

Law and Development

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1. LAW AND JUSTICE AND DEVELOPMENT: NEED OF RETHINKING IN JURISPRUDENCE

Shiva Devi, a pregnant woman, mother of a three year old girl child, from a Nepal's countryside committed suicide taking rat poison. She poisoned the daughter as well. Both of them died instantly. Reportedly, the starvation was the only cause for suicide. Shiva was a daily waged-earner worker. She lost her work for a prolonged strike of a political party, supposedly fighting for a 'revolution in Nepal. Her husband was away from home for works over the last three months. He left home to avoid a risk of forced recruitment in rebellion.² Laxmi Maya, a poor woman in village of Nepal was dragged out of home and physically assaulted by a mob until she fell unconscious. The villagers believed that she was a 'witch' causing miscarriage of pregnancies in the village. The villagers not only condemned her for their unfounded or superstitious belief but also engaged in severe physical assault almost to the death. To protect her life she agreed to munch through "human excreta". A woman in Dhaka city was dragged out by a 'slum dwellers' and tortured seriously, as she was allegedly involved in prostitution. Finally, some people threw acid on her face, permanently damaging the facial appearance. A man in village of Andhrapradesh of India committed suicide because he could not pay debt back to the bank. The prolonged drought stole his chance of yielding good crops, the only source for paying the debt back. His family was starved. In such an intense stress he had no option left but to end the life. He thus hanged himself in a tree. The landslide swept away the house of a poor Chepang family, a hill tribe in Nepal. The daughter-in-law was expecting a baby shortly. The landslide also washed away a few kilograms of the rice the family was saving for the day of her delivery. The family had nothing to feed the daughter-in-law. They were forced to live with "tarul and vhaykurs" (roots of wildly grown plants). A child was caught in a bomb-blast in an Indian city when he was rushing to home after school was off. The bomb was planted by a terrorist group. The deceased child was the only child of his parents.

These are only few representative stories about 'a cruel reality of life' associated with poverty and deprivation' in South Asia and many other parts of the world as well. Such forgotten incidents are neither remembered nor mourned for. The media in South Asia is emphatically interested about 'political gossip' rather than shocking reality of lives of millions of people. Of course, these stories are reflective of many more things. The stories implicitly suggest that

- a. The Governments in developing countries are less interested for and accountable to human security (physical integrity and security of persons). The death traps created by poverty are ignored and forgotten. The poverty is neither an 'issue of law, nor is it an issue of human rights' protection.
- b. The media in developing countries is mesmerized by 'political gossip' and seems less enthralled by the 'death traps in which millions of people are strangled in. No laws or rules of ethics require media to ' censor government' for failing its obligation to protect people from the death trap posed by poverty.

². During the conflict period (1996-2006), the Communist Party of Nepal (Maoists) coerced people to pay donation or spare a member of the family to join its armed force, the People's Liberation Army (PLA). To avoid this risk, many adult left villages to India leaving old parents and children at home. It was treacherous time in Nepal. Besides, the nation was seized by frequency of 'nation-wide violent strikes' which prevented poor people from works. Indeed, poor people were forced to starve. See, Annual Human Rights Yearbooks; INSEC, Kathmandu, Nepal.

- c. The economic systems pursued by developing countries are quintessentially exploitative, and the state of lacking of basic needs of people hardly matter for them.
- d. The legal systems in practice in developing countries are kept out of 'framework' that lets –off the Governments from accountability of the violation of basic human rights of people.
- e. The 'modality and selection of development programs' is considered a privilege of the Governments against rights of the people.
- f. The violence and impunity are emerging as a culture in developing countries. No response is found from State even a child killed on the way home from school. Terrorism and arms trade are burgeoning within poverty and want.

The representative stories do illustrate a gruesome state of human rights violations faced by people at the most bottom-line of the societies in developing countries. They prudently reflect on ' the level of acuteness of the state of poverty and deprivation the millions of poor population from developing countries is forced to live in'. The poverty and deprivation expose common people to an utterly acute state of insecurity of life, the threat to the right to life being the most obvious one—every year over 18 million people die across the world pre-maturely due to poverty related causes, which is one third of all human deaths. Every day, fifty thousand people die due to poverty, of which thirty four thousand are children below five.³ The situation has witnessed no change at all. Since the end of cold war, ordinary deaths from starvation and preventable diseases amount to approximately 250 million, most of them children.⁴ The global poverty refuses to decline and global inequality continues to increase, more than doubling since 1960.⁵ Seemingly, the state of poverty and deprivation represents a state of the 'gross violation of human rights'. The international community has abjectly failed to bring about changes in such a 'grotesque situation' of human security. By contrast, some intellectuals love to put arguments that 'the duty of international community to help poverty-stricken societies is not absolute because they are not responsible to this poverty'.⁶

- 1.1. The *regressive status quo*⁷ looming large in the developing societies is the main cause for persistence of poverty and deprivation as it meticulously refuses or averts the

³. See, Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reform*; Cambridge: Polity 2002, p. 2

⁴. Ibid, p. 98

⁵. Ibid, pp.99-100

⁶. See, Thom Brooks, "Is Global Poverty a Crime", p. 2. Available online at <http://ssrn.org/abstract>, last visited October 29, 2011.

