

Supreme Court, Constitutional Bench

Right Honorable Chief Justice Cholendra Shumsher J.B. Rana

Honorable Justice Deepak Kumar Karki

Honorable Justice Meera Khadka

Honorable Justice Hari Krishna Karki

Honorable Justice Ishwar Prasad Khatiwada

Order

Date of Order: 2078/1/8 (corresponding to 21 April, 2021)

074-WC-0020

Petitioner: Bishnu Prasad Ghimire, 41 years old, resident of Palpa District, Bagnaskali Village Municipality, Ward No. 8 and currently residing at Kathmandu District, Kathmandu Metropolitan City, Ward No. 29,

Vs.

Respondent: Federal Parliament, New Baneshwar, Kathmandu, et. al.

- Provided, there is a desired coordination and cooperation among the State agencies then only efforts on controlling corruption can be effective; coordination and cooperation are essential matters. Since the Commission for the Investigation of Abuse of Authority is a constitutional Commission focused in controlling corruption, the Commission can adopt necessary, appropriate and lawful measures deemed appropriate to control corruption. However, adopting a narrow perspective by demarcating the institutional jurisdiction on matters relating to adoption of preventive precautionary measures for controlling corruption does not seem appropriate.
(Para No. 3)
- Since Commission for the Investigation of Abuse of Authority has the authority to investigate and prosecute offences of corruption, it is expected that the Commission will be active or proactive on matters relating to preventing corruption. However, in the guise of controlling corruption, it is not deemed appropriate for the Commission to adopt arbitrary practices, engage in deceitful or fraudulent activities, framing innocent people and harassing them.

- It is not acceptable for a constitutional body of the State, that has the resources and authority to engage in the entrapment of a person and such actions are not favorable in a civilized society. It is not virtuous for a State agency to devise fraudulent plans and implement the same in order to frame its own citizens.

(Para No. 9)

- Mere recovery of an amount from an employee's work place does not ipso facto establish grave offenses such as corruption. To declare someone to be corrupt, it must also be proven that the individual had the intention to receive the bribe and had accordingly demanded the bribe amount and had of one's own accord and willingly received the amount.

(Para No. 11)

- No Act provides consent for the use of State fund for the purpose of corruption. Where the Act has not provided any authority, insertion of provisions in the Regulation for the purpose of using State funds for bribery does not seem to be reasonable. Rule 30 of the Commission for the Investigation of Abuse of Authority Regulation, 2059, provides for confiscation of the bribery amount which is contrary to the provision of the Act. It has been found that the bribery amount provided by the Commission is taken back by the Commission. The act of providing the amount, instigating to accept the bribe and thereafter arresting the person and filing a case and awarding punishment, recovering the bribed amount and re-arresting another person has narrowed the provision of confiscation of the amount as provisioned in the parent Act or it appears that the Regulation has created an exception. This seems to weaken the credibility of fair investigation.

(Para No. 18)

- Provided, it is deemed that Rule 30 is invalid and void does not denote that the cases sub-judice before the court ipso facto is deemed to come to an end or dismissed or that all proceeding is deemed to be void ab initio. There are established procedures for resolving disputes that are in the judicial process. Where Rule 30 has been declared invalid and void, this does not denote that cases sub-judice before the court should be dismissed or all proceedings should be declared invalid and void. The judicial resolution of the case depends on the evaluation of other evidence collected in the case. On matters relating to cases that are sub-judice before the court or are under judicial process, the collection of evidence pursuant to the Regulation that is in other words, the government fund that was provided by the respondent Commission and recovered and submitted as evidence cannot be deemed to be admissible.

(Para No. 21)

On behalf of the Petitioner: Learned Senior Advocates Mr. Shambhu Thapa, Mr. Chandeswar Shrestha, Dr. Mr. Rajit Bhakta Pradhananga, Mr. Prakash Bahadur K.C., Mr. Ravi Narayan Khanal, Dr. Mr. Chandrakant Gyawali, Mr. Raman Kumar Shrestha, Mr. Khagendra Prasad Adhikari, Learned Advocates Mr. Tikaram Bhattarai, Mr. Sharad Prasad Koirala, Dr. Mr. Bhimraj Acharya, Mr. Sunil Pokhrel, Mr. Lalit Bahadur Basnet, Mr. Govind Prasad Sharma Bandi, Mr. Madhav Koirala, Mr. Gaj Bahadur Air, and Mr. Tika Bahadur Kunwar

On behalf of the Respondent: Learned Deputy Attorney General Mr. Padma Prasad Pandey, Learned Joint Government Attorney Mr. Gopal Prasad Rijal, and Mr. Sanjeeb Raj Regmi

Precedents Cited:

- Nepal Law Reporter 2051, Vol.8, Decision No. 4955
- Nepal Law Reporter 2051, Vol. 9, Decision No. 4970
- Nepal Law Reporter 2063, Vol.3, Decision No. 7660
- Nepal Law Reporter 2065, Vol.12, Decision No. 8043
- Nepal Law Reporter 2069, Vol.3, Decision No. 8777
- Nepal Law Reporter 2074, No. 9886

Relevant Laws:

- The Constitution of Nepal
- The Commission for the Investigation of Abuse of Authority Act, 2048
- The Prevention of Corruption Act, 2059
- The Nepal Interpretation of Law Act, 2010

Order

Honorable Justice Ishwar Prasad Khatiwada: The summary of the facts and the decision of the writ petition filed pursuant to Sections 133 (1), (2) and (3) of the Constitution of Nepal, before this Court is as follows:

Content of the Writ Petition

Article 98 of the Constitution of the Kingdom of Nepal, 2047, and Article 120 of the Interim Constitution of Nepal, 2063, provides the Commission for the Investigation of Abuse of Authority the right to recommend in writing and bring an action against improper conduct and corruption whereas, Article 239 of the Constitution of Nepal has given the Commission the right to conduct investigation and prosecution. The Commission for the Investigation of

Abuse of Authority Act, 2048, has been enacted to regulate the work, duties, rights, and procedures of the Commission, and Article 304 (1) of the present Constitution has provided legitimacy. Article 238 of the Constitution of Nepal provides for the formation of the Commission for the Investigation of Abuse of Authority and Article 239 provides for the functions, powers and duties of the Commission. Pursuant to the constitutional provisions, and pursuant to Article 239 (1), (2) and (3), provided a person holding a public office is found to have committed an act of corruption by abusing their authority, the Commission may investigate and upon investigation provided, the person is deemed to have committed an act of corruption, the Commission may file a case against the person involved in a competent court of law. While investigation pursuant to Article 239 (1) and (2) , provided the person holding public office appears to be of such nature as to be falling under the jurisdiction of another official or body, the Commission pursuant to Article 239 (4) may write to the concerned official or body for necessary action. The procedure for investigating and prosecuting corruption cases under Article 239 have been prescribed under Sections 13 to 31 (b), 35, and 35 (c) of the Act.

