

Supreme Court, Constitutional Bench
Rt. Hon. Acting Chief Justice Deepak Raj Joshi
Hon. Justice Om Prakash Mishra
Hon. Justice Cholendra Shamsher J.B.R.
Hon. Justice Deepak Kumar Karki
Hon. Justice Kedar Prasad Chalise

Order

Date of Order: 2075/3/13 (corresponding to 27 June, 2018)

074-WC-0039

Case: Certiorari

Petitioner: Madhav Prasad Chamlagai, Central Member of the Federation of Journalists, representing disability, resident of Ilam District, Dhuseni V.D.C. Ward No. 8 currently residing at Kathmandu District, Budhanilkantha Municipality, Ward No. 10.

Vs.

Respondent: Nepal Government, Office of the Prime Minister and Council of Ministers et.al.

- The Constitution expressly provides for separate legal arrangements to protect, empower, and develop persons and groups with different capacities and circumstances, thereby granting the State special authority to bring them into the mainstream in a manner that enables them to meaningfully enjoy the rights guaranteed under the Constitution. Consequently, persons with disabilities are entitled to receive additional priority and protective measures when accessing any services provided by the State. To that end, the State is required to provide additional safeguards, opportunities, and facilities to ensure that persons with disabilities can fully participate in services and opportunities made available by the State, on an equal footing with other able-bodied persons.

(Para No. 9)

- Mountaineering, by its very nature, requires extraordinary courage, physical and mental capacity, readiness, deep determination, and skill, and there is no dispute in this regard. It is not the case that a person of any physical condition can automatically undertake mountaineering or summit a peak. While individuals who appear physically robust may often be considered suitable for mountaineering, the mere existence of a physical disability does not, in itself, render a person permanently incapable or unqualified for such endeavors. There is no scientific basis to categorically determine eligibility or ineligibility solely on the ground of physical impairment.

(Para No. 11)

- The idea of a society composed solely of homogeneous individuals is neither realistic nor feasible from an anthropological perspective. Consequently, the presence of individuals with the same age, experience, physical condition, capacity, competence, and background in society is extremely rare; rather, a society enriched by diversity across all these dimensions is the natural and inevitable reality.

(Para No. 14)

- It is impermissible to presume that a person with a physical disability is incapable of independently assessing their own abilities and, on that basis, to treat such persons in a manner that undermines their self-respect. Every individual has the right to demonstrate their capabilities, and the State is obligated to make arrangements that recognize and respect such capabilities. Although the legislature possesses plenary authority to enact laws, no law whether enacted directly by the legislature or framed through delegated legislation may contain provisions that infringe upon or diminish the self-respect and dignity of any person.

(Para No. 15)

- The State is required to treat all citizens equally and without discrimination. Persons with disabilities are not persons without capacity but persons with different capacities; therefore, questioning their ability, competence, and readiness, acting with prejudice against them, and thereby devaluing their capabilities on the part of the State is contrary to the Constitution as well as to the principles and standards of international human rights.

(Para No. 16)

- A legal provision that outright denies permission to persons with disabilities to engage in mountaineering is discriminatory and contrary to the principle of equality. Such a provision discourages the enjoyment by persons with disabilities of the right to live with dignity and self-respect, undermines equal access to public services and facilities, inflicts harm upon their human sensitivity, and deprives them of opportunities to live a dignified life and to maintain equal access to public services and facilities. Accordingly, the provision contained in Rule 3 (2a) (c) of the Mountaineering Regulation, 2059, cannot be sustained; therefore, the said Clause (c) is hereby declared void ab-initio.