⁷. Regressive status quo can be epitomized in several ways. It is a state of 'traditionalism in behaviors' which dislikes changes in the prevailing paradigm of life. Politically, the phrase 'regressive status quo' represents a 'system of feudal governance' in which the accountability of rulers is fully ignored. Economically, the phrase typifies a 'system of transactions in which the power of bottom-line segment of the population for bargaining about their labor and commodity is suppressed'. Etymologically, the status-quo refers to a state of 'changelessness'. Regressive status quo denies changes in the 'prevailing conditions'. It applies rules of law and conventions to block the changes that are essentials for transformation of lives of the people towards modernity. A progressive change in the society is necessary for establish a new system where all people can have equity in development outcomes. The regressive status quo, however, averts equity for all in development outcomes. The progressive change in the society is epitomized by the following propositions:

development events that are necessary to bring about changes in the lives of people. It is an utter state of denial of human rights. The 'state of regressive status quo' originates by persistent denial of, or restriction on, equality in security of person, physical integrity, freedom of choice, and access to subsistence supplies, as well as education and economic participation. Access to or freedom for enjoyment of basic needs— i.e. security of person, physical integrity, freedom of choice, subsistence supplies, education and economic participation—constitute the 'threshold ability'⁸ for enjoyment full-fledged condition of human rights.

- 1.2. No doubt at all, the above stories point out to a state of abject denial of 'the threshold ability' to millions of people in developing countries.⁹ The gruesome fact uncovered in these stories is that 'the governments in developing countries are less bothered with urgency of prioritizing the utilization of resources for 'generating threshold ability' and hence rescuing the lives of millions living in a state acute vulnerability of human security and dignity'. The 'threshold condition' of human rights empower people's ability to assert rights to development, in turn, establishes a 'circumstance enabling people to enjoy full-fledged protection of civil and political participation along with freedoms of conscience and decision making'. Hence, human rights and development has an 'interface'. The interplay of these two is what in which the 'full security person and dignity of human life' is rested on.
- 1.3. Attaining a state of human security and dignity demands a pragmatic but irreversible 'interplay between law and development'.¹⁰ Every society is comprised of individuals,

(1) every society is made up of individuals, groups and the state, and the interactions between these components determine the goals of the society; (2) the equity is the guiding principles for the State to exercise control over individuals and groups; (3) the State exercise this control through law for achieving social goals; and (4) the State applies law equally to all persons in an independent and rational manner. If these propositions function in a reverse way, the state of regressive status quo prevails.

- ⁸. See, Thom Brooks, "Is Global Poverty a Crime", p. 2. Available online at <http://ssrn.org/abstract>, last visited October 29, 2011.
- ⁹. The failure of the international community, the Governments of developed countries in particular, to generate 'threshold ability of people to enjoy rights to physical integrity, subsistence supplies, freedom of choice, education and economic participation' is the major cause of deaths of incredibly huge number of people around world today. As a matter of fact, millions of people are dying due to starvation and preventable diseases. The number is increasing as the gape of 'having and not having is widening ' indiscreetly. The inequality between individuals as well as as nations is becoming a serious challenge for 'security of the entire human civilization'. The lacking of 'threshold ability' prevents millions of people across the world to assert their inalienable and inherent rights to life, liberty and security', which constitutes a 'threshold condition for enjoyment of human rights guaranteed UDHR, ICCPR and many other similar human rights instruments. See, See, Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reform*; Cambridge: Polity 2002.
- ¹⁰. The theory of demanding role of law in the larger context of social, economic and political development is not new one in jurisprudence. During 1960s and 1970s, two law and development scholars, David M. Trubeck and Thomas M. Franck, described this approach as "liberal legalism". On law and development movement generally, see: Benny Simon Tabalujan, 2001. *Legal Development in Developing Countries-The Role of Legal Culture*; SSRN. The key proposition of the approach is that the State should apply law equally to all persons in an independent and rational manner. Implicit in this approach is the belief that legal development is a necessary pre-requisite of economic development and that modern laws from developed countries can be imported as "legal transplants" into developing countries to fulfill the requirements. On "legal transplants" generally, see: William Ewald, *Comparative Jurisprudence II: The Logic of Legal Transplants*; 43 *AM.J.Comp. L.* 489 (1995)

groups and the State. The interactions between these variables of society collectively determine social goals of that given society. Societies in developing countries are, however, utterly marred by penchants of traditionalism or conventions indiscreetly permitting 'disparity in treatment or advantages between individuals, individual and group and group and group in the one side, and the State on the other'. The disparity is often backed by deeply rooted 'hierarchical structure of the given society'. The hierarchical structure, on the other hand, requires 'regressive status quo' for its continuity. The change in the circumstance is necessary for positive transformation of the lives of people, which is attained by 'empowering people through generating 'threshold ability' in them to assert rights concerning their security of person, physical integrity, subsistence means, acquiring knowledge and skills for development and, for all these, the participation. The threshold ability, to make it functional and yielding fruits, requires soundly grounded legal culture. But how the society can develop the legal culture 'amidst rigorous tendency of preserving the status quo is an unanswered question yet. Some western jurists have proposed an easy approach: the developing countries can import laws from the developed countries.¹¹ Legal transplantation, however, is not as easy as described by them.¹² Laws reflect the mood of the people. Historically, they are developed to deal with specific problems faced by the given society. The laws of a society are meticulously designed by wider interactions between individual, groups and the State to formulate the goals of their society, and such interactions provide 'contents to the law'.¹³ A society failing to set the goals corresponding to demands created by the

