

CONCEPT OF RULE OF LAW, HUMAN RIGHTS GOOD GOVERNANCE: MUTUALLY REINFORCING CONCEPTS

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PREFACE:

According to Jeffrey Jowell, an administrative law expert, the concept of rule of law provides a set of principles that require feasible limits on official power- the executive, legislative and judicial powers the state is supposed to entertain for administration of the public affairs. Undoubtedly, the concept of rule of law purports to prevent misuse as well as abuse of powers. Lord Denning says: “There are two aspects of the rule of law: on the one hand it prevents exercise of power arbitrarily, and on the other provides resource to law when power is exercise arbitrarily” (Denning, 307). The rule of law is, therefore, a foundation of the concept of good governance as well as justice.

In fact the whole of the 19th century and the first half of the 20th century were marked by endeavors to conciliate and combine two currents of thoughts: on the one hand, the pure democratic tendency to give all power to the people at the risk of ending up with authoritarian or dictatorial deviations ”in the name of the people”; on the other, the liberal current (today more usually termed constitutionalism) that mistrusts all absolute power and seek to multiply the checks and balances and use power to put brakes on power. The rule of law thus emerged, as pointed by Justice Brandeis of USA, in order to promote efficiency and to impede the arbitrary use of power” (Progressive Governance, 1999).

The term "governance" gives different connotations to different people. The Asian Development Banks defines it as the "manner in which power is exercised in the management of a country's economic and social resource development". On this meaning, the concept of governance is concerned directly with the management of the development process, involving both the public and private sectors (ADB.Org). This definition well reflects on development aspect of the governance, yet it fails to 'connect its relevance to civil and political aspect of human rights. No concept of good governance is conceivable in absence of people's freedoms to unrestricted access to, and participation in, political or policy making process. The concept of good governance is essentially related with the 'people's right to self-determination", which connotes the following understandings:

- the sovereignty (state's power) is popularly controlled by the constituents of the government,
- the welfare of the people is a prime responsibility of the state and as such the state is a service delivery institution,
- the power to rule is an inherent power of the people, so that centralization power by the government is an anti-democratic notion, and
- the devolution of power is an expression of autonomy of governance, hence the decentralization should be understood as an autonym.

The resource management for economic development is, of course, an essential element of the 'good governance', yet the access of people to political and decision making process is equally crucial one. In this sense, the concept of 'good governance' means "self-governance". Rule of law thus provides theoretical foundation for the 'good governance' as it provides an instrument to prevent arbitrary exercise of power as well as remedy for harms and injuries caused by misuse or abuse of power. Human rights on the other hand are measures to test the legitimacy of the 'governance'. The relation between the concepts of rule of law, good governance and human are entwined and inseparable. One of them essentially obtains form other an inspiration and legitimacy for workability.

INTERRELATION OF HUMAN RIGHTS AND GOOD GOVERNANCE:

The bill of human rights recognizes the indivisibility and universality of fundamental rights of human person. The dependency of economic and socio-cultural rights, inclusive of rights to development, and civil and political rights with each other is absolute. The protection of 'right to life' is meaningless in absence of the protection of human dignity economically, socially and culturally. One of the connotations of the good governance is thus to create a system of 'safeguard for indivisibility' of the human rights. The concept of 'good governance' in this sense functions as a mechanism to ensure "respect and protection of human rights" in practical reality.²

With the collapse of cold war situation, the concept of good governance and human rights has entered into a new stage. The emphasis of the international order has shifted from the claim of equity between nations to the claim of equity within nations. Theo van Boven, a noted international scholar, puts:

"The days are over that the UN General Assembly declared the realization of the new international economic order an essential element for effective promotion of human rights and fundamental freedoms and should be accorded priority. While the right to development retained its place on the international agenda as a preferred item of developing countries, industrialized countries wanted to carry on the development debate from the different perspective, in spite of the affirmation in the UN Declaration on the Right to Development that this right is a prerogative both of nations and of individuals who make up nations and in spite of its focus on the human persons as the central subject of the development and the beneficiary of the right to development. Thus, the tone and the content of the discourse changed and emphasis were put on the virtues of democracy, democratic government, the rule of law and pluralism" (Boven, 1995)

