limitations, a legal construct embedded in the fabric of justice systems worldwide, delineates the temporal boundaries within which a victim must initiate legal proceedings. The statute of limitations for rape charges in Nepal places a very strict deadline on victims, compelling them to come forward with their reports within a year after the crime—previously, the term was just 35 days.

For survivors, this accelerated timeline creates enormous obstacles, making the already difficult task of pursuing justice after trauma much more difficult. The psychological, social, and practical barriers that victims frequently face make it difficult for them to report crimes on time. The long-lasting stigma associated with rape envelops survivors in a dread of rejection, censure, or reprisals. The shock of the event itself can paralyse survivors, leaving them open to manipulation and intimidation by those who use threats to silence their victims. Navigating the maze of legal processes within the constrained timeline is even more difficult for child victims since they could not be considered legal adults until they reach a specific age, which further shortens the already narrow window of opportunity for pursuing justice.

Moreover, the statute of limitations inadvertently grants perpetrators a cloak of impunity, emboldening them to evade accountability by exploiting the temporal constraints imposed

[124] *Demanding justice in Nepal: How statutes of limitations impede access to justice for survivors of sexual violence*, Equality Now, A just World for Women and Girls,
available at María Alejandra Gómez Duque, *Towards a Legal Reform of Rape Laws under International Human Rights Law*, 22 GEORGET. J. GEND. LAW 489 (2021). (last visited 2 Sep. 24)

on survivors. With the narrow window for reporting, many survivors find themselves excluded from the realm of legal recourse, allowing perpetrators to escape unscathed, perpetuating a cycle of injustice and amplifying the systemic failures of the justice system.

As discussed above, for instance India, a neighbor that has done away with this time restriction on rape prosecutions, in order to have a fuller understanding of the ramifications of Nepal's statute of limitations. But the Indian example also highlights the inherent drawbacks of depending only on the statute of limitations being lifted in order to bring about justice.

Despite the absence of temporal constraints, India grapples with systemic challenges that undermine the effective prosecution of rape cases. The dismal conviction rates bear testament to the multifaceted nature of the obstacles embedded within the justice system, ranging from delays in investigations and inadequate evidence collection to judicial backlog. Moreover, both Nepal and India share a common adversary in the form of deeply entrenched patriarchal norms that permeate societal attitudes towards sexual violence.

These norms discourage survivors from pursuing justice and promote a culture of silence and complicity by fostering a victim-blaming mentality and a cycle of impunity. As mentioned earlier, Nepal's severe statute of limitations has drawn criticism from international organizations like the CEDAW Committee and the Special Rapporteur on Violence against Women because it contrasts sharply with current human rights norms. Nepal is in the process of addressing this issue, driven by the combined voice of politicians, activists, and attorneys. Advocates are calling for the repeal of the limited statute of limitations, elevating the voices of survivors, and holding the judicial system accountable through activism, rallies, and court petitions. A possible change towards a more survivor-centric approach to justice is being signalled by legislative efforts in the Nepali Parliament that seek to prolong the reporting time for rape cases. Finally, society, legal professionals and politicians needs to understand that eliminating the statute of limitations on rape cases is a critical first step toward improving access to justice survivors for sexual abuse. But doing so does not guarantee that structural obstacles to justice will be eradicated promptly.

To put an end to violence against women and the injustice against survivors, the government needs to adopt a more holistic approach that includes awareness campaigns, legislative changes, and survivor-centric policies. As the system is deeply submerged in patriarchy and impunity, it is urgent to hold offenders accountable for their crimes. Similarly, survivors need to get the freedom to recover their dignity and agency. This research suggests following recommendations for the government to change existing situations:

- The prevailing laws related to the statute of limitations for reporting rape cases should be either repealed or the temporal restrictions they impose should be extended significantly to allow survivors more time to seek justice. This is

important to make sure that survivors have time to process their trauma and muster courage to seek justice from the legal system.

- Secure enough funds so that rape survivors can avail free services such as medical help, legal support and and psychological counselling.
- Create dedicated teams trained to handle rape cases with professionalism and skill. They should include women personnel to create a supportive environment for survivors during both the reporting and investigation processes.
- Invest in enhancing the reliability of forensic labs and training law enforcement personnel in evidence collection to make it free of errors, and ensure prosecution.
- Provide training judges, prosecutors, and police officers working at the district as well as federal level so that they can manage rape cases and assessing psychological impacts of sexual violence. This training should also look at different barriers that prevent survivors from getting justice.
- Launch a national initiative to show the public the realities of rape and why survivors need community support. These campaigns should aim at addressing stigma, promoting reporting, and fostering a culture of zero tolerance towards perpetrators of sexual crimes.
- Revisit and bolster legal provisions related to rape to ensure hefty penalties for convicts. This should also include measures that give priority to rape cases in the court to avoid delays that can affect the survivors' chances of getting justice.
- Modify legal procedures to make them more compatible with the needs of the survivors. For example, permit in-camera trials (which are not open to the public), support people to testify, and use video testimony to reduce the stress witnesses feel appearing before the judges.

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CLEAN COAL: PROSPECTS AND CHALLENGES IN THE TWENTY-FIRST CENTURY

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Abstract

Coal is the primary fuel for economic and industrial activities in the United States. Coal-fired power plants are a major source of emissions of carbon dioxide, sulfur dioxide, nitrogen oxide, mercury and waste causing great harm to health, safety, the environment and ecosystem. The United States is strongly committed to improving energy efficiencies and producing clean coal through development of clean coal technologies and enforcement of laws and regulations. Abundance of coal poses both the challenges and opportunities for America in order to meet the demand of energy and sustain a healthy and safe environment in the twenty-first century.

1. Introduction

Clean coal, whether a reality or myth, poses one of the major challenges for the twenty-first century. As of today, coal energy is vitally important for sustaining and promoting economic and industrial development in both the industrialized and developing world. Clean coal problems are deeply rooted in national economies and will require a high and steady level of commitment by governments and other international, national, and local actors. It is both timely and critical to understand the nature of the problems posed by coal energy to health, safety and environment. This essay attempts to dwell upon the current state of clean coal technology, legal framework and regulatory process, institutional enforcement, litigation and remedies in the United States.

Coal is America's most abundant fossil fuel. Coal accounts for more than 50 percent of U.S. electricity generation in the United States.[1] Over 1 billion tons of coal was produced in 25 states in 2000.[2] About 99.7 percent of U.S. coal production is consumed

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* This article was written as research scholar when I was Ph.D. candidate in U.S.A. Presently, it is submitted for the benefit of our law students for Bluebook style of citation and thesis writing.

[1] National Energy Policy Development Group (NEPDG) Report, RELIABLE, AFFORDABLE, AND ENVIRONMENTALLY SOUND ENERGY FOR AMERICA'S FUTURE, 1-6 (2001). Nuclear energy account 20%, natural gas 16%, hydropower 7%, oil 3% and renewable (wind, solar) 2%.

[2] *Id.*

domestically. [3] In addition to the western and interior regions, the Appalachian region is rich in coal deposits; coal mining is still important to these regions' economy. The coal mining has been a major part of the Appalachian economy since the mid-1880s.[4] United States coal resources are estimated at 488 billion short tons, with recoverable reserves of 268 billion short tons in 2009 that is about equivalent to a 175-year supply.[5] United States coal reserves account for 27 percent of the world's total 911 billion short tons recoverable reserves, followed by Russia, China and Australia.[6]

Growth in electricity demand is unprecedented around the world. Increase in coal use has been, and is, necessitated by demand of growth in economic and industrial activities. Coal is used for electricity generation and other industrial purposes. The utility industry finds coal easily accessible compared with other fuel sources such as oil, natural gas and nuclear power. [7]

While growth in coal-fired power generation will account for 39 percent in the United States from 2006 to 2030, world coal consumption is projected to increase by 49 percent for the same period. Coal is, therefore, expected to remain the dominant fossil fuel source in meeting increasing U.S. electricity demand[8] until the first quarter of the twenty-first century.

It is a well-known fact that coal is not a perfect fuel, because its contents are harmful to health and the environment. Coal like all other fossil fuels is formed out of carbon. When coal burns its carbon combines with oxygen and form carbon dioxide (CO_2). Sulfur and nitrogen are trapped inside coal, and when coal burns these impurities are released into the air. Scientific study shows that CO_2 is causing earth's temperature to rise impacting the earth's climate which is known as the greenhouse effect.

With a view to increasing energy efficiency and controlling emissions, the concept of clean coal was developed in consideration of the technologies that would help remove impurities from coal causing air pollution. The question arises whether it is possible to produce clean coal, based on the current scientific and technological developments in the United States and around the world. Since the mid-1980s, the United States government has been making its efforts for developing clean coal technologies under public-private partnership. However, public opinion on the success of making clean coal is divided. Some see clean coal can be produced, while some perceive that clean coal technology means expansion of coal mine operations that will have far more damages than today to

[3] *Id.*

[4] Robert E. Beck, *Water and Coal Mining in Appalachia: Applying the Surface Mining Control and Reclamation Act of 1977 and the Clean Water Act*, 106 W. VA. L. REV. 629 (Spring 2004).

[5] http://www.eia.doe.gov/cneaf/coal/reserves/reserves.html (visited 3/27/2010). 468 billion short tons as of 1 January 2025 (Retrieved on 7/23/2026)

[6] https://www.americanenergyalliance.org/facts/ (Retrieved on 7/23/2026)

[7] Donald A. Crane *et al*, *Coal and Emerging Energy and Environment Policy*, 6 FALL NAT. RESOURCES & ENV'T 26 (1991)

[8] NEPDG Report, *Supra* note 1, at 1-6.

the environment in future. Nonetheless, the United States government is strongly committed to developing clean coal technologies.

2. **Development of Clean Coal Technology**

Both public and private sectors are engaged in the efforts toward substantial reductions in the cost of controlling sulfur dioxide and nitrogen oxide emissions. In some cases, effectiveness of control systems has increased significantly.[9] The Department of Energy (DOE), through its Clean Coal Technology (CCT) program, provides effective control technologies. Regulatory compliances with these technologies are enforced in utility markets.[10]

The DOE established the CCT Demonstration Program under cooperative partnership between government and industry,[11] with a view to reducing air pollution and increasing energy efficiency. The purpose of CCT is to allow the use of coal to generate electricity while meeting environmental regulations at low cost. The CCT has short, mid and long-term goals. In the short term, its goal is to meet existing and emerging environmental regulations, which will dramatically reduce compliance costs for controlled mercury, NOx, SO_2 , and fine particulate at new and existing coal power plants. The mid-term goal is to develop low-cost, super-clean coal power plants, with efficiencies 50 percent higher than present average. The higher efficiencies will reduce emissions at minimal costs. In the long-term, the goal of the program is to develop low-cost, zero-emission power plants with efficiencies close to double that of today's fleet.[12]

The CCT program began as a response to concerns over acid rain, caused by sulfur and nitrogen pollutants emitted by coal-burning power plants. The program is recognized for many successes, such as the low nitrogen oxide (NOx) burner technology developed under CCT program, which is now found on 75% of United States coal-fired power plants. The modern scrubber technology has also been developed that has reduced capital and operating costs for sulfur removal to about half of the previous level.[13] The CCT encompasses technologies for coal preparation, coal gasification, pollutant removal, and carbon capture and storage. Despite improvements to coal-fired plant efficiency, carbon emissions still remain a problem for using coal to produce electricity because clean coal combustion technologies are still in early stages of development.

Carbon Capture and Storage/Sequestration ("CCS") technology is in the process of development. The CCS technology captures CO_2 and stores it deep underground, preventing the gas from entering the atmosphere. CO_2 could be pumped into and stored in underground aquifers, or pumped into oil fields to maintain pressure and facilitate oil

[9] *Id.*
[10] *Id.*, at 5-14.
[11] Patricia Fry Goodley and Larry M. Joseph, *Clean Coal Technology Program: Model for Government/Industry Cooperation*, 15 ENERGY L. J. 439 (1994).
[12] NEPDG Report, *Supra* note 1, at 5-14.
[13] Kevin J. McIntyre *et al* (eds.), ENERGY POLICY ACT OF 2005, 91 (2006)

extraction.[14] The CCS is cost intensive. It increases the costs of power generation by 40 to 80 percent compared with conventional power plants, depending on the location of the plant and the storage site, and the transport and capture technology used.[15]

Technologies like fluidized-bed combustion and integrated gasification combined cycle have been developed to further reduce emissions. Fluidized-bed combustion is a low-emitting nitrogen oxide combustion technology that allows the use of fuels, such as coal pile washer waste, that were not formerly usable.[16]

The initiatives of more than two decades for developing CCTs show that some 40 percent energy efficiencies have been achieved by the utility industry. Scientists have forecast improvement to 50 percent in the next 100 years. Thus, the current state of development of the CCT remains far from being realized in a near future.

2.1 Technologies for Improved Efficiency

Waste of energy in the course of production of electricity is one of the major considerations in order to improve energy efficiency. Two-thirds of the energy used in a conventional coal-fired power plant is wasted in the production of electricity. Measures for minimizing these losses include installing high efficiency steam turbines, reducing steam leaks, and using software to optimize combustion efficiency. Existing technologies are being used by new coal-burning power plants to improve efficiency. Wasted energy can also be recycled for use in industrial processes or heating buildings.[17] Energy efficiency would reduce pollutants to air and water which have direct impact on improvement in health and environment as well.

A promising development is the integrated gasification combined-cycle (IGCC) power system that has been successfully demonstrated at the 100 megawatt Cool Water plant in California. IGCC power plants convert coal to a gaseous fuel, from which most of the impurities are removed prior to combustion, and then use the gaseous fuel in a combustion turbine to produce electricity. Waste heat from the turbine is used to generate steam and drive a steam turbine, to produce more electricity.

Coal gasification burns petroleum coke and make other products in addition to electricity, such as chemical feedstocks and transportation fuels. Hydrogen, produced directly in the coal gasifier, can be used in fuel cell equipped vehicles. Methane, hydrogen, and other gasified coal products can be recombined into more traditional fuels, such as methane, gasoline, or diesel fuel. Because these fuels would contain no sulfur, they would easily meet EPA's sulfur standards for transportation fuels, and they would be usable in fuel cell-equipped vehicles designed for these fuels.[18]

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[14] Jennifer Rohleder, *The Buzz About the Clean Coal*, 7 SUSTAINABLE DEV. L. & POL'Y 21 (2007).
[15] http://www.greenpeace.org/seasia/en/asia-energy-revolution/dirty-energy/clean-coal-myth/clean-coal-myths-and-facts (visited 3/30/2010) This page is missing on 7/23/2026.
[16] NEPDG Report, *Supra* note 1, at 5-14.
[17]NEPDG Report, *Supra* note 1, at 3-5.
[18] NEPDG Report, *Supra* note 1, at 3-6.

A modern gas-fired power plant has virtually no SO_2 or mercury emissions and emits 97 percent less NOx and 50 percent less carbon dioxide (CO_2) than a traditional coal-fired plant. Natural gas as a source of electricity generation is on the rise, in part because it can help generators meet increasingly stringent clean air requirements.

The gasification process also allows many of the impurities in the coal to be removed before it is combined to generate electricity. At the Wabash River project, over 99 percent of the sulfur is removed from the coal and marketed to industrial users of sulfur. Slag is also removed and is marketed to the construction industry. The plant's design allows it to burn other fuels, such as petroleum coke.[19]

The public and private partnership of two decades has produced some positive results in the control of air pollution. However, the coal-fired power plants are still a major source of air pollution. Thus, Congress looked for the ways of clean coal power initiatives by passing the 2005 Energy Policy Act at the beginning of the twenty-first century.

2.2 **Clean Coal Power Initiative (CCPI)**

The Energy Policy Act of 2005, §401, establishes a Clean Coal Power Initiative (CCPI), providing funding and loan guarantees for CCT that promotes efficient, environment-friendly, and cost-competitive coal technologies. The Secretary of Energy administers the CCPI program which the Act authorizes $200 million annually, for fiscal years 2006-2015.[20] The CCPI was built upon the DOE's preexisting CCT program, which began in 1986 and had a number of successes.[21]

The Energy Policy Act of 2005 sets a high standard for project to qualify for CCPI funding. The project must "advance efficiency, environmental performance, and cost competitiveness."[22] The CCPI lays emphasis on coal gasification, a process that converts coal from a solid to a gaseous state. Gas produced through coal gasification can be used to make chemicals or fertilizer or electric power. The Act requires such technologies to include gasification combined cycle, gasification fuel cells and turbine combustion, and other advanced coal based technologies capable of producing a concentrated stream of carbon dioxide.[23] Setting a high standard for CCPI means cost-intensive and time-consuming projects. The utility industry may not be encouraged by it. Thus, the implementation process will be slower than expected and public skepticism will increase about the viability of these projects.

2.3 Clean coal technology regulatory incentives

[19] NEPDG Report, *Supra* note 1, at 3-6.
[20] McIntyre *et al*, *Supra* note 13.
[21] *Id*.
[22] Energy Policy Act § 420(a).
[23] McIntyre *et al*, *Supra* note 12, at 92.

The Clean Air Act, §415, provides incentives for clean technology demonstration projects funded through the DOE or EPA.[24] Existing facilities that undertake physical or operational changes for the sole purpose of installing, operating or removing equipment associated with a clean coal demonstration project and receive at least 20 percent of their funding from the EPA or DOE are exempt from certain regulatory requirements.[25]

The CAA provides for two types of clean coal technology demonstration projects: temporary and permanent. A temporary demonstration project is one that lasts five years or less and complies with the state implementation plan for the state in which the project is located and the national ambient air quality standards during and after project termination. Temporary demonstration projects are exempt from New Source Performance Standards (NSPS) under 42 U.S.C.A. §7411, and from the Prevention of Significant Deterioration (PSD) and nonattainment New Source Review (NSR) provisions of the Act. Permanent projects that constitute repowering as defined in Title IV of the Act are exempt from the NSPS standards and from the review and permitting requirements of the PSD program for "any pollutant the potential emissions of which will not increase as a result of the demonstration project."[26] The temporary and permanent demonstration projects provide some exemptions as incentives to existing facilities.

The CAA contains special provisions addressing "repowered sources"—sources that replace an existing coal-fired boiler with one of several clean coal technologies, including atmospheric or pressurized fluidized bed fuel cells, among others.[27] Units repowering technologies were provided a four-year extension of the Phase II deadline from January 1, 2000 to December 31, 2003. During this extension, such units were allocated allowances equal to the affected unit's baseline (average 1985 to 1987 fuel consumption) multiplied by the lesser of the unit's state implementation plan (SIP) limitation or its actual emission rate in 1995. After completion of the repowering, the unit received allowances according to the formula provided for Phase I units, potentially resulting in the acquisition of a large number of extra allowances. In addition, repowered units were exempt from NSPS requirements, provided the repowered unit did not increase its hourly emissions of SO_2 or NOx.[28]

Units interested in availing themselves of the repowering extension were required to notify the permitting authority of their intent by December 31, 1997 and submit by January 1, 2000 "satisfactory documentation of a preliminary design and engineering effort" and an executed and binding contract for the majority of the equipment needed to repower the unit.[29]

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[24] 42 U.S.C.A. § 7651n.

[25] David R Wooley and Elizabeth M. Morss, CLEAN AIR ACT HANDBOOK: A PRACTICAL GUIDE TO COMPLIANCE, 361 (2009).

[26] *Id.*, at 362. CAA §415(b)(3), 42 U.S.C.A. §7651n(b)(3).

[27] CAA §409, 42 U.S.C.A. §7651h.

[28] *Id.* CAA § 409(d), 42 U.S.C.A. § 7651h(d).

[29] *Id.* CAA §409(a), 42 U.S.C.A. §7651h(a).

2.4 **National Acid Precipitation Assessment Program (NAPAP)**

In 1980, Congress created the National Acid Precipitation Assessment Program (NAPAP) for a period of ten-years to coordinate the efforts of federal agencies related to acid deposition research.[30] Finally, private and public sectors have co-funded the Clean Coal Technology Program in an effort to advance the state of the art in pollution controls with a view to making these advanced technologies available for market under the CAA or to provide techniques for compliance with any additional control requirements.[31]

The 2005 report of NAPAP to Congress concluded that implementation of Title IV had "successfully and substantially" reduced emissions of SO_2 and NOx from the power generation sector at a significantly lower cost than expected, and that these emission reductions had resulted in reduced concentrations of SO_2 and sulfate in the atmosphere. The report also suggested that additional SO_2 and NOx reductions from power plants and other sources are needed to improve air quality, reduce deposition, and further reduce the number of acidic lakes and streams.[32]

The current state of CCTs used in modern coal-fired power plants shows the capability of achieving significant reductions in emissions of SO_2 or NOx associated with burning coal. However, CCTs are not in widespread use and a large number of power plants are very old. Emissions of sulfur dioxide, nitrogen oxide, mercury and carbon dioxide have continued effect on health and the environment. Nonetheless, the United States is moving ahead with various measures including funding, exemptions, regulatory incentives, etc. under the public-private partnership. Enforcement of laws and regulations are carried out by various federal and state agencies.

3. **Legal Instruments affecting the Coal Industry**

3.1 **Clean Air Act Amendments of 1970, 1977 and 1990**

Coal is formed out of carbon and inside coal sulfur and nitrogen are trapped. When coal burns, sulfur and nitrogen are released into the air. Coal-fired power plants contribute 96 percent of SO_2 emissions, 93 percent of NOx, 88 percent of CO_2 , and 99 percent of mercury emissions. Coal-fired plants are the single largest source of mercury pollution in the U.S.[33] Thus, the emissions produced by the coal industry pose challenges to the protection of public health, safety and the environment. Thus, Congress seeks to set air quality standards in the use of energy sources through the Clean Air Act.

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[30] National Acid Precipitation Act of 1980, Pub. L. No. 96-294, 94 Stat. 770 (codified as amended at 42 U.S.C. § 8901 (1982).

[31] Michael L. Teague *et al*, *The Debate Over the Adequacy of the Unites States Approach to Acid Deposition: The Electricity Utility Industry Perspective*, 91 W. VA. L. REV. 845, 848 (Spring 1989).

[32] Wooley and Morss, *Supra* note 25, at 371.

[33] http://www.greenpeace.org/seasia/en/asia-energy-revolution/dirty-energy/facts-about-coal (visited 3/30/2010) This page is missing on 7/23/2026.

Congress originally enacted the CAA in 1963, expanded the statute substantially in 1970, and has amended it several times since.[34] The 1970 Amendments to the CAA set up primary and secondary National Ambient Air Quality Standards ("NAAQS") to protect health and public welfare. The NAAQS fixed the maximum allowable concentrations for six pollutants in the air: carbon monoxide, photochemical oxidants, particulate matter, nitrogen dioxide, lead and sulfur dioxide.[35] Individual states were required to achieve these standards through the implementation of their state implementation plans (SIPs).[36] States imposed emissions limitations on existing sources to meet the federal standards. In view of sulfur content of many U.S. coals, the sulfur dioxide standards would have the most dramatic and significant effect on coal-fired utility power plants. [37]

The 1977 Amendments[38] required both new and existing sources to meet more stringent federal standards. The new sources performance standards (NSPS) required installation of scrubbers at coal burning facilities. These amendments: (i) imposed new federal requirements to be incorporated into SIPs for NAAQS non-attainment areas; (ii) imposed specific statutory requirements for prevention of significant deterioration (PSD) of air quality; (iii) established specific visibility requirements; (iv) imposed noncompliance penalties, in addition to the preexisting civil and criminal penalties; (v) prohibited the use of coal if such coal is causing "local or regional disruption or unemployment."[39]

3.2 **State Implementation Plans (SIPs)**

The CAA provisions are implemented by the states in their SIPs. SIPs cover PSD and nonattainment permit programs, including a preconstruction review of permit, periodic state review of their program and adoption of additional necessary controls. SIPs require continuing to prevent deterioration in attainment areas and providing for "state emission permits," and adopt a full-line up of state ambient air quality standards and emission limitations. Existing coal-fired utility boilers must also meet state emission limits, and new or modified coal-fired plants must comply with NSPS and the preconstruction review permit program.[40]

A coal-fired power plant would need to control the emissions of air pollutants such as SO_2 or NOx and particulate under a state implementation plan in which the power plant is located, and the SIP is approved by the EPA. New coal-burning power plants would achieve efficiencies over 40 percent using existing technologies, such as combined heat and power (CHP) and integrated gasification combined-cycle (IGCC).[41]

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[34] Charles F. Mills, *Clearing the Air: Use of Chevron's Step One to Invalidate EPA's Equipment Provision*, 33 FLA. ST. U. L. REV. 259, 262-263 (2005).
[35] William E. Hynan, *Chapter 55: Coal* in ENERGY LAW AND TRANSACTIONS, Vol. 3, at 55-90 (2009).
[36] *Id.*Clean Air Act, 42 U.S.C. §§ 7408-7410 (1982).
[37] *Id.*
[38] 42 U.S.C. § 7411 (Supp. V) (1982).
[39] 42 U.S.C. §§ 7407-7411.
[40] Hynan, *Supra* note 35, at 55-92.
[41] NEPDG Report, *Supra* note 1, at 3-5.

New Source Review (NSR) programs are designed to maintain the NAAQS by preventing significant degradation of air quality and implemented through the SIP. NSR is the most complex of all CAA programs. Numerous administrative and judicial decisions have been made on the issues of definition of modification, the relationship between federal and state enforcement, statutes of limitation, and citizen suit authority.[42] CAA creates a two-tier regulatory regime based on new sources and old sources. Older sources are not subject to the same standards as newer sources.[43] The old plants are not closed or replaced by new plants because the permit regime under CAA applies only to "new" sources of air pollution and coal-fired plants existing at the time permitting requirements took effect fall outside the scope of the Act's coverage. It is said that Congress' intent might be that pollution controls can be installed more efficiently when plants are constructed rather than later through retrofitting.[44]

3.3 **EPA's Interstate Rule**

In 2005, EPA adopted a cap-and-trade program for emissions of SO_2 and NOx from power plants in 28 eastern states and the District of Columbia. The Clean Air Interstate Rule (CAIR) requires regulated states to revise their state implementation plans (SIPs) to reduce emissions of SO_2 and NOx under CAA §110(a)(1), 42 U.S.C.A. §7410(a)(1), which authorizes EPA to compel states to implement changes to their SIPs where evidence suggests that emissions from the states are contributing significantly to nonattainment problems in downwind states.[45]

3.3.1 **National Ambient Air Quality Standards**

The EPA administrator identifies air pollutants which "may reasonably be anticipated to endanger public health or welfare"[46]and promulgates National Ambient Air Quality Standards ("NAAQS").[47]These standards establish permissible levels of specific air pollutants. If the level of air pollutants in a particular geographic area meets the standard, the area is known as an attainment area. [48] Areas that do not meet the NAAQS are known as non-attainment areas. [49] The NAAQS provide a benchmark that determines

[42] Wooley and Morss, *Supra* note 25, at 140.
[43] Benjamin Edwards, *Case Comments: Environmental Defense v. Duke Energy Corporation*, 33 COLUM. J. ENVTL. L. 197, 202 (2008).
[44] David B. Spence, *Coal-Fired Power In a Restricted Electricity Market*, 15 DUKE ENVTL. L. & POL'Y F. 187, at 195 (Spring 2005).
[45] Wooley and Morss, *Supra* note 25, at 370. [FN3: EPA proposed the CAIR in January 2004, 69 Fed. Reg. 4566 (Jan. 30, 2004) and followed up with a supplemental notice of proposed rulemaking containing proposed rule language as well as supplemental information supporting the January 30, 2004 proposal. 69 Fed. Reg. 32684 (June 10, 2004). 70 Fed. Reg.25162 (May 12, 2005). More information on EPA's web site at: www.epa.gov/interstateairquality.
[46] 42 U.S.C. §7408(a)(1)(A).
[47] 42 U.S.C. §§ 7408, 7409, 7410.
[48] 42 U.S.C. § 7409.
[49] 42 U.S.C. §7501(2).

the level of EPA involvement, since non-attainment areas face more stringent EPA oversight.[50]

The CAA Amendments of 1990[51] primarily emphasizes to improve the nation's air quality and establishes the first air quality requirements to control acid deposition. These Amendments fundamentally changed EPA and state enforcement programs and increased both civil and criminal penalties for non-compliance with the CAA. The 1990 Amendments also significantly increased the amount of publicly available information on the compliance status of facilities, simplifying both government and citizen enforcement.[52] The 1990 CAA Amendments dramatically increased the number of regulated toxic air pollutants to 189 as compared to fewer than twenty under the 1970 law. The EPA is authorized to add or delete chemicals subject to regulation. [53] The acid deposition control provision of CAA imposes "drastic limitations on the emissions of sulfur and nitrogen oxides from coal burning utility plants."[54]

In compliance with the requirements of the CAA, many power plants use flue-gas desulfurization, or scrubbers, to reduce SO_2 emissions from burning coal. The most common wet scrubber, the limestone forced-oxidation (LSFO) process, removes SO_2 from the flue gas. The limestone captures sulfur and pulls it out of the gases. The limestone and sulfur combine each other to form either a wet paste or in newer scrubbers, a dry powder. In either condition, sulfur is prevented from being released into the air. The LFSO technologies can remove up to 98 percent of SO_2 and significant amounts of mercury. By recapturing sorbent at the bottom of the spray dryer removed in a particulate control device, dry scrubbers can remove up to 96 percent of SO_2 .[55]

3.4 **Title IV of the 1990 CAA Amendments**

In 1990, the acid rain title (Title IV) was passed as part of the 1990 Amendments. This title aims at achieving two goals: First, it aimed to reduce SO_2 emissions by 10 million tons from 1980 levels (which were about 19 million tons) and to lower NOx emissions by 2 million tons from 1980 levels. Second, the Title IV sought to encourage, through various mechanisms, energy conservation, pollution prevention, and the use of renewable and clean alternative technologies.[56] The emission reductions from the utility industry were the primary target. [57] The utilities wanted to avoid being required to install

[50] 42 U.S.C. §7502(c), 7506(c)(5).
[51] John R. Rhorer, Jr. and Penny R. Warren, *Force Majeure Implications of Acid Rain Legislation: The Litigation Battle of the 1990s*, 8 J. NAT. RESOURCES & ENVTL. L. 23 (1992/1993). Clean Air Act Amendments of 1990, Pub. L. No. 101-549, Title I § 108(k), 104 Stat.2468, (codified at 42 U.S.C.A. §§ 7401-7601 (1983 and supp. 1992)
[52] Wooley and Morss, *Supra* note 25, at 508.
[53] Minturn T. Wright, III, in Rhorer, Jr. and Warren, *Supra* note 51.
[54] Rhorer and Warren, *Supra* note 51, at 26.
[55] NEPDG Report, *Supra* note 1, at 3-4.
[56] Roy S. Belden, CLEAN AIR ACT: BASIC PRACTICE SERIES, 84 (2001).
[57] *Id. See*, Footnote 1. Other industries with fossil-fuel-fired boilers and combined cycle combustion turbines generating electricity may be subject to Title IV. Fossil fuels include coal, oil and natural gas.

add-on controls- namely, a flue gas desulfurization system or "scrubber" that typically removes more than 95 percent of the SO_2 from the flue gas stream before it exits the stack. Scrubbers are extremely large pieces of equipment that may cost $80 to $120 million to install on a large utility boiler. Ongoing operation and maintenance of a scrubber can also be costly.[58]

The Title IV requires all "affected units"—that is, fossil-fuel-fired electric generating units that produce electricity for sale—to obtain acid rain permits; to hold sufficient "allowances" to cover their SO_2 emissions (starting in 1995 for Phase I units and the year 2000 for Phase II units); to install continuous emissions monitoring systems (CEMS); and comply with other monitoring and record-keeping provisions.

A number of cases were brought by environmentalists with a view to making efforts towards improving air quality that has been badly affected by the coal industry. Even though emissions of pollutants such as sulfur and nitrogen oxides and particulate matter were reduced, the acid deposition issue has continuing effects caused by residual emissions of these pollutants. Concerns have been raised about the need for accelerating the reductions of the emissions of these pollutants under the existing Clean Air Act. [59]

Deposition of acidic aerosol acidifies the environment and causes damage to fisheries in aquatic ecosystems. Reduction of these effects calls for acceleration of the reductions of acid deposition precursors in accordance with the existing legislation. Environmentalists[60] demand acceleration of pollution reduction requirements on electric utility companies.[61] The electric utility industry counters by saying that the expense of granting the relief requested by the environmentalists is not justified by the environmental benefits that accelerating additional controls would produce in light of the continuing success of the Clean Air Act to control the precursors of acid deposition.[62]

With a view to reducing SO_2 and NOx emissions, the utility industry sector became the primary target of Title IV of the CAA 1990 Amendments whereas the utilities had wanted to avoid the requirement to install add-on controls—a flue gas desulfurization system or scrubber due to heavy cost on its installation, maintenance and operation. Title IV-A, entitled *Acid Deposition Control* provision regulates the emissions of sulfur dioxide (SO_2) and NOx, in part by establishing a cap of 8.90 million tons per year on electric utility SO_2 emissions beginning January 1, 2000. In order to monitor the emissions of SO_2 and NOx with the accuracy needed to have a viable emissions trading program,

[58] *Id.*
[59] Teague *et al, Supra* note 31.. Clean Air Act, 42 U.S.C. §§ 7401 et.seq. (1982).
[60] Referred generally to those individuals and institutions that are active proponents of acid deposition legislation. *Id., at 847*.
[61] Referred to companies that are engaged in the conversion of natural resources into electricity for public consumption and that request a balancing of environmental, energy, economic, and social factors before acid deposition legislation is adopted. *Id.*
[62] *Id.*

Subchapter VI-A requires that each source subject to the subchapter install continuing emissions monitoring systems (CEMS) and opacity monitoring systems.[63]

Compliance with the provisions is scheduled in two phases. Phase I requires 110 major coal burning utility plants with more than 100 megawatt capacity to reduce sulfur emissions to a level no greater than 2.5 lbs/mmBtu of the baseline fuel consumption by 1995. These utilities must identify their selected method of compliance in a permit application to be filed by February 15, 1993. While regulations governing the permitting mechanism were to be filed by May 15, 1992, they were still awaiting final approval. The statutory methods for compliance include substituting control obligations among commonly owned units, installing scrubbers, using energy conservation or renewable energy sources, requesting alternative emission limits or emission averaging for nitrogen oxide, employing clean coal technology in Phase II, or opting into the application must include a compliance plan and a description of the schedule and means to accomplish the emission limits.[64]

In Phase II, all other existing coal-burning utility plants must obtain emission allowances and a permit to operate. Generally, allowances will be based on a sulfur dioxide emission standard of 1.2 lbs/mmBtu. Permits for Phase II compliance must be obtained by 1998.[65]

After 1990, new utility plants beginning operations must obtain allowances for emissions and an operating permit. Plants beginning their operations after the year 2000 must obtain all allowances needed to operate from elsewhere, and availability of allowances is expected to be limited.

3.4.1 **Three-pronged federal approach to the acid deposition issue**

In 1977, Congress adopted major amendments to the Clean Air Act to reinforce the comprehensive federal regulatory program for air quality. The CAA provides for the regulation of existing sources of air pollution, including the precursors to acid deposition. The Act seeks to ensure protection of the public health and welfare, including the effects of acid deposition, and state-of-the-art controls on new sources to improve air quality even further. Under federal-state partnership program, the Environmental Protection Agency (EPA or the Agency) makes the rules to implement the CAA and the states apply those rules to specific sources.[66]

Environmentalists consider the CAA, NAPAP, and the CCT program as inadequate by themselves.[67] However, the utility industry argues that there is no environmental crisis that requires new law and future emission regulations will achieve goals under the current CAA's mandate. The industry concerns about the acceleration of the timing of the

[63] Arnold W. Reitze, Jr., STATIONARY SOURCE AIR POLLUTION LAW, 265 (2005).
[64] Rhorer and Warren, *Supra* note 51, at 27.
[65] *Id*.
[66] Teague, *Supra* note 31, at 848.
[67] *Id.*, at 849.

emission reduction through new legislation that would be very expensive compared to adequate environmental benefit. The electric utility industry has reduced emissions and has expressed its commitment to emission reductions as deployment of advanced technology is encouraged by market forces or as is ordered under the current CAA.[68]

3.5 **Enforcement Provisions under the 1990 CAA Amendments[69]**

The 1990 CAA Amendments modernized the CAA by adding provisions similar to those found in amendments to the Clean Water Act, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), Resource Conservation and Recovery Act (RCRA), and the Toxic Substances Control Act (TSCA). The 1990 CAA Amendments enhance EPA's enforcement power by increasing its ability to obtain information. CAA §114 was amended to clarify EPA's right to require information to be generated and submitted on a regular basis. Under §114(a) (3), owners and operators of sources may be required to identify the standards to which they are subject and to provide certification that they are complying with the standards.[70]

The amended §307(a) makes compliance information subject to the subpoena power. The basic enforcement provision, §113, expanded EPA's enforcement options by providing a range of responses from field citations to criminal prosecution. It provided new sanctions, increased stringency in existing sanctions, and more clarity in the applicable standards.[71]

Under the pre-1990 CAA the use of compliance orders was limited because compliance has to be obtained in 30 days. The 1990 CAA Amendments allow compliance schedules of up to one year, which enhances their value as an enforcement tool. The penalties, using §113, can be applied from the date of the violation. EPA is provided authority to levy administrative penalties of up to $25,000 per day, but generally with a cap of $200,000. Prior to penalties being imposed, there must be an opportunity for a hearing on the record that meets the requirements of the Administrative Procedure Act (APA).[72] To deal with minor violations, EPA may issue field citations with penalties up to $5,000 per violation, and it needs only to provide an opportunity for an informal hearing. This field citation program, the CAA equivalent of a traffic ticket, provides EPA with an enforcement tool that could be easy to use.[73]

Sanctions are more stringent than in 1990, and fines are now based on U.S.C. Title 18, which allows increases in the maximum fines. The 1990 CAA Amendments authorize felony sanctions, typically up to five years, rather than one year misdemeanor approach used under prior law, and it authorizes the doubling the sanctions for repeat offenders. The 1990 law makes negligent endangerment a misdemeanor and knowing endangerment a

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[68] *Id*.

[69] Enforcement provisions in other major statutes are found at: CWA §309, 33 U.S.C. §1319; CERCLA §106, 42 U.S.C. §9606; and RCRA §3008, 42 U.S.C. §6928.

[70] Reitze, *Supra* note 63, at 269. CAA §115(a)(3), 42 U.S.C. §7414(a)(3).

[71] *Id.*, at 270.

[72] 5 U.S.C. §§554, 556.

[73] Reitze, *Supra* note 63, at 270.

felony. Penalties can be applied to all violations including those that predate the notice of violations. Basically, everything that needs to be enforced in the CAA, except mobile sources, is subject to §113.[74] Mobile sources are exempt from §113 because they are regulated by §205.

3.6 **Stratospheric Ozone Protection**

In 1990, Subchapter VI of the CAA created an enforceable stratospheric ozone protection program. The provisions codify and expand the Montreal Protocol[75] which aims to phase out the use of chemicals with stratospheric ozone-depleting potential.[76] Other sections provide for the recycling of ozone-depleting chemicals, bands on nonessential uses, labeling requirements, and rules on substituting safe alternative chemicals for those with ozone-depleting potential.[77]

3.7 **CAA Operating Permit program**

The 1990 CAA Amendments added the operating a permit program that identifies most of the federal and states standards, work practice requirements, emission limitations, monitoring requirements, test methods, and record-keeping and reporting requirements applicable to each source and places them in one document.[78] It makes easier for citizens to know the requirements applicable to sources and to bring citizen suits against violators.[79] Such suits also can be used to pressure government agencies to enforce environmental laws.[80]

The CAA permit program requires operating permits for major sources, sources subject to hazardous air pollution requirements, sources subject to new source performance standards (NSPS), "affected sources" under the Subchapter IV acid rain provisions, and sources subject to new source review (NSR) permitting requirements.[81] The states usually have the primary responsibility for enforcing permit requirements; however, EPA's regulations in a permit are enforceable by the Administrator and citizens.[82]

As discussed above, the enforcement provisions of the 1990 CAA Amendments for protecting health and the environment through setting standards of air pollution control are multi-dimensional. The policy direction of the CAA includes "carrot and stick" approach in terms of incentives for energy efficiencies and development of clean coal

[74] *Id.* at 270 (2005)
[75] Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1550 (entered into force Jan. 1, 1989) (as amended).
[76] CAA §§601-607, 42 U.S.C. §§7671-7671f.
[77] Reitze, *Supra* note 63, at 267.
[78] *Id.*, at 257.
[79] *Id*. CAA §304, 42 U.S.C. §7604; Fed. Reg. at 32263.
[80] *Id*.
[81] *Id.* CAA §502(a), 42 U.S.C. §7661a(a); 57 Fed. Reg. at 32250.
[82] *Id*.

technologies which seem potential for producing "cleaner" coal than before, rather than "pure clean" coal, that free from emissions.

The major challenge faced by the process of development of CCT is financial viability and practicality of making clean coal which forms itself of carbon, a major source of emission. The provisions are not adequate to address violations of the CAA due to the controversial nature of some provisions and differing interpretations by different layer of authorities. Nevertheless, the framework provided by the CAA does advance the goal of preventing degradation of health and the environment. The current level of economic and industrial activities continues to further deteriorate ozone layer. The current state of technologies is inadequate to meet the environmental requirements of sustainable development.

The CAA 1990 Amendments provide for the goal of standards for decades ahead and for regulatory administrative and institutional structures and mandates of different authorities in achieving the set standards for clean air in general and controls of emissions from coal businesses.

4. **Regulatory Structure**

The U.S. Congress has adopted many regulatory protections to limit the environmental damages and public health consequences of the exploration, extraction, production, and use of energy, including coal. State or federal permitting or review systems, with public participation, implement most environmental standards. Facilities may need several different permits or reviews from different agencies, and they may also need to meet local licensing or zoning laws. Businesses have interest in moving expeditiously to respond to consumers' needs. The public also has an interest in participating in the system to ensure that appropriate health and environmental precautions will be taken.[83]

4.1 **Role of EPA in Federal enforcement**

The 1990 Amendments substantially revised and expanded EPA's enforcement authority. Specifically, the Amendments provide clear authority for the Agency to assess civil and administrative penalties for both past and current violations[84] of Title I (SIPs, NSPS, NESHAPs, PSD/NSR), Title IV (acid rain program), Title V (operating permits), and Title VI (stratospheric ozone protection).[85]

If the Administrator finds widespread violations of either an applicable SIP or an approved permit program under Subchapter V, notice to the state must be given. Thirty days after the notice of SIP violations or 90 days after notice of permit program violations, EPA may take over the state program.[86] Until the state satisfies EPA that it will enforce the SIP or permit program, the Administrator will enforce the requirements of the CAA. [87]

[83] NEPDG Report, *Supra* note 1, at 3-12.
[84] CAA §502(a), 42 U.S.C. §7661a(a); 57 Fed. Reg. at 32250.
[85] CAA §113(a)(3), (b), (d); 42 U.S.C. §7413(a)(3), (b), (d).
[86] Reitze, *Supra* note 63, at 270. CAA §113(a)(2), 42 U.S.C. §7413(a)(2).
[87] *Id.*

The National Energy Policy Development Group's report [88] describes that regulatory requirements are not static. It highlights the need for certainty over national energy policy and standards as follows:

"New scientific information and new control technologies result in new regulations and modifications to existing regulations over time. However, some level of certainty in the regulatory environment is important for all parties. Businesses can plan more effectively in such an environment, and regulators can focus on ensuring that the desired outcomes are in fact achieved consistently. For example, studies have shown that if electricity generators knew today what their emission requirements for several emissions would be for a defined time period, they would most likely control emissions more cost effectively and sooner than if their emission requirements were decided upon one gas at time. Market-based incentives offer advantages over traditional forms of regulation because they set high performance standards and then allow market-forces to determine the most effective way to meet them. While not appropriate for every situation, market-based incentives can control pollution at a lower cost to society than traditional regulation, stimulate technological improvements, and be structured to achieve larger reductions in pollution than would result from traditional regulations."[89]

The Acid Rain Program is a market-based program, which has reduced SO_2 air emissions from utilities at a fraction of the initial cost estimates. Other emerging market-based environmental protection mechanisms include effluent trading, wetland mitigation banks, tradable development rights, easement purchases, off-site mitigation, and leasing or purchasing of water rights. These programs can reduce mitigation or pollution control costs, increase business flexibility, and provide transparency and environmental protection for the public.[90]

The environmental review process can also be made more open, understandable, predictable, and coordinated among federal agencies and with state and local agencies. It can be improved by providing greater information to clarify expectations for energy developers, facilitating concurrent reviews by federal agencies by standardizing certain information needs, sharing information received by project applicants, and seeking opportunities to integrate required environmental processes and reviews.[91]

4.1.1 **Goals of Enforcement**

Enforcement has two aspects: civil enforcement of the CAA and criminal enforcement of air pollution control laws.[92] The purposes of litigation and liability of damages cab be drawn from the goals of enforcement.

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[88] The Group was headed by the then U.S. Vice President Dick Cheney and the Group presented its report in May 2001, The recommendations of the NEPDG report form the basis for the passage of the Energy Policy Act of 2005.

[89] NEPDG Report, *Supra* note 1, at 3-12.

[90] *Id.*, at 3-12.

[91] *Id.*, at 3-13.

[92] Reitze, *Supra* note 63, at Chapter 7 and 8.

The first goal of enforcement strategy is to use available resources wisely in order to maximize compliance with environmental laws. Second, it is to develop an enforcement strategy to achieve full compliance with environmental laws. The third goal is to punish violators. This may be accomplished by sanctions imposed by the enforcement agency, or it may involve the use of more serious sanctions imposed by the judicial system. The fourth goal of environmental law enforcement is to achieve equitable treatment for all sources of pollution to prevent violators from gaining an economic advantage due to their noncompliance. The fifth goal is to use the enforcement process to achieve compliance as quickly as possible in order to protect public health or the environment.[93]

There are 13, 66,634 facilities in the United States. Stationary sources of air pollutants number about 39,961, which is about 3 percent of the core sources. An environmental enforcement program is related to and dependent upon how well drafted is the statute used to control pollution. For example, the pre-1990 CAA was difficult to enforce because a polluter's obligations were based on a state implementation plan (SIP) that may have been modified many times. The 1990 CAA Amendments make enforcement easier because requirements for self-monitoring, reporting and compliance certification by sources shift some of the enforcement-related obligations to the regulated sources.[94]

4.1.2 **Enforcement Organizations and Policies**

A statute may be enforceable by federal, state, and local pollution control authorities. The Department of Justice (DOJ) and/or a state's Attorney General office also may be involved in an enforcement action. EPA administers 12 major environmental protection laws, both directly and via oversight of state, local and Indian tribe programs. In addition to the headquarters located in the Washington, D.C., EPA has 10 regional offices.[95]

4.1.3 **Inspection and Evidence Gathering**

Under §114 of CAA, EPA is authorized to seek any information it may reasonably require for the purpose of (1) developing emission standards, (2) determining whether any person is in violation of a SIP requirement or a standard under the CAA, or (3)carrying out any provision of the CAA except Title II regarding mobile sources.[96] For mobile sources, CAA sets out a separate information collection and enforcement regime.[97]

Under §114, EPA may require a source to sample emissions and report the results, submit compliance certifications, install and use monitoring equipment, and provide any other information that the agency deems reasonably necessary. EPA's new "credible

[93] Reitze, *Supra* note 63, at 255-256.
[94] *Id.*
[95] *Id. at* 257.
[96] Belden, *Supra* note 56, at 130. §114(a); 42 U.S.C. §7414(a).
[97] *Id.* §§206(c), 208; 42 U.S.C. §§7525(c),7542.

evidence" rule dramatically increases the potential use of such monitoring data and records in enforcement actions.[98] The credible evidence rule will particularly affect compliance with NSPS, NESHAPs, SIP rules, PSD/NSR permits, and Title V operating permits.[99]

EPA is authorized to issue an administrative compliance order if a person has violated or is in violation of any requirement or prohibition of Title I, §303 emergency orders, Title IV, Title V, and Title VI contained in any "rule, plan, order, waiver, or permit" or for any non-payment of a required fee.[100]

5. **Litigation and Remedies**

5.1 **Citizen Suits**

All major environmental statutes contain citizen suit provisions, and the CAA is no exception. §304 authorizes citizens to file a civil complaint in a federal district court against persons alleged to have violated (if there is evidence that the alleged violations have been repeated) or persons currently violating a federally enforceable emission standard or limitation or order.[101]

5.2 **Judicial Review**

The EPA administers the CAA, which provides a nationwide framework for reducing airborne pollution.[102] EPA has broad authority under the CAA to pursue alleged violators of the act. Under the CAA, EPA has sweeping investigative powers and is authorized to seek both injunctive relief and civil penalties. Moreover, the federal government is empowered to seek criminal penalties and jail time for knowing violations of the CAA. The 1990 Amendments expanded the scope of criminal liability to almost all key substantive requirements of the CAA. In addition, under the act, citizens are granted authority to act as private attorneys general and may file citizen suits seeking to enforce CAA provisions when EPA or a state is not diligently prosecuting a civil action in a court.[103]

EPA Clean Air Act enforcement actions in 1997 resulted in the assessment of more than $54 million in criminal penalties, along with approximately $13.7 million in civil judicial penalties and another $3 million in administrative penalties. [104] EPA has, in the past, reached several multi-million dollar enforcement settlements with companies accused of alleged PSD/NSR permitting violations at several facilities. One settlement that was reached involves the installation of pollution controls costing over $1 billion, a civil

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[98] *Id.*, at 132. 62 Fed. Reg. 8,314 (Feb. 13, 1997).
[99] *Id.*
[100] CAA §113(a); 42 U.S.C. §7413(a).
[101] Belden, *Supra* note 56, at 139. *See, Id.* FN .43 also.
[102] 42 U.S.C. §§7401-671q (2004).
[103] Belden, *Supra* note 56, at 129.
[104] *Id., at* 129. *See,* footnote 3. United States EPA, Enforcement and Compliance Assurance Accomplishments Report FY 1997, table A-2.

penalty of over $8 million, supplemental environmental projects of over $20 million, and the surrender of SO_2 allowances with a value of over §7 million. This shows that the agency pursues a significant number of alleged CAA violators and that the resulting penalties are often substantial.[105]

CAA §307 provides for judicial review of administrative compliance and penalty orders. This section also authorizes any person to request review of an EPA rule, federal permit, NAAQS, NSPS, NESHAP, or any other final agency action.[106]

5.3 **Civil and Criminal Penalties**

EPA is allowed to bring a suit in a U.S. district court seeking injunctive relief and/or civil penalties against any person who owns or operates a stationary source. Before it can file suit in federal court, the EPA must explain the issues arising in the case to the Department of Justice and the local U.S. attorney and must convince them to pursue the case.[107] §113© sets criminal penalties for a variety of CAA violations for a person who: (1) knowingly makes a false material statement, representation, or certification, or falsifies any monitoring device or test method; (2) knowingly fails to pay a fee; or (3) negligently or knowingly releases a HAP listed under § 112 or an extremely hazardous pollutant under Superfund that places another person in imminent danger of death or serious bodily injury.[108]

5.4 **Remedies**

Injunctions are available in citizen suits at the discretion of the court. An injunction will not be issued if there is no threat that the violation will be repeated. A plaintiff seeking an injunction must show irreparable harm that can be prevented by an injunction.[109]

5.4.1 **Attorney's Fees**

The general rule in the United States is that each party to a lawsuit is responsible for its own costs, which include attorney fees. CAA §304(d) provides the court with the authority to award "costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate." Similar language also exists in CAA §307 providing for judicial review of the actions of the Administrator and is found in other statutes authorizing citizen suits.[110] In addition, the Equal Access to Justice Act (EAJA)[111] authorizes awards of attorney's fees when an eligible party prevails in a suit against the federal government. Implementation of EAJA

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[105] *Id., at* 130.
[106] *Id*.
[107] R. Shep Melnik, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT, 201 (1983).
[108] Belden, *Supra* note 56, at 137.
[109] *Natural Resources Defense Council v. Texaco Ref. & Mktg*., 906 F.2d 934 (3d Cir. 1990).
[110] Reitze, Supra note 108, at 611 (2001).
[111] 28 U.S.C. § 1214(d).

in proceedings involving EPA is found in regulations at 40 C.F.R. part 17.[112] Attorney's fees are available only to parties bringing a citizen suit; interveners are usually not allowed attorney fees. There are no attorney's fees for enforcing a consent decree entered under CAA §113 by the government.[113] Obtaining attorney's fees is not easy. Fees are reduced if the attorney did not prevail on all claims, if the court considers the attorney's records inadequate, or if the court believes excessive time was spent on the work. Even if payment is received, it can come years after the work was performed. It is not unusual to have a second, time consuming legal battle over the issue of attorney's fees. No attorney's fees will be paid unless both cases are won.[114]

6. **Future Challenges**

As stated above, the enforcement of the CAA provision for New Source Review (NSR) generated controversies regarding definition of "modification" under the Act. In *Environmental Defenses v. Duke Energy Corporation,*[115] the U.S. Supreme Court resolved the dispute concerning the proper definition of "modification" and provided the guidance on the following aspects:

6.1 Jurisdictional Limitations

The CAA limits the authority of regional circuit courts to review administrative regulations promulgated under traditional notice and comments procedures. National regulations promulgated under the CAA must be challenged in the Court of Appeals for the D.C. Circuit within sixty days from the time new national regulations appear in the federal registrar.[116]

6.2 **Shifting from Rules to Goals**

The *Duke* decision shows that the Supreme Court is more inclined to construe environmental statutes in line with the goals of the legislation rather than following the dictates of narrow rules of statutory construction. The issue in the case was the interpretation of the term "modification" in the Prevention of Significant Deterioration (PSD) section of the CAA and its regulations governing New Source Performance Standards (NSPS). The Supreme Court ruled that the EPA was not required to interpret the term "modification" similarly under the PSD and NSPS statutes. The court noted that a given term in the same statute may take on different meanings under different programs. The court noted that the PSD regulations do not define major modification in terms of an increase in the hourly emission rate and that when the regulations mention a rate, it is

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[112] 48 Fed. Reg. 39934 (Sept. 2, 1983).
[113] *United States v. National Steel Corp.*,782 F.2d 62 (6th Cir. 1986).
[114] Reitze, *Supra* note 108, at 612 (2001).
[115] 127 S. Ct.1423 (2007)
[116] 42 U.S.C. §7607(b)(1)

Any petition for review under this subsection shall be filed within sixty days from the date of notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. *I*d.

annual, not hourly. Generally, administrative distinctions and interpretive regulations seek to achieve the overarching goals of their authorizing statute.[117] In the 1970s, Congress added two air pollution control schemes to the Clean Air Act: NSPS, and PSD, each of them covering modified, as well as new, stationary sources of air pollution. The NSPS provisions define the term "modification," while the PSD provisions use that word "as defined in" NSPS. The United States sued in 2000 that Duke violated the PSD provisions by doing the work without permit.

Nevertheless, enforcement actions are filed in federal district courts. District courts lack the authority to strike down national regulations under the CAA, but they may decide which regulation applies and they can determine the scope of validly promulgated regulations.[118] In *Duke*, the district court did not address the validity of the regulation, but tried a factual issue of whether the modifications fell within the routine repair and maintenance exception provided in the CAA regulations. On appeal, geographic circuit courts still lack the jurisdiction to strike down national administrative regulations under the CAA. [119]

A citizen suit may be brought against a federal agency for a reason other than its polluting activities. For example, a coalition of environmental groups filed suit against EPA, alleging the Agency violated the Federal Advisory Committee Act (FACA) when it met with groups representing the cement industry.[120]

6.3 Separating Old and New Sources of Air Pollutants

Much of the litigation under the CAA concerns whether or not a source of pollution has been "modified."[121] The CAA defines modification as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted."[122]

6.4 **Relevant Precedent: Rowan and Robinson**

6.4.1 ***Rowan Companies Inc. v. United States***[123]

[117] David Schoenbrod, *Goals Statutes or Rules Statutes: The Case of the Clean Air Act, 30 U.C.L.A. L. REV. 740 (1983) (arguing that the EPA fails to enact enough substantive rules under the CAA while articulating lofty goals).*
[118] *Id.*
[119] Edwards, *Supra* note 43, at 200.
[120] *Huron Envtl. Activist League v. EPA*, 917 F. Supp. 34 (D. D.C. 1966) quoted in Reitze, p. 609 (2001)
[121] Representative cases include *Wis. Elec. Power Co. v. Reilly*,893 F.2d 901 (7th Cir. 1990) (holding that replacement of steam drums and air heaters at an electric power plant constituted a "modification" which would subject the plant to new source performance standards) and *United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829 (S.D. Ohio 2003) (holding that construction at a power plant constituted "physical changes," within the definition of "modification" under the Clean Air Act).
[122] 42 U.S.C. §7411(a)(4).
[123] 452 U.S. 247(1981).

