

Supreme Court, Constitutional Bench

Rt. Honorable Acting Chief Justice Hari Krishna Karki

Honorable Justice Vishwambhar Prasad Shrestha

Honorable Justice Ishwar Prasad Khatiwada

Honorable Justice Dr. Ananda Mohan Bhattarai

Honorable Justice Anil Kumar Sinha

Order

Date of Order: 2079/8/7 (Corresponding to 2022/23/11)

074-WC-001

Subject: Writ of Certiorari

Advocate Sunil Ranjan Singh et.al. resident of Sarlahi District, Ishworpur Municipality, Ward No. 14

Vs

Legislature Parliament, et.al New Baneswar, Kathmandu

- Until and unless a decision to initiate impeachment proceedings is not made and is not referred to the Impeachment Recommendation Committee pursuant to Article 101 (3) of the Constitution by the Parliament (House of Representatives), it shall not be deemed that “impeachment proceedings have commenced.” Proposal to be submitted by the Members of the House of Representatives shall not be deemed to be a decision of the Parliament. The proceedings shall not be deemed to have commenced until and unless the House of Representatives has formally accepted the ownership of the impeachment proposal. Provided, the Parliament does not formally accept the proposal and endorses the commencement of the proceedings, the impeachment proceedings shall not be deemed to have commenced. The proposal submitted by the Member of the House of Representatives is merely a "proposal". The mere submission of a "proposal" on a particular subject by anybody before any Unit shall not ipso facto initiate commencement. Provided, a judge or a constitutional office bearer is not allowed to perform their duties pursuant to the proposal submitted by one-fourth of the Members of the House of Representatives, then, as a result, the provision of the Constitution that requires a two-thirds majority to pass the impeachment proposal institutionally shall be rendered ineffective to some extent. Provided, the proposal for impeachment is presented before the House of Representatives, which is the authorized body to make such decisions, and where a decision to initiate commencement has not made then it cannot be considered that "impeachment proceedings have commenced" and provided such interpretations were to be made then such interpretations would be considered to be a misinterpretation of the Constitution.

On behalf of the Petitioner: Learned Advocates Mr. Sunil Ranjan Singh, Mr. Shiv Kumar Yadav, and Mr. Pankaj Kumar Karn

On behalf of the Respondent: Learned Joint Government Mr. Sanjeev Raj Regmi

On behalf of the Court (Amicus Curiae): Learned Senior Advocates Mr. Sunil Pokharel and Mr. Komal Prakash Ghimire

Precedents Cited:

- Nepal Law Magazine 2035, Decision No. 1197
- Nepal Law Magazine 2062, Volume 6, Decision No. 7554
- Nepal Law Magazine 2067, Decision No. 8430
- Nepal Law Magazine 2070, Decision No. 9040

Relevant Laws:

- Constitution of Nepal
- Impeachment (Procedure Regulation) Act, 2059

Order

Justice Ishwar Prasad Khatiwada: Pursuant to Article 133 (2) and (3) of the Constitution of Nepal, and pursuant to the order dated 2074/3/29 (corresponding to 7/13/2017), the brief facts and decision of the writ petition registered before this court for hearing are as follows:

Statement of Facts

The writ petition submitted by the petitioners Advocate Sunil Ranjan Singh and Kanchan Krishna Neupane states as follows: That Parliamentarians representing the Nepali Congress and the CPN (Maoist Centre) had registered an impeachment motion against the Honorable Chief Justice Sushila Karki at the Secretariat of the Legislature-Parliament on 2074/01/17, (corresponding to 30/04/2017) where character assassination of the Chief Justice was made and baseless accusation accusing her of interfering in the decision of cases and in cases that were sub-judice before the court were made Registering an impeachment motion based on the verdict of a case and on matters that were sub-judice before the court is an interference in the independence and competency of the judiciary. The Preamble of the Constitution of Nepal envisages an impartial and independent judiciary. Article 126 of the Constitution has vested the judiciary with rights relating to justice. Article 128 (4) states that all must abide by any interpretation of the Constitution or a law made by or any legal principle laid down by the Supreme Court in the course of trying a lawsuit. In accordance to the principle of independence of judiciary, judges are fully independent in delivering their verdicts. The provision articulated under Article 101 (2) of the Constitution of Nepal with

regards to impeachment cannot be proved. Allegations of impeachment should not be made against the justices based on the verdicts rendered by them. Provided, such practices are established, then it shall be construed to be a gross violation of the principle of separation of powers. Provided, judges have to face impeachment proceedings, then the judges cannot provide independent and impartial justice. Therefore, where an impeachment motion has been registered against Honorable Chief Justice Sushila Karki in lieu of the decision rendered by the court and on matters sub-judice before the court then such acts are deemed to be an interference in the principle of independent and competent judiciary, and therefore the petitioner seeks the honorable court to issue an order certiorari in the names of the concerned authorities refraining them from taking any decision related to the motion. The petitioner also requests the honorable court to issue an order of mandamus thereby refraining the respondents from registering any impeachment proposals against any justices based on their court decisions. The proposal that has been registered and is in the process of being debated in the Parliament is contrary to the provision of the Constitution which prevents discussion on sub-judice matters and hence the petitioner seeks the honorable court to issue an order to prohibition thereby refraining the respondents from initiating any actions relating to the motion. The petitioner also seeks the honorable court to issue an interim order pursuant to Rule 41 (1) of the Supreme Court Regulations, 2049, requesting the court to allow the Honorable Chief Justice Sushila Karki to continue working with full responsibility until the final hearing of the case. The petition further states that the impeachment motion was registered with malicious intention to creating a guided judiciary which is an interference to the constitutional supremacy, rule of law, and independent judiciary, and poses an immediate threat to the fundamental constitutional principles. The petitioner further requests that the petition should be given priority and be heard as per Rule 63 (5) of the Supreme Court Regulations, 2049, during the preliminary hearing.

Upon registration of the writ petition in relation to the impeachment proposal, a Single Bench of Honorable Justice Cholendra Shumsher J.B.R. had issued the following show-cause notice and an interim order on 2074/01/22 (corresponding to 2017/05/05):

What has happened in this regard? Why should the order of certiorari not be issued as requested by the petitioner? The order directs the respondents to submit within 15 (fifteen) days from the date of receipt of the notice a rejoinder stating any reasonable grounds and evidences as to why the order sought by the petitioner need not be issued. The order also directs to issue summons in the names of the respondents along with a copy of the petition to the respondents and to submit the case before the Bench upon receipt of the rejoinder or upon the expiry of the limitation period.