The Commission for the Investigation of Abuse of Authority Rules, 2059, has been enacted pursuant to Section 37 of the Commission for the Investigation of Abuse of Authority Act, 2048. Under Rule 30 of the Regulation provided any complaint that a person holding a public post has demanded bribe, the Commission during the course of its investigation may through its employee or through the complainant or through any other person may provide the bribe to the person holding such public post and the person providing such bribe shall not be subjected to any proceedings and punishment. The constitutional provision provides the Commission to investigate and prosecute on matters relating to corruption only. The Commission prior to the commission of a corrupt act cannot directly or indirectly assist in the commission of an act, create or cause to create evidence and provide the bribe amount deemed necessary. Provided, the Commission receives information that an act of corruption is going to be committed, the Commission pursuant to Article 239 (4) of the Constitution and Section 37 of the Corruption Prevention Act, 2059 must refer the case to the National Vigilance Center. On the contrary, the Commission pursuant to Rule 30 of the Regulation has been providing bribes and has been illegally arresting and prosecuting civil servants on a daily basis. The action of the Commission is contrary to Article 1 (1), 18 (1), 20 (4) 239, Chapter 4 of the Prevention of Corruption Act, 2059 and the recognized principles of law and justice and exceeds the jurisdiction prescribed under Section 37 of the Commission for the Investigation of Abuse of Authority Act, 2048 and where Rule 30 of the Commission for the Investigation of Abuse of Authority Regulation, 2059 has been enacted and enforced, the Rule is invalid and voidable. Pursuant to the existing legal system, the Commission has the authority to investigate as to whether or not an act committed is an act of corruption and provided the Commission deems it to be an act of corruption the Commission has the

discretion to file a case. The Commission exercising the right vested by Section 37 of the Act has enacted the Regulations and has also declared the source of authority for making such Rules. On matters of corruption, Section 37 and 38 of the Prevention of Corruption Act, 2059 prescribes that provided the State mechanism is informed about occurrence of a corrupt act prior to its commissioning, the Commission may make proper arrangements for controlling the corruption but the respondent Commission contrary to the provision has been involved in providing the resources and means and has been involved in commissioning an offence prohibited by the State and therefore, the act is contrary to the established principles of criminal law. The provision of Rule 30 of the Regulations has been made beyond the mandate and limitation of Section 37 of the Act. Since the Commission is a legal entity the Commission can act only in accordance with the law, and it is undisputable that the law made in excess of authority is unconstitutional.

Provided, the Rule that is made for the implementation of the Act cannot beyond a reasonable doubt prove as to which provision of the Act was the Rule framed to implement, then the validity of the Rule becomes null and void. Rule 30 must be tested on the basis of the provision of Section 37 and on the principle of delegated legislation. In the law that is under delegated legislation, provided there is absence in the mother law and provided there is absolutely a different provision than the mother law, then such laws cannot be deemed to be valid. It has been established (Nepal Law Reporter 2071, Decision No. 9141) that provided any laws are made beyond the source of authority and laws are made in the absence of source, then such laws are deemed to be invalid. The respondent Commission cannot extend its jurisdiction. Taking recourse of the provision prescribed in Rule 30 of the Regulations, the Commission cannot exercise its rights that are not granted by the Constitution and law and the extension of its right which is coverage of activities beyond law is beyond the jurisdiction. The Commission cannot assume the status of a legislature by exceeding the limits of Section 37 of the Act. An act that cannot be performed directly cannot be performed indirectly. As Section 37 of the Prevention of Corruption Act, 2059 provides for the establishment of a National Vigilance Center to control corruption and Section 38 (d), (e), (f) and (j) provides that any act prior to being an act of corruption is a matter that falls within the jurisdiction of the National Vigilance Center and therefore, the Commission cannot exercise any authority over such matters

The authority to declare and penalize any act as a criminal offense lies with the legislature and Article 109 and 197 of the Constitution clearly states that the source of substantive law lies with the legislature. Article 20(4) of the Constitution states that no person shall be liable for punishment for an act which was not punishable by law in force when the act was committed. No one has the right to acquire or modify the absolute discretion of the legislative body. The law has made provisions to address the likelihood of the commission of an act of corruption.

Even in the course of an investigation under Sections 25 and 26 of the Prevention of Corruption Act, 2059 (2002), provided, there is a likelihood of a commission of an act of corruption, then pursuant to Article 239 (4) of the Constitution and Section 37 of the said must be referred to the parent Act. Since the Act does not provide for taking action to complete a potential offense, Rule 30 of the Regulations is contrary to Sections 37 and 38 of the Prevention of Corruption Act, 2059.

Provided, any bribe is demanded, remedy can be sought by complaining to the Complaint Hearing Officer in the office, the Office Chief, Hello Government (*Hello Sarkar*) located at the Prime Minister's office, and higher authorities and the administrative and the National Vigilance Center. Where law does not provide any investigating body to provide resources and means for commissioning of an offence and to create evidence, Rule 30 of the Regulation is contrary to the established principles relating to investigation of criminal cases where the government is the plaintiff. The constitutionality and validity of any law must be proven. The principles of *nullum crimen sine lege* (No crime without law) and *nullum poena sine lege* (No punishment without law) are established principles in the criminal penal code, and according to these principles, declaration of an offence and immunity can only be made by laws that are made by the legislative. No authority other than the legislature can establish guilt or grant immunity by the law made by the legislature. Since the legislature is the sole authority to declare criminal offenses, any arrangement that establishes and punishes criminal offenses through laws other than those made by the legislature is unconstitutional.

The Supreme Court has propounded precedents (Nepal Law Reporter Decision No. 7866, 7855, 8564 and 8860) wherein it lays down that no person can be punished or deemed incompetent other than by the substantive law made by the Legislature. On the basis of the provision of Rule 30 of the Regulations, a person cannot be charged with a criminal offense or punished. Therefore, since Rule 30 of the Commission for the Investigation of Abuse of Authority Regulations, 2059, is contrary with Section 37 of the Commission for the Investigation of Abuse of Authority Act, 2048, Sections 3, 37, 38 (d), (e), (f), (g), (j) of the Prevention of Corruption Act, 2059, Articles 1(1), 18(1), 20(4), 109(1), 197, 239(1), (2), (6) of the Constitution of Nepal, and contrary to the principle of legislative authority and where the acts performed pursuant to Rule 30 is contrary to the law, the petitioner hereby requests to issue an order of certiorari and any other appropriate orders to declare the act void ab initio. On the basis of Rule 30 arrest on criminal offences, prosecution and punishment has been handed down without any reason and since this provision has been applied and misused as a tool for revenge and a mechanism for framing people, the petitioner pursuant to Rule 19 (4) of the Supreme Court (Constitutional Bench Operation) Regulation, 2072 requests the Bench to issue an interim order in the name of the respondents directing them not to implement or cause to implement Rule 30 of the Regulation.

Show Cause Order:

A show cause notice had been issued by this Bench on 2074/9/7 (corresponding to 22 December, 2017) which reads as follows: why should the order as demanded by the petitioner need not be issued? A summon be issued in the names of the respondents and the respondents are hereby directed to submit their rejoinder along with the grounds and reasons thereof for not issuing the order and to submit the case file before this court upon receipt of the rejoinder or upon the expiry of the limitation period.

Content of the Rejoinder:

The rejoinder submitted by the respondent Commission for the Investigation of Abuse of Authority reads as follows: as cited by the petitioners, the provision prescribed under Rule 30 of the Commission for the Investigation of Abuse of Authority Regulation, 2059, is not to declare any act an act of offence rather Section 3 of the Prevention of Corruption Act, 2059 provides for acts considered to be acts of corruption and also provides for legislative construction of crime Provided, a complaint that a person holding public post has sought bribe is made before the Commission, the Commission during the course of its investigation may provide the amount to the person holding the public post through its own employee or through the complainant or through any other person and this is purely a procedural provision wherein the petitioners have stated that Rule 30 has declared a new crime and have misconstrued the prevailing legal provisions and since their contention that the said provision is contrary to the Constitution is erroneous the writ petition should be quashed. Rule 30 of the Regulation has not defined taking of bribe by civil servant as an offence rather Section 3 of the Prevention of Corruption Act, 2059 has explicitly defined it as an offence and in order be result-oriented and to effectively implement Section 3, procedural mechanisms had been made by exercising the right provided by the Act wherein the petitioners have misconstrued the provision and in order to save oneself from the penal provisions made under Section 3 of the Prevention of Corruption Act, 2059, the writ petition has been filed and therefore, the writ petition should be quashed. The provision under Rule 30 of the Commission for the Investigation of Abuse of Authority Rules, 2059, has been in practice for a long time and has gained legality and legitimacy through uninterrupted testing. The writ petition has been filed with the intention of making the provision under Section 3 of the Prevention of Corruption Act, 2059, dysfunctional and therefore, the writ petition should be quashed. The Commission provides the graft amount through a whistle blower and is a secretive operation where special investigative techniques are applied to collect evidence. Article 50 of the United Nations Convention against Corruption (UNCAC) to which Nepal is a Party and which pursuant to Section 10 of the Treaty Act is to be applied as Nepal law, prescribes that for investigation of special kind of cases special investigative techniques may be followed and has prescribed obligations to the State Party. Provided the Commission is informed of any person holding a

public post demanding (the intention for seeking bribe by the person holding a public post is already established here) bribe, the service seeker may not be able to provide the amount immediately or owing to the financial conditions and or through any other reasons may not be able to provide the amount wherein the Commission through the application of Rule 30 of the Commission for the Investigation of Abuse of Authority, 2059 may provide the amount for the simplification of collection of physical evidence. The practice of providing the amount and collecting physical evidences is also practiced at an international level for corruption and other grave cases. In many cases that are filed under various laws (Prevention of Organized Crime Act, 2070) the process of control delivery and undercover operation are followed. The provision prescribed under Rule 30 is a procedural provision under special investigative technique and since the provision is not contrary to the constitutional provisions and law, the writ petition should be quashed.