This case is somewhat similar to *Duke*. *Rowan* also involves two different regulatory interpretations of a single statutory term. In *Rowan*, the Internal Revenue Service ("IRS") interpreted the term "wages" differently in two tax provisions.[124] The Supreme Court disallowed the divergent interpretations because they were inconsistent, unexplained, unreasonable, and contradicted by the legislative history of the implementing statute.[125]

The Supreme Court found that the IRS lacked the ability to interpret the term "wages" differently. Although *Rowan* predated the *Chevron* decision, the Supreme Court engaged in a similar inquiry into the reasonableness of the agency's interpretation of its governing statute. [126] This case also validates the general maxim of statutory construction that "the same words, when repeated, carry the same meaning."[127]

6.4.2 ***Robinson v. Shell Oil Co.***[128]

This case was another unanimous decision. Justice Thomas wrote the brief opinion, applying the *Chevron* framework to evaluate differing regulatory constructions of a term defined by the statute and used in different context. [129] Under a reasonable inquiry, the Supreme Court decided that the term "employee" may or may not include former employees depending on the context in which the term was used within the statute.[130]

6.5 **Regulatory uncertainty**

Uncertainty about future environmental controls is of particular concern for companies that operate existing coal power plants. Regulations under development include a variety of measures requiring reductions in emissions of nitrogen oxide, sulfur dioxide, and mercury. In addition, rules related to discharges to streams and cooling-water intake structures, possible regulation of large-volume wastes as hazardous wastes, uncertainty over rules requiring air permits for certain modifications to power plants, i.e. *Duke*, and uncertainty over global and domestic efforts to reduce carbon dioxide emissions also play a role. This regulatory uncertainty discourages power producers from building coal power plants and is one reason the United States is relying so heavily on natural gas power generation to meet growing electricity demand. [131]

Much of the current uncertainty has resulted because regulators do not weigh the cumulative impacts of their proposals. Compliance decisions by businesses concerning each new regulation must often be made without the benefit of clear information regarding additional requirements that may be imposed. More effective and economical compliance

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[124] *Rowan v. United States*, at 250.
[125] *Id.*, at 263.
[126] *Id.*, at 252 (stating that Treasury Regulations are valid if they "implement the congressional mandate in some reasonable manner").
[127] *Envtl. Def. v. Duke Energy Corp.*,127 S. Ct. 1423, 1438(2007) (Thomas, J., dissenting).
[128] 519 U.S. 337 (1997).
[129] *Robinson v. Shell Oil Co.*, at 340 and 345.
[130] *Id.*,, at 346.
[131] NEPDG Report, *Supra* note 1, at 5-14.

strategies are possible if companies know the full range of requirements with which they must comply. [132]

Placed alongside *Massachusetts v. Environmental Protection Agency*,[133] the *Duke* decision shows that the Supreme Court will likely consider environmental policy in future cases. Although drafting regulatory policy remains firmly within the domain of the other branches, the court may consider environmental concerns in deciding close cases. Decreasing skepticism about global warming may improve the EPA's prospects for defending its air quality regulations in court and may also drive Congress to enact tougher legislation. However, the Supreme Court also handed environmentalists a loss in the same term. [134] It remains to be seen how much environmental consequences may influence the Supreme Court in future decisions.

6.6 **Mercury Emissions**

Future coal electricity generation will need to meet new challenges to reduce emissions even further, especially mercury emissions. The DOE is supporting efforts to develop more cost effective control technology. Indeed, the goal of these research, development, and demonstration programs is to develop and demonstrate coal power systems with near zero environmental emissions, while maintaining low production costs. The NEPD Group recommended that the DOE continue to develop advanced clean coal technology by investing $2 billion over 10 years to fund research in clean coal technologies, supporting a permanent extension of the existing R & D tax credit, and encouraging agencies to explore regulatory approaches for advancements in environmental technology.[135]

6.7 Pending Bill on Acid Rain and Mercury Control

As of July 2009, only one bill had been introduced in Congress to expand the existing acid rain cap-and-trade program for power plants. Congressman John McHugh had proposed the Acid Rain and Mercury Control Act (H.R. 1841), which would require new coal-fired power plants to meet mercury emission limits at the time they commence operation, with existing units subject to the same limits by January 1, 2013. The bill also called for significant reductions in emissions of SO_2 or NOx power plants to be implemented via regulations that may include a cap-and-trade program. Finally, the bill requires all power plants to comply with applicable NSPS and with standards for modified sources established under PSD or nonattainment NSR within 30 years after they commence operation or five years after the Act's enactment, whichever is later. [136] However, the H.R. 1841 was not enacted into law.[137]

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[132] NEPDG Report, *Supra* note 1, at 5-14.
[133] 127 S. Ct. 1438 (2007).
[134] *National Association of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518(2007).
[135] NEPDG Report, *Supra* note 1, at 5-15.
[136] Wooley and Morss, *Supra* note 25, at 370.
[137] https://www.govtrack.us/congress/bills/111/hr1841/text/ih (Accessed on 7/23/2026)

7. **Conclusion**

Coal is the most significant energy source of electricity generation in the United States. At the same time, coal is major source of air emissions as well. Clean coal is not yet prevalent in the market, although some power plants have used clean coal technologies to reduce air pollution by removing pollutants such as sulfur dioxide and nitrogen oxide in some circumstances. The great challenges lying ahead include the risks posed by two byproducts of coal combustion, i.e., mercury and carbon dioxide. The purpose of the 1990 CAA to prevent air pollution and protect environment is to yet to be achieved. Moreover, the EPA has declined to use its regulatory authority under the CAA to regulate greenhouse gas emissions that are significantly contributing to the global warming. Enforcement of the Act by federal agencies and the states have provided for citizen suits and judicial review for remedying the harms caused by coal power plant operators. While technologies present an opportunity to produce clean coal, the great challenge is to make those technologies commercial viable and available to the coal industry for use.

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अदालती पत्रकारीता: अवस्था, सम्भावना र आवश्यकता

हरिप्रसाद फुयाल*

राकेश बम**

१. परिचय

यस लेखमा अदालती पत्रकारिताको वर्तमान अवस्था र सम्भावनालाई विवेचना गर्ने प्रयत्न गरिएको छ । न्यायालय र सञ्चार माध्यमको साझा महत्त्वको विषयको रूपमा रहेको अदालती पत्रकारिताको सारवस्तुलाई यस लेखमा मूख्यतः पाँच शिर्षकमा विभाजन गरी प्रस्तुत गरिएको छ । लेखको प्रथम खण्डमा, पत्रपत्रिका, रेडियो र टिलिभिजनलगायत पूरानो प्रविधिमा आधारित परम्परागत पत्रकारिता र नयाँ प्रविधिमा आधारित सामाजिक सञ्जालमूखि पत्रकारितामा अदालत सम्बन्धी समाचार सामग्रीको प्रचुरतालाई पहिल्याइएको छ । दोस्रो खण्डमा, अदालती पत्रकारितामा आधारित समाचार माध्यमहरूको सञ्चालन अवस्था, यसको दिगोपना र सम्भावनाको विश्लेषण गरिएको छ । तेस्रो खण्डमा, खुल्ला न्यायको अवधारणाका विविध पक्षलाई औल्याइएको छ भने चौथो खण्डमा मिथ्या सूचनाले अदालती पत्रकारितामा पार्न सक्ने जोखिमलाई उजागर गरिएको छ । अन्तिम खण्डमा, विभिन्न देशहरूमा जारी गरिएको अदालती पत्रकारिता सम्बन्धी पेशागत मार्गदर्शनको विश्लेषण गर्दै सन्तुलित पत्रकारिताको माध्यमबाट समग्र न्याय प्रणाली र समाचार माध्यमहरूको सार्वजनिक विश्वसनीयता कायम गर्न प्रोत्साहन गरिएको छ ।

शब्द कुञ्जी

दिगोपना, मार्गदर्शन, उदियमान, समिकरण, सत्ताधारी, विधिशास्त्र

२. मिडियामा अदालती खबरको प्रचुरता

सामान्यतयः समाचार माध्यमहरू ब्रेकिङ न्यूजको खोजिमा रहने गर्दछन् । यसको मूख्य कारण ब्रेकिङ न्यूजले पाठकको ध्यान सजिलै आकर्षित गर्छ भन्ने नै हो । साथै, अत्यधिक सार्वजनिक खपतमा रहने ब्रेकिङ न्यूजको शिघ्र र विस्तृत प्रशारण गर्न सक्ने नयाँ तथा उदियमान सञ्चार माध्यमहरूले छोटो अवधि मै स्थिर लोकप्रियता र आर्थिक उपार्जन गर्न सक्ने हुँदा मिडियाको 'ब्रेकिङ न्यूज मोह'लाई स्वभाविक मान्न सकिन्छ । अर्कोतर्फ, शनशनीपूर्ण खबरले दश पृष्ठको अखबारको पहिलो पृष्ठमा स्थान पाउँदै गर्दा सार्वजनिक महत्त्वका खबरहरूले एक अनुच्छेद समेत नपाउने जोखिमलाई नजरअन्दाज गर्न सकिँदैन । यसको असर अदालती पत्रकारिताको क्षेत्रमा पनि देख्न सकिन्छ । राजनीति, राजनीतिक दल वा दलका नेता सम्बद्ध अदालती मुद्दाहरूले राष्ट्रिय दैनिकहरूको पहिलो पृष्ठ प्राप्त गर्दै गर्दा सर्वोच्च अदालतबाट प्रतिपादन भएका सार्वजनिक महत्त्वका नजिर सिद्धान्तहरूले खासै स्थान नपाएको वास्तवकिता हामी माझ प्रष्ट छ ।

राजनीतिक दल तथा दलका नेताको गतिविधिको संवैधानिक परीक्षण गर्ने क्रममा अदालतबाट भएका फैसलाका कारण सत्ता समिकरण र राजनीतिक गठजोडमा समेत प्रभाव पर्न सक्ने हुँदा उक्त विषयका अदालती समाचारहरूको उच्च सार्वजनिक उपभोग भइरहेको पाइन्छ ।[1] पछिल्लो समयमा राजनीतिक दलको विभाजन, सत्ताधारी राजनीतिक दलको सरकारको वैधता, सरकारका विवादास्पद निर्णय, सांसदको योग्यता तथा राजनीतिक दलसँग सम्बन्धित व्यक्तिहरू उपरका भ्रष्टाचार लगायत

* न्यायाधीश, सर्वोच्च अदालत ।

** उहाँ नेपाल ल क्याम्पसमा एल.एल.एम. मा अध्ययनरत हुनुहुन्छ र मा.न्या. फुयालको चेम्वरमा इन्टर्न गरिरहनु भएको छ ।

[1] नेपाली पत्रपत्रिकाहरुमा प्रकाशन हुने कुल समाचारको करिब बीस प्रतिशत अदालती विषयवस्तुमा आधारित हुने अनुमान गरिएको देखिन्छ ।

अन्य फौजदारी मुद्दाका विषयवस्तु सर्वाधिक चासोका विषयका रूपमा रहेका थिए । उदाहरणको लागि, संसद विघटन, ललिता निवास, नक्कली भुटानी शरणार्थी, कोशी र गण्डकी सरकारको वैधता लगायतका विषयलाई समाचार माध्यमहरूद्वारा व्यापक रूपमा प्रकाशन-प्रशारण गरिएको देखिन्छ । यसबाहेक सार्वजनिक क्षेत्रमा ख्याति कमाएका सेलिब्रिटिहरू सम्बद्ध अदालती मुद्दाहरूले पनि निकै ठुलो कवरेज पाएको देखिन्छ ।

पछिल्लो केहि वर्षमा अखबारहरूले सम्प्रेषण गरेका समाचार सामग्रीहरूको विषयगत विश्लेषण गर्ने हो भने अधिकांश सामग्रीहरू केहि राजनीतिक तथा हाइ-प्रोफाइल मुद्दासँगमात्र सम्बन्धित रहेको देखिन्छ । समग्र अदालती कवरेज भने न्यूनतर नै रहेको छ । समाचार माध्यमहरूको "मुद्दा" भन्दा पनि "प्रकरण" सम्बन्धी समाचार सम्प्रेषण गर्ने प्रवृत्तिका कारण अदालतद्वारा कुनै महत्वपूर्ण विषयका विधिशास्त्र तथा मानव अधिकार सम्बन्धमा गरिएका फैसला र अन्य कानूनी विषयमा प्रतिपादन भएका सार्वजनिक महत्त्वका तथा ऐतिहासिक प्रकृतिका नजिर सिद्धान्तलाई पत्रपत्रिकामा उल्लेख्य स्थान दिइएको देखिँदैन । निम्नानुसार प्रस्तुत गरिएको तालिका १ र २ बाट प्राप्त तथ्यांकले समेत यसको पुष्टि गर्छ ।[2]

तालिका १: राष्ट्रिय समाचार दैनिकहरूमा प्रकाशन भएका समाचार सामग्रीहरूको संख्या ।

समाचार दैनिक	**सामग्री संख्या**
कान्तिपुर	६५
काठमाण्डु पोस्ट	७५
नयाँ पत्रिका	७८ (१६ अंक फेला नपरेको)
हिमालयन टाइम्स	९६ (१ अंक फेला नपरेको)
अन्नपूर्ण पोस्ट	८२
नागरिक दैनिक	८५

साल २०८१ वैशाख १ गते देखि असार १२ सम्म (जम्मा ७५ दिन) प्रकाशन भएका तालिका १ मा उल्लिखित समाचारपत्रहरूको इन्टरनेट अभिलेखअनुसार, हिमालयन टाइम्समा सबैभन्दा धेरै ९६ र कान्तिपुर दैनिकमा सबैभन्दा कम ६५ वटा अदालती विषयवस्तु सम्बन्धी समाचार सामग्री प्रकाशन भएको देखिन्छ । नयाँ पत्रिका र काठमाण्डु पोस्टमा प्रकाशन भएका अदालती समाचार सामग्रीको संख्या क्रमशः ७८ र ७५ रहेको देखिन्छ । सो अवधिमा अन्नपूर्ण पोस्टमा ८२ र नागरिक दैनिकमा ८५ वटा अदालती विषयवस्तु सम्बन्धी समाचार सामग्रीहरू प्रकाशन भएको देखिन्छ ।

नेपालमा प्रकाशन हुने दैनिक समाचारपत्रहरूमा अदालत सम्बन्धी समाचार सामग्रीले उल्लेख्य स्थान पाउने गरेको देखिएतापनि उक्त समाचार सामग्रीहरू विशेषतः राजनीतिक तथा हाइ-प्रोफाइल प्रकरण एवम् भ्रष्टाचारका मुद्दामा केन्द्रित रहेको यस अध्ययनले देखाएको छ, जसलाई निम्नानुसार तालिकीकरण गरिएको छ ।

[2] यस लेख तयार पार्ने क्रममा केहि राष्ट्रिय समाचार दैनिकहरुको २०८१ सालदेखिको दैनिक समाचार पत्रको इन्टरनेट अभिलेख अध्ययन गरिएको थियो । समाचार दैनिकहरुको अध्ययन गर्ने क्रममा नेपाली भाषामा प्रकाशन हुने कान्तिपुर दैनिक, नयाँ पत्रिका, हिमालयन टाइम्स, अन्नपूर्ण पोष्ट, नागरिक दैनिक र अंग्रेजी भाषामा प्रकाशन हुने द काठमाण्डु पोष्टका इन्टरनेट अभिलेखका रूपमा रहेका समाचारपत्रहरुमा साल २०८१ वैशाख १ गते देखि असार १२ सम्म (जम्मा ७५ दिन) प्रकाशित समाचार सामग्रीहरुको अध्ययन गरिएको थियो । उक्त समयावधि भित्र प्रकाशन भएको नयाँ पत्रिका दैनिकको १६ दिन र अन्नपूर्ण पोष्ट र हिमालयन टाइम्सको समान १ दिनको समाचारपत्रको इन्टरनेट अभिलेख भने फेला नपरेको हुनाले उक्त समाचारपत्रको तथ्यांक अपूर्ण रहेको छ ।

तालिका २: राष्ट्रिय समाचार दैनिकहरूमा प्रकाशित अदालती समाचारका विषयवस्तुहरू

समाचार दैनिक	समाचार विषयवस्तु									
	प्रदेश सरकार वैधता	विदेशी तथा अन्त-र्राष्ट्रिय मुद्दाहरू	भ्रष्टाचार सम्बन्धी मुद्दाहरू	हाइ-प्रोफाइल व्यक्ति सम्बद्ध प्रकरण (सिरोहिया, सन्दीप, आलम, बमजन)	'फेक न्युज' प्रकरण	मन्त्री तथा राजनीतिक दल, तथा दलका नेता सम्बद्ध मुद्दाहरू	गिरीबन्धु टि-स्टेट प्रकरण	सहकारी प्रकरण (जिबि राइ, रवि लामिछाने, दिनेश पुन)	नजिर तथा व्याख्या	अन्य
कान्तिपुर	७	१	१४	८	७	३०	४	१३	०	१२
काठमाण्डु पोस्ट	५	१६	९	१३	३	२०	१	८	०	१३
नयाँ पत्रिका	८	२	२६	६	१	१५	१	४	०	२१
हिमालयन टाइम्स	१३	०	३४	१०	१	२६	३	५	८	२२
अन्नपूर्ण पोस्ट	९	३	१६	६	१८	१४	१	४	१	१४
नागरिक दैनिक	७	३	१९	६	६	२१	२	७	८	१६

उपर्युक्त तालिकाबाट २०८१ सालदेखि असार १२ सम्म कान्तिपुर दैनिकमा प्रकाशन भएका कुल ६५ अदालती समाचार सामग्रीहरू मध्ये राजनीतिक दल, हाइ-प्रोफाइल प्रकरण वा भ्रष्टाचारका मुद्दासँग प्रत्यक्षरूपमा सम्बन्धित नरहेका सामग्रीको संख्या केवल १२ रहेको देखिन्छ। साथै, सर्वाधिक ३० वटा समाचार सामग्रीहरूको विषयवस्तुमा कुनै मन्त्री, राजनीतिक दल, वा दलका नेता सम्बद्ध मुद्दाहरू रहेको देखिन्छ। द काठमाण्डु पोस्टले प्रकाशन गरेका कुल ७५ समाचार सामग्रीहरू मध्ये १३ वटा समाचार सामग्री मात्र राजनीतिक दल, हाइ-प्रोफाइल प्रकरण वा भ्रष्टाचारका मुद्दासँग प्रत्यक्ष रूपमा जोडिएको देखिँदैन। यो संख्या नयाँ पत्रिकामा २१ (कुल ७८ मध्ये) रहेको छ भने हिमालयन टाइम्समा २२ (कुल ९६) रहेको देखिन्छ। त्यस्तै, सो अवधिमा अन्नपूर्ण पोस्टमा र नागरिक दैनिकमा प्रकाशन भएका अदालती समाचार-सामग्री मध्ये क्रमशः १४ (कुल ८२) र १६ (कुल ८६) मात्र राजनीतिक दल, भ्रष्टाचार वा हाइ-प्रोफाइल प्रकरणसँग असम्बन्धित रहेको देखिन्छ। अध्ययन गरिएका समाचार दैनिकहरूमध्ये, हिमालयन टाइम्स, अन्नपूर्ण पोस्ट र नागरिक दैनिकले मात्र सर्वोच्च अदालतबाट प्रतिपादित सैद्धान्तिक व्याख्या वा नजिरलाई विषयवस्तु बनाई सामग्री प्रकाशन गरको देखिन्छ। यद्यपि यसरी प्रकाशित समाचारको संख्या निकै कम रहेको छ। उक्त संख्या हिमालयन टाइम्स र नागरिक दैनिकमा समान ८ रहँदा अन्नपूर्ण पोस्टमा उक्त संख्या केवल १ रहेको देखिन्छ।

परम्परागत समाचार माध्यमहरूको तुलनामा अनलाइन वेब पोर्टलका रूपमा रहेका समाचार माध्यमहरूमा प्रकाशन हुने अदालती समाचार सामग्रीको संख्या धेरै रहेको पाइन्छ। विशेषतः कानून बिट भएका अनलाइन खबर, सेतोपाटी र रातोपाटीजस्ता समाचार पोर्टलहरूमा प्रकाशित समाचार सामग्रीहरूमा सर्वोच्च अदालतबाट प्रतिपादित नजिर तथा व्याख्यालाई दिइएको स्थान उत्साहजनक देखिन्छ। तर, राजनीतिक तथा हाइ-प्रोफाइल प्रकरण र भ्रष्टाचार मुद्दालाई प्रश्रय दिने प्रवृत्ति इन्टरनेटमा आधारित समाचार माध्यमहरूमा पनि समान नै रहेको छ। शनशनीपूर्ण खबरलाई प्रश्रय दिने उक्त प्रवृत्तिले एकातर्फ हाई प्रोफाइल व्यक्तिसँग सम्बन्धित मुद्दाहरूले अनावश्यक मिडिया मूल्य पाई मिडिया ट्रायलको स्थिति सिर्जना भइरहेको देखिन्छ भने अर्कोतर्फ सार्वजनिक महत्त्वका अदालती निर्णय र कानून सरहका सैद्धान्तिक व्याख्याहरूको संचार नेपथ्यीकरण भइरहेको पाइन्छ।

अदालती पत्रकारिताको आवश्यकता

न्यायालयका कामकारबाहि बारे नियमित सूचना प्राप्त गर्नु जनताको अधिकार हो । यस अधिकारको प्रचलनमा समाचार माध्यमको मूख्य भूमिका रहन्छ । अदालती कामकारबाहीबारे साक्षर जनता विश्वसनीय न्याय प्रणालीको मेरुदण्डको रूपमा रहेका हुन्छन् । प्रहरी र निजामति प्रशासन कार्यापालिकाले र बजेट अधिकार व्यवस्थापिकाले प्रयोग गर्दै गर्दा न्यायालयको शक्ति स्रोत भने पूर्णतः जनसमर्थन र जनविश्वासमा निर्भर रहेको हुन्छ । जनमानसमा अदालतका गतिविधि र कामकारवाहिको फेहरिस्त नपुग्ने वा अदालतको नकारात्मक छवि निर्माण हुने अवस्था भएमा अदालती कामकारवाहीको प्रभावकारितामा समेत ह्रास आउन सक्दछ ।

बेलायती दार्शनिक जेरेमी बेन्थमले अदालती कामकारवाहीको प्रचारप्रसारको महत्त्व उद्धटित गर्नेक्रममा भनेका छन्;

"Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial."[3]

अर्थात् अदालती कामकारबाहीको प्रचारप्रसार नहुने हो भने पूर्ण न्याय सुनिश्चित हुन सक्दैन । अदालती कारवाही तथा न्याय प्रक्रियाबारे प्रचार प्रसार नभएको अवस्थामा समग्र न्याय प्रणालीमा सार्वजनिक विश्वास कायम गर्न मुश्किल पर्दछ । अदालत न्याय निरूपण गर्न सक्षम निकाय हो भन्नेमा जनताको विश्वास हराएर जान्छ ।[4] अन्ततः समग्र न्याय प्रणाली असफल बन्न पुग्दछ ।

पत्रकार तथा सञ्चार माध्यमको उत्तरदायी पत्रकारिताबाट न्यायिक प्रक्रियामा जनताको विश्वास अभिवृद्धि गर्न सकिन्छ । साथै, पर्याप्त मिडिया कवरेज हुने हो भने अदालतको आदेश तथा फैसलाको अनुपालनमा समेत सहायता पुग्दछ । विशेषतः सर्वोच्च अदालतद्वारा नेपाल सरकारका नाममा जारी गरिएका आदेशको कार्यान्वयन गराउनुमा उक्त निर्णयबारे जनतालाई जानकारी छ छैन भन्ने कुराको विशेष महत्त्व रहन्छ । कतिपय अवस्थामा जनतालाई अदालतले कुनै अमुक निर्णय गरेको छ र आफू त्यसबाट लाभ प्राप्त गर्न सक्दछु भन्ने जानकारी नै नभएको अवस्था पनि हुन सक्दछ । त्यस्तो अवस्थामा सरकारी अंगहरूले अदालतको फैसलाको अवज्ञा गर्ने जोखिम बढेर जान्छ । तसर्थ, अनभिज्ञताको निवारण गरी सरकारी उत्तरदायित्व कायम गर्न सञ्चार माध्यमहरूको महत्त्वपूर्ण भूमिका रहन्छ । जसरी कुनै कानूनको सुविधा प्राप्त गर्न जनतालाई त्यस्तो कानूनको ज्ञान हुन आवश्यक छ, त्यसरी नै अदालती निर्णयले प्रदान गरेको सुविधा प्राप्त गर्न त्यस्तो निर्णयको पर्याप्त प्रचारप्रसार हुनु अत्यावश्यक हुन्छ । उत्तरदायी अदालती पत्रकारिताको माध्यमबाट यस समस्याको सजिलै समाधान गर्न सकिन्छ ।

त्यस्तै, सार्वजनिक सरोकारका मुद्दाहरू (PIL) को विषयवस्तु सार्वजनिक नीति निर्माणसँग प्रत्यक्षरूपमा गाँसिने हुनाले यस प्रकृतिका मुद्दाको फैसला बारे जनतालाई जानकारी हुनु फैसलाको कार्यान्वयनका दृष्टिले लाभदायिक देखिन्छ । साथै, सञ्चार माध्यमबाट अदालतको नियमित कवरेज हुँदा अदालतमा हुन सक्ने भ्रष्टाचार, अनियमितताको निरन्तर निगरानी त हुन्छ नै अदालतको छवि सुदृढिकरण, राज्य शक्ति सन्तुलन, फैसलाको अनुपालन तथा जनसरोकारका विषयलाई जनतामाझ पुर्याइ जनाधिकारको संरक्षण समेत हुने देखिन्छ ।

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[3] Quoted in A.G. (Nova Scotia) v. MacIntyre, [1982] 1 S.C.R. 175, at p. 183, per Dickson J.

[4] Right Honourable Beverly McLachlin, P.C. Chief Justice of Canada, The Relationship Between the Courts and the Media (2014).

अदालती समाचारको न्यून प्रकाशन र प्रशारण हुनुका कारण

संयुक्त राज्य अमेरिकामा गरिएको एक अध्ययनका अनुसार मुद्दा लगायतका अदालती कामकारवाहिले पर्याप्त मिडिया कवरेज नपाउनुमा तीन मूख्य कारण रहन्छन् । [5] प्रथम, अदालतमा 'सुत्र' वा 'भित्री स्रोत'को अवस्थिति नहुने हुँदा ब्रेकिङ न्यूजको संख्या आफैमा न्यून रहन्छ । [6] दोस्रो, कानूनी विशेषज्ञताको कमीले पत्रकार स्वयंले फैसलाको सारतत्त्व बुझ्न कठिनाई हुँदा अदालती समाचारहरूको न्यून प्रकाशन प्रशारण हुने गर्दछ । भाषिक जटिलताका कारण फैसलाको अपव्याख्या भई अदालती अवहेलनाको मुद्दा सामना गर्नुपर्ने अवस्था आउन सक्ने हुँदा अदालती रिपोर्टिङ गर्न पत्रकार निरुत्साहित हुने गर्दछन् । [7] तेस्रो, पाठकको ध्यान आकर्षित गर्न सक्ने वा बजारमा खपत हुने समाचार मात्र प्रकाशन-प्रशारण गर्ने मिडिया प्रवृत्तिका कारणले मूलधारका पत्रपत्रिका एवम् समाचार माध्यमले अदालती पत्रकारितामा शून्यप्राय समयस्रोत खर्चिने गर्दछन् । [8] जसकारण अदालती पत्रकारिताका क्षेत्रमा निपूण तथा दक्ष पत्रकारको कमी हुन जान्छ र फलतः अदालती समाचारको संख्या समेत घटेर जान्छ ।

यसबाहेक अदालतको कार्यपद्दति पनि न्यून प्रकाशन तथा प्रशारणको कारक तत्त्वको रूपमा रहेको देखिन्छ । मुद्दामामिलाको सुनुवाई बाहेक पेशी गोलाप्रकृया, मिसिल कागज, निर्णय प्रक्रिया, फैसला लेखन जस्ता अन्य अदालती कारवाहीहरू तुलनात्मक रूपमा गोप्य प्रकृतिको रहने हुँदा अदालतका अधिकांश गतिविधिहरू प्रेसको पहुँच भित्र हुँदैनन् । विश्वव्यापी रूपमा नै अनुशरण गरिएको "खुला अदालत", "खुला इजलास"को मान्यता नेपालमा लागू नभएको भने होइन । तर, हाम्रो न्यायालयहरूको खुलापनको दायरा भने बहसको विषयको रूपमा रहेको पाइन्छ । संसद विघटन लगायतका केहि सार्वजनिक प्रकृतिका मुद्दाको सुनुवाईको प्रत्यक्ष प्रसारण गरिएको भएतापनि समाचार माध्यममा वा ईन्टरनेटमा आधारित मिडियालाई सुनुवाईको प्रसारण गर्न दिइएको इतिहास भने हामीसँग रहेको देखिँदैन । अर्कोतर्फ, स्यालोफेक[9] र डिपफेक्स[10]को जमानामा अदालतको इजलास कक्षमा चल्ने सुनुवाइ प्रक्रियाको प्रत्यक्ष प्रसारण गरिनु हुन्छ हुँदैन वा त्यसरी प्रत्यक्ष प्रसारण गर्दा के-कस्ता बन्धन वञ्चनाको आवश्यकता पर्दछ भन्ने बहस कायम रहँदा अदालत क्यामेरा निषेधित क्षेत्रको रूपमा रहन गएको छ । तर, हालसालै मात्र इजलासको सुनुवाईको प्रत्यक्ष प्रसारण गर्न सर्वोच्च अदालतले विशेष अदालतलाई अनुमति प्रदान गरेको हुँदा विस्तारै यस पद्धतिले समस्त न्यायालयको प्रेस कवरेजमा टेवा पुर्याउनेमा आशावादी हुन सकिन्छ । [11]

साथै, नेपालमा अदालती कारवाहीको सुस्तताका कारणले समेत नियमित तथा अविच्छिन्न रूपमा अदालती रिपोर्टिङ गर्न बाधा अड्चन परेको देखिन्छ । अदालतबाट फैसला भएको दिन र फैसलाको पूर्णपाठ तयार हुने दिनबिच लामो अन्तराल हुने हुनाले सम्बद्ध पक्ष बाहेक अन्यलाई मुद्दाको फैसला बारे जानकारी प्राप्त गर्न असुविधा हुने गरेको देखिन्छ । त्यस्तै, सर्वोच्च

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[5] Tyler Johnson, *How and Why the Supreme Court Remains Undercovered* in COVERING THE UNITED STATES SUPREME COURT IN THE DIGITAL AGE 23-41 (Ed. By Richard Davis, Cambridge University Press, 2014).

[6] *Id.* at 28.

[7] *Id.* at 29.

[8] *Id.* at 30.

[9] स्यालोफेक भन्नाले कसैको भनाईलाई काँटछाँट गरेर भ्रम फैलाउने गरी तयार पारिएको सामग्री भन्ने बुझिन्छ ।

[10] कृत्रिम बौद्धिकताको प्रयोग गरी कुनै व्यक्तिले गर्दै नगरेको कुरालाई दुरुस्त रूपमा निजले नै व्यक्त गरेको देखिने गरी तयारी गरिएको श्रव्यदृष्य सामग्रीलाई डिपफेक्स भनिन्छ ।

[11] रातोपाटी, 'विशेष अदालतको सुनुवाइ प्रत्यक्ष प्रसारण गर्ने तयारी', https://www.ratopati.com/story/416578/bisesh-adalat- बाट साभार ।

अदालतले महत्त्वपूर्ण फैसला भनी वेबसाईटमा प्रकाशन गरेका बाहेक अन्य फैसलाको पूर्णपाठ तयार भयो भएन वा हुने मिति सम्बन्धी जानकारी सार्वजनिक रूपमा उपलब्ध नहुँदा मुद्दामामिलाको नियमित अनुरेखमा समेत समस्या सिर्जना भएको छ । तर, यो परिस्थिति निकट भविष्यमा पूर्ण रूपमा सम्बोधन हुनेमा आशावादि रहन सकिन्छ । अघिल्लो आर्थिक वर्षमा भएका मुद्दा फर्स्यौट र फैसला लेखनका तथ्यांकलाई आधार मान्दा अदालती कारवाहीमा केहि हदसम्म द्रुतता आएको मान्न सकिन्छ ।

अदालती विषयवस्तुका सम्बन्धमा पाठकको अनभिज्ञता तथा अनिच्छाले समेत सञ्चार माध्यमको विकर्षणलाई केहि हदसम्म प्रभाव पारेको देखिन्छ । कानूनी भाषामा निहित प्राविधिकता तथा जटिलताका कारण मुद्दा मामिलामा आधारित सामग्रीको सार बुझ्न परिश्रम गर्नुपर्ने हुँदा सामान्य पाठकले त्यस्ता समाचार नरुचाउने गरेको पाइन्छ । पाठक अरुचीका कारण समाचार बजारमा अदालती विषयवस्तुको न्यून माग रहने हुँदा पत्रपत्रिका एवम् समाचार माध्यमहरूले स्वभावतः न्यून महत्त्व दिएको देखिन्छ । तर, पत्रपत्रिका तथा समाचार माध्यमहरूले प्राविधिक अदालती भाषालाई सरल एवम् वोधगम्य सूचनामा अनुवाद गर्न सक्ने हो भने यस समस्याको सहजै निरूपण गर्न सकिनेमा विवाद देखिँदैन ।

३. अदालती पत्रकारिताको नयाँ आयामः व्यवसाय र व्यवसायिकता

यसअघिको खण्डमा उल्लेख भएको तथ्यांक एवम् विश्लेषणबाट राजनीतिक तथा हाइ-प्रोफाइल मुद्दामै भएपनि अदालती पत्रकारिता उदियमान अवस्थामा रहेको देखिन्छ । विभिन्न समाचार माध्यमहरूमा अदालती बिटको स्थापना भएको तथ्यबाट पनि अदालती पत्रकारिताले लामो समयदेखि 'बिट' पत्रकारिताको स्थान ग्रहण गरेकोमा सन्देह छैन । [12] उदाहरणका लागि, प्रिन्ट मिडियामा आधारित पत्रपत्रिका तथा अनलाइनमा आधारित समाचार माध्यमहरू जस्तै; अनलाइन खबर, सेतोपाटी, र रातोपाटीमा लामो समयदेखि कानून बिट रहँदै आएको देखिन्छ । त्यस्तै, लामो समयदेखि कानूनी साहित्य वा कानूनी समाचार सामग्रीलाई विषयवस्तु बनाई मासिक वा द्वैमासिक रूपमा छाँपिदै आएका "कानून", "पैरवी", "भर्डिक्ट" लगायतका पत्रिकाहरू अझै पनि प्रकाशन मै रहेको देखिन्छ । यी पत्रपत्रिकाका नियमित ग्राहकको दायरा भने कानून व्यवसायी, न्यायाधीश तथा कानूनका क्षेत्रमा आबद्ध व्यक्तिहरूमा सिमित रहेको पाइन्छ । अर्कोतर्फ, वर्तमान विश्वव्यवस्था द्रुतगति (fast-paced) मा चल्दै गर्दा कानूनका विद्यार्थी लगायत समग्र पाठक वर्गहरू आफ्नै मोबाइल वा ल्यापटपमा समाचार सामग्री सम्प्रेषण भएको देख्न चाहन्छन् । [13] तीस सेकेन्डको भिडियोमा सिमित गरिएको वा मेटाको कुनै एउटा पोस्टमा तीस शब्दमा वर्णन गरिएको समाचार सामग्री नै अहिलेको पुस्ताको मूख्य रोजाइ बनेको देखिन्छ । यसकारण अदालती समाचार सामग्रीको प्रकाशन प्रशारण इन्टरनेटमा आधारित तथा उपभोक्तामूखी हुनु आवश्यक भइसकेको छ ।

त्यस्तै, नयाँ प्रविधिको विकासले पत्रकारिताको क्षेत्रलाई थप विस्तार गरेको देखिन्छ । कम्प्युटर तथा इन्टरनेटमा पहुँच भएको कुनै व्यक्ति सामान्य पत्रकारिताका कार्य गर्न सक्षम हुने हुँदा अदालती पत्रकारितालाई परम्परागत अवधारणामा सिमित गर्न

[12] यम विरही, *अदालती पत्रकारिताः अवसर र चुनौती*, संहिता, अंक ५५, पृ. ५३

[13] Right Honourable Beverly McLachlin, P.C. Chief Justice of Canada, The Relationship Between the Courts and the Media (2014); Newspapers, radio and television, despite their importance, are now old technology. Many people today – the young and even the not-so-young – use social media as their main sources of information. Without exaggeration, we are witnessing a profound cultural shift in how people communicate and how information is packaged, disseminated and consumed.

सकिने देखिँदैन । [14] साथै, कतिपय अवस्थामा मेटा तथा एक्सका प्रयोगकर्ताहरूले आफ्ना पोस्ट तथा ट्विट मार्फत् सम्प्रेषण गरेका खबरहरू परम्परागत समाचार माध्यमको तुलनामा छिटो, सरल र विस्तृत रहने गरेको समेत पाइएको छ । जसकारण थुप्रै मेटा तथा एक्सका प्रयोगकर्ताहरूले छोटो समयमै अधिक लोकप्रियता आकृष्ट गर्न सफल भएको थुप्रै उदाहरण भेट्न सकिन्छ । नेपाली समाचार वृत्तमा रुटिन अफ नेपाल बन्दको उदय पनि केहि यसैप्रकार भएको देखिन्छ । [15]

इन्टरनेटको यसै अवसरलाई उपयोग गर्दै अदालती पत्रकारिताको क्षेत्रमा कानूनी वेबपोर्टल लगायतका समाचार माध्यमहरू उदय भइरहेको देख्न सकिन्छ । मूलधारका पत्रपत्रिका बाहेक लेक्स नेपाल, कानून खबर, कानून पत्रिका, कानून घर, नेपाली ल डटकम लगायतका कानूनी समाचार सामग्रीमा आधारित वेबपोर्टलहरू स्थापना भएका देखिन्छन् । त्यस्तै, फेसबुक, इन्स्टाग्राममा कानूनका विद्यार्थीहरूद्वारा कानून सम्बन्धी जनचेतना फैलाउने उद्देश्यले थुप्रै पेजहरू चलाइएको पाइन्छ । हाल नेपालमा टिकटकमा प्रतिबन्ध लगाइएको भएतापनि केहि समय अघि The Digital Lawyer का Reels हरूले टिकटकमा लोकप्रियता कमाएको उदाहरण उल्लेखनीय छ । त्यस्तै, नेपाली कानूनी विषयमा चर्चा परिचर्चा गर्दै पोडकास्ट तथा अन्तर्वार्ताको रूपमा समाचार सामग्री प्रस्तुत गर्ने केहि प्रयास समेत भएको देखिन्छ । मेरो अड्डाबाट युट्युबमा प्रसारण हुने "Law कुरा गरौं" र हिमाल पत्रिकाबाट प्रसारण हुने 'कानून यात्रा' लाई यसको उदाहरणको रूपमा लिन सकिन्छ । अर्कोतर्फ, युट्युबमा आधारित केहि च्यानलहरूले कानूनी तथा अदालती विषयलाई प्रश्रय दिने गरेको पाइन्छ । जसअन्तर्गत पचास हजार भन्दा बढि सब्स्क्राइबर रहेका LukekoLaw, Random Nepali, Advocate Pritam Tamang, Lex Nepal, NEPAL Law लगायतका युट्युब च्यानलहरूले कानून सम्बन्धी विषय जानकारीहरूलाई समाग्री बनाई दर्शक माझ प्रस्तुत गर्ने गरेको पाइन्छ । तर, बढ्दो बजार स्पर्धा र न्यून उपभोक्ता संख्याका कारण अदालती विषयलाई मात्र सामग्री बनाई स्थिर आय आर्जन गर्नु मुश्किल त छ नै यसले सामग्री सर्जक र समाचार माध्यमको दिगो अस्तित्वलाई समेत चुनौति दिएको देखिन्छ । स्मरणीय के पनि छ भने, इन्टरनेटले सिर्जनशील सामग्रीलाई लोकप्रियता र आर्थिक उपार्जन गर्न सहजता प्रदान गर्ने हुँदा पाठक तथा दर्शकमूखी सामग्री सम्प्रेषण गर्न सक्ने समाचार माध्यमले सहजै दिगो उपलब्धी हासिल गर्न सक्ने सम्भावना रहेको छ ।

वैकल्पिक अदालती पत्रकारिता: विश्वव्यापी प्रचलन

अदालती विषयवस्तुलाई विशेष प्रश्रय दिई समाचार सम्प्रेषण गर्नुका साथै विभिन्न विधिबाट समेत आय आर्जन गरिरहेका इन्टरनेटमा आधारित विश्वविख्यात समाचार माध्यमहरूको सञ्चालन प्रक्रियाबाट नेपाली मिडियाहरूले अनुशरण गर्नु आवश्यक छ । उक्त सञ्चार माध्यमहरूले समाचार सम्प्रेषणका अलावा इ-पुस्तकालय, शोध सफ्टवेयर र उपकरण, इ-अध्ययन, तयारी कक्षा तथा भौतिक कार्यक्रम सञ्चालन गरी मुनाफा कमाउने गरेको पाइन्छ । पाठक सुविधाका लागि, ती समाचार माध्यमहरूलाई निम्नानुसार वर्गिकरण गरी प्रस्तुत गरिएको छः-

क) कानून तथा अदालती विषयलाई मात्र विषयवस्तु बनाई सञ्चालनमा रहेका इन्टरनेटमा आधारित समाचार माध्यम,

ख) कुनै चर्चित पत्रपत्रिकाको कानूनी शाखाको रूपमा स्थापना भएका समाचार माध्यम,

ग) कानूनी शोध सुविधा प्रदान गर्ने कम्पनीको कानूनी समाचार शाखाको रूपमा स्थापना भएका समाचार माध्यम,

[14] Right Honourable Beverly McLachlin, P.C. Chief Justice of Canada, The Relationship Between the Courts and the Media (2014); The explosive growth of new media signals a shift in who reports on legal proceedings. Court decisions may no longer be the preserve of trained professional journalists. Anyone with a keyboard and access to a blog can now be a reporter.

[15] थप अध्ययनका लागि हेर्नुहोस्, https://www.ronbpost.com/

घ) कानूनी पेशागत संगठनको स्वामित्वमा स्थापना भएका समाचार माध्यम, र

ङ) क्याम्पसका विद्यार्थीहरूको सञ्जालमा आश्रित समाचार माध्यम

उपर्युक्त प्रथम वर्गका समाचार माध्यमहरूमा LiveLaw.in[16] तथा Bar & Bench[17] लगायतका समाचार माध्यमहरू पर्दछन् । इन्टरनेटमा आधारित उक्त समाचार माध्यमहरू मूख्यतः ग्राहक सदस्यता शुल्कबाट सञ्चालित भएको देखिन्छ । यस बाहेक उक्त वेब पोर्टलहरूले विज्ञापन, एफिलिएट मार्केटिङ, प्रायोजित सामग्री, परीक्षा तयारी तथा प्रमाणपत्र प्रशिक्षण कार्यक्रमबाट समेत आय आर्जन गर्दै आएको देखिन्छ । दोस्रो वर्गका समाचार माध्यमहरूमा Bloomberg Law[18] र West Law Today[19] लगायतका समाचार माध्यमहरू पर्दछन् । Bloomberg Law सुपरिचित मिडिया कम्पनी Bloomberg[20] सँग सम्बद्ध छ भने हालसालै मात्र WestLaw[21] कानूनी शोध सेवालाई Thomson Reuters[22] मिडिया कम्पनीले अधिग्रहण गरेपश्चात WestLaw Today उक्त पत्रिकाको कानूनी शाखाको रूपमा रहेको देखिन्छ । यी समाचार माध्यमहरूले समाचार सम्प्रेषण गर्ने काम गर्ने मात्र नभई सदस्यता शुल्क वापत कानूनी शोध सफ्टवेयर तथा इ-लाइब्रेरी सेवा समेत उपलब्ध गराउँदै आएको पाइन्छ । तेस्रो वर्ग अन्तर्गत Law 360[23], SCC Times[24] तथा vlex fastcase[25] लगायतका इन्टरनेट माध्यमहरू पर्दछन् । Law 360 प्रतिष्ठित कानूनी शोध तथा सफ्टवेयर वितरक कम्पनी LexisNexis[26] द्वारा सञ्चालन गरिएको समाचार माध्यम हो । त्यस्तै, SCC Times भारतीय कानूनी शोध सफ्ट्वेयर SCC Online[27] सँग आबद्ध छ जसले EBC Reader[28] सँग सहकार्य गरी कानूनी किताबको किनमेलको सेवा समेत उपलब्ध गराई आफ्नो ग्राहक दायरा समेत बढाएको देखिन्छ । साथै, vlex fastcase आफैमा शोध उपकरण तथा सफ्ट्वेयर कम्पनी भएतापनि NewsBank, JD Supra, Lex Blog, Quartz, Asia-Net Pakistan लगायतका समाचार माध्यमद्वारा संकलित अदालती समाचार सामग्रीलाई आफ्नो विषयवस्तुको रूपमा समेटेको पाइन्छ । उक्त सबै कम्पनीहरू मूख्यतः सफ्टवेयर वितरण वा सदस्यता शुल्कबाट आर्जित आयबाट सञ्चालन भइरहेको देखिन्छ । यसबाहेक, चौथो वर्ग अन्तर्गत केहि यस्ता पत्रपत्रिका पर्दछन् जुन कानूनी पेशागत संगठनद्वारा सञ्चालन गरिएका छन् । The Law Society Gazette[29] यसैको एक उदाहरण हो । वेलायतमा सोलिसिटरहरूको पेशागत संगठनका रूपमा रहेको The Law Society ले साप्ताहिक रूपमा The Gazette प्रकाशन गर्दै आएकोमा हाल अनलाइनमा नियमित रूपमा समाचार सम्प्रेषण गर्दै आइरहेको देखिन्छ । मासिक सदस्यता शूल्क बाहेक यस संस्थाले विभिन्न प्रशिक्षण तथा अध्यापन कक्षाहरू सञ्चालन गर्नुका साथै ई-पुस्तकालयको समेत सुविधा प्रदान गर्दै आइरहेको देखिन्छ । अन्तिम वर्गमा निःशुल्क रूपमा समाचार वितरण गर्दै गरेका कानूनका विद्यार्थिको सञ्जालद्वारा

[16] थप अध्ययनका लागि हेर्नुहोस्; https://www.livelaw.in/

[17] थप अध्ययनका लागि हेर्नुहोस्; https://www.barandbench.com/

[18] थप अध्ययनका लागि हेर्नुहोस; https://www.bloomberglaw.com/

[19] थप अध्ययनका लागि हेर्नुहोस; https://www.today.westlaw.com/

[20] थप अध्ययनका लागि हेर्नुहोस; https://www.bloomberg.com/

[21] थप अध्ययनका लागि हेर्नुहोस; https://www.legal.thomsonreuters.com/en/westlaw/

[22] थप अध्ययनका लागि हेर्नुहोस; https://www.thomsonreuters.com/

[23] थप अध्ययनका लागि हेर्नुहोस; https://www.law360.com/

[24] थप अध्ययनका लागि हेर्नुहोस; https://www.scconline.com/blog/

[25] थप अध्ययनका लागि हेर्नुहोस; https://www.vlex.com/

[26] थप अध्ययनका लागि हेर्नुहोस; https://www.lexisnexis.com/

[27] थप अध्ययनका लागि हेर्नुहोस; https://www.scconline.com/

[28] थप अध्ययनका लागि हेर्नुहोस; https://www.ebcreader.com/

[29] थप अध्ययनका लागि हेर्नुहोस; https://www.lawgazette.co.uk/

सञ्चालित समाचार माध्यमहरू पनि रहेका पाइन्छन् । Jurist Legal News[30] यसैको एक विशिष्ट उदाहरण हो । पिट्सबर्ग विश्वविद्यालयको प्रयासमा सुरु गरिएको यस अभियानमा करिब २५ देशका विभिन्न विश्वविद्यालयमा अध्ययनरत विद्यार्थीहरू आबद्ध रहेका छन् । कुनै सदस्यता शुल्क वा खरिद शुल्क नलिने यस समाचार माध्यमले निरन्तर रूपमा विश्वव्यापी रूपमा कानूनी तथा अदालती समाचार सामग्रीको सम्प्रेषण गर्दै आइरहेको पाइन्छ ।

इन्टरनेटमा आधारित अदालती पत्रकारिताको नाफामुलक सञ्चालन

इन्टरनेटको युगमा बजार प्रतिस्पर्धा बढेको भएतापनि समाचार माध्यमहरूको लागि थप अवसर सिर्जना भएको देखिन्छ । इन्टरनेटका अवसरहरूमा पहुँच प्राप्त गर्न हेतु नेपालका लगभग सबै मिडिया कम्पनीहरूले अनलाइन उपस्थिति कायम गरेको देखिन्छ । यी सबै समाचार कम्पनीहरूको आफ्नै वेब पोर्टल हुनुका साथै युट्युब र मेटामा पनि उपस्थिति रहेको देखिन्छ । नेपाली समाचार माध्यमहरूको इन्टरनेट उपस्थितिले एकातिर संसारभरका मानिसहरूको पहुँच वृद्धि भई ग्राहक वर्गको संख्या बढ्दै गरेको पाइन्छ छ भने अर्कोतिर आयआर्जनका थुप्रै आयामहरूको समेत विकास भएको देखिन्छ । माथि उल्लेख गरिएका विश्वविख्यात समाचार माध्यमहरूको अध्ययनबाट अब समाचार माध्यमहरूले सदस्यता शुल्क वा परम्परागत विज्ञापनमा मात्र निर्भर भएर बस्नुपर्ने स्थिति छैन । इन्टरनेटका अवसरहरूको उचित प्रयोग गरी समाचार माध्यमहरूले भौतिक कार्यक्रम, प्रायोजित सामग्री, शोध उपकरण, परीक्षा तयारी तथा प्रमाणपत्र प्रशिक्षण कार्यक्रमबाट कम्तिमा निर्वाहमूखी एवम् मुनाफायुक्त आय आर्जन गर्न सक्दछन् ।

वेब पोर्टल मोनेटाइजेशन, मेटा मोनेटाइजेशन तथा युट्युब मोनेटाइजेशनबाट बहुमुखी आय आर्जनको ढोका खुलेसँगै समाचार माध्यमहरूले निम्नानुसारका विभिन्न विधिबाट समेत आय आर्जन गर्न सक्ने देखिन्छः

क) **विज्ञापन सम्बद्ध आयः** यस विधि अन्तर्गत इन्टरनेटमा आधारित कुनै समाचार माध्यमले आफ्नो वेब पोर्टल, युट्युब भिडियो वा मेटा पोस्टमा अन्य कम्पनीबाट उत्पादित वस्तु वा सेवाको विज्ञापन गरी आय आर्जन गर्न सक्ने देखिन्छ ।

ख) **सदस्यता शुल्कः** प्रिन्ट तथा श्रव्यदृश्य मिडियामा लामो समयदेखि मासिक तथा वार्षिक सदस्यता शूल्कको अभ्यास चलिआएको भएतापनि नेपालमा इन्टरनेटमा आधारित समाचार पत्रिका तथा युट्युब च्यानलमा यसको अभ्यासले तिव्रता लिएको देखिँदैन । यद्यपि विश्वव्यापी रूपमै सञ्चार माध्यमहरूले केहि समाचार सामग्रीलाई निःशूल्क राखी प्रिमियम सामग्रीमा भने सदस्यता शुल्क लगाउने गरेको पाइन्छ । नेपालमा 'सेतोपाटी' अनलाइन पोर्टलले यस अभ्यासलाई अवलम्बन गरेको देख्न सकिन्छ ।

ग) **मर्चेन्डाइज स्टोरः** तिव्र ख्याति प्राप्त समाचार माध्यमले आफ्नो छुट्टै मर्चेन्डाइज स्टोरलाई आफ्नो वेबसाइट वा युट्युब च्यानल सँग आबद्ध गरी वस्तु बिक्री गर्ने गरेको पाइन्छ ।

घ) **एफिलिएट मार्केटिङः** यस विधि अन्तर्गत कुनै युट्युब भिडियो, न्यूज पोर्टल वा मेटा पोस्टमा विज्ञापन गर्न चाहने सम्बद्ध कम्पनीको वेब लिंक जडान गरी कुपन कोड समेत उपलब्ध गराईको हुन्छ । कुनै उपभोक्ताले उक्त कुपन कोड उल्लेख गरी वस्तु खरिद गर्दा छुट प्राप्त गर्न सक्ने गरी व्यवस्था गरिएको हुन्छ । यसरी विज्ञापन गरिने तरिकालाई एफिलिएट मार्केटिङ भनिन्छ । इन्टरनेटको दुनियाँमा एफिलिएट मार्केटिङलाई युट्युब, मेटा तथा न्यूज पोर्टलको मूख्य आय आर्जनको स्रोत मानिन्छ ।

ङ) **युट्युब पार्टनर प्रोग्रामः** यस अन्तर्गत योग्यता पुगेको युट्युब च्यानललाई गुगलले पार्टनर प्रोग्राममा अनुबन्ध गरी स्वचालित विज्ञापन प्रदान गर्दछ । त्यस्तो विज्ञापन गरेबापत गुगलले युट्युब च्यानलहरूलाई निश्चित रकम समेत तिर्ने गरेको पाइन्छ ।

[30] थप अध्ययनका लागि हेर्नुहोस; https://www.jurist.org/

च) **पे पर क्लिक वा भ्यूज**: मेटा, युट्युब तथा न्यूज पोर्टलहरूले प्रत्येक क्लिक तथा भ्यूज मार्फत पनि रकम प्राप्त गरी आय आर्जन गरेको पाइन्छ।

अदालती पत्रकारिताको नाफामूलक सञ्चालन सँग नयाँ मिडियाको प्रतिस्पर्धा पनि जोडिएर आउँछ। बढ्दो प्रतिस्पर्धात्मक वातावरणमा गुणस्तरीय एवम् उपभोक्तामूखि वस्तु वा सेवा प्रदान गर्न सक्ने सेवा प्रदायकको अस्तित्व मात्र दिगो हुने हुँदा परम्परागत सञ्चार माध्यमहरूले एकातिर कन्टेन्ट क्रियटर (सामग्री सर्जक) जसरी सोच्न आवश्यक भइसकेको छ भने अर्को तिर द्रुत खबरको सम्प्रेषणको लागि लाईभ-ट्विटिङ था लाईभ ब्लगिङको आयामलाई समेत अवलम्बन गर्न सक्ने देखिन्छ;

कन्टेन्ट क्रियटर जसरी सोच्दै गर्दा

इन्टरनेटको युगमा सबैभन्दा बढि मूल्य पर्ने र बिक्री हुने वस्तु "कन्टेन्ट" लाई मानिन्छ। युट्युब, मेटा लगायतका सामाजिक सञ्जालमा धेरै दर्शकले मनपराएको "कन्टेन्ट"ले छोटो अवधि मै अधिकाधिक लोकप्रियता प्राप्त गर्न सक्दछन्। त्यस्तै, बलियो कन्टेन्ट वा सामग्री निर्माण गर्न सक्ने सर्जकहरूले सहजै स्थीर आय आर्जन गरेको पाइन्छ। युट्युब, मेटा लगायतका सामाजिक सञ्जाल सबैको पहुँचमा पुगेसँगै सामग्री सर्जकको संख्यामा पनि उल्लेख्य वृद्धि भएको छ। जसकारण मूलधार तथा परम्परागत समाचार माध्यमको रूपमा स्थापना भएका संस्थाहरूले समेत उपभोक्तामूखी सामग्रीको उत्पादनमा तिव्र प्रतिस्पर्धाको सामना गर्नुपरिरहेको देखिन्छ। अर्थात्, इन्टरनेटको युग "समाचार" बाट "सामग्री"को दिशातर्फ अघि बढिरहेको देख्न सकिन्छ। फलतः परम्परागत सञ्चारमाध्यममा लामो समय काम गरेका चर्चित पत्रकारहरू पनि नयाँ मिडियामा स्थानान्तरण हुँदै आएको पाइन्छ।[31] तसर्थ, निकट भविष्यमा 'समाचार'लाई 'सामग्री'ले प्रतिस्थापन गर्नेमा विश्वस्त हुन सकिन्छ।

युट्युब च्यानलको लोकप्रियताको मापदण्डको रूपमा रहेको सब्स्क्राइबरको संख्यालाई आधार मान्दा केहि नियमित समाचार माध्यमलाई सामग्री सर्जकहरूले सहजै चुनौति दिएको देख्न सकिन्छ। उदाहरणको लागि, भारतीय समाचार माध्यम NDTV को युट्युब सब्स्क्राइबरको संख्या एक करोड पैंतीस लाख रहेको छ भने चर्चित भारतीय सर्जक ध्रुव राठीको च्यानलमा करिब दुई करोड बाइस लाख संख्यामा सब्स्क्राइबर रहेको देखिन्छ।[32] यसको एक मुख्य कारण सामग्री सर्जकहरूको सरलीकृत, आकर्षक र बोधगम्य सामग्रीतर्फको रुझानलाई मान्न सकिन्छ।

वर्तमान परिप्रेक्ष्यमा परम्परागत पत्रकार तथा समाचार माध्यमहरूले सामग्री सिर्जनाको अवधारणालाई अवलम्बन गर्नु आवश्यक भइसकेको छ। कन्टेन्ट क्रियटर जसरी सोच्दा आयआर्जनका थप अवसरहरूमा सञ्चार माध्यमको पहुँच पुग्ने हुँदा मुनाफामा वृद्धि हुने सम्भावना समेत बढेर जान्छ। प्रथमतः अदालती पत्रकारिताको क्षेत्रमा अभ्यासरत सञ्चार माध्यमहरूले प्रत्येक सामाजिक सञ्जालमा उपस्थिति जनाउनु आवश्यक छ। यसरी सबै सामाजिक सञ्जालमा उपस्थिति जनाउँदा सबै प्रकारका पाठक, दर्शक तथा श्रोतागणसम्मुख पुग्न सहज हुने देखिन्छ। साथै, एकभन्दा बढि सामाजिक सञ्जालमा उपस्थिति जनाउँदै गर्दा सञ्चार माध्यमहरूले एकै समाचारबाट बहुसांख्यिक सामग्री निर्माण गर्न सक्दछन्। परिणामस्वरूप सञ्चार माध्यमहरूले एकै समाचार सामग्रीको सम्प्रेषणबाट गुणात्मक रूपमा आय आर्जन गर्न सक्ने अवसर सिर्जना हुन्छ। जस्तै, कुनै समाचार माध्यमले आफ्नो समाचार पोर्टलमा सम्प्रेषण गरेको समाचारको विषयवस्तुलाई नै भिडियोको रूपमा युट्युबमा प्रशारण गर्न सक्दछ। त्यस्तै, सोही युट्युब भिडियोका केहि मूख्य तथा मनमोहक भागहरूको छोटो क्लिप्स बनाई युट्युब सर्ट्स