¹¹ . Alan Watson figures one of the prominent advocates of 'legal transplants. For him legal transplant has been a common phenomenon through the history and was the most fertile source of legal development. See, Alan Watson, 1993. *Legal Transplants: An Approach to Comparative Law* (2nd edition) p. 95.

¹² . The legal transplant movement which gained momentum during 1960s and 1970s through flurry of law modernization programs in latin America, Africa and, to some extent, Asia lost its vitality in 1980s. The law modernization programs did not fare well as they were expected to do. With failures of these programs, the movement got put into low-profile. According to Patrick McAuslan, the movement lost momentum partly because its main emphasis was on structural and substantive law issue and it failed to determine the nature of relationship, causal or otherwise, between law and development more generally. See: Patrick McAuslan, *Law, Governance and the Development in the Market: Practical Problems and Possible Solutions in GOOD GOVERNMENT AND LAW: LEGAL AND INSTITUTIONAL REFORM IN DEVELOPING COUNTRIES* ; Julio Fundez ed. 1997, p.25 . In 1990s, the law and development movement regained its momentum once more time by emphasis of developed countries about law reforms in developing countries. This push of developed countries appeared through multilateral agencies like Asian Development Bank and individual agencies like USAID. However, the renewed momentum paid central focus on 'reforms of the governance system'. No doubt, the reforms of governance system required changes in the 'substantive framework of law', but the transplantation of the laws of developed countries could not be the central issue of the movement. The 'reforms of law movement' was found relevant more to the 'economic development' of the developing countries. Though the impact of the movement in overall economic development drive was only modest, it played reinforcing role in the process of social change in the developing countries. The movement's role was particularly crucial in identifying the relationship between legal development and the broader issues of economic, social and political development. For detail, see: Philip von Mehren and Tim Sawers, *Revitalizing the law and Development Movement: A Case Study of Title in Thailand*, 33 HARV. INTL. L. J. 67 91994)

¹³ . The legal transplant theory was rejected as early 19th century by German scholar Friedrich Carl von Savigny. He believed that a nation had organic unity- over arching the individuals who constituted it and that nation's laws developed through a gradual embodiment of social norms within that community. (On Savigny's organic theory of law, see: *Of the Vocation of Our Age for Legislation and Jurisprudence*, Translated by Abhram Wayward, Littlewood & Co. 1831, Ch II). In recent times many jurists rejected the theory on several grounds. Robert Seidman, for instance, who coined the term "The Law of non-transferability of Law" argued that transference of rules from one culture to another would not work because a rule cannot be expected to induce same sort

change in that society falls in traps of 'regressive status quo'. Socio-political movement for equity-based change backed by economic entrepreneurship is thus a prologue for development of a legal culture in a developing society. The development of legal culture requires the following three pre-requisites to fulfill: (a) emergence of an indigenous intelligentsia of law which can underscore the importance of interactions between the social facts and emerging needs of human development; (b) formulation or determination of economic and socio-political goals on which the structure of the State has to be erected on; and (c) establishment or reforms of institutions to play role in planning laws giving reflections on emerging needs of human development and economic and socio-political goals determined by the society.

The modernization of governance system is a key element to facilitate the economic, social and political development, and to protect human rights. The legal development has to correspond to the economic, social and political development of a given society. The relationship between legal development and other broader issues of economic, social and political development is imperative for protection of human rights in any society. Emerging issues of economic, social and political development push for rationalization of laws, and the newly adopted laws do ensure the 'equity of all people in benefits or advantages of the economic, social and political development'. The laws of a society have to embody human security and dignity is an issue 'of the development of legal culture' as well as human rights as morality.¹⁴ Human security and dignity as a matter of development is thus a matter of law as well as morality. The law failing to embody issues of economic, social and political development of the society in general fails to be rested on the principal or ground of 'legality'. The economic, social and political development is a right of individuals and legal as well as moral obligation of the State. The State's positive law to be rationalized requires human rights values as 'fundamental norms for 'legitimacy as well legality'. Rationalization of State's positive law is to affirm the principal value (respect to inherent dignity of human being) of human rights: that is to say that the State's positive law has to imperatively affirm that 'every human being has inherent dignity and that is inviolable under any circumstance'.¹⁵

Poverty and deprivation are forms of latent violence and hence pose threat to human dignity.¹⁶ Economic, social and political development is hence an issue of human rights.

of role-performance as it did in the place of origin'. See, Robert B. Seidman, *Administrative Law and Legitimacy in Anglophonic Africa- A Problem in Reception of Foreign Laws*; 5 Law & Soc'y. Rev. 161, 200-1 (1970)