The concept of good governance and human rights are thus essentially connected with the concept of democratic government, rule of law and pluralism. The respect and protection of human rights is thus dependent on 'democracy, rule of and pluralism. The Charter of Paris, for instance, signed by European Heads of State or Government, on 21 November, 1990, stated that "the free will of individual, exercised in democracy and protected by the rule of law, forms necessary basis for successful economic and social development. "We will, they declared, promote economic activity with respects and upholds human dignity (Boven, 1995). They further held that "Freedom and political pluralism are necessary elements in our common objective of developing market economy towards sustainable economic growth, prosperity, social justice, expanding employment and efficient use of economic resources". Respect and protection of human rights thus becomes one of the goals of the concept of good governance. In this sense, the concept of good governance means: 1) civil and political freedoms and pluralism in governance system; 2) sustainable economic development contributing to the prosperity of the people; 3) social justice; and 4) expanding employment and efficient use of economic recourses.

². The right to form and operate political association is one of the most significant civil and political rights guaranteed by the Bill of Human Rights. The practical realization of this right is, however, dependent on 'democratic political system'. The economic development of a society is one of the contributing factors for 'consolidation' of democracy, yet the economic development alone does not guarantee political freedoms. There are States, for Singapore, China, Cuba and so on, which are economically fairly developed in terms of welfare programs, per-capita income of citizens and technological development. Nevertheless, the peoples' say in policy and decision making is generally neglected. The right to form and operate political associations necessarily attaches right to 'participate in government'. The concept of good governance is thus primarily founded on 'peoples' freedoms to choose political ideologies and form and operate political association. Ultimately, the right to form and operate political associations is related with the process of 'devolution of powers', which in turn is a pre-condition for practical realization of the 'right to self-determination'. The concept of good governance thus means an instrument of securing respect and protection of human rights with due care to its indivisibility. Good governance in this sense can be defined as a 'link between human dignities with opportunity for development benefits'.

The concept of 'good governance' is thus obviously linked to 'human rights- a system of protecting and promoting human dignity'. In this sense, the good governance is an 'art of steering societies and organizations' for the purpose of respecting and protecting human dignity, welfare and development. The "good governance' encompasses interaction among structures, processes and traditions that determine how power is exercised, how decisions are taken and how citizens and stakeholders have their say secured. Fundamentally, it is about power, relationship and accountability (Plumptre and Graham, 1999). The power, relationship and accountability are tested against measures that are commonly known as "human rights".

MANIFESTED ELEMENTS OF GOOD GOVERNANCE:

As Plumptre and Graham suggest, most writers agree that governance itself has "no automatic normative connotations. However, some forms of governance are undoubtedly better than others. The following elements, however, need to be overtly manifested to make a 'governance system "a good governance system":

- 1) Constitutional Legitimacy
- 2) Judicial Independence
- 3) Democratic Elections
- 4) Transparency
- 5) Rule of Law
- 6) Absence of Corruption
- 7) Political Openness
- 8) Active Independent Media
- 9) Freedom of Information
- 10) Predictability and Stability of Laws
- 11) Administrative Competence
- 12) Administrative Neutrality- Merit-based public service, accountability to public interests on issues of public concern.
- 13) Tolerance, Equity, Public participation, Public expenditures directed to public purposes.

Human rights exist as a regime to govern the legitimacy of the system. From the perspective that the rule of law, pluralism and democracy, the human rights regime provides a ground for legitimate functioning of these elements. Development programs (i.e. UNDP) and multi-lateral agencies, however, emphasize accountability, participation, predictability and transparency as four basic elements of the good governance. The World Bank identifies 1) public sector management, 2) accountability, 3) legal framework development, and 4) transparency and information as four key dimensions of the