[31] उदाहरणका लागि भारतीय पत्रकार रविश कुमार र नेपाली पत्रकार टिकाराम यात्रीलाई लिन सकिन्छ, जसले लामो समयसम्म टेलिभिजन पत्रकारिता गर्दै आएकोमा हाल युट्युबलाई कर्मथलोका रूपमा स्वीकारेको छन्।

[32] यहाँ मिति २०८१।०२।३१ सम्मको तथ्यांकलाई आधार मानिएको छ।

वा मेटामा रिल्सको रूपमा पोस्ट गर्न सकिन्छ । यसरी सामग्री निर्माण गर्दा इन्टरनेटमा उपलब्ध कृत्रिम बौद्धिकता तथा ग्राफिक उपकरणको समेत सदुपयोग गरी उपभोक्ता केन्द्रित सिर्जनशील सामग्री निर्माण गर्न सकिन्छ । यसरी समाचार माध्यमहरूले एउटै कन्टेन्टबाट सबै प्रकारका पाठकलाई आकर्षित गरी गुणात्मक रूपमा आय आर्जन गर्ने बाटो समेत खुल्न जान्छ ।

लाईभ ट्विटिङ तथा लाईभ ब्लगिङ

ईन्टरनेटको आगमन तथा प्रगतिसँगै अदालती पत्रकारितामा लाईभ ट्विटिङ तथा लाईभ ब्लगिङको अवधारणाले पनि प्रवेश पाएको देखिन्छ । लाईभ ट्विटिङ मूख्यतः ट्विटर (एक्स) सँग सम्बन्धित छ, जसअन्तर्गत पत्रकारले कुनै अदालती मुद्दाको सुनुवाई भइरहँदा इजलास कक्षमै बसी तत् इजलासमा चलिरहेको घटना व्यहोरालाई तत्समयमा नै ट्विटर थ्रेड निर्माण गरी लगातार रूपमा ताजा खबर ट्विट गर्ने गर्दछन् । यदि यसै विधिको अवलम्बन गरी कुनै समाचार माध्यमले आफ्नो वेब पोर्टल वा मेटा पोस्टमा थ्रेड निर्माण गरी समाचार सम्प्रेषण गर्दछ भने त्यसलाई लाईभ-ब्लगिङको संज्ञा दिने गरिएको छ ।

विकसित देशहरूमा लाईभ-ट्विटङ तथा लाईभ ब्लगिङको अवधारण नौलौ नभएतापनि नेपालमा यसको नियमित अभ्यास भएको पाइदैँन । नेपालीहरूको ट्विटर (एक्स)मा तुलनात्मक रूपमा पातलो सहभागिता भएका कारणले समाचार माध्यमहरूले लाईभ ब्लगिङ गर्दा भने मेटा वा आफ्नो वेबसाइटलाई नै माध्यम बनाएको पाइन्छ । यस प्रकारको अभ्यासको केहि राजनीतिक तथा लोकप्रिय सेलिब्रिटि सम्बद्ध मुद्दामा सुरुवात भएको देखिन्छ । उदाहरणका रूपमा संसद विघटन तथा शरणार्थी प्रकरणको मुद्दालाई लिन सकिन्छ । *संसद विघटन मुद्दा*[33] गम्भीर एवम् सार्वजनिक चासोको मुद्दा भएका कारण मूलधारकै सञ्चार माध्यमहरूले पनि मुद्दाको ताजा रिपोर्टिङ गर्न मुद्दाको सुनुवाई गर्ने इजलास कक्षमै आफ्ना पत्रकारहरू खटाएको पाइन्छ । मुद्दाको रिपोर्टिङका क्रममा पत्रपत्रिकामा प्रकाशन भएका "न्यायाधीश खतिवडाले महान्यायाधिवक्तालाई सोधे – धारा ७६(५) को आधार के हो? दलको समर्थन अनिवार्य हो कि होइन?"[34], "निवेदक पक्षका वकिललाई इजलासका सात प्रश्न"[35], "निवेदक पक्षको जवाफी बहसः गम्भीर संवैधानिक प्रश्न पन्छाएर राजनीतिक भाषणबाजी"[36] लगायतका समाचार शिर्षकले केहि हदसम्म लाईभ ब्लगिङको आशयलाई प्रकट गरेको बुझ्न सकिन्छ ।

तर, थ्रेड नै निर्माण गरी लाईभ ट्विटिङ वा लाईभ व्लगिङ गरिएको अभ्यास रहेको भने देखिँदैन । यद्यपि, जनचासो तथा सार्वजनिक सरोकार रहने हाइ-प्रोफाइल तथा राजनीतिक दल सम्बद्ध मुद्दाहरूको सम्बन्धी सूचनाको माग उत्कर्षमा रहने हुँदा अदालती पत्रकारितामा लाईभ-ब्लगिङ एक महत्त्वपूर्ण औजारको रूपमा विकसित हुनेमा विश्वस्त रहन सकिन्छ ।

सामान्यज्ञता विरुद्ध विशेज्ञता

अदालती पत्रकारिताको नयाँ आयामसँग सम्बन्धित अर्को विषय हो विशेषज्ञ पत्रकारिता । विशेषज्ञ पत्रकारिताले भाषिक, प्राविधिक तथा कार्यविधिगत जटिलता छिचोल्न सक्ने विशिष्ट गुण तथा योग्यता सहितका पत्रकारको परिकल्पना गर्दछ । विशेषज्ञ पत्रकारिताको मान्यतामा आधारित रहेर नै अदालतमा योग्य तथा विशेषज्ञता हासिल गरेका पत्रकारलाई मात्र कानूनी

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[33] *शेर बहादुर देउवा समेत वि. राष्ट्रपतिको कार्यालय समेत*, मुद्दा नं ०७७-WC-००७१, आदेश मितिः २०७८ । ०३ । २८ ।

[34] नेपाल लाईभ, *न्यायाधीश खतिवडाले महान्यायाधिवक्तालाई सोधे – धारा ७६(५) को आधार के हो? दलको समर्थन अनिवार्य हो कि होइन?*, https://nepallive.com/story/251162 बाट साभार ।

[35] देशसञ्चार, *निवेदक पक्षका वकिललाई इजसलासका सात प्रश्न,* https://deshsanchar.com/2021/07/04/528711/ बाट साभार ।

[36]

देशसञ्चार, *निवेदक पक्षको जवाफी बहसः गम्भीर संवैधानिक प्रश्न पन्छाएर राजनीतिक भाषणबाजी,* https://deshsanchar.com/2021/07/04/528917/ बाट साभार ।

संवाददाताको रूपमा प्रत्यायित गर्ने प्रचलनको विकास भएको पाइन्छ । साथै, परम्परागत रूपमा कुनै एक पत्रकारले नै सबै प्रकारका विषयवस्तुको समाचार सम्प्रेषण गर्ने प्रचलन रहेतापनि हाल भने क्षेत्रगत विशेषज्ञतालाई महत्त्व दिइ पत्रकारिता बिटको स्थापना गरिएको देखिन्छ ।

खासगरी अदालती पत्रकारितामा "सामान्यज्ञ पत्राकार" र "विशेषज्ञ पत्रकार" बीच स्पष्ट भिन्नता देख्न सकिन्छ । प्रचलित अभ्यास हेर्दा, कानून र पत्राकारिता दुवैमा स्नातकोपाधि हासिल गरेका वा अनुभवले विशेषज्ञता आर्जन गरेका पत्रकारहरूद्वारा अदालतबाट प्रतिपादित नजिर सिद्धान्तलाई खास महत्त्व दिईएको पाइन्छ भने सामान्यज्ञ पत्रकारहरू विशेषतः शनशनी खबरको खोजिमा रहने गरेको देखिन्छ । आफ्नो योग्यता र विशिष्टताका कारण प्राविधिक कानूनी भाषालाई सजिलै बुझ्ने हुनाले विशेषज्ञ पत्राकारले अदालती समाचार सम्प्रेषण गर्दा विषयवस्तुको यथार्थपरकता कायम गर्न सक्दछन् । तर, फैसला एवम् कानूनी भाषाबारे वोधदुविधा हुँदा सामान्यज्ञ पत्रकारले त्रुटिपूर्ण समाचार सम्प्रेषण गर्ने सम्भावना बढेर जाने देखिन्छ । अर्कोतर्फ, विशेषज्ञ पत्रकारहरू अदालती मर्यादालाई सर्वोपरी ठान्दछन् । अदालत र न्यायाधीशको गरिमालाई ध्यानमा राखी समाचारको तथ्य, सत्य र यथार्थलाई विश्लेषण गरी सामग्री निर्माण गर्ने गुणवेत्ता पत्राकारहरूको रूपमा विशेषज्ञ पत्रकारहरूलाई लिइने गरिएको छ । यसको विपरित अदालती मर्यादाको महत्त्वबारे अवोधपनका कारण सामान्यज्ञ पत्रकारहरूले सम्प्रेषण गरेको समाचार सामग्रीले अदालतलाई विवादास्पद तुल्याएको भेटिन्छ । विवादास्पद विषयले नै अखबारको मूख्य पृष्ठ प्राप्त गर्ने र उपभोक्ताको ध्यानाकर्षण गर्न सक्ने हुँदा आम पत्रकारले त्यस्तो विषयलाई अत्यधिक खपत हुने समाचारको रूपमा बुझ्ने गरेको पाइन्छ । तसर्थ, अदालती विषयवस्तुमा विशेषज्ञता प्राप्त पत्रकार तुलनात्मक रूपमा कम मुनाफामूखी र अदालती मर्यादालाई लिएर ज्यादा नैतिकवान र सजग रहने गरेको देखिन्छ । यसकारण पनि अदालती पत्रकारिताका क्षेत्रमा सञ्चार माध्यमहरूले सामान्यज्ञ पत्रकारका तुलनामा विशेषज्ञ पत्रकारलाई प्राथमिकता दिने गरिएको पाइन्छ ।

समग्रमा, अदालती पत्रकारिताको नविनतम विकासलाई हेर्दा कानूनी शोध र अदालती पत्रकारिताको एकीकरण गरी समाचार माध्यमहरू सञ्चालनमा आएको देखिन्छ । अर्कोतर्फ, मुलधारका चर्चित पत्रपत्रिकाहरूले कानून तथा अदालती विषयलाई केन्द्रमा राखेर छुट्टै अंक प्रकाशन गर्ने गरेको समेत देखिन्छ । त्यस्तै, अदालती पत्रकारितामा कृत्रिम बौद्धिकताको प्रयोगले पनि स्थान पाउँदै गरेको देख्न सकिन्छ । कृत्रिम बौद्धिकताको प्रयोगले समाचार माध्यमहरूलाई उपभोक्ता अनुसार सामग्रीको प्रकृति, लम्बाई, पठन-सहजता र सरलता कायम गरी उपभोक्ता मैत्री सामग्री निर्माण गर्न सहायता पुगेको हुँदा यसको प्रयोगमा बढोत्तरी आएको पाइन्छ । कृत्रिम बौद्धिकताको प्रयोगले कानून तथा अदालती विषयका शोधकर्तालाई अध्ययनमा सहज हुने भएकाले यसले बहुमुखि फाइदा पुर्याएको बुझ्न सकिन्छ । साथै, वर्तमान समयमा अदालती समाचार भनी पत्रपत्रिका तथा टलिभिजनबाट सम्प्रेषण हुने समाचार सामग्री मात्र नभई पोडकास्ट, समाचार पोर्टल, दृष्य कथा, रिल्स तथा कानून जानौं, आज अदालतमा जस्ता उपभोक्तामूखी सामग्री निर्माण गरी विभिन्न इन्टरनेट वेबसाइट र सामाजिक सञ्जालहरूमा सम्प्रेषण गरिएको देख्न सकिन्छ ।

४. अदालती पत्रकारिता, स्वच्छ सुनुवाई र अदालती मर्यादा

आधुनिक न्याय प्रणालीमा अदालतलाई खुल्ला निकायको रूपमा मानिएको पाइन्छ । सामान्यतया अदालत खुल्ला न्यायको सिद्धान्तमा आधारित रहने भएतापनि पत्रकारिता र अदालती कार्यपद्धतिको प्रकृति र मान्यताबीच केहि अनमेल रहेको देखिन्छ । पत्रकारितामा खुलापन र पारदर्शिताका मान्यताको अवलम्बन गरिन्छ भने अदालतको कार्यपद्धतिमा कतिपय अवस्थामा गोपनियताको विशेष महत्त्व रहन्छ । कहिलेकाहिं मुद्दाको स्वच्छ सुनुवाई कायम गर्न पनि प्रेस स्वतन्त्रताका मान्यताको स्वनियमन् आवश्यक पर्न सक्दछ । खासगरी, मुद्दाको विषयवस्तुलाई सार्वजनिक परीक्षणको विषय बनाउँदा स्वच्छ सुनुवाईमा

व्यवधान खडा हुने जोखिम रहनाले सञ्चार माध्यमहरूले समाचार सम्प्रेषण गर्दा मुद्दाको सूचना दिनु बाहेक अन्य कुनै अभिलाषा बोक्नु हुँदैन।

मुद्दामामिला सम्बन्धी जानकारी पुर्याउने दायित्व अनुरूप समाचार माध्यमहरूद्वारा प्रेस स्वतन्त्रताको हक प्रयोग हुँदै गर्दा स्वच्छ सुनुवाईमा असर पर्न सक्ने जोखिमलाई न्यूनिकरण गर्नु आवश्यक छ। प्रिन्ट पत्रकारिता, टेलिभिजन न्यूज, वेब पोर्टल, मेटा तथा युट्युबमा व्यापक प्रचार पाउने हाइ-प्रोफाइल मुद्दाहरूको विषयवस्तुमा आधारित रहेर सञ्चार माध्यमहरूद्वारा सम्प्रेषण गरिएको सामग्रीको अध्ययन गर्दा, प्रेस स्वतन्त्रता र स्वच्छ सुनुवाईको मान्यता बीचको द्वन्द्व प्रष्ट रूपमा देख्न सकिन्छ।

प्रेस स्वतन्त्रता वि. स्वच्छ सुनुवाई

मुद्दाको स्वच्छ सनुवाई सुनिश्चित गर्न अदालतबाट थुप्रै नियम तथा मान्यताहरू लागू गरिएको पाइन्छ। कतिसम्म भने स्वच्छ सुनुवाईको अभावमा गरिएको निर्णयलाई प्राकृतिक न्यायको दृष्टिले खारेजभागी मानिन्छ । उक्त प्राकृतिक न्यायको सिद्धान्तलाई अनुशरण गर्दै नेपालको संविधानमा पनि स्वच्छ सुनुवाईको हकको व्यवस्था गरिएको देखिन्छ । नेपालको संविधानको धारा २० मा व्यवस्था गरिएको न्याय सम्बन्धी हक अन्तर्गत "प्रत्येक व्यक्तिलाई स्वतन्त्र, निष्पक्ष र सक्षम अदालत वा न्यायिक निकायबाट स्वच्छ सुनुवाईको हक हुनेछ" भनी व्यवस्था गरिएको देखिन्छ।[37] उक्त हकको प्रचलनका निमित्त विचाराधीन मुद्दालाई प्रभावित पार्ने गरी सञ्चार माध्यममा कुनै पनि सामग्री सम्प्रेषण हुनुहुँदैन भन्ने मान्यताको विकास भएको पाइन्छ। सो अनुरूप पत्रकार आचारसंहिता, २०७३ को नियम ५(११) मा विचाराधीन मुद्दाको न्याय निरूपणमा प्रभाव पार्ने गरी सामग्री सम्प्रेषण गर्न रोक लगाइएको छ।[38] तर, उक्त व्यवस्थाको विपरित पत्रपत्रिकामा चर्चामा आएका हाइ-प्रोफाइल मुद्दाहरूमा विशेषतः पीडित र अभियुक्तको पक्षलाई बलियो वा कमजोर पार्ने उद्देश्य सहित समाचार प्रकाशन गरिएकोबाट आचारसंहिताको पूर्ण अनुपालन भएको देखिँदैन।

पत्रपत्रिकाहरूले स्वच्छ सुनुवाईको सिद्धान्तको अवलम्बन नगर्दा अदालतमा परीक्षण भइ नसकेका प्रमाणहरू समेत सार्वजनिक परीक्षणको विषय बन्न पुगेको दृष्टान्त भेटिन्छ । जसकारण अदालतबाट मुद्दाको निर्णय हुनु अगावै प्रमाण र कानूनका विषयमा एकतर्फि टिकाटिप्पणी हुने तथा प्रमाण र तर्कको अदालती परीक्षण बिना नै अभियुक्तको दोष वा निर्दोषिताको भाष्य निर्माण हुन पुगेको देखिन्छ। त्यस्तै, कतिपय मुद्दाहरूमा अदालतको आदेश र पीडित न्याय प्रणालीका मान्य सिद्धान्त विपरित पीडितको गोपनियता हनन हुने तथा पीडित एवम् अभियुक्तको चरित्रमा लाञ्छना लगाउने कार्यमा अनैतिक अदालती पत्रकारिताको प्रत्यक्ष-अप्रत्यक्ष भूमिका रहेको पाइन्छ।

यसको अर्थ, कुनै पनि मुद्दा सम्बन्धी विषयवस्तुमा समाचार लेख्नै हुन्न भन्ने होइन। सार्वजनिक न्याय सुनिश्चित गर्न सञ्चार माध्यमको उल्लेख्य भूमिकालाई कदापि बिर्सिन सकिदैँन। मुद्दाको सुनुवाई सुरु हुनु पूर्व कुनै घटनाका पीडितको आवाज बन्न, प्रमाण खोज्ने कार्य गरी त्यसबारे सत्यतथ्य पत्ता लगाउन, घटनाको संवेदनशीलतालाई लोक माझ प्रचारप्रसार गर्न सञ्चार माध्यमहरूलाई सदैव सक्षम मान्नुपर्ने हुन्छ। साथै, मुद्दाको सुनुवाई पश्चात अदालतबाट भएको फैसला सार्वजनिक सम्पत्तिको रूपमा रहने हुनाले त्यस्तो फैसलाले कानून तथा न्यायको सिद्धान्तको पालना गरे नगरेको सम्बन्धमा लेख्न, आलोचना गर्न र अदालतमा हुन सक्ने अनियमितता र भ्रष्टाचार बारे समाचार सम्प्रेषण गर्न सञ्चार माध्यमलाई पूर्ण स्वतन्त्रता हुन्छ। नेपालको संविधानप्रदत्त प्रेस स्वतन्त्रताको हकको आशय पनि यहि नै हो। तर, सुनुवाईको क्रममा रहेको कुनै मुद्दाको स्वच्छ सुनुवाईलाई

[37] नेपालको संविधान, धारा २०, उपधारा ९।

[38] पत्रकार आचारसंहिता, २०७३, नियम ५, उपनियम ११।

प्रभावित पार्ने कार्य भने गरिनु हुँदैन । तसर्थ, सञ्चार माध्यमहरूले न्यायिक मर्यादाका सिमालाई ध्यानमा राखी स्वनियमन मार्फत् प्रेस संयमता अपनाउनु अवश्यक छ ।

विचाराधीन मुद्दामा अदालती पत्रकारिता

तर, कस्तो मुद्दालाई विचाराधीन मुद्दा मान्ने वा कुनै मुद्दाको अन्त्य कति बेला हुन्छ भन्ने प्रश्नमा एकमत रहेको पाइदैँन । जस्तै, तल्लो अदालतबाट फैसला भईसकेको तर माथिल्लो अदालतमा पुगिनसकेको मुद्दा आचारसंहिताको प्रयोजनका लागि विचाराधीन मुद्दा हो होइन भन्ने सवाल त छ नै तल्लो अदालतबाट भएको फैसलाबारे टिकाटिप्पणी हुँदा वा सोसँग सम्बन्धित सामग्री पत्रपत्रिकामा छापिँदा पुनरावेदन सुनुवाई प्रभावित हुने सम्भावना कायम रहने हुनाले के कति समाचारलाई सञ्चार माध्यमले सम्प्रेषण गर्नुपर्ने हो भन्ने विषयमा असमञ्जस रहेको पाइन्छ । यस दुविधाको निरूपण गर्न विचाराधीन मुद्दाको परिभाषा गरिनु आवश्यक छ । सामान्यतयः विचाराधीन मुद्दा भनेर अदालतमा दर्ता भई फैसला भइनसकेको मुद्दालाई बुझिन्छ । तर, तल्लो अदालतबाट निर्णय भईसकेका मुद्दामा निर्णय उपर पुनरावेदन गर्ने अधिकार पक्षहरूमा रहिरहेको अवस्थामा भने 'विचाराधीन मुद्दा'को परिभाषालाई विस्तार गर्नुपर्ने हुनसक्छ । उदाहरणका लागि, नेपालको कुनै पनि अदालतमा दर्ता भई लगत कट्टा भइनसकेको मुद्दालाई 'विचाराधीन मुद्दा'को रूपमा बुझ्न सकिन्छ । यसप्रकारका विचाराधीन मुद्दाका तथ्य वा प्रमाणको मूल्यांकन र पक्ष विपक्षको मानमर्दन वा पक्षपात गरी समाचार निर्माण गर्न बाट सञ्चार माध्यमहरूले पन्छिनु आवश्यक छ । अदालतमा दर्ता भएका मुद्दामा बयान सुन्ने, प्रमाण साक्षी बुझ्ने र कानून र न्यायका मान्य सिद्धान्त बमोजिम मुद्दाको निर्णय गर्ने अधिकार र दायित्व स्वयं अदालतको हुने हुँदा सञ्चार माध्यमहरूले समाचारको माध्यमबाट विचाराधीन मुद्दामा विघ्न खडा गर्ने वा उक्त दायित्वको भार आफै बोक्ने कार्य गर्नु हुँदैन । यद्यपि विचाराधीन मुद्दाको स्वच्छ सुनुवाईमा प्रतिकुल असर नपार्ने वा मुद्दामा निहित संवैधानिक वा कानूनी प्रश्न सँग सम्बन्धित समाचार र सार्वजनिक हितसँग सम्बन्धित सामग्रीलाई सम्प्रेषण गर्न भने पत्रपत्रिका तथा सञ्चार माध्यमहरूलाई रोक लगाउने कार्य गरिनु हुँदैन ।

अदालती मर्यादा

अदालतका सम्बन्धमा कहिलेकाहिं यस्ता समाचार सामग्रीहरू प्रेषित हुने गर्दछन् जसको विषयवस्तुले अदालती मर्यादामा प्रतिकुल असर पारेको देखिन्छ । न्यायालयलाई विवादास्पद बनाउने मनसायले प्रेरित यस्ता समाचारहरू प्रिन्ट पत्रपत्रिकाभन्दा नयाँ मिडियामा आधारित सञ्चार माध्यमहरूमा तुलनात्मक रूपमा बढि देखिन्छ । यस्तो प्रवृत्तिलाई पत्रकार र सञ्चार माध्यमको अनभिज्ञता, अनुशासनहिनता र असावधानीसँग जोडेर हेर्न सकिन्छ । कतिपय अवस्थामा भने समाचार माध्यमहरूले बाह्य तत्त्वको प्रभावमा अदालती मर्यादाको सिमा उल्लङ्घन गरी कलुषित मनसायपूर्वक अदालतलाई विवादास्पद बनाउने प्रयत्न गरेको समेत पाइन्छ ।

त्यस्तै, केहि समाचार सामग्रीहरू भने न्यायाधीशउपर व्यक्तिगत लाञ्छना लगाउने मनसायले प्रेषित भएका पाइन्छन् । उदाहरणको लागि; "बलात्कार मुद्दामा अदालत संवेदनशील हुँदैन? प्रधान न्यायाधीशबाटै यस्तो फैसला!"[39], "थुनाको आदेश नसेलाउँदै सिद्धबाबाले कसरी पाए उन्मुक्ति?"[40], "बलात्कार गर्दागर्दै रङ्गेहात पक्राउः तर अदालतले भनिदियो – 'लेनदेनको विवाद'[41], "सुन तस्करीको मुद्दामा फैसला गर्ने न्यायाधीशको कालीकोट सरुवा"[42] । उल्लेख गरिएका यी शिर्षकहरू तथा

[39] पहिलोपोष्ट, *बलात्कार मुद्दामा अदालत संवेदनशील हुँदैन? प्रधान न्यायाधीशबाटै यस्तो फैसला!,* https://pahilopost.com/content/-1626.html ।

[40] साँघु न्यूज, *थुनाको आदेश नसेलाउँदै सिद्धबाबाले कसरी पाए उन्मुक्ति?,* https://www.sanghunews.com/content/27361 ।

[41] लोकपथ, *बलात्कार गर्दागर्दै रङ्गेहात पक्राउः तर अदालतले भनिदियो – 'लेनदेको विवाद',* https://www.lokpath.com/story/661667 ।

सामग्रीको अन्तरवस्तुले न्यायाधीश एवम् अदालतमाथि सोझो लाञ्छना साँधेको देखिन्छ । यसरी आग्रह, वैरभाव र कलुषित मनसायले प्रेरित भई हल्ला, अफवाह र मिथ्यावस्तुमा आधारित समाचार सामग्री निर्माण गर्दा एकातर्फ सञ्चार माध्यमको विश्वसनीयता माथि प्रश्न त उठ्छ नै अर्कोतर्फ अदालतलाई विवादास्पद तुल्याई न्यायप्रतिको जनआस्थालाई पनि विचलित पार्दछ । अदालती मर्यादामा आँच आउने तथा न्यायसम्पादनमा प्रतिकुल प्रभाव पार्ने गरी लेखिएको समाचारले अदालतको अवहेलनाको कारबाही समेत आकर्षित गर्ने हुँदा पत्रकार तथा सञ्चार माध्यमहरूले पर्याप्त सावधानी अपनाउन आवश्यक छ ।

अदालत भित्रका 'सुत्र' र कानून व्यवसायीहरूमा छाएको पपुलिजम्

अदालती पत्रकारितामा 'सुत्र' तथा 'भित्री स्रोत' को अवधारणालाई उचित मानिँदैन । सञ्चार माध्यमहरूले पनि अदालतलाई शनशनीपूर्ण खबरको स्रोतको रूपमा हेर्ने गरेको पाइँदैन । यसै कारण अदालती बिषयवस्तुमा आधारित ब्रेकिङ न्यूजहरू को संख्या विश्वव्यापी रूपमै अतिन्यून रहेको पाइन्छ ।[43] यद्यपि नेपालमा भने 'सुत्र' वा 'स्रोत'हरू इंगित गरी अदालत सम्बन्धमा समाचार सामग्रीहरू प्रकाशन गरिएको पाइन्छ । उक्त भित्री 'स्रोत'हरू भनी सामान्यतया अदालतका कर्मचारी र कतिपय अवस्थामा स्वयं न्यायाधीशहरूलाई इंगित गर्ने गरिएको पाइन्छ । त्यस्ता भित्री स्रोतहरू सकारात्मक र नकारात्मक दुवै प्रकारका उद्देश्य प्राप्तिका लागि प्रयोग हुने गरिएको देखिन्छ । तर, असल उद्देश्य प्राप्तिका लागि भित्री स्रोतको प्रयोग हुन सक्ने भएतापनि यसले गुप्तता, अस्वस्थ प्रतिस्पर्धा र न्यायिक विकृतिलाई प्रश्रय दिने हुँदा न्यायालयजस्तो गरिमामय निकायमा 'भित्री स्रोत'को अवस्थितिलाई अनैतिक एवं मर्यादाविरोधी मान्नुपर्ने हुन्छ ।

भित्री स्रोतको उल्लेख गरी सम्प्रेषण गरिएको समाचार सामग्रीको रूपमा करिब दुई वर्ष अघि सर्वोच्च अदालतमा न्यायाधीशहरूले सामूहिक रूपमा इजलास बहिष्कार गर्दाको प्रसंगको सेरोफेरोमा लेखिएका विषयवस्तुलाई लिन सकिन्छ । त्यसबेला अदालतलाई विवादास्पद गर्ने गरी "आनन्दमोहनले पढ्दापढ्दै रोकिएको ईश्वर खतिवडाको इमेल न्यायाधीशहरूबीचमै गुपचुप" शिर्षकमा छापिएको एक समाचार सामग्रीमा "स्रोत"लाई इंगित गर्दै घटनाको तथ्यलाई पुष्टि गर्न खोजिएको थियो । यसरी 'स्रोत' वा 'सुत्र' को रूपमा अदालत भित्रका कर्मचारी तथा न्यायाधीशहरू इंगित गरी व्यक्तिगत स्वार्थका लागि अदालतको गरिमा मै आँच आउने गरी समाचार सामग्री निर्माण गरिनु अदालत र अदालती पत्रकारिता दुवैका लागि दुःखद अभ्यास मान्नपुर्छ । यसले अदालतको साख घटाउने र न्याय प्रक्रियामा अविश्वसनियता निम्त्याउने कार्य गर्दछ ।

त्यस्तै, छोटो समयमै लोकप्रिय हुने कानून व्यवसायीहरूको अस्वस्थ प्रतिस्पर्धाले कतिपय अवस्थामा अदालतलाई विवादित बनाउन सक्दछ । अदालत र न्यायाधीशका बारेमा विवादास्पद कुरा व्यक्त गर्दा पेशामा थप मानिसले चिन्ने र अधिकाधिक मुद्दाहरू पनि प्राप्त हुने अभिलाषाले यसप्रकारका गतिविधिहरू प्रेरित भएको पाइन्छ । यस प्रकृतिका कानून व्यवसायी र सञ्चार माध्यमको संगम हुँदा अदालती गरिमालाई लक्षित गर्ने प्रकृतिका समाचार सामग्रीको सिर्जना हुने गरेको पाइन्छ । न्यायालयमा हुन सक्ने भ्रष्टाचार वा अनियमितताको विषयमा थप प्रमाण फेला पार्न तथा लागेका आरोप पुष्ट्याइ गर्न अदालती स्रोत र पेशामा आबद्ध कानून व्यवसायीहरूको सहभागिता समग्र न्याय प्रणालीको उन्नतीका लागि लाभदायी हुन सक्ने भएतापनि न्यायाधीशमाथि व्यक्तिगत निशाना साध्ने र अदालतको मानमर्यादामा आँच आउने गरी समाचार माध्यमहरूले 'सुत्र' तथा 'स्रोत'हरूलाई प्रश्रय दिनु उचित देखिँदैन । न त त्यस्ता स्रोत वा पपुलिष्ट कानून व्यवसायीहरूले व्यक्त गरेका पुष्टि हुन नसक्ने आरोपहरूलाई समाचार सामग्रीको रूपमा सम्प्रेषण गर्नु अदालती पत्रकारिताको नैतिकता अनुरूप नै हुन्छ ।

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अनलाइनखबर, *सुन तस्करी मुद्दामा फैसला गर्ने न्यायाधीशको कालीकोट सरुवा,* https://www.onlinekhabar.com/2022/07/1163978 ।

[43] सन्दर्भका लागि फूटनोट ३ हेर्नुहोला ।

फैसलाको अपव्याख्या

कानूनको भाषिक जटिलताका कारण समाचार सामग्रीहरूमा फैसलाको अपव्याख्या हुने अत्यधिक जोखिमले अदालती पत्रकारिता ग्रस्त रहने गरेको छ। साथै, अदालती कार्यवधिको प्राविधिक प्रकृतिका कारण समेत फैसलाको अपव्याख्या भई मिथ्या सूचना फैलिने सम्भावना रहने गरेको देखिन्छ। उदाहरणको लागि केहि वर्ष अघि "अदालतमा विचाराधीन स्टिङ अपरेशनका ४०० मुद्दा खारेज हुने" नामक शिर्षकमा प्रकाशन गरिएको समाचार सामग्रीलाई लिन सकिन्छ।[44] *विष्णुप्रसाद घिमिरे विरुद्ध अख्तियार दुरूपयोग अनुसन्धान आयोग*को मुद्दा[45] मा सर्वोच्च अदालतको संवैधानिक इजलासले अख्तियार दुरुपयोग अनुसन्धान आयोगको स्टिङ अपरेशनको कार्यलाई अवैधानिक घोषणा गरेको विषयवस्तुमा आधारित रहेर निर्माण गरिएको उक्त समाचार सामग्रीमा फैसलाको अपव्याख्या हुन गई सर्वोच्च अदालतले स्टिङ अपरेशनका ४०० भ्रष्टाचार मुद्दा खारेज गरेको भनी मिथ्या सूचनाको प्रसार भएको देखिन्छ। वास्तवमा उक्त फैसलाले अदालतमा विचाराधीन रहेका स्टिङ अपरेशन सँग सम्बन्धित भ्रष्टाचारका मुद्दालाई खारेज भने गरेको थिएन। सर्वोच्च अदालतमा अहिले पनि स्टिङ अपरेशनसँग सम्बन्धित घुस रिसवतका मुद्दाहरू कायम छन् जसको फैसला सम्बद्ध मिसिल कागज र प्रमाणका आधारमा भइरहेको छ।

यसरी समाचार सामग्री तयार गर्दा फैसलाको अपव्याख्या हुने स्थिति मूख्यतः पत्रकारको अदक्षताका कारण आउने गरेको देखिन्छ। तर, कतिपय अवस्थामा भने पत्रकार तथा सञ्चार माध्यमहरूले लोकप्रियता हासिल गर्ने उद्देश्यले नियतवश फैसलाको अपव्याख्या गरेको स्थिति पनि हुनसक्दछ। ईन्टरनेटमा भ्रमपूर्ण सूचनाको बढ्दो प्रवृत्तिका बीच अदालती पत्रकारिताको क्षेत्रमा अब्बल विशेषज्ञ पत्रकार नियुक्त गरी वा क्षमता विकास तालिम प्रदान गरी फैसलाको अपव्याख्या हुन सक्ने स्थितिलाई निरोध गर्न सकिन्छ। विशेषज्ञ पत्रकारिताको छनौटले अदालती पत्रकारितामा व्यवसायिकता प्रवर्द्धन गर्न समेत सहायता पुग्दछ। सञ्चार माध्यम एक्लैको प्रयासमा मात्र फैसलाको अपव्याख्याको जोखिमलाई निवारण गर्न सकिने भने देखिँदैन। अदालती समाचारहरूको स्रोत स्वयं अदालत नै हुने हुँदा मिथ्या सूचना नियन्त्रण गर्न अदालतको पनि महत्त्वपूर्ण भूमिका रहन्छ।

अदालती पत्रकारितामा रहेका अन्य समस्याहरू

यस खण्डमा माथि नै चर्चा गरिसकिएका विषयवस्तु लगायत अदालती पत्रकारितामा रहेका अन्य केहि समस्याहरूलाई पाठक सुविधाका लागि निम्नानुसार संक्षेपीकरण गरिएको छ;

क) मुद्दामा अनावश्यक मिडिया ट्रायल एवम् एजेन्डामूखि प्रसारण,
ख) संवेदनशील मुद्दामा सुनुवाई गर्ने न्यायाधीश, पक्ष तथा नियुक्त कानून व्यवसायीको नाम किटेर सामग्री निर्माण गर्ने प्रवृत्तिले न्याय निरुपणमा विघ्न अड्चन,
ग) विचाराधीन मुद्दासँग सम्बन्धित प्रमाण कागजहरूको परीक्षण हुनु अगावै खुला प्रकाशन र विश्लेषण,
घ) अन्तरकालीन तथा अन्तरिम आदेशलाई नकारात्मक रूपमा चित्रण गर्दा बाँकी सुनुवाईमा प्रतिकूल असर,
ङ) न्यायाधीशको चरित्रहत्या हुने गरी समाचार सामग्री प्रकाशन,
च) न्यायाधीशको योग्यता, क्षमता र विश्वसनीयतामा प्रश्न उठ्ने गरी लगातार रूपमा अस्वच्छ आलोचना,
छ) अदालतप्रति लाञ्छनाप्रेरित नकारात्मक पत्रकारिता,

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अनलाइनखबर, *अदालतमा विचाराधीन स्टिङ अपरेशनका ४०० मुद्दा खारेज हुने,* https://www.onlinekhabar.com/2021/04/947358 ।

45 अधिवक्ता विष्णु प्रसाद घिमिरे वि. अख्तियार दुरुपयोग अनुसन्धान आयोग, संवैधानिक इजलास, मुद्दा नः ०७४-WC-००२०, फैसला मितिः २०७८।०१।०८।

ज) अदालतमा भित्री स्रोतको उदय,
झ) सामाजिक सञ्जालमा बढ्दो मिथ्या सूचना,
ञ) लाईभ-ब्लगिङ सँग सम्बद्ध समस्या,
ट) दर्ता नभएका सामाजिक सञ्जालका मिडियाको अनैतिक गतिविधि।

समग्रमा, प्रेस स्वतन्त्रता र न्याय सम्पादन प्रक्रिया बीच पारस्परिक सम्बन्ध रहेको देखिन्छ। यस सम्बन्धमा नेपालको संविधान प्रदत्त प्रेस स्वतन्त्रताको हकले समेत स्वच्छ न्याय प्रणाली र उत्तरदायी पत्रकारिताको समपुरकतालाई आन्तरिकीकरण गरेको देखिन्छ । त्यस्तै, प्रेस स्वतन्त्रताको उत्तरदायी प्रयोगले अदालतमा हुन सक्ने भ्रष्टाचार र अनियमिततालाई उद्घटित गरी न्यायालयलाई स्वच्छ र स्वतन्त्र कायम गर्न सघाउनुका साथै विश्वसनीय पत्रकारिता प्रवर्द्धन गर्न सहयोग पुर्याउँदछ । तसर्थ, अदालती मर्यादा तथा स्वच्छ सुनुवाईका मान्यताको संरक्षण एवम् प्रवर्द्धन गर्न संयमित तथा स्वनिमयित प्रेस स्वतन्त्रताको हकको उपयोग गर्ने तर्फ सबै सञ्चार माध्यमहरू अग्रसर हुनु जरुरी देखिन्छ।

५. मिसइन्फर्मेशन, डिसइन्फर्मेशन र मालइन्फर्मेशन

यस अघिको खण्डमा फैसलाको अपव्याख्या लगायतका शिर्षकहरूमा मिथ्या सूचनाको प्रभावलाई केहि चर्चा गरिएको थियो । इन्टरनेट र कृत्रिम बौद्धिकताका कारण विश्वव्यापी रूपमा भ्रमपूर्ण सूचनाको त्रासदि अवस्था रहेका कारण यस खण्डमा मिथ्या सूचना बारे थप विवेचना गर्ने प्रयास गरिएको छ । मिथ्या सूचनालाई मूख्यतः तीन समूहमा वर्गिकरण गरिएको पाइन्छ ।[46] पहिलो, मिसइन्फर्मेशन भन्नाले कसैलाई हानी गर्ने उद्देश्य नलिई अन्जानमा सम्प्रेषण गरिएको मिथ्या सूचना बुझिन्छ ।[47] दोस्रो, डिसइन्फर्मेशन भन्नाले कसैको व्यक्ति, मर्यादा, इज्जत वा प्रतिष्ठामा हानी गर्ने वा समग्र जनता वा राष्ट्रलाई गलत दिशामा डोर्याउने बदनियतका साथ सम्प्रेषण गरिएको मिथ्या सूचना बुझिन्छ ।[48] त्यस्तै, मालइन्फर्मेशन भन्नाले कुनै यथार्थ विषयवस्तुलाई बङ्ग्याइ वा अतिरञ्जित पारी पाठकलाई गलत सूचना दिने वा कसैको मानमर्यादामा आँच आउने तरिकाले प्रस्तुत गरिएको मिथ्या सूचना बुझिन्छ ।[49] यी तीनै प्रकारका मिथ्या सूचनाले पाठकलाई यथार्थबाट दुर गरी अनिभिज्ञता र गलतको पक्षपाती बनाउँदछ। मिथ्या सूचनाको माध्यम र विषयवस्तु कतिसम्म भयावह छ भने स्यालोफेक र डिपफेक्स जस्ता मिथ्या सूचनाले समग्र शासन प्रक्रियालाई प्रभावित पार्न सक्दछ । विशेषतः सामाजिक सञ्जालको तिव्र गतिमा सूचना सम्प्रेषण गर्न सक्ने क्षमताका कारण मिथ्या सूचनाले महामारीको रूप लिएको देखिन्छ।

मिथ्या सूचनाको प्रभावबाट अदालती पत्रकारिता पनि अछुतो छैन। केहि महिना अघि सर्वोच्च अदालतलाई विवादास्पद बनाउने उद्देश्यले युट्युब च्यानल 'सिधाकुरा'मा प्रशारण गरिएको अडियो फाइल र सोमा आधारित समाचार मिथ्या सूचना भित्रै पर्दछ। इन्टरनेटको बढ्दो प्रयोग र सामाजिक सञ्जालमूखि समाचार सामग्रीको उदय सँगसँगै मिथ्या सूचनाको भयावह स्थिति सिर्जना भएको देखिन्छ।

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[46] Canadian Centre for Cyber Security, How to Identify misinformation, disinformation and mal-information, retrieved from https://www.cyber.gc.ca/sites/default/files/misinformation-mesinformation-itsap.00.300-en.pdf

[47] *Id.,* Misinformation refers to false information that is not intended to cause harm.

[48] *Id.,* Disinformation refers to false information that is intended to manipulate, cause damage, or guide people, organizations, and countries in the wrong direction.

[49] Disinformation refers to false information that is intended to manipulate, cause damage, or guide people, organizations, and countries in the wrong direction.

मिथ्या सूचनाको संक्रमणसँग लड्न सञ्चार माध्यमहरूको मूख्य भूमिका रहने गर्दछ । सूचनाको प्रमुख संवाहकको रूपमा रहेका सञ्चार माध्यमहरूले समाचार प्रकाशनपूर्व सूचनाको यथार्थता र सत्यताको परीक्षण गरी धेरै हदसम्म मिथ्या सूचनाको नकारात्मक प्रभावलाई नियन्त्रण गर्न सक्दछन् । साथै, अदालतले एकद्वार प्रणाली मार्फत सञ्चार माध्यमहरूलाई यथार्थपरक सूचना प्रवाह गरी मिथ्या सूचनालाई निरुत्साहित गर्न सकिन्छ ।[50] पारदर्शिता नै यथार्थपरक सूचनाको पहिलो शर्त हुने हुँदा अदालती कामकारवाहिमा निहित आवश्यक बाहेकका गोप्य प्रकृतिलाई न्यूनिकरण गरी मिथ्या सूचनाको प्रभावलाई निवारण गर्न सकिन्छ ।[51] यद्यपि केहि अवस्थामा गोपनियता र सुरक्षाका दृष्टिले पूर्ण पारदर्शिता कायम गर्न गने सकिँदैन ।

६. अदालती पत्रकारितामा नैतिकता तथा पेशागत आचरण

यस खण्डमा विभिन्न राष्ट्रहरूमा अभ्यास गरिएका अदालती पत्रकारिता सम्बन्धी मार्गदर्शन र पेशागत आचारणसंहिताको विश्लेषण गरिएको छ । मिथ्या, भ्रमपूर्ण तथा नियोजित एजेन्डायुक्त अदालती पत्रकारिताका कारण चल्न सक्ने अदालती मुद्दाहरू जस्तै; गोपनियताको हनन, बेइज्जति तथा अदालतको अवहेलना सम्बन्धी फौजदारी कारवाही लगायतका विषयलाई भने यस लेखमा समावेश गरिएको छैन ।

कोसोभोमा अदालती पत्रकारिताका लागि जारी गरिएको मार्गदर्शन, २०२३[52]

अर्गनाईजेसन फर सेक्युरिटी एन्ड को-अपरेशन इन युरोप मिसन इन कोसोभोद्वारा सेप्टेम्बर, २०२३ मा जारी गरिएको अदालती पत्रकारिता सम्बन्धी हातेपुस्तिका विशेषतः मुद्दाको स्वच्छ सुनुवाई कायम गर्न अबलम्बन गरिनुपर्ने पेशागत आचरणसँग सम्बन्धित देखिन्छ । सूचनाको तथ्यपरकता तथा विश्वसनियता, पीडितप्रतिको संवेदनशीलता र पक्ष तथा साक्षीको गोपनियताजस्ता विषयलाई विशेष महत्त्व दिँदै अदालती पत्रकारिताका कारणले मुद्दाका कुनै पक्षलाई लाभ वा हानी हुने स्थिति सिर्जना नहुने गरी रिपोर्टिङ गर्न उक्त मार्गदर्शनले सुझाएको देखिन्छ ।

अदालती पत्रकारिता सम्बन्धी मार्गदर्शन – इप्सो (संयुक्त अधिराज्य)[53]

संयुक्त अधिराज्यमा इप्सो अर्थात् स्वतन्त्र प्रेस मापदण्ड संगठनले संपादकको आचारसंहिता[54]का सान्दर्भिक व्यवस्थामा आधारित रहेर अदालती पत्रकारिता सम्बन्धी मार्गदर्शन जारी गरेको पाइन्छ । उक्त मार्गदर्शनको विषयवस्तु विशेषतः फौजदारी प्रकृतिका मुद्दामामिला सँग निकटतर देखिन्छ । मार्गदर्शनमा अदालती पत्रकारिताको अभ्यास गर्दा गर्न हुने तथा गर्न नहुने कार्यको व्याख्या गरी पत्रकारहरूलाई स्वच्छ सुनुवाईको सिद्धान्तको पूर्ण अनुपालन गर्न आह्वान गरिएको देखिन्छ ।

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[50] Right Honourable Beverly McLachlin, P.C. Chief Justice of Canada, The Relationship Between the Courts and the Media (2014); I have been discussing how courts can help inform the press, (and through the press, the public) on the day-to-day functioning of the courts and the content of judicial decisions. The approach I have discussed is premised on a fundamental principle of great importance – the principle that the courts should be open, subject only to narrow and judicial exceptions.

[51] *Id;* Of course, not everything can always be disclosed; sometimes the pressing concerns of privacy or security trump openness.

[52] Mission in Kosovo - Organization for Security and Co-operation in Europe, *Court Reporting Guidelines for Journalists,* Sept. 2023).

[53]

Independent Press Standards Organisation, *Guidance on Court Reporting* available at https://www.ipso.co.uk/media/2168/ipso-court-reporting-guidance.pdf .

[54] Independent Press Standards Organisation, *Editor's Code of Practice* (Jan. 2021).

समाचारको यथार्थता कायम गर्न उत्प्रेरित गरिएको उक्त मार्गदर्शनमा मुद्दाका पक्षलाई झिझ्याउने, पक्ष वा पक्षका परिवारको तस्विर सार्वजनिक गर्ने लगायतका कार्यलाई निषेध गरिएको देखिन्छ । साथै, सामाजिक सञ्जालको संवेदनशीलतालाई ध्यानमा राखी कुनै समाचार प्रकाशन गर्दा विशेष सतर्कता अपनाउन निर्देशन गरिएको देखिन्छ ।

क्विन्स्ल्यान्ड सेन्टेन्सिङ एड्भाइजरी काउन्सिलको अदालती पत्रकारिता सम्बन्धी मार्गदर्शन[55]

अष्ट्रेलियाका विभिन्न प्रान्तहरूमा प्रान्तिय क्षेत्राधिकारभित्र लागू हुने गरी अदालती पत्रकारिता सम्बन्धी मार्गदर्शनको निर्माण गरिएको पाइन्छ । हातेपुस्तिकाको स्वरुपमा निर्माण गरिएका उक्त मार्गदर्शनहरूमा पेशागत आचरण बाहेक प्रान्तको अदालती प्रक्रिया, कानून सम्बन्धी प्राविधिक शब्दावली र समग्र अदालती प्रणालीका बारेमा जानकारी दिइएको देखिन्छ । जसमध्ये क्विन्सल्यान्ड सेन्टेन्सिङ एड्भाइजरी काउन्सिलद्वारा पत्रकारका लागि निर्माण गरिएको अदालती रिपोर्टिङ मार्गदर्शन हेर्दा, विशेषतः मुद्दाको स्वच्छ सुनुवाईलाई कायम गर्न आचरणगत नियमहरू पालना गर्न सुझाइएको देखिन्छ । उक्त मार्गदर्शनमा कुनै मुद्दाको सुनुवाई सुरु भइसकेपछि त्यस मुद्दासँग सम्बन्धित पूर्वअवगत सूचनालाई उल्लेख गर्न वा सन्दर्भ स्रोतका रूपमा लिनबाट रोक लगाइएको देखिन्छ । यसरी उक्त मार्गदर्शनले कुनै पनि किसिमको समाचार सामग्रीबाट विचाराधीन मुद्दाका सम्बन्धमा भाष्य निर्माण गर्ने वा न्यायाधीशको निर्णयलाई प्रभावित गर्ने कार्यमा पूर्ण रोक लगाएको देखिन्छ ।

भारतीय व्यवस्था

अदालती पत्रकारिता सम्बन्धमा भारतीय व्यवस्था अन्य राष्ट्र भन्दा केहि पृथक रहेको देखिन्छ । भारतमा अदालती पत्रकारिताको गुणस्तर र सूचनाको यथार्थपरकता कायम गर्न प्रेस काउन्सिल मापदण्ड[56] र अदालतमा संवाददाताको प्रत्यायान सम्बन्धी मापण्ड[57] अवलम्बन गरिएको देखिन्छ । उक्त मापदण्डहरूको माध्यमबाट अदालतको मर्यादा, स्वच्छ सुनुवाई र गुणस्तरीय पत्रकारिता प्रवर्द्धन गर्दै अदालती पत्रकारिता सम्बन्धमा नैतिक मार्गदर्शन जारी गरिएको देखिन्छ ।

भारतीय सर्वोच्च अदालतद्वारा जारी गरिएको कानूनी संवाददाता प्रत्यायान मापदण्ड अनुसार, कानूनी संवाददाताले नियमित प्रत्यायान प्राप्त गर्न शैक्षिक योग्यता र कार्यानुभवको योग्यता पूरा गर्नु पर्ने देखिन्छ । शैक्षिक योग्यताको शर्त बमोजिम कानूनी संवाददाताले भारतीय बार काउन्सीलले मान्यता दिएको कानूनी उपाधी प्राप्त गरेको हुनुपर्दछ भने नियमित एवं अविच्छिन्न रूपमा कम्तिमा पाँच वर्ष सर्वोच्च अदालतको रिपोर्टिङ गरी अनुभव प्राप्त गरेको पत्रकारका हकमा निजले कुनै अन्य विषयमा स्नातकोपाधि हासिल गरेको भएमा प्रधान न्यायाधीशको निर्णयले निजलाई सर्वोच्च अदालतमा प्रत्यायित गर्न सकिने देखिन्छ । [58] त्यस्तै, कार्यानुभवको योग्यता शर्त बमोजिम त्यसरी प्रत्यायित हुन चाहने व्यक्तिले सर्वोच्च अदालत वा अन्य भारतीय उच्च अदालतमा कम्तिमा साढे तीन वर्षको रिपोर्टिङ गरेको अनुभव सहित अविच्छिन्न एवं नियमित रूपमा कम्तिमा पाँच वर्षको अदालत रिपोर्टिङको अनुभव हासिल गरेको हुनुपर्ने देखिन्छ । [59] विद्युतीय सञ्चार माध्यमको हकमा भने सर्वोच्च अदालत वा भारतीय उच्च अदालतको कम्तिमा दुई वर्षको रिपोर्टिङको अनुभव समेत गरी पाँच वर्षसम्म अविच्छिन्न तथा नियमित रूपमा अदालत रिपोर्टिङको अनुभव भए पुग्ने देखिन्छ । [60]

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[55] Queensland Sentencing Advisory Council, *Court Reporting Guide for Journalists,* June 2019.

[56] Press Council India, *Press Council Norms of Journalistic Conduct* (Edition, 2022).

[57] Supreme Court of India, *Norms for Accreditation of the Legal Correspondents in the Supreme Court of India,* (Amended, 2018).

[58] Norms for Accreditation of the Legal Correspondents in the Supreme Court of India, Norm 1.

[59] Norms for Accreditation of the Legal Correspondents in the Supreme Court of India, Norm 2.

[60] Norms for Accreditation of the Legal Correspondents in the Supreme Court of India, Norm 2.

त्यस्तै, भारतीय प्रेस काउन्सिलले जारी गरेको पत्रकारको पेशागत आचार संहितामा अदालती पत्रकारितासँग प्रत्यक्ष सम्बन्ध राख्ने दुईवटा नियमहरू राखिएको छ; जसमा अदालती मर्यादा र स्वच्छ सुनुवाई सम्बन्धमा विशेष प्रावधान रहेको देखिन्छ। उक्त प्रावधानहरूमा निम्नानुसार व्यवस्था गरेको देखिन्छ;

न्यायिक कार्यको आलोचना गर्दा अपनाउनु पर्ने सावधानी[61]

यस प्रावधान बमोजिम अदालती रिपोर्टिङ तथा पत्रकारिता गर्ने क्रममा न्याय प्रशासनको कार्यमा प्रतिकुल प्रभाव पार्ने तथा विचाराधीन मुद्दामा टिप्पणी गर्ने, बहस चलाउने वा मिडिया ट्रायल हुने गरी सामग्रीको प्रकाशन प्रशारण गर्न रोक लगाइएको देखिन्छ। यस प्रावधानले रोक लगाइएका सामग्रीहरूमा अभियुक्तको व्यक्तिगत चरित्र, साबिती बयान र अभियुक्तलाई हिरासतमा लिइसकेको अवस्थामा पत्रपत्रिकाले खोजपत्रिकाको माध्यमबाट आफै संकलन गरेका प्रमाण लगायतका विषयवस्तु समेत पर्दछन्। त्यस्तै, सार्वजनिक हितका लागि फैसलाको आलोचान गर्न सकिने भएतापनि न्यायाधीश उपर अनुचित आशंका वा व्यक्तिगत आग्रह प्रस्तुत गर्ने, निजको इमान र सक्षमता विरुद्ध लाञ्छना लगाउने र अदालतलाई विवादास्पद तुल्याउने सामग्री प्रकाशन गर्न रोक लगाइएको पाइन्छ। उक्त प्रावधानले अदालती अवहेलनाको मुद्दा आकर्षित नहुने अवस्थामा पनि अनुचित आलोचना गर्नबाट रोक लगाएको देखिन्छ।

अदालती कारवाही सम्बन्धी समाचारको रिपोर्टिङ[62]

यस प्रावधान बमोजिम अदालती समाचार सामग्रीको प्रकाशन गर्नुपूर्व सूचनाको वास्तविकता, यथार्थता र आधिकारिकता परीक्षण गर्न निर्देशन गरिएको देखिन्छ। त्यस्तै, इजलासमा सुनुवाईका बेला न्यायाधीशद्वारा सोधिएका प्रश्न सत्य तर्फ पुग्न गरिएको प्रयास समेत हुन सक्ने हुँदा सो बारे सावधानी अपनाउन भनी उल्लेख गरिएको देखिन्छ। साथै, कुनै सामग्री निर्माण गर्दा मुद्दासँग सम्बद्ध कानून व्यवसायी र न्यायाधीशको नाम बोक्ने वा कुनै विषयलाई मात्र खास जोड दिई मनोमानी ढंगले फैसलाको विषयवस्तु उद्धरित गर्ने कार्यबाट रोक लगाइएको देखिन्छ।

राष्ट्रिय व्यवस्थाः पत्रकार आचारसंहिता, २०७३

नेपालमा पत्रकारिताको अभ्यासलाई उच्च पेशागत, मर्यादित, जवाफदेही एवं उत्तरदायी बनाउन सबै सञ्चार माध्यम र पत्रकारलाई लागू हुने गरी पत्रकार आचारसंहिता, २०७३ जारी गरिएको पाइन्छ। अदालती पत्रकारीताको क्षेत्रका लागि छुट्टै आचरणगत निर्देशिका जारी गरिएको नभएतापनि उक्त आचारसंहितामा व्यवस्था गरिएका केहि प्रावधानहरूले अदालती पत्रकारितासँग सम्बद्ध नैतिक आचरणलाई समेटेको देखिन्छ। वस्तुतः आचारसंहिताको नियम ५(११) प्रत्यक्ष रूपमा अदालती पत्रकारितासँग जोडिएको देखिन्छ। उक्त प्रावधानमा "पत्रकार तथा सञ्चारमाध्यमले न्यायिक निकायमा विचाराधीन मुद्दाको स्वच्छ सुनुवाइ प्रक्रिया वा निर्णयमा प्रतिकूल असर पार्ने गरी कुनै पनि सामग्री सम्प्रेषण हुनुहुँदैन" भनी व्यवस्था गरिएको देखिन्छ।[63] पत्रकारिताको क्षेत्रमा उक्त प्रावधानको पूर्ण अनुपालन भएको छ भन्ने दावी गर्न सकिने अवस्था भने देखिँदैन। त्यस्तै, उक्त आचार संहिताले अपराधबाट प्रभावित व्यक्ति (survivor) तथा पीडित व्यक्तिलाई नकारात्मक असर पर्ने गरी वा निजको गोपनियतामा असर पर्ने गरी समाचार, तस्वीर र दृश्य उत्पादन, वितरण वा प्रकाशन-प्रशारणमा समेत रोक लगाएको देखिन्छ।[64] साथै, आचार संहिताको नियम ३(९) मा पत्रकार तथा सञ्चार माध्यमहरूलाई गोपनियताको हकको

[61] Press Council Norms for Journalistic Conduct, Rule 6a.

[62] Press Council Norms for Journalistic Conduct, Rule 6b.