14. Michale J. Perry, the Robert W. Woodruff Professor of Emory University School of Law, says: " Law of human rights is one thing, the morality of human rights, another. By the morality of human rights, I mean the morality that, according to the International Bill of Human Rights, is principal ground—the principal warrant for —the law of human rights." See on: "Human Rights as Law, Human Rights as Morality; Emory University School of Law, Public Law & Legal Theory Research Paper Series, Research paper No. 08-45; p. 12 (This article can be downloaded from <http://ssrn.comabstract=1274728>)
15. Michale J. Perry, the Robert W. Woodruff Professor of Emory University School of Law, says: " Law of human rights is one thing, the morality of human rights, another. By the morality of human rights, I mean the morality that, according to the International Bill of Human Rights, is principal ground—the principal warrant for —the law of human rights." See on: "Human Rights as Law, Human Rights as Morality; Emory University School of Law, Public Law & Legal Theory Research Paper Series, Research paper No. 08-45; pp.12-13 (This article can be downloaded from <http://ssrn.comabstract=1274728>)
16. To quote Dietrich Bonhoeffer is worthy at this point. In Germany during the World War II, he observed that " we have for once learned to see the greatest events of the world history from below, from perspective of outcast, the suspects, the maltreated, the powerless, the oppressed, the reviled—in short, from perspective of

The law of a society failing to embody economic, social and political development as human rights of individual fails to hold the 'sanctity of legality'. Human dignity is protected by economic, social and political development by offering adequate 'economic and social security' to every individual. Hence, the issues of economic and social security provide contents to the law and also provide 'principal ground for its legality'.

Hence, the elements of human security, which constitute the ground for non-violability of human dignity, must find explicit expression in the 'words of positive laws'. This is what we call 'rationalization or internalization of human rights'. The law of a society without having human rights values firmly articulated in it is merely a body of rules to 'impose State's decisions on human beings' but not a body of 'rules to oblige State to work for overall security of human beings and thus protect human dignity'. The law without having being pregnant by development concerning human security and dignity obviously lacks a notion of justice, and hence becomes enforceable only for unwanted desire of the State. It means that the laws of a society have to embody human rights values and norms for their legitimacy or legality. The human beings are not for the 'rules of law but the rules of law have to serve the 'interests and justified claims of human beings' is the crux of the legal culture that connects laws with human development'. Having legal structure, with substances of law, is not enough for law to protect human beings from 'injustice' or 'violation of human dignity'. Friedman, an American legal sociologist, has rightly said that lawyers have a tendency of confining their analyses to the structure and substance of the legal system. According to him, structures and substances are real components of a legal system, but they are not a working machine. The trouble with ... structure and substance was that they were static; they were like a still photograph of the legal system'.¹⁷ Legal culture refers to the attitudes, values and opinions held in society with regard to the law, legal system and its various parts.¹⁸ The development of a legal culture is an important role the State has to take in the developing countries, especially in order to break the vicious cycle of regressive status quo.¹⁹ Legal culture can also be taken as a theory in itself

those who suffer" . See, Dietrich Bonhoeffer, 1995, *A Letter to Family and Conspirators in Geoffrey B. Kelly and F. Burton Selson, eds. Dietrich Bonhoeffer A testament of Freedom; Harper SanFrancisco, pp.482-486*. Martin Luther King Jr. declared, in the same spirit, that man's inhumanity to man is not only perpetrated by vitriolic actions of those who are bad. It is also perpetrated by vitiating inactions of those who are good. Quoted in Nicholas D. Kristof "The American Witness", New York Time, March 2, 2005.

¹⁷ . Lawrence M. Friedman, 1975, *The Legal System: A social Science Perspective*, p. 15

¹⁸ . Ibid p.76. Another scholar defines legal culture as : "a specific way in which values, practices and concepts are integrated into operation of legal institutions and interpretations of legal texts: attributed to John Bell by Mark van Hoecke & Mark Warrington, 1998, "Legal Cultures, Legal Paradigms and Legal Doctrines: Towards a Model for Comparative Law; 47 Int'L&Comp.L. Q. 495 (1998). These two definitions are somehow abstract. The legal system, in a developing country, is characterized by a 'minimum role in role in the society'. The larger part of the human relations in a developing society (country) is controlled by 'traditions' both pro-human rights and anti-human rights. The legal culture in the context of developing countries is a 'specific action of expanding the role of law in dealing with human relations in the society by absorbing the positive traditions and preventing the negative traditions'. The legal culture as a dynamic phenomenon is a means to break the 'grotesque cycle of regressive status quo and violation of human dignity- that is to say poverty and deprivation', including discrimination of all forms". See, Yubaraj Sangroula, 2010, *Jurisprudence: The Philosophy of Law*; Kathmandu School of Law, ch. 5.

