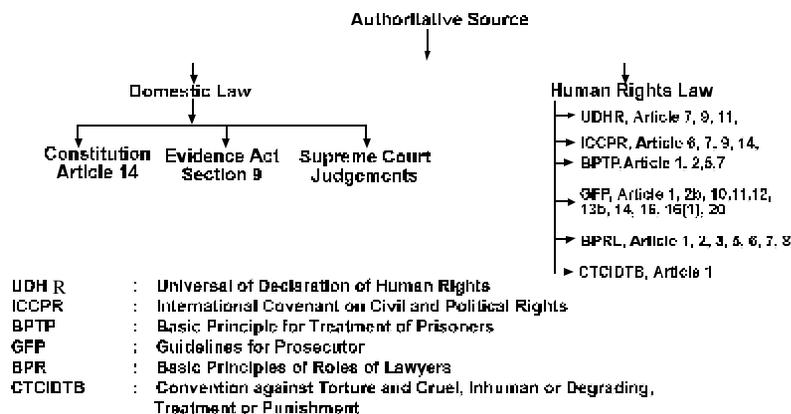


Compliance of International Standards in Nepal:
Critical Analysis of Situation of

Fair Trial and Safeguard of the Rights of Accused in Nepal

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Definition

The terms of fair trial comprise all processes of criminal justice commencing from the investigation to ultimate stage of trial that is sentencing of the accused. In general, the system of justice means a scientific of judicial decision making process. Conceptually, the criminal justice system can be defined as a scientific judicial decision making process by the State in relation to crime and criminal liability. In the sphere of criminal justice system, the scientific judicial decision making process refers to an accurate and authentic analysis of crimes, unbiased application of available evidence, safeguard of just treatment to the accused, provide remedy to victims and

maintain peace and order in the society. Overlooking of any of those elements necessarily leads to the miscarriage of justice.

Legal Framework for Fair Trial in Nepal

Constitution of the Kingdom of Nepal, 1990, provides a basic guarantee to fair trial in Nepal. The guarantees have been expressed through various articles.

- The **Preamble** has recognized the protection of human rights as one of the basic features of the Constitution. This is an explicit commitment on the part of the State that it would respect the spirit of the international instruments on human rights.
- The **Preamble** has also explicitly made promise to people that it would adopt and implement an independent and competent system of justice. The commitment obliges institutions involved in the process of justice that they would work fairly, efficiently and independently. It means that the State recognizes the obligation of complying with the doctrine of rule of law and due process. It further means that any acts or actions of State's institutions against the said commitments result in denial of justice. **Article 1**¹ of the Constitution has animated these commitments.
- Another landmark to fair trial is **Article 12(2)**, which unequivocally ensures a guarantee against deprivation of personal liberty save in accordance with law. This Article is landmark in the sense prohibiting:
 - the extra-judicial proceedings and sentencing;
 - the extra-judicial killing;
 - the extra-judicial detention;
 - the extra-judicial trial, including summary trial;
 - the punitive detention; and

¹ Constitution has been declared as the fundamental law of the nation. Hence, any laws, which are inconsistent to the constitutions, become null and void. This is how the State is prohibited to go against the spirit of the preamble. Other way speaking, by virtue of the Article, the commitments of the State towards protection of human rights and independent and competent justice have been enlivened to be applicable in practice without any kind of limits. The argument often made by some judges, government attorneys and police officers in relation to compliance of minimum standards of fair trial that the situation should be viewed in the Nepalese perspective and reality but not in that of America and Europe, is not only reactionary but also ostensibly ultra-constitutional. This argument is fully baseless in the light of the preamble and Article 1 of the constitution.

- the violation or infringement of the procedures established by law.
- **Article 14** is an immediate and straight guarantee to the fair trial and competent justice. Provisions enshrined into the Article provide for safeguards to the citizens from:
 - two separate trials and punishment for the same crime,
 - forced or imposed confession,
 - use of retrospective legislation,
 - physical and mental torture, or cruel, inhuman and degrading treatment,
 - arbitrary arrest and detention, and
 - deprivation of the right to see and be defended by a legal counsel of choice.
- Article **23 and 88(1) and (2)** stand as provisions of remedy for violations of fundamental or basic rights guaranteed by the constitution. By virtue of these Articles, the Supreme Court, in some instances also the Appellate Courts, can strongly intervene in the situation and reconstitute the violated rights of individuals. The intervention of the Supreme Court can even extend to judicial review of the legislation denying of, or posing threat to unrestricted exercise of the fundamental rights. These guarantees have no limits and conditions allowing the actors of criminal justice to permit excuses.
- Clause **9 of the Treaty Act, 1990**, plainly upholds the sanctity of the international human rights instruments meaning that no laws or actions can be interpreted inconsistent to the standards of fair and competent justice².