[63] पत्रकार आचारसंहिता, २०७३, नियम ५ उपनियम ११।

[64] पत्रकार आचारसंहिता, २०७३, नियम ५ उपनियम ४।

सम्मान गर्न निर्देशन गरिएको देखिन्छ।[65] महिला-संवेदनशील पत्रकारिता गर्न आह्वान गर्दै प्रेस काउन्सिलद्वारा जारी गरिएको निर्देशिकाले लैङ्गिक कसूरको अदालती कारवाही सम्बन्धमा अवलम्बन गर्नुपर्ने अभ्यासलाई समेत समेटेको देखिन्छ।[66] यसरी गोपनियता र स्वच्छ सुनुवाई कायम गर्न पत्रकार आचारसंहिता, २०७३ मा केहि गोश्वारा व्यवस्था गरिएको भएतापनि अदालती पत्रकारिताको विशेष प्रकृतिलाई सम्बोधन गर्न भने सकिएको छैन।

अदालती पत्रकारितामा व्यवसायिकता तथा नैतिकता प्रवर्द्धनका उपायहरू

समग्रमा हेर्दा, पश्चिमा देशहरूमा अवलम्बन गरिएका मार्गदर्शन, पत्रकार आचारसंहिता, २०७३, यस अघिका खण्डमा विवेचना गरिएका विषय समेतको आधारमा अदालती पत्रकारितामा कायम समस्याहरूलाई निम्नानुसारका स्वनियमनका उपायहरू अबलम्बन गरी समाधान गर्न सकिने देखिन्छ;

व्यवसायिक दक्षता

अदालती रिपोर्टिङमा विशेषज्ञ पत्रकारिता कायम गर्न अदालती बिटमा कार्यरत प्रत्येक पत्रकारले नेपालको संविधान, न्याय प्रणाली, अदालती कार्यविधि र सर्वोच्च अदालत लगायत अन्य अदालतको वेबसाइट सम्बन्धमा आवश्यक ज्ञान आर्जन गर्नु आवश्यक छ। पत्रकारहरूले अदालतको वेबसाइटबाट दैनिक पैसी सूची हेर्ने, महत्त्वपूर्ण र नियमित आदेश वा फैसला प्राप्त गर्ने तथा अदालतबाट आदेश वा फैसलाका कागजहरूको प्रतिलिपि लिने लगायतका विषयमा आफ्नो सिप विकास गर्न सक्दछन्। त्यस्तै, अदालतमा दैनिक रूपमा प्रयोग हुने कानूनी शब्दावलीहरूको अर्थ, अदालती कार्यविधि एवम् अन्तरिम तथा अन्तरकालीन आदेशको प्रभाव र अदालती मर्यादाका नियम र मान्यता समेतको अध्ययन गरी पत्रकारहरूले पेशागत व्यवसायिकता आर्जन गर्न सक्दछन्।

नैतिक आचरण

अदालती पत्रकारितामा नैतिकता प्रवर्द्धन गर्न निम्नानुसारका उपायहरू अवलम्बन गर्न सकिन्छ;

गर्नु पर्ने कार्यः

क) अदालत वा कुनै मुद्दा विशेष रिपोर्टिङ गर्दा सूचनाको यथार्थता, विश्वसनियता र आधिकारिकता परीक्षण गर्नु पर्ने,
ख) समाचार सम्प्रेषण गर्नु पूर्व अदालती कागजातबाट समाचारको यथार्थता पुष्टि गर्नुपर्ने,
ग) विश्वसनिय, वैधानिक र अधिकाधिक स्रोतबाट प्राप्त सूचनाको मात्र सम्प्रेषण गर्नुपर्ने,
घ) मुद्दाको अन्तिम सुनुवाई भइसकेको छैन भने आफूले सम्प्रेषण गरेको समाचारमा अन्य प्रमाणहरू पेश हुन बाँकि रहेको र अदालती कारवाही चलिरहेको भनी उल्लेख गर्नुपर्ने,
ङ) मुद्दामा सुनुवाई हुनु पूर्व पत्रकार तथा सञ्चार माध्यमलाई थाहा भएका मुद्दासम्बन्धी सूचनालाई उल्लेख नगरी मुद्दा सम्बन्धी समाचार सामग्री निर्माण गर्नुपर्ने,
च) मुद्दाका कुनै पक्षको पक्षपाती नभई सबै पक्षको विषयलाई समेटी संतुलित पत्रकारिताको अभ्यास गर्नु पर्ने,
छ) फौजदारी मुद्दाको रिपोर्टिङ गर्दा अभियुक्तको दोष वा निर्दोषिताबारे संकेत नगरी समाचार लेख्नुपर्ने,
ज) इजलास कक्षभित्रका घटना रिपोर्ट गर्दा मुद्दाको अभिलेखमा जाने र नजाने कुराको भिन्नता बोध गरी सो अनुसार समाचार सामग्री प्रकाशन गर्नुपर्ने,
झ) लाईभ ट्विट वा लाईभ ब्लग गर्दा अदालती कारवाही र मर्यादामा बाधा नपुग्ने गरी गर्नुपर्ने,

[65] पत्रकार आचारसंहिता, २०७३, नियम ४ उपनियम ९।

[66] महिला उत्तरदायी सञ्चार निर्देशिका, २०७६।

ञ) अदालतमा हुन सक्ने भ्रष्टाचार वा अनियमितता सम्बन्धमा समाचार प्रकाशन गर्दा यथार्थता र वस्तुनिष्ठता प्रवर्द्धन गर्नुपर्ने,

गर्न नहुने कार्यः

क) पीडित वा साक्षीको गोपनियता हनन् हुने गरी समाचार सामग्री प्रकाशन प्रशारण गर्न नहुने,
ख) विशेषतः यौन कसूरमा पीडितको नाम, पहिचान वा अन्य कुनै पहिचान सम्बन्धी विवरण खुलाउन नहुने,
ग) समाचार सम्प्रेषण गर्दा आफ्नो वा अन्य कसैको विचारलाई समावेश गर्न नहुने,
घ) विचाराधीन मुद्दामा अभियुक्तको आपराधिक पृष्ठभूमिबारे उल्लेख गर्न नहुने,
ङ) अदालत तथा इजलासभित्र अनुमतिबिना फोटो, भिडियो वा अडियो रेकर्ड गर्न नहुने,
च) अदालतमा पेश गरिएका प्रमाण साक्षी बाहेक अदालती कारवाही भन्दा बाहिर अनुसन्धानका बेला थाहा हुन आएका कुराहरूको उल्लेख गर्न नहुने,
छ) विचाराधीन मुद्दामा पीडित, साक्षी, अभियुक्त वा संलग्न कानून व्यवसायीको अन्तर्वार्ता लिन नहुने,
ज) मुद्दा सम्बद्ध कागजात र प्रमाणहरू प्रकाशन प्रशारण गर्न नहुने,
झ) मुद्दाका पीडित वा अभियुक्तका अभिव्यक्तिहरूका रूपमा रहने "खुला पत्र" प्रकाशन प्रशारण गर्न नहुने,
ञ) अदालत भित्र कुनै किसिमको भित्री "सुत्र" वा "स्रोत"हरू स्थापना गर्न नहुने,
ट) न्यायाधीशको आचरण सम्बन्धमा अनैतिक तथा अवैधानिक स्रोतबाट प्राप्त सूचनलाई प्रश्रय दिन नहुने,
ठ) सम्पूर्ण अदालतलाई विवादास्पद बनाउने गरी सामग्री प्रकाशन गर्न नहुने,
ड) कुनै किसिमको भाष्य निर्माण गर्ने उद्देश्यले अदालती फैसला वा आदेशका निश्चित प्रकरणहरू छनोट गरी तिनलाई मात्र प्रकाशन प्रशारण गर्न नहुने,
ट) न्यायाधीश उपर व्यक्तिगत लाञ्छना लगाउन नहुने,

उल्लिखित उपायहरूको अवलम्बन पूर्णतः पत्रकार तथा सञ्चार माध्यमहरूको प्रयासमा निर्भर रहन्छ । मिथ्या सूचना निरुत्साहित गर्न र समस्त न्याय प्रणालीको सार्वजनिक विश्वास कायम गर्न तत्पर पत्रकार तथा सञ्चारकर्मीको कर्तव्यपरायण गतिबिधिबाट अदालती पत्रकारितामा नैतिकता प्रवर्द्धन हुनेमा विश्वास गर्न सकिन्छ ।

७. उपसंहार

निष्कर्षमा, ईन्टरनेटको उदय र विकास सँगै मिथ्या समाचारको जोखिम उच्च रहेकोमा विवाद देखिँदैन । खासगरी, अदालतजस्तो संवेदनशील निकायको गरिमा र मर्यादामा आँच आउने गरी समाचार सम्प्रेषण हुँदा समग्र न्याय प्रणाली प्रभावित हुने हुनाले यसतर्फ सावधानी अपनाउनु आवश्यक देखिन्छ । त्यसो त मिथ्या सूचनाको संक्रमण रोक्न मिथ्या समाचार फैलाउने निकायलाई दण्ड गर्न सकिने व्यवस्था नभएको भने होइन । सञ्चार माध्यमहरूका आफ्नै आचारसंहिता र स्वनिमयन प्रणालीले पनि मिथ्या सूचनाको न्यूनिकरणमा भूमिका खेलेको पाइन्छ । यद्यपि अदालत तथा मुद्दासम्बन्धी विषयवस्तुलाई लिएर समाचार सामग्री तयार पार्ने क्रममा पर्याप्त सावधानी नअपनाउँदा अदालती मर्यादामा आँच आउने तथा मुद्दाको स्वच्छ सुनुवाईमा प्रतिकुल प्रभाव पर्ने जोखिम बढेको देखिन्छ ।

खासगरी अदालती पत्रकारिताको क्षेत्र अन्य बिट पत्रकारिता भन्दा पृथक प्रकृतिको रहने हुँदा यस क्षेत्रमा कार्यरत पत्रकार र सञ्चार माध्यमहरूको व्यवसायिक अभ्यासलाई प्रवर्द्धन गर्न छुट्टै मार्गदर्शनको आवश्यकता रहेको देखिन्छ । न्यायालयको

गरिमा र विश्वसनियताको दिगो संरक्षण र प्रबर्द्धन गर्न पनि अदालती पत्रकारितालाई सहयोग हुने प्रकृतिको मार्गदर्शन वा आचरणगत निर्देशिका आवश्यक रहेको देखिन्छ । त्यसरी कुनै आचारणगत निर्देशिका निर्माण हुँदा प्रेस स्वतन्त्रताको अधिकारको प्रयोगमा भने कुनै वञ्चना वा रोक लगाइनु हुँदैन ।

हालै मात्र संवैधानिक तथा न्यायिक पत्रकार मञ्चको सक्रियता र अदालत, प्रेस तथा सरोकारवाला निकायको सहभागितामा अदालती पत्रकारिता सम्बन्धी मार्गदर्शन निर्माण गर्ने प्रयास भइरहेको देखिन्छ । नवोदित पत्रकार तथा सञ्चार माध्यमलाई समग्र न्याय प्रणाली तथा अदालती पत्रकारिताका अन्तरवस्तुसँग परिचय गराउने उद्देश्यले गरिएको उक्त प्रयासले न्यायिक मर्यादा प्रवर्द्धन गर्नेमा विश्वास गर्न सकिन्छ । साथै, मिथ्या सूचनाको निरुत्साहन तथा प्रेस स्वतन्त्रता र स्वच्छ सुनुवाई बीच पर्याप्त सन्तुलन कायम गर्न उक्त मार्गदर्शन सफल भएमा न्यायालय र सञ्चार माध्यम दुवैको सार्वजनिक विश्वसनियता प्रवर्द्धन हुनेमा आशावादी हुन सकिन्छ ।

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संविधानको व्याख्याः धारा ७६(५) को प्रसंग सहितः

मेघराज पोखरेल
न्यायाधीश, सर्वोच्च अदालत

विषय प्रवेश:

संविधानको धारा ७६(५) बमोजिम प्रधानमन्त्रीमा दावी गर्न प्रतिनिधिसभामा विश्वासको मत प्राप्त गर्नसक्ने आधार प्रस्तुत गरि राष्ट्रपति समक्ष पेस गर्ने समावेदनमा प्रतिनिधिसभाका सदस्यहरूले व्यक्तिगत समर्थन गर्न मिल्छ कि मिल्दैन ? यदि मिल्छ भने समावेदन गरिएको दावीमा द्विविधा उत्पन्न भएमा राष्ट्रपतिको छानविन गर्ने अधिकार कति हुन्छ भन्ने सन्दर्भमा सम्मानित सर्वोच्च अदालतले दुईवटा फैसला मार्फत व्याख्या समेत गरिसकेको छ।

यो धाराको व्याख्या र विश्लेषणलाई सजिलो बनाउनका लागि धारा ७६(५)लाई तल उद्धरण गरिएको छ :

> धारा ७६(५) उपधारा (३) बमोजिम नियुक्त प्रधानमन्त्रीले उपधारा (४) बमोजिम विश्वासको मत प्राप्त गर्न नसकेमा उपधारा (२) बमोजिमको कुनै सदस्यले प्रतिनिधि सभामा विश्वासको मत प्राप्त गर्न सक्नेआधार प्रस्तुत गरेमा राष्ट्रपतिले त्यस्तो सदस्यलाई प्रधानमन्त्री नियुक्ती गर्नेछ।

संविधान व्याख्यामा विधायिकी प्रकृयाको महत्त्व:

यो उपधारा अन्तर्गत प्रस्तावित प्रधानमन्त्रीको समावेदनमा प्रतिनिधिसभाका सदस्यहरूले व्यक्तिगत रूपमा समर्थन गर्न मिल्छ वा मिल्दैन भन्ने सम्बन्धमा निरूपण गर्न यो उपधारा निर्माण गर्दा संविधानसभाले गरेको संविधान निर्माणको पृष्ठभूमीको अध्ययन गर्नु आवश्यक छ। **संविधानसभा, राज्यको शासकीय स्वरूप निर्धारण समितिले तयार पारेको अवधारणपत्र एवं व्याख्यात्मक टिप्पणी सहितको प्रारम्भिक मस्यौदा प्रतिवेदन**मा यो उपधारा (५) को व्यवस्था नै राखिएको थिएन। यो प्रतिवेदनको पृष्ठ XIV विषयबस्तु नं. १५ मा मन्त्रीपरिषद्को गठन र पृष्ठ XVII विषयवस्तु नं. २३ मा प्रधानमन्त्रीको नियुक्ति सम्बन्धी विशेष व्यवस्था उल्लेख गरिएको छ। त्यसमा यो उपधारा (५) प्रस्तावित गरिएको छैन। तर सोही प्रतिवेदनको तत् पृष्ठहरूमा "व्यवस्थापिकाको समर्थन रहेसम्म प्रधानमन्त्री पदमा वहाल रहने व्यवस्था रहेको छ" भन्ने र "कुनै अवस्थामा व्यवस्थापिकाको तल्लो सदनले सरकार गठन गर्न नसक्ने अवस्था भएमा यस्तो सदनलाई कायम राख्न औचित्यहिन हुने भएकोले यसलाई भंग गरी आम निर्वाचनको मिति तोक्नु पर्ने व्यवस्था गरिएको छ" भन्ने उल्लेख गरिएको हुँदा प्रतिनिधिसभाले वैकल्पिक प्रधानमन्त्री दिएसम्म सबै उपायबाट प्रधानमन्त्री चयन हुनुपर्ने आसय राखेको देखिन्छ। यसरी प्रधानमन्त्री दिन नसकेको अवस्थामा मात्र अन्तिम अस्त्रको रूपमा प्रतिनिधिसभाको विघटन गरि आम निर्वाचनको घोषणा गर्नुपर्ने वैधानिक मनशाय हो। यसले व्यवस्थापिकाको तल्लो सदन "समुच्च" लाई सरकार गठनका लागि जिम्मेवार बनाएको छ। दलगत जिम्मेवारीलाई पार्थक्यरूपमा औल्याएको छैन। संविधानको अन्तिम मसौदा तयार हुँदा उपधारा (५) थपेर प्रतिनिधिसभा "समुच्च" समक्ष प्रधानमन्त्री चयनको अझ थप वैकल्पिक उपाय दिएको हो। अतः संविधानसभाले धारा ७६(५) बमोजिमको प्रधानमन्त्री चयनको समावेदनमा प्रतिनिधिसभाका सदस्यहरूले व्यक्तिगत रूपमा पनि समर्थन गर्नसक्ने व्यवस्था गरेको

स्पष्ट हुन्छ । सार्वभौम नेपाली जनताले निर्वाचित गरी पठाएका प्रतिनिधिहरूले प्रतिनिधि सभाको आफ्नो पूर्ण क्रियाशील जीवन ५ वर्षसम्म प्रधानमन्त्री चयनमा लगायतका विषयहरूमा अधिकार प्रयोग गर्न पाउँने हो । प्रधामन्त्री चयन गर्नसकेसम्म प्रतिनिधिसभा विघटन नै हुँदैन । यो उपधारालाई दलगत हिसावले व्याख्या गर्ने हो भने यो उपधारा नै निरर्थक र निष्क्रिय हुने अवस्था हुँन आउछ । अन्य कुनै संविधान-अधिनस्थ कानूनको सहारा लिएर सम्बैधानिक व्यवस्था नै निष्प्रयोजित तथा निष्कृय हुने गरि संविधानको व्याख्या गर्न मिल्दैन । यो धाराको व्याख्या गरी सम्मानित सर्वोच्च अदालतको संवैधानिक इजलाशले प्रतिनिधिसभाका सदस्यहरूले व्यक्तिगतरूपमा पनि समर्थन गर्नसक्ने भनी व्याख्या गरिसकेको छ ।

संविधान व्याख्यामा उद्धश्यमूलक सिद्धान्त:

Interpriting Constitutions: A Comparative Study k':ts}df **The United States: Eclecticism in the Service of Pragmatism** भन्ने शीर्षकको परिच्छेदमा *Mark Tushnet* संविधानको व्याख्यामा तलको सिद्धान्त अनुशरण गर्नुपर्ने बताउछन्:

> ˚Ordinarily we translate the Constitution's words first by identifying the principles those words embodied at the time they were written into the Constitution, and then by determining how those principles apply to contemporary problems".
>
> -*Jeffery Goldsworthy* (Ed), **Interpriting Constitutions: A Comparatitive Study**, Oxford University Press, First published in paperback 2007, **P. 39**.

जर्मनीको Basic Law (संविधान) को व्याख्या गर्दा त्यहाँको संवैधानिक ईजलाशले अपनाउने गरेको व्याख्याको पद्धतिका वारेमा **Interpriting Constitutions: A Comparative Study** पुस्तक मा **Germany: Balancing Rights and Duties** भन्ने परिच्छेदमा *Donald P. Kommers* ले यसरी उल्लेख गरेको छन्:

> ˚As noted, the Basic Law is an elaborate and often inconsistent framework of rules, powers, and principles. Notwithstanding its repeated reference to the need for *balancing* rights and duties, the Federal Constitutional Court tends to define its interpretive role as one of harmonizing inconsistencies and carving order out of uncertainty and paradox. From the beginning, the Federal Constitutional Court has insisted on the Basic Law's fundamental underlying unity. The Court has even described the document as a 'logical-teleological' entity, a concept traceable to Rudolf Smend's 'integration' theory of the constitution. More recently, the Court has referred to the 'constitutional order as a holistic unity of meaning.' This notion of the constitu- tion as a substantive unity has good pedigree in Germany's tradition of *Begriffsjurisprudenz* (conceptual jurisprudence), a tradition that envisions law as a self-contained, internally coherent, system of rules and norms. Yet constitutional law transcends the boundaries of positive law. Social context, political morality, and cultural norms play an important role in constitutional interpretation. An important interpretive

canon postulates the interdependence of the constitutional order and the broader community." **pp. 177-178.**

"These (modes of interpretation) include legalistic modes of analysis along with an effort to determine the general purpose of textual provisions in the light of their historical, philosophical, and socio-moral determinants. But the constitution includes more than the documentary text. What might be called the *working* text arguably extends to long-established practices whose attenuation would raise serious constitutional issues." **P.190.**

"Another approach to constitutional interpretation is structural—or what the Germans call 'systematic' reasoning. This mode of reasoning stems from the FCC's view of the Basic Law as a unified structure of values and relationships. In its first major decision–the *Southwest State Case* (1951)–the Court underscored the critical importance of the Constitution's unity. 'No single constitutional pro- vision may be taken out of its context and interpreted by itself,' declared the Court. 'Every constitutional provision,' it continued, 'must always be interpreted in such a way as to render it compatible with the fundamental principles of the Constitution as a whole.' In its narrow sense, structural analysis focuses not on the meaning of specific, isolated clauses, but rather on the location of the clause and its relation to the whole text. In a broader sense, it seeks unity and coherence not only in the text, but in the larger political order the text signifies." **P. 199.**

संविधानको निर्माण गर्दा संविधानसभा जस्तो युगिन संस्थाबाट भविष्यातित् लक्ष राखेर निर्माण गरिन्छ र संविधानको संशोधनको प्रक्रिया जटील र केही सैद्धान्तिक सीमामा सीमाबन्ध हुन्छन् । त्यसैले संविधानलाई समयानुकूल ग्रहणशील बनाउन अदालतले व्याख्याको माध्यमबाट रचनात्मक भूमिका खेल्नुपर्दछ । संविधान एक जीवन्त दस्तावेज भएको हुनाले यसको व्याख्या गर्दा केवल व्याकरणगत व्याख्या मात्र नगरी लक्ष्यात्मक (Purposive) व्याख्या गर्नुपर्दछ भनी आहरन बराक भन्दछन् । आहरन बराक इज्रायलको हेब्रु युनिभरसिटीका प्रोफेसर तथा इज्रायलको सर्वोच्च अदालतका निर्वत्त प्रधानन्यायाधीश (President of the Supreme Court) हुन् । उनको पुस्तक **Purposive Interpretation of Law** मा उनले उल्लेख गरेका व्याख्याका पद्धति, सिद्धान्त र तरिकाहरू प्रस्तुत संवैधानिक व्याख्याको सम्बन्धमा उपयोगि देखेका छौं । निजले लेखेको उल्लेखित पुस्तक **Constitutional Interpretation** परिच्छेदको सांदर्भिक अंश तल उद्धरण गरिएको छः

"Constitutional language is no different than any other kind of language. It is the natural language used by a given society, at a given point in time. Constitutions, however, contain more "opaque" expressions than other legal texts. They include many terms that could be interpreted in a number of ways, and many constitutional provisions are "open-textured" and opaque. Of course, all

language can be open-textured and opaque for some sets of facts, but constitutional language is open-textured and opaque for many, if not most, sets of facts. Three primary reasons explain this state of affairs: *First*, a constitutional text expresses national agreement. In order to reach agreement, nations generally must confine themselves to opaque and open-ended terms, reflecting their ability to reach consensus only at a high level of abstraction. *Second*, a constitutional text seeks to establish the nation's fundamental values, covenants, and social viewpoints. We tend to express those concepts in value-laden language, conveying a message that is rarely clear or unequivocal. *Third*, a constitutional text is designed to regulate human behavior for future generations. It takes a long-term view, assuming that viewpoints, positions, and social behavior will change. It must adopt language flexible enough to include the new viewpoints, positions, and modes of behavior that cannot be predicted at the time it is written. Otherwise, the constitutional text would be obsolete the day it is enacted. At the same time, a constitutional text must be definitive enough to bind the branches of government and prevent them from behaving, in the future, in a way that is contrary to the viewpoints, positions, and social behavior that the text seeks to preserve. **Pp. 372-373**.

There are two kinds of puroposes of the Constitution, subjective and objective.

The subjective purpose of a constitution is the goals, interests, values, aims, policies, and function that the founders of the constitution sought to actualize. Despite literature arguing the contrary, I believe that a constitution has a subjective purpose that judges can identify. Without such intention, the founders could not have enacted the constitution. If credible historical information about it exists, then it can be identified. Recall that we are interested in abstract, not concrete or interpretive, intention. **P-375.**

The objective purpose of a constitution is the interests, goals, values, aims, policies, and function that the constitutional text is designed to actualize in a democracy. Justice Lamer of Canada expressed this well in noting that "Our constitutional *Charter* must be construed as a system where every component contributes to the meaning as a whole, and the whole gives meaning to its parts... The court must interpret each section of the Charter in relation to the other." We assume constitutional unity. A constitutional norm is part of a larger constitutional project. A specific constitutional provision affects our understanding of the constitution as a whole, and vice versa. In formulating the

purpose of a constitutional text, the interpreter should seek the purpose that best advances constitutional unity and harmony." **Pp. 377-378.**

-Aharon Barak, **Purposive Interpretation of Law**, (*Translated from the Hebrew by Sari Bashi*), 2005 by Princeton University Press, 2005.

सर्वोच्च अदालतको व्याख्या:

सर्वोच्च अदालतको संवैधानिक ईजलाशले धारा ७६ को समग्र आशय र भावनाका वारेमा *०७७-WC-००३७* को (लगायत) रिटमा बाध्यकारी नजिर सिद्धान्त कायम गरिसकोको छ । सान्दर्भिक खण्ड तल उद्धरण गरिएको छः

"त्यसैले धारा ८५(१) ले "यस संविधानमा अगाडी विघटन भएकोमा बाहेक" भन्ने वाक्यांशले प्रतिनिधिसभा निर्वाचन पश्चात धारा ७६ को उपधारा (१), (२), (३) र (५) बमोजिम प्रधानमन्त्री नियुक्त हुन नसकेपछि वा नियुक्त प्रधानमन्त्रीले विश्वासको मत प्राप्त गर्न नसकेपछि प्रतिनिधिसभाको अरु कुनै सदस्य प्रधानमन्त्री नियुक्त हुने विकल्प समाप्त भएपश्चात धारा ७६ को उपधारा (७) बमोजिम प्रतिनिधिसभा विघटन हुने प्रावधान रहेको भन्ने अर्थ नै बुझाउछ।"

"जनताले चुनावमार्फत् संसद दिन्छ, संसदले नै सरकार दिन्छ भन्ने मान्यतामा संसदीय व्यवस्था चलेको हुन्छ। संविधान निर्माताले आफ्नै देशका विगतका अभ्यासहरू समेतलाई मध्येनजर राखि संसदले सरकार दिनसक्ने अवस्था र विकल्प कायम रहेसम्म प्रतिनिधिसभामा बहुमत कायम रहेको संसदीय दलको नेतालाई नेपालको संविधानले धारा ७६ को उपधारा (७) मा उल्लेखित प्रावधानहरूको अभ्यास गर्नुपर्ने अवस्थाको परिकल्पना गरेको देखिदैन।"

यसरी ७६ को उपधारा (५) बमोजिमको प्रधानमन्त्री बन्न प्रतिनिधिसभाको कुनै पनि सदस्य भए हुने तर दलहरूका सांसदहरूले एकमुष्ठ समर्थन दिनुपर्छ भनि व्याख्या गर्दा यो उपधाराको मनशाय नै पराजय हुन पुग्छ । संविधानको कुनै पनि प्रावधानमा ७६ को उपधारा (५) बमोजिमको प्रस्तावित प्रधानमन्त्रीलाई दलका सांसदहरूले पृथक समर्थन गर्न मिल्दैन भनि निषेधात्मक प्रावधान राखेको पनि पाइँदैन । सांसदहरूले आफ्नो राजनीतिक स्वायत्तता (Political Autonomy) कायम गरि स्वतन्त्रपूर्वक मत जाहेर गर्न सक्दछन् । सम्मानित संवैधानिक ईजलाशले माथिको मुद्दाको आदेशमा दिएको आदेशको मर्म र आशय पनि त्यही देखिन्छ।

धारा ७६(५) मा सुक्ष्म दृष्टि दिँदा उपधारा (२) मा लेखिए देखि बाहेकका शब्दहरू "प्रतिनिधिसभामा विश्वासको मत प्राप्त गर्नसक्ने आधार प्रस्तुत गरेमा" प्रयुक्त छन् । उपधारा (२) मा दलीय सर्मथन हुने भएपछि उपधारा (५) लाई दलीय बन्धनमा बाँध्ने मनसाय भए यी थप शब्दावलीको आवस्यकता पर्ने थिएन । प्रतिनिधिसभामा विश्वासको मत प्राप्त गर्नसक्ने दलीय समर्थन बाहेकका अन्य के आधारहरू हुनसक्छन भनी हेर्दा पक्का पनि प्रतिनिधिसभाका थप सदस्यहरूको समर्थन भन्ने अर्थ गर्नुपर्ने हुन्छ। माथि उल्लेखित संविधान व्याख्याका सिद्धान्तहरूले पनि हामीलाई यसै निष्कर्षमा पुग्न मद्दत गर्दछन्।

संविधानको रचनात्मक व्याख्या संवन्धि सिद्धान्त:

संवैधानिक प्रावधानहरूलाई सम्बृद्ध बनाउन संविधानमा साङ्केतिकरूपमा मात्र राखिएका वाक्यांशहरूको रचनात्मक व्याख्या गर्नुपर्ने अभ्यास अमेरिका र भारतका सर्वोच्च अदालतहरूले गरेका छन् । धारा ७६(५) मा

राखिएको "प्रतिनिधिसभामा विश्वासको मत प्राप्त गर्नसक्ने आधार प्रस्तुत गरेमा" वाक्यांशले सांकेतिकरूपमा मात्र आसय राखि अर्थलाई मौनरूपमा ग्रहण गरेको छ । यसले गरेको संकेतको मूलसम्म पुग्न ती मुलुकका अभ्यासहरू सहयोगी हुनसक्दछन् ।

संयुक्त राज्य अमेरिकाको संघीय व्यवस्थापिकाले बैंक अफ द यूनाईटेड स्टेस्ट्स् स्थापना गर्न बनाएको संघीय कानून संघको अधिकारको सूचिभित्र नपर्ने हुँदा न्यायिक पुनरावलोकबाट बदर गरिपाँउ भनि अमेरिकाको संघीय सर्वोच्च अदालतमा सन् १८१९ मा मुद्दा पऱ्यो । वास्तबमा संघको अधिकारको सूचिमा बैंक खोल्न पाँउने अधिकार समावेश छैन र कुनै सूचिमा नपरेको अधिकार अवशिष्ठ अधिकारकारूपमा राज्यलाई रहने अमेरिकन संविधानको व्यवस्था छ । *McCulloch v Maryland* 17 US 316 (1819) नामले चर्चित उच्च मुद्दा प्रधानन्यायाधीशले जोन मार्शलले एक ल्याण्डमार्क व्याख्या गरेर उक्त ऐन अमान्य (Ultra virus) नहुने फैसला गरे । केन्द्रको अधिकारको सूचिमा परेको कर संकलनको अधिकार, ऋण उठाउन सक्ने अधिकार तथा सैनिक/जलसैनिकहरू राख्न पाउने अधिकारले नै बैंक खोल्न पाउने अधिकारको सङ्केत गर्छ किनभने यी अधिकारहरूको प्रयोग गर्न बैंकको आवस्यक पर्ने कुरा साङ्केतिक रूपमा बुझ्नुपर्छ । उत्तरमा उठेको संचित कोष दक्षिणमा पठाउनु पर्छ भने दक्षिणमा उठेको उत्तरमा । कुनै राष्ट्रिय बैंक विना यी कार्यहरू जटील, महँगो र असुरक्षित हुनसक्छन् भनि प्रधानन्यायाधीश मार्शलले कर सङ्कलन, ऋण उठाउने तथा शैनिक/जलसैनिकहरू राख्न पाँउने अधिकारभित्रै राष्ट्रिय बैंक खोल्ने अधिकार अन्तर नीहित हुने रचनात्मक व्याख्या गरे । *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), *Cooper v. Aaron*, 358 U.S. 1 (1958), *Planned Parenthood of Southeastern Pennsylvania v Casey* 505 US 833, 855 (1992) लगायतका थुप्रै मुद्दाहरू छन् जसमा अमेकिन सर्वोच्च अदलातले सृजनात्मक व्याख्या गरि संवैधानिक प्रावधानलाई समयानुल र संवृद्ध बनाएको छ । *McCulloch v Maryland* को मुद्दाको आँखाबाट धारा ७६(५) को "प्रतिनिधिसभामा विश्वासको मत प्राप्त गर्नसक्ने आधार प्रस्तुत गरेमा" भन्ने प्रावधानको व्याख्या "प्रतिनिधि सभाको बहुमत सदस्यहरूको समर्थन" नै भनि व्याख्या हुनुपर्ने देखिन्छ ।

भारतीय सर्वोच्च अदालतले तय गरेको पोजेटिभिज्म देखि स्ट्रक्चरालिज्मसम्मको यात्राको उल्लेखन पनि हाम्रो संविधान व्याख्याका क्रममा उपयोगी हुन्छ । यसका लागि भारतीय सर्वोच्च अदालतको धारा २१ म गरेको व्यवस्थाबाट सुरु गर्न चाहन्छौ, जसको व्यवस्था यस प्रकारको छ :

> 21. Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law.

यो धारा मसौदाका क्रममा बेलायती मोडेलको "procedure established by law" राख्ने कि अमेरिकी मोडेलको "due process of law" राख्ने भन्ने बारेमा भारतीय संविधानसभामा कडा छलफल भएको थियो । बेलायती शिक्षाबाट दिक्षित जवाहरलाल नेहरू लगायतका नेशनल कांग्रेसका नेताहरू "procedure established by law" का पक्षमा थिए भने डा. बाबासाहेव अम्बेड्करँdue process of law" का पक्षमा खुलेर लागेका थिए । अन्ततः स्वतन्त्रता आन्दोलनको नेतृत्व गरेका नेहरूको जित भयो र धारा २१ मा "procedure established by law" राखियो । त्यहाको फ्यूडल जमिदारी प्रथा हटाएर किसानहरूलाई हक अधिकारसम्पन्न बनाउने समाजवादी नारा दिएर आन्दोलनमा सहभागी गराएको कांग्रेसले संसदबाट आफूले चाहेजस्तो कानून निर्माण गरेर कानूनले निर्धारण गरेको प्रक्रियाबमोजिम भूमिसुधार योजना लागु गर्न सोच्नु

स्वाभाविक थियो । संविधान जारी भएपछि संसदको नयाँ निर्वाचन नभएसम्म संविधानसभा नै विधायिकामा रूपान्तरित भयो । मद्रासका बामपन्थी नेता ए.के. गोपालन सन् १९४७ देखि जेल परेका थिए । नयाँ संविधान लागू हुदाँ नहुदै उनको तोकीएको जेल अवधी समाप्त भयो । जेलबाट निस्कन नपाउँदै उनलाई निवारक नरबन्द ऐन, १९५० बमोजिम राष्ट्रिय सुरक्षामा दखल पारेको भनि तुरुन्तै पक्राउ गरियो । पक्राउका विरुद्ध उनी धारा २१ प्रत्याभूत मौलिक हकको उल्लङ्घन भएको भनि बन्दिप्रत्येक्षीकरणको मुद्दा लिएर सर्वोच्च आए **-*A.K. Gopalan v. State of Madras***, AIR 1950 SC 27) । सर्वोच्च अदालतको ६ जना मध्ये ५-१ न्यायाधीशहरूको बहूमतले धारा २१ मा "procedure established by law" लाई व्याख्या गर्दै अदालतले विधायिकाले निर्दिष्ट गरेको कानूनद्वारा निर्धारित कानूनी प्रकृया, चाहे त्यो खराव कानून नै किन नहोस्, लाई व्याख्याको माध्यमबाट हस्तक्षेप गर्न नसक्ने व्याख्या गऱ्यो ।

यस्तो पोजिटिभिष्टिक पुरातन व्याख्यालाई ***Maneka Gandhi v. Union of India***, AIR 1978 SC 597 मा आएर उल्ट्याएर विधायिकी कानुन पनि न्यायिक, स्वच्छ र विवेकसंगत (Just, Fair and Ressonable) हुनुपर्छ यदि न्यायिक, स्वच्छ र विवेकसंगत (Just, Fair and Ressonable) छैन भने अदालतले न्यायिक पुनरावलोकनको पद्धतिबाट अमान्य घोषणा गर्न सक्ने भनि संविधान निर्माताले आशयपूर्वक राखेको "procedure established by law" लाई "due process of law" मा रूपान्तरित गरेर प्राकृतिक न्याय/कानूनका सार्वकालिक तथा सार्वदेशित सिद्धान्तहरू विधि निर्माताले पनि मान्नु पर्छ भनी व्याख्या गऱ्यो ।

भारतीय सर्वोच्च अदालतले जन्म दिएको संविधानका आधारभूत सिद्धान्तहरू (Basic Structure Doctrine) को पनि यस्तै घतलाग्दो यात्रा छ । संविधानसभा विधायिकामा परिणत भएपछि आफ्नै अवधिमा कृषि तथा भुमि सुधार गर्न भनि विहार, उत्तर प्रदेश र मध्येप्रदेशमा जमिन्दारी प्रथा उन्मुलन ऐनहरू ल्याईयो । यी ऐनहरूको जग्गा प्राप्ति गर्ने व्यवस्थाले मार्का परेको र यस्तो संविधान संशोधन गर्ने कानूनले मौलिक हकको हनन् भएको भनी सांकरी प्रसादसमेत (*Shanari Prasad v Union of India*, 1951 SCR 89: AIR 1951 SC 458) सर्वोच्च अदालत गए । तर विधायिकाले चाहेमा मौलिक हक पनि संविधान संसोधनको अधिकार भित्र पर्नसक्ने भनि व्याख्या गऱ्यो ।

घतलाग्दो विषय के थियो भने संविधानसभा (परिवर्तितरूप) आफैंले मौलिक हक संशोधन हुने गरी संविधान संशोधन गर्दा संविधानमा पनि असंशोधनीय आधारभूत संचरना (Basic Structure) हुन्छन् वा छन् भनेर नै सोचको थिएन । यस मुद्दालाई *Sajjan Singh vs The State Of Punjab*, 1964 AIR 464, 1964 SCR (4) 630 को मुद्दामा अनुशरण गरियो भने *I.C. Golaknath v. State Of Punjab* (1967 AIR 1643, 1967 SCR (2) 762), ओभररुल गरेर संविधान संसोधनमा मौलिक हकको संसोधन गर्ने अधिकार नहुने व्याख्या भयो । *Kesavananda v State of Kerala* (1973) Supp. S.C.R. 1, मा गोलखनाललाई ओभररुल गरेर मौलिक हकलाई संसोधनीय बनाईए पनि न्यायिक इतिहासमा पहिलो पटक संविधानमा आधारभूत संरचना (Basic Structure) हुने र यस्ता आधारभूत संरचनाहरूलाई विधायिकाले पनि संसोधन गर्न नसक्ने भनी पहिलो पटक संविधानसभामा नै नसोचिएको मान्यता कायम भयो ।

भारतीय सर्वोच्च अदालतको यो पोजेटिभिज्मबाट स्ट्रक्चरालिज्मको यात्राका बारेमा संवैधानिक तथा प्रशासकीय कानून का विज्ञ एस.पि.साठेले **Interpriting Constitutions: A Comparative Stydy** k':ts df **India: From Positivism to Structuralism** भन्ने परिच्छेदमा चर्चा गरेका छन् जुन हाम्रो

संविधान व्याख्याका लागि पनि अनुरणीय हुनसक्छ । उनले पोजिटिभिज्म र स्ट्रक्चरालिज्मको पनि व्याख्या गरेको छन्:

> ॅThe Court began by taking a positivist approach to constitutional interpretation. But judicial review under a written constitution with a bill of rights cannot remain merely positivist, because the expressions used in it are often open-textured and continue to acquire new meanings. Over the years, as Indian democracy threw up unexpected challenges, the Court gradually moved to a structuralist approach. This movement was not linear, or even chronologically consistent. There were dissents during the initial period of positivism, and zig-zags forwards and backwards during later periods." **P. 227.**
>
> "There are basically two models of constitutional interpretation. One is legal positivism, 'which holds that the truth of legal propositions consists in facts about the rules that have been adopted by specific social institutions, and in nothing else'. This model emanates from the 'black letter law' tradition, which seeks to interpret law as a distinct, relatively autonomous reality. Law is separated from morality, and interpreted in accordance with self-constituted principles and concepts.
>
> In the second model, which we will call structuralism, the Constitution is interpreted liberally, as a totality, in the light of the spirit pervading it and the philosophy underlying it. A structuralist interpretation aims to articulate the implicit nuances of the Constitution, but may vary according to the ideological or philosophical predilections of the judges. It accords a wider role to the judiciary, which is required to be creative. According to Justice Cardozo, a written constitution 'states or ought to state not rules for the passing hour, but principles for an expanding future'. Structuralist interpretation can also be called teleological, meaning that it understands the Constitution to be intended to achieve certain purposes. It is, in that sense, result-oriented." **P. 226.**

उल्लेखित उन्नत अभ्यासहरूको उद्धरणबाट के स्पष्ट हुन्छ भने सम्मानित अदालतले परिवर्तित समयसँग संवैधानिक प्रावधानहरूको जीवन्त व्याख्या गरी संवैधानिक मौनता तथा जटीलतालाई स्ट्रक्चरल व्याख्याको पद्धतिबाट संवैधानिक निकास दिँदै जानुपर्छ । माथि उल्लेख गरिसकियो कि धारा ७६(५) बमोजिमको प्रधानमन्त्रीको दावेदारलाई प्रतिनिधिसभाका सदस्यहरूले दलगत वा स्वतन्त्र हैसियतले समर्थन गर्नसक्ने व्याख्या हुनु उचित र तर्क संगत हुन्छ भने यस धारा बमोजिम नियुक्त प्रधानमन्त्रीले धारा ७६(४) बमोजिम प्रतिनिधि सभामा विश्वासको मत लिँदा संविधान-अधिनस्थ संसदीय दल सम्बन्धि ऐन, २०७३ को ह्विप सम्बन्धि प्रावधान निस्कृय हुने गरि अधिनस्थ कानुनको सीमित व्याख्या (Restrictive Interpretation) हुनुपर्दछ । यि दुवै सिद्धान्तहरू सम्मानित सर्वोच्च अदालतले पछिल्लो प्रधिनिधिसभा विघटन मुद्दामा अंगिकार गरेको छ ।

एण्टि डिफेक्सन् ल:

यसरी व्याख्या गर्दा एण्टि डिफेक्सन् ल विनाको लोकतन्त्र परिकल्पना सम्म पनि गर्न नसकिने भन्ने पनि चासो देखिन्छ। यो चासो पूर्ण तथ्यसंगत छैन। वेलायत, अमेरिका, अष्ट्रेलिया तथा क्यानडा जस्ता उन्नत लोकतन्त्र भएका मुलुकहरूमा एण्टि डिफ्क्सन ल भएको देखिदैन। बेलायतमा ह्विप विपरित मत दिने सांसदहरू संसदको पछिल्लो वैञ्चमा बस्छन्, जसलाई व्याकबैंचर भनेर भनिन्छ। बेलायतमा सरकारको नीति सुधारमा व्याकबैंचरको भूमिका हुने मानिन्छ। दक्षिण अफ्रिकामा एण्टि डिफेक्सन् ल ले सांसदहरूको राजनीतिक स्वायत्तता हरण गरेको र दलका शीर्षस्थ नेताहरूलाई निरंकुश बन्न सहयोग गरेको भनि एण्टि डिफेक्सन एक्ट नै खारेज गरिएको छ। भारतमा एण्टि डिफेक्सन्को प्रावधान संविधानको अनुसूचि-९ मै राखिएको छ भने दलको ह्विप डिफेक्ट् गर्ने सांसदलाई दलले होईन सभामुखले कारवाही गर्नसक्ने व्यवस्था छ। इजरायल तथा न्युजिल्याण्डमा एण्टि डिफेक्सन् ल छन् तर तिनको अभ्यास दुर्लभ केशहरूमा भएको पाईन्छ।

(*Christopher J. Kam,* **Party Discipline and Parliamentary Politics,** University of British Columbia , Cambridge University Press, First Published in print format 2009;

Samuel C. Paterson, (Genaral Advisory Edotor) ENERAL, **Party Discipline and Parliamentary Governent**, Ohio State University Press, 2009;

Kenneth Janda, "Laws Against Party Switching, Defecting, or Floor-Crossing in National Parliaments"**,** The Legal Regulation of Political Parties Working Paper, *2* August 2009, University of Bakingham.)

उल्लेखित रेफरेन्सहरूले पनि एण्टि डिफेक्सन् ल को व्याख्या गर्दा सीमित (Restrictive Interpretation) पद्धत्ति अपनाई धारा ७६(५) र सो सँग संगति हुनसक्ने गरि गर्नपर्ने व्यहोरामा थप मद्दत मिल्दछ।

यसरी व्याख्या गर्दा नेपालको संविधानको धारा ८९(ङ) र एण्टी डिफेक्सेन् संबन्धि अन्य प्रचलित कानूनहरूको उलंघन हुन सक्ने नसक्ने भन्ने प्रश्न पनि उठ्न सक्छ। कुनै पनि न्यायिक, अर्ध-न्यायिक वा प्रशासनिक निर्णय गर्दा कज अफ एक्सन उत्पन्न हुनु पूर्व नै भोलि यस्तो होला भनि अनुमान गरेर आजै निर्णय गर्न मिल्दैन। त्यस्तो निर्णय अवैधानिक (Illegal), अविवेकी (Irrational), कार्यविधिगत असÏत (Procedural impropriety) हुनजाँन्छ। कज अफ एक्सन नै उत्पन्न नभै निर्णय गर्दा त्यस्तो निर्णयकर्ताको काम कारवाही कानूनी (Lawfullness), मनासिब (Reasonableness), स्वच्छतापूर्ण (Fairness) र निष्पक्षता (Impartiality) को मान्य विधिशास्त्रले स्वीकार गर्न सक्दैन भन्ने कुरामा विवाद छैन। धारा ८९(ङ) ले जुन दलको उम्मेदवार भै सदस्य निर्वाचित भएको हो त्यस्तो दलले संघीय कानून बमोजिम निजले दल त्याग गरेको कुरा सुचित गरेमा संघीय संसदको सदस्यको स्थान रिक्त हुने व्यवस्था गरेको हो। यससँग सम्बन्धि संघीय कानून राजनीतिक दल सम्बन्धि ऐन, २०७३ को दफा ३४(१) ले संघीय संसद वा प्रदेश सभाको सदस्य रहेको दलको सदस्यले यस ऐन बमोजिम दल त्याग गरेमा वा निजलाई दलबाट निष्कासन गरिएमा त्यसको निर्णयसहितको सूचना सम्बन्धित संसदीय दलले सम्बन्धित सभाको सचिवालयलाई दिनुपर्ने प्रष्ट कानुनी व्यवस्था गरेको छ। धारा ८९(ङ) ले उल्लेख गरेको

"त्यस्तो दलले संघीय कानून बमोजिम दल त्याग गरेको सूचित गरेमा" भन्ने वाक्यांशले यसै कानूनी व्यवस्थाको संकेत गरेको हो।

राजनीतिक दल संवन्धी ऐन, २०७३ को दफा २८(१) मा विशिष्टिकृत गरिएका विषयहरूमा संघीय संसदको कुनै सदन वा प्रदेश सभामा हुने मतदानमा संसदीय दलका नेताको निर्देशन (ह्वीप) बमोजिम प्रस्तावको पक्ष वा विपक्षमा मतदान गर्नुपर्ने व्यवस्था गरेको छ। दफा ३२(२) अनुसार सम्बन्धित दलको केन्द्रीय समितिले त्यस्तो सदस्यलाई निष्कासन गर्नसक्ने र त्यसको सूचना संसद सचिवालयमा प्राप्त हुनुपर्ने व्यवस्था छ। दफा ३६ बामोजिम सभामुखले सम्बन्धित सदनलाई सूचना दिएपछि वा सम्बन्धित सभाको सूचना पाटिमा टाँस भएपछि मात्रै त्यस्तो सदस्यको स्थान रिक्त हुने व्यवस्था गरिएको छ। यी कुनै पनि प्रावधानहरूको प्रयोग नभै धारा ८९(ङ) आकृष्ट नै हुँदैन। फेरी संविधानको धारा ७६(५) को प्रयोजनको लागि यो आकृष्ट हुने व्यवस्थै छैन। ह्विप नै लाग्ने भए पनि खसालेको मत बदर नभै after-action को रूपमा यो ऐन प्रयोग हुने हो। संविधान, कानून र न्यायका मान्य सिद्धान्तहरूले स्थापित गरेका सारवान् र कार्यविधिगत कानूनको मान्य अवधारणाहरूलाई आत्मसात गरी कार्य गर्नु कुनै पनि कानूनी अख्तियारप्राप्त अधिकारीको प्राथमिक र आधारभूत दायित्व हो।

संवैधानिक सुशासन तथा वैधानिक संवैधानिक विश्वास:

संवैधानिक सुशासन तथा वैधानिक संवैधानिक विश्वास (Constitutional Governance and Legitimate Constitutional Trust) को सिद्धान्तले पनि यस्ता कार्यहरू असंवैधानिक मान्दछ।

संवैधानिक सुशासन तथा वैधानिक संवैधानिक विश्वासको सिद्धान्तलाई माथि उद्दृत *Govt. Of Nct Of Delhi vs Union Of India* को मुद्दामा निम्नानुसार न्यायिक सैद्धान्तकरण गरेको छः

> "The concept of constitutional governance in a body polity like ours, where the Constitution is the supreme fundamental law, is neither hypothetical nor an abstraction but is real, concrete and grounded. The word 'governance' encapsulates the idea of an administration, a governing body or organization whereas the word 'constitutional' means something sanctioned by or consistent with or operating under the fundamental organic law, i.e., the Constitution. Thus, the word 'governance' when qualified by the term 'constitutional' conveys a form of governance/government which adheres to the concept of constitutionalism. The said form of governance is sanctioned by the Constitution itself, its functions are consistent with the Constitution and it operates under the aegis of the Constitution.

वैधानिक संवैधानिक विश्वासका बारेमा सोही मुद्दामा निम्न बमोजिम उल्लेख छ :

> "It is essentially a discharge of a constitutional trust of which certain constitutional functionaries are collectively repositories. …The founding fathers expected that constitutional functionaries who derive their authority from the Constitution shall always remain sincerely obeisant to the Constitution."

धारा ७६(५) बमोजिम बहूमत सदस्यहरूको समर्थन लिई प्रधानमन्त्रीको दावी लिएको गएको अवस्थामा यस्तो वैधानिक दावीलाई अस्वीकार गर्ने गरि राष्ट्रपतिले गर्न मिल्दैन । यसरी अस्वीकार गर्ने काम कुनैपनि हालतमा संविधान सम्मत, संविधान संगत, संवैधानिक ईजलाशको माथि उल्लेखित नजिर तथा संवैधानिक सुशासन र विश्वासको सिद्धान्त प्रतिकुल हो । यसले लोकतन्त्रको मान्य सिद्धान्त बहुमतको शासन (Majority Rule) को सट्टा बहुमत माथि अल्पमतको शासन (Counter-Majoritorian Rue) को अवस्था परि लोकतन्त्र कै उपहासपूर्ण प्रयोग नेपाली जनताले व्यहोर्नु परिरहेको विडम्बनापूर्ण अवस्था आउन सक्छ ।

राष्ट्रपतिको व्यवहार यस्तो पक्षपातपूर्ण देखिएमा राज्यका उच्चतम् जिम्मवारीमा रहेका निकायहरूले संवैधानिक निष्पक्षता (Constitutional Objectivity) को संस्कार देखाउनुपर्ने भन्ने संवैधानिक विधिशास्त्रको पनि उपहाँस हुनजान्छ ।

भारतीय सर्वोच्च अदलातले *Govt. Of Nct Of Delhi vs Union Of India* कै मुद्दामा यो सिद्धान्तलाई निम्नानुसार न्यायिक स्थान दिएको छः

> ॅOur Constitution, in its grandness, resolutely embraces the theory of "checks and balances". This concept of checks and balances, in turn, gives birth to the principle of "constitutional objectivity". The Constitution expects the organs of the State adorned by high constitutional functionaries that while discharging their duties, they remain alive to the allegiance they bear to the Constitution. Neutrality as envisaged under the constitutional scheme should guide them in the performance of their duties and functions under the Constitution. This is the trust which the Constitution reposes in them.
>
> The founding fathers of our Constitution had a vision for our Nation whose ultimate aim was to make right the upheaval that existed before setting up of the Constituent Assembly. The concept of constitutional objectivity is, by itself, inherent in this vision and it is incumbent upon the organs of the State to make comprehensive efforts towards realization of this vision."

निष्कर्षः

माथिको विवेचनाबाट यो निष्कर्शमा पुग्न सकिन्छ कि संविधानको धारा ७६(५) भनेको धारा ७६ बमोजिमको अन्य सबै विकल्प सकेपछि प्रधानमन्त्री चयन गरि सरकार गठन गर्ने अन्तिम विकल्प हो । अतः यो सरकार गठन गर्ने प्रयास कै लागि बनेको व्यवस्था हो । राष्ट्रपतिले यो धाराबमोजिम सरकार गठन हुन सक्ने सम्भावनालाई बिल्कुलै वेवास्ता राजनीतिक दलको समर्थन खोजी सरकार गठन गर्न इन्कार गर्न सक्दैन । विवेचित आधार र कारण अनुसार राष्ट्रपतिले संविधान बमोजिमको अधिकार प्रयोग गर्दा सद्नियत (Good Faith) मा गरेको हुनु पर्दछ भन्ने पनि स्पष्ट भएको छ । दुई वा उम्मेदवारहरूको प्रधानमन्त्रीको दावी परिरहेको अवस्थामा सबै पक्षहरूले पेश गरेका आधारहरूलाई स्वच्छ र निष्पक्ष तरिकाले छानविन गरि संविधानले दिएको विश्वासको सिद्धान्त समेतको पालना गरि उचित निकास दिनुपर्नेमा राष्ट्रपतिको संवैधानिक कर्तव्य हुन्छ । यस विपरित कुनै पनि पक्षपातपूर्ण काम कारवाही भएमा सोबाट राष्ट्रपति संविधानको पालना र संरक्षण गर्नुपर्ने प्राथमिक संवैधानिक कर्तव्यबाट मात्र च्युत नभै उल्लेखित संवैधानिक निष्पक्षता (Consitutional Objectivity) को सिद्धान्तसमेतबाट विमुख हुने देखिन्छ ।

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H. L. A Hart's The Concept of Law: Revisited

Manish Nepal*

Abstract

Hart, in the book, figure out and tried to solve, 3 recurrent issues/persistent questions in the "law". Answering Q.1, How does law differ from and how is it related to orders backed by threats? Hart opined that there can be "variety of imperative" Hart opined that, all the "orders" do not necessarily possess the "internal" property (of law), that is, "having an obligation" to obey. So, Austinian conception of law as the "sovereign's coercive orders" is a failure. Answering Q.2- How does legal obligation differ from moral obligation? Hart states that, Justice and Morality are interrelated phenomena. For this he proposed the "truisms" concerning human condition, and consisting of "common universal elements "crumbling with Fuller theoretical ideas (of inner morality). Hart opines that it shows that, as long as these hold good, there are certain rules of conduct which any social organization must contain if is it to be viable. According to Hart, such rules do in fact constitute a "common element in the law and conventional morality" of all societies (which Hart called "minimum content of natural law") which have progressed to the point where these are distinguished as different forms of social control. Answering Q.3- What are rules and to what extent is law an affair of rules? Hart states that, there is a need for "a fresh start", as the Austinian conception of law as the "sovereign's coercive orders" is a failure. Hart opines that, remedy of inconsistency of primary rule can be done by substituting it by secondary rule. According to Hart, the "rule skepticism" exist in law due to the "open texture" in formalism.

Key Words: Habit of Obedience, Rule of Recognition, Minimum Content of Natural Law, Fresh Start, Primary Rule, Secondary Rule, Open Texture of Law

1. Introduction

In the "preface" of the book, "The Concept of Law" Hart opined that the objective of the book is to "further the understanding of law, coercion, and morality as different but related social phenomena."[1] In preface, he also emphasized that the book may also regarded as an essay in "descriptive sociology." In the preface he even acknowledged Professor J.L. Austin for using his "linguistic philosophy" by stating that, "a sharpened awareness of words to sharpen our perception of the phenomena." Also, in the book, Hart considered: how "being obliged" differ from "having of obligation"; how the statement that a rule is a valid rule of law differs from a prediction of the behavior of officials; what is meant by the

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[1] H. L. A. HART, THE CONCEPT OF LAW vi (2d ed., Clarendon Press, Oxford 1996).

ascertain that a social group observes a rule and how this differs from and resembles the assertion that its member habitually do certain things. He even emphasized that,

> "One of the central themes of the book is that neither law nor any other of social structure can be understood without an appreciation of certain crucial distinctions between two different kinds of statement, which I have called "internal" and "external" and which can both be made whenever social rules are observed."[2]

According to Hart, Law is a social phenomenon and its study involves recognition of the characteristic of human condition. In the book, Hart identifies and tries to find answer to 3 recurrent issues/persistent questions in the "Law". Which he identifies as:[3]

Q.1 How does law differ from and how is it related to orders backed by threats?
Q.2 How does legal obligation differ from moral obligation?
Q.3 What are rules and to what extent is law an affair of rules?

2. Answering Q.1- How does law differ from and how is it related to orders backed by threats?

Hart tried to answer the above question through Chapter- II, III, and IV entitled "Laws, Command, and Order", "The Variety of Law", and "Sovereign and Subject" respectively. In order to reformulate the claim of Austin that, laws or rules set by men (political superior) to men (subject) consists of the order backed by threats, failing to obey such command leads to the serious consequences (sanction).[4] Hart opined that there can be "variety of imperative" such as:[5]

- "Pass the salt please"- request
- "Do not kill me"- plea
- "Don't move"- warning
- "Hand over the money or I will shoot"- order

Here, comes the confusion as there are various types of imperatives. So, which are the orders to be followed is difficult to pick. For the solution Hart opined that, all the "orders" does not necessarily possess the "internal" property (of law), that is, "having an obligation" to obey. For example, the order, "money or life" by the gunman forces person of "being obliged" however s/he may not be "have an obligation" to the gunman. Since, the gunman's order has all the properties of "command theory", that is, order backed by threat and the possible consequences of sanction if not followed.

[2] *Ibid.*
[3] *Ibid.* at 6-13.
[4] JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 13 & 15 (Indian Economy Reprint, Universal Law Pub. Co., New Delhi 2012).
[5] HART, *supra* note 1, at 18-19.