The interim order issued by Honorable Justice Cholendra Shumsher J.B.R. reads as follows: “While issuing an interim order as requested by the applicant, my mind is engulfed with sadness, restlessness and remorse. Ever since the day the impeachment proposal was registered against the Honorable Chief Justice, I have observed and experienced a sense of gloom and disparity descending upon the faces of all the justices of this institution. It seems, as if a dark cloud has overshadowed them. Should I not be concerned about such situation? Is this not a matter of concern for the independent judiciary as established by the Constitution of Nepal? With this impeachment proposal, it feels that along with the three organs of the State, the political parties and civil societies are on a war footing. Under such circumstances, can't the three organs of the State sit together and resolve this problem? There is a saying that this country has been cursed by Sati, however, after this order, everyone should reflect on this issue. In order to free the country and the people from

this case, I would reiterate that the court is a highly sensitive organ of the State, and we should also question as to whether or not there has been any grave deviation in the behavior, conduct, and judgment of the justices, and serious debates at an intellectual level should be carried out and any results emanating from the civil society are subjective and evidence oriented, then can the impeachment proposal against the Chief Justice and other justices considered to be constitutional, practical, and justifiable? An impeachment proposal presented in any other situation cannot be considered to be in line with the spirit and essence of the Constitution. It is because of the sacred essence and spirit of the Constitution that Nepal has an independent judiciary, and I am also committed to it. Where there is a manipulation in the concept of an independent judiciary, the rights and interests of any Body or citizen cannot be protected. In the absence of an independent judiciary, it is not possible for me to envisage what consequences may arise. Today, I consider it my divine duty to uphold the values and beliefs that the path of an independent judiciary must be perennial in order to maintain the dignity, protection of an independent judiciary, and also for future generations.

The impeachment proposal registered against Chief Justice Sushila Karki on 2074/01/17 (corresponding to 30/04/2017) is related to the decision made regarding the promotion of the Inspector General of Police that was sub-judice before this court. Apart from this, various allegations were also made and where the allegations cannot be substantiated, the impeachment proposal prima facie cannot be deemed to be in accordance with the spirit and values of the Constitution of Nepal. Based on the principle of convenience, and until the final decision on this petition, the impeachment proposal dated 2074/1/17 (corresponding to 30/04/2017) that was registered at the Secretariat of the Legislature-Parliament and the letter dated 2074/1/17 issued by the Secretary General of the Legislature-Parliament this Bench hereby orders to maintain a status quo, and pursuant to Rule 41 (1) of the Supreme Court Regulation, 2049, an interim order has been issued, and directs the respondents to allow the Honorable Chief Justice Sushila Karki to continue working in her position.

The rejoinder submitted by Rt. Honorable Speaker Onsari Gharti Magar reads as follows: the Constitution of Nepal pursuant to the principle of separation of powers, has made a clear provision regarding the work, duties, and rights of the Executive, Legislature, and Judiciary. All the three organs of the State are capable and competent of functioning independently. However, such competency cannot be arbitrary. The exercise of competency or independence should be in accordance with the Constitution and the law. Pursuant to Sub-article (2) of Article 101 of the Constitution, a proposal for impeachment against the Chief Justice of Nepal or a Justice of the Supreme Court, a Member of the Judicial Council, or the Chief or Official of a Constitutional Body can be presented in the House of Representatives, which is the current Legislature-Parliament, by at least one-fourth of the total number of members, which is approximately 249 members out of the current 593 members. Upon submission of the proposal and furnishing the reason and basis thereof, the Secretary-General or Secretary shall register the proposal, and pursuant to Rule 168 (2) of the Legislature-Parliament Regulation, 2073, the Speaker of the House shall schedule a debate on the proposal within seven days of registration of the proposal. It is the constitutional and legal duty of the Legislature-Parliament to perform its functions in accordance with this provision. Where 249 Members of the Legislature-Parliament pursuant to Article 101 (2) of the Constitution and Rule 168 Legislature-Parliament Regulation, 2073, had registered an impeachment proposal against the Chief Justice of Nepal on 2074/1/17 and where this motion is in accordance with the Constitution and the Legislature-Parliament Regulations, 2073, the writ

petition should be dismissed. Upon registration of the impeachment proposal and pursuant to Rule 168 (2) of the Legislature-Parliament Regulation, 2073, a debate on the proposal was scheduled to be held on 2074/1/22 (corresponding to 05/05/2017) at 11:00 am. However, owing to some obstruction in the Legislature-Parliament, the debate could not be held as scheduled. The Impeachment Recommendation Committee constituted under Sub-article (3) of Article 101 of the Constitution and Rule 169 of the Regulations is vested with authority to investigate and recommend as to whether or not there are sufficient grounds and reasons for initiating the impeachment process. Therefore, the petitioners' argument that the impeachment proposal cannot be registered is contrary to the Constitution and the law, and therefore the writ petition should be quashed. Article 103 (2) of the Constitution guarantees the Legislature-Parliament full freedom and authority to conduct its business and make decisions thereof, and the concerned Parliament is vested with the authority to determine as to whether or not any proceeding is regular or not and that no questions can be raised in any court. Rule 266 of the Legislature-Parliament Regulations, 2073, clearly states that the business and proceedings of the Legislature-Parliament are considered to be an internal business and proceedings, and no questions can be raised in any court. The proposal for impeachment presented under Sub-article (2) of Article 101 of the Constitution has already entered the regular procedure of the Legislature-Parliament, and pursuant to Rule 168 (2) of the Legislature-Parliament Regulation, 2073, the Speaker has scheduled the date and time for conducting a debate on the proposal. Therefore, the authority to conduct debate and to render a decision on the proposal falls within the internal jurisdiction and prerogative rights of the Legislature-Parliament which cannot be questioned in a court and hence the writ petition and the interim order issued by the Supreme Court on 2074/01/22 (corresponding to 05/05/2017) should be dismissed.

The rejoinder submitted by Mr. Manohar Prasad Bhattarai, Secretary-General of the Legislature-Parliament reads as follows: that pursuant to Article 101 (2) of the Constitution and Rule 168 of the Legislature-Parliament Regulation, 2073, a total of 249 Members of the Legislature-Parliament had signed and registered an impeachment proposal against the Chief Justice of Nepal on 2074/01/17 (corresponding to 30/04/2017). Registration of the impeachment proposal is in accordance with the prevailing constitutional law and recognized principles of justice. Pursuant to the provision of the Constitution and as a Member of the sovereign Parliament, a Member has the right to bring forward an impeachment proposal and matters relating to impeachment falls within the "Prerogative Right" of the Member of Parliament. Where the constitutional provisions clearly stipulates that the Supreme Court cannot interfere in the internal functioning and proceedings of the Parliament, the contentions and references submitted by the petitioners is contrary with the Constitution and the law. The agenda for discussion against the impeachment proposal registered before the Legislature-Parliament on 2074/01/17 (corresponding to 30/04/2017) and the letter written pursuant to the Constitution and Regulation by the Secretary-General on 2074/01/17 (corresponding to 30/04/2017) is in accordance with the Constitution and the Regulations, and therefore, the interim order issued on 2074/01/22 (corresponding to 05/05/2017) and the writ petition should be quashed.