The rejoinder submitted by respondent Federal Parliament reads as follows: Under the delegated management, the legislative authority to make the Regulation has been delegated to the Executive. Provided any law owing to it being inconsistent with the Constitution is to be amended or provided it is deemed necessary to frame new laws, the Government of Nepal shall submit a Bill before the Federal Parliament and wherein the Bill pursuant to the procedures will be passed and therefore the writ petition where the Federal Parliament has been made a respondent should be quashed.

The rejoinder submitted by the Ministry of Justice, Law and Parliamentary Affairs reads as follows: pursuant to Sub-Rule (1) of Rule 30 of the Commission for the Investigation of Abuse of Authority, 2059, states that provided a complaint is filed before the Commission alleging that a person holding a public office has demanded a bribe, the Commission may, through its employees or the complainant or any other person make arrangements to provide the bribe to the person holding the public office. Sub-rule (1) of Sub-Rule (2) of the Regulation provides that the employee or person providing the bribe shall not be subjected to any kind of action and punishment. The act of giving and receiving a bribe is an offence under the Prevention of Corruption Act, 2059. Sub-section (1) of Section 13, of the Commission for the Investigation of Abuse of Authority Act, 2048, prescribes that provided the Commission receives any complaint or through any other sources receives information, the Commission on the basis of the information received shall pursuant to this Act conduct an investigation and inquiry or take any other actions. The provision under Rule 30 of the Regulations is limited to the investigation to be conducted after a complaint is filed before the Commission alleging that a person holding a public office has demanded a bribe. The provision under Rule 30 of the Regulations is not for determining any offence and providing punishment but rather it is the basis for investigating the tendency of acquiring bribe by a person holding a public office.

Since the provision is not contrary to the subordinate legislation and is not inconsistent with the Constitution, the writ petition should be quashed.

The rejoinder submitted by Nepal Government Council of Ministers reads as follows: provision of Rule 30 of the Commission for the Investigation of Abuse of Authority Rules is a provision made to facilitate the implementation of the law, and it cannot be deemed to be inconsistent with the Constitution and provisions of the law. Disputed Rule 30 of the Regulation prevents the commission of any corrupt act and determines the procedure to be adopted for taking action against the corrupt. The purpose of this provision is to collect evidence against those who commit an act of corruption, and therefore, it should not be deemed to be otherwise and as such the writ petition should be quashed.

Written Argument Note and Arguments

Hearings on the dispute that was registered in the cause-list pursuant to the rules were held on Kartik 8, 2076 (corresponding to 25 October, 2019), Paush 2, 2076 (corresponding 18 December, 2019), Magh 01, 2076 (corresponding to 15 February, 2020), Falgun 14, 2076 (corresponding to 25 February, 2020), Shrawan 21, 2077 (corresponding to 5 August 2020) and Mangsir 24, 2077 (corresponding to 9 December, 2020). During the course of the hearings arguments from learned Senior Advocates Mr. Shambhu Thapa, Mr. Chandeswar Shrestha, Dr. Mr. Rajit Bhakta Pradhananga, Mr. Prakash Bahadur K.C., Mr. Ravi Narayan Khanal, Dr. Mr. Chandrakant Gyawali, Mr. Raman Kumar Shrestha, Mr. Khagendra Prasad Adhikari, and learned Advocates Mr. Tikaram Bhattarai, Mr. Sharad Prasad Koirala, Dr. Mr. Bhimarjun Acharya, Mr. Sunil Pokharel, Mr. Lalit Bahadur Basnet, Mr. Govind Prasad Sharma (Bandi), Mr. Madhav Koirala, Mr. Gaj Bahadur Air, and Mr. Tika Bahadur Kunwar on behalf of the petitioner were heard. In addition to this, the written arguments submitted by learned Senior Advocate Prof. Dr. Mr. Rajit Bhakta Pradhananga on behalf of the petitioner, the joint written arguments submitted by learned Senior Advocates Mr. Shambhu Thapa, Mr. Chandeswar Shrestha, Mr. Raman Kumar Shrestha, and learned Advocates Mr. Govind Prasad Sharma (Bandi), Mr. Sharad Prasad Koirala, and Dr. Mr. Bhimarjun Acharya, and the separate written arguments submitted by learned Advocate Ms. Bishnu Maya Bhushal were also studied. The main points of their arguments were: pursuant to the Prevention of Corruption Act, 2059 and Commission for the Investigation of Abuse of Authority Act, 2048, provided a person holding a public post seeks bribes, the investigating agency Commission for the Investigation of Abuse of Authority does not have any provision of providing bribe. The legislature is vested with the special authority to criminalize and decriminalize any act and therefore while implementing the law the legislative law must be strictly followed in letter and spirit. The Constitution and the law have vested the Commission the authority to investigate and prosecute cases of corruption. Where an act of corruption has not been commissioned or where the Commission is aware of an act to be commissioned, the

Commission rather than preventing the commission of the act is involved in providing the bribery amount, then it can be deemed that a crime that was incomplete had been completed with the involvement of the Commission. Where the Commission provides the bribery amount and creates evidence and thereby registers the charge-sheet in the court then such act is contrary to the Constitution and laws. For regulations framed under the delegated legislation procedural arrangements can be made for the implementation of the Act. Incorporating and declaring any act to be an offence, prescribing penalties and punishment, and creating rights are matters of substantive law and hence such act is unconstitutional. Matters of substantive law are the prerogatives rights of the Parliament. Since the provision under Rule 30 of the Commission for Investigation of Abuse of Authority Rules, 2059, provides immunity to the person providing the bribe then this provision has made Section 3 of the Prevention of Corruption Act, 2059 dysfunctional In Basanta Bahadur Shrestha vs. Secretariat Council of Ministers et.al, the Supreme Court with regards to the disputed Rule 30 has laid down that “it cannot be deemed that where substantive procedures have been provisioned in the Rule then it cannot be said that such acts have been performed pursuant to the rights and limitations provided by the Constitution or Act; provided the basic and substantive matters are not prescribed in the Act then it is not deemed appropriate and valid to incorporate it in the Regulation; Regulation cannot be self-independent and self-sufficient.” The petitioners also argued that investigating and prosecuting a person with the intention of trapping them in a web of deceit is against the principles of constitutionalism.

The petitioners while presenting their arguments cited the case of Brannan vs. Peek that was entertained by the House of Lords in 1947 wherein it was ruled that where an investigation is carried out with the intention of entrapping a person to instigate the commission of a crime then the investigator is deemed to be guilty of such acts. The Indian Supreme Court in Ram Krishna, Baswan Singh, Som Prakash et.al. has opined that since trap investigations encourages to accept bribes and instigates in the commission of a crime, such kind of investigation and prosecutions should be prohibited. Article 239 of the Constitution of Nepal, Commission for the Investigation of Abuse of Authority, 2048, and the Prevention of Corruption Act, 2059, has given the Commission the authority to investigate and prosecute individuals only on the basis of a complaint that they have committed an act corruption by abusing their authority. Where a crime has not been commissioned, the Commission does not have the authority to create a crime and contrary to the laws use state funds to provide or cause to provide bribes by manipulating a person. The provision of Rule 30 is contrary to the concept of due process. This provision can be used against innocent people and there is a probability of instigating a crime by providing the money and this provision is unjust and unethical.