(Para No. 17)

On behalf of the Petitioner:

On behalf of the Respondent:

Precedents Followed:

Relevant Laws:

Order

Justice Om Prakash Mishra: The summary of the facts and the decision of the writ petition submitted pursuant to Article 133 (1) and (2) of the Constitution of Nepal under the extra-ordinary jurisdiction of this court are as follows:

Fact Section

The contents of the writ petition filed by Madhav Prasad Chamlagain are as follows:

I, the petitioner, am a person with a physical disability and am presently serving as the incumbent Central Member representing persons with disabilities in the Federation of Nepali Journalists. The Government of Nepal, Ministry of Culture, Tourism and Civil Aviation, by a notice published in the Nepal Gazette, Volume 67, Number 53, dated 2074/10/15 (corresponding to 29 January, 2018), declared that the *Mountaineering (Fifth Amendment) Regulation, 2074* shall come into force with immediate effect. By adding Sub-rule (2)(a) to Rule 3 of the said Regulation, Clause (c) thereof has imposed a prohibition on granting mountaineering permits to persons who lack both hands or both legs, or who are unable to see with both eyes. The said provision inflicts injury upon the dignity and self-respect of the petitioner, a person with disability, as well as upon all Nepali citizens with disabilities, thereby rendering the matter one of public interest. The impugned provision is inconsistent with the fundamental rights guaranteed under Articles 18 and 42 of the Constitution of Nepal, and further violates the petitioner's fundamental and legal rights conferred by Articles 17, 18, 33, and 42 of the Constitution of Nepal. In the absence of any other alternative and effective remedy for the enforcement of such rights, the petitioner pursuant to Article 46 and 133 (1) and (2) has approached the honorable court with the present writ petition.

The provision contained in Clause (c) of Sub-rule (2a) of Rule 3, as inserted by the Fifth Amendment to the Mountaineering Regulation, 2059, discriminates against persons with disabilities. The said provision is inconsistent with the right to equality guaranteed under Article 18 (2) of the Constitution of Nepal; the right conferred by Article 42 (3) of the Constitution, which guarantees citizens with disabilities the right to live with dignity and self-respect with recognition of diversity and to have equal access to public services and facilities; and is also contrary to Articles 5 and 9 of the Convention on the Rights of Persons with Disabilities. Further, the impugned provision adversely affects the right of persons with disabilities to employment, occupation, and profession and inflicts injury upon their dignity and self-respect, disregards and undermines their capacity and competence, and imposes an impermissible restriction upon their fundamental rights. Therefore, the petitioner requests the honorable court to issue an order of certiorari quashing and declaring void Clause (c) of Sub-rule (2a) of Rule 3, as inserted by the said amendment. It is further prayed that, until the final disposal of the present petition, an interim order be issued in the name of the respondents restraining them from enforcing or causing the enforcement of the impugned provision.

An order had been issued by the court on 2074/11/23 (corresponding to 7 March, 2018) which reads as follows: What has transpired in this matter? Why an order as sought by the petitioner should not be issued. Provided, there are any grounds and reasons as to why the order should not be issued, the respondents are hereby ordered to submit their rejoinder with 7 days excluding the period of travel and to submit the case file upon receipt of the rejoinder or upon the expiry of the limitation period. With regard to the prayer seeking the issuance of an interim order directing that the provision contained in Clause (c), which states “persons who do not have both hands or both legs, or who are unable to see with both eyes,” inserted by the Fifth Amendment to the Mountaineering Regulation, 2059 by amending Rule 3 of the principal Regulation and adding Sub-rule (2a), and which provides that such persons shall not be granted mountaineering permits, not be implemented or caused not to be implemented with immediate effect. Upon consideration thereof, it is seen that Article 18 (2) of the Constitution of Nepal guarantees the constitutional right that no discrimination shall be made in the application of general laws on grounds of origin religion, race, caste, tribe, sex, physical condition, condition of health, marital status, pregnancy, economic condition, language or region, ideological or on similar other grounds. In view of the aforesaid constitutional guarantee of the right to equality, the provision introduced by the Fifth Amendment to the Mountaineering Regulation, 2059, which deems persons with certain physical conditions or disabilities to be directly unfit for mountaineering and, on that basis, denies them permission, appears *prima facie* to be discriminatory and to have subjected persons with disabilities to unequal treatment in the application of general law. Accordingly, an interim order in the name of the respondents has been issued by this court directing that the provision contained in Clause (g) of Sub-rule (2a), added after Sub-rule (2) of Rule 3 by the Fifth Amendment to the Mountaineering Regulation, 2059, shall not be implemented or caused to be implemented with immediate effect. The order also directed to provide a notification of the order to the respondents.