The rejoinder submitted by Arjun Kumar Khadka, Joint Secretary of Secretariat of the Legislature-Parliament reads as follows: From among the three organs of the State, the Legislature-Parliament is an important organ that formulates laws necessary for the State. Pursuant to the provision stipulated in Rule 168 of the Legislature-Parliament Regulations, 2073, a proposal for impeachment has been registered in the Secretariat of the Legislature-Parliament. Pursuant to the

legal provision prescribed under the Constitution of Nepal and Sub-rule (2) of Rule 168 of the Legislature-Parliament Regulations, 2073, date and time for discussion against the proposal for impeachment before the Legislature Parliament has been scheduled by the Speaker. As claimed by the writ petitioner, it cannot be concluded that the proposal for impeachment was tabled without factual basis and grounds. As to whether or not the allegations made against the Honorable Chief Justice are based on facts and are objective in nature is an issue that will be decided upon discussion before the Legislature-Parliament, and provided, an investigation is deemed necessary the Impeachment Recommendation Committee shall pursuant to provisions prescribed under Article 101 (3) of the Constitution of Nepal and Legislature-Parliament Regulation, 2073 shall initiate an inquiry and investigation to ascertain as to whether or not sufficient grounds and reason exists for submission of the impeachment proposal. The petitioners claim that the grounds for impeachment are not factual is baseless. Submission of the impeachment proposal is a constitutional right vested to the Members of the Legislature-Parliament. The right vested upon by the sovereign people is a right that cannot be questioned by the petitioners. Pursuant to Sub-article (2) of Article 103 of the Constitution of Nepal, the Legislature-Parliament has the authority to determine as to whether or not its proceedings are in accordance with the law. The Constitution clearly stipulates that no questions can be raised in any court and therefore, the petitioners' claim that the impeachment proposal should be quashed by an order of certiorari, and that any proceedings carried out on the basis of the impeachment proposal should be stopped through the order of prohibition and the petitioners claim to halt all proceedings through the order of mandamus and an interim order cannot be entertained and therefore, the interim order issued by the court on 2074/01/22 (corresponding to 05/05/2017) and the writ petition submitted by the petitioners is not justifiable and hence should be quashed.

Rejoinder submitted by Ram Narayan Bidari, Member of the Legislature-Parliament and representative of Nepal Communist Party (Maoist Center) reads as follows: The Legislature-Parliament is the sovereign legislative body wherein more than one-fourth of its members have pursuant to the provisions prescribed under Article 101 (2) of the Constitution have filed for a judicial review against the impeachment motion filed against the Chief Justice and therefore, the writ petition filed by the petitioners is contrary to the principles of constitutionalism, separation of powers, balance of convenience and is contrary to the general accepted principles and concept of writ petitions. In a democratic country, provided sufficient grounds and reasons exists for impeachment, the impeachment proceedings can be initiated in the legislature against high-ranking officials of the State wherein such official may be relieved from the post through an impeachment process. In the context of Nepal, the concept of impeachment has been in existence from inception and is a concept that has been growing along with the constitutional development process. Pursuant to Article 101 (2) of the present Constitution, an impeachment motion can be filed against the Chief Justice of Nepal, a justice of the Supreme Court, a Member of the Judicial Council, or a Chief or Official of a Constitutional Body on the ground of his/her failure to fulfill her/her duties of office because of serious violation of the Constitution and law, or incompetence or misconduct or failure to discharge one's duty of office honestly or serious violation of the code of conduct and the impeachment motion can be filed by one-fourth of the total Members and therefore, where an impeachment proposal has been registered pursuant to the provisions of the Constitution, the process cannot be deemed to be contrary to the Constitution or law. The legitimacy, appropriateness, or theoretical and policy aspects of any proposal duly registered by the members of the sovereign legislature is a matter to be discussed and debated in the Parliament, and decision thereof can be made through the process prescribed by the Constitution and the prevailing laws.

The Constitution and Legislature-Parliament Regulation, 2073 stipulates that provided one-fourth of the members have registered an impeachment motion, an Impeachment Recommendation Committee consisting of eleven members is constituted to investigate as to whether not there exists any ground and reason for moving a motion of impeachment. The Committee shall conduct a study of the proposal and shall conduct inquiry with the concerned person, collect evidence and shall determine as to whether or not sufficient grounds and reasons exist and shall submit its report along with its recommendations to the Legislature-Parliament wherein a two-third majority of the total number of members present in the Legislature-Parliament shall endorse the proposal wherein the said official shall be relieved from the post. Where Legislature-Parliament exercises its jurisdiction, other organs of the state cannot interfere with the jurisdiction and internal proceedings of the Legislature-Parliament. Provided, any other organ of the state interferes with or issues any order or directives on a matters that are under consideration before the Legislature-Parliament, the sovereign legislature's right to discuss on the subject matter, its right to exercise its collective judgment, and reach a decision will be curtailed. Such acts will create encumbrance to the constitutional development process and the implementation of the constitutional provisions. Where a judicial review is sought against any proposal registered in the sovereign Legislature, and provided such review is entertained by the court then such acts will be deemed to be contrary to the principle of separation of powers and principle of conveyance. In this context, the Indian Supreme Court has dismissed a writ petition filed demanding a stay on a bill presented by the government in the Parliament, stating that the Parliament is vested with the sovereign right to debate and decide on the status of the Bill. A precedent has been set stating that a judicial review cannot be made against a Bill that has been enacted as an Act, However, the demand for a judicial interference against the proceeding of the impeachment motion that has not been discussed and processed in the Parliament is an issue that cannot be entertained by the court and hence the writ petition should be quashed. Provided, the courts were to test the impeachment motion or conduct a review or orders a stay to the proceedings of impeachment against the Honorable Chief Justice or honorable justices, then there would not be any control over the judiciary. Provided, if the courts were to decide as to whether or not an impeachment motion is appropriate, or provided the future course of the proposal is to be decided based on the court's decision, then in such circumstances, the sovereign Parliament prior to initiating any proceedings against such proposal need to seek approval from the court and provided proceedings are to be initiated only upon approval from the court, the sovereign Parliament would not be able to exercise its right and the sovereign Parliament would merely be a hostage. This would also infer that the jurisdiction of the Parliament would be transferred to the court and the constitutional provision relating to impeachment would be rendered ineffective. The Constitution should prescribe specific provisions for judicial review of impeachment. The writ petition filed pursuant to Article 133 (2) of the Constitution does not contain any constitutional or legal issue that requires interpretation and therefore, the subject matter is beyond the scope of judicial review. The impeachment motion registered specifies the reasons thereof for the motion, and the reasons are pursuant to Article 101 (1) of the Constitution and where facts to substantiate the reasons thereof have been presented, the petitioners claim is misleading and erroneous. The impeachment motion filed against the Honorable Chief Justice contains grounds and reasons for impeachment and the proposal as such is not targeted against the judiciary in whole but rather it is an attempt to uphold and promote the dignity, trust, independence, and credibility of the court. The contention that the impeachment motion is targeted towards the judiciary in whole is an attempt to mislead the general public. Where the impeachment proposal under special circumstances has been retracted, the writ petition has no purpose or objective and

hence the writ petition should be dismissed.