Treaty Obligations of Nepal

As a member of the United Nations and other international as well as regional organizations, Nepal is party to large number of international human rights instruments. As of date, Nepal has acceded or ratified the following international human rights instruments directly concerned with fair and competent criminal justice and treatment of the prisoners:

² In case of inconsistency between the provisions of Nepalese Law and provisions of an international treaty to which Nepal is a party, the provision of the treaty shall apply.

- International Covenant on Civil and Political Rights, 14 May, 1991.
- Optional Protocol to the International Covenant on Civil and Political Rights, 14 May, 1991.
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 14 May, 1991.
- Second Optional Protocol to the International Covenant on Civil and Political Rights.

By ratification of these international instruments, the Kingdom of Nepal agreed to follow the standards of criminal justice as stipulated therein. Therefore, no excuses can be tolerated in any level or forms of institutions, which are responsible to execute the fair and competent criminal justice. The Judiciary, including all levels, and quasi-judicial bodies have to interpret the laws in consistent to the standards declared in the conventions.

The practice, however, record far below standard in compliance these minimum standards of criminal justice. Both the national studies and observation of the international community, including the Human Rights Committee discover utterly dissatisfactory situation in respect of fair and competent justice.

Although the problem of applying retrospective legislation and resort to process of trial twice for the same crime do no longer exist, the situation of use of torture, cruel inhuman or degrading treatment both for punitive and confession purposes prevails widely during the investigation, not instances of attempts on the part of the Government Attorneys and the Judges are found intervening the situation.

Compliance of International Standards and Enforcement of Constitution

Arbitrary Arrest and Detention:

As it becomes spectacular for the discussion above, at the constitutional and legislative level, Nepal has gradually established a system consistent to rule of law and modern standard of criminal justice system. While significant achievement is made in respect of enshrining the principles, the practice of those principles in reality has received no encouraging accomplishment. A large number of arrests take place without warrant and suspects have been

put into police beyond the constitutional deadline of 24 hours with impunity³.

As discovered by a study on "Analysis and Reforms of the Criminal Justice System in Nepal, 1999, detention in the police custody beyond 24 hours, without concurrence of the judicial authority, is recorded in 37% of the cases. Similarly, suspects are arrested without warrant in 46% of the cases⁴. The report of the Amnesty International substantiates the findings of the study⁵. The violation of the international instruments and concerned provisions of the constitutional is evident in the given situation.

Torture and other Forms of ill-treatment:

In its report, the observation team of the Commission on Human Rights reported that the tendency of extracting confession is one of the main reasons for the quite frequent cases of torture or ill-treatment inflicted during investigations and, consequently, as a source of judicial error⁶. The volume of the number of incidents of torture reported by prisoners is serious. In the scrutiny of 222 criminal cases carried out, an allegation of physical torture for confessing the crime is reported by suspects in their deposition at courts in 50% of cases, whereas inhuman treatment, like handcuffing, verbal abuse etc, is reported in 19% of cases⁷.

Legal Assistance:

Guarantee of legal assistance by counsel of choice and adequate time for preparation for defense is most fundamental element of fair trial. This is where the criminal justice system in Nepal is seriously handicapped. Suspects are effectively and deliberately preventing from approaching the lawyers in the initial stage of arrest. Generally, a suspect is allowed to contact or consult the lawyer only after his/her statement is recorded. Evidently, the whole process of interrogation is carried out without giving an access for suspect to consult his/her lawyer. Often, it is seen that the interrogation completes with extraction of confession. A survey of 321

³ Report of the Working Group on Arbitrary Detention. Addendum, Visit to Nepal, 26th November, 1996. Commission on Human Rights.

⁴ CeLRRd, *Report on "Analysis and Reforms of Criminal Justice in Nepal* at. 91-96.

⁵ Amnesty international, Nepal, *Human Rights at a Turning Point*, 15 March, 1999. at. 6.

⁶ *Report of the Working Group on Arbitrary Detention*. Addendum, Visit to Nepal, 26th November, 1996. Commission on Human Rights.

⁷ CeLRRd, *Report on "Analysis and Reforms of Criminal Justice in Nepal*, at 105.

prisoners reveals that none of them had been allowed to consult the lawyer before interrogation was completed and the deposition was signed up⁸.