The rejoinder submitted by Dinesh Bhattarai, Director General of the Department of Tourism is as follows: Since mountaineering is an inherently adventurous activity, a person undertaking a Himalayan ascent must be mentally and physically prepared. In the event that a person who does not have both hands or both legs, or who is unable to see with both eyes, seeks to engage in mountaineering, such person would, in essence, have to rely primarily on high-altitude workers and mountain guides and undertake the ascent with their assistance. In circumstances where an accident occurs necessitating rescue, not only the climber but also the lives of the workers and guides may be exposed to risk. Taking these considerations into account, the Regulation was amended to impose a prohibition on granting mountaineering permits to persons who do not have both hands or both legs, or who are unable to see with both eyes. Under the Constitution of Nepal, the State bears the responsibility to protect the life, property, equality, and liberty of its citizens. In light of this, taking into account the highest potential of persons who do not have both hands or both legs, or who are unable to see with both eyes, in circumstances where they possess alternative capacities, the State is required to prioritize the protection of their interests while regulating risks to life in adventurous activities such as mountaineering. Accordingly, the amended provisions of the Regulation do not violate their fundamental rights, but rather serve to safeguard their best

interests and ensure that the right to equality is not infringed. Therefore, it is prayed that the present writ petition be dismissed.

Rejoinder submitted by Krishna Prasad Devkota, Secretary on behalf of the Ministry of Culture, Tourism and Civil Aviation is as follows: When a physically challenged person attempts to ascend high peaks, there exists likelihood that they may face physical risks. Moreover, such persons would need to rely on the assistance of guides or other individuals to undertake mountaineering, which may render the ascent a matter of potential dispute. Taking into consideration the best interests of such persons, the Mountaineering Regulation has been amended to prohibit persons who do not have both hands or both legs, or who are unable to see with both eyes, from engaging in mountaineering. Accordingly, it is prayed that the present writ petition be dismissed.

Rejoinder submitted by Rajeev Gautam, Secretary of the Office of the Prime Minister and Council of Ministers is as follows: The Government of Nepal, in compliance with the Constitution and prevailing laws, is committed to actualizing the concept of a legal state, while ensuring, protecting, and promoting the rights and entitlements granted to citizens under the Constitution and law, and providing certainty in their enjoyment. The Tourism Act, 2035, and the Mountaineering Regulation, 2059, have been implemented with the objective of promoting tourism, safeguarding the economic interests of the general public, and ensuring the health, welfare, and safety of both international tourists visiting Nepal and domestic tourists traveling within the country. The matters amended by the competent authority under the said laws cannot be questioned otherwise. Mountaineering is a sensitive subject closely related to the safety of citizens. The amended provisions of the Regulation do not discriminate against persons with disabilities, but rather take into account their additional safety sensitivities and provide necessary measures accordingly. Therefore, the said provisions cannot be deemed otherwise and hence, the writ petition should be quashed.

Decision

The writ petition having entered into the cause-list had been submitted before this Bench. Learned Advocate Mr. Rewati Kharel on behalf of the petitioner submitted that the provision contained Rule 3 (2a) (c) , as inserted by the Fifth Amendment to the Mountaineering Regulation, 2059, which prohibits persons who “do not have both hands or both legs, or who are unable to see with both eyes” from engaging in mountaineering, presumes that physically challenged persons are incapable of mountaineering. Such a presumption, when considered in light of the human sensitivity of persons with physical disabilities, amounts to a measure that insults and demeans them. Learned advocate further submitted that this provision is contrary to Articles 18 (2) and 42(3) of the Constitution of Nepal. It was further argued that the State cannot predetermine the capacity, courage, or competence of any individual and disregard their abilities, nor can the State, in enacting laws, undermine or restrict what is recognized by the Constitution. However, the amended provision, which denies mountaineering permission solely on the ground of disability, undermines the right of such persons to live with dignity and to enjoy equal access to facilities.