The rejoinder submitted by the Nepali Congress Parliamentary Party Office reads as follows: As there is no probable and reasonable cause for making the Nepali Congress Parliamentary Party Office a respondent, the writ petition should be quashed in favor of the respondent. Pursuant to Article 101(2) of the Constitution of Nepal, one-fourth of the total number of Members of the House of Representatives may move a motion of impeachment against the Chief Justice of Nepal or justices of the Supreme Court, Member of the Judicial Council, or Chief or Official of a Constitutional Body on the grounds of serious violation of the Constitution and laws, incompetence, or misconduct. Provided, such motion is passed by at least two-thirds majority of the total number of members of the House of Representatives, the concerned person shall be relieved from office. Pursuant to the constitutional provision, Members of the Legislature-Parliament had registered a motion of impeachment against the Chief Justice on 2074/01/17 (corresponding to 30/04/2017) and pursuant to the legal provisions, matters relating to impeachment cannot be raised in the courts and since the writ has been submitted with the intention of interfering with prerogative rights of the Legislature-Parliament, the writ petition should be quashed. Article 101 (2) of the Constitution stipulates that one-fourth of the total number of members of the House of Representatives can register a motion of impeachment. Article 101 (6) prescribes that after the commencement of impeachment proceedings, the Chief Justice or justice of the Supreme Court, Member of the Judicial Council, or Chief or Official of the Constitutional Body shall not be allowed to discharge the duties pending the settlement of such proceedings. Rule 168 (1) of the Legislature-Parliament Regulations, 2016, states that one-fourth of the total number of Members of the House of Representatives can register a motion of impeachment, and Sub-Rule 9 of Rule 168 prescribes that with the commencement of impeachment proceedings, the accused officer shall not be allowed to discharge the duties pending the settlement of such proceedings. Pursuant to the constitutional and legal provisions, the Legislative-Parliament is vested with the constitutional right to submit a motion of impeachment against the Chief Justice and render its final decision and therefore, the rights of the Legislature-Parliament cannot be curtailed. Article 103 of the Constitution prescribes privileges of the Parliament. Sub-Article 2 of Article 103 prescribes every Member of the Federal Parliament shall have full power to regulate and decide its business and shall have exclusive right to decide whether or not any of its proceedings is regular or irregular and no questions shall be raised in any court regarding this matter. Likewise, Sub-article 7 of Article 103 stipulates that any breach of privileges shall deem to constitute contempt and the concerned House shall have the exclusive right to decide whether any privilege has been breached. Pursuant to the Constitution, it is the duty of all individuals and constitutional bodies to protect and respect the privileges of the Legislature-Parliament. This alone ensures the smooth functioning of the constitutional provisions. Matters that fall within the ambit of the prerogative rights of the Legislature-Parliament, such matters cannot be a matter of judicial review. Contrary to the constitutional provisions, a writ petition had been entertained by the court and an interim order had been issued on 2074/01/22 (corresponding to 05/05/2017) and as such the interim order is contrary not only to the constitutional provisions, but it is also contrary to the principles of separation of powers, prerogative rights of the Legislative-Parliament and constitutional supremacy and therefore the said interim order cannot be sustained and should be quashed.

Since the case was subjected to constitutional interpretation, an order to present the case before a Constitutional Bench had been issued on 2074/03/29 (07/13/2017). Where the court deemed appropriate to seek the assistance of amicus curiae to reach an appropriate decision, an order had

been set aside by this court on 2075/01/19 (05/02/2018) directing Nepal Bar Association and Supreme Court Bar Association to provide names of three lawyers and to present the case for hearing upon receipt of the names of the lawyers.

A letter providing the names of Senior Advocate Mr. Komal Prakash Ghimire, Advocate Mr. Bishnu Luitel, and Advocate Mr. Madhav Kumar Basnet had been submitted by the Supreme Court Bar Association to represent the court as *amicus curiae*. The written pleading note submitted by *amicus curiae* Learned Advocate Bishnu Luitel reads as follows: the concept of separation of powers, control, and balance is based on the idea that provided a state power is exercised by only one organ of the government, possibility of abuse of power may arise whereby the general citizens may not experience the rule of law. In order to minimize the abuse of power, the state power should be divided among the three organs and should be exercised independently, and provided, any organ abuses the power, other organs should control it and maintain a balance among each other. This concept has been adopted in Nepal after the advent of democracy. The current Constitution of Nepal has prescribed provisions for the Executive, Legislative and Judiciary which are considered to be the three principal organs of the State and accordingly has distributed powers among them, thereby ensuring mutual control and balance, and has incorporated the concept of separation of powers, control, and balance. Part 11 of the Constitution of Nepal, prescribes provisions relating to the judiciary, and subsequently guarantees the independence of the judiciary. In order to prevent the abuse of power by the judiciary, Article 101 (2) of the Constitution of Nepal provides for a motion of impeachment against the Chief Justice or a justice of the Supreme Court wherein one-fourth of the total number of Members of the House of Representatives may move a motion of impeachment and provided the motion is passed by at least two-thirds majority, the concerned person shall be relieved from office. The said Article specifies grounds for introducing an impeachment motion Pursuant to this constitutional provision, an impeachment motion was introduced against the then Chief Justice Sushila Karki. The Parliament is vested with this authority to exercise this power. With regards to matters sub-judice before the court, discussion shall not be held in any House of the Federal Parliament that may cause adverse effect on the dispensation of justice, nor shall any discussion be held on the judicial acts performed by a judge in the course of performance of their duties. However, under Article 105 of the Constitution, the conduct of a judge may be raised provided there is a discussion on the impeachment motion. Having said this, since the then Chief Justice Sushila Karki has already retired from her service, the justification and appropriateness for the impeachment motion ceases to exist, and where the writ petition has become redundant, the writ petition should be dismissed. Nevertheless, the court should take into account the constitutional provisions of Nepal and international practices and provide an interpretation regarding the constitutional rights and duties of the three organs of the state in relation to the impeachment motions that may be presented in future.

The written pleading note submitted by Learned Joint Government Attorney Sanjeev Raj Regmi representing the Office of the Attorney General reads as follows: that Sub-article (2) of Article 101 of the Constitution of Nepal, prescribes a provision that allows one-fourth of the total number of the then Members of the House of Representatives to move a motion of impeachment motion against the Chief Justice of Nepal on the grounds stipulated in the said Article. Pursuant to the provisions of the said Article, out of 593 Members 249 Members present in the then Legislature-Parliament registered an impeachment motion against the Chief Justice of Nepal, Sushila Karki, before the Legislature-Parliament Secretariat on 2074/01/17 (corresponding to 30/04/2017). The said proposal was withdrawn on 2074/12/23 (corresponding to (06/04/2018). Where the motion

for impeachment has been withdrawn from the Legislature-Parliament, the writ petition has become redundant. The right to move an impeachment motion against any constitutional position, including the Chief Justice, lies upon the members of the then Legislature-Parliament currently the House of Representatives. On the basis of the principle of separation of powers and the principle of judicial review, the jurisdiction of the legislature cannot be a subject matter of judicial decision and judicial review. Where the intent of the writ petition has ended and where the issues raised in the writ petition no longer is substantial, the court need not enter into the subject matter of the writ petition and deliver an interpretation. Pursuant to Sub-rule (9) of Rule 168 of the former Legislature-Parliament Regulations, 2073, and Sub-rule (9) of Rule 161 of the current House of Representatives Regulations, 2075, where a motion for impeachment has been initiated, the accused official shall not be allowed to discharge the duties pending the settlement of such proceedings. Since a motion for impeachment has been made and proceeding thereof has been initiated, the accused official cannot discharge their duties and hence the writ petition should be quashed.

Order of this Court

The writ petition has been submitted for hearing pursuant to the rules and the learned advocate and petitioner Mr. Sunil Ranjan Singh, and learned advocates Mr. Shiv Kumar Yadav and Mr. Pankaj Kumar Karn, on behalf of the petitioner stated that in order to move a motion of impeachment against the Chief Justice under Article 101 of the Constitution of Nepal, it must be demonstrated that the Chief Justice has committed a serious violation of the Constitution and the law, or is incompetent or has carried out any misconduct, or has failed to discharge the duties honestly, or has committed a serious violation of the code of conduct.