¹⁹ . Significance of 'legal culture is that it is an essential intervening variable in the processes of producing legal stasis or change. See, Lawrence M. Friedman, 1997, "The Concept of Legal Culture: A Reply in David Nelken (ed.) Comparing Legal Cultures, p. 33. Development of legal culture is essential to overcome the static position of law. In case of developing countries, the concept of legal culture is especially important. See, Volkmar Gessner, "Global Legal Interactions and Legal Cultures"; 7(2) *RATIO JURIS* 132, 134 (1994). The

which renders the legal system conscientiously concerned with the economic and social problems facing the people, and hence makes meaningful efforts to serve the people by recognizing and protecting their justified claims. Modernization mission of legal system, however, does not epitomize the 'development of legal culture in itself'. The development of legal culture is a phenomenon of rationalization of laws by accepting the 'universal values of human rights, the human security and dignity in particular'. Many developing nations have grotesquely failed in development of legal culture because of attempt to effect change into their legal system by imports of laws from western nations. The borrowings of privatization laws during the post 1990 era in Nepal is an example, which rendered poor people to compete with elites in economic development endeavors. The consequent was that the gap between rich and poor increased sharply.²⁰

The performance of South Asian countries concerning developing a legal culture, with essential objective of linking laws with development and vice versa, is a grey area—very few jurists and law schools have paid attention to this issue. The culture of taking law as an object rather than 'concept' is pre-dominant. Consequently, the following misconceptions prevail and play roles in defiling the notion of 'law and justice':

- a. A judgment (written statement of the verdict of judges) is a justice. It implies that interpretation or intellectual or logical 'formulation' of principles or doctrines is what is called 'justice'. Many people indeed get judgment but not the 'justice'.
- b. Law is a body of rules envisaged by the State to regulate the behaviors of citizens. In fact, the potential of violation of laws by individuals is minimal as individual citizen does not wield the power. The quantum of violation of laws by State is far bigger. However, the law is not understood to subject the State to limitations.
- c. Laws are essentially contextual and devised to address the 'contemporary aspirations or needs' of the society. Nevertheless, the culture of 'research on impact of laws and judgments courts' is negligible. Most laws are made by lawyers in disconnection with development agencies, and thus they represent more a 'rhetoric' that instrument of promoting 'economic, social and cultural transformation of people' and society at large.
- d. Transplantation of laws has been a culture. In the past, the colonial masters transplanted their laws, and in the modern era international agencies such as the World Bank, IMF, and so on are dictating.

- 1.4. Figuratively speaking, the concept of justice, representing moral aspect of human rights, legitimizes the system of law. Literally speaking, however, the concept of justice distributes 'benefits or advantages of development by providing each individual with 'equity in resources to fulfill basic needs and opportunities for fair

importance of legal culture is in developing countries is because developing countries often important from Western nations' legislation, codes or even entire legal system in their attempt to modernize their domestic legal frameworks. See, Franz von Benda-Beckmann, *Scape Goat and magic Charm: Law in development Theory and Practice*, 28 J, OF LEGAL PLURALISM 129 (1989)

²⁰. For more detail on impacts of legal transplants: see Benny Simon Tabalujan, 2001. *Legal Development in Developing Countries-The Role of Legal Culture*; This article can be downloaded from SSRN.

competition in participation of decision making process'.²¹ The role of justice at this point is paramount because it functions to generate a 'threshold condition' of human security, physical integrity, sustenance supplies, freedom of choice, acquisition of knowledge for life skills, and participation in economic activities. Justice in this sense is an indicator of the 'embodiment of paramount values of human rights concerning human security, development and dignity'. A legal system is obviously considered valid or legitimate for having these indicators of justice immersed within it. Hence, the laws of a progressively transforming society need to expressly recognize these benefits and advantages, and also oblige the State to protect such benefits and advantages by establishing 'asset of concrete institutions and mechanisms to ensure enforcement expeditiously, impartially and reasonably'. Human rights values and norms²² are inherently imbibed in human capacity of acquiring knowledge and using the same for his/her transformation into a better situation; in human ability to process information and using outcomes thereof for enhanced knowledge and skills for productivity in life; and human capability of engendering mechanisms for continuity of changes without jeopardizing its collective positive impacts in the society at large. Human rights as moral values embody claims that every human being is inherently dignified by virtue of his/her birth as a human being and thus he/she is entitled to enjoy the dignity irrespective of differences he/she has in origin, status or circumstance. The human dignity is inviolable in any circumstances, and thus poverty and ensuing deprivation are not tolerable by any excuses. Nation's laws should prevent poverty and deprivation by empowering individuals to assert the right to development.

Economic and social needs or benefits and advantages of individuals constitute the primary sources of values or norms guiding the 'meaningful operation of justice'. The outputs (equity based distribution of resources and opportunities for fair competition) generated by the operation of justice are carried out by rules of law in practice. The positive rules of law are instrumental in protecting and enforcing 'the values and norms recognized by the concept of justice'. This notion of justice as an equity based resource

21. These two aspects of justice are being debated with nomenclature of intrinsic or instrumental conception of justice. Instrumental justice is a notion directly related to the 'application of justice system to alleviate poverty of mass'. The debate on this taxonomy of justice is becoming more spectacular by World Bank's attempt to define indicators of justice in connection with its programs about poverty reduction. The Measuring Justice Initiative, which attempts to quantify the performance of the Justice Sector in developing countries, is a part of greater trend in the bank to empirically measure normative standards. See, Galit A. Sarfaty, 2009. "Measuring Justice: Internal Conflict over World Bank's Emperical Approach to Human Rights" in Kamari Clarke & Mark Goodale (eds), *Mirrors of Justice: Law and Power in the Post-Cold Era*; Cambridge University Press.