Accordingly, the learned counsel submitted that the provision contained in Rule 3 (2a) (c) as inserted by the Fifth Amendment to the Mountaineering Regulation, 2059, should be declared invalid and should be quashed.

Learned Joint Government Attorney Mr. Padam Prasad Pandey, appearing on behalf of the respondents, including the Office of the Prime Minister and Council of Ministers, submitted that the Mountaineering Regulation prescribes three specific circumstances under which mountaineering permission shall not be granted. The provision was made based on the presumption that persons who do not have both hands or both legs, or who are unable to see with both eyes, cannot safely undertake mountaineering in the high mountains, and it was enacted for their protection. Since the State acts as the guardian of its citizens, the measure was taken in accordance with the proviso clause of Article 18 (3) of the Constitution of Nepal and Article 10 of the Convention on the Rights of Persons with Disabilities, to safeguard persons with disabilities and prayed that the writ petition should be dismissed.

Upon hearing the arguments presented by the learned counsel for the petitioner and the learned Joint Government Attorney for the respondents, and upon perusal of the entire record along with the documents annexed to the case file, it appears that the following principal issues need to be resolved:

- (a) As to whether or not the provision contained in Rule 3 (2a) (c) as inserted by the Fifth Amendment to the Mountaineering Regulation, 2059, is inconsistent with the Constitution of Nepal?
 - (b) As to whether or not an order as prayed in the petition is warranted?
2. Upon consideration of the matter, it appears that by enacting the Fifth Amendment to the Mountaineering Regulation, 2059, and inserting Sub-rule (2a) into Rule 3, certain conditions were prescribed under which mountaineering permission would not be granted. Clause (c) of Sub-rule (2a) prohibits persons who do not have both hands or both legs, or who are unable to see with both eyes, from obtaining mountaineering permits. The Government of Nepal, Ministry of Culture, Tourism and Civil Aviation, published a notice in the Nepal Gazette, Volume 67, Number 53, dated 2074/10/15 (corresponding to 29 January, 2018), bringing the *Mountaineering (Fifth Amendment) Regulation, 2074* into effect. The impugned provision imposes an unreasonable restriction on the rights of persons with disabilities to live with dignity, to enjoy social justice, and to exercise the right to equality. As such, the provision is inconsistent with Articles 18 (2) and 42 of the Constitution of Nepal. Accordingly, it is prayed that, in accordance with Articles 133 (1) and (2) of the Constitution of Nepal, an order of certiorari be issued to quash the said provision.
3. It was noted in the rejoinder submitted on behalf of the respondents that mountaineering is a sensitive matter closely connected to the safety of citizens, and that the Regulation has been

appropriately amended to provide necessary measures while taking into account the additional safety sensitivities of persons with disabilities.

4. Upon examination of the provisions added by the Fifth Amendment to the Mountaineering Regulation, 2059, it is observed that Sub-rule (2a) of Rule 3 of the Regulation provides as follows:

(2a) Notwithstanding anything contained in Sub-rule (2), the following persons shall not be granted permission to undertake mountaineering:

- a) who have not completed sixteen years of age;
- b) Persons certified by a medical practitioner as unfit for mountaineering due to a serious illness; or
- c) Persons who do not have both hands or both legs, or who are unable to see with both eyes.

5. No dispute arises that the provision contained in Clause (c) of Sub-rule (2a) imposes a prohibition on persons with certain specified disabilities from being granted permission to undertake mountaineering. Under this legal provision, it is evident that the restriction was imposed based on the presumption that persons who do not have both hands or both legs, or who are unable to see with both eyes would be unable to safely engage in mountaineering.
6. Article 7 of the Universal Declaration of Human Rights, 1948, provides that all persons are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination. Similarly, Article 26 of the International Covenant on Civil and Political Rights, 1966, incorporates the provisions reflected in the Universal Declaration of Human Rights. To give effect to the provisions of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, the *Convention on the Rights of Persons with Disabilities*, 2006, was adopted to ensure equal rights for persons with disabilities. Article 5 of the Convention embodies the principle of equality and establishes the obligation of States Parties to prohibit any discriminatory treatment on the basis of disability and to take appropriate and necessary measures to ensure the substantive equality of persons with disabilities. Similarly, Article 9 of the same Convention obligates each State Party to ensure that persons with disabilities can participate fully and equally in all aspects of public and governmental life. It requires the elimination of all barriers and impediments, and mandates that equal access to public services and facilities be guaranteed, thereby facilitating the full and equal enjoyment of such services and participation in public life by persons with disabilities.
7. Since Nepal has ratified the Convention and its optional protocols, the State has embraced its international obligations. In accordance with the Constitution of Nepal, no discrimination shall be made among citizens, and all citizens are to be treated equally, with opportunities to