However, Hart states that these are not the standard ways in which the law functions. Hart opines the functioning of law is of coercive as defined by Austin, however he has some twist in the tail. As Hart supposed the order to be "general" and "specific or particular" accordingly who gives the order. The order to be "general" when given by the sovereign body, that is, "Queen in the Parliament" and of "specific or particular" if given by the sub-ordinate body. Hart also viewed that such order should have the "standing or persistent character", that is, it need to be followed time after time by class of persons and the "sanction or punishment" need to be given by the court.

2.1 Amongst Varieties of Law: Enacted Laws May Not Necessarily Contain Legislator's Actual Desire

According to Hart, not all "laws" orders people to do or not to do things.[6] (For example some of the law has educative purposes, such as, the reproductive health law, copyright law etc.). He even emphasized that the "enacted laws" may not necessarily contain any legislator's actual desire, intentions, or wishes. As, the legislator who voted for any Act (for example- the Finance Act or Medical Act) may not necessarily know what it meant? Since some laws might be technical and everybody may not know the content of the Act. There are also some laws which "confer powers" on private individuals to make will, contract or marriages. There are also laws which "confer power" to officials, for example, judge to try cases, minister to make rules, or a country council (or the administrator) to make by-laws. He also emphasizes custom to be source of laws in most legal system.

Hence, Hart opined that, these "variety of laws" need to be studied through:

i. The Content of Laws
ii. The Range of Application
iii. Modes of Origin

2.2 Interrelation Between Sovereign and Subject: "Habit of Obedience" Instead of "Habitually Obeying" is the Basis for the Effective Functioning of Law

According to Hart, in any society where there is law, there actually is a sovereign, characterized affirmatively and negatively by reference to the "habit of obedience": a person or body of persons whose orders the great majority of the society habitually obey and who does not habitually obey any other person or persons. However, Hart tried to analyzed some of the properties of "habit of obedience." His first concern was:[7] (i) the continuity of the authority to make law possessed by a succession of different legislators; and (ii) the persistence of laws long after their maker and those who rendered him habitually obedience has perished.

[6] *Ibid.* at 26.
[7] *Id.* at 50-51.

His second concern was: position occupied by the sovereign above the law. To which Hart tried to analyses that:[8] (i) whether the "legally illimitable" status of the supreme lawgiver is necessary for the existence of law; and (ii) whether the presence or the absence of legal limits on legislator power can be understood in the simple terms of habit and obedience into which this theory analyses these notions.

2.2.1 The Habit of Obedience and the Continuity of Law: Leads to "Critical Reflective Attitude"

Hart supposes, Rex (absolute monarch), after the successful reign, dies. Now, Rex-II (son of Rex) starts to issue general orders. In this situation, Hart suspects that,

> "The mere fact that there was a general habit of obedience to Rex-I in his lifetime does not by itself even render probable that Rex-II will be habitually obeyed. .... we shall not be able to say of Rex-II's first order, as we could have said of Rex-I's last order, that it was given by one who was sovereign and was therefore law."[9]

That is, there is nothing to make him sovereign from the start. Only after we know that his orders have been obeyed for some time shall we be able to say that "a habit of obedience" has been established. In other words, acceptance of a rule by a society at one moment does not guarantee its continuous existence. Because "habits are not normative".[10] Then what will be the status of Sovereign-Subject here? For this Hart replies, till this stage is reached there will be an "interregnum" (that is, Intermediate Confused State) in which no law can be made or established. According to Hart, such a state of affairs is of course possible and has occasionally been realized in troubled time, viz after the revolution, change of guard (Rex-I to Rex-II).

Now the question arises: How does a habit differ from a rule?

According to Hart, there is one point of "similarity" between social rules and habit: in both cases the behavior in question must be general though necessarily invariable; this means that it is repeated by most of the groups when occasion arises (for e.g.- taking out Hat when entering church or greeting elders etc.). So, if the behavior of the group "converges at a point" then that is considered a "habit" and deviation from the regular course need not be a matter for any form of criticism. However, if such convergent behavior is "rule" then the deviation is generally regarded as "lapses or faults" open to criticism. And threatened deviation meet with pressure for conformity. Also, pressure differs with different types of rules. Similarly, a "social rule" has an "internal" aspect, in addition to the "external" aspect. That is, "social rules" possess both internal + external

[8] *Id.* at 51.
[9] *Id.* at 53.
[10] *Id.* at 60.

aspect. However, "social habits" possess only "external" aspect and which are observable. Hart clarifies it by stating,

> "A social rule has an 'internal aspect' , in addition to the 'external aspect' which it shares with a social habit and which consists in the regular uniform behavior which an observer could record. This internal aspect of rules may be simply illustrated from the rules of any game. Chess players do not merely have similar habits of moving the Queen in the same way which an external observer, who knew nothing about their attitude to the moves which they make, could record. In addition, they have "reflective critical attitude" to this pattern of behavior."[11]

Hart stress that, "there should be a "critical reflective attitude" to certain pattern of behavior as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgement that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of 'ought', 'must', and 'should', 'right' and 'wrong'." However, Hart warned that "internal aspect of rules" are not "felling" i.e. "feel bound." Feeling is not neither necessary nor sufficient for the existence of "binding" rules.

2.2.2 The Persistence of Law: Depends upon the "Habit of Obedience"

Citing the example of a women who was prosecuted in England in 1944 with respect to the "Witchcraft Act,1735" Hart, opined that the "Persistence of Law" depends upon the "habit of obedience." Hart, explain this by stating,

> "One ingenious attempt to do this has been made: Hobbes, echoed here by Bentham and Austin, said that 'the legislator is he, not by whose authority the laws were first made, but by whose authority they now continue to be laws'."[12]

However, Hart stressed that, this recognition does not take the form of an "explicit" order as in the case of statutes made by the now living legislator, but of a "tacit" expression of the sovereign's will. American realist John Chipman Grey opined that, "The law of the State or of any organized body of men is composed of rules which the courts, that is, the judicial organs of that body, lay down for the determination of legal right and duties."[13] According to Hart this "realist" notion of "statue made by a past sovereign is not a law unless applied by the court in the particular case" as an absurd. For realist Hart's reply is,

> "If this theory is right, it follows that the courts do not enforce it because it is already a law: yet this would be an absurd inference to draw from the fact that the

[11] *Id.* at 56.
[12] *Id.* at 63.
[13] J. C. GRAY, THE NATURE AND SOURCES OF LAW 84 (2d. ed., Macmillan, New-York 1924); cited from PROF. HILAIRE MCCOUBREY & DR. NIGEL D. WHITE, TEXTBOOK ON JURISPRUDENCE 205 (3d. ed., Blackstone Press Limited, London 1999).

> present legislator could repeal the past enactment but has not exercised this power."[14]

2.2.3 Legal Limitations on Legislative Power: If not Given by the Political Sovereign Authority

According to Hart, there could only be the legal limits on legislative power if the legislator were under the order of another legislator whom he habitually obeyed; and in that case he would no longer be sovereign. That is, if he is a sovereign he does not obey any other legislator and hence there can be no legal limits on his legislative power.[15] However, it should be noted that, Hart does not mean that there are no limits on the sovereign's power but only that there are no legal limits on it. So, what ways, the sovereign may in fact defer, in exercising legislative power. It is because it is either from fear of the consequences of flouting it, or because he thinks himself morally bound to respect it. So, if a fear of popular revolt or moral conviction leads him not to legislate in ways which he otherwise would, then it would also be considered as "limits" on his legislative power.

2.2.4 The Sovereign Behind the Legislature: As Federal Constitution Poses Substantive Limitations

Hart opines that, in modern world many legal systems consist a body, normally considered to be the supreme legislature within the system, is subject to legal limitations on the exercise of its legislative power. However, the enactments of such a legislature within the scope of its limited powers are plainly considered to be law. Nevertheless, Hart had termed the expression as "Substantive Limitation." Hart states that,

> "Plain examples of substantive limitations are to be found in federal constitutions such as those of the United States or Australia, where the division of powers between the central government and the members states, and also certain individual rights cannot be changed by the ordinary processes of legislation."[16]

3. Answering Q.2- How does legal obligation differ from moral obligation?

Hart had tried to answer the question in Chapter-VIII, IX and X entitled, "Justice and Morality", "Laws and Morals", and "International Law" respectively.

[14] HART, *supra* note 1, at 64.
[15] *Ibid.* at 66.
[16] *Id.* at 72.

3.1 Justice and Morality: Need for the Distinction as it Cannot be limited to Thomist Tradition of Natural Law

Hart insisted that, until the "necessary" relationship with morality is made explicit and its central importance seen, the mists which have so long clouded the understanding of law cannot be dissipated. Hart further adds that, they (that is, Thomistic tradition of Natural Law) claim that for a legal system to exist there must be a widely diffused though not necessarily universal, recognition of a moral obligation to obey the law, even though this may be overridden in particular cases by a stronger moral obligation not to obey particular morally iniquitous laws ("lex injusta non est lex"). However, according to Hart concern need for the:[17] (i) distinction within the sphere of morality of the specific idea of justice and the special features which account for its peculiarity intimate connection with law. (ii) characteristics which distinguishes moral rules and principles not only from the legal rules but from all other forms of social rule or standards of conduct. (iii) many different senses and ways in which legal rules and morals may be said to be related.

3.2 Principle of Justice: is Administration of Resources

Hart insists "justice" lies on the "administration of resources." "just" and "unjust" could almost equally well be conveyed by the words "fair" and "unfair." So, "fairness" is plainly not coextensive with morality in general. For this Hart states,

> "'Just' would be the appropriate expression of the approval of a law distributing the burden of taxation according to the wealth; so 'unjust' would be appropriate for the expression of disapproval of a law which forbade colored people to use the public means of transport or the parks".[18]

Hart further opined that,

> "Treat like cases alike and different cases differently", the then central element in the idea of justice, to be incomplete. This is because any set of human beings will resemble each other in some respects and differ from each other in other. So, Hart insisted, until it is established what resemblance and differences are relevant, 'Treat like cases alike' must remain an empty form."[19]

So, according to him "justice" and "injustice" of laws may be viewed as "distributing" among individuals' burden and benefits. Some of the benefits are tangible, like poor relief, of food rations; others are intangible, like protection from bodily harm given by the criminal law, or the facilities afforded by laws relating to testamentary or contractual capacity, or the right to vote.[20]

[17] *Id.* at 157.
[18] *Id.* at 158.
[19] *Id.* at 159.
[20] *Id.* at 163.

Provision for the poor can be made only out of the goods of others; compulsory school education for all may mean not only loss of liberty for those who wish to educate their children privately, but may be financed only at the cost of reducing or sacrificing capital investment in industries or old-age pensions or free medical services. So, when the choice has been made between such competing alternatives it may be defended as proper on the ground that it was for the "public good" or the "common good." However, Hart skeptic about the process of identifying such basic good. He states,

> "It is not clear what these phrases mean, science there seems to be no scale by which contributions of various alternatives to the common good can be measured and the greater identification."[21]

3.3 Moral and Legal Obligation: Proper Intention or Motive Vs. External Behavior

According to Hart, legal and moral rules when properly understood, could not ever have the same content. Here, Hart states,

> "...while legal rules only require 'external' behavior and are indifferent to the motives, intentions, or other 'internal' accomplishment of conduct; morals on the other hand do not require any specific external actions but only a good will or proper intentions or motive."[22]

According to Hart, there are 4 cardinal related features which collective serve to distinguish morality not only from legal rules but also forms of social rules. They are:

i. Importance
ii. Immunity from deliberate change
iii. Voluntary character of moral offence
iv. The form of moral pressure

3.4 Moral Ideals and Social Criticism: Obligation and Duty to meet Rationality and Generality

According to Hart, "moral obligation" and "duty" are the bedrock of the social morality, however, they are not the whole. There are forms of morality which extends beyond the accepted share morality, the realization of these is not taken as a duty but achievement deserving praise. Such as- bravery, charity, benevolence, patience, or Chasity; are shown by the saint or hero. Other moral virtues like- temperance, patience, bravery, or consciousness are in a sense ancillary: they are qualities of character shown in exceptional devotion to duty or in the pursuit of substantive moral ideals in the face of special temptation or danger. Hart opines that,

[21] *Id.* at 167.
[22] *Id.* at 172-73.

> "It is always possible, when we come to examine the accepted morality either of our own or some other society, that we shall find much to criticize; it may, in the light of currently available knowledge, appear unnecessary repressive, cruel, superstitious, or unenlightened. It may cramp human liberty, especially in the discussion and practice of religion or in experimentation with different forms of human life, even when only negligible benefits are thereby secured for others."[23]

Above all, a given society's morality may extend its protections from harm to its own members only, or even only to certain classes, leaving a slave or helot class at the mercy of their masters' whims. So, implicit in this type of criticism which (even though it might be rejected) would certainly be accorded recognition as 'moral' criticism, is the assumption that the arrangements of society, including the accepted morality, must satisfy two formal conditions, one of "rationality" and the other of "generality." Thus, according to Hart, such moral criticism of society as that enshrined in watchword like,

> "Liberty, fraternity, equality, and pursuit of happiness draws its moral character from the fact that it invites reform, either in the name of some value or combination of values already recognized (though perhaps to an inadequate extent) in all actual social moralities or in the name of a version of these, refined and extended so as to meet the two demands of "rationality" and "generality."[24]

3.5 Laws and Morals: Hart's Submission to Natural Law Philosophy

About the relationship between Law and morality Hart opined that, it cannot seriously be disputed that the development of law, at all times and places, has in fact been profoundly influenced both by the conventional morality and ideals of particular social groups, and also by forms of enlightened moral criticism urged by individuals, whose moral horizon has transcendent the morality currently accepted.[25] However, it does not mean that, legal system must include, tacitly if not explicitly, a reference to morality or justice. On the "truisms" concerning human nature and the world in which men live, Hart opines that it shows that, as long as these (truism) hold good for any social organization, must contain it, if it is to be viable. According to Hart, such rules do in fact constitute a common element in the law and conventional morality of all societies (which Hart called "minimum content of natural law") which have progressed to the point where these are distinguished as different forms of social control.

[23] *Id.* at 183.
[24] *Id.* at 183.
[25] *Id.* at 185.

3.5.1 Human Vulnerability[26]

According to this "truism", the minimum criteria of survival which men have in associating with each other is "thou shall not kill", which is the most characteristic provision of law and moral. So, according to Hart, the common requirements of law and morality consists for the most part not of active services to be rendered but of forbearance. Of these the most important for social life are those that restrict the use of violence in killing or inflicting bodily harm. In this truism Hart shouldered the basic premise of Natural Law Theory, that is, "preservation of life."

3.5.2 Approximate Equality[27]

Although men differ from each other in physical strength, agility, and even more in intellectual capacity; however, according to Hart, no individual is so much powerful than others that he would able to dominate or subdue them for more than a short period. So, this fact of approximate equality, according to Hart, makes obvious the necessity for a system of mutual forbearance and compromise which is the base of both legal and moral obligation. In this truism Hart opined that there is much to gain in human life by mutual co-operation than forbearance.

3.5.3 Limited Altruism[28]

Men are not devils dominated by a wish to exterminate each other. But if men are not devils, neither are they angles; and the fact that they are a mean between these two extremes is something which makes a system of mutual forbearance both necessary and possible. So, according to Hart, human altruism is limited in range and intermittent, and the tendencies to aggression are frequent enough to be fatal to social life if not controlled.

3.5.4 Limited Resources[29]

It is a merely contingent fact that human beings need food, clothes, and shelter; that these do not exist at hand in limitless abundance; but are scarce, have to be grown or won from nature, or have to be constructed by human toil (that is, by division of labor). The "institution of property" has distinctive kind of rules excluding persons generally other than the owner; at all times and places life itself depends on this minimal forbearance. However, according to Hart, these rules are "static"; in contrast, the recognition of promise (for human toil) that is, the perennial need for co-operation make the "dynamic" or obligation-creating rule necessary in social life. So, according to Hart, where altruism is not unlimited, a standing procedure providing for such self-binding operations is required

[26] *Id.* at 194-95.
[27] *Id.* at 195.
[28] *Id.* at 196.
[29] *Id.* at 196.

in order to create a minimum form of confidence in the future behavior of others, and ensure the predictability necessary for co-operation. In short, in this truism Hart insisted that the State should shoulder the basic doctrine of "socialism" through the standard procedural guidelines.

3.5.5 Limited Understanding of Strength and Will[30]

According to Hart, the facts that make rules respecting persons, property, and promises necessary in social life are simple and their mutual benefit are obvious. Most men are capable of seeing them and of sacrificing the immediate short-term interests which conformity to such rules demands.

They may indeed obey, from variety of motives:
(a) some from prudential calculation that the sacrifices are worth the gain;
(b) some from a disinterested interest in the welfare of others; and
(c) some because they look upon the rules as worthy of respect in themselves and find their ideals in devotion to them.

On the other hand, some have limited understanding of will, which leads to: neither understanding of long-term interest nor the strength of goodness of will. All are tempted at times to prefer their own immediate interest and the absence of special organization for their detection and punishment, many would succumb to temptation. According to Hart, although the advantage of mutual forbearance is so palpable that the number and strength of those who would co-operate voluntarily in a coercive manner will normally be greater than any likely combination of malefactors. So, except in very small closely-knit society, submission to the system of restrain would be folly if there were no organization for the coercion of those who would than try to obtain the advantages of the system without submitting to its obligations.[31]

3.6 Legal Validity and Moral Value: Complement with the Minimum Content of Natural Law

Hart claims that, there is some further way in which law must conform to morals beyond that which is exhibited in minimum content of natural law. Hart has identified 6 of them:

3.6.1 Power and Authority

According to Hart, the dichotomy of law based "merely on power" and law which is accepted "as morally binding" is not exhaustive. Those who accepts the authority of a legal system look upon it from the internal point of view, and express their sense of its

[30] *Id.* at 197.
[31] *Id.* at 197-98.

requirement in internal statements couched in the normative language which is common to both law and morals.[32]

3.6.2 The Influence of Morality on Law

The law of every modern state shows at a thousand points the influence of both the accepted social morality and wider morals ideals. These influences enter into law either abruptly and avowedly through legislation, or silently and piecemeal through the judicial process. For example- in US the ultimate criteria of legal validity explicitly incorporate "principles of justice" or substantive moral values. No, positivist could deny that these are facts, or the stability of legal system depends in part upon such types correspondence with morals.[33]

3.6.3 Interpretation of Law

Law needs interpretation if they are to be applied in concrete case (i.e. open texture). Very often the judges' choices (that is, blind arbitrary choice or mechanical deduction) are guided by an assumption that the purpose of the rules which they are interpreting is a reasonable one, so that the rules are not intended to work injustice or offend settled moral principles. So, there is "weighing" and "balancing" characteristic of the effort to do justice between competing interest.[34]

3.6.4 The Criticism of Law

In the criticism of law, there may be disagreement both as to the appropriate moral standards and as to the required points of conformity (of law).[35]

3.6.5 Principles of Legality and Justice

It may be said that the distinction between a good legal system which conforms at a certain point to morality and justice, and a legal system which does not, is a fallacious one, because a minimum of justice is necessarily realized whenever human behavior is controlled by general rules publicly announced and judicially applied.[36]

3.6.6 Legal Validity and Resistance to Law

The enactment which enjoyed or permitted iniquity should not be recognized as valid, or have the quality of law, even if the system in which they were enacted acknowledged no restriction upon the legislative competence of the legislature.[37]

[32] *Id.* at 202-03.
[33] *Id.* at 203-04.
[34] *Id.* at 205-06.
[35] *Id.* at 206.
[36] *Id.* at 206.
[37] *Id.* at 206.

3.7 International Law: Considered as a Weak Law

According to Hart, absence of an international legislature, courts with compulsory jurisdiction, and centrally organized sanction make international law a weak law. The absence of these institutions means that the rules for states resembles that simple form of social structure, consisting only of primary rules of obligation, which, when we find it among societies of individuals, we are accustomed to contrast with a developed legal system. Hart doubt on the "source" of international law. So, he states that, international law not only lacks the secondary rules of change and adjudication which provide for legislature and courts, but also a unifying rule of recognition specifying "sources" of law and providing the general criteria for the identification of rules.[38]

However, it should be noted that, the Source of International law as stated in International Court of Justice Statute (ICJ Statute) are as follows:[39]

a. International conventions, whether general or particular, establishing the rules expressly recognized by the contesting states;
b. International customs as evidence as general practice accepted as law;
c. General principles of law recognized by civilized nations;
d. Subject to the provisions of Article 59, Judicial decisions and the teachings of highly qualified publicists of various nations as subsidiary means for the determination of rules of law.

However, the ICJ Statute further states that, the decisions of the ICJ does not create any binding precedents to others except to the parties in respect to the particular case.[40]

On "Obligation and Sanction" in international law Hart opined that, there is absence from the system of centrally organized sanctions. He further states that, neither Article 16 of the Covenant of the League of Nation nor Chapter VII of the United Nation Charter introduced into international law anything which can be equated with the sanctions of municipal law. Hart also emphasized that the process of law enforcement in international law has been paralyzed by "veto" power state and says that it exists only on the paper.[41] However, it should be noted that, after the establishment of International Criminal Court (ICC) in 1998 and functioning from 2002, this notion needs to be redefined. Although the ICC follows the "complementary principle"[42], and has jurisdiction only on "Genocide, Crime Against Humanity, War Crime, and Crime of Aggression"[43], however, considered as the effective mechanism for the global sanctioning system.

On "Obligation and the Sovereignty of State" Hart opined his skeptic view as,

[38] *Id.* at 214.
[39] Statute of International Court of Justice, Article 38 (1).
[40] Statute of International Court of Justice, Article 39.
[41] H. L. A. HART, THE CONCEPT OF LAW 216-17 (2d ed., Clarendon Press, Oxford 1996).
[42] Statute of International Criminal Court, Article 17.
[43] Statute of International Criminal Court, Article 5.

> "One of the most persistent sources of perplexity about the obligatory character of international law has been the difficulty felt in accepting or explaining the fact that a state which is sovereign may also be bound by, or have an obligation under, international law."[44]

According to Hart, States can only bound by self-imposed obligation, that is, "auto-limitation" derived from the promises which the state makes to international community mostly through treaty law. Though these promises may have been given only "tacitly" or has to be "inferred."[45]

Quoting Kelsen, Hart states that, there is one suggested formal analogy between international and municipal law. Accordingly, like municipal law international law possess a "basic norm" (or what Hart termed "rule of recognition") by reference to which the validity of other rules of the system is assessed, and in virtue of which the rules constitute a single system. However, the above hypothesis is opposed by Hart as- the analogy of structure is false as international law simply consists of a set of separate primary rules of obligation which are not united as the system.[46]

However, it is to be noted that, then and now, time has changed a lot and so did the international law. International law has now had some sort of obligatory character in the breach of "International Humanitarian Law", "Customary International Law" and there is "universal jurisdiction" provision applicable in the breach of grave human right violation, protected by "International Human Right Law." However, other area the "authority" of "International Law" counts only if (related) "treaties" or "conventions" are ratified by the concerned States.

4. Answering Q.3- What are rules and to what extent is law an affair of rules?

Hart tried to answer this question in Chapter-V, VI, and VII entitling "Law as The Union of Primary and Secondary Rules", "The Foundations of a Legal System" and "" Formalism and Rule Skepticism" respectively.

4.1 Need for A Fresh Start: As the Austinian Conception of Law is a Failure

Hart criticized the Austinian conception of "law" as the "sovereign's coercive orders." Hart opines that the "over-simple theory of law" as the sovereign's coercive orders failed to reproduce some of the silent features of a legal system, which were either distorted or altogether unrepresented. Hart has identified various ways by which the Austinian theory failed and asked for the second summary. So, the ways by which the theory failed are:

[44] H. L. A. HART, THE CONCEPT OF LAW 220-25 (2d ed., Clarendon Press, Oxford 1996).
[45] *Ibid.* at 224-26.
[46] *Id.* at 233-36.

Criminal Statute, mostly resembles orders backed by threats, however applies to those who enact it and not merely to others. Hart adds,

> "There are other varieties of law, notably those conferring legal powers to adjudicate or legislate (public powers) or to create or vary legal relations (private powers) which cannot, without absurdity, be construed as order backed by threats…. There are legal rules which differ from orders in their mode of origin, because they are not brought into being by anything analogous to explicit prescription."[47]

Hart even suggested that, the notion of a "tacit order" seems to have no application to the complex actualities of a modern legal system. Also, Hart opines that, treating power-conferring rules as mere fragments of rules imposing duties, or treating all rules as directed only to officials, distorts the ways in which these are spoken of, and actually used in social life. To illustrate it, Hart writes, this has no better claim to our assent than the theory that all the rules of a game are 'really' directions to the umpire and the scorer.[48] So, Hart opines that Austinian theory fails. The root cause of failure is that, the ideas of orders, obedience, habit, and threats do not induce, and cannot by their combination yield the idea of rule, without which we cannot hope to elucidate even the most elementary forms of laws.

So, according to Hart, this notion of failure needs for a "fresh-start"

4.1.1 The Idea of Obligation: Is a "Gunman Situation"

Hart claimed that, "The Idea of Obligation" as suggested by Austin in his theory is a "gunman situation." He illustrates it as, if "A" orders "B" to hand over his money and threatens to shoot him if he does not comply. Here, Hart claims, if B obey then B was "obliged" to hand over his money. However, B did not "have an obligation" to hand over his money. Hart illustrates the "obliged situation" by stating that, the statement that a person "was obliged" to obey someone is a psychological one referring to the "beliefs and motives" with which an action was done. But the statement that someone "had an obligation" to do something is of a very different type and there are many signs of this difference.[49] Then how different is "have an obligation"? Hart clarifies it by criticizing as,

> "Some theorists, Austin among them, seeing perhaps the general irrelevance of the person's beliefs, fears, and motives to the question whether he had an obligation to do something, have defined this notion not in terms of the subjective facts, but in terms of the "chance" or "likelihood" that the person having the obligation will suffer a punishment or evil at the hands of others in the event of disobedience."[50]

[47] *Id.* at 79-80.
[48] *Id.* at 81.
[49] *Id.* at 82.
[50] *Id.* at 83.

Hart further explains, "rules of etiquette" or correct speech are of certain rules: they are more than convergent habits or regularities of behavior; they are taught and efforts are made to maintain them; they are used in criticizing our own and other people's behavior in the characteristic normative vocabulary. e.g. "you ought to take your hat off" (say, when entering the church). Hart state that, rules imposing obligations may be customary if the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great. i.e. there may be no centrally organized system of punishments for breach of the rules; and the social pressure may take only the form of a general diffused hostile or critical reaction which may stop short of physical sanction.[51]

However, Hart warns that, the fact that rules of obligation are generally supported by serious social pressure does not entail that to have an obligation under the rules is to experience feeling of compulsion or pressure.

4.1.2 The Elements of Law: Remedy of Inconsistency of Primary Rule by Substituting it by Secondary Rule

The social structure where the only means of social control is that general attitude of the group towards its own standard modes of behavior (that is, rules of obligation) are often referred as "custom" however Hart preferred to use the terminology "primary rules of obligation" or simply "primary rules." Hart chooses so, as it is often believed that the customary rules are very old and supported by less social pressure than other rules.

So, according to Hart, if a society is to live by such primary rules alone, there are certain conditions which must clearly be satisfied. Those conditions are as follows:

The rules must contain in some form of restrictions on the free use of violence, theft, and deception to which human beings are tempted but which they must, in general, repress, if they are to coexist in close proximity to each other. Though such a society may exhibit the tension between those who accept the rules and those who reject the rules, except where fear of social pressure induces them to conform. So, in primitive communities, though there were dissidents and malefactors, the majority live by the rules seen from the "internal point of view". Hence, only in a small community closely knit by ties of kinship, common sentiment, and belief, and placed in a stable environment, could live successfully by such a regime of unofficial rules.[52]

So, according to Hart, when a society moves from pre-legal to legal world, such a simple form of social control must prove "defective." and will require supplementation in different ways. As,

[51] *Id*, at 86.
[52] *Id*. at 92.

i. Primary rules are uncertain
ii. Primary rules are static
iii. Primary rules are insufficient

The remedy for each of these 3 main defects in this simplest form of social structure consisting in supplementing the "primary rules of obligation" with "secondary rules." While "primary rules" are concerned with the actions that individuals must or must not do, however these "secondary rules" are all concerned with the primary rules themselves. They specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined.

The remedy for the defect of primary rules is given by Hart as follows:[53]

(i) The simplest form of remedy for the "uncertainty" of the regime of primary rules is the introduction of "rule of recognition" a rule for conclusive identification of the primary rules of obligation. However, in a developed legal system the "rules of recognition" are of course more complex; instead of identifying rules exclusively by reference to a text or list they do so by reference to some general characteristic possessed by the primary rules. This may be the fact of (a) there having been enacted by a specific body (b) their long customary practice, or (c) their relation to judicial decisions. If conflict arises among the "identifying criteria" then custom and precedent are subordinate to statute.

(ii) The remedy for the "static" quality of the regime of primary rules consists in the introduction of "rules of change." The simplest form of such a rule is that which empowers an individual or body of persons to introduce new primary rules and to eliminate old rules. There will be a very close connection between the "rules of change" and the "rule of recognition." i.e. if "rule of change" exist then "rule of recognition" will necessarily incorporate a reference to legislation as an identifying feature of the rule. Hart opines that, without such private power-conferring rule society would lack some of the chief amenities which law confers upon it.

(iii) The remedy for the "inefficiency" of primary rules is introduction of "rules of adjudication." However, "minimal form of adjudication" consists in such determinations. The rule which confers jurisdiction will also be a "rule of recognition" identifying the primary rules through the judgments of the courts and these judgments will become a "source" of law. However, it should be noted that, the reliability of "rule of adjudication" fluctuates both with the skill of the interpreter and the consistency of the judges.

Concludingly, Hart warns that, though the combination of primary and secondary rules merits, because it explains many aspects of law, the central place assigned to it, however, this cannot by itself illuminate every problem.

[53] *Id.* at 95-96.

4.2 Rule of Recognition: Provides Legal Validity for a Legal System

In modern municipal system, secondary "rule of recognition" is accepted and used for the identification of primary "rules of obligation". This is the situation, according to Hart, to be called the foundation of a legal system. Wherever such a rule of recognition is accepted, both private persons and officials are provided with authoritative criteria for identifying primary rules of obligation. These criteria include reference:

a) to an authoritative text;
b) to legislative enactment;
c) to customary practice;
d) to general declarations of specified persons;
e) to past judicial decisions in particular cases.

So, in modern legal system where there are a variety of "sources" of law, the rule of recognition is correspondingly more complex. The criteria for identifying the law are multiple and commonly include a written constitution, enactment by a legislature, and judicial precedents. In day-to-day life of a legal system its "rule of recognition" is very seldom expressly formulated as a rule; though occasionally, courts in England may announce in general terms the relative place of one criterion of law in relation to another, as when they assert the supremacy of Acts of Parliament over other sources or suggested sources of law.[54]

He further adds, for the most part the "rule of recognition" is not stated, but its existence is "shown" in the way in which particular rules are identified, either by courts or other officials or private persons or their advisers. According to Hart, there is a difference in the use made by courts of the criteria provided by the rule and the use of them by others: for when courts reach a particular conclusion on the footing that a particular rule has been correctly identified as law, has a special authoritative status conferred on it by other rules.[55] So, in this respect the "rule of recognition" of a legal system is like the "scoring rule of a game." That is, identifying criteria towards winning the game. The use of unstated "rule of recognition" by courts and others, in identifying particular rules of the system is characteristic of the "internal point of view". According to Hart,

> "If this use of an accepted rule of recognition in making internal statements is understood and carefully distinguished from an external statement is understood and carefully distinguished from an external statement of fact that the rule is accepted, many obscurities concerning the notion of legal 'validity' disappears."[56]

[54] *Id.* at 101.
[55] *Id.* at 101-02.
[56] *Id.* at 103.

That is, to say that a given rule is valid is to recognize it as passing all the tests provided by the "rule of recognition" and so as a rule of the system. However, Hart warns that, there is no necessary connection between "validity" of a particular rule and its "efficacy" unless the "rule of recognition" of the system includes among its criteria the provision that no rule is to count as a rule of the system if it has long ceased to be efficacious. Hence, the statement that a rule is "valid" is an internal statement recognizing that the rule satisfies the test for identifying what is to count as law in his court, and constitutes not a "prophecy" of but part of the "reason" for his decision.

4.3 New Questions: Difficulty Arising After the Abandonment of Austin's Habit of Obedience

Here, Hart has identified various difficulty arising after the abandonment of Austin's "habit of obedience" to a legally unlimited sovereign; and substituting it for the conception of an ultimate "rule of recognition" which provides a system of rules with its criteria of validity.

The 1st difficulty is that of classification between rules and conventions- Although these are exhaustive cases, there may be some confusion. For example- as Dicey states that the constitutional arrangement of UK consist partly of laws strictly so called (statues, orders in council, and rules embodied in precedents) and partly of conventions which are mere usages, understandings, or customs.[57] Here, Hart states that, the Queen may not refuse her consent to a bill duly passed by Peers and Commons; there is, however, no legal duty on the Queen to give her consent and such rules are called "conventions" because the courts do not recognize them as imposing legal duty. So, the base of legal systems there are something which is "not law", which is "pre-legal", "meta-legal", or is just "political fact."

The 2nd set of difficulty arises out of the hidden complexity and vagueness of the assertion that a legal system "exists" in a given country or among a given social group. So, when we make this assertion, we in fact refer in compressed, portmanteau form to a number of heterogeneous social facts, which are usually concomitant. Austinian formula of a general "habit of obedience" to orders fails to reproduce or distorts the complex facts which constitute the minimum conditions which a society must satisfy if it is to have a legal system. According to Hart, this is one necessary condition required for the "existence" of the legal system, that is, where laws impose obligations or duties these should be generally obeyed or at any rate not generally disobeyed.[58]

However, in day-to-day existence consists also in the official creation, the official identification, and official use and application of law. So, in no ordinary sense of "obey" are legislators obeying rules when, in enacting laws, (they conform to the rules conferring

[57] *Id.* at 111.
[58] *Id.* at 112.

such powers are reinforced by rules imposing a duty to follow them). Nor in failing to conform with these rules do they "disobey" a law, though they may fail to make one. Nor does the word "obey" describe well what judges do when they apply the system's "rule of recognition" and recognize a statue as valid law and use it in the determination of dispute.[59]

Hence, as long as the law which are valid by the system's tests of validity are obeyed by the bulk of the population, then according to Hart, this surely is all the evidence needed to establish that a given legal system exists. However, according to Hart, this evidence is not the sufficient condition to describe the relationship to law involved in the existence of a legal system. In fact, it must be supplemented by a description of the relevant relationship of the system to the secondary rules which concerns them as officials. Here what is crucial is that there should be a unified or shared official acceptance of the "rule of recognition" containing the system's criteria of validity.[60]

There are 2 minimum conditions necessary and sufficient for the existence of a legal system. They are: (i) Those rules of behavior which are valid according to the system's ultimate criteria of validity must be generally obeyed, and (ii) Its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behavior by its officials.

4.4 The Pathology of Legal System: Breakdown in the Complex Congruent Practice of a Legal System

According to Hart, evidence for the existence of a legal system be drawn from two different sectors of social life. They are: First, the "normal unproblematic case" where the rules recognized as valid at the official level and are generally obeyed. However, sometimes, the official sector may be detached from the private sector, in the sense that there is no longer general obedience to the rules which are valid according to the criteria of validity in use in the courts.[61] So, according to Hart, the variety of ways in which this (that is, the second condition) happen belongs to the "pathology of legal system".

For they represent a breakdown in the complex congruent practice which is referred to when we make the external statement of fact that a legal system exists. So, there is a partial failure of particular system. Such breakdown may be the product of different disturbing factors, such as "revolution", "enemy occupation", and "simple breakdown of ordered legal control in the face of anarchy or banditry without political pretensions to govern is yet another." In each of these cases, there may be half-way stages during which the court function by using criteria of legal validity of the older legal system, either on the territory or in exile.

[59] *Id.* at 113.
[60] *Id.* at 115.
[61] *Id.* at 117-18.

4.5 Rule Skepticism in Formalism: Exist due to Open Texture in Law

According to Hart, in any large group, general rules, standards, and principles must be the main instrument of social control, and not particular directions given to each individual separately. So, two principal devices have been used for the communication of such general standard, one of them makes a maximal and the other a minimal use of general classifying words. The first one is "legislation" and the other is "precedent."[62] Hart opines that, there will indeed be "plain cases" constantly recurring in similar contexts to which general expressions are clearly applicable (for example, if anything is a vehicle a motor-car is one) but there will also be cases where it is not clear whether they apply in other cases or not (for example, does "vehicle" used here include bicycles, airplanes, roller skates?). [63] So, whichever device, precedent or legislation, is chosen for the communication of standards of behavior, these, however smoothly they work over.....they will have what has been termed as "open texture."

As, peace and quiet in the park is to be maintained or defended for those children whose pleasure or interest it is to use these things. In fact, all systems, in different ways, compromise between two social needs: The need for certain rules which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance. Weighing up of social issues, and the need to leave open, for later settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case. Hart further state, "Descriptions of the English 'theory' of precedent are, on certain points, still highly contentious: indeed, even the key terms used in the theory, "ratio decidendi", "material facts", "interpretation", have their own penumbra of uncertainty. However, Hart stated that, he tried to focus the "open texture" in the case of statute and the creative judicial activity within it."[64]

According to realist, the then "Law" is under-determinative of decision in particular cases (say "Hard Cases" as stated by Dworkin or "Open-Texture" as stated by Hart). So, there are free "space or gap" for the judges to move.[65] The "space or gap" is illustrated in the following Venn-diagram:

[62] *Id.* at 124.
[63] *Id.* at 126.
[64] *Id.* at 134.
[65] Manish Nepal, *An Insight into the American Legal Realism: An Analytical Approach*, NEPAL LAW REV., Year 42, Vol. 29, No. 1 & 2 (2020-21), at 410.

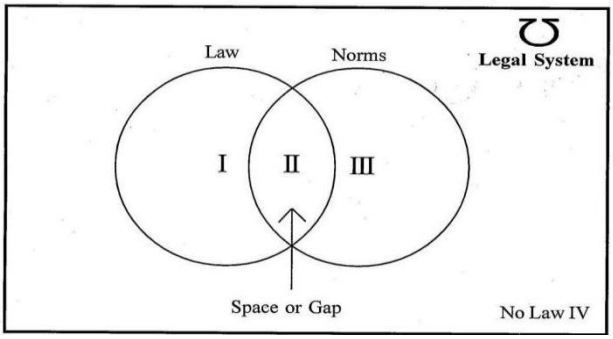


Diagram 1: Space or Gap in the Legal System

In the above Venn-diagram Region-I is the region depicting the region with the clear rules, where no interpretation is required. The Region-IV is the region in which there is "no rules", so the accused have the right to be acquitted on the ground of having no law. The Region III is the region where people are guided by the "norms" either legal or moral (the interpretation of "legal and moral norms" is beyond the scope of the paper). And, the Region-II is the region where there is no clear law, that is, having "space or gap" in the law.[66]

Hence, the "open texture" of law means that there are, indeed, areas of conduct where much be left to be developed by courts or officials striking a balance, in the light of circumstances, between competing interests which vary in weight from case to case.

5. Conclusion

Hart, in the book, figure out 3 recurrent issues/persistent questions in the "law". Answering Q.1, How does law differ from and how is it related to orders backed by threats? Hart opined that there can be "variety of imperative" Hart opined that, all the "orders" does not necessarily possess the "internal" property (of law), that is, "having an obligation" to obey. For example, the order, "money or life" by the gunman forces person of "being obliged" however s/he may not be "have an obligation" to the gunman. So, Austinian conception of law as the "sovereign's coercive orders" is a failure. According to Hart, there is one point of "similarity" between social rules and habit: in both cases the behavior in question must be general though necessarily invariable; this means that it is repeated by most of the groups when occasion arises (for example, taking out Hat when entering church or greeting elders etc.). So, if the behavior of the group "converges at a point" then that is considered a "habit".

Answering Q.2- How does legal obligation differ from moral obligation? Hart states that, Justice and Morality are interrelated phenomena. Hart insisted that, until the "necessary"

[66] *Ibid.* at 411.

relationship with morality is made explicit and its central importance seen, the mists which have so long clouded the understanding of law cannot be dissipated. Hart further adds that, they (that is, Thomistic tradition of Natural Law) claim that for a legal system to exist there must be a widely diffused though not necessarily universal, recognition of a moral obligation to obey the law, even though this may be overridden in particular cases by a stronger moral obligation not to obey particular morally iniquitous laws. On the "truisms" concerning human nature and the world in which men live, Hart opines that it shows that, as long as these hold good, there are certain rules of conduct which any social organization must contain if is it to be viable. According to Hart, such rules do in fact constitute a common element in the law and conventional morality of all societies (which Hart called "minimum content of natural law") which have progressed to the point where these are distinguished as different forms of social control. According to Hart, absence of an international legislature, courts with compulsory jurisdiction, and centrally organized sanction make international law a weak law.

Answering Q.3- What are rules and to what extent is law an affair of rules? Hart states that, there is a need for "a fresh start", as the Austinian conception of law as the "sovereign's coercive orders" is a failure. Hart has identified various ways by which the Austinian theory failed and asked for the second summary. However, Hart warns that, the fact that "rules of obligation" are generally supported by serious social pressure does not entail that "having an obligation" under the rules is to experience feeling of compulsion or pressure. Hart opines that, remedy of inconsistency of primary rule can be done by substituting it by secondary rule. According to Hart, the "rule skepticism" in law exist due to the "open texture" in formalism. For example, if anything is a vehicle a motor-car is one but there will also be cases where it is not clear whether they apply or not. As, does "vehicle" used here include bicycles, airplanes, roller skates?

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A Brief Overview of Money Laundering: A Crisis Affecting the Global Economy

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Abstract

Money laundering is probably as old as money itself. In the past, however, nobody looked at it as a crime as such. It was more the underlying crime that was looked at than what was done with the proceeds of that crime. The term Money Laundering is simply used to describe a process of laundering or washing black or illegal money into white or legal putting through a cycle of transactions. The term Money laundering is said to be coined in 1920s and it had first appeared in a judicial or legal context only in 1980s in U.S.A. Since then, the term has been widely accepted and is in popular usage throughout the world. However the criminalization of the act or attempted act of laundering of proceeds or the expression of money laundering is one of the fairly recent origin and its a modern concept in the field of criminal jurisprudence. Money laundering itself is not a main part of a crime but it is the byproduct of predicate offences which fuels corruption and organized crime and a danger to economic stability of a country. Due to clandestine nature of money laundering its actual impacts and amount laundered could not be possible to estimate accurately. In the present context, it has been developed as a transnational crime and emerging as a serious problem in Nepal also. This paper presents a glimpse of the basic concepts, origin and history, type nature and methods, and process of money laundering briefly.

Key words: Money Laundering**,** organized crime, illegal money, black money, proceeds of crime.

1. Introduction

Money laundering is a global phenomenon that has been around for ages. In its basic form, it is the process of concealing of the source of illicit money. The problem with money laundering is that it encourages criminal activities, which allow money launderers to benefit from the proceeds of their criminal activities and threatens the soundness of the financial system.[1] It is not only as serious and highly sophisticated forms of crime but also as threats to human rights, democracy and the rule of law.

Money laundering is probably as old as money itself. In the past, however, nobody looked at it as a crime as such. It was more the underlying crime that was looked at than what was

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[1] ABDULLAHI USMAN BELLO, IMPROVING ANTI-MONEY LAUNDERING COMPLIANCE, Plagrave Macmillan, Cham Switzerland at.2 (2016).

done with the proceeds of that crime. It is undeniable that during the Prohibition period in the USA (1920–1933) enormous amounts of money had been laundered.[2] Evolution of technology is one factor that has contributed to the growth of Money Laundering and Terrorist Financing activities and deficiency in international cooperation and coordination is another factor to weaken the AML/CFT mechanism.

Money is the prime reason for engaging in almost any type of criminal activity. Money-laundering is the method by which criminals disguise the illegal origins of their wealth and protect their asset bases, so as to avoid the suspicion of law enforcement agencies and prevent leaving a trail of incriminating evidence. Money laundering is a modern concept in the field of criminal jurisprudence. The term money laundering is said to be coined in the 1920s when most of the people engaged in illegal earnings were found showing their source of income as earned from shops like washing and laundry in USA.[3] The term money laundering has been defined by some authors, international organizations and agencies in different ways.

According to Black's Law Dictionary (9th Ed.) Money-laundering is the act of transferring illegally obtained money through legitimate people or accounts so that its original source cannot be traced.[4]

Prof. Frank Schmallenger has defined it as; it refers to the process by which illegal gains are disguised as legal income. A more formal definitions has been offered by the National Institute of Justice (USA), which says that money laundering is "the process of converting illegally earned assets, originating as cash, to one or more alternative forms to conceal such incriminating factors as illegal origin and true ownership.[5]

Butterworths International Guide to Money Laundering has defined The term Money Laundering as; the process by which the proceeds of crime are converted into assets which appear to have a legitimate origin, so that they can be retained permanently or recycled into further criminal enterprises.[6]

INTERPOL has defined money laundering as: "any act or attempted act to conceal or disguise the identity of illegally obtained proceeds so that they appear to have originated from legitimate sources. Illegally obtained funds are laundered and moved around the globe using and abusing shell companies, intermediaries and money transmitters. In this way, the illegal funds remain hidden and are integrated into legal business and into the

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2 WOUTER H. MULLER & CHRISTIAN H. KALIN, ANTI MONEY LAUNDERING INTERNATIONAL LAW AND PRACTICE, John Wiley and Sons, Ltd Henley & Partners, England at.3 (2007).

3 Ranjit Bhakta Pradhananga & Balaram Prasad Raut, "*Nepalese experience of Organized Crime: An appraisal"* NEPAL LAW REVIEW, Nepal Law CampuS, vol.23, number 1&2,Year 36, at.19 (2011).

4 BLACK'S LAW DICTIONARY (9th ed), (2009) at 1097.

5 FRANK SCHMALLENGER, CRIMINOLOGY TODAY (4th ed.), Pearson Education Inc., New Jersey, USA, at.431 (2006).

6 TOBY GRHAM (General ed.), (2nd ed.), BUTTERWORTHS INTERNATIONAL GUIDE TO MONEY LAUNDERING, LAW AND PRACTICE, Butterworths LexisNexis, London. at.1 (2003).

legal economy.[7] UN Convention against illicit traffic in narcotic drugs and psychotropic substances (Vienna Convention), 1988 is the first UN convention which has criminalized money laundering.

Similarly, the financial action task force (FATF), recognized as the international standard setter for anti money laundering (AML) and combating of financing terrorism (CFT), defines the term "money laundering" as the processing of.....criminal proceeds to disguise their illegal origin" in order to "legitimize" the ill gotten gains of crime."[8] Nepalese Asset (Money) Laundering Prevention Act, 2008 has not defined money laundering separately but it has only defined the assets supposed to have laundered or the activities which are considered to be the offense of laundering.

2. Origin and History of Money Laundering

The phrase "Money Laundering" was first coined at the beginning of the 20th century. Money Laundry was first seen with individuals hiding wealth from the state to avoid taxation or confiscation, or a combination of both. The practice of disguising income derived from illicit activities can be traced back to the 13th Century B.C., when pirates were dominant and used the oceans and seas as international trade routes. The shipments were often purged and plundered for valuable commodities and assets. Pirates were arguably pioneers in the practice of laundering such articles as they and even the empires they served sought to profit from their treacheries in a way that did not attract any ramification.[9] However the criminalization of the act or attempted act of laundering of proceeds or the expression of money laundering is one of the fairly recent origin.

The original sighting was in newspapers reporting the "Watergate Scandal" in the United States in 1973. The expression first appeared in a judicial or legal context in 1982 in America in the case US V$4,255,625.39 (1982) F Supp. 314. Since then, the term has been widely accepted and is in popular usage throughout the world.[10] In spite of the fact that money laundering came to the world centuries back, however no industry level initiatives were taken until few decades ago. Banks over the worlds were having different practices at their entity level until anti money laundering guidelines came to effect post the Sept 11 attacks. Now the regulation of more than 100 countries has set up Financial

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7 **https://www.interpol.int/Crime-areas/Financial-crime/Money-laundering. (Access date 20 Aug, 2024).**

8 PRADHANANGA & RAUT *Supra* note 3, at.20.

9 Laxmi Prasad Mainali & Chandra Shekhar Khadka,"*Concept of Money Laundering and Nepalese Anti-Money Laundering Initiatives:An Insight*"NEPAL BAR COUNCIL LAW JOURNAL, Nepal Bar Council, Vol.XVII, at.17 (2018).

10 Gauri Bahadur Karki, *"Nepalese Experience in Money Laundering"*. SAMPATTI (ASSET) MONEY LAUNDERING JOURNAL, Vol 1, Year 1, Money Laundering Investigation Department, Thapathali, Kathmandu, at. 2 (2012).

Intelligence Units (FIUs) who are issuing guidelines to their stakeholders.[11] The international community has also put their hands together to formulate effective mechanism to combat money laundering and terrorist financing activities.

In recent time, money laundering has been much easier than what is used to be in the Pirate's time. The advent of information technology and sophistication in the global banking industry has eased the process in the twenty first century. Along with the technological progress and the geographic expansions of banking industry, crime has also become more global. Hence, criminals no longer desire to remain or limit their activities to one country. The international criminal organizations have mastered themselves at moving illegitimate proceeds from one country to another, taking advantage of the notoriously lax legislation existent in some countries that provides safe oasis for foreigners seeking to conceal their wealth. This has led to the situation where it is no longer sufficient for enforcement authorities to merely be aware of what is occurring within their own jurisdiction. Many of these countries provide "dead ends" for investigation who attempt to follow the trail left by the proceeds. Though criminal money may be successfully laundered without the assistance of the financial sector, the reality is that very huge amount of criminally derived money in laundered through financial institutions.[12] With the technological advancements and globalizations of financial markets; launders are constantly trying to find new ways of non financial channels to expand their activities.

3. Types, Nature and Methods of Money Laundering

Depending on the activities money laundering can be categorized into three types as; Fraud related money laundering ii.) Drug related money laundering and iii.) Terrorist financing. While considering the nature of money laundering generally there are three processes or functions like; i) Erase the link of crime and money ii) Erase the link of the money and the new owner and iii) Shelter the profits from possible confiscation.[13]

A striking feature of money laundering is the numbers of different methods used to carry it out some of the very common methods are:[14] Cash smuggling, Structured deposit, Casinos/bookmakers , Wire transfer, Credit cards advance payments, Legitimate business ownership, Shell companies , Purchase of high value goods, Real estate transactions,

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[11] Nil Saru, "*Combating Money Laundering in the Context of Nepalese Bank*". SAMPATTI (ASSET) MONEY LAUNDERING JOURNAL, Vol.5, Year 5, Money Laundering Investigation Department. Pulchowk, Lalitpur, at.160-161 (2017).

[12] *Ibid*

[13] Chudamani Sharma, *"Anti-Money Laundering Challenges for Nepal and Solution Measures"*. SAMPATTI (ASSET) MONEY LAUNDERING JOURNAL, Vol 4, Year 4, Money Laundering Investigation Department, Pulchowk, Lalitpur, at. 33-34 (2012).

[14] Durga Prasad Gnawali. "Money Laundering- At a Glance/ Money Laundering- An Overview". SAMPATTI (ASSET) MONEY LAUNDERING JOURNAL, Vol 5, Year 5, Money Laundering Investigation Department. Pulchowk, Lalitpur, at. 175-179 (2017).

Securities/share market and Other methods like false invoices/receipts, alternative remittance system/ hundi, accountants/ financial officers, offshore accounts, trusts etc.

4. Process of Money Laundering

There is no one way of laundering money or other property. It can range from the simple method of using it in the form in which it is acquired to highly complex schemes involving a web of international business and investments. Traditionally it has been accepted that the money laundering process comprises three stages: *Placement, Layering and Integration.*[15] These stages, while they can be separate and distinct, more often occur simultaneously or overlap. It all depends on the facilities of the launderer, the requirements of the criminals, and on the robustness, or otherwise of the regulatory and legal requirements linked to the effectiveness of the monitoring system of the financial or regulated sector.

Money laundering has often been characterized as a three stage process that requires;

i) Moving the funds from direct association with the Crime-*Placement*,

ii) Disguising the trail to foil Pursuit-*Layering*, and

iii) Making them available to the criminal once again with their occupational and geographic origins hidden from View-*Integration*.

5. Global Scenario of Money Laundering

The advent of sophisticated technologies in the global financial system of the world in one hand has been able to provide services per excellence to its customers but in the other hand, it has also made it more difficult to combat the anti-money laundering activities. The deeper "dirty money" gets into the international banking system; the more difficult it is to identify its origin.[16]

Rapid developments in financial information, technology and communication allow money to move anywhere in the world with speed and ease. This makes the task of combating money-laundering more urgent than ever. The deeper "dirty money" gets into the international banking system, the more difficult it is to identify its origin. Because of the clandestine nature of money-laundering, it is difficult to estimate the total amount of money that goes through the laundry cycle. The estimated amount of money laundered globally in one year is 2 - 5% of global GDP, or $800 billion - $2 trillion in current US dollars. Though the margin between those figures is huge, even the lower estimate underlines the seriousness of the problem governments have pledged to address.[17] According to new figures from Wealth insight, global spending on AML compliance is set to grow to more than $8billion by 2017.[18]

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[15] DOUG HOPTON, MONEY LAUNDERING A CONCISE GUIDE FOR ALL BUSINESS, Gower Publishing Limited, Hampshire, England, at.1 (2006).

[16] GRAHAM, *Supra* note 6, at. 2.

[17] http://www.unodc.org/unodc/en/money-laundering/globalization.html, (Access date 24 Aug,2024).

[18] SARU, *Supra* note 11, at. 163-164.

6. Effects and Necessity of Countering Money Laundering

Even though the practice of money laundering has apparently been around since ancient times, it was not unit 1986 that that it was criminalised. The main reason for criminalising it is because of the impact it has on the society especially in the early years when money laundering was largely synonymous with drug trafficking. One of the effects of money laundering is its threat to the legal economy. Money laundering can also "undermine the integrity and stability of financial institutions and systems, discourage foreign investment, and distort international capital flows.[19]Other effects, according to Unger and van der Linde (2013), include economic, social and political effects of money laundering. Money laundering and the financing of terrorism can occur in any country, they have particularly significant economic and social consequences for developing countries like Nepal, because those markets tend to be small and, therefore, more susceptible to disruption from criminal or terrorist influences. Some of the major effects are; it increases crime and corruption, international consequences and effect on foreign investment, weakens financial institutions, compromised economy and private sector and potential for monetary and economic instability and it damages privatization efforts etc.[20]

The economic effect involves unfair competition, price distortion and negative effect on investments. On the social side, they stated that it encourages corruption and bribery since disguising the origin of money may require compromising those that are responsible for operating a legitimate system of money transfer. The political effect is centered around having criminals using their ill-gotten money to gain political power and in the process further corrupting the system by laundering the proceeds of their crimes. Although it is believed that the effect of money laundering is huge, at least in the estimation of regulatory authorities, it is, however, difficult to estimate the actual extent of the effect on the economy despite the "courageous attempts" that have been made to estimate the magnitude of the problem.[21] There are various studies that have tried to measure the impact, but according to Masciandaro and Barone (2008 p. 9), "most literature on Money Laundering effects is pure speculation, or it is based on figures that are either wrongly cited, misinterpreted or just invented".[22] Therefore it can be said that due to the clandestine nature of Money Laundering its actual amount and effects cannot be easily measured.

A country's regime to counter money laundering and the financing of terrorism has three primary objectives. The first is to deter money launderers and terrorist financiers from using a country's financial system for illicit purposes. The second is to detect money laundering (ML) and terrorist financing (TF) when and where they occur, and the third is to prosecute and punish those involved in such schemes. There are varied reasons that an anti-money laundering (AML) and counter terrorist financing (CFT) regime is important

[19] BELLO, *Supra* note 1.p. 26.

[20] PAUL ALLAN SCHOTT, REFERENCE GUIDE TO ANTI-MONEY LAUNDERING AND COMBATING THE FINANCING OF TERRORISM, The World Bank/IMF, Washington DC, USA, at.II-1(2006).

[21] BELLO, *Supra* note 1, at. 26.

[22] SCHOTT, *Supra* note 20, at. II-1.

in any country. The relevant stakeholders from a country's public sector are likely to have slightly different priorities because the stakeholders include policy makers from the legislative and governmental authorities, the judiciary, law enforcement agencies, the financial intelligence unit (FIU), and from financial regulatory and supervisory authorities. But, among other things, the reasons will encompass the need to advance the domestic agenda, will enhance safe-and-sound banking practices, and will avoid or minimize negative international implications. Political will is the most important prerequisite for achieving these three objectives. A national government demonstrates its clear political commitment to establish a robust AML/CFT regime by passing appropriate laws and regulations, by granting suitable powers, by dedicating necessary resources to relevant ministries and agencies, and by prosecuting cases and obtaining convictions.

An effective AML/CFT regime requires significant collaboration and cooperation from the country's stakeholders in the public sector. Also crucial to the success of the regime, however, are relevant stakeholders from the private sector, namely the financial institutions and designated nonfinancial businesses and professions (DNFBPs) subject to compliance obligations. These should also be included in the collaborative process.[23] Paul Allan Schott has listed three major benefits of an effective AML/CFT framework such as; fighting crime and corruption, enhancing stability of financial institutions and encouraging economic development.

7. Conclusion

The term Money Laundering is used to describe a process of laundering or washing black or illegal money into white or legal putting through a cycle of transactions. The term was first coined at the beginning of 20th century, for those individuals, avoiding taxation or confiscation, or a combination of both. The original sighting of the term was in the newspapers reporting the "Watergate Scandal" in the United States in 1973. The expression first appeared in a judicial or legal context in 1982 in America. Since then, the term has been widely accepted and is in popular usage throughout the world. However, the criminalization of the act or attempted act of laundering of proceeds or the expression of money laundering is one of the fairly recent origin. However, the practice of disguising income derived from illicit activities can be traced back to the 13th Century B.C., when pirates were dominant and used the oceans and seas as international trade routes. The shipments were often purged and plundered for valuable commodities and assets.