The learned advocates on behalf of the petitioner while arguing have cited examples where the Commission for the Investigation of Abuse of Authority has not carried out the investigation in major disputes (cases) even when the Commission was directed by the Parliamentary Committee; although the agency has been empowered by the Constitution and the law there have been no significant results in the investigation and prosecution of major cases, but on the contrary the Commission has been performing its work to occasionally fulfill the self-interest of the government; where the Commission has the mandate to investigate the widespread web of corruption, the Commission on the contrary through sting operation has been arresting low-level employees thereby ensuring its role in guaranteeing control over corruption and good governance; there are examples where the Commission through sting operation has been providing thousand/two thousand rupees as bribes to low-level employees such as office assistants and arresting them. The role of the investigator is to collect evidence and not to create it and providing funds by the State should be considered an unethical investigation. This is contrary to the right to fair hearing. The learned advocates further argued, that the disputed provision is contrary to the right to equal protection under the law, right to judicial purity and right to privacy. The disputed provision creates crime and provides a basis for the implementation of an individual's hidden plans.

Learned Senior Advocates and advocates argued that Sub-article (4) of Article 20 of the Constitution of Nepal stipulates that no person shall be liable for punishment for an act which was not punishable by law in force when the act was committed and no person shall be subjected to a punishment greater than that prescribed by the law in force at the time of the commission of the offence. The principles of legality/principle of constitutionality, which have been recognized as principles of criminal justice, must be followed. Rule 30 of the Regulations has decriminalized the act of providing bribe and Section 3 of the Prevention of Corruption Act, 2059 has provided immunity to the person providing bribe and therefore, the provision prescribed under Section 3 is an exception. Section 37 of the Commission for the Investigation of Abuse of Authority Act, 2048, has vested the Commission with the authority to make procedures. The Commission does not have the authority to make substantive law. They further argued that the right to frame substantive criminal law lies with the Parliament and argued that criminalization, de-criminalization, re-criminalization, double criminalization and over-criminalization falls within the cycle of criminalization and therefore, Rule 30 should be analyzed on this basis too.

They further argued that where the provision under Rule 30 of the Commission for the Investigation of Abuse of Authority is arbitrary, malafide and unreasonable and inconsistent with Article 1, 18, 20, 109, 197 and 239, Section 3, 37 and 38 and Section 37 of Commission for the Investigation of Abuse of Authority therefore, all actions taken thereunder be declared void ab initio.

The learned Deputy Attorney General Mr. Padma Prasad Pandey, and learned Joint Government Attorneys Mr. Gopal Prasad Rijal and Mr. Sanjeev Raj Regmi, on behalf of the respondents presented their arguments. The written pleading notes submitted by them were also considered. Through their written pleading notes and during their deliberations they argued that the provision of Rule 30 of the Commission for the Investigation of Abuse of Authority Rules, 2059, is applicable only to a person holding a public office who is found to have committed an act prohibited by the Prevention of Corruption Act, and therefore, where the petitioners do not hold any public office the said provision is not applicable to them. The petitioners have failed to show that they have meaningful relation with the provision of the said Rule. The person holding a public office against whom Rule 30 of the Regulation is applicable or the person who has been arrested and charged for receiving bribe has not challenged Rule 30. The question of locus standi needs to be resolved. Pursuant to Article 137 such disputes do not fall within the jurisdiction of the Constitutional Bench. Article 239 of the Constitution has provided that the Commission for the Investigation of Abuse of Authority may conduct or cause to conduct an investigation of any abuse of authority committed through corruption by any person holding a public office and register a case against the person or other person involved. Section 37 of the Commission for the Investigation of Abuse of Authority Act, 2048, has granted the Commission the authority to frame rules for the implementation of the Act and the Commission pursuant to this authority has framed the rules. The provision of the disputed Rule 30 has not declared any act an offense and this provision is not a substantive provision. Section 3 of the Prevention of Corruption Act, 2059, has defined the act of giving and receiving bribes as an offense and the Commission is vested with the right and duty to investigate such corrupt activities. They argued that anyone can file a complaint with the Commission regarding bribery. Where a complaint is received by the Commission, the Commission can conduct an investigation and provided it is proved that the person holding a public office has demanded a bribe or there is likelihood of demanding a bribe then only in lieu of the bribe can the amount be made available.

The Learned Deputy Attorney General and Joint Government Attorney during the course of their arguments stated that the Commission pursuant to the authority granted by Section 32, of the Commission for Investigation of Abuse of Authority Act, 2048, had drafted and issued the Directive 2073 related to the arrest, investigation, and prosecution of a person with regards to bribery. This provision should not be used as a tool for revenge or to frame someone. According to Section 3 of the Prevention of Corruption Act, demand and acceptance of bribes are both offenses. Provided, the amount is sought from a service seeker and provided the service seeker cannot provide for it, or is unable to pay or is reluctant to pay and where such information is received from the service seeker the Commission shall make a record of it and provide the amount and provided a government employee receives such amount, the amount shall be duly recovered and submitted before the court as evidence. This is a procedural

arrangement for collecting evidence after the commission of the offense of corruption. The petitioners have not raised any objection that the application of Rule 30 has been discriminatory or biased against them or against any other person. Provided, Rule 30 is applied arbitrarily or if deemed otherwise, then it is up to the court to decide in individual case as to whether or not to accept it as evidence.

Article 50 of the United Nations Convention against Corruption, 2003, allows the State Parties to use special investigative techniques such as electronic or other forms of surveillance and undercover operations for the purpose of combating corruption and to allow for the admissibility in court of evidence derived therefrom. Nepal ratified this Convention on February 23, 2011, and became a State Party and as a State Party it is the responsibility of Nepal to implement and comply with the Convention. Rule 30 of the Regulations provides for special investigative methods for the collection of evidence in cases of corruption. Article 50 of the United Nations Convention against Corruption also recognizes the provisions of the Regulation. Controlled investigative methods and undercover operations have been recognized internationally in cases of organized crime. The United Nations Convention against Transnational Organized Crime, 2000, has included the application of such methods to control organized crime. In the investigation of a crime, Section 13 of the Prevention of Organized Crime Act, 2070, and Section 3, Part (j 1) of the Narcotic Drugs (Control) Act, 2033 (1976), have made provisions for the use of controlled delivery and undercover operations, and other appropriate investigation methods. They further argued that the international and national laws have recognized appropriate investigation methods such as sting operations in corruption and organized crimes. The provision of Rule 30 is based on this recognition. This is a procedural matter and does not affect the fundamental rights or the right to a fair hearing of the petitioner or any other person and as such the writ petition should be dismissed.

Decision/Decree of this Court

The hearing of the case had been concluded and as the date for rendering a decision had been prescribed, the following questions need to be determined: :

- a. As to whether or not the petitioners have the locus standi to file the writ petition?
- b. As to whether or not the Commission for the Investigation of Abuse of Authority has the authority to adopt preventive measures to prevent corruption?
- c. As to whether or not Rule 30 of the Commission for the Investigation of Abuse of Authority Rules, 2059 is consistent with the provisions of the Constitution of Nepal and Section 3 of the Prevention of Corruption Act, 2059?

d. As to whether or not the aforementioned Rule 30 should be declared null and void?
Provided, if it is to be declared null and void, from when and from which date should it be considered null and void?