22. Human rights values or norms refer to moral foundations on which human rights law has been founded on. They can be referred to as 'moral foundations human rights laws'. As pointed out by Michael J. Perry (*Human Rights as Morality – Human Rights as Law*: University of San Diego Law School, Legal Studies Research Paper series No. 08-079), the moral foundation of human rights, according to International Bill of Human Rights, consists of two connected claims: "The first of which is this: Each and every (born) human being has equal inherent dignity. To say that every human being has "inherent" dignity is to say that the fundamental dignity every human being possesses, she possesses not as a member of one or other group (racial, ethnic, national, or religious), not as a man or woman, not as someone who has done or achieved something and so on but simply as a human being. This is the second claim: The Inherent dignity of human beings has a normative force for us, in this sense: we should—everyone of us—live our lives in accord with the fact that every human being has inherent dignity; we should respect—the inherent dignity of every human being. There is another way to the second claim: Every human being is inviolable; not-to-be-violated".

distribution system and as a tool of guaranteeing opportunity for fair competition along with formal positive rules of law ' provide normative ground or foundation for the principle of 'rule of law'. A political system that operates making these principles as cardinal norms is called democracy.²³

- 1.5. This thesis underscores role of equity-based justice, economic and social development programs and progressive legal culture as coherently interacting components of the 'concept of rule of law'. The concept of rule of law²⁴ is neither a 'dogmatic belief that underscores a theory that strict observance of the rules of positive law, as outlined by the procedural rules, is the true essence of 'rule of law',²⁵ nor is it an indicator of measuring the justice. Concept of rule of law is rather an instrument of 'guiding the process of development of the progressive legal culture' that embody human rights laws and values as cardinal principles of promoting human security and dignity'. The relationship between human rights and rule of law is indispensable. Better enforcement of human requires a sound political stability, economic development and good governance. A long list of economists, legal scholars and development agencies from Max Weber to Douglas North to the World Bank have argued that rule of law is necessary for sustained economic growth and well-functioning of democracy.²⁶ Though Human rights movement has significantly increased in size, the fault lines encountered by it are not less severe and of trivial in nature. The international human rights movement is facing many crises. The fault lines emerged out of the (a) economic gap between developed Northern countries and developing Southern countries, (b) attempts of some countries to define human rights to suit their cultural and economic contexts, (c) deeply rooted disparity between men and women and men's dominance in policy making institutions, and (d) questions about western liberalism and capitalism and cultural differences across the world are posing

²³. John Rawls concept of justice that 'opportunity and priority require a political equality as a primary good is founded on a notion of the supremacy of the civil and political rights. (critize it)

²⁴. Literature about the relationship between human rights and rule of law is still largely cryptic. Even the most fundamental human rights instruments such as UDHR and ICCPR have failed to point out the relationship between the concept of human rights and rule of law. Rule of law, however, is essentially important for better enforcement of human rights. Human rights' enforcement requires a sound state of political stability, economic development and good governance, and they, in turn, require meticulous observance of the concept of rule of law. Sergio Vieira de Mello suggests, rule of law will be a "fruitful principle to guide us toward agreement and results" and "a touchstone for us for spreading the culture of human rights". See, Address of de Mello at the Closing Meeting of the 59th Session of the Commission on Human Rights, April 25, 2003 at <http://unhchr.ch/huricane/huricane.nsf/0/997CB7D98CAB294C1256D16002B1276?opendocument> (last visited March 29th 2005)

²⁵. At its most basic, rule of law refers to a system in which law is able to impose meaningful restraints on State and individual members of ruling elite. The supremacy and equality of all before the law is the threshold of rule of law. Beyond this threshold requirement, concept of rule of law can be divided into general types, thin and thick. A thin conception stresses the formal or instrumental aspects of rule of law—those features that any legal system must possess to function effectively as a system of laws, regardless of whether the legal system is a part of a democratic society or non-democratic society, capitalist or socialist, liberal or theocratic (See, Joseph Raz, 1979, *Rule of Law and Its Virtue in the Authority of Law: Essays on law and Morality*). Moreover, laws must be reasonably acceptable to majority of the populace or people affected by the laws (Lone Fuller, 1977, *The Morality of Law*, p. 39). The thick conception, beginning with thin concept elements, incorporates of political morality and legitimacy.

²⁶. See, Randall Peerenboom, "Human Rights and Rule of Law: What is the Relationship? University of California Los Angeles School of Law, Public Law & Legal Theory Research Paper Series, Research Paper No, 05-31

serious obstruction for universality theory of human rights. The prospect of rule of law is bright to address the fault lines²⁷ faced by the universality of theory of human rights. As a component of rule of law, the human rights laws and values are the 'indicators of measuring the justice in acts of the State and instrument of people to invoke 'human rights values in the law made by the State and acts performed by the Government agencies'.