Money Laundering has been recently emerged transnational organized crime particularly as a multi-dimensional financial crime in the field of criminal jurisprudence. It is not a main part of a crime but it is the byproduct of predicate offences which fuels corruption and organized crime and a danger to economic stability of a country. Therefore, it has

[23] PIERRE-LAURENT CHATAIN & JOHN MCDOWELL, PREVENTING MONEY LAUNDERING AND TERRORIST FINANCING, The World Bank, Washington DC, USA at.3 (2009).

been considered that uncovering and preventing money laundering would be efficient instruments in combating organized crime.

Money laundering process having its clandestine nature its actual figure and effects is not possible to measure. It has been developed very rampantly worldwide threatening global economic stability. With the development of modern communication, technologies and globalizations of financial markets; launders constantly finding new ways and making use of new non financial channels and expanding their activities. Therefore, collaborative effort of international community is very necessary for combating this global problem. In the context of Nepal money laundering has been also emerging as a serious problem deeply rooted in the domestic economy challenging the effectiveness of the existing enforcement mechanism. Nepal has been trying to cope and comply with the international norms and standards related with Money Laundering and Terrorist Financing (ML/TF|) to fight against this recently emerged crime in the criminal jurisprudence.

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HISTORICAL BACKGROUND FOR THE ESTABLISHMENT OF ICC: AN APPRAISAL

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Abstract

Although the International Criminal Court (ICC) was specifically created to deal with humanitarian issues, however, interestingly, the ICC primary function is to ensure that states standardize their domestic laws on war crimes, genocide, and crimes against humanity. The norm of international law sets one function of ICC as the institute for legal homogenization, and by doing so, it helps spread the idea that these crimes will not go unpunished.

Key Words: ICC, Nuremberg Tribunal, Tokyo Tribunal, ICTY, ICTR

1. Introduction

Interesting to note that, the creation of ICC does not ensure that it itself will hear such cases outside the jurisdiction of domestic courts. Another *function* is to create a completely new international institution with autonomous legal powers, and of course having a powerful political role. Blending these two functions together results the concept of "complementarity," [1] which specifies that the ICC shall be "complementary" to domestic courts rather than to supersede them. However, the ICC has the mandate and jurisdiction to hear cases related to genocide, war crimes, crimes against humanity, and crimes of aggression.[2]

2. The International Tribunal Prior to World War I

The idea of the establishment of a criminal court having international jurisdiction is not new. The first tribunal with an arguably international character summons in Breisach, Germany, in 1474. It involved the Holy Roman Empire conducting the trial of Peter von Hagenbach with 28 judges, appointed from the members of the coalition who had fought von Hagenbach.[3]

Von Hagenbach was charged with murder, rape, torture, perjury, and giving orders to the non-German 'mercenaries' whom he had brought to Breisach that they should kill men in their houses. The defendant was found guilty by the tribunal and put to death for the crimes he had committed against the laws of God and the laws of men.[4]

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[1] ICC Statute, Article 17.

[2] ICC Statute, Article 5.

[3] G. SCHWARZENBERGER, INTERNATIONAL COURTS AND TRIBUNALS, THE LAWS OF ARMED CONFLICT 462-463 (Vol. II, 1968).

[4] *Id.* at 465.

After the trial of Peter von Hagenbach, on 3 January 1872, one of the founders of the Red Cross movement, Gustav Moynier of Switzerland, proposed the establishment of a permanent international criminal court by treaty at a meeting of the ICRC.[5] He even drafted a proposal for a permanent court to prosecute individuals for the breach of the Geneva Convention of 1864. He thought it inappropriate to leave judicial remedies to belligerents because the judges could be placed under pressure at any time, whereas an international court could offer better assurances of neutrality. This, in turn would make belligerents more likely to use it.[6]

In fact, no serious attempt was taken to establish the international court following Moynier's proposal. The next attempt at the establishment of an international tribunal occurred after World War I.

3. The Establishment of the Leipzig Court after World War I

In the aftermath of World War I, the victorious Allies decided to prosecute Germans responsible for aggression and other war crimes. There was outrage concerning war crimes on the part of Allied states, against Germany's war crimes, and also on the part of foreigners, such as against the Ottoman Empire for the Armenian massacres.[7]

During the war the Allies repeatedly expressed their strict determination to bring to justice all Germans who had committed acts which violated the laws and the customs of war. Hence, shortly after World War I, the Allies set up a commission in 1919 in order to 'investigate the responsibility for the start of war crimes' and which type of tribunal would be adequate for trials.[8] The commission reported the responsibility of the Central Powers for initiating the war, and made a number of recommendations, such as the prosecution of high authorities such as the Kaiser and establishing an Allied 'High Tribunal' among the Allied member states.[9]

The Report's suggestions were largely followed by the Allies, and led to the Treaty of Versailles being signed between the Allied and Associated Powers. The Treaty provided the legal grounds for the prosecution of Kaiser Wilhelm II and other war criminals before a military tribunal which would be established by the Allied powers.[10] It seems that the first serious initiative to implement the individual responsibility of holders of high

[5] CRISHTOPHER KEITH HALL, THE FIRST PROPOSAL FOR A PERMANENT INTERNATIONAL CRIMINAL COURT 58 (322 International Review of Red Cross, 1998).

[6] *Id.* at 57-59.

[7] DADRIAN V., THE HISTORY OF THE ARMENIAN GENOCIDE: ETHNIC CONFLICT FROM THE BALKANS TO ANATOLIA TO THE CAUCASUS (2003), and THE ARMENIAN GENOCIDE AND THE LEGAL AND POLITICAL ISSUES IN THE FAILURE TO PREVENT OR PUNISH THE CRIME (1998)

[8] The Report of the Commission on the Responsibility of the Authors of the War and on the Enforcement of penalties, 14 AMERICAN JOURNAL OF INTERNATIONAL LAW 95(1920).

[9] *Id.*

[10] *Id.*

positions of state was concerned with the case of Kaiser Wilhelm II, Emperor of Germany.[11]

In 1921 and 1922, a total of twelve "war crimes" trials were held before the highest German court, the Reichsgericht in Leipzig. The accused were former members of the imperial German armed forces suspected of having perpetrated war crimes. At first, in keeping with Articles 228 and 229 of the Treaty of Versailles.[12]

4. Post World War I Era Tribunals

After the WWI the idea of the creation of the international criminal court found some support, the League of Nations Advisory Committee in 1921 provided a proposal for the creation of an international criminal court to prosecute war crimes.[13] However, the effort by the League was not successful for the creation of an international criminal court despite the fact that the League drafted and adopted a statute for such an international criminal court.

It was only after the Second World War that international tribunals were established. By creation of Tokyo and Nuremberg tribunals, international law had begun to accept that individuals have both rights and duties under international law.

5. The Creation of the Nuremberg and Tokyo Tribunals after World War II

Due to the widespread brutality and war crimes committed by the Nazis during the WWII, after the war several Allied leaders such as Churchill and Stalin were pressing for the summary execution of Axis leaders and trial for the lower ranks, but because of repeated arguments to the contrary by Henry Stimson of the US they were persuaded to accept the establishment of an international tribunal. The Allied states, under Control Council Law Number 10, agreed to the prosecution of the major Nazi and Japanese war criminals in the Nuremberg (IMT) and Tokyo (IMTFE) tribunals.[14]

Through the creation of the Nuremberg and Tokyo Tribunals, direct individual criminal responsibility for international crimes was stipulated for the first time. In practice, in the Nuremberg Tribunal twenty-four defendants, including political and senior military leaders, were tried from 14 November 1945 to 1 October 1946.[15] Twelve of them were sentenced to death, three to life imprisonment, and four to limited imprisonment; three were acquitted.[16]

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[11] Article 227 of the Treaty of Versailles described the crimes of Kaiser Wilhelm II as 'a supreme offense against international morality and the sanctity of life.'

[12] International Encyclopedia of First World War. Available at: https://encyclopedia.1914-1918-online.net/article/leipzig_war_crimes_trials (Apr. 28, 2025)

[13] T. Mc. CORMACK, FROM SUN TZU TO THE SIXTH COMMITTEE: THE EVOLUTION OF AN INTERNATIONAL CRIMINAL LAW REGIME, IN T. Mc. CORMACK AND G SIMPSON (eds.), THE LAW OF WAR CRIMES NATIONAL AND INTERNATIONAL APPROACHES 51-52(1997).

[14] Charter of The Tokyo Tribunal, Art. 1.

[15] *Id*.

[16] *Id*.

In addition to the number of defendants who were tried in Nuremberg and Tokyo, many other 'subsidiary' tribunals were held before the US military tribunal at Nuremberg and over 800 Japanese defendants in the Australian military tribunal. The Tokyo tribunal (IMTFE) similarly to the Nuremberg, was established by the Allies; the crimes within the jurisdiction of the two courts were almost the same, but the structure of the tribunal was different from the Nuremberg Tribunal, as was the number of countries that took part in each one (eleven countries in Tokyo versus four countries in Nuremberg).
Also, unlike Nuremberg, the Tokyo Tribunal did not characterize any organization as criminal; yet like Nuremberg, the Tokyo Trials neither accepted the defence of superior orders nor that government officials were protected through 'acts of state'. In contrast to the Nuremberg Charter, however, in the Tokyo Trials the 'official position of an accused could be treated as a circumstance in mitigation of punishment if this was required in the interest of Justice.

6. The Establishment of ad-hoc ICTY and ICTR

Security Council decided that an international tribunal should be established for the prosecution of persons responsible for serious violations of IHL (e.g., deportations, mass executions, mass sexual assaults and rapes, and concentration camps) committed in the territory of the former Yugoslavia since 1991.
On February 22, 1993, the Security Council in one of the resolutions[17] decided that an international criminal tribunal should be established and asked the UN Secretary General, Butros Butros Ghali, to prepare a report. In only 60 days, the Secretary General reported back to the Security Council with the Statute of the future ICTY, which was adopted without changes on May 25, 1993, by the Security Council, acting under Chapter VII of the UN Charter. Crimes covered by ICTR Statute are- Grave breaches of Geneva Convention, Genocide, Crime Against Humanity and War Crimes.

ICTR was established in a like manner 18 months later.[18] Crimes covered by ICTR Statute are- Genocide, Crime Against Humanity and War Crimes. The structural similarities between the ICTY and the ICTR are numerous, including the fact the ICTY and the ICTR share the same Chief Prosecutor and the same Appeal Chamber. The affinity of the two institutions, often called the twin tribunals, also set them apart from all other international judicial bodies.

Unlike all other bodies included in this compilation, the ICTY and the ICTR are ad-hoc in nature. As enforcement measures under Chapter VII, the life span of each is linked to the restoration and maintenance of international peace and security in the territories of former Yugoslavia and Rwanda. Their establishment by a Security Council resolution[19] (as

[17] UNSC Resolution No. 808 (1993)
[18] MICHEAL P. SCHARF & MARGAUX DAY, THE AD HOC INTRNATIONAL CRIMINAL TRIBUNALS; In WILLIAM A. SCHABAS & NADIA BEMAZ (eds.) ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIMINAL LAW 58(2011).
[19] UNSC Resolution No.808(1993).

opposed to an international agreement, as in the case of all other international judicial bodies) has three further consequences.

Firstly, all member States of the United Nations are bound to comply with the requests and decisions of the tribunals.

Secondly, unlike the Nuremberg and Tokyo tribunals, neither the ICTY nor the ICTR possess the means to bring an accused to trial of its own. However, non-compliant or even non-collaborative States can be referred to the UN Security Council for sanction.

Thirdly, the ICTY and the ICTR are subsidiary organs of the Security Council within the terms of the Charter.[20]

The single most important element that sets the ICTY and the ICTR apart (and for that matter also the ICC) from all other international judicial bodies, is that they are criminal courts. This has multiple implications.

Firstly, it means that the parties to the judicial process are always, on the one hand individuals[21], as indicted, and on the other hand the Prosecutor.

Secondly, unlike in the case of all other international judicial bodies, States and international organizations do not have standing. Individuals convicted of crimes of genocide or crimes against humanity are subject to criminal sanctions (i.e., serving jail periods up to life-sentencing). Accordingly, unlike all other international judicial bodies, the ICTY and the ICTR have a special detention unit located at the Hague and in Arusha, respectively. Their statutes and rules of procedure and evidence provide elaborate protective measures for victims and witnesses, especially in cases of rape or sexual assault.

Finally, it should be mentioned that the jurisdiction of the ICTY and the ICTR is not exclusive but concurrent with that of national courts.[22] However, both have primacy over national courts (something the ICC does not have). At any stage of the procedure, the two ad hoc international criminal tribunals may formally request the national courts to defer competence.

7. The Establishment of ICC

After the World War II, the successful functioning of the Nuremberg and Tokyo Tribunals helped establish the principle of "individual criminal responsibility". This inspired the UNGA to invite the International Law Commission (ILC) to examine the possibility of establishing a permanent international criminal court to try persons charged with genocide or other crimes of similar gravity. But with the ideological and political tensions during the cold war and consequent polarization of interests the establishment of such an international body remained ineffective for about three and a half decades during 1953-1989.

Thereafter, the establishment of the ad hoc tribunals for the former Yugoslavia and Rwanda in 1993 and 1994 respectively once again encouraged the UNGA to take initiative

[20] The UN Charter, Article 29.
[21] Nuremberg Principle I
[22] ICTY Statute, Article 9.

for the establishment of a permanent court. At last, in July 1998 in Rome international community overwhelmingly decided to establish a permanent ICC to try individuals for the most serious offences of global concern, such as genocide, war crimes, crimes against humanity and crime against aggression.[23]

ICC acts as a complimentary[24] institution which respects the domestic jurisdiction of the individual states to prosecute their own criminals if they find the evidence to prosecute as well as possess a functioning judicial body to properly convene a fair and just trial.

The Court will serve as a catalyst to states' investigating and prosecuting such crimes committed either within their territories or by their nationals. The ICC will be a global judicial institution with universal jurisdiction complementing national legal systems. The jurisdiction of the Court will not be retroactive[25] and binds only those States that ratify[26] it. The Court's very existence will be hoped to serve as a deterrent to future tyrants by sending a strong signal that never again will such acts be met with impunity[27].

The ICC is a fairly young institution, having only been open and active since 2003. In September 2009, the ICC opened its first case, prosecuting Congolese warlord Thomas Lubanga Dyilo. Found guilty, on 14 March 2012, of the war crimes of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities (child soldiers). Sentenced, on 10 July 2012, to a total of 14 years of imprisonment. Verdict and sentence confirmed by Appeals Chamber on 1 December 2014.[28]

The ICC depends on the cooperation of the states. Unfortunately for the ICC, this is not always the case. Specifically, many instances have occurred where the prosecutor has the evidence, the indictment has been issued, but no trial ensues simply because the indicted is not turned over to the ICC for trial. Therefore, the suspect remains at large as an international criminal. This is especially the case with Omar Al-Bashir of the Sudan.

The Conference in 2010 in Kampala, Uganda inducted a definition of aggression[29] and added it to genocide, war crimes and crimes against humanity as a list of possible crimes that fall under the umbrella of the ICC. This amendment to the Rome Statute showed the flexibility of the court, the ICC was able to add new amendments that would further extend its jurisdiction and ensure international peace.

The final major flaw of the ICC definitely stems from the lack of participation by three permanent members of the UN Security council. As of this text, China has not signed the Rome Statute, and neither the United States nor Russia has ratified it. In fact, as of the Bush Administration actions of 2002, the United States actually unsigned it. This lack of participation certainly hinders the ability to enforce the laws instituted by the court. The lack of U.S. participation especially hinders any recognizable advancement of the court.

[23] The Rome Statute, Article 5.
[24] The Rome Statute, Article 17.
[25] The Rome Statute, Article 24.
[26] The Rome Statute, Article 4 (2).
[27] The Rome Statute, Preamble.
[28] The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06.
[29] UNSC Resolution No.3314 (2010).

Also, the cases being brought before the court are mostly located in Africa. Now, as some Africans claim bias, the turmoil in Africa is no secret. So, it seems that there is no consistency in the prosecution of the cases by the ICC.

Overall, despite a strong foundation laid out at the Rome Conference, the ICC has had few tangible successes since its inception. Some of this can be attributed to the youth of the court, but much can be realized specifically from the three major flaws, the ineptness of the prosecutor's office, the unwillingness of states party to the treaty to cooperate with the wishes of the court, and the lack of support from permanent members of the UN Security Council which holds veto powers over the cases of the ICC. Due to hindrances such as these, the court has struggled to carve out its niche in the world of international criminal law.

8. Conclusion

The first tribunal with international character summons in Breisach, Germany, in 1474 for conducting the trial of Peter von Hagenbach by the Holy Empire. Gustav Moynier of Switzerland, proposed the establishment of a permanent international criminal court by treaty at a meeting of the ICRC in 1872. After World War I, the Allies set up a commission in 1919 in order to 'investigate the responsibility for the start of war crimes.' League of Nations Advisory Committee in 1921 provided a proposal for the creation of an international criminal court to prosecute war crimes. However, the effort by the League was not successful for the creation of an international criminal court despite the fact that the League drafted and adopted a statute for such an international criminal court

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In July 1998 in Rome international community overwhelmingly decided to establish a permanent ICC to try individuals for the most serious offences of global concern, such as genocide, war crimes, crimes against humanity and crime against aggression. ICC acts as a complimentary institution which respects the domestic jurisdiction of the individual states to prosecute their own criminals if they find the evidence to prosecute as well as possess a functioning judicial body to properly convene a fair and just trial. The ICC depends on the cooperation of the states. The final major flaw of the ICC definitely stems from the lack of participation by three permanent members of the UN Security council. Also, the cases being brought before the court are mostly located in Africa. So, some Africans claim bias.

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"Navigating the Cosmic Frontier: Legal Considerations for Nepal's Entry into Space Exploration"

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Abstract

As space exploration expands beyond traditional spacefaring nations, emerging space players like Nepal face unique legal and regulatory challenges. This article explores the legal considerations crucial for Nepal's entry into space exploration, focusing on national and international frameworks that govern space activities. Through a comprehensive analysis of space law literature, treaties such as the Outer Space Treaty and the Convention on Registration of Objects Launched into Outer Space, and the policies of other nations with emerging space programs, this study identifies key legal issues Nepal must address. These include compliance with international treaties, establishment of national space legislation, and participation in global space governance. The findings suggest that while Nepal's entry into space offers significant opportunities for scientific and technological advancement, it requires careful navigation of legal responsibilities and international collaborations. The article concludes with recommendations for developing a robust legal framework that ensures Nepal's safe and equitable participation in the global space community.

Keywords: *Nano-satellite, Cube satellite, Celestial bodies, Space debris, Public-Private Partnerships (PPP), Outer Space Act, Satellite collisions, Environmental harm, Satellite Spectrum Rights, Space Sustainability and Ethics, UNOOSA, COPUOS, ITU.*

Introduction

The beginning of the 21st century has marked the start of a new age in space exploration, defined by swift technological progress and a growing involvement of nations and private companies in outer space activities.[1] Nepal is also part of this race, having successfully launched its own nanosatellite. The launch of Nepal's first nano-satellite (NepaliSat-1), a cube satellite, on April 18, 2019, at 2:31 AM (Nepal Standard Time) from Virginia[2], was a historic moment for the nation—a dream realized amid economic challenges. This achievement not only showcased Nepal's growing desire for technological capabilities but also marked a significant step toward leveraging satellite technology for national development.

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[1] Amrit Pathak, Space Exploration in the 21st Century https://www.studocu.com/in/document/tribhuvan-university/information-technology/space-exploration-in-the-21st-century/105421642 (accessed Aug.1, 2024)

[2] Nepal's first ever satellite launched into space, *The Kathmandu Post* (Apr.18, 2019) https://kathmandupost.com/science-technology/2019/04/18/nepals-first-ever-satellite-launched-into-space (accessed Aug. 1, 2024)

Leveraging this accomplishment, Nepal is now preparing to launch its next cube satellite, the Munal Satellite, by the end of 2024[3]. This upcoming mission further emphasizes the country's commitment to advancing its space endeavors and utilizing satellite data for crucial sectors such as agriculture, disaster management, and environmental monitoring. As Nepal embarks on this exciting journey, these milestones represent more than just technological advancements; they embody the aspirations of a nation determined to overcome obstacles and forge a path toward sustainable growth and innovation. In the wake of each satellite launch, Nepal not only enhances its standing on the global stage but also inspires future generations to dream big and aim for the stars.

Nepal's foray into space exploration offers a distinctive opportunity for the nation to position itself as a responsible and progressive player on the global stage. However, this opportunity also brings significant legal challenges alongside economic hurdles. As humanity expands into the vastness of space, the urgency for a comprehensive legal framework to regulate exploration and resource utilization intensifies. With Nepal preparing to initiate its space endeavors, it is crucial to explore the legal aspects that will influence its journey into this uncharted realm.

The advent of the Space Age in the late 1950s marked a pivotal moment in human history, necessitating the establishment of a legal framework to govern outer space activities. As nations embarked on ambitious missions beyond Earth, the potential for conflict and competition in this new frontier became apparent. The launch of the Soviet satellite Sputnik-I in 1957[4] marked the beginning of the space age and the subsequent U.S. response with Explorer- 1[5] underscored the urgency for international cooperation and regulation. This led to the creation of foundational treaties, such as the Outer Space Treaty of 1967, which set forth principles for the peaceful exploration and use of outer space, emphasizing that space should be the province of all humankind.[6] The need for space law has only intensified with the rapid advancements in space technology and the increasing involvement of private entities in space exploration. Today, space law addresses critical issues such as the liability for damages caused by space objects, the preservation of the space environment, and the ethical considerations surrounding the use of space resources. As humanity continues to push the boundaries of exploration, a robust legal framework is

[3] MEA, NSIL ink MoU to assist launch of Nepal-made Munal satellite, *Hindustan Times* https://www.hindustantimes.com/india-news/mea-nsil-ink-mou-to-assist-launch-of-nepal-made-munal-satellite-101723362760978.html (accessed Aug. 1, 2024)

[4] John Uri, 60 years ago, the Space Age began, *NASA* https://www.nasa.gov/history/60-years-ago-the-space-age-began/#:~:text=On%20October%204%2C%201957%2C%20the,the%20world's%20first%20artificial%20satellite. (accessed Aug. 1, 2024)

[5] *Sputnik and The Dawn of the Space Age, NASA* https://www.nasa.gov/history/sputnik/index.html (accessed Aug. 1, 2024)

[6] Vladimír Kopal, *Treaty On Principles Governing The Activities Of States In The Exploration And Use Of Outer Space, Including The Moon And Other Celestial Bodies*, https://legal.un.org/avl/pdf/ha/tos/tos_e.pdf (accessed Aug. 1, 2024)

essential to ensure that space remains a domain for peaceful cooperation and sustainable development, safeguarding the interests of all nations and future generations.

As Nepal sets its sights on the burgeoning field of space exploration, a clear framework for its ambitions becomes essential in navigating the complexities that accompany such endeavors. The nation seeks to harness space technology for applications such as telecommunications, agriculture, and disaster management, which could significantly contribute to its socio-economic development. However, this pursuit necessitates a comprehensive understanding of legal frameworks that govern outer space activities, as outlined in the previous paragraph. The establishment of regulatory mechanisms is crucial for ensuring compliance with international treaties and also addressing potential environmental issues associated with space activities, such as space debris and the sustainable use of outer space resources including the peaceful use of outer space, and the responsibility of nations for their space activities.[7]

Nepal has indeed taken steps toward legal reconsideration in outer space activities, notably through the formulation of the Satellite Policy, 2020 (2077 B.S), which aims to regulate and oversee the country's endeavors in this domain. Thus, on 12th March 2019, Nepal Telecommunications Authority (NTA) signed an agreement with the French satellite operator *Thales Alenia Space* to build Nepal's first satellite and to operate and manage Nepal's satellite (C/Ku Band satellite[8]) in the orbital slot allotted to Nepal at 123.3 degrees East[9] by the International Telecommunications Union (ITU).

The Nepalese government intends to use the satellite to provide nationwide internet access to its citizens, improve disaster management efforts, and strengthen economic growth in the country.[10] Unfortunately, NTA, through a notice published on 30th July 2021, canceled the process to procure its own satellite.[11] If this plan had proceeded as initially intended, Nepal would have already launched its own satellite by 2022, marking a significant step forward in the country's space ambitions. The satellite was envisioned to improve telecommunications, enhance connectivity, support disaster management, and boost Nepal's presence in the global space community. However, the project faced several

[7] M. Islam, The Sustainable Use of Outer Space: Complications and Legal Challenges to the Peaceful Uses and Benefit of Humankind. Beijing Law Review, 9, 235-254 (2018). doi: 10.4236/blr.2018.92016.

[8] The Telecommunication Satellite Project For Nepal Has Been Launched, *Thales Group* https://www.thalesgroup.com/en/worldwide/space/press-release/telecommunication-satellite-project-nepal-has-been-launched (accessed Aug. 2, 2024)

[9] Country Report Presentation Nepal, Department of Communication and Broadcasting Nepal, Presented by Bharat Gautam, Director https://www.itu.int/en/ITU-D/Regional-resence/AsiaPacific/Documents/Events/2023/LLDC2023/Final%20Slide_Nepal.pdf https://www.nta.gov.np/uploads/contents/EOI-Satellite-2021.pdf (accessed Aug. 1, 2024)

[10] Nepal Establishes First Satellite Project, *Relief Web* https://reliefweb.int/report/nepal/nepal-establishes-first-satellite-project (accessed Aug. 1, 2024)

[11] Notice for Cancellation of Applications for RFP No. 01-NTA-SATELLITE-2021, NTA https://www.nta.gov.np/content/notice-for-cancellation-of-applications-for-rfp-no-01-nta-satellite-2021 (accessed Aug. 1, 2024)

challenges, including the lack of adequate legal frameworks and regulatory clarity. Critical legal considerations were missing, particularly regarding satellite spectrum rights, international coordination, and the governance of space assets. These legal gaps contributed significantly to the decision to halt the procurement process.[12] As a result, Nepal lost an opportunity to capitalize on its allocated satellite slot, delaying the realization of its long-term space program objectives.[13]

This article, therefore, lays the groundwork for a comprehensive examination of the legal ramifications of Nepal's entry into space exploration, underscoring the necessity of navigating the intricate framework of international space law and domestic regulations that will govern the nation's activities in this field. By exploring the legal factors discussed, Nepal can effectively maneuver through these complexities and establish a robust framework for its space endeavors. This approach will enable the country to capitalize on the benefits of space exploration while minimizing risks and ensuring alignment with global norms and standards.

International Outer Space Law

The framework of international outer space law is built upon a series of treaties and agreements that establish guidelines for the exploration and use of outer space.[14] It happened in response to several critical needs and challenges that emerged with the advent of space exploration. These treaties aim to ensure that space activities are conducted for the benefit of all humanity, promoting peace, cooperation, and sustainability. Therefore, international space laws are pivotal for nations attempting to engage in space exploration, as they delineate the rights and responsibilities of states in outer space.

At the core of this framework are treaties like the Outer Space Treaty of 1967, which states that space exploration should benefit everyone and prevents any nation from claiming ownership of celestial bodies.[15] For a country like Nepal, aspiring to improve its space capabilities, understanding these legal guidelines is crucial. The complex landscape of modern threats and challenges, as noted in several studies, underscores the importance of legal frameworks that can adapt to shifting technological and geopolitical realities.

In addition, the challenges of transitional justice in various governance contexts can provide valuable lessons for emerging spacefaring nations on addressing equity and collaboration in global space activities. Given that transitional justice is a prominent issue

[12] Finally, Nepal To Get Own Satellite, *Nepali Times* https://nepalitimes.com/news/finally-nepal-to-get-own-satellite (accessed Aug. 1, 2024)

[13] NTA Cancels Process For Launching Satellite, *My Republica* (December 08, 2020), https://myrepublica.nagariknetwork.com/news/nta-cancels-process-for-launching-satellite/?categoryId=37 (accessed Aug. 2, 2024)

[14] Zhijie Chen & Yun Zhao, Intellectual Property Protection in Outer Space: Conflict in Theory and Application in Practice, *Sci.Direct*, https://www.sciencedirect.com/science/article/abs/pii/S0265964622000108 (accessed Aug. 1, 2024).

[15] Kate Howells, What is the Outer Space Treaty? *Planetary Society* (May 14, 2024). https://www.planetary.org/articles/what-is-the-outer-space-treaty (accessed Aug. 1, 2024).

in Nepal, the country is well aware of its complexities. Therefore, Nepal's involvement in International Space Law will be key to ensuring its responsible participation in space exploration.

The following outlines the space laws that must be understood when exploring outer space.

a) The Outer Space Treaty (1967)[16] (OST)

The treaty serves as the foundation of international space law for its signatory nations (115 as of March, 2024[17]) and outlines key principles for space exploration and operation:

- Space activities are intended for the benefit of all nations, allowing any country the freedom to explore orbits and beyond[18].
- No nation can claim sovereignty over space; no country can "own" space, the Moon, or any other celestial body.[19]
- The use of weapons of mass destruction is prohibited in orbit and beyond; celestial bodies can only be utilized for peaceful purposes.[20]
- Any astronaut represents all of humanity, and signatory states are required to assist astronauts in need, including facilitating emergency landings in foreign countries or at sea.[21]
- Each signatory state is responsible for its space activities, including those conducted by private companies, and must provide authorization and ongoing oversight.[22]
- Nations are liable for damage caused by their space objects and must take steps to prevent the contamination of space and celestial bodies.[23]

The cornerstone of space law, the Outer Space Treaty, sets fundamental principles for the use of outer space[24]. It emphasizes that space shall be used for peaceful purposes and prohibits the placement of nuclear weapons in orbit. The treaty establishes that celestial bodies cannot be claimed by any nation and underscores the importance of international cooperation.

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[16] "Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies"

[17] United Nations Office for Outer Space Affairs, Status of International Agreements relating to Activities in Outer Space https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/status/index.html (accessed Aug. 2, 2024).

[18] Article I, Outer Space Treaty (OST), 1967.

[19] *Ibid*, Article II, 1967.

[20] *Ibid* Article IV, 1967

[21] *Ibid* Article V, 1967

[22] *Ibid* Article VI, 1967

[23] *Ibid* Article VII, 1967

[24] Jinyuan Su, The "Peaceful Purposes" Principle In Outer Space And The Russia–China PPWT Proposal, *Space Policy*, https://www.sciencedirect.com/science/article/abs/pii/S026596461000024X
Doi: https://doi.org/10.1016/j.spacepol.2010.02.008 (accessed Aug. 1, 2024)

b) Rescue Agreement (1968)[25]

This agreement emphasizes the humanitarian aspect of space exploration by requiring states to assist astronauts in distress and ensure their safe return. It also covers the recovery of space objects that land on Earth outside the territory from which they were launched.

c) Liability Convention (1972)[26]

The Liability Convention establishes a framework for managing damages caused by space objects, holding launching states accountable for any harm inflicted on Earth or in space and providing a process for claims and compensation.

d) Registration Convention (1976)[27]

To enhance transparency,

The Registration Convention requires states to register space objects with the United Nations, enhancing transparency. This includes providing details about the object's orbit and function, facilitating the identification and tracking of space activities.

e) Moon Agreement (1984)[28]

The Moon Agreement extends the principles of the Outer Space Treaty to the Moon and other celestial bodies, declaring them the "common heritage of mankind." The Agreement stipulates that celestial bodies must be used exclusively for peaceful purposes and must not be contaminated. It also mandates that the UN be informed of any stations on non-Earth bodies, and it calls for the establishment of an international regime to govern the extraction and use of resources if mining on the Moon becomes viable. It proposes an international regime for resource exploitation, although it has not been widely adopted.

As Nepal continues to develop its space capabilities, adherence to these principles will be vital for ensuring its responsible participation in the global space community. This alignment not only enhances Nepal's standing in international forums but also facilitates collaborative efforts that benefit both national and global interests in space exploration.

National Space Legislation and Policy Framework

Satellite Policy, 2077 (2020)

The history reflects that Nepal has consistently recognized the growing importance of outer space activities and their potential to support national development. Over the years, the country has acknowledged that space-based technologies, such as satellite communications, earth observation, and remote sensing, can play a crucial role in

[25] "The Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space"
[26] "The Convention on International Liability for Damage Caused by Space Objects"
[27] "The Convention on Registration of Objects Launched into Outer Space"
[28] "The Agreement Governing the Activities of States on the Moon and Other Celestial Bodies"

addressing key challenges across sectors like telecommunications, disaster management, agriculture, and environmental monitoring. Nepal, strategically located in South Asia (between China and India), understands that access to space not only strengthens national security and technological capabilities but also enables the country to participate in global space initiatives. This growing awareness of the transformative power of space led to the formulation and implementation of Nepal's Satellite Policy in 2077 (2020),[29] which aims to harness space technology for socio-economic growth. By establishing this policy, Nepal sought to formalize its ambitions in space exploration and satellite technology, with a clear focus on developing its own space capabilities.

The Satellite Policy, 2077 reflects the country's commitment to enhancing national infrastructure, improving connectivity, and contributing to sustainable development goals through satellite-based solutions. It marks a significant step in Nepal's journey to integrate space technology into its broader development agenda. It emphasizes the importance of collaboration with international partners to enhance Nepal's capabilities in space science and technology. The policy reflects a commitment to not only participate in the global space community but also to ensure that Nepal can effectively contribute to and benefit from advancements in this field. Overall, the Satellite Policy 2077 marks a significant step forward in Nepal's efforts to engage with outer space in a meaningful and responsible manner.

The Satellite Policy 2077, a significant milestone for satellite usage in Nepal, was approved by the cabinet on 2077/03/02. Its goal is to achieve prosperity through the establishment, operation, and utilization of Nepal's own satellites, contributing to various sectors of development.

The objective and Strategy set by this policy are;

Objectives of the Policy:

- *To launch and establish the satellite controlled and operated from within the territory of Nepal, To prepare the skilled and qualified manpower necessary for space technology,*
- *To provide institutional provision necessary for providing services through the satellite operation.*
- *Coordinate and collaborate with international organizations working in the satellite/space-related field.*

Strategies of the policy

- *To extend/expand access to space by establishing Nepal's own satellite,*
- *To provide necessary arrangements to use Nepal's own satellite after its establishment,*

[29] Nepal Satellite Policy, Ministry of Foreign Affairs https://mofa.gov.np/wp-content/uploads/2020/05/Unofficial-Translation-of-Policy-and-Programme-2077-78.pdf (accessed Aug. 1, 2024)

- *To provide a necessary arrangement for preparing skilled and qualified manpower related to space technology,*
- *To provide a necessary arrangement for program formulation of space research and study.*
- *To use satellites in order to provide effective communication during a disaster and facilitate communication in rural areas,*
- *To collaborate and cooperate with the related international organizations to establish, operate and manage the satellite.*

In the 'Institutional Provision' section of the policy, it is stated that:

- *A separate institutional set-up will be arranged for the operation and management of satellite service,*
- *Nepal Telecommunication Authority (NTA) will work on the necessary functions until the institutional provision is provided,*
- *The functions related to the regulation of satellites shall be done by MoCIT or the body/entity appointed by MoCIT,*

Nepal's **Satellite Policy 2077** sets out clear goals for using satellite technology, but to achieve these goals, Nepal will need to create special laws to manage space activities. The country's current laws are not enough to handle the unique challenges of launching and running satellites, so new and special (Specific) legal structures are needed.

First, with the goal of launching and managing a satellite controlled and operated from within Nepal, the country will need to establish clear legal rights regarding satellite operations, spectrum allocation, and the protection of space assets. This could involve creating laws that align with international space treaties, such as the **Outer Space Treaty (1967)** and the **Registration Convention (1976)**, to ensure compliance with global norms and standards.

The **Satellite Policy** also stresses the need for skilled workers and collaboration with other countries. To support this, Nepal will need laws that not only help develop space technology skills but also guide how Nepal works with international space agencies. These laws should clarify the roles of organizations like the **Ministry of Communications and Information Technology (MoCIT)** and the **Nepal Telecommunications Authority (NTA)**, which will oversee satellite operations.

The policy also focuses on using satellites for disaster communication, rural connectivity, and space research. To ensure these goals are met safely and effectively, legal rules are needed to manage satellite use for these purposes. A special **Outer Space Act** could help manage space debris, control satellite traffic, and protect Nepal's satellite infrastructure.

In short, Nepal's **Satellite Policy 2077** sets ambitious goals, but to make them work, the country will need to create new laws to address gaps in regulation. This is exactly why the French team had to cancel Nepal's satellite launch plan.[30] Without these laws, Nepal could struggle to manage satellite operations, work with international partners, and ensure the long-term success of its space program.

Outer Space Law in Nepal: No Special Legislation Enacted

The landscape of Nepal's legal framework concerning space exploration is currently underdeveloped, mirroring the nascent status of its space endeavors. Existing policy primarily focus on terrestrial issues and are inadequate for addressing the complexities and international obligations that come with space activities. The need for new regulations is pressing as Nepal looks to engage in international partnerships and collaborations in space research and technology. Specifically, risks associated with transnational threats, as highlighted by the challenges of globalization, necessitate a more robust legislative approach. Furthermore, initiatives like the Disaster Information Management System (DIMS) portal underscore the importance of a comprehensive strategy encompassing social factors in risk management[31]. As Nepal prepares to navigate the cosmic frontier, developing a regulatory framework tailored to space exploration will be essential for fostering innovation, ensuring safety, and promoting international cooperation in this critical area.

Further, to build a comprehensive legal framework for space activities, Nepal can draw inspiration from the legal frameworks of other nations, particularly those with successful space programs and similar geopolitical contexts. For instance, India's Space Activities Bill,[32] which is currently being discussed, could serve as a model for Nepal. This bill proposes a dedicated space regulatory authority, which oversees both government and private sector space activities and ensures compliance with international treaties. Likewise, the United States' Commercial Space Launch Competitiveness Act (2015) outlines the roles of private companies in space exploration and addresses liability and insurance concerns related to satellite launches.[33] Nepal should also look to global space law conventions, such as the Outer Space Treaty and Liability Convention, to ensure its national legislation is in alignment with international norms, particularly concerning the

[30] NTA Calls Off Proposal To Procure Own Satellite, *My Republica*, https://myrepublica.nagariknetwork.com/news/nta-calls-off-proposal-to-procure-own-satellite/ (accessed Aug.2, 2024).

[31] Gaurab Sagar Dawadi. "Strengthening the Government of Nepal's portal for data on disaster and disaster risks: Ensuring That Bipad Portal is Used to Make Informed Decisions by Federal, Provincial, and Local Governments to Enhance Disaster Resilience". Oxford Policy Management Limited, (2020), https://www.opml.co.uk/files/Publications/a1594-strengthening-the-disaster-risk-response-in-nepal/strengthening-the-bipad-portal-for-data-on-disaster.pdf (accessed Aug.2, 2024).

[32] Draft Space Activities Bill, 2017, https://prsindia.org/billtrack/draft-space-activities-bill-2017 (accessed Aug.2, 2024).

[33] United States' Commercial Space Launch Competitiveness Act (2015) https://www.congress.gov/114/plaws/publ90/PLAW-114publ90.pdf (accessed Aug.2, 2024).

peaceful use of outer space and the prevention of space debris. By aligning its legal structures with established frameworks, Nepal will be able to attract international investment and ensure that its space activities are recognized as credible and compliant with global standards.

Nepal's Legal Gaps and Challenges in Space Exploration

As Nepal continues to develop its space program, it faces significant gaps in its current legal framework regarding space activities. While the country has made notable strides in space exploration—such as the successful launch of the NepaliSat-1 nano-satellite—there are several legal complexities that must be addressed to ensure responsible and sustainable participation in outer space activities.

Regulation of Private Actors

As space exploration increasingly involves the private sector, Nepal must proactively establish legal frameworks to regulate private space companies, especially as they play a critical role in satellite development, launch services, and space technology innovation. One effective approach could be to encourage Public-Private Partnerships (PPP), which would allow Nepal to leverage private expertise and funding in space activities while maintaining government oversight. Through PPPs, Nepal can establish mutually beneficial agreements where private firms invest in the space infrastructure while the government ensures compliance with national regulations, security standards, and international treaties. For example, private companies could be invited to build satellite manufacturing plants or participate in satellite launch programs under the supervision of a national space agency. This would also provide a pathway for Nepal to develop advanced space technologies without relying solely on state funding, thus accelerating its space ambitions and fostering innovation in the space sector.

In particular, Nepal must consider**:**

a. **Licensing and Oversight**: Clear legal mechanisms must be put in place for the authorization and ongoing oversight of private companies operating in Nepal's space sector. This includes regulating satellite launches, space data collection, and ensuring compliance with both national and international law**.**
b. **Public-Private Partnerships (PPP)**: Nepal could benefit from creating legal provisions for Public-Private Partnerships (PPP) in space exploration. By incentivizing private investment while maintaining regulatory oversight, Nepal could boost its technological capacity without relying solely on government funding.

Liability and Insurance:

Space activities inherently involve risks, such as satellite collisions, space debris, and potential environmental harm. Nepal's legal framework must address these risks by adopting liability and insurance frameworks**:**

a. **Liability for Space Objects:** Under the Convention on International Liability for Damage Caused by Space Objects (1972), Nepal would be held responsible for any

damage caused by its space objects, whether in outer space or on Earth. As Nepal looks to launch additional satellites, including the Munal Satellite in 2024, it must establish clear procedures for liability and ensure that it is covered by adequate insurance to protect against potential damages.

b. **Insurance Requirements:** A comprehensive insurance framework would help mitigate the financial risks associated with satellite launches and space activities. Nepal could mandate that space operators procure insurance that covers third-party liability, damage to other space objects, and environmental contamination.

Space Debris Management

As space exploration accelerates globally, space debris is becoming a pressing issue. Nepal must be proactive in addressing this concern by incorporating legal provisions that**:**

a. Regulate Satellite End-of-Life Procedures: Nepal should adopt regulations for the deorbiting and disposal of its satellites to minimize space debris. These regulations could align with international guidelines on debris mitigation set forth by entities like the United Nations Office for Outer Space Affairs (UNOOSA)**.**

b. Promote Sustainable Practices: Nepal can establish a "sustainability clause" within its space law that mandates the adoption of best practices for space debris management. This can include requirements for satellite design to ensure the satellite's removal from orbit at the end of its operational life.

Nepal's Role in Global Space Governance

As Nepal looks to expand its space activities, one of the most critical considerations will be the issue of space debris and the long-term sustainability of its space program. Space debris—comprising defunct satellites, fragments from satellite collisions, and other waste—presents a growing challenge to both national and global space operations. Nepal must incorporate space debris management into its space policy and legal framework. This can include adopting end-of-life protocols for satellites, ensuring that they are deorbited in a controlled manner, and mandating that all new satellite designs incorporate features to minimize the generation of space debris. Nepal could also align its regulations with international guidelines set by the United Nations Committee on the Peaceful Uses of Outer Space (COPUOS), which promotes space sustainability through debris mitigation measures. By doing so, Nepal can demonstrate its commitment to responsible space exploration and ensure that its growing space program does not contribute to the problem of space congestion and debris.

Joining and Contributing to International Space Organizations

Nepal's participation in international organizations will be critical for enhancing its credibility and fostering collaborations that benefit national and global interests. Some avenues for Nepal to explore include**:**

a. **United Nations Committee on the Peaceful Uses of Outer Space (COPUOS):** By increasing its involvement in COPUOS, Nepal can help shape global policies related to the peaceful use of outer space and space sustainability. This engagement will also ensure that Nepal is aligned with international space norms and treaties, such as the Outer Space Treaty (1967).

b. **International Telecommunication Union (ITU):** As Nepal continues to develop its satellite program, it must work closely with the ITU to ensure proper coordination on satellite spectrum allocation. Nepal should actively participate in ITU's work on satellite communication and contribute to the development of global telecommunication policies.

South-South Cooperation in Space

Nepal's geopolitical positioning, bordered by China and India, places it at the crossroads of major spacefaring nations in Asia. Given the increasing importance of space cooperation among developing nations, Nepal can act as a regional bridge for South-South collaboration in space. Areas where Nepal can focus its efforts include:

a. **Space Technology Transfer:** Nepal could play a key role in facilitating the transfer of space technologies from more advanced nations to other developing countries in the region. By partnering with countries such as India, Brazil, and other emerging space nations, Nepal could help build capacity for space science and technology in the Global South.
b. **Regional Space Networks:** Nepal can advocate for regional space collaboration programs in South Asia, focusing on shared challenges like disaster management, climate monitoring, and agricultural advancements through satellite data.

Recommendations for Nepal's Legal Framework for Space Exploration

Space technology has the potential to significantly transform Nepal's economy and society, particularly in areas critical to national development. For instance, satellite-based technologies can be harnessed to improve agricultural productivity, monitor climate change, and assist in disaster management. Remote sensing satellites could provide critical data for weather forecasting, crop monitoring, and natural resource management, which are vital to Nepal's largely rural and agriculture-dependent economy. Furthermore, satellite communications can bridge the digital divide by enhancing connectivity in remote and mountainous regions, where traditional infrastructure is limited. As Nepal invests in building its space capabilities, it should ensure that the benefits of space technology are aligned with its sustainable development goals (SDGs), particularly in areas such as education, healthcare, and climate resilience. By framing space exploration within the context of national development, Nepal can not only boost its global presence in space but also make significant strides in improving the lives of its citizens.

To ensure its successful and responsible entry into space exploration, Nepal must build a comprehensive legal and regulatory framework. Below are several specific recommendations to address the current gaps and guide Nepal's future space activities.

1. Drafting a National Space Law

The development of a dedicated National Space Act should be Nepal's top priority. This law would:

a) Establish the legal and regulatory framework for all space activities, including satellite launches, space research, and collaboration with private companies.
b) Ensure compliance with international space treaties such as the Outer Space Treaty (1967), the Registration Convention (1976), and the Liability Convention (1972), while also addressing national interests and security concerns.
c) Create a regulatory body or National Space Authority that would oversee space-related activities, provide licensing, and enforce compliance with the law.

2. Strengthening Institutional Capacity

Nepal should establish dedicated space institutions to support the implementation of the National Space Act:

a) **Space Research and Development Institute:** This institution could be tasked with advancing space technologies and research, building a skilled workforce in space sciences, and developing local satellite systems.
b) Nepal Space Agency: This could act as the central authority for coordinating space-related policies, projects, and international partnerships. It would also serve as the focal point for Nepal's space diplomacy.

3. International Collaboration and Capacity Building

As Nepal's space program evolves, establishing bilateral agreements with more advanced space nations will be critical for gaining the technical expertise and infrastructure necessary for its space activities. For instance, partnering with India could provide access to its space launch facilities, satellite communication systems, and expertise in space technology. Similarly, collaborations with Japan and European Union (EU) space agencies could offer advanced capabilities in satellite development, remote sensing, and space research. Additionally, Nepal should engage in capacity-building initiatives through joint training programs with international space agencies, which would help develop a skilled workforce capable of operating and managing satellite systems. By establishing these partnerships and pursuing technological transfers, Nepal can accelerate its space program and enhance its global competitiveness in the space sector.

Nepal must pursue partnerships with international space agencies and organizations. This will provide the necessary technical expertise and financial support needed for Nepal's space program to thrive. The following steps can be considered**:**

a) Bilateral agreements: Nepal should negotiate space cooperation agreements with countries such as India, Japan, and the European Union to access advanced space technologies and infrastructure.
b) Training and education: Establishing space training programs in collaboration with international space agencies can help build a skilled workforce capable of operating and managing Nepal's space activities.

4. Focus on Space Sustainability and Ethics

Given the global emphasis on space sustainability, Nepal should develop national policies that:

a) Promote space debris management, ensuring that all satellite projects include a plan for end-of-life disposal and debris mitigation.
b) Encourage ethical use of space resources, aligning with the principles of the Moon Agreement (1984) and ensuring that Nepal's space activities contribute to the common good, particularly in environmental monitoring and disaster management.

Conclusion:

A Robust Legal Framework for Nepal's Space Future

Nepal stands at a pivotal moment in its journey into space exploration. As the country seeks to leverage space technology for socio-economic development, it is essential to develop a comprehensive legal framework that ensures safe, responsible, and sustainable participation in space activities. This legal infrastructure must address both the technical and ethical challenges of space exploration while positioning Nepal as a responsible player in the global space community.

Through the establishment of a National Space (Outer Space) Act, active engagement with international space organizations, and a focus on sustainable space practices, Nepal can build a space program that not only advances its national development goals but also contributes to global efforts in space exploration and cooperation. By navigating the legal complexities of space with foresight and strategic planning, Nepal will be able to harness the full potential of the final frontier.

Further, to ensure that Nepal's space program remains on track and achieves its ambitious goals, Nepal must act swiftly to implement the recommendations outlined in this article. Developing a National Space (Outer Space) Act and fostering an ecosystem that supports both governmental and private sector initiatives will be pivotal to bridging gaps in regulation and infrastructure. Moreover, Nepal must continue to prioritize capacity building and international cooperation, acknowledging that no country can advance its space ambitions in isolation. By aligning its legal framework with international treaties and committing to sustainable practices, Nepal can contribute to the broader global dialogue on the responsible use of outer space.

Ultimately, by ensuring that its space activities are well-regulated, collaborative, and forward-thinking, Nepal will be able to harness the full potential of space—not only for its own development but also as a force for global progress and cooperation.

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ARTIFICIAL INTELLEGENCE IN ARBITRATION: PROSPECTS AND CHALLENGES

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Abstract:
The integration of AI powered tools in arbitration is transforming convention dispute resolution process through increased procedural efficiency, analytical accuracy, improved consistency, and accessibility. AI functions as a valuable assistant to arbitrators. Tools of artificial intelligence are increasing used in arbitration because it reduces time and cost by offering prospects like predictive analysis, categorization of data, language translation, case analysis/assessment, procedural coordination, and recognizing trends. However, the adoption of AI tools in arbitration introduce notable challenges like lack of transparency, potential biases in embedded data, data privacy, concern regarding ethical issues, legitimacy in arbitral proceedings etc. The absence of clear regulatory framework also raises considerable challenges. Despite its challenges, AI is believed to be promising in the sector of arbitration.

Key Words: Arbitration, Artificial Intelligence, Online Dispute Resolution, Relation of AI and Arbitration,

Introduction of Arbitration:

Alternative dispute resolution (ADR) is a significant mechanism to resolve disputes outside the traditional justice system. The courtroom is no longer the only place where justice is delivered. Although an alternative to formal court litigation, it does not replace it in all regards, but rather co-exists with court procedure and is concurrent with other forms of settlements.[1] Arbitration is a dispute resolution process that based on the mutual consent of the parties involved. Such consent is established through an arbitration clause. The clause provides that any future disputes arising from the agreement will be settled by arbitration instead of being taken to court. Alternative dispute resolution is a broad term encompassing a range of methods used to resolve disputes outside the courts including mediation, conciliation, negotiation and arbitration.

Arbitration has been recognized as one of the most popular means of alternative dispute resolution. It can be defined as a mechanism for the resolution of disputes which takes place usually in private pursuant to an agreement between two or more parties, under

[1] Robert Mnookin, *Alternative Dispute Resolution*. Paper 232 Harvard Law School John M. Olin Center for Law, Economics and Business Discussion Paper Series. (1948)

which the parties agree to be bound by the decision to be given by the arbitrator according to law or, if so agreed, other considerations, after a fair hearing, such decision being enforceable at law"[2] **Arbitration** is regarded as dispute-resolution proceeding governed by an agreement (contract) between the parties, in which the dispute is decided by an impartial adjudicator chosen by the parties themselves. The arbitrator's decision is final and binding on the parties and is based on principles of equity and justice, as well as the applicable law. It is also considered as fast, effective and efficient means of dispute resolution. Rather than taking disputes to court, the parties chose to decide their dispute through neutral arbitrator or panel of arbitrators.

Arbitrator is a person who needs to decide the dispute, fairly, amicably and neutrally, and whose decision is known as "award."[3] The decision made by the arbitrator(s) appointed for each case or those made by permanent arbitral bodies to which the parties have submitted is usually binding and enforceable, providing a final resolution to the commercial dispute. Arbitration is based on the consent of parties which is often expressed through valid contractual clauses.

Thus, arbitration is a consensual dispute resolution process based on the parties' agreement to submit their disputes for resolution to an arbitral tribunal usually composed, of one or three independent arbitrators appointed arbitrators appointed by or on behalf of the parties.[4]

Features of Arbitration:

Arbitration has witnessed an increasing application due to its tremendous features like; -

a. Autonomous Party: Arbitration is based on party's will. Parties have autonomy to choose professional arbitrators, free to decide how their arbitration will be conducted, decide the venue, applicable law, procedures, language, set arbitrator's power, to agree on the use of AI or a specific AI tool etc.
b. Voluntarily Agreement: Parties voluntary refer their dispute to an impartial third person, an arbitrator, selected them in order to deliver decision (award) based on the available evidences and arguments to be presented before arbitrators.[5]
c. Involvement of Neutral Arbitrators: Disputes are settled through the involvement of neutral arbitrator or arbitrators.
d. Expertise: Arbitrators are especially chosen because of their professional experience, specialized knowledge and understanding of subject matter and arbitral proceedings. They may have expertise in related domain such as law, construction, international trade, finance and so on. This expertise assists to resolve disputes in reasoned manner.

[2] BERSTEIN. HAND BOOK OF ARBITRATION PRACTICE, 13 (3 ed.,) (1998).
[3] NOMITA AGGARWAL, JURISPRUDENCE LEGAL THEORY 74 (8d ed., Central Law Publications) (2010).
[4] Hong Kong International Arbitration Center, https://hkiac.org
[5] ROBERT BEADGATE & FIDELMA WHITE, COMMERCIAL LAW 3 (3rd ed., Blackstone Press Ltd) (1997).

e. Reduction of Time: Disputes are often resolved faster than court litigation because arbitration follows flexible, simplified and faster procedures.
f. Limited Right to Appeal: There are very limited grounds to challenge arbitral awards in court.
g. Flexibility: Involved parties can choose the place, arbitrators, language, applicable law of the arbitration.
h. Confidential Process: Unlike court proceedings, which are generally open to the public, arbitration is a private process. The proceedings are closed to the public and information about the dispute is not disclosed ensuring confidentiality of the parties.

Online Dispute Resolution:

ODR digitalized the way of dispute settlement process. Online dispute resolution (ODR) is considered as the byproduct of the creation of cyberspace.[6] It is a technology mediated mechanism for resolving disputes between parties involved in disputes, often geographically dispersed. ODR helps to digitalize dispute resolution mechanism preventing the barriers caused by location or geography.

Through online space parties of different countries involved in disputes put their claim, facilitate their communication in order to seek remedy. Use of digital platform allows parties to settle dispute without physical presence. Virtual hearing, submission of evidences, communication with the arbitrator takes place through online platforms. However it poses some limitations like maintaining data privacy/ security, procedural fairness and confidentiality.

Artificial Intelligence:

The origin of modern AI can be traced back to the Turing Test proposed by Alan M. Turing in 1950. Often regarded as the father of artificial intelligence, Turing predicted that creating the machines with real human intelligence was possible in the future. Since the mid twentieth century, artificial intelligence has captured human interest in a new way. It is inspiring to see that AI has achieved a tremendous progress in various fields. The legal profession, including the field of international arbitration, is increasingly embracing technological advancements. The use of technology in arbitration enhances efficiency, lowers costs, and enables arbitration services to reach new market segments.[7]

Artificial intelligence refers to developing computer systems that can perform tasks that typically require human intelligence. These tasks include making decision, learning, reasoning, problem-solving, perceiving visual elements, recognizing human speech, translating language and language understanding.

There is no single universally defined definition of Artificial Intelligence. The Oxford English Dictionary defines AI as "the capacity of computers, or other machines, to exhibit

[6] Ballesterds, T. (2021), "International Perspectives on Online Dispute Resolution in the E-Commerce Landscape", International Journal of Online Dispute Resolution, 2 p. 87.

[7] Ljiljana, B., 'International commercial arbitration in cyberspace: Recent developments' Nw. J. Int'l L. & Bus. 22 (2001): 319, p. 345

intelligence behvior". This definition refers AI tools appear to act and think like human beings. It means AI tools can perform tasks like human beings and in some cases exceed the capabilities of human. Similar to this, John McCarthy at the 1956 Dartmouth Conference outlined the artificial intelligence is about letting a machine stimulate the intelligence behavior of humans as precisely as it can be.[8] He also officially introduced AI as a new discipline at the 2-month long Dartmouth Conference, which marks the birth of AI.[9]

Artificial Intelligence and Arbitration:

Artificial intelligence (AI) significantly influencing the field of arbitration. The emergence and rise of artificial intelligence undoubtedly played an important role in the field of arbitration. Interplay between human expertise and technological innovation is a matter of prime concern in legal sphere. AI in arbitration has transformed the way through which disputes are resolved. Artificial Intelligence (AI) is rapidly disrupting the traditional way of conducting arbitrations. In International Commercial Arbitration (ICA) some innovative AI applications are improving the efficiency and quality of arbitration proceedings.[10]

The need to embrace artificial intelligence into arbitration is becoming essential. Uses of AI tools in arbitration are source of both opportunities and challenges. The potential benefits of AI in arbitration are undeniable. Undoubtedly, uses of artificial intelligence in arbitration enhance procedural efficiency of through automated scheduling, review of documents, handling large volume of data, virtual hearings, identifying relevant information, document review, data processing, translation services and so on. AI tools can predict the outcome of arbitral proceedings. AI helps parties to overcome geographical barriers, language barriers, save time and cost reduction as well as increase accuracy of outcome. It facilitates smoother cross-border collaboration. AI may lead to well-reasoned decision or reason oriented output. It helps to trace out trends or pattern in arbitration.