Where an impeachment motion is registered based on any disagreement with a decision made by the court on a particular issue, and where such a motion is filed on baseless accusations, then such acts would be deemed to be contrary to the principle of separation of powers and the recognition of judicial independence. Provided, such trends are recognized, the judiciary shall not only fail in fulfilling its responsibility relating to dispensation of justice but will also fail in regulating the work and business of other organs of the State and shall fail in maintaining balance in the overall state system. The impeachment proposal was registered against Chief Justice Sushila Karki that was based on a decision made against a writ petition which was related to the promotion of the Inspector General of Police. However, the respondents have neither failed to show as to how a serious violation of the Constitution and the law was committed by the Chief Justice while dispensing the judgment, nor have they been able to identify her incompetence or misconduct, or failure to perform her duties honestly, or commission of a serious breach of the code of conduct. Registration of an impeachment motion in the absence of reasonable grounds is against judicial independence wherein it would not be possible for judges to dispense independently and impartially which inter alia would tarnish the public trust upon the judiciary. One branch of the state should not abuse its authority on the pretext of controlling and regulating another branch. The controversial impeachment proposal is contrary to the spirit of the Constitution. The impeachment proposal has been withdrawn, and the tenure of Chief Justice Sushila Karki has also expired. Nevertheless, it is necessary to discuss on the constitutional situation that may regulate such tendencies. It also does not seem reasonable to suspend the Chief Justice once the impeachment proposal has been registered and therefore, an interpretation of the Constitution is necessary to establish a clear procedure.

The learned Joint Government Attorney Mr. Sanjeev Raj Regmi, representing the Legislature-Parliament et.al, stated that where the proposal for impeachment against the then Hon'ble Chief Justice Ms. Sushila Karki was registered on 2074/1/17 (corresponding to 30/04/2017), a decision to withdraw the proposal was made wherein the proposal was withdrawn subsequently on 2074/2/23 (corresponding to 06/06/2017), likewise, her tenure has also expired; where the existence of the then Legislature-Parliament before whom the impeachment motion was registered no longer ceases to exist, it is not appropriate or relevant for this court to provide any definition or order and hence the writ petition should be dismissed.

Amicus curiae duo, learned Senior Advocate Mr. Sunil Pokhrel, and learned Senior Advocate Mr. Komal Prakash Ghimire, representing Nepal Bar Association and Supreme Court Bar Association respectively informed the court that the development process of the Constitution is more complex than the Constitution making process; they further stated that the judiciary has to interpret the provisions of the Constitution and showcase the underlying subject matter and spirit of those provisions for the development of the Constitution; furthermore, they informed the court that although the writ petition has no relevance there are still some underlying questions that need to be answered by the court such as: When and under what circumstances are the provisions of impeachment applicable? Under what circumstances can the concerned official not be able to discharge one's duty upon registration of an impeachment proposal? When can the impeachment proceedings deemed to have been commenced? Is this a matter of privilege of the Legislature or does this matter also fall within the ambit and scope of judicial interpretation and regulation? Has the proposal of impeachment been presented pursuant to the provisions of the Constitution of Nepal? Therefore, it is imperative that the court provide its interpretation of these diverse issues and develop a clear opinion relating to impeachment.

Upon perusal of the contents of the writ petition, the rejoinder submitted by the respondent, and upon hearing the deliberations of the learned Senior Advocate, Advocate, and learned Joint Government Attorney, the Bench needs to look into the following questions:

- a) As to whether or not this court can entertain the impeachment proposal presented before the Legislature/Parliament and render its decision on questions relating constitutional status?
 - b) As to whether or not, the impeachment motion filed against the then Honorable Chief Justice Sushila Karki before the Legislature-Parliament on 2074/1/17 (corresponding to 30/04/2017) is consistent and congruent with the provisions, spirit, and essence of the Constitution of Nepal?
 - c) When can the impeachment proceedings deemed to have commenced, and when or at what stage shall the concerned official be deemed unable to discharge their duties?
 - d) Should any kind of order be issued as sought by the writ petitioner or not?
2. While considering the rationality of the decision, and for clarity, it is imperative and relevant to present some facts related to the impeachment motion. Members of the Legislature-Parliament, Mr. Min Bahadur Vishwakarma, the proposer Mr. Tek Bahadur Basnet the supporter, along with other Members of the Legislature-Parliament, had registered an

impeachment motion against the then Honorable Chief Justice Sushila Karki on 2074/1/ 17 (corresponding to 30/04/2017) at the Legislature-Parliament Secretariat. The impeachment proposal contained the following allegations:

“That the Honorable Chief Justice of Nepal, Sushila Karki, while presiding over the Bench in relation to a writ petition relating to the promotion of the Inspector General of Police had rendered a decision that not only interfered with the prerogative rights of the Council of Ministers that was vested to them under Article 75 but the Chief Justice also cited a provision not prescribed under Rule 41 of the Police Regulation, 2071, and had rendered a decision that interfered with Nepal government’s decision to promote the candidate deemed fit to the position of Inspector General of Police; while rendering the verdict, the Chief Justice distorted the facts wherein the Deputy Inspector General of Police attaining the highest score in the performance evaluation was judged to be second and his counterpart attaining the second highest was judged to be first; that the question of judicial independence and integrity has been repeatedly raised owing to the Chief Justice’s performance wherein the Chief Justice despite the Supreme Court having 19 other justices, has been repeatedly involved in constituting Bench with limited justices and has been involved in influencing the justices to render orders and decision; she has violated the procedural laws that were needed to be followed while dispensing justice and to fulfill her vested interest, she has violated the prevailing laws and recognized principles and has rendered various orders and decisions, likewise, she has tarnished the image, independence and integrity of the judiciary, she has flouted the principles of separation of powers, has not shown equal respect to the justices of the Supreme Court but rather has been involved in groupism and not only has she failed to dispense justice independently but has also failed to create a conducive environment for dispensing justice independently and has been involved in interference and creating undue pressure and as such where the Chief Justice pursuant to Article 101 (2) of the Constitution of Nepal has committed serious violation of the Constitution and law, has failed to discharge her duties honestly, has shown lack of incompetence and misconduct and has committed serious violation of the code of conduct, it is deemed that she is unfit to fulfill her official responsibilities and hence pursuant to Rule 168 (1) of the Legislature-Parliament Regulation, 2073, one fourth of the total number of the then Members of the Legislature-Parliament hereby submit this a motion of impeachment.”