concept of good governance. Accountability is a condition for officials to be answerable on their acts and behaviors to public. Accountability also means establishing criteria to measure the performance of public officials, as well as oversight mechanisms to ensure that the standards are met. The element of participation is founded on a principle that people are the heart of development; they are not only the ultimate beneficiaries of development, but are also the agents of development. At the grassroots level, participation implies that government structures are flexible enough to offer beneficiaries, and other affected, the opportunity to improve the design and implementation of public programs and projects. Participation is thus directly associated with the right to 'self-determination. Predictability refers to (i) the existence of laws, regulations, and policies to regulate society; and (ii) their fair and consistent application. The element of predictability is directly associated with the doctrine of rule of law which encompasses the well-defined rights and duties as well as mechanisms (procedures and institutions) for enforcing them, and settling disputes in an impartial manner. Transparency is associated with system of providing information to the general public and clarity about the government rules, regulations and decisions. It requires to absolutely recognizing the citizens' right to information along with a mechanism of enforceability. Transparency in government policy and decision making and implementation thereof reduces uncertainty and can help inhibit corruption among public officials. Conceptually, these four elements are mutually supportive and reinforcing. Accountability is often related with participation, and is also the ultimate safeguard of predictability and transparency. Similarly, transparency and information openness can not be assured without legal frameworks that balance the right to disclosure against the right of confidentiality, and without institutions that accept accountability (ADB, 2004). At the same time, the predictability also requires transparency, because without information about how similarly placed individuals have been treated, it may be difficult to ensure adherence to the rule of equality before the law. Finally, a transparent system facilitates governmental accountability, participation and predictability of outcomes.

RIGHT TO DEVELOPMENT AS A CRUX OF GOOD GOVERNANCE:

Right to development is intrinsically associated with the right to life. It believes that every individual is entitled to 'ensure better conditions of life" which in turn ensure the dignity of life. The ultimate goal of the good governance is to promote the participation of every individual in development as a beneficiary as well as an agent. It is why the State or the Government is obliged to be transparent and accountable. State or the Government is strictly prohibited to exercise the power arbitrarily. The prohibition on arbitrary exercise of power by the state or government enables individuals to 'participate in the development process'. Article 1 of the Declaration on the Right to development states that "the right to development is inalienable human rights by virtue of which every human person and all people participate in, contribute to, and enjoy economic, social, cultural and political development which all human rights and fundamental freedoms can be fully realized. The right to development includes:

- Full sovereignty over natural resources
- Self-determination
- Popular participation in development
- Equality of opportunity
- The creation of favorable conditions for the enjoyment of other civil, economic, social and cultural rights.

The Vienna World Conference on Human Rights, 1990, has expressly linked the right to development, human rights and democracy as interdependent and mutually reinforcing.

INTERFACE OF RULE OF LAW AND GOOD GOVERNANCE:

It is often difficult, if not impossible, to precisely demarcate the crossing point between the concept of rule of law, good governance and human rights. Simply speaking, the concept of rule of law is a set of principles governing the legality of power, whereas the good governance a condition in which an individual's participation in political process and development is ensured as a beneficiary as well as an agent. The concept of rule of law in this context disables or inhibits the state or government to entertain discretionary power. The concept of good governance through certain defined standards enables citizens to 'enjoy civil, economic, social and cultural rights. The concept of good governance is thus a favorable condition for citizens to participate in decision and policy making and implementation thereof. The concept of human rights is ' a capacity of citizens as human being to restrain state and government to put limitation on their human qualities.

According to the concept of rule of law, a power is rested on rule but not on man, and as such it defies a rule of man (Massey, 20). The possibility of rule of man emerges out of wider discretion of power (Dicey, 198). The fundamental objective of the rule of law is thus to subject the government to 'rule and principles of law' so that exercise of discretion becomes restricted. The rule of law in this sense is an ideal of democratic government. In India, for instance, the Supreme Court has recognized the concept of rule of law as a basic structure of the constitution. Hence, the Supreme Court can review even the provision of constitution, and can declare invalidated if it contradicts with the principle of rule of law (Indian Supreme Court, 1990). The fairness of procedure is a mechanism of rule of law to prevent government from being arbitrary. For determining the fairness of the procedure, the principle of rule of law sets out the following standards:

- **Absence of discretionary power in the hands of the government officials.** It implies that justice must be done through known principles.
- **An absence of special privileges for government officials or any other persons.** No special privilege is afforded to any person for he/she being a government official. In Nepal as well as other countries in SAARC, this principle is violated frequently.
- **All the persons irrespective of status must be subjected to the ordinary courts of law of land.**
- **The law passed by the ordinary legislative organs of the state should govern everyone.** In Nepal, for instance, the executive government's tendency to rule the country by regulation is phenomenal. Statues are made ambiguous and vague intentionally to avoid restrictions on dissection.

Violation of these four principles of rule of law results in violation of human rights and standards of good governance.