2. The respondents have claimed that the petitioners do not have any locus-standi and meaningful relation with the provision prescribed under Rule 30 of the Commission for the Investigation of Abuse of Authority Regulation, 2059 and therefore, the Bench deems it expedient to resolve this preliminary question raised by the respondent. Article 133 (1) of the Constitution of Nepal, states the following “Any citizen of Nepal may file a petition in the Supreme Court to have any law or any part thereof declared void on the ground of inconsistency with this Constitution because it imposes an unreasonable restriction on the enjoyment of any fundamental right conferred by this Constitution or on any other ground, or to have any law or any part thereof made by a State Assembly declared void because it is inconsistent with any law made by the Federal Parliament or to have any law or any part thereof made by a Municipal Assembly or Village Assembly declared void because it is inconsistent with a law made by the Federal Parliament or the State Assembly, and the Supreme Court shall have an extra-ordinary power to declare that law to be void either ab initio or from the date of its decision if the law appears to be so inconsistent. Section 2 (m) of the Nepal Interpretation of Law Act, 2010, defines "Nepal law" as "any Nepal Act or any Act, ordinance, rule, order, or sub-rule application to any part of Nepal." The disputed Regulation is an Act made by the Parliament and is applicable as a law and therefore, for the purpose of Article 133 (1) of the Constitution it should be recognized as “law”. The Constitution has explicitly provided “**any Nepali citizen**” may file a petition in matters relating to such laws. The petitioners’ who are legal professionals have submitted the writ petition stating that the Rule is inconsistent with the Constitution and provisions of the Act and the respondents have not raised any dispute regarding the nationality of the writ petitioners. In addition to this, and with regards to the constitutional review of laws, this court has followed the principle that the concept of locus standi should not be narrowly applied. Provided, the petition was submitted pursuant to Article 133 (2) of the Constitution, then the issue of the petitioners’ “meaningful relation” with the subject matter would have been relevant and pertinent. However, the present dispute has been submitted pursuant to Article 133 (1) of the Constitution, and where the writ petition has been filed by a Nepali citizen under the capacity of a legal professional, denial to provide judicial remedy on the basis of “locus-standi” or “meaningful relation” would not deem to be appropriate.
3. The writ petitioner and learned Senior Advocates and Advocates on behalf of the petitioner had stated that "the Constitution has authorized the Commission to investigate and prosecute a person against whom a complaint regarding commission of an act of

corruption by abusing the authority has been filed; the Commission does not have the authority to initiate proceeding in the absence of an Act". It is the duty of every agency and public official of the State to establish good governance in the country. Corruption is an act contrary to good governance. Corruption can only be controlled provided every agency or institutions of the State make their contribution from their respective places. The task of controlling corruption should not be considered to be the responsibility of one single agency, institution, or official. There are many administrative mechanisms for controlling corruption such as the complaint hearing officer, office chief, higher-level officials of the concerned agency, and relevant agencies of the Government of Nepal including the National Vigilance Center which is a legal body established for this purpose. It is necessary for these bodies or concerned officials to the extent possible to adopt preventive measures to prevent corruption. This does not mean that the Commission for the Investigation of Abuse of Authority should not adopt preventive measures to prevent corruption merely because agencies like the National Vigilance Center exist. Provided, there is a desired coordination and cooperation among the State agencies then only efforts on controlling corruption can be effective; coordination and cooperation are essential matters. Since the Commission for the Investigation of Abuse of Authority is a constitutional Commission focused in controlling corruption, the Commission can adopt necessary, appropriate and lawful measures deemed appropriate to control corruption. However, adopting a narrow perspective by demarcating the institutional jurisdiction on matters relating to adoption preventive precautionary measures for controlling corruption does not seem appropriate. Since the Commission for the Investigation of Abuse of Authority is a constitutional Commission that is focused on corruption control, it can adopt necessary, appropriate, and lawful preventive measures to prevent corruption. Therefore, the preliminary question related to the authority of the Commission raised by the petitioner does not seem to be reasonable.

4. Now, looking at the principal subject matter of the dispute, the petitioners' have raised that since the provision is contrary to the Constitution of Nepal and Section 3 of the Prevention of Corruption Act, 2059, the said provision should be declared ultra-vires. In this context, Rule 30 of the Commission for the Investigation of Abuse of Authority Rules, 2059 prescribes the following provision:

Rule 30. "To Provide the Amount in Lieu of Bribe: (1) "During the course of investigation against a complaint received by the Commission that a person holding a public post has demanded bribe, the Commission may provide the amount in lieu of the bribe to the person holding the public post through its employee or the complainant or through any other person."

(2) "The employee or person providing the bribe pursuant to Sub-rule (1) shall not be subjected to any action or punishment."

5. Pursuant to the provision prescribed under Rule 30 of the Commission for the Investigation of Abuse of Authority Rules, 2059, the Commission has given recognition to the act of providing amount to the person demanding bribe/graft and upon delivery the Commission can arrest such person with the amount and files a case of corruption with the seized amount as the capital amount. It is evident that the amount provided by the Commission is from the state treasury. The question as to whether it is appropriate, reasonable, and lawful to use the state treasury to fund for the purpose of bribing is another matter to be resolved.
6. Article 20 (9) of the Constitution of Nepal states that "every person shall have the right to a fair trial by an independent, impartial and competent court or judicial body". The concept of a fair trial is not only applicable to the judicial proceedings in the court, but it is also necessary in the preliminary investigation of the case. Apart from the hearing in the court, it is expedient that fairness and impartiality are maintained in all aspects of the investigation, including the acceptance of the complaint, conducting an inquiry, search and seizure, taking the statement, collection of evidence and prosecution. An investigation that is conducted with a biased or prejudiced mindset and collection of fabricated evidence cannot be justified in a court of law. The provision in Article 20 (9) of the Constitution implies the same. This provision of fair trial is also related to the "right to live with dignity" as provisioned in Article 16 of the Constitution and is intricately linked to the protection of individual freedom. The Constitution has made provisions for such rights to protect individuals from the misuse of state power and to prevent violations of their right to individual freedom. These provisions in the Constitution are not merely cosmetic and it is necessary to follow the letter and spirit of the provisions of the Constitution and their application in practical life must also be demonstrated.
7. Punishing the guilty and protecting the innocent is a matter of judicial responsibility. A well-established principle of criminal justice underlines that "it is better for nine guilty persons to go free than that one innocent person be convicted." Article 126 (1) of the Constitution of Nepal states that "the powers relating to justice in Nepal shall be exercised by the courts and judicial bodies in accordance with this Constitution, other laws, and the principles of justice." The adherence to the principles of justice is not just a matter of academic debate and discussion. The recognized principles of justice such as values, principles, or conditions relating to dispensation of justice as determined by the Constitution should be followed. Principles of justice do not ignore the innocent. Punishing the innocent is not considered acceptable in any democratic and law-abiding state. Furthermore, provided any innocent person in a public position is framed with

fabricated or factitious evidence, this will create unwanted fear among public officials, which will have a serious impact on the flow of service and will have a grave impact in the establishment of good governance. Such kind of affairs is not desirable and cannot be accepted.

8. In the context of the dispute, the aspect of ensuring fairness and impartiality is considered to be noteworthy. The Commission for the Investigation of Abuse of Authority is a constitutional body established under the Constitution, and it is natural to expect that the Commission will conduct investigations fairly, impartially, independently, and in a competent manner. However, it is not easy to assume that this expectation will always be fulfilled in a reliable manner in all circumstances. The subject matter and our practical conditions must also be considered. The investigation and inquiry into corruption-related offenses are basically the responsibility of the Executive. To ensure reliability, impartiality, and competency in the work of the Executive, the Constitution has made provisions for the establishment of a Commission with provisions for independent functioning, and the task of entrusting authority has been provided by the Constitution. In a broader sense, from among the three organs of the State, the Executive, Legislative and the Judiciary, the nature of the work performed by the Commission is likely to fall within the executive domain. The establishment of the Commission as a constitutional body to maintain independence and impartiality in the performance of its duties does not in itself guarantee impartiality, competency and independence. This aspect certainly needs to be considered. Considering various social contexts, it cannot be ruled out that the Commission for the Investigation of Abuse of Authority would abuse the authority¹. The Learned Advocates on behalf of the petitioner during the hearing/discussion had provided examples of planned transactions, such as money being provided through the window and recovering the same as evidence. There are no sufficient reasons to reject the claim by the respondents. Appointment of an unqualified person as the Chief Commissioner of the Commission²; corruption cases initiated against the officials or employees of the Commission³; and the appointment and transfer of officials and employees of the Commission have also raised suspicions from time to time. In these circumstances, it is not realistic to assume that the Commission's constitutional status alone ensures and guarantees impartiality. Impartiality or fairness must be established through actions.