3. Upon submission of the impeachment motion, Manohar Prasad Bhattarai, the General-Secretary of the Legislature-Parliament, had vide letter dated 2074/1/17 (corresponding to 30/04/2017) Dispatch No. 59, had informed the Office of the President, Sheetal Niwas, about the impeachment motion. The letter among others contained the following:

"Pursuant to Sub-rule (1) of Rule 168 of the Legislative-Parliament Regulations, 2073, a notice of impeachment against the Honorable Chief Justice Sushila Karki has been received by the General-Secretary of this Secretariat on 2074/01/17 (corresponding to 30/04/2017) that has been signed by more than one-fourth of the total number of Members currently present in the Legislative-Parliament. Pursuant to Article 101 (6) of the Constitution of Nepal, after the commencement of the impeachment proceedings, the Chief Justice shall not be allowed to discharge the duties of her office pending the settlement of such proceedings. Likewise, pursuant to Sub-rule (9) of Rule 168 of the Legislative-Parliament Regulations, 2073, with the commencement of the impeachment proceedings, the accused official shall not be allowed to discharge the duties pending the

settlement of such proceedings. Where, impeachment proceedings against the Honorable Chief Justice Sushila Karki has commenced, the Secretariat informs the President's office that the Chief Justice pursuant to Article 101 (6) and Sub-Rule (9) of Rule 168 of the Legislative-Parliament Regulations, 2073 shall not be able to discharge her duties pending the settlement of the proceedings."

4. The impeachment motion that was submitted was finally withdrawn. The withdrawal motion submitted by the proposer and supporter contained the following: **"taking into considering the sensitive period of implementation of the Constitution and the need for the constitutional bodies to work in accordance with the objectives of the Constitution , thereby creating harmony, positive cooperation and understanding among the constitutional bodies, the impeachment motion submitted against Honorable Chief Justice Sushila Karki has been withdrawn."**, Notification of withdrawal of the impeachment was provided to Honorable Speaker on 2074/02/15 (corresponding to 29/05/2017) and subsequently the impeachment motion was withdrawn as per the decision of the meeting of the Legislature-Parliament held on 2074/2/23 (corresponding to 06/06/2017).
5. Considering the facts referred hereinabove, it is imperative for this court to resolve the constitutional and legal questions raised in relation to the impeachment proposal and its subsequent proceedings. The first issue to be resolved is "as to whether or not this court possesses the jurisdiction to conduct a hearing on the impeachment proposal submitted before the Legislature-Parliament and provide answers to the constitutional issues raised therein." This issue has been raised with special emphasis by the respondents, and as such the court deems it expedient and imperative to enter into this subject matter to provide its judicial perspective and bring clarity on the issue of constitutional law.
6. Through the British constitutional practice the concept of parliamentary prerogative was established. The British Parliament does not have a written Constitution, however, the British parliament has the authority to change the constitutional law and tradition by enacting laws. However, in Britain, even one House of the Parliament cannot interpret its own prerogative rights and expand its scope, it is the court that determines such matters. In *Ashby vs. White*, the House of Lords, supported the opinion of Chief Justice Holt, and decided that the court's jurisdiction cannot be excluded on the basis that the Parliament has the authority to decide on any matter, the court can investigate the question of prerogative rights.¹ Generally, impeachment is the Parliament's prerogative rights. It has been established that where an impeachment is applied with malice or with a political biasness or for fulfilling a political objective or for controlling or influencing the independence of judiciary, then such matters can be a subject of judicial review. In *Howard vs. Gosset* case of 1845, it was established that the court can investigate the warrant issued by the House of Commons and if deemed to be irregular, the court could make necessary decisions.² On the issue of jurisdiction, there are still some contradictions between the judiciary and the parliament. It has been established in England that laws relating to prerogative rights are similar to any other law, that the parliament cannot interpret and extend its prerogative right, and that the courts can examine and review to

¹ *Ashby v White* (1703) 92 ER 126, R. v. The same principle was adopted in the dispute between *Pafy* (1704) 2 Ld. Raym. 1105, *Stockdale v Hansard* (1839) 9 Ad & El 1

² *Howard v. Gosset*, 10 Q.B. 359 (1845)

determine as to whether or not any proceedings made in relation to the application of prerogative rights is constitutional. Sub-article (1) of Article 105 of the Indian Constitution guarantees freedom of speech inside the Parliament and this is kept within the ambit of the Constitution and Regulation of the Parliament. In the context of India, it can be observed that the parliamentary prerogative rights can only be exercised under the Constitution and Regulation of the Parliament.

With regards to the case between Senior Advocate Sarvagya Ratna Tuladhar vs. the Chairman, Rastriya Panchayat, et.al. , this Court has held that "the Constitution of Nepal has limited the prerogative rights of the Rastriya Panchayat wherein the freedom of speech within the Rastriya Panchayat and that anything said in the Rastriya Panchayat or any of its Committee could be a matter that could be raised in any court. Accordingly, the freedom of speech can be enjoyed only under the Constitution of Nepal and the Rastriya Panchayat Regulation, and immunity against any court proceedings can be enjoyed provided such matters are raised within such limitations. Therefore, mere addition of the word "wholly" in the prerogative rights relating to freedom of speech does not mean that the prerogative rights are unlimited or inaccessible. In fact, it is not necessary for the courts to say that freedom of speech including any other freedom cannot be unlimited. Duties are also attached to rights or freedoms. Provided, freedom is unlimited, then such freedom becomes arbitrary and ultimately leads to its own downfall³ and has thus clarified the meaning and purpose of "full freedom of speech".

8. With reference to the writ petition filed by Mr. Sarvagya Ratna Tuladhar, 45 years ago during the autocratic Panchayat system where constitutional supremacy and judicial review were not recognized, this Court has propounded an exemplary precedent on the limitation of the Parliament's prerogative rights. Notwithstanding the interpretation made in Sarvagya Ratna Tuladhar in 2035 BS, interpretation on the application of the Parliament's prerogative rights has also been made in the case of Taranath Ranabhat in 2062 BS⁴, Matrikaprasad Yadav in 2067 BS⁵, and Sanjay Kumar Shah in 2070 BS⁶. Pursuant to the interpretation and precedents propounded therein, it has been established, that the court has the final authority to interpret the Constitution and laws, and therefore, it has been established that provided any decision or proceedings that is carried out arbitrarily or in the absence of jurisdiction and which is contrary to the Constitution or prevailing law, then such decisions can be a matter of judicial review by the courts. Today we are in the process of practicing democratic constitutional supremacy. In the present context, any proceedings, or acts that are contrary to constitutionalism, constitutional supremacy, the rule of law, etc. cannot attain legitimacy. Article 103 (1) of the Constitution of Nepal, that was promulgated in 2072, states that "there shall be full freedom of speech in both Houses of the Federal Parliament , and no member shall be arrested, detained, or prosecuted in any court for any anything expressed or any vote cast by him or her in the

³ Chairman of Nepal Bar Association, Senior Advocate Sarvagya Ratna Tuladhar vs. Chairman, National Panchayat, et.al. Decision No. 1197, Nepal Law Magazine, 2035, (Full Bench comprising of five justices) Date of Decision 2035/9/25 (Five Justices Full Bench)

⁴ Interpretation made in Rabin Raj Bhandari vs. Taranath Ranabhat, Nepal Law Magazine, 2062, Decision No. 7554, Case relating to Contempt of Court

⁵ Matrika Prasad Yadav vs. Parliament Secretariat et.al. Nepal Law Magazine, 2067, Decision No. 8430, Date of Decision 2067/4/19 (Full Bench)

⁶ Sanjay Kumar Shah vs. Secretariat of Constituent Assembly and Legislative-Parliament et.al. Nepal Law Magazine, 2070, Decision No. 9040, Date of Decision: 2070/3/26

House." The Constitution of Nepal prescribes that "there shall be full freedom of speech in both Houses of the Federal Parliament," wherein any matters expressed in any House of the Federal Parliament cannot be raised in any court and has limited the prerogative rights of the Parliament. Likewise, it is also evident that other types of prerogative rights of the Parliament can only be exercised under the Constitution of Nepal. No one is exempted or provided with special privileges from not complying with the Constitution. A prerogative right does not become unlimited or inaccessible merely because the term "wholly" is attached to any prerogative rights. Prerogative rights cannot be whole and unlimited, and should be considered in relation to the provisions of the Constitution. Therefore, in this context, it is expedient that the prerogative rights of the Federal Parliament be exercised.