EXTENSION OF THE CONCEPT OF RULE OF LAW:

The basic postulates of rule of law are universal. They include equality, freedom and accountability. "Equality" is not a mechanical and negative concept but has progressive and positive contents, which oblige every government to create conditions (social, economic and political) where every individual has an equal opportunity to develop his/her personality to the fullest and to live with dignity. "Freedom" postulates absence of every arbitrary action. It ensures free speech, expression and association, personal liberty and many others to each individual. These basic rights of individuals in any society may be restricted only on ground that the claims of these freedoms would be better served by such circumscription. The basic idea behind 'accountability' is that rulers' rule with the sufferance of the people, and therefore must be accountable to them in the ultimate analysis.

During the last few years, the judiciary in the third world has strategically extended the scope of rule of law to the protection and welfare of poor and downtrodden people. Hence, the devolution of power to the grassroots, and the safeguard of socio-economic interests of poor, marginalized and displaced people are major concern of rule of law. Hence, the concept of rule of law with its extended scope requires that:

- the state must not legislate discriminatory laws,
- state must legislate laws for effect of providing special treatment to special categories of people,
- state should abstain from interfering in cultural matters of people, hence it should legislate laws which deprive people of their rights to religion, language, etc. and
- state must abstain from using force against people while resolving problems,
- state must legislate for enabling people to participate in the process of governance.

The extension of scope of the rule of law is valid because the rule alone cannot prevent the government of man. There are several other alternative means to control discretion. Accountability, participation, inspection system, investigation of corrupt affairs, and schemes for giving effects for civil society's view play dominant roles in securing rule of laws.

(Baldwin, 16)

Legal Framework for Operation of Rule of Law in Nepal:

The constitution of the kingdom of Nepal, 1990, incorporates, inter alia, through it permeable the human rights to every citizens and independent and competent system of justice as the basic structure of the constitution. These basic structures provide a basis for operation of the administrative and judicial systems of the country. The operation of rule of law is fundamentally rested on these basic structures. Along with the preamble, the concept of rule of law operates with the help of following devices:

1. The constitution of the Kingdom of Nepal is the fundamental law of Nepal, and all laws inconsistent with it are null and void to the extent of inconsistency (article 1). The scope of the provision is very wider. Here the term "laws" also include policies, decisions and actions of the state.
2. The constitution of the Kingdom of Nepal guarantees rights to equality in application of the general laws irrespective of sex, caste, religion, political ideology, etc (article 11, 1). The Supreme Court's Judgement on Reena Bajracharaya V. Royal Nepal Airlines has reinforced the applicability of equality in actions without compromise.

3. The rights to freedoms and liberty guaranteed by the article 12 (2) of the constitution provide another mechanism for operation of rule of law in Nepal.
4. Directive principles incorporates the following alternative mechanisms to ensure the absence of arbitrary exercise of power by the State:
 - the state must endeavor to raise the living standard of the citizens through education, health, housing and employment,
 - the state must endeavor to raise economic progress of the people who are dependent on agriculture by raising the productivity,
 - the state must endeavor to promote women's participation in the task of national development by making special provisions for their education, health and employment,
 - the state must endeavor to safeguard the interest of children, and protect them from exploitation,
 - the state must endeavor to provide helpless women, the aged, the disabled and incapacitated person accessibility to education, health and social security,
 - the state must endeavor to promote interest of economically and socially backward groups and communities by making special provisions with regard to education, health and employment.

The Section 9 of the Treaty Act, 1993, provides for application of rule with international perspective as it subjects the legal sanctity of the Nepalese laws to their consistency with international conventions and treaties.

Problems and Challenges of Rule of Law in Nepal: This chapter deals with specific areas of problems and challenges facing the rule of law in Nepal. However, many of these problems and challenges are equally true in other countries in the SAARC region.

Rule of Law in Relation to Autonomy for Local Governance: Devolution of power to the local people is one of the best alternative safeguards to prevent arbitrary exercise of power. The accumulation of power at center leads to excess exercise of power. Politically, the concept of local government represents both a form of devolution of power from central government and a basis for local democracy (Sathe). The local governments have the following powers without any interference and control of the central power:

- a. The local government institutions can elect their officials independently. Their election process is not controlled by the central administration. The people can participate not only in exercising the rights to vote, but also in framing the norms of elections, code of conducts for candidates and fixing the qualifications of officials.
- b. Local government institutions are enabled to adopt development policies and plan, which includes power to adopt byelaws.
- c. The right to levy and collect taxes is inherent with power of adopting policies and plan.
- d. The local government institutions are empowered to fully control the welfare schemes and development projects at local level.