Role of Lawyers in Defending Fair Trial:

By disregard of the right to legal counseling and be defended adequately, all other fundamental rights associated with fair trial are ostensibly transgressed. In such a circumstance, post investigation representation of lawyers faces challenges, and as such becomes extremely difficult in the one hand and extremely sensitive on the other hand. In such a circumstance, the fight of defense counsel must be directed equally to representation of fact in issue as well as the legal issues. The problem of the Nepalese legal profession is that it is not generally sensitive to issues of transgression of the fair trial elements. The insensitivity is reflective in the following circumstances:

- Suspects make complaints of long prior detention before first remand (within 24 hours). Often, the prior illegal detention is mentioned in their statement made before the judge. Provided the illegal detention is proved, under the existing premise of constitutional provisions and UN standards for fair trial, the whole subsequent proceeding becomes marred and consequently extra-legal. In such circumstance, the role of lawyers begins with challenging the illegality of the detention and the whole process of investigation. However, Nepalese legal profession is not sensitive to such matters. It normally proceeds to adjudication process accepting the sanctity of the evidence procured by the police. The prosecution, which precedes illegal detention, itself, is never challenged.
- As it is clearly established by naked facts and reports of the studies, the right of the suspect to have legal counseling is effectively and deliberately denied. Under the prevailing State Cases Act, 1993, the statement of the suspect is to be recorded in presence of the concerned Government Attorney. The statement is recorded as a final process of interrogation. During the whole interrogation process, the suspect is kept aloof from his/her guardians or relatives and deliberately preventing from approaching the lawyer. Considering that Government Attorney's role is to protect prosecution of innocent, he/she is stipulated to confirm whether the suspect had enjoyed a chance to consult his/her lawyer or not. However, instead of

⁸ *Ibid*. P.135.

protecting the suspect's right of consulting the lawyer, the government attorneys are found actively supporting the police in evading the rights. The legal profession is not unaware of this circumstance. However, it is not found sensitive to issue that " an interrogation and whole process of investigation and prosecution effectively preventing the suspect from exercising the right to consult and legally assisted in defense", render the criminal proceedings extra-judicial. It is an established fact that no challenge of criminal proceeding is made on the ground that the right to defense was violated. The legal profession in Nepal takes it normally.

- A concept among the lawyers that the representation commences at court with arguments for bail, is predominant in Nepal. This is an outcome of insensitivity to the fair trial and the values of justice that "no one can be condemned without being heard adequately". Participation and follow-up of the procedures during the investigation and prosecution are therefore never made.
- The suspect and hi/her defense lawyer is never given access to documents procured during investigation. Even the copy of statement made by suspect is kept hidden and access to it is deliberately denied. The charge sheet and other prosecution documents are not made available to defense lawyer or the suspect before hearing in the court for bail. The bail hearing determines the fate of the suspect as to whether he/she would put into judicial incarceration- indeed in Nepal, it is virtually imprisonment because the accused is put together with convicted criminals. This is therefore momentum when an important decision is made about personal liberty of a person. In such circumstance, the accused deserves unrestricted privilege to defend himself/herself. But how he/she can defend himself/herself through a lawyer where documents are not available to him/her.

There are several excuses made by police, government attorneys, and lawyers to these circumstances, and importantly the system of confession oriented investigation is primarily responsible to this.

- **Police:** Consultation between lawyer and the suspect prior to interrogation is completed create hurdles to police to discover facts.
- **Government Attorneys:** This is not an accountability of Government Attorney to check this matter. There is no legal authority on them to

instruct the police to respect the right of the suspect to legal counseling⁹.

- **Judges in the Trial Court:** It is not their responsibility to examine this issue while remand period continues. They have no legal authority to intervene in this circumstance. Rather, this is habeas corpus jurisdiction of the Supreme Court.
- **Lawyers:** There can be nothing running behind such things. The judiciary is not ready to act so pro-actively.

These excuses in totality render the criminal justice a mockery. The psyche of the various actors, including lawyers, of the criminal justice system is therefore major factor for non-compliance of the international standards of the criminal justice system. Pro-activation of the legal profession is therefore necessary for forcing the compliance of standards by various actors of criminal justice system.

The legal profession thus needs to prepare itself for taking up the challenges of enforcing the constitution and international instruments of human rights. Especially, the lawyers dedicated to represent the prisoners must strategize the actions for fair and competent criminal justice with priority of defending the following rights:

- Right to be informed of charges promptly and precisely.
- Right against forced and imposed confession.
- Unrestricted right to legal assistance from the moment of arrest.
- Right to public and adequate hearing.