9. Article 105 of the Constitution of Nepal provides for restriction on discussion. The said Article stipulates that **"No discussion shall be held in any House of the Federal Parliament on any matters that may cause adverse effect on the dispensation of justice on any cases which are sub-judice in any courts of Nepal and on any judicial acts done by a judges in the course of discharging their duties. Provided, that nothing in this Article shall be deemed to be bar the expression of opinions about the conduct of a judge during deliberations held on a motion of impeachment."** Pursuant to this provision, it is evident that opinions on the conduct of a judge can be expressed during the deliberations on motion of impeachment however any other matter relating to dispensation of justice cannot be a matter of discussion in the Federal Parliament. Other than the provisions prescribed above, it is evident that the acts or conduct of a judge cannot be discussed in the Parliament. Under the pretext that motion of impeachment is a prerogative right of the Parliament, it would be inappropriate to justify the rationality of such proposal or act that is performed contrary to the provision of the Constitution. Where a person today claims one's right to surpass one's restriction may claim the same right the next day. Such unconstitutional claims cannot be entertained or recognized by the court. Provided, the Parliament attempts to exceed its constitutional limits, the court as the final interpreter of the law and the Constitution, has constitutional obligations to interpret and clarify matters relating to constitutional limitations.⁷
10. The courts are the final interpreter of the Constitution in countries having a written Constitution. Sub-article (2) of Article 128 of the Constitution of Nepal, stipulates that "the Supreme Court shall have the final authority to interpret the Constitution and laws" which is a democratic provision included in the Constitution. Any laws enacted by the Legislature pursuant to Article 128 and Article 133 can be a matter of judicial review by the Supreme Court. The right to judicial review is a fundamental basis or recognition of a written Constitution. Therefore, on the pretext of the prerogative rights of the Parliament, the court's right to interpret the Constitution or the law cannot be limited.
11. It is now for the court to decide as to whether or not the impeachment motion filed against the then Hon'ble Chief Justice Sushila Karki in the Legislature-Parliament on 2074/1/17 (corresponding to 30/04/2017) was in accordance to the provisions, spirit, and essence of the Constitution of Nepal? The disputed motion of impeachment proposal states that **"Chief**

⁷ The Supreme Court in Sarbagya Ratna Tuladhar vs. Chairman, National Panchayat had interpreted that "the court is the final interpreter of the law whether the law is a general Act or Regulation or Constitutional law, the role of the Legislative is to manage the laws and not to interpret them."

Justice Sushila Karki of Nepal, while deciding on the writ petition related to the promotion of the Inspector General of Police, interfered with the executive powers of the Council of Ministers prescribed under Article 75 of the Constitution of Nepal and cited provisions not prescribed under Rule 41 of the Police Regulations, 2071, had and interfered with the Government of Nepal's right to promote a candidate deemed appropriate to the post of Inspector General of Police, and by distorting the facts, the Chief Justice had rendered a decision by stating that the Deputy Inspector General of Police scoring the highest point according to the performance evaluation was second and the one scoring second was first..."⁸ Plenty of adjectives could have been used in relation to the impeachment motion filed. Upon perusal of the aforementioned proposal, it is prima facie evident that the disputed impeachment motion is centered on the decision made against the writ petition relating to the promotion of the Inspector General of Police. There can be no doubt that the disputed impeachment motion was merely a product of a retaliatory mentality. It is evident that the hearing and decision (order) on the dispute relating to the promotion of the Inspector General of Police was heard by a Full Bench of this court consisting of five justices. However, the impeachment motion has been filed against Chief Justice Sushila Karki. Where all justices involved in the Bench have an equal role and responsibility while dispensing justice, it is evident that the impeachment proposal has been directed against one particular individual. Looking at the features and the statement of the proposal relating to the impeachment, it is evident that the proposal has been presented to defend and justify the decision of the Government rather than to establish any values, or principles, or to ensure compliance with the Constitution. Such kind of acts is not acceptable even in the general or regular administrative or management practices. The court deems that the language in the context of impeachment is very objectionable in nature.

12. The Preamble to the Constitution of Nepal states that the Constitution has been promulgated with the objective of building a prosperous nation by remaining committed to socialism based on democratic values and principles, including the concept of an independent, impartial, and competent judiciary and the rule of law. Article 1 of the Constitution states that the Constitution is the fundamental law of Nepal and any laws inconsistent with the Constitution shall, to the extent of such inconsistency be declared void." Sub-article (2) of Article 128 of the Constitution provides that "the Supreme Court shall have the final authority to interpret the Constitution and laws." Therefore, pursuant to a system of government that recognizes a written Constitution, the "final authority" to interpret the Constitution and laws has been vested in this Court. The aforementioned provision incorporates and recognizes the principle of constitutional supremacy. The Court by exercising the extra-ordinary jurisdiction prescribed under Article 133 of the Constitution must protect the constitutional supremacy and this is not only a matter of authority but also a constitutional duty of the judiciary. Any kind of argument, logic, tendency or statement that attempts to misinterpret and prohibit the exercise of such authority and performance of duty, or attempts to set limitations on the exercise of such rights is not acceptable.
13. The present Constitution of Nepal has incorporated the principle of separation of powers, control, and balance. The final authority to interpret the Constitution and laws is vested upon

⁸ Other matters or contents have also been mentioned in the impeachment proposal. Since, those matters are not relevant for judicial dispensation, the court does not deem to delve into those issues.

the judiciary, and ipso facto it is the responsibility of the judiciary to examine as to whether or not the action undertaken by other organs of the State is in accordance with the Constitution or laws. Therefore, neither any Body of the State including the Parliament, in the pretext of taking action or proposal cannot interfere against any order or decision made by the judiciary. Provided, any action or proceeding in the name of impeachment is taken in relation to any decision or order made by the court, then such actions seriously undermines the independence and impartiality of the judiciary. Therefore, where the impeachment proposal has been submitted in relation to the decision of the court, then such impeachment proposal is deemed to be contrary to the Constitution.