In Nepal, the existing practice shows that the notion of local governance with autonomy of power is discarded. The autonomy of local governance is politically wrongly dealt with as its legal postulates are

totally ignored. Legally, the concept of decentralization and autonomy are two different concepts, and so that the decentralization does not necessarily mean autonomy. The autonomy is a process of devolving power, whereas the decentralization simply delegates the power of central government to local entities. The concept of decentralization does not recognize the ownership of local institutions to power devolved to them. The following illustrations will amply justify that the local governance is largely a myth in Nepal:

- a. The power attached to local governance is related to right to self-determination. However, the Local Autonomous Governance Act of Nepal is founded on de-recognition of the people's right to self-determination. The Act delegates only those powers to local institutions that are inconvenient for it to entertain.
- b. The power to local governance is owned by the people themselves under the principle of popular sovereignty. However, under Act the power conferred upon is not owned by people. For instance, many powers conferred upon them are effective through regulations adopted by HMG.
- c. The concept of social welfare and security of the people is politically backed by the principle of popular sovereignty. However, this power is severely restricted by following practices:
 - daily administration of the local institutions is controlled by the central government as it deposes officials or personnel of the central government to run the administration,
 - audit is done centrally,
 - the local institutions are bound to follow central government's financial guidelines
 - the planing is indirectly controlled by the central government as the central government employees are involved in preparation of policies and plan,
 - the local institution can formulate bye-laws for recruitment of the staff, but such regulations are effective only after approval of HMG,
 - the right to recall representatives is not given to people, but vested on central government.
 - the election is held by the central government under direct control of its administrative officer, CDO.

The circumstance impels us to conclude that the government of Nepal:

- lacks of political will to institutionalize local governance with autonomy of power.
- lacks of conceptual clarity to understand the difference between decentralization and autonomy, administration and self-governance, state's power and right to self-determination of people.
- disregards right to self-determination as ruling elite has persistently ignored the equal opportunity of ethnic groups to participate in governance in Nepal.

These facts clearly show that the question of rule of law is obviously in pernicious condition. No rule of law can flourish ignoring the right to governance.

Rule of Law in Relation to Civil Society: Active involvement of the citizens in civic and development affairs is essential for democratization of the society. This is equally important to promote civic competence whereby individual and collective behaviors can significantly influence public policies. (POLSAN, 1996) NGOs are instruments for giving expression and shape to concerns and efforts of civil society. In spite of good efforts of many organizations, because of misdoing of few NGOs, the entire credibility of NGOs in the social development sector is being questioned. (NEFAS, 1998). The following problems are noticed in this sector:

- The government policies on civil society are not clear. In fact the government is not yet prepared to accept civil society as partner in governance.
- Government has shown no interest for developing mechanism to monitor civil society's activities.
- The relation between INGOs and NGOs is not precisely defined. INGOs have no rules and guidelines for partnership with NGOs. The partnership is generally guided by personal relationship. With some exceptions, the same situation is true of the donor agencies. Similarly, there has been a growing trend of INGOs to perform a role of implementers. (NEFAS, 1998).
- Civil society like many other spheres is divided on partisan basis.
- The evaluation of programs funded by INGOs and donor agencies is largely based on report prepared by recipients.
- Many NGOs have no policy concerning recruitment of manpower. No rule of equal opportunity applies in the sector of NGOs/INGOs.
- The priorities of donors are changing. The programs in grassroots should meet the priority of or funds available with donors. The needs of the people are not matters of consideration.

Apart from these weaknesses, NGOs are lost in the wilderness of ambiguities of government policies. The government-controlled Social Welfare Council, for instance, functions sometimes as a NGO and sometimes as governmental organization. In principle, the SWC may not have power to control independence of other NGOs. SWC is a statutory body, and as such is a legal person. It can function for its objectives, but it cannot control organizations, which are registered under other laws as legal persons too. The government is allegedly using it to get funds for party supporters and activists. The secretary is politically appointed. One can imagine the kind of influence such government interference can have for those working in the social service sector. (Polsan, 1996)

Access to Political Process and Electoral System: Prof. Yadhunath Khanal says: "Nepal is passing through a direct and chaotic experience of liberal democracy. The problem of good governance is seriously felt as a great challenge to the sustainability of the democracy". The democracy rests on accountability of people in power, and the accountability finds its expression first in free, fair and regular elections. But it does not end with fair elections alone. It also expresses itself in the day to day moral attitude to work and money. Nepal has failed in these both aspects. Elections are mockery in many parts of the country. The 'three-Gs (gold, guns and *gundas*) have virtually controlled elections.