While protecting these rights, a defense lawyer must be conscious of representing the suspect adequately in every stage of the proceeding. He/she should be conscious of removing the excuse or psyche that he/she has nothing to do with investigation and prosecution stages of proceeding. His/her service is more importantly paramount in these stages.

⁹ I had a chance to a make presentation in a training program for the Under Secretary level of judicial officers. These excuses had been widely discussed. A participant responded "How could we behave in a way like Americans do" ? He said " It was not possible to get a lawyer for suspect". He further said " They are the Government Staff, and as such are not obliged to act as an independent institution and examine whether a suspect is innocent or not. According to him, the role of Government Attorney is confined to prepare the charge sheet. Thus, they don't feel necessary to make inquiry as to if the suspect had provided with access to have a legal counsel or not during police custody. This psyche of the prosecuting officers may random at least at the subordinate levels.

Strategies for Defense of Suspects

Discussion above is fairly indicative of poor state of criminal justice system as well as the legal profession. It is not the academic background of the Nepalese lawyers, but their sensitivity towards gross violation of the elements of fair trial is a problem. Hence, breaking the iceberg of sensitizing the lawyers should begin with the following planning:

Protection of Right to Legal Assistance:

Right to Legal Assistance is unrestricted and unconditional right. Exercise of this right cannot be limited by putting limitations or imposing conditions. The following international instruments have affirmed the non-violability of the rights under any circumstance:

- Article 7, 9 and 11: Universal Declaration of Human Rights¹⁰.
- Article 14: Convention on Civil and Political Rights¹¹.
- Basic Principles on the Roles of Lawyers¹².

The right to legal assistance covers the following various aspects:

- Receive legal advice of lawyer since the moment of arrest.
- To be interrogated in presence of legal counsel.
- Representation in hearing motions.

¹⁰ **Article 11:** Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.

¹¹ **Article 14 (2):** Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
(3): In the determination of any criminal charges against him, everyone shall be entitled to the following minimum guarantees, in full equality,
(a) To be informed promptly and detail in a language which he understands of nature and cause of the charge against him;
(b) To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing.
(c) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing, to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interest of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

¹² Access to Lawyers and Legal Services: (1) All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings. (2) Governments shall ensure the efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, color, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status..

- Examination and cross-examination of the witnesses.

Right to legal assistance provides a good basis for protection of several other rights like, right against arbitrary arrest and detention, right to notice of charges, right against self-incrimination etc. Thus, the defending lawyer is supposed to jealously defend the right of accused to defense. No compromise can be made in this regard.

Scope of Legal Assistance:

Scope of right to legal assistance is very much determined by the international instruments of human rights, national constitution and interpretations of the Apex courts. Supreme Court of Nepal in 1971 made a landmark interpretation vide Habeas Corpus case ¹³, which clearly laid down principle that the legal assistance cannot simply be ignored on the ground that the detainee made no request for. This judgement indicated to the obligation of investigators that the detainee should be aware of his/her right to contact the lawyer. In this connection, defending lawyers should venture to uphold the following principles laid down by a American Judgement¹⁴ while interpreting the Article 14 of the Constitution of the Kingdom of Nepal:

- Legal assistance of a counselor of choice is an indispensable rule of due process of law.
- Deprivation of the right to legal assistance amounts to deprivation of liberty.
- Types of offence or punishment are immaterial for exercising the right to legal assistance.
- The right to legal assistance is a fundamental prerequisite to the very existence of a fair trial.
- The Right to be heard would be meaningless if the right to legal assistance is not unconditionally protected.
- Imprisonment without representation of legal counsel would amount denial of liberty.
- Even the statute cannot prohibit exercise of the right to legal assistance.

¹³ *Yagymurti Banjade v. HMG*, 1971

¹⁴ *Arsersinger v. Hamlin*, 407.U.S.25, June 12, 1972.

The legal assistance is paramount especially during the initial stage of interrogation. Under the premise of right to heard properly, a suspect has to know about what are his/her rights and what is the procedures to be followed. In this regard, the Miranda case is worth mentioning which laid seven obligations to be discharged by the investigators in the beginning of the interrogation. The investigator must aware the suspect of the following:

- You have the right to remain silent.
- Anything you say can and will be used against you in a court of law.
- You have the right to talk to a lawyer and have him present with you while you are being questioned.
- If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish one.
- You may stop answering questions at any time.
- Do you understand each of these rights, I have explained to you.
- Having these rights in mind, do you wish to talk to us now?

These requirements were propounded in Miranda V. Arizona case by the Supreme Court of America (384. US.436, 1966).