2. CONCEPTUAL FRAMEWORK OF 'LAW AND JUSTICE' TO BE PURSUED BY DEVELOPING COUNTRIES

Basic needs are 'primary essentials' of human lives and are recognized so by fundamental human rights instruments and the most Constitutions of democratic nations.²⁸ The right to adequate standard of life, which includes right to food, water supply, housing, health, education and social security, is a basic input or milestone for 'human security and dignity. Rights offered to these basic needs are characterized as 'economic and social rights'. These rights need to be guaranteed by the State as basic needs of human beings. The legal systems of democratic States acquire contents as well as legality from these rights. Indeed, no legal system can be oriented to 'development or perfection in disregard of these rights'. The fundamental objective of the legal system of any democratic nation is thus to secure a ground for 'enforcement of such rights'. Since these rights are essential both for contents and legality of the 'rules of law', they can be defined as 'source or input rights. The economic and social rights, along with freedom of choice and physical integrity, place every individual in 'a threshold condition of development and capacity to enjoy freedoms'. The 'threshold condition', as explained by Thomas Pogge, stipulates that a person suffers a violation of human rights if he/he is prevented from enjoyment of basic goods.²⁹ The paramount role or significance the source or input rights lies on acquisition of the 'threshold condition' of human development and capacity to enjoy rights. The satisfaction of 'basic goods, i.e. adequate access to security of person, physical integrity, sustenance supplies, freedom of choice and actions, basic education and participation in economic entrepreneurship, is what literally constitutes the 'threshold condition of development'. Deprivation of the access

²⁷ . Islamic States from Egypt to Malaysia have endorsed rule of law. Asian Governments, including socialist regimes in China and Vietnam, have welcomed technical assistance aimed at improving the legal systems and implementing rule of law. Developing countries that emphasize right to development see rule of law as integral to development. Concept of rule of law that way has a prospect of becoming a milestone for institutionalization of human rights universally. See, Randall Peerenboom, "Human Rights and Rule of Law: What is the Relationship? University of California Los Angeles School of Law, Public Law & Legal Theory Research Paper Series, Research Paper No, 05-31

²⁸ . South Asia has yet to endorse 'economic, social and development' rights as fundamental rights. Such rights are still included only as directive principles of State, and the State is exempted from liability of 'violation of such rights'.

²⁹ . Thomas Pogge has listed the basic goods constituting the 'Threshold Condition' of human rights enjoyment. He says: "Other, more elementary, basic goods are ... physical integrity, sustenance supplies, freedom of movement and actions, as well as basic education and economic participation". Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reform*; Cambridge: Polity 2002, p. 49. What Thomas Pogge implies to say is that the satisfaction of the right to life, liberty and security of person under Article 3 of the UDHR collectively constitute the 'threshold condition' of human rights. Thus, when enjoyment of basic needs meets the 'threshold condition', the door gets opened for enjoyment of human rights in comprehensive form. The 'threshold condition' prepares individuals psychologically, intellectually and materialistically competent to 'assert all those rights provided by international human rights laws', the enjoyment of participating in activities of state's decision making and governance being the most important one.

to these basic goods amounts to be a human rights violation.³⁰ Hence, failure to underline the importance of economic and social rights or to deny justiciability of these rights amount to 'disregard of source or input rights'. The recognition of the overriding significance of economic and social rights not only secures 'rights to development' but also provides a ground for enjoyment of 'civil and political rights'. Individuals whose threshold rights are incomplete or ill-protected are placed in a less advantaged position. In such a situation, they suffer excessive exposure to violent crimes, suppressions by the State, and become unable to defend their dignity. They are unable to meet their standard basic socio-economic needs. These 'incompetence or disadvantaged conditions' pose 'disadvantaged conditions regarding basic political liberties and place such individuals in a suffering of abridgements of other civil and political liberties'. No need to hesitate saying that 'civil and political rights are the 'yields of economic and social rights as threshold rights. The deaths and deprivation of millions of people across the world today is thus a 'violation of human rights'.³¹ The input or threshold right concept holds that 'the poverty is an outcome of human rights violation'³² caused by 'wrong political decisions and policies'. The situation cannot be averted having no ability of people engendered to participate in the political process.

Justice as a concept embodying elements of 'physical integrity, security of person, sustenance supplies, freedoms of choice and action, access to basic education and economic participation' provides contents and measuring indicators for a system of law. These elements, in turn, embody moral and normative standards for legitimacy. A law cannot be justified having void of one or other of these elements. Human dignity is a 'moral value or normative standard' cumulatively projected by these elements. To further enunciate, the internalization of 'basic needs' by the legal system' is justified by the need of 'protecting and promoting human dignity'. Hence, to say that economic and social rights are vague and not justiciable will imply that 'human dignity can be ignored or disregarded'. The human dignity as a value of justice renders the laws incorporating basic needs of human being grounded with full legal force as well as morally justified system. The human dignity as described by the oriental value system comprises of 'five qualities of human beings- free from want, free from diseases, free from exploitation, free from early death and free from violence'.³³ When the legal system of a society are able to adequately secure human dignity by way of 'recognizing and protecting basic needs', along with notion of justice rationalizing the same through normative values, it is supposed to correspondence with economic, social and political development of the given society. As an outcome the process, 'output rights' are