lead a dignified life being ensured. The Constitution further provides for the promotion of equality through inclusion and empowerment for those who, due to various reasons, have been deprived of the full exercise of State mechanisms or access to public services and facilities.

8. Article 8 of the Constitution of Nepal prescribes for Right to Equality and under the Article, the following provisions have been prescribed: “(1) *All citizens shall be equal before law. No person shall be denied the equal protection of law.*
- (2) *No discrimination shall be made in the application of general laws on grounds of origin, religion, race, caste, tribe, sex, physical condition, condition of health, marital status, pregnancy, economic condition, language or region, ideology or on similar other grounds.*
- (3) *The State shall not discriminate citizens on grounds of origin, religion, race, caste, tribe, sex, economic condition, language, region, ideology or on similar other grounds.*

Provided that nothing shall be deemed to prevent the making of special provisions by law for the protection, empowerment or development of the citizens including the socially or culturally backward women, Dalit, indigenous people, indigenous nationalities, Madhesi, Tharu, Muslim, oppressed class, Pichhada class, minorities, the marginalized, farmers, labours, youths, children, senior citizens, gender and sexual minorities, persons with disabilities, persons in pregnancy, incapacitated or helpless, backward region and indigent Khas Arya”.

9. The intent of the said constitutional provisions indicates that the State may, through special legal measures, safeguard the interests of persons with physical disabilities, including the petitioner, and facilitate their overall development and full participation in mainstream society. The Constitution expressly provides for separate legal arrangements to protect, empower, and develop persons and groups with different capacities and circumstances, thereby granting the State special authority to bring them into the mainstream in a manner that enables them to meaningfully enjoy the rights guaranteed under the Constitution. Consequently, persons with disabilities are entitled to receive additional priority and protective measures when accessing any services provided by the State. To that end, the State is required to provide additional safeguards, opportunities, and facilities to ensure that persons with disabilities can fully participate in services and opportunities made available by the State, on an equal footing with other able-bodied persons.
10. It appears from the rejoinder of the respondents that the legal provision contained in Clause (c) of Sub-rule (2a) of Rule 3 of the Mountaineering Regulation, 2059, was enacted for the protection of persons with disabilities. Clause (c) prohibits persons with disabilities from engaging in mountaineering based on the rationale that in the absence of additional guides or assistants, extra tools or equipment, or supplementary physical support necessary to ensure

their safety during mountaineering, such persons would face undue risk. It is evident that the State authorities have adopted and understood this prohibition as a measure intended to safeguard and protect the interests of persons with disabilities.