¹ There are examples where countless number of disputes has been presented before this court against the arbitrary decision made by the Commission that had exceeded the limitations prescribed by the Constitution and the law wherein this court had entertained those disputes and provided its interpretation and had nullified many works of the Commission.

² Om Prakash Aryal vs. Lok Man Singh Karki et.al., (Certiorari Mandamus, 073-NF-003) Date of Decision 2073 Paush 24 (corresponding to 8 January, 2017)

³ The Learned Advocates cited that Deep Basnyat, Former Chief Commissioner of the Commission and Raj Narayan Pathak former Commissioner were charged for corruption and the case is sub-judice before the Special Court

Looking at various past references, doubts have been raised about the Commission's impartiality and fairness in its work, and in order to resolve this in a logical and reasonable manner and to make it more reliable, it is expedient that the investigative methods to be followed by the Commission should be just and should follow the legal and procedural norms.

9. It is necessary to control corruption. Since this is a grave criminal activity that undermines the state system, the state must use all possible legal (appropriate) means to prevent corruption. Since Commission for the Investigation of Abuse of Authority has the authority to investigate and prosecute offences of corruption, it is expected that the Commission will be active or proactive on matters relating to preventing corruption. However, in the guise of controlling corruption, it is not deemed appropriate for the Commission to adopt arbitrary practices, engage in deceitful or fraudulent activities, framing innocent people and harassing them. The question that can the Commission perpetrate a crime by providing money is a sensitive matter that needs to be considered. The Constitution and the law have entrusted the Commission with the responsibility of controlling corruption at all levels whether it be insignificant or significant. This responsibility must be fulfilled by the Commission in a competent manner, within the boundaries of judicial values, norms, and dignity. The Commission should not abuse its authority. It is not acceptable for a constitutional body of the State, that has the resources and authority to engage in the entrapment of a person and such actions are not favorable in a civilized society. It is not virtuous of a state agency to devise fraudulent and implement the same in order to frame its own citizens. This court cannot rule out the possibility that Rule 30 may be applied to frame someone based on the complaint of a person with vested interests. It is not acceptable and appropriate to consider an investigator scheming crime plans and instigating an innocent person to commit a crime. The purpose of covert or secret operations is to dismantle criminal gangs and bring serious and organized crime within the boundaries of the law. It is not acceptable from the perspective of good governance to investigate individuals holding public office or those holding a post of public accountability to conduct fraudulent investigation that lacks transparency and is suspicious. Provided, an individual has committed an act contrary to the law, the response of the State cannot be contrary to the law. Any response by the state to a culpable act must be lawful. Otherwise, it would be deemed to be considered to be an act contrary to the rule of law.
10. Rule 30 of the Commission for the Investigation of Abuse of Authority Regulation, 2059 should also be examined within the context of the law of evidence. According to the concept of laws relating to evidence, the role of the investigator is to collect evidence and

not to create it⁴. Through the perspective of judicial fairness, any kind of evidence collected that is false fabricated, forged or tainted is not recognized as evidence. Investigation denotes "searching for the truth, reality or actual facts"; "creating evidence of something that did not occur" does not fall within the scope and ambit of fair investigation. To maintain fairness in the investigation, due process of law must be followed in the work. However, the disputed Rule 30 appears to provide authority to "create" evidence rather than to "collect" it. It is not possible to assume that this provision might not be abused. To maintain fairness in the investigation, due process of law must be followed in the work. However, the disputed Rule 30 appears to provide authority to "create" evidence rather than to "collect" it. It is not possible to assume that this provision might not be abused⁵. Consequently, this provision also poses a threat of being used with prejudice to frame an innocent person or cause suffering and harassment. Such provisions promote arbitrariness. Personal freedom and the right to a fair trial are not matters that are dependent on a person's good intentions, but rather they are determined and regulated by law, procedure, and system. Therefore, the disputed Rule 30 cannot be deemed to be appropriate, reasonable, or logical.

11. The issue as to whether or not an investigation or an inquiry can be conducted secretly or in a covert manner was also raised. Since corruption is a white-collar crime, special methods and techniques need to be applied during its investigation and inquiry, and such methods and techniques can be adopted accordingly. Article 50 of the United Nations Convention against Corruption⁶ also recognizes the use of "special investigative techniques". In countries such as the United States, Canada, the United Kingdom, Australia, and India, investigations carried out covertly or secretly are also recognized and applied in certain circumstances. In our own context too, there are also some legal and practical applications of covert or secret investigations that have been recognized. While investigating complex crimes like corruption, it is necessary and desirable to use methods and technologies such as the use of informer; conduct surveillance of the suspect; recover the amount exchanged between the service-seeking and civil servant and submit as evidence; use of technology to prepare audio-visual; seek the source of acquired property, and scientifically collect and testing the evidence. However, while doing so, one must remain within certain judicial limitations. In the pretext of investigating offenses related to corruption, it is not permissible to unjustly infringe upon an individual's personal

⁴ It is a recognized principle of evidence law that "Evidences are collected not created"

⁵ During the course of discussion, although the Learned Deputy Attorney General informed the Bench that by applying the right prescribed by Section 32 of the Commission for the Investigation of Abuse of Authority and for the purpose of implementing Rule 30, the Commission had drafted and implemented "Directive Related to Arrest, Investigation and Prosecution in offences related to Bribery, 2073", the Directive is for internal purpose of the Commission and there is no logical grounds to believe that fairness and impartiality will be maintained by the Directive.

⁶ Adopted by General Assembly resolution 58/4 of 31 October 2003

freedom, cause undue harm, and fail to follow due process of law, or exceed the limits of a fair trial. In summary, covert or secret investigations or inquiry can be conducted, however, while doing so one must collect evidence and not create it and should also ensure that the investigation does not compromise the principles of a fair trial. Laws, rules, directives, or orders that are framed and permits to perform actions contrary to the recognized principles then such laws, rules, directives or orders cannot receive judicial recognition. It would not be appropriate to limit covert or secret investigations to providing money by the respondent Commission. Other than providing money, there are other methods and techniques that can be applied during the investigation and those methods and techniques should be followed during the investigation. Covert or secret investigations can be a significant and important tool for investigating complex nature of offences. However, it should not be used lightly. Mere recovery of an amount from an employee's work place does not ipso facto establish grave offenses such as corruption. To declare someone to be corrupt, it must be proven that the individual had the intention to receive the bribe and had accordingly demanded the bribe amount and had of one's own accord and willingly received the amount.

12. The US Supreme Court in 1992 in the case of Jacobson⁷ had interpreted that in the context of enforcing the law government officials scheme a crime, instigate an innocent person to commit the criminal act, and create a criminal incident and prosecute a person. Prior to this, the American court in many disputes has provided the definition of "entrapment." For example, in 1958, Chief Justice Earl Warren had expounded that in criminal jurisprudence one should look at the distinction between "trap for the unwary innocent" and "trap for the unwary criminal"⁸. The Canadian Supreme Court in 1988 had mentioned that certain conditions should be fulfilled while performing "entrapment", and laid emphasis that fairness should be maintained during the investigation process⁹. In England, the House of Lords in 2001 while providing the definition of "entrapment" had cautioned that this could lead to the abuse of the judicial process¹⁰. The High Court of Australia had also provided its definition on "entrapment" and had emphasized on testing its

⁷ Jacobson v. United States, 503 U.S. 540 (1992)

⁸ Sherman vs. United States, 356 US 369 (1958)

⁹ R vs. Norman Lee Mack, (1988) 2 SCR 903

¹⁰ In the dispute between Regina v. Loosely, (2001) UKHL 53, the House of Lords had opined the following: "A prosecution founded on entrapment would be an abuse of the court's process. The court will not permit the prosecutorial arm of the state to behave in this way." "Entrapment is not a matter going only to the blameworthiness or culpability of the defendant and, hence, to sentence as distinct from conviction. Entrapment goes to the propriety of there being a prosecution at all for the relevant offence, having regard to the state's involvement in the circumstance in which it was committed." Prior to this decision, the House of Lords in Brannan vs. Peek 1947 (2ALL ER 572) had opined that when an investigation is done with coercion or through entrapment then such investigations instigates to commit a crime and the obligation rests on the investigator.

admissibility¹¹. In the dispute relating to Rajat Prasad case¹², the Indian Supreme Court had provided its explanation on the validity of entrapment and had opined that some moral questions arises from such an investigation and that the accused should not be held guilty for the criminal act committed under the instigation of the investigator¹³. In the context of the application made in other countries and on the basis of the judicial explanations made therein, the provisions prescribed in Rule 30 of the Commission for the Investigation of Abuse of Authority Rules, 2059 cannot be deemed to be justifiable.