The following factors contribute immensely to the disarray of electoral process:

- There is a lack of strict and realistic code conducts for elections. The so-called existing code of conducts is nothing but a conciliation of political parties in disregard of democratic values.
- The Election Commission is dependent on government for manpower, which is generally subject to manipulation by party in power.
- Commissioners are vulnerable to be influenced by party in power or big parties, and as such they may not be fair to smaller parties.

Elections are mechanisms to secure proper representation people. The independence and fairness of the electoral process is therefore most fundamental prerequisite of the good governance, the lack of which essentially rules out the possibility of the rule of law. The fourth dimension of election is that it must be representative enough. (Polans, 1996). However, the electoral process has largely failed in this respect. The following illustrations will amply justify the statement:

- Local elections are controlled by CDOs, who represent executive government,
- The proportion of women representation in parliament is limited to 3.41% (NEFAS, 1998) The situation local level further worse.
- Government of Nepal, like other SAARC countries, fails to satisfy ethnic minority groups. The more failure to resolve the problem will lead to politicization of ethnicity, and if the country fails to promote or at least tolerate its expression, will loss its legitimacy to govern, making grounds for secession of the country justifiable. (Mallik, 1998).

Rule of Law in Relation to Civil Service: As Devendra Raj Pandey says: "After 1950, the bureaucracy has tended to grow rather than develop. From 28000 employees, it increased to around 100,000 by 1995. Moreover, the incessant flow of technical experts has made Nepalese bureaucracy more and more dependent upon foreign aid, assistance and loan." (Pandey, 1998). Another feature commonly noticed in the Nepalese civil service system is the *Jagire culture*. The civil servants do not serve people, they rather rule. Nepotism and favoritism persists. Merit is rarely recognized. And, as a consequence, low morale pervades among the employees. (Bhatta,1996).

Rule of Law and the Problem of Corruption: The problem of abuse of power and corruption has devastating effect to the consolidation of emerging democracy in Nepal. The corruption range from taking bribes to extortion of the government expenditures and pillaging of the state's property. A few illustrations are cited for instance:

- The 36th Report of the Auditor General reveals that the Prime Minister used State' fund totaling Rs. 96, 00,000 to travel by helicopters for the local projects and conventions of local party units. Such expenditure is not permitted under finance regulations.
- Similarly, the same report unravels an embezzlement of State treasury to pay party aids (so-called secretaries).
- A secretary of the Prime Minister's office received Rs. 80,000 for medical treatment in India without sanction of medical board.

The annual report of the Auditor General brings such incidents to public notice every year. The counter corruption mechanism's effectiveness is greatly suspected. Commission on Investigation of Abuse of Authority (CIAA), although its performance is somehow improved recently, role is insignificant. A study shows that 81% of percent of key informant respondents suspect on efficiency and effectiveness of CIAA. (CeLRRd, 2000) Similarly, 76% of key informant respondents suspect on judiciary's willingness to address the situation of corruption (CeLRRd, 2000). As revealed by studies the following factors are encouraging corruption with impunity:

- The definition of corruption is narrower in the Corruption (Control) Act, 1961, which simply includes "*RISWAT*", meaning taking of bribe.

- Several of the Act’s provisions are vaguely formulated and therefore susceptible to misinterpretation. For instance, terms such as “post of benefits”, “nation’s servant”, “post of public responsibility” “quantity of offence”, etc almost defy definition.
- CIAA Act section 19(11) privileges politically appointed persons like ministers through the non-disclosure of corruption charges and investigation.
- The Section 19 (2), by allowing exemption to ministers of corruption charges, allows the Prime Minister, Speaker and Chairman to override the authority of CIAA.
- The mechanism of CIAA itself is fully inconsistent with the spirit of rule of law. The CIAA staffs are recruited by HMG.

Access to Justice and Fair Trail: The State’s institution of justice is a mechanism to address the problems like misuse of power, violation of people rights, and put the government within the bound of laws. This sector however records progress far below the standard.