However, different questions raised by the use of AI in arbitration related to transparency, data privacy, trustworthiness, suspicion and due process which remain a constant challenge. In this era of artificial intelligence,[11] it is crucial to adopting with the new technological demands with ensuring effectiveness. As the use of AI tools in arbitration becomes more widespread, arbitrators need to adopt best practices ensuring compliance with applicable laws. An arbitral tribunal should adopt the positive aspects of artificial intelligence while rejecting its negative aspects or potential pitfalls.

Thus, analyzing positive and negative impact of using AI, AI can be considered as the new fire in the hands of mankind, which has potential to cause great destruction to life and

[8] Official Textbook for Huawei ICT Academy, Artificial Intelligence Technology, Springer, (2023)P.1

[9] Ibid, p. 7

[10] Azael Socorro Márquez, Can Artificial Intelligence be used to appoint arbitrators? AVANI, Nro. 1, 2020. pp. 249-272

[11] Kissinger, H., Schmidt, E. Y Huttenlocher, D. (2003). La era de la Inteligencia Artificial y el future de la humanidad, Anaya, pp 1-240.

property. It can also be used to provide warmth, make life more comfortable, and take civilization to new heights.[12]

Human - AI Relationship:

Artificial intelligence is steadily diminishing the reliance on human manpower, transforming societal structures into machine-regulated systems. According to Demis Hassabis, Nobel Prize Winner for Chemistry (2024) states, everything in nature that exhibits patterns can be modeled by artificial intelligence. This statement also brings deep concern regarding the replacement of humans by AI in near future.

While AI can contribute to the arbitration process, there is ongoing skepticism about its application, especially when it comes to replacing human decision-makers. Artificial Intelligence is merely a tool, if applied appropriately, serve a supportive tool that can meaningfully play supportive role in arbitration, but ultimate decision making power should stay with qualified and trained human arbitrators. Data containing inherent biases can bring outcomes that are neither neutral nor fair. To some extent, AI can replace routine based tasks having low cognitive capacity like pattern recognition, data processing, document review, scheduling, summarizing cases, making reports etc. Arbitrator can be benefited from such works.

AI cannot replace the work like rendering award which needs sequence of negotiations between parties. Arbitrators should independently verify the reliability and accuracy of information or data obtained through AI tools in order to ensuring their judgment remains free from confirmation bias. Only human brain can analyze the given raw data to AI are enough or not. AI provides fair result as long as it receives enough and precise data. Arbitrators using AI must be mindful of both the information provided in the system and the result or output it produces. Arbitrators must not delegate their decision making authority to AI and must always exercise independent judgment. The outcome of AI tools regarding arbitration should confirmed by human arbitrators. Final decision-making authority and discretionary judgment continue to rest with human arbitrators.

Arbitration practitioners independently verify AI generated outputs before being relied upon. The use of AI tools does not replace the arbitrators' responsibility. Even when AI tools are used, the arbitrator must think independently, decide fairly, and remain accountable for the reasoned award. AI cannot replace of human intelligence in terms of intellectual insight and artistic creativity.[13] One factor that must always be taken into account is that no matter machines can act on their own, but they always require a human assistance and supervision.[14]

Tools of artificial intelligence assists human or arbitrators to draft contract, review of contract, scheduling time slot, evidence management, multilingual transcribers etc. Arbitrators are encouraged to consult with the parties involved in disputes regarding the

[12] D.P. Mittal, Handbook on Artificial Intelligence and Machine Learning, Commercial Law Publishers (India) Pvt Ltd, (2025 Edition) P. 13

[13] D.P. Mittal, Handbook on Artificial Intelligence and Machine Learning, Central Law Publishers (India) Pvt. Ltd. (2025) P .7

[14] Purvi Polhariyal and Amit K Kasyap eds, Artificial Intelligence Law and Policy Implications, (Reprinted 2024) p 41

use of AI tools. If the concerned parties oppose the use of AI tools in the proceedings, the arbitrator should refrain from using such tools in order to resolve disputes. AI must always remain subject to human oversight to preserve fairness, legitimacy, and due process.

AI Models/ Tools for Arbitration:

a. **ArbiLex:** In arbitration, it refers to a digital legal research platform. It is used for predictive arbitration analytics and case strategy. This helps to analyze historical case data and legal precedents to predict the winning probability of claims. According to Arbilex founder, Isabel Yang, ArbiLex analytics solution leverages expert knowledge and probabilistic modeling to inform high value strategic decisions, starting with the selection of arbitral tribunals which is arguably the highest value decision in any arbitration case.[15]

b. **Case Text CoCounsel:** For AI assisted legal research and case law.

c. **DISCO:** Helps to organize evidence, review of witness videos, transcripts and find documents.

d. **Modron Spaces:** For digital arbitration sessions and evidence handling.

e. **Zoom AI**: Zoom is widely used for virtual arbitration hearings, witness testimony, live transcription and meeting summaries. It assists legal professionals or arbitrators to conduct real time discussion through video/ audio, screen sharing as well as private breakout rooms. This tool makes arbitral proceedings more accessible for multi-jurisdictional arbitration.

f. **LegalMation:** For automating legal document generation.

g. **Ross**: This is an artificial intelligence app allows arbitrators or parties to navigate through documents, submissions, exhibits and case law.

h. **Kira:** This app helps to extracts and analyzes texts like contracts in single second of time. In arbitration process, it helps to review relevant information on contracts.

i. **NetCase:** Through Web based service NetCase, arbitration proceedings can be managed in a secure virtual setting where all participants communicate and share documents via a secure platform managed by the ICC.

j. **Luminance:** A well-known artificial intelligence platform for legal works especially in contracts and arbitration related matters. This legal platform used by law firms, arbitrators to trace timelines, link evidence to claims and in order to analyze large volumes of legal documents quickly. This also helps to categorize legal documents by legal issues, themes and facts. This AI tool is very useful in international arbitration where document production is extensive.

[15] https://legalfundingjournal.com, Launch of ArbiLex Brings AI and Predictive Analytics to International Arbitration. (AUG 5, 2019)

Benefits of the Use of AI in Arbitration:

Some of the benefits of using AI in arbitration are mentioned below:

a. Increased Efficiency: AI can assist in routine based task like analyzing data, document review, case management, scheduling, taking of evidence, generating text, drafting of awards etc.
b. Enhanced Consistency: Use of AI in arbitration promotes uniformity in procedural steps, uniformity in research, supports standardized processes etc.
c. Improved Accuracy: AI tool supports the processing of voluminous data, helps to recognize pattern, reduce potential accuracies.
d. Reduce the time required: AI reduces the time required for document review, evidence review, case preparation, legal research and so on.
e. Legal Research: AI can support legal research by summarizing legal materials and identifying relevant authorities.
f. Text Generation: AI tools used in arbitration can help to generate text, formatting documents, documentation, preliminary analysis etc.
g. Translation: In arbitration, documents of multiple languages may arise. AI tools can assist with language translation of legal documents and communications. It may also help to harmonize the interpretation of materials across different languages.
h. Case Analysis: AI tools assists in arbitration by extracting legal issues of case, identifying relevant facts, detecting trends or patters in prior decisions, providing well-informed decisions, organizing evidences, outcome prediction etc.

Challenges of Using AI in Arbitration:

Maintaining Data security and Client Confidentiality: Arbitrators must maintain data security and confidentiality while using AI tools. Appropriate safeguard must be used to keep data security.

a. AI Generated Content: AI generated content may contain outdated legal provisions, factual errors, fabricated authorities which can mislead arbitral tribunals if not verified. If not carefully checked or scrutinized such content
b. Ethical Uncertainty/Ambiguity: Integrating AI tools in arbitration creates ethical concern. Us of AI tools in arbitration proceedings raises ethical uncertainty related to procedural fairness, biasness, accountability, confidentiality, transparency, evidence integrity etc. Ensuring impartiality and procedural fairness in arbitral procedure is equally critical, as these constitute fundamental pillars of arbitration. Clear guidelines or regulatory framework is needed to minimize ethical uncertainty concerning use of AI tools in arbitration.

c. Issue of Confidentiality: AI tools can be viewed as third - party in arbitration. This raises serious concern regarding confidentiality which is also a fundamental feature of arbitration. When Ai tools are used, information may be shared to AI platform or to service provider. This can lead to risks of unauthorized access to sensitive data/ information or misuse of confidential data. The protection of commercially confidential and sensitive data is especially important in arbitration.
d. Explaining AI Outputs: Many AI systems operate as "black boxes," making it difficult for arbitrators and the parties involved understanding the reasoning behind their conclusions. Arbitrators and parties involved in disputes may find it difficult to comprehend how decisions are produced, reducing transparency, weakening procedural fairness, and hindering the evaluation of reliability, potential bias, and compliance with due process standards. The output may be inaccurate or flawed due to the use of unrepresentative or biased data.
e. Limitation of Generative Language Models: In arbitration, the use of generative language models whose text is produced by forecasting the most probable word sequences rather than through deliberate legal reasoning presents challenges, as their outputs may convey an impression of authority while often lacking accuracy, contextual relevance, and a solid legal foundation. A lack of awareness of this limitation may lead arbitrators to rely on or cite fabricated or inaccurate cases.
   Generative language models still struggle to handle long documents and to provide answers that integrate information dispersed throughout different parts of the text. Generative language models often lack access to the most current information and may provide outdated or incomplete data.
f. Black Box Problem: The internal decision making process is not fully understandable by involve parties and arbitrators. Parties may not trust the process of reasoning behind the conclusion generated by AI. It becomes difficult to determine who is responsible for errors. It is hard to detect the hidden errors made by AI tools.

Guidelines:

<u>The Chartered Institute of Arbitrators Guideline on the Use of AI in Arbitration (2025):</u>

The CIArb Guideline enables parties to take advantages of the benefits of AI in arbitration. The Chartered Institute of Arbitrators Guideline on the Use of AI in Arbitration seeks to give guidance on the effective and ethical use of AI in a manner that allows dispute resolvers, parties, their representatives, and other participants to take advantage of the benefits of AI, while supporting practical efforts to mitigate some of the risk to the integrity of the process, any party's procedural rights, and the enforceability of

any ensuring award or settlement agreement.[16] The Guideline seeks to balance the advantages of AI with safeguards for confidentiality, procedural fairness, and the integrity of the arbitral process.

This Guideline divided into four sections covering a framework for arbitrators and parties to maximize the benefits of using artificial intelligence in arbitration. Part I outline the benefits and risks of the use of AI in arbitration, Part II sets out general recommendations on the use of Ai in an arbitration, Part III addresses arbitrators' powers to give directions and make rulings on the use of AI by parties in arbitration and Part IV addresses the use of AI in arbitration by arbitrators. Appendix A is about agreement on the use of AI in arbitration, and Appendix B is a template procedural order on the use of AI in arbitration. The Guidelines highlight some risks including potential biases in AI algorithms, impact on due process rights, enforceability of awards etc.

The Guidelines provide recommendations on the use of AI in arbitration such as arbitrators have the authority to issue procedural orders specifying the manner in which AI tools are incorporated in the process, a party may propose certain AI tools that may or may not be used, appoint AI experts, parties may be required to know the role of AI to preserve the integrity of the arbitration, arbitrators have power to rule on use of AI, and admissibility of AI-generated material/ evidence in the arbitration process.

Guide on the Use of Generative Artificial Intelligence Tools by Court Users:

Reflecting the growing emphasis on AI adoption in legal sphere of Singapore, this guide sets out some principles to promote accountable and ethical use of AI in court proceedings. Such principles are equally valuable in the field of arbitration also.

This guide defines artificial intelligence as "refers to technology said to be able to perform tasks that require intelligence. These tasks include reasoning, problem solving, learning and planning. For the avoidance of doubt, it does not include technology which merely corrects spelling or grammar and does not generate content based on prompts."

Suggestions regarding use of AI in Arbitration:

- The arbitrator remains responsible for all the procedural fairness, findings and awards regarding arbitration.
- In arbitration, AI should be used as an assistive tool that supports arbitrators, not as a substitute for their judgment and expertise.
- Parties involved in arbitration should not rely on AI Generated content without verification.
- Arbitrators should write or deliver final judgment or award. AI should act as a drafting assistant rather than a decision maker.

Conclusion:

To sum up, AI has emerged as a viable aid in arbitration. AI in arbitration has both positive as well as negative sides. It can help with administrative tasks by supporting tasks like translation, transcription, evidence organization, effective handling of large

[16] Guideline on the use of AI in Arbitration (2025), P. 1

volumes of information and procedural management but arbitrators must independently assesses or evaluate legal arguments as well as evidence. AI tool may enhance efficiency in arbitration but their uses always align with ethical rules and confidentiality.

However, the role of artificial intelligence in arbitration is limited. Some fundamental tasks like safe guarding procedural fairness, privacy of confidential data, transparency, interpretation of legal principles, fair evaluation of evidence must be handled by human arbitrators. Excessive dependence on AI tools may leads to erosion of human judgment, potential biasness, breach of data security, reduced transparency, and challenges to the legitimacy regarding the enforcement of arbitral awards.

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Changing Aspects of Tenancy Right

Bhawesh Gautam

Introduction.

The national economy of Nepal was dominated by agricultural income. Most of the population were engaged in agricultural works. The exports from Nepal had majority portion of agricultural products. Nepal has therefore been, and often called as, an Agriculturally Based (*Krisi Pradhan*) country. The overall enrichment and development of nation and its people was realized to be accomplished by means of agricultural development. This and various other reasons had time and again created environment for land and agrarian reforms. Access to land, lawful title over the land, equal distribution of land has always been proposed as the demand of time and the means to achieve social justice in the Nepalese context. The enactment of different laws relating to land and acknowledgment of tillers/tenants' right over the land has been considered as the achievement for the social and economic development as well as the political expediency. Nepalese history exhibits the legal and/or customary relationship of the tenants with the land. Tenants are the actual farmers or tillers who cultivate the land and yield crops. Although the terms farmers, peasants, tillers or tenants are often interchangeably used, the term Tenant '*Mohi'* explicitly means the legal title of tenancy on the land. The 'Tenant' is entitled to the tenancy right over the land of any landowner cultivated by him under any conditions. In the development of land law to modern stage, we can see the emphasis on the legal recognition of tenancy and legal provisions in safeguarding the rights of tenants. In this backdrop, the concept of tenancy has a deeper relation with land and agriculture. Major historical developments, change of ruling regimes and rulers, political changes have enunciated different land reform policies and practices. The debates and discussions regarding changes to the land reforms is an ever-going process as the spirit of land reform is invariably related to time and social changes. The current dual ownership, of the tenant over the land, derives its rationale from the past experiences of exploitation of tenants in different land tenure practices.

Traditional land tenure practices and their termination.

Nepal has a long history of different land tenure system. The traditional land tenure do not constitute the actual rights of the tenants. There were different land holding practices in the traditional land tenure system. In the *Birta* tenure, large pieces of land were given as grants by the king to the near ones. Later in Rana regime the *Birta* lands were graciously granted by the Rana rulers to their kinship and closed ones. Large portion of Nepalese agricultural land concentrated in few elites until 2007 BS. The *Birtawals* did not cultivated the land by themselves. "Absentee landlords invested very little in the agriculture sector, whereas the intermediaries and tax collecting agents such as *Jimidars*,

Talukdars and *Patwaris* desperately exploited the land and the tillers. …A pair of bullocks was that all a tenant could hardly pay for."[1]The Birta System came to an end after the promulgation of the Birta Abolition Act, 2016. All the *Birta* land have been converted to *Raikar* land. The Act classified the existing *Birta* Land into Category 'A' and Category 'B'. The Category "A" *Birta* land, except uncultivated abandoned land & forest, was provisioned to be registered in the name of tenant.[2] Further amendments provided for registration of Category 'B' *Birta* land in the name of the tillers if the concerned landowner failed to do so by 2049 BS.[3]

In the *Kipat* Tenure communal land ownership was in practice. The tillers enjoyed the right over the land mere for cultivation and income generation. Restrictions were imposed on the transfer rights as the *Kipat* land was not transferrable or sold to person belonging to other communities. The *Kipat* land tenure system was put to an end by the second amendment (2025.7.9 BS) of the Land Concerning Act, 2021. After this enactment *Kipat* land can be completely disposed (or sold) like *Raikar* Land.[4]

The *Ukhada* tenure was the most feudalistic land ownership practice. The landlords would hold auction for tilling their lands and the tenants who posted the highest bid in cash or crop per year would obtain that land for cultivation till a year. The same process would repeat next year. The Ukhada Related Act, 2021 terminated or eliminated the title of landowners over such *Ukhada* Land. Such lands were to be registered in the name of the tillers as *Raikar* Land.[5]

The *Jagir* tenure means the land authorized to civil servants to collect and use the land tax in terms of cash or crops for a certain period in lieu of salary. In the Rana regime, most of the *Jagir* lands belonged to the relatives and near ones of Ranas. The *Jagir* land was non-inheritable. The possession of employees was until their service. When such *Jagir* land underwent the major audit and was distributed (*raibandi*), the tenants were attributed upon collection of certain portion of the rent, the tenancy was confirmed by law (*sanada*) safeguarding tenants from dismissal until he pays the rent and applicable taxes for the land, but, if someone lies about or decreases the rent of the land, or stops the payment of the customarily applicable taxes, such a tenant could be dismissed and the land could be reassigned to another person.[6] The practice of assignment of land as *Jagir* was abolished after the end of Rana dynasty, by a government decision in 2008/7/12 BS.

The *Rakam* tenure denotes the labor land ownership. The *Rakam* land was granted as a recognition of long & faithful service. Unlike *Jagir* land which was provided to civil servants, *Rakam* land were provided to carpenters, bricklayers, musicians, postmen and

[1] RAM BAHADUR K.C., LAND REFORM AND LAND ADMINISTRATION WITH PROBLEMS & REMEDIES, Department of Land Reform Nepal, Kathmandu, at 11, (1971)
[2] Birta Abolition Act, Section 4, 2016
[3] Ibid at Section 7 'ka'
[4] Land Concerning Act, Section 3 'ka', 2021
[5] Ukhada Related Act, Section 3, 2021
[6] Muluki Ain, Chapter on Tenants and Landlords, Number 25, 1910

similar professionals for their work. The term *Rakam* literally means money in Nepali language. Instead of cash, land were assigned as *Rakam*. These *rakam* lands were also granted by Prime Minister, generals, chief priests and other high ranking officials in the palace, civil or military service. Even landlords would give land parcels to their faithful servants. No such land granted after 2007 BS. Muluki Ain, 2020 Chapter on Land Arrangement, Number 6, dissolved all *Rakam* land and converted into *Raikar*.

In the *Guthi* tenure, land in the form of guthis were given either by the government or by individual donors. Land were allocated as a source of income for managing the expenses for certain religious, charitable and social functions. In Newar, Tharu, Thakali communities guthis are even used for discharging family functions and community chores. The Raj guthi lands are managed by the government. There are no tenancy rights over such *Guthi Tainathi* land. The *Nizi Guthi* were run and managed by private individuals. The guthiyaar (trustees) were the donor, patron of the land or their successors, managers or person assigned to run the guthi or consume the remainder from the guthi proceeds or the priests or saints of such guthi. Guthi Corporation Act, 2021 provisioned for establishment of a Guthi Corporation to operate the state trusts (Raj Guthi) in a systematic manner. The latter Guthi Corporation Act, 2029 continued its existence as well as the current Guthi Corporation Act, 2033. The Raj Guthi land having tenants were categorized as *Guthi Adhinastha* Land. The tenant of such land has to pay rent (in-kind) to Guthi Corporation. The tenancy right can be bought and sold. If any person has obtained the right pursuant to law and built a house and resided in any *Guthi Adhinastha* land, the land up to the ceiling of land that can be held for house and cartilage pursuant to the prevailing Nepal law shall be registered in tenancy in the name of that person. [Section 26] This Act affirmed that the actual tiller/farmer shall be entitled to the right of tenancy in a Guthi land in accordance with the prevailing law (i.e. Land Concerning Act, 2021). In addition, The Corporation was assigned with the power to register the land on the tenancy by collecting the prescribed fees, where the Guthi land has been allotted on the land rent, before the commencement of the Act, and, also if any person has already constructed a building in a Guthi land without obtaining the approval of the Corporation, at the time of the commencement of the Act.

The *Jhora* region in the eastern side of Nepal, basically in Jhapa, Morang and Sunsari districts, the land/region were used for human habitats (settlement) or cultivation by clearing the forest, obtaining legal authority. The landowners, instead of cultivating by themselves, used tillers to cultivate these lands. Act Concerning the Land of Jhora Region, 2028 was enacted which discouraged further deforestation for the sake of human settlement. This also put an end to all the rights and titles of the landowners who did not cultivate the lands by themselves but used tillers for cultivating. Such land were distributed to the actual tenants upto 4 *bighas* considering the size of their family.

The exploitation of the land resources and defective land tenure practices hindered the productivity of land. The owners of the larger piece of land did not manage nor cultivated their land by themselves, they used tillers for cultivation or may opt to leave the large portion of land uncultivated. The concentration of large portion of land remained on

few elites or landlords. The uneven distribution of land resulted in the lesser land occupancy thereby upholding primitive and subsistence-based farming. Actual tillers were deprived of land holdings. Their rights as tillers or cultivators of the land remained unsecured, in most cases, upon the will of the landowners. Paradoxically the agricultural income and development has remained a backward sector. This traditional approach towards agricultural productivity needed a leap both structurally and institutionally.

Position of Tenancy Right in the *Muluki Ain*

The traditional land tenure practices focused on the ownership title of the landlords over the land. The landowners exercised their ownership titles unconditionally, thereby suppressing and invalidating the permanency of the tenancy right of the tenants over the land they tilled. The first codified law of the land, Muluki Ain, 1910 had few chapters regarding tenancy over land and eviction of tenants. The Chapter on 'Tenants and Landlords' (*Mohi Talsingko)* guaranteed the exclusive right of the landlord over the land. The landowners collected rent (fees) from the tenants/tillers who cultivated the land. The tenant who did not pay the rent and customary fees incurred on that land could be dismissed. If the landlord declared that he himself wanted to cultivate his land he was allowed to dismiss the tenant and cultivate his land himself. He was entitled to evict the tenant even if he wished to live on his land by building a house on it. The eviction of tenants was to be performed in the given time frame only i.e. in hilly region- after *Dashain Tika* (month of Asoj) until *Sripanchami* (month of Falgun) and in other region- after *Dashain Tika* (month of Asoj) until the month of Jyestha. The landlords could be questioned and fined only in case of eviction of tenants in season other than the prescribed one. The law seems to safeguard the tenancy only during the planting and harvesting seasons. The tenant who complaint for his dismissal during this prescribed time was rather fined and in case of his inability to pay such fine he could be imprisoned for 15 days.[7]

The tendency of the prevailing laws showed lesser sympathy towards tenants compared to the landlords, however rights of the tenant seem to be protected against other tenants; as the law restricted reassignment or replacement by new tiller on the land to some extent. The old tenant could not be replaced by the newer one, as long as he submits the harvest and pays the rent at regular intervals. Nevertheless, the limit on reassignment cannot be presumed to be the permanency of the tenant, the tenant was reluctantly in competition with other tillers. If a new tenant offered rent and fees more than the existing tenant does, the existing tenant comes under pressure to increase his rent in order to retain his tenancy and if he does not promise to pay the increased rate, the new tenant shall be introduced in his place.[8] The tenancy was protected from encroachment of the land by other tillers. No one except the tenant was allowed to dig or plough on his field. The violation or encroachment was made punishable with fine and payment of damages.[9]

[7] Muluki Ain, Chapter on Tenants and Landlords, Number 14, 1910
[8] Muluki Ain, Chapter on Tenants and Landlords, Number 13, 1910
[9] Muluki Ain, Chapter on Land, Number 55, 1910

The Chapter on Tenants defaulting on the payment of rent *(Bali Natirnya Mohiko)* provisioned for the duties of the tenants towards the landlords and the land. The *birtawal* or the *jagira* holders had the choice of receiving paddy as rent from their tenants. The tenants were obliged to deliver the rent to the landlord either at the landlord's residence or at the field as per the agreement. If the tenant does not pay the rent or defaults on the timely payment of the rent pretending reason for deficient crop, fire, hailstorm, landslide, flood, lack of water, damage to the irrigation channel, and, upon disclosure of the reasons to be fraudulent, or embezzled rice that grew on the field or troubled the landlord with such trickeries, such a tenant could be dismissed and the land could be reassigned to another person.[10] But, if it is ascertained that the damage caused to the land does exist, the tenant could get a reasonable rebate in terms of the rent. Nonetheless no rebate was given, upon assessment, for a loss up to one-fourth of the total crop yield.

If a *Jagira* holder complained that his tenant had withheld the payment of rent by fraudulent and deceitful means, and if it was ascertained upon interrogation, such a tenant shall be detained and his goods, house and land shall be used as compensation for the outstanding rent. If the property of the tenant was not sufficient, he was made to sign a loan agreement (*kapali tamasuka*) or could be fettered and sent for road construction works. However the landowner could pardon the tenant and set him free.[11]

The Muluki Ain, 2020 also contained provision regarding eviction from the land in the Chapter on *'Jagga Pajaniko'*. The Number 3 of the Chapter states *" If the eviction of a land is to be made or cause to be made for any reason, such eviction should be made between the last day of the month of Falgun to last day of the month of Jestha in case of Terai Region and the last day of the month of Poush to last day of the month of Chaitra in case of Other Region."*

Land Concerning Act, 2021 and Rights of Tenants.

Since 2007 the land reform laws and policies seem to be directed towards securing rights of the tillers or tenants on the land they cultivated. The Royal Land Reform Commission, 2009 and later the proclamation of Late King Mahendra in 2012 recognised that tenancy was not compatible either with agricultural efficiency or with social justice, and that it has therefore to be replaced either by 'secured tenancy' or by 'owner cultivation'.[12]But the framework of policy adopted by the then government favored neither of these two courses, instead a middle course reconciling the interests of landlords with those of the tenants was followed.[13]The Land Concerning Act, 2021 was introduced with one of the objectives as to bring about improvement in the standards of living of the actual peasants/tillers dependent on the land by making equitable distribution of the cultivable land and by making easily accessible the necessary know-how and resources on agriculture. Political change and a new environment created by it provided favorable

[10] Muluki Ain, Chapter on Tenants defaulting on the payment of rent, Number 2 & 3, 1910
[11] Ibid at Number 9
[12] Y.P. Pant, "Our Land Reform Policy – The Middle Course", Land Reforms in Nepal, Vol. VI, at 1, (1971)
[13] Ibid, at 2

conditions for formulation and implementation of this newer land law. This Act was said to be a progressive step to the management of land holding system in Nepal. This Act contained as many features as to address the demand of that time. This Act abolished feudal system (*Jamindari*) and *Kipat* land made taxable and converted to *Raikar* land.

It prescribed ceiling over land holdings by an individual or his family, provisioned for confiscation of land above the ceiling and redistributed such land in equitable manner. Although this Act is often criticized in terms of its definition of the family which has put hindrance to the achievement of the spirit of the promulgation of law on ceiling to land holding. At the time of Manmohan Adhikari government, the Land Reform High Commission (Badal Aayog) 2051 was formed. Report was presented in 2052/5/8, which stated: 70% Farmers have less than 20 *Ropani* land (which amounts to only 30% of the total agricultural land), 1.5 % Rich Farmers have more than 100 *Ropani* land (which amounts to 14% of the total agricultural land). The report pointed that the government has not been able to acquire all the land above the prescribed ceiling. On the contrary, the government showed reluctance to implement the recommendations, for lesser land holding limits, prescribed by the report. Later, Sher Bahadur Deuba government amended (Fifth amendment in 2058.10.25 BS) the land ceiling to current provisions. The Land Concerning Act, 2021 had also put upper ceiling over the land held by a person in the capacity of a tenant in Section 8. But this section has been repealed by the eighth amendment (2076/10/28) to the Act.

The Land concerning Act, 2021 have explicitly recognized the rights of tenants over the land and also affected the Muluki Ain provisions regarding eviction of tenant. No pervious laws had addressed the issues of tenants as clear and extensive like this Act does. There were requirements for compulsory saving by the tenants and the landlords, which was later repealed. The amount accrued from the scheme of such compulsory saving was later required to be dispersed to the concerned person, by the eighth amendment in 2076 BS. The Act also provisioned for arrangement of loan to the farmers. The tenancy right cannot be purchased or be subject to acquisition by way of gift, donation or other means whatsoever, and cannot be auctioned for governmental or non-governmental amount or punishment.

As defined in Section 2(b), "Tenant" means a peasant who holds the land that belongs to another landowner to till the same on any terms and cultivates the land by him/herself or his/her family's labor. A person who as a tenant had been cultivating a land that belonged to any landowner until the date of the commencement of Section 25 of the Act could obtain the tenancy right, in respect of the land. A creditor, who had obtained any land except the land subject to tenancy from any other landowner in the prescribed area, could also obtain the tenancy right over the land if he had tilled that land on his/her own. However, tenancy rights could not be conferred for cultivating homestead land (i.e. land used for personal use and not for paddy yield), land owned by government as well as land assigned by the government for industrial purpose. Foreign nationals were not entitled to tenancy rights. The concept of tenancy right which initially denoted the rightful title, as recognized by law, for possession or cultivation of the land and also safeguard

against willful dismissal by the landowner gradually shifted its virtue towards title of ownership [in half] to the actual tenants/tillers of the land. The fourth amendment in 2053/09/24 B.S. of the Land Concerning Act, 2021 secured dual ownership right i.e. the tenant receives half of the land as a co-owner. Land can be divided on fifty-fifty basis according to the area or valuation of the land. Joint or separate application can be lodged by the landowner & tenant in the Land reform office for such allocation of title over land. While conferring the ownership title over half of the land to the tenant, the fourth amendment of the Act put on halt the entitlement to tenancy right, to a new tiller, by the promulgation of Sub-section (2) of Section 25. But tenancy right, which was already acknowledged, can be transferred, to the legal heir, after death. Nonetheless, Landowners possessed the rights over rent and selection of tenant, after the tenant's death, amongst the husband, wife, son, daughter, mother, father, adopted son, adopted daughter, daughter-in-law, grandson, granddaughter, granddaughter-in-law, elder or younger brother or elder or younger sister living in the same family of the tenant. There are numerous cases where the tricky landowners were found exploiting this right of selection, while depriving the actual successor of the tenant from cultivating the land and taking over the land by themselves in whole. The landowners tricked by persuading the other members, more often the younger ones, for a certain amount of money, and pretended to trust him as the descendent of the tenant and after confessing the tenancy right over them, usually made them to abandon such tenancy and surrender it to the landlord himself either via a deed of compromise or any other means, from the concerned Land Reform Office, making the overall process look realistic and legal. The fortune turned into nightmare, for those who were supposed to be the genuine tenants, as their plight went overlooked by the courts as well, on the ground that the law has vested the landowner with the right to choose his tenant, amongst the deceased tenant's family members, and hence procedural requirements were fulfilled as prescribed by the Act. After the eighth amendment in 2076, this right of the landowner regarding selection of the tenant, after the tenant's death, was curtailed and the tenancy right of a tenant over the land shall be devolved to his successors as per the law of inheritance i.e. National Civil code, 2074 [Section 238, 239].

Along with the rights, the tenants were also assigned with responsibilities of paying rent to the landowner. The landowners could opt to charge rent or collect division thereof from the main annual crop yield of the land. "Rent (Kut)" means any consideration in money or in kind or both payable by a tenant to the landowner on account of the occupation of the landowner's land for cultivation. Furthermore, the Land Concerning Act, 2021 prescribed the rate of the rent to be paid to the landowner as well as the time or season of such payment. Time limitation is imposed against the landlords regarding the claim of rent from their tenant. In addition, if the crops do not go better in any year due to a natural calamity or unfavorable situation, the tenant was granted remission of the rent on such portion, as payable to the landowner.

Termination or end of Tenancy right

The tenancy right ceases if any one of the family members of the tenant buys the land. That means there can be no tenant over the land of members of the same family.[14] For example if someone is the tenant of a land and when his own blood brother or son buys the land and becomes the landowner then the tenancy right is automatically said to be dismissed or terminated. By the definition of a tenant, the right or title of tenancy, it is clear that the tiller who cultivated other's land could only be conferred upon such right over the land. No one can be a tenant of his own land. The courts have upheld the decision of cancellation of the record of tenancy over the land if the new landowner filed application informing that the previous landowner and the tenant belonged to the same family.

The tenant can also voluntarily terminate or leave/give up the tenancy over any land by providing information to the concerned authority and the landowner in writing. There are few grounds prescribed by the Act for dismissal of a tenant. Section 29 of the Act states that if any tenant who has abandoned the land or disappeared or tenancy right has terminated for not paying rent then the landowner shall inform the concerned authority within 25 days. Upon petition filed by landowner, if it is found that the tenant failed to pay the rent except by the act of God, or by any act done or carelessness by tenant due to which the value or crop of the land has decreased or the land has not been cultivated or neglected by tenant for one year the concerned authority can order for dismissal of such tenant. But conversely, according to the judicial decisions, the tenancy right cannot be terminated mere for the cause of not paying rent to the landowners.[15] The Full Bench of the Supreme Court has laid precedent[16] where the termination of tenancy right for not paying rent to the landowner is termed to be unconstitutional and illegal. Although the Section 29, regarding termination of tenancy right, of the Land Concerning Act, 2021 has not been repelled but the judiciary has most often denied the termination of tenancy right, upholding the legislative intent in making the tenants the owners of the land. Judiciary has played key role in the changing dynamics of the concept of tenancy right in Nepal. The judicial precedents have safeguarded the tenants against the legal provision of eviction and dismissal. Unless the land has been distributed among the landlord and the tenant, tenancy right cannot be terminated or put to an end.[17]

Conclusion

The relation of tenants with the landlords has been a very old notion. The concept of tenancy emerged from the non-cultivation of the land by the landowner himself either willingly or by impossibility as the plot of land was large. This relation was based on the mutual agreements between them. The traditional tenure practices shows that the landlords

[14] *Bansi Raut Khulawat Vs. Land Reform Office, Bara et. al,* NKP 2043, vol. 4, d.n. 2679, p. 311.
[15] *Jogindra Mahato Nuniya Vs. Sitaram Sah*, NKP 2077, vol. 10/11, d.n. 10587, p. 1938.
[16] *Loknath Upadhyaya Vs. Debimaya Bhattarai et.al*, NKP 2062, vol. 6, d.n. 7549, p. 670.
[17] *Advocate Chandralal Shrestha et.al Vs. Government of Nepal, Office of the Prime Minister and Council of Minsters et.al,* NKP 2072, vol. 4, d.n. 9379 p. 619.

resided on the upper hand in prescribing the terms and conditions of tenancy. The tenants and their tenancy right could not get acknowledgement by the previous laws. Different political upheavals led to formation of law and policies focusing on the rights of landowners. The concept of tenancy started getting formal and legal recognition after the downfall of Rana regime along with the political drift towards land and agrarian reform. The Land Concerning Act, 2021 and its amendments has been able to shift the paradigm of concept of tenancy from lawful possession towards the title of ownership, over half of the land to the tenant. The tenant cannot be removed by the landowner or anyone without conferring title of ownership for half of the land. Nepalese Judiciary as the protector and guarantor of the tenancy right, against dismissal, has the most crucial role in shifting and changing dynamics of the tenancy right.

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Legal Dilemmas and Problems in Settlement of Rohinga Refugees

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Abstract

This paper is formulated to reflect the lives of Rohingyas in Nepal. The crisis began with the 1982 immigration law in Myanmar, which deprived the Rohingyas of their right to citizenship. According to Section 3(1) of the Immigration Act 1992, "No foreigner may enter or stay in Nepal without a valid passport and visa." However, Nepal is aligned with international obligations and customary law through treaties and conventions such as the ICCPR, CRC, and CAT. Although the UNHCR's Refugee Status Determination (RSD) process has provided temporary shelters for Rohingyas in areas like Kapan in Kathmandu. This paper addresses the question of whether the status of Rohingya refugees under Nepalese law is legal. This study critically examines the Rohingyas' life in Kapan, Kathmandu. What measures and tools can be employed to resolve this issue? The study focuses on the historical context, media discourse, inquiries, data collection, questionnaires, and the textual analysis of a Rohingya memoir. The paper concludes that negotiation, repatriation, reintegration, and third-country resettlement are the only viable long-term solutions

Key Words: Reparation; Re-integration; third-country resettlement; migration

1. Introduction

Refugees are forcibly displaced persons who have fled their countries of origin due to reasons beyond their control, such as persecution, public disorder, civil war, famine, natural disasters, or environmental degradation.[1] The legal status of refugees is rooted in modern Western history, where some people sought new worlds while others remained in their hometowns.[2] Migration brings both problems and opportunities. While factors such as social, political, economic, and environmental pressures in their homeland or even personal decisions may influence a person's choice to cross borders and settle in a new country.[3] According to Utopian Theory, migration without boarders enhances human mobility but it may also bring numerous problems.[4]

[1] B.S. CHIMNI (ED.), INTERNATIONAL REFUGEE LAW 44(1d ed., Sage Publications, New Delhi 2007).

[2] B.S. CHIMNI, INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES (Sage Publications, New Delhi 1993).

[3] Bhola R. Das, *Refugee Status and International Protection: A comparative Analysis*, JOURNAL OF REFUGEE STUDIES, Vol 18, No.1, at 1-20(2005).

[4] CHAKRA PRASAD BASTOLA, TIBET JUSTICE CENTRE 212(Barkley, California, USA 2001).

There are challenges related to ethnic and religious conflict as well as other security issues to the Rohingyas' flight. The global economic crisis, disparities between the Global North and South, growing xenophobia, ethnic cleansing, religious conflict, the formation of new nation-states, climate change, ongoing conflicts, and the persistence of old ones all threaten to exacerbate displacement issues are the other factors to be blamed.[5] August 2017, the Myanmar military began a sweeping campaign of massacres, rape, and arson in northern Rakhine State. According to Human Rights Watch, more than 730,000 Rohingyas fled to precarious, flood-prone camps in Bangladesh, while approximately 600,000 remained in Myanmar.

Human Rights Watch reported that Myanmar soldiers systematically killed and raped villagers before burning their homes. The security forces engaged in barbaric acts of arson. "Myanmar authorities brutalized us," said Shaker Muhammad, a 26-year-old Rohingya refugee in Kathmandu, Nepal. They burned down our homes, raped our mothers, sisters, and daughters, and burned our children. Twelve of us took shelter in Bangladesh to escape the brutality. The Bangladesh police arrested us and left us at the India border. Indian police then brought us to Kakadvitta on the Nepal border, and we were able to enter Kathmandu in 2012." Rohingyas have been subjected to atrocities that Zeid Ra'ad Al Hussein, the United Nations High Commissioner for Human Rights, described as "a textbook example of ethnic cleansing".[6]

It is estimated that approximately 65.6 million people worldwide are identified as refugees due to persecution and violence, the highest number since World War II.[7] Among them, 20 million—including 7 million children—have fled their homelands. Around 86% of these refugees are from developing countries, primarily in Asia. Conflicts in Syria, Afghanistan, and Myanmar have led South Asia to host refugees from both within and outside the region.[8] Currently, about 19.9 million refugees face a bleak future worldwide, with around 8.7 million in Asia, including 1.1 million in Bangladesh.[9] Despite the close border between Bangladesh and India, over 650 Rohingyas have unofficially entered Nepal and taken shelter there. Although Nepal is not a party to international refugee conventions, half of the Rohingyas in Nepal have been certified as refugees by the UNHCR.[10]

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[5] JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 67-68(Butterworths, Toronto 1991).

[6] https://news.un.org/en/story/2018/08/1017802 (retrieved: 15 September 2024)

[7] https://www.unhcr.org/news/stories/forced-displacement-worldwide-its-highest-decades (retrieved: 15 September 2024)

[8] Mahendra P. Lama: "Refugee Situation in South Asia: Critical issues in perspective", Bulletin on IHL and Refugee Law, vol. 3, no.1, at 87 (2000).

[9] https://www.migrationpolicy.org/article/bangladesh-india-climate-migration(retrieved: 15 September 2024).

[10] Yadav Kumar K.C., International *connections concerning refugees: their rights with special reference to Nepal, Vishleshan,* NUTA PG CAMPUS UNIT, BIRATNAGAR, VOL.3, at 26 (1998).

Furthermore, the most serious and adverse impact of the open and uncontrolled Nepal-India border has been the rise in anti-social and lawless activities.[11] The open border system between Nepal and India has had negative consequences, such as the illegal smuggling of goods, trafficking of girls to brothels in Indian cities, trafficking of narcotic drugs, arms, and ammunition, and the movement of criminals and terrorists. Both Nepal and India have agreed, in principle, to control such illegal activities, but there is a lack of an effective and practical approach between the two countries.[12] The Indo-Nepal border has posed a security challenge for Nepal, and the open border with India significantly contributes to insecurity.[13] The open border is the primary cause of cross-border crime between Nepal and India.[14] The significance of borderlands also contributes to a thread of mutual relationships between the two nations, which is accepted by both the Nepali and Indian governments.[15] Geographical location, open borders, and religious, geographical, and ethnic issues are mentioned as elements influencing national security.[16]

2. Legal Lenses Toward the Rohingya Refugee

What rights do foreigners or aliens possess in the territory of Nepal? The Supreme Court of Nepal has not yet provided a concrete view on this matter. In July 2008, Nepal reportedly handed over a Tibetan to Chinese officials after finding and jailing him on suspicion of theft. The government attributed the deportation to policy confusion and internal miscommunication. Nepal has also deported four asylum seekers to their most recent countries of transit after arresting them for illegal entry or lack of documentation.[17] Although UNHCR-recognized refugees and asylum seekers are technically in violation of immigration laws, the GoN generally does not prosecute them. According to the Home Ministry, around 2,000 nationals from more than 12 countries—including Nigeria, Ethiopia, Somalia, Liberia, Zimbabwe, Pakistan, Myanmar, Afghanistan, Iraq, Iran, and Bangladesh—have sought asylum and refugee status through UNHCR in Kathmandu. Relevant to the context of Nepal are the prevailing Foreigners Act 1958, The Citizenship Act, and the Immigration Rules 1994. [18]

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[11] Kenny David, *International refugee protection,* HUMAN RIGHTS QUARTERLY VOL.8, NO 1, at 287 (1986).

[12] Kalyan Shrestha, *International convention concerning refugees and their rights (*working paper), UNHCR, BIRATNAGAR, (2049).

[13] P. B. Bogati, *Security Management of Nepal-India Open Border*, PHD THESIS, TRIBHUVAN UNIVERSITY at 22 (2023).

[14] Yadav Kumar K.C., *Politico-legal aspects concerning Bhutanese refugees and their repatriation,* ANUBHAV SMARIKA, JHAPA, at 9 (2060).

[15] B. R. Upreti, Proliferation *of Small Arms and Challenges to Post-Conflict State Building; The Remake of a State: Post-Conflict Challenges and State Building in Nepal*, KATHMANDU UNIVERSITY, at 30 (2010).

[16] YADAV K.C., KUMAR REFUGEE LAW, 101 (Pairavi Prakasha, Kathmandu 2016).

[17] United States Committee for Refugee and Immigrants, World Refugee Survey Report, at 1 (2008).

[18] Bhola R. Das, *Refugee Status and International Protection: A comparative Analysis*, JOURNAL OF REFUGEE STUDIES, Vol 18, No.1, at 1-20(2005).

On January 27, 2005, the Ministry of Foreign Affairs sent a letter to UNHCR stating that any foreign national seeking refuge and resettlement should be held accountable under the Immigration Act, rules, and regulations, and would be punishable for settling without the permission of the Government of Nepal. The Ministry reiterated this request on March 11, 2007, asking for a suspension of refugee certificates issued by UNHCR. According to the National Immigration Act of 1992, foreign nationals are not allowed to enter Nepal without a visa and passport. The Immigration Act requires the Department of Immigration to keep a record of any foreign national living in Nepal. Director-General Ishwar Raj Poudel stated that he had no information about the Rohingyas living in Nepal, noting, "Did the Rohingyas come by plane to be monitored by the immigration department?" He added, "Since they entered the country, the jurisdiction falls under the Ministry of Home Affairs." Article 7 of the Immigration Act assigns the responsibility for regulating, managing, and controlling the entry, presence, and departure of foreigners to the director-general. Article 2 allows the GoN to prohibit the entry, presence, or departure of any foreigner if deemed detrimental to the national interest. As per the International Criminal Court (ICC) Statute recognizes the need to establish principles related to reparations for victims, including restitution, compensation, and rehabilitation.[19]

Nepal has not acceded to the 1951 Refugee Convention or its 1967 Protocol. However, Nepal has ratified other human rights treaties such as the Universal Declaration of Human Rights (UDHR), which is subject to international customary laws. Article 14(1) of the UDHR states that everyone has the right to seek and enjoy asylum from persecution in other countries. This implies that Rohingyas have the right to seek asylum in Nepal, although they are not guaranteed refugee status. Forcefully deporting all Rohingya refugees would violate this article of the UDHR. Customary international law also plays a significant role. The Principle of Non-Refoulement, a principle of customary international law, prohibits the rejection of a refugee at the frontier and the expulsion of refugees who have entered the country. This principle, enshrined in Article 33(1) of the Refugee Convention, states, "No Contracting State shall expel or return (refouled) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion."

Nepal's Constitution, Immigration Act, Passport Act, Extradition Act, Marriage Registration Act, Children Act, and Compensation for Torture Act touch upon the rights of refugees to a limited extent. The Supreme Court had ordered the government to formulate a national refugee law, but no such law has been enacted yet. Nepal's 2015 Constitution forbids human trafficking and provides for the protection of the fundamental rights of women, labor, and children by criminalizing exploitation and torture. [20]

[19] Article 75, ICC Statues.

[20] Sambhu Prasad Khanal, *An insight over refugee problem in Nepal and legal regime on refugee protection*, NEPAL LAW REVIEW, YEAR 36, VOL. 23 (2001).

Emigration is regulated by the Memorandum of Understanding between the GoN and the governments of the receiving countries.[21]

3. Dilemmas in the Application of Laws

The law relating to the right of refugees to seek asylum involves a complex balance between providing protection from persecution and respecting the sovereign rights of the asylum state. An asylum state must consider its internal policies, as political refugees can pose a threat to the peace and order of the host country.[22] Similarly, while the asylum seekers' claims may be genuine, the state might be unable to accommodate them due to economic constraints or the influence of more powerful states demanding their return. Therefore, despite the principle of sovereign equality in international law, a weaker nation must weigh factors such as humanitarianism, foreign policy, and domestic considerations before granting asylum to refugees.[23]

In this context, there is confusion about why Nepal has granted asylum to such a large number of refugees despite not being a party to the 1951 Refugee Convention and its 1967 Protocol, and lacking specific legislation on refugees. It is indeed paradoxical that Nepal has accepted thousands of refugees without enacting comprehensive laws regarding their status.[24] Justice Kalyan Shrestha of the Supreme Court of Nepal noted, "To give refugees the right to travel, to engage in professions and business, and the right to study, while not making comprehensive laws regarding refugees and not acceding to international conventions, is logically inconsistent".[25]

Despite the absence of specific legislation on refugees, some researchers suggest that Nepal's existing laws, such as the Treaty Act and the Immigration Act, might indirectly address refugee issues. [26] For example, the Immigration Act of 1992 does not explicitly provide access to territory for asylum seekers and imposes penalties for visa overstays and unauthorized entry. However, Articles 11 and 14 include provisions for "waivers" for certain groups, communities, or races, though these provisions have not been actively applied. As a result, refugees in Nepal might be viewed merely as aliens who entered the country illegally and reside in violation of Nepalese law and regulations.

4. Role of UNHCR

As there is no refugee law in Nepal and Nepal has not even ratified the International Refugee Convention, the UNHCR has stated that it only keeps records of Rohingyas living here. It is the job of the state to issue or manage refugee certificates. We can only

[21] https://mofa.gov.np/wp-content/uploads/2024/08/Protocol-and-Consular-Handbook-2024.pdf (retrieved: 28 September 2024)
[22] *Ibid*
[23] *Ibid*
[24] Laxman Kumar Upadhyaya, *A glance at Refugee law, policy and Practice in Nepal,* NEPAL LAW REVIEW, VOL.19 (2008)
[25] *Ibid*
[26] *Ibid*

work in coordination with the government of Nepal.[27] Although refugees from Bhutan before 1993 were prima facie recognized by the GoN; the subsequent arrivals were processed using individual refugee status determination. For Tibetans arriving before the 1990s, the modus operandi of prima facie recognition was used, and for the subsequent arrivals, only a transit facility through Nepal was provided as per the so-called Gentleman's agreement between UNHCR and the Nepal government in 1989 under the auspices of the US embassy.

On 13 April 2023, Md Shaker, 26, left Myanmar. Myanmar military burned their houses when they returned from the farm. They saw the entire incident and fled from their homes with five friends in 2012. Shaker and his friends had little money; they crossed the sea by swimming and reached Bangladesh. Another refugee, Rolma, and her family are among about 140 Rohingya refugees in Nepal. There, members of the Muslim minority group are denied citizenship, despite having ancient roots in the majority-Buddhist country.[28] The Rohingya who remain in Myanmar face extreme violence from armed forces and local people, according to a February U.N. report. Sadistic killings of people of all ages, including babies, and sexual violence are occurring at high rates. Starvation is common.[29] Mumtaz Begum, 45, stands with two of her four children in Kapan, a community near Kathmandu, Nepal's capital city. Begum is a Rohingya refugee from Myanmar, but she doesn't receive support from the Nepalese government and UN agencies. Her children often go hungry,' she added. 'We have not chased the Rohingya away from Nepal because of our Hindu tradition that guests should be provided hospitality.' [30]

At first, UNHCR, the U.N.'s refugee division, gave 5,000 rupees per month to the head of each refugee family, and a lesser amount to the other members, Shrestha says. Those payments ended in 2015 due to budget constraints. That money was desperately needed, says Rolma. 'Many Rohingya have been cheated in their workplaces, but they do not go to the police office to complain due to the fear of getting arrested,' she says. Rolma's children attend the nearby Nepal Charter School, where UNHCR covers their school fees. But the family needs food just as badly as the children need education, Rolma says.

A Rohingya person, MD Saker, fled in 2012. He says he won't return unless he receives an invitation from Myanmar's government confirming that the Rohingya would be welcome there. Even though there is a huge problem of residence recently, the contract period for their land in Kapan is ending. They tried many places like Banepa, Godawari, Sundarijal, Panauti, Kushadevi, Tokha, and many other places, but locals denied them resettlement. They paid the expensive rent to the landowner, but local villagers and the community objected. However, NCELL Telecom provided the mobile SIM card concerning the UN identity or refugee documents. Shaker added that UNHCR is providing

[27] www.unhcr.org/3b73b0d63.html (retrieved: 12 September 2024).
[28] UNGA, UDHR. United Nations, 127(III) A, Paris, art. 17 (1948).
[29] *Ibid*
[30] Usman Jabed v. Government of Nepal, Writ no. 0038 (2007)

yearly NRs 6,000.00 per student for those studying in community schools. As for Abdul Malik and others, during the field survey, we found that they have no option of further staying in the Kathmandu Valley. Native people didn't permit the staying of refugees in their local places.

The United Nations has called the Rohingya 'the most persecuted minority in the world.' Myanmar has denied citizenship to the Rohingyas since 1982.[31] At present, more than one million Rohingyas have taken refuge in different countries. The UNHCR Nepal officer Luma Singh Bisowkarma said "It is very difficult in recognition of Rohingya Refugees and give them an identity. The government didn't permit to give them identity as per the Nepalese laws but UN agencies were forced to imply.

5. A Survey of Rohingya Refugees in Kapan Kathmandu

Researcher had visited to the Rohingya refugee camp in Kapan, Kathmandu, on February 20, 2023, where researcher met several intellectuals among the Rohingyas, including Shaker, Muhammad, Abdul Malik, Muhammad Faruk, Muhammad Harras, Jaafar Miya, and others. Researcher has collected various data from them. Which is given below in table.

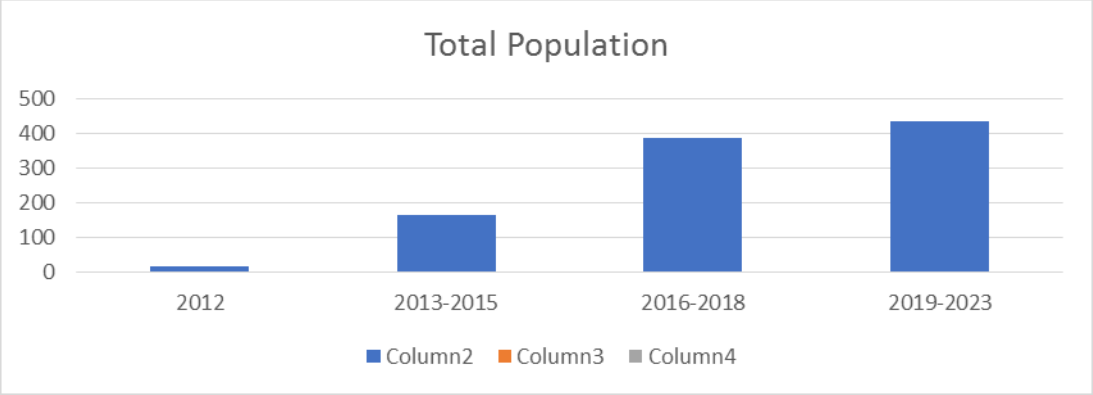


Table: 1 Source: Field Survey

Table 1: In above-mentioned figure, it is seen that the number of Rohingya 2012, only 14 Rohingya refugees were staying in Kapan, Kathmandu. The number of males was 198, females 155, and children 82.

[31] *Ibid.*

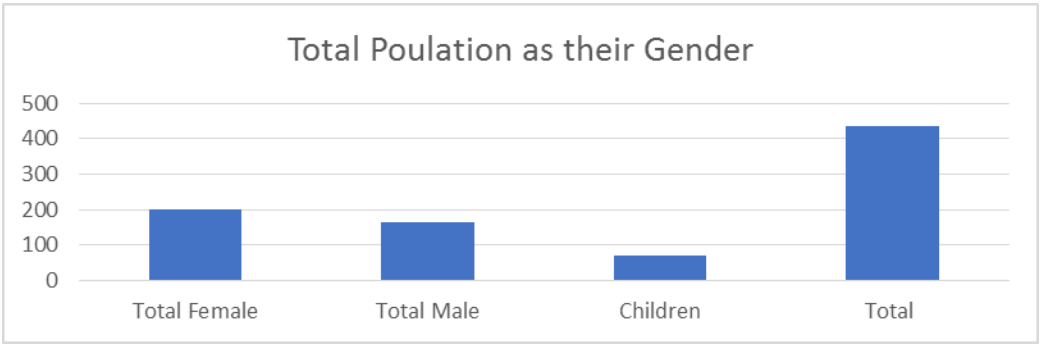


Table: 2 Source: Field Survey

It was found that there are 201 females, 165 males, and 69 children, bringing the total to 435 as of the end of 2023.

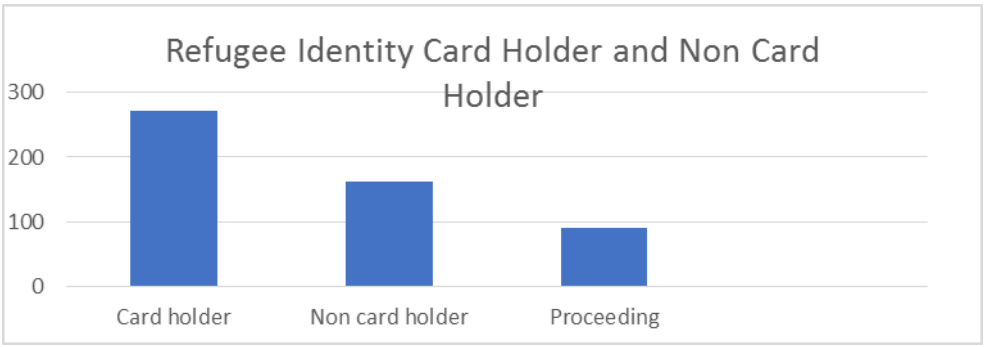


Table: 3 Source: Field Survey

As per the questionnaire there are 272 refugees were able to get refugee identity cards from the UNHCR office in Kathmandu, whereas 163 Rohingyas do not have refugee identity cards, and 91 people are in the process of obtaining refugee identity cards from the UNHCR office in Kathmandu but it is not easy to proceed to get the refugee identity.

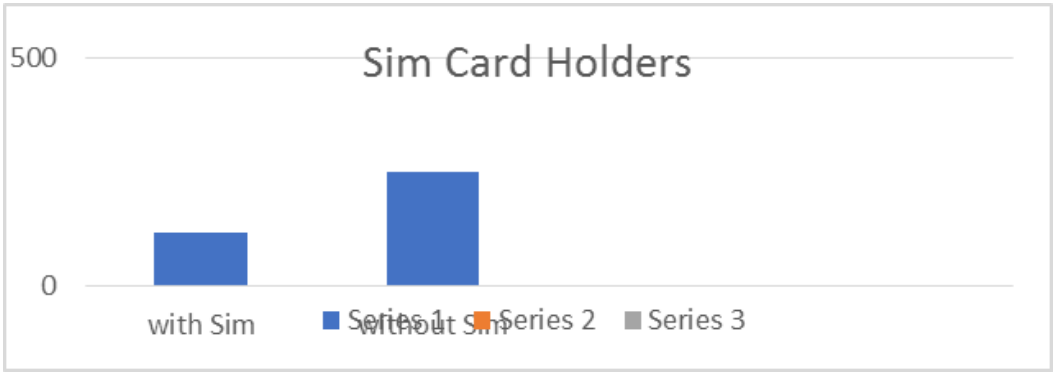


Table: 4 Source: Field Survey

A total number of 115 Rohingya refugees were able to get SIM cards. The private telecom company NCELL of Nepal provided SIM card on the basis of their refugee identity in Kathmandu.