13. Section 3 of the Prevention of Corruption Act, 2002, prohibits the act of providing and receiving bribes and provides for punishment for individuals committing such acts. Therefore, the act of providing or receiving bribes and instigating such acts are criminal offenses prohibited by the law. Provided, anyone commits an offence pursuant to Section 3 of the aforementioned Act, then such person pursuant to Section 55 of the Prevention of Corruption Act, 2002, and the prevailing laws of Nepal, and pursuant to the provisions of plea bargaining may be exempted from any punishment or maybe entitled to some privilege. Section 55 of the Prevention of Corruption Act, 2002, prescribes that the investigating authority may give complete or partial remission in the claim of punishment with regard to the accused who assists in the investigation and who may be presented as a witness on its behalf. However, this does not mean that the investigating agency personally can be involved in the act of receiving and providing or giving bribes. The Prevention of Corruption Act, 2002, provides for the confiscation of bribe. However, the disputed Rule 30 (2) prescribes that "no action or punishment shall be taken against the employee or person providing the bribe." Overall, the disputed provision in Rule 30 appears not to be only a procedural arrangement, but rather to some extent it is a covert attempt to create an offence and to maintain some exception/exemption in the provision of the Act. This provision is not in consonance with the provisions of the Act. The provision of providing bribes by the Commission and instigating a suspected person to commit a crime may lead to undesirable consequences.
14. For the purpose of “implementing the Act”, it seems that the Commission by exercising the authority provided by Section 37 of the Commission for the Investigation of Abuse of Authority Act, 2048 has formulated the "Commission for the Investigation of Abuse of Authority Regulation, 2059". This should also be considered in the context of the concept of delegated legislation. The study of contemporary jurisprudence shows that the

¹¹ Ridgeway v The Queen, (1995) 184 CLR 19

¹² Rajat Prasad vs. C.B.I. decision handed down by Full Bench comprising of three justice of the Indian Supreme Court on 24 April, 2024.

¹³ In Ram Krishna vs. State of Delhi (IR 1956, SC 476), State of Bihar vs. Basawan Singh (AIR 1958 SC 500) and Som Prakash vs. State of Delhi (AIR 1974 SC 989) the Indian Supreme Court has propounded precedents.

application and extension of concept of delegated legislation has become a pragmatic necessity¹⁴. The concept of the application of delegated legislation among others is to decentralize authority, assist in the functions of the legislature, facilitate in the operations of work, facilitate in technical subjects, and provide procedural arrangements. The practice of applying this has become regular in Nepal. While applying the delegated legislation, its limit or scope has also been defined. However, in the name of delegation, the legislative work or right cannot be delegated¹⁵.

15. The Legislature has the authority to enact laws that determines as to which act constitutes a crime and which does not¹⁶. While framing the laws, the Legislature should frame laws consistent with the provisions of the Constitution. Provided, a matter not included in the Constitution and Act is defined as an offence and is managed by the Rule then this will not be in consonance with the legislative procedure of framing law or it will be inconsistent with the concept of delegated legislation. According to the principle of delegated legislation, the Regulation cannot augment or restrict the parent Act. This court has repeatedly interpreted and commented on the issue of delegated legislation. In the petition submitted by Basant Bahadur Shrestha¹⁷, it has been established that "the Regulations cannot be independent and self-sufficient; provision in the Regulations cannot exceed the scope and jurisdiction of the Act; it is not permissible to adopt and implement objectives through the Regulation that have not been determined by the Legislature." This court has repeatedly interpreted and commented on the issue of delegated legislation. With regards to the writ petition filed by Advocate Bal Krishna Neupane¹⁸ the court has laid down that "provided, the Regulations that is made to achieve the objective of the Act prescribes additional grounds, such grounds shall be deemed to be contrary to the Act and cannot be acceptable and valid." Similarly, in the case of Binod Dhungel¹⁹, the court has been established that "according to the concept of administrative law regarding judicial review of delegated legislation, Regulations, sub-rules, or bye-laws made under the delegated authority cannot exceed the limits set by the Constitution which is the fundamental law of

¹⁴ The Supreme Court in *Ajaya Kumar Banerjee vs. Union of India* (AIR 1984 SC 1130) had stated that "the practice of empowering the executive to make subordinate legislation within the prescribed sphere has evolved out of political necessity and pragmatic needs of the modern welfare state."

¹⁵ In this regard, it is a recognized principle that "the Legislature cannot create a parallel legislature"

¹⁶ This can be analyzed as cycle of criminalization. Criminalization, decriminalization, re-criminalization, double criminalization, over criminalization falls within the cycle of criminalization The right to determine the legal status on such matters falls with the Legislature.

¹⁸ *Advocate Bal Krishna Neupane vs. Secretariat Council of Ministers et.al* (Nepal Law Reporter 2051, Vol. 9, Decision No. 4970)

¹⁹ *Binod Dhungel vs. Prime Minister and Office of the Council of Ministers et.al.* (Nepal Law Reporter 2063, Decision No. 7660, Vol. 3, pg. 880)

the land and the parent Act that has given birth to the Regulation; provisions can be made in the Regulation on procedural matters necessary for the implementation of the substantive legal provisions prescribed in the Act; no provision can be made in the Regulation on matters that are not contemplated by the Act enacted by the legislature." With regards to the writ petition filed by Advocate Madhav Kumar Basnet²⁰, the court has laid down that "the work and proceeding performed under a delegated authority should not exceed the scope of delegation; substantive matters are directed by legislative act, and Regulation covers only procedural aspects, in other words Regulation makes provisions on procedural matters and not on substantive matters." In the case of Shiv Chandra Poudel²¹, this court has propounded that "additional provisions that are not prescribed in the Act or for which the Act has not granted authority cannot be included in the Regulation; for the implementation of the provisions of the Act, Regulation can be made and regulated within the limits of the authority granted by the Act; in the name of regulating and controlling unauthorized bodies or individuals cannot be granted such authority."

16. The Indian Supreme Court has also laid down that the rules made through the application of delegated powers can provide for procedural matters necessary to implement the substantive provisions contained in the Act made by the legislature; it is not permissible to include provisions in the rules that replaces, increases, decrease, or create exceptions to the substantive provisions in the Act made by the legislature²². In addition to the provisions in the Constitution, provided, the matters made pursuant to the delegated legislation is contrary to the parent Act then such matters are subject to judicial review²³. Provided, a rule is made that is contrary to the provisions of the Constitution or the parent Act, then the rule becomes a "colorable legislation". Therefore, from the perspective of established principles on delegated legislation, the provision of Rule 30 of the Commission for the Investigation of Abuse of Authority Rules, 2059, cannot be deemed to be appropriate.

²⁰ Advocate Madhab Kumar Basnet vs. Office of the Council of Ministers et.al. (Nepal Law Reporter 2065, Vol. 12, Decision No. 8043. Similar kind of interpretation has been made in Sharmila Maharjan vs. Public Service Commission et.al. (Nepal Law Reporter 2074, Decision No. 9886); Since, the court has propounded various precedents, the court does not deem it appropriate to present a different view.

²¹ Shiva Chandra Paudel vs. Prime Minister and Office of the Council of Ministers et.al. (Nepal Law Reporter 2069, Vol. 3, Decision No. 8777)

²² In this regard, the Indian Supreme Court in Greater Bombay Municipal Corp. vs. Nagpal Printing Mills (AIR 1988 SC 1009) has stated the following: Delegated legislation repugnant to or inconsistent with or in contravention of or in excess of or overriding the provisions of the parent Act is ultra vires

²³ In Indian Express Newspapers vs. Union of India (AIR 1986, SC 515) the Supreme Court has laid down that "every subordinate legislation must yield to the plenary legislation."