11. Mountaineering, by its very nature, requires extraordinary courage, physical and mental capacity, readiness, deep determination, and skill, and there is no dispute in this regard. It is not the case that a person of any physical condition can automatically undertake mountaineering or summit a peak. While individuals who appear physically robust may often be considered suitable for mountaineering, the mere existence of a physical disability does not, in itself, render a person permanently incapable or unqualified for such endeavors. There is no scientific basis to categorically determine eligibility or ineligibility solely on the ground of physical impairment. Fundamentally, a person's eligibility for mountaineering depends on essential factors such as willpower, firm determination, mental courage, adequate knowledge of the climbing route, assistance from guides available at high altitudes, availability of necessary physical equipment, the ability to tolerate the effects of high-altitude geography, and the capacity to utilize oxygen as a vital element. The absence of any of these essential factors may render a person unfit for mountaineering. Therefore, the understanding that mere possession of fully functional hands, legs, and eyesight alone constitutes the standard of eligibility for mountaineering, and that any person lacking these must be deemed unfit, cannot be regarded as complete, absolute, or permanent. Consequently, the argument advanced by the respondents that the provision in Sub-rule (2a) of Rule 3 of the Mountaineering Regulation, 2059, prohibits the petitioner and other persons with physical disabilities from mountaineering on the ground that their safety cannot be ensured is entirely unfounded and unjustified.
12. The argument that prohibiting persons with disabilities provides them with special protection is, in itself, unfounded. When the Constitution mandates the guarantee of special protection and special opportunities to certain classes of persons, the appropriate response, where participation in a State service, employment, or opportunity carries risks due to their physical or mental condition, is to adopt protective measures or ensure additional safety. To argue that simply barring participation constitutes protection is, in effect, a way for the State to evade its constitutional obligations. Exclusion, prohibition, or being deemed unfit cannot be construed as affording protection to anyone. For protection, it is essential to provide special arrangements, additional facilities, greater opportunities, and extra support to persons with disabilities, rather than assuming that mere prohibition constitutes protection. Therefore, any law that imposes restrictions on the constitutional rights of persons with physical disabilities, bars them from accessing opportunities, or creates any form of discrimination between able-bodied and disabled persons is deemed to be invalid.
13. With regard to the present petition's claim that the provision contained in Clause (c) of Sub-rule (2a) of Rule 3 of the Mountaineering Regulation, 2059, is discriminatory against persons with disabilities, it is observed that persons with disabilities constitute a special category of persons. The Constitution specifically empowers the State to make special arrangements to

ensure their equal participation across all levels and sectors of State mechanisms. Accordingly, it is the duty of the State to promote the holistic development of such persons, to create conditions for equal and meaningful access to public services and facilities, and to ensure that they can equally enjoy public services and facilities. The enjoyment and benefit of services, facilities, and opportunities made available by the State in public life, or the unobstructed utilization of any opportunity provided by the State and the receipt of a fair share of its benefits, constitute a natural right of every individual/citizen within the country. Therefore, the benefits of opportunities available in the country cannot be restricted to any particular class, gender, or persons with a specific physical condition; such opportunities must be made accessible to all.

14. Since the structure of society is formed through the participation of all, it is natural for a society to include children, the elderly, the healthy, the sick, the educated, the uneducated, the affluent, the impoverished, able-bodied, persons with disabilities, as well as people from diverse classes, genders, and castes. The idea of a society composed solely of homogeneous individuals is neither realistic nor feasible from an anthropological perspective. Consequently, the presence of individuals with the same age, experience, physical condition, capacity, competence, and background in society is extremely rare; rather, a society enriched by diversity across all these dimensions is the natural and inevitable reality. As members of society entitled to human dignity, every individual has a duty towards their community, and correspondingly, each member possesses the right to expect or claim the benefits of opportunities available within that society. Such claims cannot be denied or treated differently on the basis of a person's status, physical condition, or similar attributes. Persons with physical disabilities, including the petitioner, may possess or develop a strong desire, willpower, mental determination, and readiness to undertake mountaineering. The availability of mountaineering opportunities to persons with diverse physical capacities does not imply that all such persons must necessarily reach the summit. Furthermore, the mere availability of such an opportunity does not mean that everyone will necessarily undertake mountaineering. As discussed above, participation in mountaineering is not determined solely by physical strength; rather, mental willpower is of paramount importance. Additionally, mountaineering is not an entirely individual endeavor, but a collective activity, and there are instances where persons with physical disabilities have successfully undertaken mountaineering with the physical assistance of able-bodied individuals. It has been noted that Eric, a visually impaired individual, undertook climbs of various mountains in 2001; Arunima Sinha, an Indian national missing one leg, climbed mountains in 2011; and Mark, a New Zealand citizen without both legs, ascended various peaks in 2006. Furthermore, following the filing of the present petition and the issuance of an interim order by this court, Harka Bahadur Budhathoki, who has both legs missing, also successfully climbed Mount Everest.
15. It is impermissible to presume that a person with a physical disability is incapable of independently assessing their own abilities and, on that basis, to treat such persons in a manner that undermines their self-respect. Every individual has the right to demonstrate their