Especially, the legal aid lawyers, who are also proudly known as alternative lawyers, are to be jealously encouraged to defend these principles while representing the case. In this connection, the following few approaches should be pursued in order to ensure fair trial:

Proposed Movement to Ensure Fair Trial in Nepal:

Because of the police and government attorneys, for fully depending on investigation prosecution respectively, still believe on confession as a decisive evidence for conviction. The courts enjoy entertaining such evidence without much care about the Constitution, Evidence Act and other international instruments. Viewing this situation, it is advisable for defense lawyers rejuvenate the legal profession with the following strategies:

- Approach the Government attorney and seek his assistance to secure the legal assistance is accessible to the suspect.
- If the Government Attorney is not cooperative, approach the district court for making intervention. In district courts, the judges have already done it.
- Appear in the court during remand process and argue the case.

- If the District court is not cooperating, initiate the Habeas corpus case together with other relevant writ jurisdictions, challenging the whole trial process. It is important to develop a strategy to challenge the legal sanctity of the evidence collected through a process, which exists in contravention to the constitution.

Strategic Structure of Defense:

The focus of the lawyer while representing the suspect should be given on protection of the following rights:

Right to be presumed innocent

The right to be presumed innocent is entertained by execution of some unavoidable principles of criminal justice. These principles have been evolved and enshrined into the constitution and laws to render the prosecutors pay full attention to the fair trial. Negligence of fully applying the principles in practice should benefit the suspects as rule.

- **Right to Silence:**

The principle that a suspect can remain silence stands as guarantee against the State forcing the confession. Pursuant to the principle, the accused virtually immune from the obligation of proving his/her innocence. The immunity is fully guaranteed by the Article 14 of the Constitution of the Kingdom of Nepal, and Article 14.3.g. of the ICCPR.

- **Guilt to be proved Beyond Reasonable Doubt**

This principle virtually imposes obligation on the prosecutors to recognize the right to silence of the accused. The Article 11(1) and Article 14(2) of the UDHR and ICCPR respectively recognize the principle.

Why Fair Trial and we need to protect the Rights of Suspects Jealously:

The cost and risk of social breakdown and consequent impact thereof created by wrong investigation are more the matters of criminology and anthropology. In the given premise, therefore, we are more concerned with standard treatment of the detained persons, which is a basic requisite of a fair trial. The fair trial is necessary for following reasons:

- **State V. Individual:**

State wields huge power and possesses strongly organized machinery for interrogating the suspect and collecting evidence against him. The same circumstance is not available for suspect to prove his/her innocence. Hence, the obligation of proving the guilt, without any relaxation, remains upon the prosecutors. His/her any actions prejudicial, therefore, not only create default in given obligation, but they are necessarily treated as illegal actions with consequences.

- **Suspect is in Custody of Prosecutor:**

Suspect's liberty during the investigation is curtailed and thus he/she has been incapacitated to help himself/herself. Rather, he/she is in active and effective disposal of the counter party. In such circumstance, there is always a risk of the State being prejudicial to the detainee. Hence, he/she needs to be protected by help of lawyers and leniency of the court.

- **Suspect is affected by his/her Circumstances:**

The suspect has to undergo mental tension as he/she has been isolated from the family of community. In such a circumstance, for fear of known or unknown consequences and resulting sufferings, he/she may not be able to decide what is good or bad for him. Hence, if he/she is not jealously protected by a lawyer since the beginning of investigation.

- **Suspect may Lack Resource:** Compared to the State machinery, human resources, logistic support and financial resource, the suspect is left in misery. In such a circumstance, it is implausible to believe that an individual can protect him. Moreover, the tendency of the prosecutor generally directs toward incrimination.

Out of the given situation, the following circumstances may appear:

- Being influenced by subjective analysis of the facts and circumstances, the investigating officer may act like a judge. He/she may, therefore, be prejudiced to the suspect, and as such, instead of engaging himself in discovering the independent evidence, he may indulge in using force to extract confession. And for that purpose, he may use means of torture. This would lead to miscarriage of justice.
- To hide the result of his illegal action, the investigating officer may deny the suspect to have the right to lawyers exercised deliberately.

- To suppress the evidence against the suspect, the investigating officer may cook or forge the real evidence.
- To disable the detainee for having effective defense preparation, the investigating officer may intentionally withhold the notice of charges.

These circumstances again lead to the miscarriage. In such situation, if judges, prosecutors or the lawyers are not serious to their accountability the process of justice ends at mockery, which is largely true in Nepal. This is why lawyers have to have taken lead to break the iceberg.