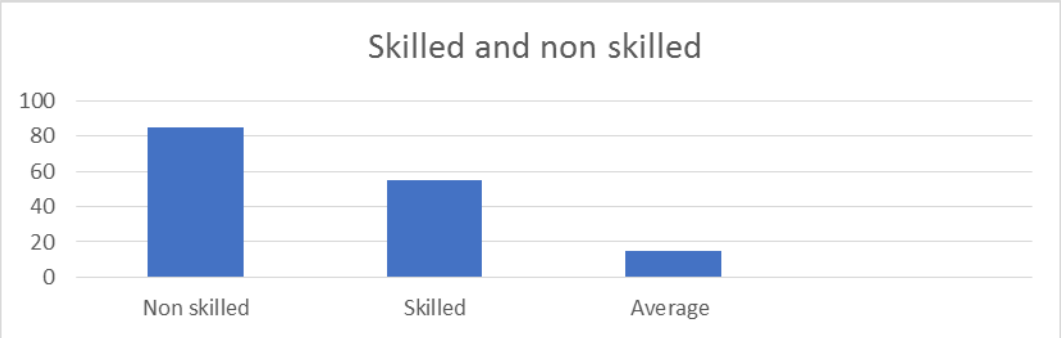


Table: 5 Source: Field Survey

All the refugees are staying at the same location because it allows them to pray at the same time in the afternoon. We collected data showing that only 55 of them are categorized as skilled manpower. These individuals are working in tile fitting, masonry, vehicle mechanics, and more. Many of them, 85 people, are not skilled and spend their time playing Ludo, chess, and cards. Only 15 people can work as skilled labor in this community.

6. Repatriation of Rohingya: A Preferable Solution

Repatriation is the vital solution for resolving the Rohingya crisis, and if that is not possible, third-country resettlement is the next best option. The world seems to have a short memory in the aftermath of World War II, despite many countries agreeing to protect the lives of refugees through the 1951 Refugee Convention and its 1967 Protocol, along with various UN agencies. However, Nepal has not ratified these conventions and protocols, indicating a preference for sharing the burden of refugees internationally rather than taking it on alone. Nevertheless, Nepal has ratified the ICCPR of 1966, the CRC of 1989, and the CAT of 1984, which binds it to protect refugees. Nepal can and should play a significant role in resolving the crisis in the following ways:

6.1 Mediation and Negotiation

The foremost solution may involve negotiations between the affected countries under the mediation of the UN. Bangladesh and Myanmar signed agreements to repatriate the Rohingya to Myanmar within two years in 2017 and 2019, respectively. However, the Myanmar authorities did not honor these agreements and have shown reluctance to repatriate the Rohingya. Bangladesh has raised the issue in various international forums, gaining the support of many countries, but Myanmar has shown little respect for international law and norms. There may be influential powers behind the scenes. Bangladesh's Prime Minister raised the issue at the UNGA on September 25, 2021, calling for attention to the Rohingya crisis and emphasizing the engagement of ASEAN leaders.

ASEAN, in particular, can play a crucial role in solving the Rohingya refugee problem. As a South Asian country and a trusted friend of Bangladesh, Nepal can assist Bangladesh in resolving this issue by acting as a mediator. Nepal can raise these issues at various regional conferences such as BIMSTEC and SAARC platforms.[32]

6.2 Diplomatic and Bilateral Negotiations

Nepal can negotiate with Myanmar diplomatically and bilaterally, leveraging its good bilateral relations with Myanmar to find a solution to the crisis. Regional Engagement: Nepal can engage with other regional states to find a collective solution to the crisis, encouraging collaboration and joint efforts to address the issues.

6.3 Role of the Buddhist Community

The Buddhist societies of Nepal and Sri Lanka can play an effective role in resolving the crisis by following the path shown by the founder of Buddhism, Gautama Buddha. If the Buddhist community takes an active role in addressing the Rohingya crisis, Buddhists will be recognized as advocates for human rights, contributing to regional and, to some extent, global peace and communal harmony. Lumbini, Nepal, is the birthplace of Gautama Buddha, making it a holy place for Buddhists worldwide. Nepal can use this opportunity to leverage religious ties and motivate the people of Myanmar to pressure their government to repatriate the Rohingya to their homeland. All Buddhists around the world, especially Myanmar and Nepalese Buddhists, should realize the importance of addressing this issue with special attention.

7. Conclusion

According to the Immigration Act of 1992, foreigners are prohibited from entering and staying in Nepal without valid passports and visas. If they fail to comply with visa regulations, they face legal penalties, including imprisonment. Not officially recognized as refugees by the GoN, the Rohingya are considered illegal immigrants. The settlement of illegal immigrants is a difficult task. Further, UNHCR cannot unilaterally grant refugee status in Nepal. GoN instead approaches the issue under the cultural notion of "Athiti Devo Bhava" (Guest is God), which lacks a legal framework for addressing refugee issues. There is an urgent need for clear legislation that defines the rights and obligations of refugees in Nepal. Such laws would not only address the Rohingya crisis but also help manage other potential refugee situations in the future. While political efforts are essential, legal and rights-based approaches must also be implemented to manage the Rohingya refugee crisis in the short and long term. Ultimately, refugees are an international responsibility, and a cohesive approach is required to ensure their safety. However, Nepal must ensure its laws align with international obligations, particularly the ICCPR, CRC, and CAT treaties, which it has ratified.

[32] YADAV K.C., KUMAR REFUGEE LAW, 33(Pairavi Prakasha, Kathmandu 2016).

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"Navigating Transit Rights with Reference to Nepal : Legal Challenges and Solutions for Landlocked Countries in International Trade Law"

Dhiraj Pokhrel*

Abstract

This article examines the intricate legal landscape surrounding the transit rights of landlocked countries similar to Nepal within the framework of international trade law. As a landlocked nation, Nepal faces significant challenges in accessing global markets, primarily due to its dependency on neighboring countries like India for transit routes. The study explores the historical evolution of transit rights under customary international law and key treaties such as the General Agreement on Tariffs and Trade (GATT) and the United Nations Convention on the Law of the Sea (UNCLOS). It delves into landmark international cases that have shaped the legal understanding of transit rights and analyzes the impact of bilateral agreements, particularly between Nepal and India, as well as Nepal's recent transit arrangements with China. Additionally, the article provides a comparative analysis of transit challenges faced by other landlocked countries, offering insights into best practices and potential legal remedies. Through a detailed examination of these issues, the article proposes strategic recommendations for Nepal to strengthen its transit rights, enhance legal capacities, and improve infrastructure, thereby ensuring more secure and equitable access to international trade routes. This comprehensive analysis contributes to the broader discourse on the rights of landlocked states in the global trading system and offers practical solutions for overcoming the unique challenges faced by Nepal.

1. Introduction

Landlocked countries face unique challenges in participating in the global economy, primarily due to their lack of direct access to the sea, which is a crucial conduit for international trade. Among these nations, Nepal—a small, landlocked state nestled between two of the world's largest economies, India and China—exemplifies the complexities of navigating transit rights under international trade law. The geographical constraints of being landlocked can severely restrict a country's economic development, as it must rely on neighboring transit states to access seaports and international markets. This reliance introduces a range of legal, political, and economic vulnerabilities that can significantly impact a landlocked country's ability to engage in international trade[2].

Nepal's dependence on India for transit routes has been a defining feature of its trade policy and economic strategy. Historically, the bilateral agreements between Nepal and

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[2] United Nations Convention on the Law of the Sea (UNCLOS), Dec. 10, 1982, 1833 U.N.T.S. 3.

India have governed the terms of transit, dictating the flow of goods and services through Indian territory to global markets[3]. However, this dependence has also exposed Nepal to considerable risks, as seen during the 2015 economic blockade, which had devastating effects on the country's economy and highlighted the limitations of relying on a single transit state[4]. In response to these vulnerabilities, Nepal has sought to diversify its transit options by negotiating new agreements with China and engaging more actively in regional trade frameworks[5].

This article seeks to provide a comprehensive analysis of the legal challenges and solutions related to Nepal's transit rights under international trade law. It begins by examining the foundational principles of customary international law and key international treaties that govern the rights of landlocked states to access the sea[6]. The article also explores significant case law, including rulings by the International Court of Justice (ICJ) and decisions under the World Trade Organization (WTO) dispute settlement mechanism, that have shaped the legal landscape of transit rights[7].

Furthermore, the study delves into the specific challenges Nepal faces in implementing its bilateral and regional transit agreements, particularly in the context of its relationships with India and China. The legal and practical implications of these agreements are critically assessed, with a focus on how they impact Nepal's ability to maintain secure and reliable access to international trade routes[8]. The article also draws on comparative analysis from other landlocked countries to identify best practices and potential strategies that Nepal can adopt to strengthen its position[9].

By providing a detailed examination of these issues, the article aims to contribute to the broader discourse on the rights of landlocked states in international trade and offers pragmatic solutions for overcoming the challenges Nepal faces. In doing so, it seeks to highlight the importance of legal frameworks, diplomatic strategies, and infrastructure development in ensuring that landlocked countries like Nepal can effectively navigate the complexities of international trade

2. Fundamental Concept and Importance of Freedom of Transit

2.1 Transit Rights as a Key Aspect of International Trade. (Fundamental Concept)

Freedom of transit refers to the right of landlocked countries to transport goods through the territories of neighboring states to reach international markets. This concept is crucial for ensuring that landlocked nations can effectively participate in global trade, despite

[3] See, Treaty of transit between the government of India and Nepal, 1999.
[4] Bishnu Raj Upreti, *Strengthening Nepal's International Trade Diplomacy*, 7 *Nepal Foreign Affairs Journal* 12 (2020).
[5] Sumit Ganguly & S. Paul Kapur, *The India-Nepal Crisis: Causes, Consequences, and Future Prospects*, 42 *Asian Survey* 1 (2016).
[6] *Corfu Channel (United Kingdom v. Albania)*, Judgment, 1949 I.C.J. 4 (Apr. 9).
[7] *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, 1978 I.C.J. 3 (Dec. 19).
[8] Northern Corridor Transit and Transport Agreement, Sept. 6, 1985, available at https://ttcanc.org.
[9] Afghanistan-Pakistan Transit Trade Agreement, July 18, 2010, available at https://commerce.gov.af.

their lack of direct access to the sea. Transit rights are embedded in several international treaties and agreements that aim to facilitate and regulate the movement of goods across borders. The principle of freedom of transit is enshrined in Article V of the General Agreement on Tariffs and Trade (GATT), which mandates that goods in transit should be granted "freedom of transit" through the territories of transit countries without discrimination[10].

Additionally, the United Nations Convention on the Law of the Sea (UNCLOS) supports this principle by recognizing the rights of landlocked states to access and use the sea via the territories of transit states. Article 125 of UNCLOS establishes that landlocked states are entitled to access to the sea for international trade through transit arrangements with neighboring countries[11]. These legal frameworks underscore the significance of transit rights in ensuring that landlocked countries can engage in international commerce and benefit from global markets[12].

2.2 Importance for Landlocked Countries like Nepal

For landlocked countries such as Nepal, transit rights are particularly critical due to their reliance on neighboring states for access to seaports and international trade routes. Nepal's geographical location between India and China means it must navigate complex transit arrangements to move goods to and from international markets. The importance of these rights is highlighted by Nepal's dependence on India's ports for the majority of its international trade. The economic impact of any disruption in transit routes, such as the 2015 blockade imposed by India, can be severe, affecting everything from essential goods to trade revenues.

Moreover, securing reliable and efficient transit routes is vital for landlocked countries to enhance their economic development and integration into the global economy. Nepal's recent efforts to diversify its transit options by negotiating agreements with China, such as the transit treaty signed in 2016, reflect the country's strategy to mitigate its dependency on any single transit state[13]. These efforts are crucial for ensuring that Nepal can maintain stable access to global markets, support its economic growth, and reduce vulnerabilities associated with reliance on a single transit partner.

3. Overview of Nepal's Geopolitical and Economic Context

3.1. Landlocked Nature of Nepal

Nepal is a landlocked country situated in South Asia, bordered by India to the south, east, and west, and China to the north. Its lack of direct access to the sea poses significant challenges for its economic development, particularly in the context of international trade. Being landlocked means that Nepal must rely on its neighboring countries for access to

[10] General Agreement on Tariffs and Trade (GATT), Oct. 30, 1947, 55 U.N.T.S. 194, art. V
[11] United Nations Convention on the Law of the Sea (UNCLOS), Dec. 10, 1982, 1833 U.N.T.S. 3, art. 125.
[12] See ibid no 5
[13] See, *Nepal-China Transit Trade Treaty*, May 21, 2016, available at https://nepal.gov.np

seaports and global markets, which affects its ability to engage efficiently in international trade and access vital goods and services. The country's topography, characterized by the Himalayan mountain range, further complicates transportation and infrastructure development, exacerbating the challenges associated with its landlocked status[14].

3.2. Reliance on Neighboring Countries (India and China) for Access to Global Markets

Nepal's geographical constraints necessitate dependence on neighboring countries for trade routes to the sea. Historically, India has been Nepal's primary transit route for accessing global markets. Most of Nepal's international trade flows through Indian ports, such as Kolkata and Visakhapatnam. The bilateral agreements governing these transit routes, including the Treaty of Transit and Trade, dictate the terms under which Nepal can export and import goods through Indian territory[15].

However, this dependence on India has its risks. For instance, during the 2015 economic blockade imposed by India, Nepal experienced severe disruptions in its supply chains, which led to shortages of essential goods and a significant economic impact[16]. This event highlighted the vulnerabilities associated with relying on a single transit partner and underscored the need for Nepal to seek alternative transit routes.

In recent years, Nepal has made efforts to diversify its transit options by strengthening trade relations with China. The 2016 Nepal-China Transit Trade Treaty represents a significant step in this direction, allowing Nepal to use Chinese ports for international trade. This treaty aims to reduce Nepal's dependence on Indian ports and provide more stability and flexibility in its trade routes[17]. Despite these efforts, Nepal continues to face challenges related to infrastructure, political relations, and logistical coordination in its quest to fully leverage its agreements with China and enhance its trade capabilities.

4. Objective and Scope of the Article

4.1. Analyzing the Legal Frameworks that Protect Transit Rights

The primary objective of this article is to provide a comprehensive analysis of the legal frameworks that protect the transit rights of landlocked countries, with a specific focus on Nepal. Transit rights are critical for landlocked countries to access global markets, and various international legal instruments provide the foundation for these rights. This article will delve into key treaties and conventions, including the General Agreement on Tariffs and Trade (GATT)[18], the United Nations Convention on the Law of the Sea (UNCLOS)[19],

[14] Bishnu Raj Upreti, *Strengthening Nepal's International Trade Diplomacy*, 7 *Nepal Foreign Affairs Journal* 12 (2020)
[15] Id.13
[16] Sumit Ganguly & S. Paul Kapur, *The India-Nepal Crisis: Causes, Consequences, and Future Prospects*, 42 *Asian Survey* 1 (2016)
[17] Id.15
[18] General Agreement on Tariffs and Trade (GATT), Oct. 30, 1947, 55 U.N.T.S. 194.
[19] United Nations Convention on the Law of the Sea (UNCLOS), Dec. 10, 1982, 1833 U.N.T.S. 3.

and other relevant regional agreements[20]. By examining these legal frameworks, the article aims to highlight the protections afforded to landlocked states and the obligations imposed on transit states to ensure the free movement of goods.

In addition to international treaties, the article will explore the role of customary international law and jurisprudence from international courts, such as the International Court of Justice (ICJ) and the World Trade Organization (WTO) dispute settlement mechanism[21]. These legal principles and rulings have played a significant role in shaping the rights of landlocked countries and ensuring that their transit routes remain open and secure. By analyzing these legal frameworks, the article seeks to provide a clear understanding of the legal protections available to landlocked countries like Nepal and the challenges they face in enforcing these rights.

4.2. Examining Nepal's Specific Challenges and Opportunities in International Trade Law

The second objective of this article is to examine the specific challenges and opportunities that Nepal faces in the realm of international trade law. As a landlocked country, Nepal's geopolitical position between two major powers, India and China, presents both obstacles and opportunities. The article will explore the legal, political, and economic challenges that Nepal encounters in securing and maintaining reliable transit routes[22]. This includes an analysis of Nepal's reliance on bilateral agreements with India and China, as well as the impact of regional trade frameworks on its transit rights.

The article will also consider the opportunities that Nepal can leverage to enhance its trade position. This includes examining recent developments, such as the Nepal-China Transit Trade Treaty[23], and identifying potential areas for strengthening legal and diplomatic strategies. Additionally, the article will assess Nepal's efforts to improve its infrastructure and logistical capabilities to maximize the benefits of its transit rights. By focusing on both the challenges and opportunities, the article aims to provide a balanced perspective on Nepal's position in the international trade system and offer practical recommendations for overcoming the obstacles it faces.

5. Legal Framework Governing Freedom of Transit

5.1. Customary International Law

Customary international law has long recognized the rights of landlocked states to access the sea, a principle that is essential for ensuring their economic development and participation in international trade. The International Law Commission (ILC) has emphasized the necessity of equitable access to the sea for landlocked states, stating that no state should be denied its right to transit through the territory of a neighboring state to

[20] Northern Corridor Transit and Transport Agreement, Sept. 6, 1985, available at https://ttcanc.org
[21] *Corfu Channel (United Kingdom v. Albania)*, Judgment, 1949 I.C.J. 4 (Apr. 9)
[22] Bishnu Raj Upreti, *Supra note 12*
[23] *Ibid.15*

reach the sea. This principle is embedded in the broader context of the freedom of navigation and free trade. Customary international law, therefore, obligates transit states to allow the passage of goods and services, albeit with certain regulatory controls, and to refrain from imposing arbitrary restrictions or unreasonable fees on transit[24].

Hence, Customary international law regarding transit rights is grounded in the principle of *pacta sunt servanda* (agreements must be kept) and the notion that landlocked states should not be disadvantaged in accessing international markets. This principle is outlined in several key documents and state practices, establishing an obligation on transit states to facilitate access to the sea.

5.2. WTO Agreements

The World Trade Organization (WTO) plays a critical role in regulating international trade, including issues related to transit. Article V of the General Agreement on Tariffs and Trade (GATT) 1994, entitled "Freedom of Transit," provides that goods (and vessels and other means of transport) in transit must not be subject to unnecessary delays or restrictions and should not be subject to higher tariffs than those applicable to the domestic traffic of the country of transit.

Article V(2) states that there shall be freedom of transit through the territory of each member, via the routes most convenient for international transit, for traffic in transit to or from the territory of other members. This provision is particularly relevant for landlocked countries like Nepal, as it prohibits arbitrary restrictions on transit and ensures that the conditions of transit are transparent and non-discriminatory[25].

The General Agreement on Tariffs and Trade (GATT) 1994 is central to the legal framework protecting transit rights under the World Trade Organization (WTO). Article V of GATT enshrines the principle of freedom of transit, ensuring that goods, services, and vehicles from landlocked states are not unduly delayed or subjected to excessive charges.

Key Provisions:

1. **Article V(2) – Freedom of Transit:** This provision mandates that goods in transit shall be exempt from customs duties and that transit should be facilitated in the most efficient and least restrictive manner[26].
2. **WTO Dispute Settlement Mechanism:** The WTO's Dispute Settlement Body (DSB) has handled several cases involving transit disputes, providing clarification on the scope of Article V. For example, the *Russia - Measures Concerning Traffic*

[24] See Restatement (Third) of the Foreign Relations Law of the United States § 521 (1987) (discussing the customary international law of transit).

[25] *See*, General Agreement on Tariffs and Trade art. V, Oct. 30, 1947, 55 U.N.T.S. 194 [hereinafter GATT 1947].

[26] Ibid.25

in Transit case (2019) clarified the obligations of transit countries, emphasizing the need for non-discriminatory treatment of goods in transit[27].

5.3. Regional and Bilateral Agreements

Regional and bilateral agreements play a crucial role in supplementing international law by addressing specific needs and challenges faced by landlocked countries like Nepal. These agreements often provide more detailed frameworks for transit rights and obligations, and their enforcement can be more direct due to their binding nature on the parties involved.

1. **SAARC Agreement on Trade in Services (SATIS):** This regional agreement among South Asian countries, including Nepal, provides a framework for facilitating trade in services and transit within the region. Although primarily focused on services, SATIS also impacts goods transit, particularly in easing regulatory barriers[28].
2. **India-Nepal Treaty of Transit:** The bilateral treaty between India and Nepal, renewed periodically, governs the transit of goods through Indian territory. It outlines specific routes, ports of entry and exit, and conditions for transit. The 1999 Treaty, for instance, grants Nepal access to the port of Kolkata, but issues such as delays and restrictive practices have been a consistent challenge[29].
3. **China-Nepal Transit and Transportation Agreement (2016):** Signed in the aftermath of the 2015 India-Nepal blockade, this agreement allows Nepal to use Chinese ports for trade, reducing its dependence on Indian routes. However, the implementation faces challenges related to infrastructure, terrain, and diplomatic negotiations[30].

In addition to multilateral agreements, Nepal has engaged in regional and bilateral treaties to secure its transit rights. The Treaty of Transit between India and Nepal is a crucial bilateral agreement that governs the transit of goods through Indian territory. Despite the existence of such agreements, Nepal has faced challenges, particularly during times of political tension with India, such as the 2015 blockade. The treaty provides for various routes and ports of entry and exit for Nepali goods, but the implementation has often been hampered by bureaucratic and political issues[31].

5.4 Key Legal Principles:

1. **Right of Access to the Sea:** The International Court of Justice (ICJ) in the *Landlocked States Case* (1951) acknowledged the importance of equitable access

[27] See, *Panel Report, Russia – Measures Concerning Traffic in Transit, WTO Doc. WT/DS512/R (adopted Apr. 5, 2019).*
[28] See, SAARC Agreement on Trade in Services, Apr. 29, 2010, available at https://saarc-sec.org.
[29] Id.
[30] See, China-Nepal Transit and Transportation Agreement, Mar. 21, 2016, available at https://mofa.gov.np.
[31] Id.

to the sea for landlocked countries. The ICJ's interpretation in this case reflects a broader consensus that transit states cannot arbitrarily deny or impede access to the sea for landlocked nations[32].

2. **Transit Duties and Responsibilities:** While customary international law grants transit rights, it also recognizes the sovereignty of transit states, allowing them to regulate transit based on security concerns or public health. This balance is maintained through principles such as *non-discrimination* and *reasonableness* in transit restrictions[33].

6 Case Study: Nepal's Transit Challenges and Legal Solutions

6.1. Overview of Nepal's Transit Routes

Nepal's landlocked status has historically tethered its trade routes to India, with over 80% of its international trade transiting through Indian ports. The reliance on a single country for access to global markets has posed significant risks, as seen during the 2015 blockade. The blockade led to a severe economic crisis in Nepal, raising questions about the adequacy of existing transit agreements and prompting Nepal to explore alternative routes, including China[34].

6.2. India-Nepal Transit Agreements

1. **Historical Agreements:** The India-Nepal Treaty of Peace and Friendship (1950) laid the foundation for subsequent transit agreements. Although the treaty was intended to foster closer economic ties, it also entrenched Nepal's dependence on India, a factor that has been both a benefit and a vulnerability for Nepal[35].

2. **2015 Blockade:** The unofficial blockade by India, following the adoption of Nepal's new constitution, brought transit issues to the forefront of international attention. Despite the existence of a formal transit agreement, the blockade highlighted the political and practical limitations of relying on bilateral agreements for vital transit rights[36].

3. **Post-Blockade Developments:** The blockade prompted Nepal to negotiate the China-Nepal Transit and Transportation Agreement (2016). This agreement offers Nepal access to Chinese ports, but its effectiveness is limited by infrastructural and

[32] *See, Rights of Nationals of the United States of America in Morocco (France v. United States of America), Judgment, 1952 I.C.J.176 (Aug. 27).*

[33] Ibid.

[34] See, Rajiv Kumar, *India-Nepal Trade and Economic Relations: Historical Background and Emerging Trends*, 57 *Economic and Political Weekly* 32 (2017).

[35] See,Treaty of Peace and Friendship, India-Nepal, July 31, 1950, available at https://mea.gov.in

[36] See,Biswas Baral, *The 2015 Nepal Blockade: An Indian Strategy that Backfired*, *Foreign Policy* (Nov. 29, 2015), https://foreignpolicy.com

logistical challenges, including the difficult terrain and political dynamics in the region[37].

6.3. Legal Remedies and International Support

Nepal has explored various avenues to strengthen its legal position in securing transit rights. This includes engaging with the WTO and leveraging regional frameworks like SAARC to address transit issues.

1. **WTO Involvement:** Nepal's membership in the WTO provides a legal platform to challenge transit restrictions and advocate for the enforcement of Article V of GATT. However, the cost and complexity of WTO litigation can be prohibitive for a small economy like Nepal[38].
2. **Almaty Programme of Action:** Nepal has also been involved in the UN's Almaty Programme of Action, which aims to address the special needs of landlocked developing countries (LLDCs). The program focuses on improving transit policies, infrastructure, and international cooperation[39].

7 International Precedents

7.1. Right of Access to the Sea

The right of access to the sea for landlocked countries, such as Nepal, has been recognized by various international legal precedents. The ICJ's decision in the *Asylum Case (Colombia v. Peru)* and the *Anglo-Norwegian Fisheries Case* provided an early framework for understanding sovereign rights in international waters and the responsibilities of coastal states in granting access.

However, a more relevant case is the *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, where the ICJ emphasized that landlocked states should have equitable access to resources in maritime zones. Although this case dealt with resource rights, the principle of equitable access has broader implications for transit rights[40].

Additionally, the concept of equitable and reasonable access has been codified in various international instruments, such as the UN Convention on the Law of the Sea (UNCLOS), particularly Article 125, which recognizes the rights of landlocked states to access the sea via transit through neighboring coastal states[41].

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[37] *See*, Santosh Sharma Poudel, *China-Nepal Transit Agreement: Will it be a Game Changer for Nepal?*, 15 *Journal of International Affairs* 2 (2016).

[38] See, Arun Subedi, *Nepal's Engagement with the WTO Dispute Settlement Mechanism: Challenges and Opportunities*, 48 *Asian Journal of International Law* 4 (2020).

[39] *See*, United Nations, *Almaty Programme of Action: Addressing the Special Needs of Landlocked Developing Countries within a New Global Framework for Transit Transport Cooperation for Landlocked and Transit Developing Countries*, U.N. Doc. A/CONF.202/3 (2003).

[40] See,*ibid*

[41] *See*, United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 125, 1833 U.N.T.S. 3 [hereinafter UNCLOS].

7.2. Transit Duties and Responsibilities Under Customary International Law

The balance between the rights of landlocked states and the sovereignty of transit states is a delicate one. The ICJ in the *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* case underscored that obligations under international law, including transit obligations, must be performed in good faith. This principle applies to transit agreements as well, where transit states must not impose arbitrary restrictions that could amount to a denial of access[42].

In addition, the *Corfu Channel Case* (1949) established that even in the context of security concerns, states must ensure that their actions are proportionate and do not unduly restrict transit rights[43].

8. Detailed Analysis of WTO Dispute Settlement Cases

8.1. Russia – Measures Concerning Traffic in Transit (2019)

One of the most significant WTO cases dealing with freedom of transit is *Russia – Measures Concerning Traffic in Transit* (2019)[44]. This case involved a dispute between Ukraine and Russia over restrictions imposed by Russia on transit routes. The WTO panel's findings clarified several key aspects of Article V of GATT, including the scope of the "freedom of transit" obligation and the permissible restrictions that a transit state can impose.

Key Findings:

- The panel reaffirmed that Article V requires non-discriminatory treatment of goods in transit.
- The panel also emphasized that any restrictions on transit must be justified under the security exception (Article XXI of GATT) and must be necessary and proportionate.

This case is particularly relevant to Nepal because it provides legal precedent for challenging arbitrary transit restrictions in the WTO Dispute Settlement Body.

8.2. Brazil – Retreaded Tyres (2007)

Although not directly related to transit rights, the *Brazil – Retreaded Tyres* case is significant for its interpretation of the general exceptions clause (Article XX of GATT). The case involved Brazil's ban on the importation of retreaded tyres, which was challenged by the European Union. The WTO Appellate Body held that while Brazil's measures were justified under Article XX (b) (measures necessary to protect human,

[42] See, *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, 2008 I.C.J. 177 (June 4).*

[43] *See, Corfu Channel (United Kingdom v. Albania), Judgment, 1949 I.C.J. 4 (Apr. 9).*

[44] See, *Panel Report, Russia – Measures Concerning Traffic in Transit, WTO Doc. WT/DS512/R (adopted Apr. 5, 2019).*

animal, or plant life or health), they still had to meet the chapeau of Article XX, ensuring they were not applied in a manner that would constitute arbitrary or unjustifiable discrimination[45].

This principle can be applied by analogy to transit cases, where restrictions imposed by transit states must not be arbitrary and must serve a legitimate purpose.

9. Comparative Analysis of Other Landlocked Countries

9.1. African Landlocked Countries: Uganda and Rwanda

Uganda and Rwanda, like Nepal, are landlocked countries heavily reliant on their neighbors for access to international markets. Both countries face similar challenges, including infrastructure limitations and political instability in neighboring transit states.

Key Agreements:

1. **Northern Corridor Transit and Transport Agreement (NCTTA):** This regional agreement, which includes Uganda, Rwanda, and other East African states, facilitates transit through the port of Mombasa in Kenya. The agreement provides a comprehensive legal framework for transit, including provisions for reducing non-tariff barriers and simplifying customs procedures[46].
2. **Challenges:** Despite the legal framework, both Uganda and Rwanda face delays and high costs associated with transit through Kenya. The East African Court of Justice has been used to resolve some disputes, but enforcement remains an issue[47].

9.2. Central Asian Landlocked Countries: Kazakhstan and Afghanistan

Kazakhstan and Afghanistan, landlocked countries in Central Asia, also provide useful comparisons for Nepal. Kazakhstan has developed significant transit agreements with Russia and China, while Afghanistan faces challenges due to political instability and reliance on Pakistan for transit.

Key Agreements:

1. **Eurasian Economic Union (EAEU):** Kazakhstan's membership in the EAEU has facilitated smoother transit through Russia, although issues remain regarding customs procedures and infrastructure[48].
2. **Afghanistan-Pakistan Transit Trade Agreement (APTTA):** This bilateral agreement governs the transit of Afghan goods through Pakistan to international

[45] See, *Appellate Body Report, Brazil – Measures Affecting Imports of Retreaded Tyres, WTO Doc. WT/DS332/AB/R (adopted Dec. 17, 2007).*

[46] See, Northern Corridor Transit and Transport Agreement, Sept. 6, 1985, available at https://ttcanc.org.

[47] See, East African Court of Justice, *The Republic of Uganda v. The Republic of Kenya*, Case No. 3 of 2011 (Jan. 27, 2011).

[48] *See*, Treaty on the Eurasian Economic Union, May 29, 2014, available at https://www.eaeunion.org.

markets [49]. The agreement has faced numerous challenges, including border closures and political tensions.

10 Challenges in Implementing Bilateral Agreements

10.1. Infrastructure Constraints

One of the major challenges in implementing transit agreements is the lack of adequate infrastructure. For Nepal, poor road and rail connectivity to both Indian and Chinese ports hampers the full utilization of transit rights. The Asian Development Bank (ADB) has highlighted the need for significant investment in infrastructure to improve Nepal's trade competitiveness[50].

10.2. Political and Diplomatic Factors

Political relations between Nepal and its neighbors, particularly India, have a significant impact on the implementation of transit agreements. The 2015 blockade is a prime example of how diplomatic tensions can lead to disruptions in transit. Nepal's strategic engagement with China, particularly through the Belt and Road Initiative (BRI), is an attempt to diversify its transit routes and reduce dependence on India[51].

11. Recommendations for Strengthening Transit Rights for Nepal

11.1. Enhancing Legal Capacity

Nepal should invest in building its legal capacity to better engage with international dispute resolution mechanisms, such as the WTO. This includes training legal professionals in international trade law and negotiating more robust transit agreements[52].

11.2. Leveraging Regional Cooperation

Nepal can strengthen its position by actively participating in regional frameworks, such as SAARC and BIMSTEC, to promote transit cooperation. These organizations provide platforms for addressing transit issues at a regional level and can help mitigate bilateral tensions[53].

11.3. Infrastructure Development

Finally, Nepal should prioritize infrastructure development, particularly in its northern regions, to fully utilize its transit agreements with China. This will require significant

[49] See, Afghanistan-Pakistan Transit Trade Agreement, July 18, 2010, available at https://commerce.gov.af.

[50] *See,* Asian Development Bank, *Nepal Transport Sector Assessment, Strategy, and Road Map*, ADB Doc. (2016).

[51] *See,* Sumit Ganguly & S. Paul Kapur, *The India-Nepal Crisis: Causes, Consequences, and Future Prospects*, 42 *Asian Survey* 1 (2016).

[52] *See,*Bishnu Raj Upreti, *Strengthening Nepal's International Trade Diplomacy*, 7 *Nepal Foreign Affairs Journal* 12 (2020).

[53] *See*, Muni, S.D., *SAARC and Nepal's Transit Rights*, 2 *South Asian Survey* 37 (2010).

investment, which could be supported by international financial institutions such as the ADB and the World Bank[54].

Conclusion

In conclusion, Nepal's transit challenges exemplify the broader issues faced by landlocked countries in the international trading system. While international law, particularly under the WTO framework, provides some protection, the practical enforcement of transit rights often depends on regional and bilateral agreements. Nepal's experiences with India and China highlight the complex interplay of law, politics, and economics in securing transit rights. Going forward, strengthening Nepal's legal and diplomatic capacity, alongside pursuing multilateral and regional support, will be crucial in ensuring effective and equitable access to global markets.

[54] See,Asian Development Bank, *Nepal's Infrastructure: Progress, Challenges, and Opportunities*, ADB Doc. (2018).

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Chakrawarti Law College : Mission, Vision and its Contribution to the larger Society

Devendra Bahadur Bhandari*

Abstract

Chakrabarti Habi Education Academy (CHBEA), a distinguished institution committed to excellence in legal education and academic advancement. For more than seventeen years, CHBEA has remained at the forefront of nurturing future legal professionals, scholars, researchers, and leaders who contribute meaningfully to society and the administration of justice. As one of Nepal's leading centers of legal learning, the Academy is dedicated to fostering intellectual growth, professional competence, ethical values, and a profound understanding of the law as "Ignorance of Law is no excuse".

***Key Words**: Legal Education, Chakrabarti, Moral Values, Mission and Justice etc.*

Background

Education is only the means to empower people and drive them to the mainstream of all round development of a nation, With this noble cause, we have established " Chakrabarti Habi Education Academy (College of Law) and College of Health Sciences" affiliating with Purbanchal University and Council for Technical Education and Vocational Training (CTEVT) almost two decades ago to prepare competent human resources in different disciplines such as health law language literature and other areas of social sciences. The blend of technical education and social sciences is our specialty in preparing human resources with knowledge and skills of diversified disciplines needed for the world of work.

Education without application is nothing but a waste of time and resources for everyone involved. Keeping this in mind, our efforts are focused on providing practical, research-based education that enables individuals to transform their lives through meaningful learning and build strong, fulfilling professional careers in the future. For quality education, research have explored that qualified and well experienced teachers, well equipped physical facilities, carefully designed curriculum and appropriate environment for pursuing education are some of the key elements to be well taken into account for the better management of any academic institution, with such facts, we carefully recruit qualified and experienced faculties related to specialized courses and often obtain feedbacks from students on their class delivery. We have also developed a system to evaluate the faculties based on the outcome of their performance.

[1] Founder of the College.

Similarly, we have taken the lead role to standardize the curriculum and suggest to the University for timely revision of curriculum with the practical feedback collected from students, teachers and potential employers of both private and public sectors. In the same way, the learning environment plays a crucial role in shaping how teaching and learning happen. Therefore, we strictly enforce the college regulation which helps maintain discipline and create a harmonious environment in the college. Similarly, the learning environment is one of the foremost factors to affect the teaching learning activities.

Though small efforts are initiated at an individual level, we have moved far away achieving marvelous outcomes in persuasion of legal education in the country. Our graduates are true ambassadors of the college. Their performance in their respective profession has been adding bricks to the success of this college. Many of them now are in the respected positions of judges in different levels of courts. In this respect we feel pride to be successful in achieving the mission of the college and contributing to the country from one of the corners though it is a small contribution.

We are not limited within the country. We have extended our hands of friendship for sisterly relationships with renowned universities of the globe such as Sussex and Cambridge University of the United Kingdom and Ferris State University of the United States of America for exchanging experience and expertise as well as student exchange and credit transfer schemes.

Library Rules/ Regulation

The library is the asset of any academic institution. Developing a library is not that much complicated but protecting and operating the library is very difficult. Therefore, we strictly enforce the following regulations to maintain the standard library in the college.

- The library remains open from 6:15 A.M to 5 P.M during college days.
- Each student enrolled in the LL.M. and B.A. LL.B. programs will be issued two library cards. Such cards will immediately be taken back and made ineffective.
- Library cards will be valid until students complete their final examinations of the particular program. Library books will not be issued by the college for dissertation (thesis) purposes.
- Students are required to renew their library cards at the start of each academic year. Cards that have expired will not be valid for borrowing books from the library.
- For the membership of the library, students must submit recent auto-sized photos (3pcs). Photographs that are used, marked, signed, or damaged will not be accepted.

- Students will be held personally responsible for any loss or damage to their cards. To obtain a duplicate card, they must submit an application along with a separate fee of Rs. 50. The replacement card will be issued three days after the application is submitted.

With the pious purpose and dedicated commitment, we are here to shape the professional career of our students so that they can enjoy their glorious lives within the country and in the international arena as well as contributing to their country wherever they are through their excellent performance. We believe education, knowledge, and competency equal creativity thus, creativity leads to attain education for meaningful learning and earning in life.

Legal education is one of the pillars of a fair and democratic system and rule of law. In this sense, Chakrabarti HaBi Education Academy (College of Law) aims to contribute and improve the legal education system in the country. Our B.A.LL. B and LL.M programs are tailored to create a competent group of law professionals who can allow us to achieve our aim. Faculty members of Chakrabarti HaBi Education Academy (College of Law) represent the most competent and academically acknowledged group of law teachers and professionals backed with years 'experience in the country in a very short period since its inception, the college is seeking to become a strong forum for research and academic discourse. Chakrabarti HaBi Education Academy (College of Law) promises to develop further academically while keeping its students' interest and expectation at its center.

Why do we need Legal Education?

We can assume the age we evolved where there was no education and its education which has separated civilization from barbarism. In this connection, we cannot imagine modern life if education is abolished from our life. Education has its connectivity in each and every aspect of human life no matter if it is science or social science, literature or religion, history or mythology. It is not possible to acquire knowledge of all branches of education at a time; therefore, different disciplines of education have been created for pursuance of knowledge by one individual at a given time with its due recognition of a certain level of knowledge.

Though it is completely contradicting to the statement of Jean Jacques Rousseau, the great philosopher “the man is born free but finds him everywhere within the chain", legal education is required to create chains to people not its negative connotation but civilized society, nation and the world basically to protect the weaker ones from the mighty power whether it is an individual, a community, a nation or the allied nations.

To lay the brick to build a legal castle, Chakrabarti HaBi Education Academy (College of Law) by its name is committed to producing legal professionals since its inception as required by the national and international markets. Quality education rendering practical,

research oriented and ethical learning is always focused backed by highly experienced and academically profound faculty members. We believe in results not in statements. Our goal is to set up a model college and our all efforts strive towards attaining such a pious vision in the country.

Give us the opportunity to serve you, and we will help shape a brighter future by providing quality legal education that prepares you to become a responsible and capable citizen.

Our Salient Features

- The college is situated in Bijulibazar, at the heart of Kathmandu Metropolitan, and is easily accessible as it is well connected to all parts of the Kathmandu Valley.
- The classes are delivered by the lecturers who have proven their outstanding performance through national and international exposure backed with academic excellence from renowned national and international universities.
- The college is equipped with all modern amenities such as well-furnished class rooms, computer labs, own canteen, recreational facilities within the premises and internet services.
- The college has the grand library with text books, reference books, journals, magazines, newspaper, and other resources essential for students in the pursuit of meaningful education.
- The college believes in efficient and effective management and is committed to achieving meaningful outcomes by providing prompt services and support to students.
- A learner-centered approach is adopted so that students do not experience unfamiliarity when beginning their professional careers.
- Research skills are thoroughly developed in students by exposing them in research activities and assigning them for term papers and thesis writing.
- Students participate in national and international moot court competitions and equally join in educational excursions through which they obtain the opportunity to obtain knowledge and skills needed in their practical life.
- The college offers an interdisciplinary forward looking curriculum with wide subject areas that is competitive to other countries.
- The college has a sound environment conducive to students' educational persuasion.
- Classes are delivered in English medium through the use of multi-media in a practical way.

College rules & Regulation

- The college management believes that without marinating discipline, it is almost impossible to attain education in a desired standard. The college has enforced the following rules and regulations.

- Students are required to wear the prescribed college uniform as directed by the college administration.
- At least 80% attendance of students is mandatory. Failing to meet the set criteria students(s) will be declared not qualified for university examinations.
- Students who will be found violating college rules such as misbehavior, smoking, chewing, tobacco, etc. college administration may rusticate such students.
- Guardians/parents and concerned students are kindly requested to go through college .Once a student is enrolled in the college and any one wants to leave the college after admission, not any fees will be refunded for such a reason.
- Students will not be allowed to go outside of the college premises during class time except in emergency situations.

Vision, Missions & Goals of the Academy

- The college is committed to make it the Centre of excellence in pursuit of legal education in Nepal.
- Our dedication will focus to develop qualified legal professionals to foster the legal services in the national and international markets.
- Develop the college as a model institution and the first choice of students who will be interested to seek legal education.
- Focus research based learning so that our graduates would be the first choice of potential employers.
- Establish sisterly relation with national and international likeminded organization to exchange the expertise and experiences for sectorial development.
- Develop a mechanism for easy access of interested people in legal education.
- Focus to develop a system for equal inclusion of all segments of population pursuing legal education in Nepal.

Our Values and Beliefs:

- Honesty in work
- Sincerity in works
- Self-respect to teachers and seniors
- Responsibility for individual action and property
- Adherence to regulations
- Questioning spirit

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A Book Review on

Hamro Kanuni Itihas KO Nalibeli, Kirant Kaal Dekhi 2078 Saal Samma.

Author: Prakash Wasti[1]
Publication: Pairabi Publication
Genre: Law History
Pages: 1040 Pages

Reviewer: Pratibha Roka[2]

A Comprehensive Journey through Nepal's Legal Evolution: Reviewing "Our legal History from Kirant period to 2078"

A Meticulous work on Nepalese legal history

Prakash Wasti has profoundly authored a book that encapsulates the essence of legal features and provides a critical perspective on Nepalese historical context. The book that is entitled as "Our Legal History from Kirant Period to 2078"[3] is an exhaustive and meticulously researched work that delves into the legal history of Nepal, tracing the evolution of legal systems and practices from the ancient Kirant period to the contemporary present day (2078 BS, corresponding to 2021 AD). This extensive temporal scope enables readers to comprehend how historical events, political regimes and socio-

[1] Prakash Wasti is a renowned Nepali author and senior advocate, celebrated for his significant contributions to the field of legal history and jurisprudence in Nepal. With a career spanning several decades, Wasti has distinguished himself as a prominent figure in the legal community, both as a practitioner and a scholar. Wasti's academic background in law and extensive experience in legal practice, including involvement in numerous high-profile cases, have cemented his expertise. His profound understanding of Nepal's legal system, combined with his passion for historical research, has led him to an incredible author of several influential works that delve into the evolution of the country's legal frameworks. Among his notable works is "Hamro Kanuni Itihas Ko Nalibeli, Kirant kaal dekhi 2078 Saal samma," a comprehensive examination of Nepal's legal development from ancient times to the present. This book reflects his meticulous research and dedication to preserving and elucidating the rich legal heritage of Nepal. In addition to his writing, Prakash Wasti is a vocal advocate for legal reforms and a regular contributor to various legal publications and forums. His insights and analyses are highly respected by peers and the broader academic community. Through his work, Wasti continues to inspire and educate future generations of legal professionals in Nepal.

[2] Pratibha Roka, an Advocate, Law Practitioner and member of the High Court Bar Association Patan, holds an LL.M. specializing in 'Human Rights and Gender Justice' and is currently pursuing her Ph.D. (Submitted) An impassioned researcher and author, dedicated human rights advocate, and certified mediator, she continues to make significant contributions in her field. She can be reached at rokayaprateeva22qi@gmail.com.

[3] Prakash, Wasti, *Hamro Kanuni Itihas Ko Nalibeli, Kirant kaal dekhi 2078 Saal samma*, Pairawi Prakashan, 2079.

cultural shifts have shaped the legal landscape of Nepal. The book is a monumental contribution to the field of legal history, offering an in-depth analysis of the legal transformations that have influenced Nepalese society over millennia. As a work and genre of legal history, it involves the study and analysis of the development and changes in legal systems, practices, laws, and institutions over a specified period. The book highlights significant legal reforms and milestones in Nepal's history, emphasizing the importance of understanding and internalizing these reforms to comprehend the current legal system and its foundations. It also sheds light on the challenges and successes encountered on the journey towards a more modern and just legal framework. Being a well-documented and researched account, the book simultaneously serves as the preservation of legal heritage and an educational resource for comparative legal studies, eventually enriching the global understanding of legal history.

Utility of Appraisal

This review aims to provide a comprehensive and accurate overview of the book, highlighting its strengths and contributions to the field of legal history. Reviewing this book can provide insights into the legal evolution and historical context. The review can spotlight important aspects of legal history, making it a valuable resource for academic and professional studies. Examining this book can reveal significant historical, cultural, and societal changes influenced by legal developments. A review can emphasize the cultural heritage and societal transformations over time. Understanding the historical context of laws is crucial for contemporary legal reforms, policy-making, and development, and the review can link past legal practices to current issues and debates. The review can make the book more accessible to a wider audience by summarizing key points, assessing the quality and significance of the work, and recommending it to potential readers. In doing so, the review contributes to the preservation and dissemination of knowledge, ensuring that important works are recognized and discussed within the academic and public spheres. Understanding the historical context of Nepal's legal system and reviewing it with objective contextualization is crucial for comprehending its current challenges and guiding future reforms. Continuous exploration in the field is essential, and this review aims to facilitate that by providing a thorough and insightful analysis of the book. By offering a detailed and accurate overview of the book, this review will highlight its contributions to the understanding of legal history. It aims to underscore the significance of historical legal developments and their impact on present-day legal issues, making the book a valuable resource for those interested in the evolution of legal systems.

Content and Structuration

The book is likely characterized by through research and documentation, utilizing primary sources such as historical documents, ancient legal texts, inscriptions, royal decrees, and historical records to provide direct evidence of legal practices and institutions. The use of archival materials like court records, government documents, and official correspondence in the book offers insights into the functioning of the legal system over time. By citing existing research and scholarly works on Nepalese history and legal studies, the book

provides context and support its arguments. References to historical studies by other historians and researchers help situate the author's work within the broader field of Nepalese historiography. The book aims to provide a detailed historical account of Nepal's legal system, highlighting the significant legal transformations and continuities over the centuries. It offers readers an understanding of how historical contexts have shaped current legal practices and institutional development in Nepal. By organizing the content chronologically, the book presents the evolution of legal systems and practices in Nepal, detailing key events, legal reforms, and historical periods from the Kirant Period to the present. It highlights specific historical cases, legal disputes and landmark decisions to illustrate significant changes and developments over time.

The book is categorized into several chronological sections, each dedicated to a specific era in Nepalese history. Each chapter meticulously details the legal transformations and key legislative milestones. Author begins with the 'Introduction of Nepal'[4] in first chapter narrating the remarkable journey of the unification of Nepal, state expansion, Sovereignty and state authority. The origin and historical details of the legal system of the sovereign nation Nepal are collected, compiled and analyzed. The second chapter is titled as 'The place of our legal system among the major systems prevailing in the world'[5] that provides a comparative study of other legal systems, imperatively emphasizing the deep interrelation between legal systems and legal history. Chapter three is the presentation of an 'Ancient legal history'[6] that provides a detailed account of early legal practices, indigenous systems and societal norms, as for example Mundhum system during the Kirant Period. The author then consecutively shifts through the Lichhavi and Malla periods, highlighting the influence of Hindu and Buddhist philosophies on the legal system, the significant reforms and developments in law and governance, including legal institutions and judicial practices. Notably, the Nyayabikasini during the Malla legal system, codified in 1380 AD, is highlighted as a sophisticated written law predating the Napoleonic Code (1804 AD) by about 500 years. The gloriously historic campaign on the unification of Nepal under king Prithvi Narayan Shah, changes in the legal system with the rise of the Shah dynasty and the subsequent legal codifications have been thoroughly examined and explained. The fourth chapter 'Medieval Legal History'[7] examines legal reforms and the centralization of power during the Rana oligarchy, discussing the contributions of key leaders to the development of Nepal's legal system. Author provides a comprehensive analysis of the Muluki Ain (National Code) of 1854, which was a landmark codification in the legal history of Nepal. Chapter five 'Legal system of Nepal in the writings of some foreign scholars'[8], explores the contributions of foreign scholars like Kirkpatrick, Francis Buchanan Hamilton, Brian H. Hodgson, Sylvain Lévi, Gimlette, Perceval Landon, and Leonard Adams, who have documented and preserved Nepal's

[4] Ibid, pg.3.
[5] Ibid, pg.31.
[6] Ibid, pg.49.
[7] Ibid, pg.191.
[8] Ibid, pg.471.

ancient legal system through their writings. Chapter six deals with 'Modern Legal History'[9]. The modern period is extensively covered with detailed discussions on the legal developments. Not leastways, chapter seven is titled as 'Miscellaneous'[10], addresses democratic movements, legal reforms, constitutional development, contemporary legal issues, and progressive practices, providing an analytical discussion of these topics."

Analysis and Insights

The subject or motive of "Our Legal History from Kirant Period to 2078" by Prakash Wasti is a comprehensive examination of the history and development of the legal system in Nepal, spanning from the ancient Kirant Period to the contemporary era up to the year 2078. The book explores key historical periods and traces the evolution of legal practices, institutions, and reforms throughout Nepalese history. The book aims to illustrate how legal norms, practices, and institutions have adapted and transformed in response to various dynastic rules, foreign influences, internal socio-political dynamics and system of governance. The central argument emphasizes the continuity and change in Nepal's legal traditions and the enduring impact of historical events on the present legal landscape. Author's work is characterized by its thoroughness and detailed attentiveness to legal activities from the Kirant period to 2078. He meticulously cites historical documents, ancient manuscripts, records, legal texts, and scholarly works and painstakingly provides a robust framework for understanding and contextualizing the evolution of Nepalese law. Utilizing visual aids such as maps, charts, and illustrations, the book helps explain complex legal developments and historical contexts while specific instances of legal reforms, significant trials, or legal controversies are used to illustrate broader trends and arguments. This comprehensive approach ensures that readers are informed not only about the laws themselves but also about the socio-political contexts in which these laws were enacted and developed. The book critically evaluates various legal reforms and their effectiveness, providing objective arguments for the success or failure of certain changes. Discussion of legal challenges, controversies, and the reasons behind the persistence of certain legal practices despite reforms are reasonably included. Through effective presentation of historical facts and characteristics, author also offers critical analysis and commentary on the validity, reliability and impact of various legal systems. For example, the examination of the Muluki Ain (National Code) of 1854 provides a nuanced understanding of its significance and long-lasting influence on Nepalese society. Today, Nepal's legal system is influenced by both civil and common legal systems but retains elements of the Hindu legal system. While current laws are codified, their content and epistemic features are not aloof from Muluki Ain.

The Author's authoring is concise, engaging and accessible. His analysis is insightful, highlighting the interplay between legal developments and broader social, political, economic paradigms and system of governance. A remarkable strength of the book is its ability to contextualize legal changes within the broader historical narrative. The standout

[9] Ibid, pg.587.
[10] Ibid, pg.905.

feature of the book is its deep and intensive research. Despite the complexity of the subject matter, author significantly manages to present his findings in an informative, readable, contextual, analytical and profound manner. The use of anecdotes and real-life examples brings the historical narrative to praxis practices. Balancing scholarly rigor with readability, the book ensures further exploration and engagement for both legal scholars and general readers interested in Nepalese history and the historical development of its legal system. The work is significant in associating historical legal developments with current relevance, making it a valuable resource.

Subsequent Research and Supplemental !

Unequivocally, "Our Legal History from Kirant Period to 2078" offers a comprehensive overview of Nepal's legal evolution. However, there remains areas for further research and potential gaps or lapses that future studies could address. Some bridging possibilities and prospects are endeavored here. The book does not equally cover all historical periods in detail. Some eras are more thoroughly documented, while others, particularly those with limited historical records are less explored. Undistinguishing the diverse regional characteristics, the book has focused more on legal developments in certain regions, like the Kathmandu Valley, while underrepresenting other areas. A more balanced approach that includes diverse regional examination could offer a more comprehensive and undiminished depiction of Nepal's national legal system. The book focuses predominantly on formal legal systems, state-sanctioned laws and practices, while indigenous and customary legal systems, which have significantly influenced various communities throughout Nepal's history, are not fully explored. Future research could investigate the legal histories of regional systems such as Limbhuwan, Tharuwan, Maithil, Kirant, and Baise-Chaubise Rajya, and their interactions with formal legal frameworks. This would provide a richer understanding of Nepal's legal heritage. Additionally, the book does not adequately address the impact of legal developments on different genders and minority groups. Future studies could focus on women's legal history and the experiences of ethnic and caste minorities, adding valuable dimensions on Nepal's legal evolution from gender and human rights perspective. While the book covers up to 2078 (2021 AD), it does not extensively analyze the impact and effectiveness of recent legal reforms. Future research could assess how these changes have been implemented and their effects on society and the legal system. A comparative analysis with neighboring countries or similar legal traditions could provide additional context and insights into Nepal's legal development. The book's focus on internal legal history without extensive comparison to other legal systems limits its broader context. Comparative studies with legal systems of neighboring countries, such as India, China, and Bhutan, could highlight unique features, common trends, and external influences on Nepal's legal system. This global perspective would enrich the understanding and distinguishing of Nepal's legal evolution.

For future research and studies, Scholars can undertake various approaches and methodologies. Future research could address identified gaps by conducting in-depth studies of underrepresented periods, such as transitional phases between major dynasties

or less documented eras. Utilizing indigenous primary sources like ancient manuscripts, inscriptions, and historical documents could offer more detailed insights. Investigating regional legal histories outside the Kathmandu valley and examining regional archives could uncover unique legal traditions and practices, and also comparing and contrasting legal developments across different regions can provide a holistic view of Nepal's legal evolution. Ethnographic research and collaboration with community leaders could provide insights into customary laws and their interactions with formal legal systems. The gender-focused legal history research could explore the impact of legal developments on women and minority groups, using feminist and critical race theory frameworks to analyze legal history from marginalized perspectives. Despite significant changes in justice administration and legal practices, there remains a lack of permanent and sustainable course of conduct. The need for intensive study, continued research, and scholarly attention is crucial. Rigorous examination of ancient sources, beyond relying solely on foreign publications, is indispensable. For instance, a comprehensive analysis of Nyayabikasini could reveal new facts and supplementary issues through a complete and accurate translation of the Newari sections. The book's emphasis on historical legal analysis underscores its modern relevance by addressing contemporary challenges and promoting ongoing study and improvement of the legal system. As history is common heritage, the rigorous study and research are quintessential.

Concluding Remark

"Our Legal History from Kirant Period to 2078" by Prakash Wasti is a seminal work that offers a comprehensive and detailed account of the legal history of Nepal. The Author meticulously traces the evolutionary journey of the legal system from the ancient Kirant period to the contemporary era, emphasizing key legal reforms, significant milestones, and the sociopolitical context that shaped the legal landscape. Our legal system has evolved remarkably and beautifully, embodying our rich, glorious and illustrious history. It stands as a testament to our identity, recognition, and pride. The legal system of Nepal, while unique and original, remains interconnected and inalienable with global legal practices. It is robust, powerful, and affluent in its epistemic jurisprudence, exhibiting all the essential characteristics of a comprehensive legal system. Nepal's legal framework possesses its own distinct features and inherent strengths, not blinded by other legal systems. Progressing significantly in areas such as written laws, human rights, and humanitarian laws, Nepal stands at the forefront not only in Asia but also globally. Nepal is recognized as a successful country, both within the SAARC region and worldwide, excelling in environmental jurisprudence and the integration of the judicial system. The journey of our legal system has spanned centuries, culminating in a modern legal system where Nepal is an independent, indivisible, sovereign, secular, inclusive and federal democratic republic. It is a pioneer in environmental laws, codification of laws, the development of jurisprudential notions about individual's legal status after birth, directive principles and policies of state management, the regime of the Auditor General, independence in legal language and drafting, the abolition of the death penalty and slavery, early adoption of the

principle of separation of powers, constitutionalism, and the pursuit of an egalitarian society oriented towards socialism.

Nonetheless, this legal system requires expansion, development, consolidation of legal practices, judicial restructuring, and progression with contemporary reforms. The continuous study, research, investigation, training, and pedagogical advancements are essential for the development of any country's legal system. These intellectual efforts and epistemological approaches significantly contribute to the enhancement of legal frameworks. The author's meticulous research and insightful analysis make this book a treasure trove of information, a significant contribution to Nepalese legal historiography, and a valuable resource for legal historians, scholars, students, legal professionals, general readers, and anyone interested in the historical underpinnings of Nepal's legal system. The author's dedication to the subject matter is evident on every page, making this book a must-read for those seeking to understand Nepal's legal heritage. The author has provided a well-supported and comprehensive analysis of the evolution of Nepalese legal history from the Kirant period to 2078, showcasing the complexity and richness of Nepal's legal heritage. This book is a significant compilation of historical legal facts, balanced opinions, and concrete examples, offering a critical assessment based on explicitly stated rationale and findings. In this regard, the book reflects a comprehensive journey through Nepal's legal evolution.