- Only 35% of criminal cases are tried by the independent courts of law (CeLRRd, Banke). Interestingly enough, many institutions, which can take cognizance, are solely involved in investigation as well as the adjudication of offences, and as such the fairness of the process is simply ignored.
- A study carried out in Saptari, Kathmandu, Sayngjha, Banke and Dadeldhura reveal that:
 - 60% of prisoners interviewed had not been allowed to have legal defense during the police custody,
 - 67% of prisoners complained torture during police custody,
 - 72% of prisoners complained forced to sign prepared confession, (CeLRRd 2000)
 - 56% of prisoners had been sentenced to imprisonment without representation of legal counselors, CeLRRd 2000)
 - over 50% of cases take more than one year for disposal in the trial court (CeLRRd 2000),
 - Property bond is asked for in 94% of cases (CeLRRd 2000).

These findings suggest a deplorable condition of criminal justice.

STRATEGIC APPROACHES FOR CONSOLIDATION OF RULE OF LAW IN NEPAL:

1. Governance System:

A. Problems:

- a. The governance system of Nepal has failed in three major sectors: (1), maintenance of peace and security; (2), control and prevention of corruption, and (3) providing moral leadership. Similarly, Nepal has too many public servants and too little service, and there has been too much control and too little welfare. Most importantly, there have been too many laws and too little justice. These three failures have largely obstructed the process of democratization.

- b. Prof. Irving Younger (Cornell University) suggested that judges should evolve the doctrine that “no law is validly enacted unless legislators voting for it have read it”. By this test 95% of the laws passed by the Nepalese Parliament would have to be invalidated. They pass the law without giving even eye-birds’ view. For instance, the Local Autonomous Governance Act is conflicting with at least 34 known Acts.

A. Recommendations:

- a. Building moral leadership by implanting values of rule of law should be a strategy for transforming the current electoral democracy into liberal one. For this education on values of democracy and rule of law should be widespread and intensified.
- b. The information of MPs and political leaders on values of liberal democracy must be strengthened through developing a resource base in the parliament. However, at the mean time, the current “strict whipping system” must be annulled. The MPs must be enabled to use their wisdom. Simultaneously, they should be encouraged to bring private bills as much as possible.
- c. Enhancement of local governance at multi level is a need of the country. This is necessary for democratizing the nation at all level, and at the same time empowering the people to share country’s sovereignty (governance competence) at all level. The system of shared sovereignty does not necessarily resemble and call for the federal system (European University Institute, 44-59). The shared competence is more or less a mechanism of devolving autonomy of state at multi-levels.
- d. The autonomy at different level will a create condition for participation of heterogeneous groups in governance, and this will give the legitimacy to the democracy. The heterogeneity at bottom level is necessary to build plurality at the national level. The recognition of ‘heterogeneity’ at the regional or local level will be catalyst to foster leadership of various ethnic groups for national competence. To achieve goals of shared competence, the Parliament must make amend the Local Autonomous Governance Act with effect of the following:
 - The Local Autonomous Law must give full autonomy to local government in matters of resource mobilization, including levying taxes within the framework of constitution and laws enacted by the parliament.
 - The government must stop recruiting staff to the local government institutions.
 - The DDC must be provided with a clear legal basis for impelling the line agencies to accept its leadership in matters of determining priorities, planing projects, monitoring the progress and making expenditures. The local authorities must be involved in planning process.
 - The control of the services provided and property owned by the central government must be handed over to the local government.
 - Alternative dispute resolution mechanisms must be strengthened at local level.

2. Electoral System:

A. Problems:

- a. Both the fairness and representativeness of elections at all level are seriously maligned in Nepal. Elections are therefore not becoming a mechanism to secure participation of people in governance, but merely an instrument of securing elite groups to power. This statement is proved by level of representation of women, ethnic groups and minorities.

B. Recommendations:

- a. In order to secure the fairness and independence of elections the following measures must be undertaken.
 - The independence of Election Commission must be secured by having a system of independent recruitment of staff.
 - The electoral laws must provide strictly for declaration of property by the candidates at the time of filing the candidacy, and the scrutiny of the declaration must be made instantly. The law must clearly provide that falsity of statement would forfeit his post.
 - The law must also provide for disclosure of the funds used by the political parties during elections, and such disclosure must include the source of funds.
 - The civil society must be encouraged for empowering voters through voters' education.
 - The present election system is not friendly to ethnic minorities. For building Nepal a society of ethnically shared competence for governance, the election system must be changed to ensure equal opportunity for all ethnic groups take part in and be elected at all level of elections.