capabilities, and the State is obligated to make arrangements that recognize and respect such capabilities. Although the legislature possesses plenary authority to enact laws, no law whether enacted directly by the legislature or framed through delegated legislation may contain provisions that infringe upon or diminish the self-respect and dignity of any person. No person is constitutionally empowered to enact laws that treat persons with disabilities in a prejudiced manner or as a weaker class. Every individual is entitled to be treated with dignity and to live with self-respect, a right guaranteed by the Constitution. Under Article 42 (3) of the Constitution, as part of the right to social justice, “*The citizens with disabilities shall have the right to live with dignity and honor, with the identity of their diversity, and have equal access to public services and facilities*”. Even under the foregoing provision, the State cannot make any arrangement that would infringe upon the right of persons with disabilities to live with dignity and self-respect. Any law enacted in a manner that violates such right cannot acquire legitimacy. It appears that the State may, in accordance with the proviso clause of Article 18 (3) of the Constitution, make special provisions to ensure equal access for persons with disabilities to public services and facilities. However, any arrangement made under the pretext of special provision that injures the dignity, self-respect, or feelings of any individual, or imposes barriers to access public services and facilities, creates a situation of discrimination among individuals.

16. The State is required to treat all citizens equally and without discrimination. Persons with disabilities are not persons without capacity but persons with different capacities; therefore, questioning their ability, competence, and readiness, acting with prejudice against them, and thereby devaluing their capabilities on the part of the State is contrary to the Constitution as well as to the principles and standards of international human rights. It is the duty of the State to adopt appropriate measures to ensure that persons with disabilities are able to live independently and participate fully in all aspects of life, and to guarantee their access to all types of public services and facilities. The State’s obligation to ensure the active participation of such persons in every sphere of public life is undermined when it enacts laws that permit discriminatory treatment among citizens, thereby mocking the principle of equality. Since the Constitution is the fundamental law of the country and the parent law of all legislation enacted by the legislature, and having been promulgated by citizens possessing sovereign authority, any law enacted that contracts or misinterprets the spirit and essence of the Constitution is contrary to the Constitution itself. Enacting a law that, based on the presumption that persons with disabilities cannot undertake mountaineering, questions their capabilities and denies them permission to engage in mountaineering under the pretext of safeguarding their lives, violates the right under Article 18 (2) of the Constitution of Nepal, which prohibits discrimination on the basis of disability. Accordingly, the provision under sub-rule (2a), clause (c) of Rule 3, added by the Fifth Amendment to the Mountaineering Regulations, 2059, which denies permission for mountaineering to persons who have lost both hands or feet or who are blind, is contrary to Articles 18 (2) and 42 (3) of the Constitution of Nepal.

17. In considering whether an order should be issued as prayed for in the petition, it is observed that legal provision that outright denies permission to persons with disabilities to engage in mountaineering is discriminatory and contrary to the principle of equality. Such a provision discourages the enjoyment by persons with disabilities of the right to live with dignity and self-respect, undermines equal access to public services and facilities, inflicts harm upon their human sensitivity, and deprives them of opportunities to live a dignified life and to maintain equal access to public services and facilities. Accordingly, the provision contained in Rule 3 (2a) (c) of the Mountaineering Regulation, 2059, cannot be sustained; therefore, the said Clause (c) is hereby declared void ab-initio. It is hereby ordered to provide a copy of this order to the respondents and remove the case from the registry and accordingly submit the case file to the Record Section.

Concurring with the above Opinion

Acting Chief Justice Deepak Raj Joshi

Justice Cholendra Shamsher J.B.R.

Justice Deepak Kumar Karki

Justice Kedar Prasad Chalise

Bench Officer: Indira Sharma

Dated Year 2075 of the Month of Asadh Date 13 Day 4

(Corresponding to Year 2018 of the Month of June Date 27 Day 4)