³⁰. Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reform*; Cambridge: Polity 2002, p. 38

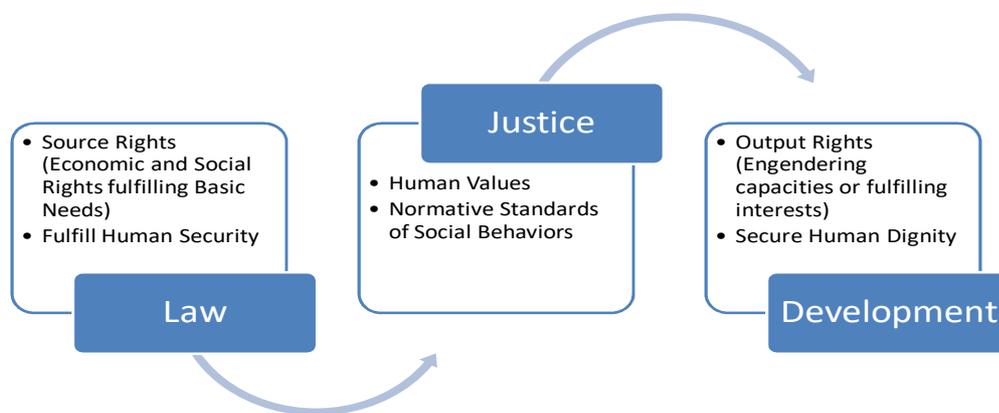
³¹. Source or Input rights (can be said threshold rights) contribute to build capabilities or abilities to assert other human rights, political rights in specific. They provide individuals with 'right' to have rights. Development and input rights support each other to 'justify each other's rationality and element of justice'. Indeed, they form an interface and their interplay encourages greater participation of people in 'public affairs', thus strengthening the prospect of a participatory democracy. On role of threshold rights to build capabilities of individuals; see, Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach*, Cambridge: Cambridge University Press, 2000, pp. 96-101 and Amratya Sen, "Elements for a Theory of Human Rights", *Philosophy & Public Affairs* 32 (2004) 315-56

³². It would be sheer fallacy to believe that 'people are poor so their human rights are violated'. Human rights violation is a state which enshrines infliction on one by others. It means that the violation of human rights is not something we do to ourselves, but others do to us. This view of the nature of human rights violation is grounded on J.S. Mills' Harm Theory. See, Thom Brooks, "Is Global Poverty a Crime", p. 5. Available online at <http://ssrn.org/abstract>, last visited October 29, 2011.

³³. See, Yubaraj Sangroula 2010, *Jurisprudence: The Philosophy of Law*; Kathmandu School of Law, Ch. on Justice

activated. An individual at this stage acquires ability to exercise his/her rights to participate in the decision making process. These rights in human rights language are called 'civil and political rights'. The the source rights operate to empower individuals economically and socially whereas the output rights are active to control State's tyranny or acts against rule of law. Economic and social rights are 'inherent advantages' endowed to human personality. They offer 'security' to every individual against want, diseases, violence, exploitation and untimely ending of life. The output rights on the other hands are 'capacities' of individuals to assert claims, powers, privileges and immunities that engender an independent personality of every individual. Source rights along with output rights 'secure' human dignity.

Law with help of Justice works to attain Development



The beneficiary of the right to development is, first and foremost, the individual. But no individual can simply wait until he/she has developed; the individual also has right to opportunities to develop. That is to say that 'every individual has right to have rights'. The responsibility to make such is fully guaranteed to every individual belongs to States: States have the primary responsibility for creation of national and international conditions favorable to the realization of the right to development.³⁴ On the international level, this means that 'States have the duty to take steps individually and collectively, to formulate international development policies with a view of facilitating the full realization of the right to development.'³⁵ And on the national level, it means that 'States should undertake all necessary measures for the realization of the right to development and shall ensure, *inter alia*, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income'.³⁶

³⁴. Article 3(1) of the Declaration on the Right to Development, 1986.

³⁵. Article 4(1) of the Declaration on the Right to Development. See Also, Article 4(2) and Article 3(3).

³⁶. Article 8(1) of the Declaration on the Right to Development. See also Article 2(3).

3. CONCLUSIONS

Law and development efforts are corresponding each other's position or situation. A development effort is bound to suffer from quality of 'legitimacy' for its lack of linkage with laws', and a rule of law is deprived of element of justice for its being isolated from development endeavor'. Laws and development endeavors both a 'matters of planning' and 'strategic enforcement'. The objective of 'development endeavors' to ensure 'economic and social transformation' of individuals, and the law is a tool of providing indicators to that 'envisaged transformation'.

Law and development both promote changes and thereby breaking of 'regressive status quo', which constitutes a stumbling block to 'progressive changes'. Laws are therefore essentially of 'changing characters'. They are evolved or developed by the given society reflecting on the needs of society to 'empower its members by providing necessary advantages and benefits'. Adequate economic, social and political development of every individual and society at large is the goal which the law and justice intend to serve at. Law and justice are, in that sense, instrument of human development. This proposition makes 'law and development' as complimentary phenomena of the society.