17. The Deputy Attorney General and Joint Government Attorneys on behalf of the respondents had stated that since this Court has recognized or provided validity to the actions and evidence collected pursuant to the disputed Rule 30 for quite some time, the act cannot be declared invalid. It is without doubt that disputes related to the collection of evidence collected under Rule 30 have been entertained by this court from time to time, and that the collected evidence has also been accepted and judgments have been rendered therein. However, it is worth mentioning that in the aforementioned disputes, the provision of Rule 30 was never challenged on the ground of it being contrary to the Constitution and the law, and resolution to those question were never made.. Provided any question on the constitutionality of an Act or legislation laws is raised and is not formally declared invalid and void, then the laws including the Act and Regulation is deemed to be made pursuant to the Constitution and such Act or Regulation would be applied on the assumption of its constitutionality²⁴. In general, in the absence of a challenge to the constitutionality of a law, the court does not have the authority to go beyond the context and declare a law invalid (except in exceptional²⁵. Where the question of constitutionality is raised, the question should be resolved by the court. It would not be appropriate for the court to avoid from deciding on the question of constitutionality on the basis of limitation. The fact that a law contrary to the Constitution has been in practice for a long time does not make it valid. This is a matter of general judicial practice or custom. Therefore, it does not seem reasonable to interpret that the disputed Rule 30 has been given final validity by this court simply because evidence collected under that Rule has been accepted and judgments have been made in some disputes.
18. No Act provides consent for the use of State fund for the purpose of corruption. Where the Act has not provided any authority, insertion of provisions in the Regulation for the purpose of using State funds for bribery does not seem to be reasonable. Rule 30 of the Commission for the Investigation of Abuse of Authority Regulation, 2059, provides for confiscation of the bribery amount which is contrary to the provision of the Act. It has been found that the bribery amount provided by the Commission is taken back by the Commission. The act of providing the amount, instigating to accept the bribe and thereafter arresting the person and filing a case and awarding punishment, recovering the bribed amount and re-arresting another person has narrowed the provision of confiscation

²⁴ Indian Supreme Court Justice K. Ramaswamy in *ML Kamar vs. New India Assurance* (1992 AIR 1072) opined that "There is a presumption in favour of constitutionality of a legislation or statutory rule unless ex facie it violates the fundamental rights guaranteed under Part III of the constitution. If the provisions of a law or the rule is construed in such a way as would make it consistent with the Constitution and another interpretation would render the provision or the rule unconstitutional, the Court would lean in favour of the former construction." Indian Supreme Court Justices G.B. Pattanaik and M. Srinivasan on 3 March, 1998 had in *K. Anjaiah vs. K. Chandraiah* opined similar concept.

²⁵ For example law made to directly curtail the fundamental rights can be taken as an exception

of the amount as provisioned in the parent Act or it appears that the Regulation has created an exception. This seems to weaken the credibility of fair investigation. Considering all the aspects mentioned hereinabove, it is deemed necessary, appropriate and expedient to declare the provision in Rule 30 of the Commission for the Investigation of Abuse of Authority, 2059, as invalid and void.

19. It is for this court to decide as to when and from which date the aforementioned Rule 30 should be declared null and void. The Commission for the Investigation of Abuse of Authority Rules, 2059, has been in commence since 2059/5/31.(corresponding to 16 September, 2002). It has been more than 18 years that the Regulation has been in enforcement. In the interim, the disputed Rule 30 has been applied to perform acts and some disputes have been settled by this court as well, by recognizing the evidence collected therein. Given that the rule has been in application/execution for a long duration, declaring the aforementioned Rule 30 void ab initio from the date of its enactment (from its commencement) would affect many decisions and proceedings that have already been made. According to Article 133 (1) of the Constitution of Nepal, if any law is found to be inconsistent with the Constitution, the Supreme Court has the extraordinary power to declare that law to be “void either ab initio or from the date of the decision if the law appears to be inconsistent”. It has been found in India and other countries that under certain circumstances laws are be declared null and void with a prospective effect. Taking into considering the aforementioned aspects, it is deemed appropriate to declare the provision of the disputed Rule 30 ultra vires with a prospective effect from the date of decision.
20. Pursuant to the grounds and reasons discussed above, the provision contained in Rule 30 of the Commission for the Investigation of Abuse of Authority Rules, 2059, is found to be inconsistent with the spirit to the right to a fair hearing as provided in Article 20 (9) of the Constitution of Nepal and inconsistent to the provisions underlined in Section 3 of the Corruption Prevention Act, 2059; the said provision is also deemed to be inappropriate and incoherent with the established principles of criminal justice, due process of law, and judicial norms regarding collection of evidence; the said provision is inconsistent with the concept of delegated legislation and the interpretations and precedents propounded by this court; the said provision is also perceived to encourage the investigating officer to act in an arbitrary manner. Therefore, pursuant to Sub-article (1) of Article 133 of the Constitution of Nepal, Rule 30 of the Commission for the Investigation of Abuse of Authority Rules, 2059, is declared void and is applicable from today Baisakh 8, 2078 (corresponding to 21 April, 2021).²¹.
21. The writ petition demands for Rule 30 of the Commission for the Investigation of Abuse of Authority Rules, 2059 to be declared invalid and void, and “all proceedings undertaken” on the basis of recovery of the amount with the application of the Rule be declared void

ab initio through the issuance of the order of certiorari or any other appropriate order. The learned Advocates on behalf of the writ petitioners had also argued that the case should be dismissed since the case was filed in accordance to the amount recovered pursuant to Rule 30. Rule 30 has been adopted as one of the means or methods for collecting evidence. Other than Rule 30, there are other measures for collecting evidence. Provided, it is deemed that Rule 30 is invalid and void does not denote that the cases sub-judice before the court ipso facto is deemed to come to an end or dismissed or that all proceeding is deemed to be void ab initio. There are established procedures for resolving disputes that are in the judicial process. Where Rule 30 has been declared invalid and void, this does not denote that cases sub-judice before the court should be dismissed or all proceedings should be declared invalid and void. The judicial resolution of the case depends on the evaluation of other evidence collected in the case. On matters relating to cases that are sub-judice before the court or are under judicial process, the collection of evidence pursuant to the Regulation that is in other words, the government fund that was provided by the respondent Commission and recovered and submitted as evidence cannot be deemed to be admissible. The case cannot be dismissed or all proceedings cannot be declared invalid and void for this reason only. Therefore, no further discussion or commentary is required to be made in this context. It is hereby ordered to do as per the particulars.

Particulars

1. It is hereby ordered to provide a copy of this order to the respondents for their notification and to correspond to the Office of the Attorney General for the execution of the order.
2. Provided, any law pursuant to Sub-article (1) of Article 133 of the Constitution is declared invalid or void by the final order or judgment by the Constitutional Bench pursuant to Rule 27 (1) of the Supreme Court (Constitutional Bench Operation) Regulation, 2072, it is hereby ordered that the Registrar keep a copy of such order or judgment and send the information thereof to the Ministry of Law and Justice, and to provide a copy of this order to the Administration Division of this court.
3. Where the order has been issued as per the petition, the petitioner pursuant to Rule 15 (3) of the Supreme Court (Constitutional Bench Operations) Regulation, 2015, is entitled to refund of the amount deposited, therefore, it is hereby ordered to inform the Account Section of this court to refund the deposited amount of Rs. 5,000 that was deposited on 2074/09/02 (corresponding to 17 December, 2017) having receipt number 3686. It is hereby ordered to remove the case from the register; enter the order into the electronic system and to submit the case file to the Record Section as per the Rules.

Concurring with the above Opinion:

Chief Justice Cholendra Shumsher J.B.R.

Justice Deepak Kumar Karki

Justice Meera Khadka

Justice Hari Krishna Kark

Bench Officer: Harka Bahadur Chettri

Dated, 8th Baishakh, 2078 BS, 4th day of the week.

(Corresponding to 21 April, 2021)