3. Civil Society:

A. Problems:

- a. Issues of accountability and transparency are major concerns with regard to NGOs in Nepal despite their increasingly potential roles in organizing the civil society and democratizing the society. The following recommendations are suggested for strengthening the accountability and transparency:

B. Recommendations:

- a. NGOs must maintain effective linkages at the local and national level. They should strengthen their capacity to influence the national policies based on their experience gained at community level.
- b. Strengthen their capacity to understand the problems and need of the Nepalese society.
- c. They should develop their expertise at the level so that INGOs cannot interfere in their concepts and actions.
- d. Provide a forum for INGOs to transform knowledge and skills.

1. Control and Prevention of Corruption:

A. Problems:

- a. Apex level of State or Public officials is involved in extortion of government expenditures and pillaging of state property through various means. Public officials, elected officials in particular, enjoy exemption of actions against corruption. The exemption is thus becoming a basis for impunity. The possibility of rule of law in such circumstance will simply be a myth.

- b. The definition of corruption is taken in very stricter sense in Nepal. Hence, CIAA, which is supposed to investigate corrupt actions, has to limit its actions to the scope of corruption set by Corruption (Control) Act, which only specific law on crime of prevention in Nepal.

B. Recommendations:

- a. The following five “D” are suggested.
- **Defusion of Power:** Concentration of power is nest of corruption. A strategy of decentralizing and devolving power will help preventing corruption.
 - **Deformalization of Process:** Excessive bureaucratic formality of governance promotes good environment for growth of corrupt practices. Hence, government administrative procedures must be simplified.
 - **Democratization of Mechanism:** Democratization will secure accountability and transparency of works. Hence, citizens should entitle to unrestricted information on decision making process.
 - **Dedication and Commitment:** Corruption investigating officers must be dedicated and committed. The independence of tenure and protection against interference by powerful executive officials is prerequisites for dedication. The present CIAA Act must be immediately amended with effect of giving power to CIAA for recruitment its staff independently.
 - **Deconstruction:** The hierarchy based bureaucracy system of Nepal should not affect the administration of CIAA. Hence, to protect investigating officials from influence, their work must be kept outside of interference any officials.

2. Access to Justice and Fair Trail:

A. Problems:

- a. Only 35% of criminal cases are tried by the independent court of justice, rest others are taken cognizance by quasi-judicial bodies like CDO, Forestry Office, Immigration Office, Revenue Office, etc. Interestingly enough, these institutions are solely involved in investigation as well as the adjudication of offences.
- b. Sensitivity to respect human rights and develops a culture of human rights, severely lacking.

B. Recommendations

The following strategic changes are suggested in the justice system:

- Departmentalizing of criminal justice system should be stopped immediately, and the criminal offences involving restriction on individual liberty should not be left in hands of executive officials for trail and punishment. The judicial administration law should be amended to the effect of banning on departmentalizing the criminal justice system.
- Court of civil and criminal justice must be separated at trial level, and the concept of specialized justice system must be introduced.
- Legal education and training must be revitalized to meet the standards of justice recognized by the international community.

CONCLUSION:

The rule of law is not a stereotyped principle, and is not strictly a lawyerly concept. Rule of law as a principle of good governance has socio-economic and political bearings. Conventionally, the concept of rule of law has been advocated as means of controlling governmental discretion. Indeed, when discussing how a governmental activity should be carried out there is a strong temptation to ask: 'Should this activity be governed by rules versus discretion?' Assessing governmental processes involves, however, far broader issues than are encompassed in the rules versus discretion debate.

Using governmental rules is one way of controlling or executing governmental functions but it is by no means the only one. Alternative controls include accountability to variously constituted bodies; scrutiny, complaints, and inspection systems; arrangements to ensure openness (such as requirements to publish performance indicators and statistics) and schemes for giving effects to citizens' view.

In asking whether, when, and how rules may best contribute to good governance, it is necessary to bear in the mind the potential of controlling or enabling devices like electoral process, effective participation of, and involvement in actions, civil society in policy making, prevention of corrupt practices, and remedy for the violation of citizens' rights.

Framing good laws alone therefore cannot ensure the rule of law. The good governance can be achieved by securing operation of rule of law with the help of alternative controls.

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