14. Article II Section 4 of the Constitution of the United States prescribes that an impeachment motion can be proposed for high crimes and serious violations of the Constitution⁹ Apart from the Constitution, provision for impeachment of judges in the United States has also been provided in the Judicial Conduct and Disability Act, 1980. In the presidential election held in 1996, Bill Clinton and Bob Dole had raised the issue of the removal of the federal district court judge Harold Baer Jr. from office. In response four judges of the Federal Appeals Court jointly spoke out against the political interference in the judiciary. They informed that the Constitution does not “provide for resignation or impeachment whenever a judge makes a decision with which elected officials disagree,” “these attacks do a grave disservice to the principle of an independent judiciary and ... mislead the public as to the role of judges in a constitutional democracy.” As a result, no action was taken against the judge. Former Chief Justice of the US Supreme Court William Rehnquist, in a book relating to the American practice on impeachment¹⁰, states that “judicial acts — their rulings from the bench — would not be a basis for removal from office by impeachment and conviction,” and emphasizes that judicial proceedings or decisions cannot be the basis for impeachment.
15. The method of impeachment to charge and punish high-ranking officials for crimes equivalent to felony was first introduced in 1376 by United Kingdom, a country having parliamentary supremacy¹¹. The impeachment process that commenced in 1376 ended in 1805¹² i.e., after 1805 no person has been impeached. Therefore, constitutional scholars like Phillips and Jackson have claimed that practice of impeachment has disappeared. In 1999, the Committee on Parliamentary prerogative rights has recommended that impeachment itself is unjustified¹³.
16. Provisions of impeachment have been prescribed in the Constitution of India and the Judges (Inquiry) Act, 1968. In India, impeachment can be brought against a judge on the grounds of "proved misbehavior" or "incapacity". Pursuant to the Judges (Inquiry) Act, 1968, a Committee consisting of three members, including the Chief Justice of the Supreme Court or any one justice from among other justices, one Chief Justice from among the Chief Justices of the High Court, and a distinguished jurist, is constituted to conduct an investigation against the accused

⁹ Article II Section 4 of the Constitution of the United States of America: “The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”

¹⁰ [William Rehnquist](#), Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson, 1992.

¹¹ Barnett, Hilaire (2002), [Constitutional and Administrative Law](#), Cavendish Publishing, [ISBN 978-1-84314-475-5](#), Retrieved 22 May 2020.

¹² Jack Simson Caird “Impeachment” House of common, Briefing paper, Number CBP7612, 6 June 2016

¹³ HL Paper 43-1 HC 214-1 1998-99 Para 16

judge. Provided, the Committee contains a finding that the judge is not guilty, the impeachment process comes to an end. However, if the report of the Committee contains a finding that the judge is guilty, the matter will be taken up for consideration by the Parliament. Looking at the practices in India and in other countries, it can be concluded that judicial decisions, judgments, and the wisdom exercised in making those decisions cannot be the grounds for impeachment¹⁴. Provided, impeachment is brought by delving into the appropriateness of a judgment or provided, the Parliament is allowed to investigate into the appropriateness of a judgment then the Parliament would become a body to review the judgments and hear appeals made by the courts, and such practices cannot be deemed to be pursuant to the principles of separation of powers.

17. In the United States, other than the justices of the Supreme Court 8 justices of various levels have been impeached. All the eight impeachments were related to allegations of misconduct. The charges brought against Shirani Bandaranayake Chief Justice of Sri Lanka in 2013 were related to financial irregularities¹⁵. Similarly the impeachment of Philippine Chief Justice Renato Corona in 2011 was also related to financial irregularities and lack of transparency. Likewise, the impeachments of three Indian High Court judges were also related to financial irregularities, corruption, and misuse of public property. We cannot find one example of impeachment that was made against a decision or an order made in the process of dispensing justice. However, in the case of Sushila Karki, there is no allegation of any misconduct, but rather the proposal highlights that the court had interfered in the government's decision relating to appointment of a police officer. Therefore, looking at the comparative practices practiced, the court deems the controversial impeachment proposal to be flawed and erroneous.
18. Pursuant to the provisions of the Constitution, provided sufficient and proper grounds are prevalent, then an impeachment proceeding against a judge can be initiated and the judge may be removed from office. In some exceptions, it may be necessary to proceed with the impeachment process. However, this cannot be used as a weapon to be used with malicious intent. Provided, an impeachment proceeding is initiated as an act of revenge, then such action will pose a serious threat to the constitutional balance, good governance, and the implementation of the concept of constitutionalism. In the context of India, no judges have been removed through impeachment even after 75 years since the promulgation of the Constitution. Similarly, in the American context, since 1803, approximately 15 federal court judges, excluding the judges of the Supreme Court, have had impeachment resolutions passed by the House of Representatives, out of which only eight have been approved by the Senate. The impeachment resolution against Samuel Chase, judge of the Federal Supreme Court was passed by the House of Representatives, but was not approved by the Senate in 1803/1804 [19]. Thereafter, no impeachment proceedings have been initiated against any judge of the US Supreme Court for approximately 220 years.

¹⁴ Article 20 of UN Basic Principles on the Independence of the Judiciary, 1985 states "Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings"

¹⁵ Sri Lankan President Mahindra Rajapaksa had removed Shirani Bandaranayake the Chief Justice of Sri Lanka in 2013 on allegations of financial irregularities. The impeachment motion was endorsed by the Parliament. There was lot of criticism at the international level stating that this was an interference over the judiciary. The critics state that the accusation of financial irregularities were fake and biased.

19. Since impeachment was deemed necessary, the provision of impeachment had been prescribed in the Constitution. However, in order to justify the appropriateness of impeachment, impeachment can be exercised to remove and punish a person creating encumbrances to the effective implementation of the rule of law. Impeachment should not be a tool for exercising political revenge or retaliation. In addition to this, impeachment cannot be brought merely because of one's dissatisfaction with matters sub-judice before the or a judicial decision¹⁶. Keith has stated that: "Judges could not be removed simply for taking politically unpopular positions"¹⁷
20. While reaching a decision regarding impeachment proceedings, it is imperative and expedient for us to consider the mentioned facts and the perspective contained therein. The withdrawal of the controversial impeachment proposal motion against Sushila Karki reads as follows: **"at this juncture of crucial period of implementation of the Constitution , it is deemed necessary for the organs of the State that have been established according to the Constitution to function pursuant to the objectives of the Constitution, thereby maintaining a greater harmony, positive cooperation, and understanding and therefore, the impeachment proposal against Honorable Chief Justice Sushila Karki has been withdrawn."** The Bench ponders as to whether or not the crucial period for implementation of the Constitution did not exist 28 days prior to the submission of the proposal and that the need for State organs established according to the constitution did not function pursuant to the objectives of the constitution and that the harmony, positive cooperation, and understanding among the constitutional organs" did not exist 28 days prior to the submission of the proposal. However, when such a situation or condition was not observed 28 days earlier, the court needs to take into consideration as to how these situation or condition arose after 28 days. The impeachment proposal was formally presented in the meeting of the House of Representatives and a decision to withdraw the proposal was taken without further discussion or proceedings and therefore, it can be concluded that the proposer and supporter to the proposal were not confident that the charges mentioned in the proposal could sustain. The proposer and supporter of the impeachment proposal had informed the Honorable Speaker about the withdrawal of the proposal on 2074/02/15 (corresponding to 29/05/2017) wherein the proposal was withdrawn by a decision of the Legislature-Parliament. Considering the nature of withdrawal of the impeachment motion, the court deems that the impeachment proposal submitted against Honorable Chief Justice Sushila Karki in the Legislature-Parliament on 2074/01/17 (corresponding to 30/04/2017) was contrary to the provisions, spirit, and essence of the Constitution of Nepal.
21. It is now relevant for this Bench to consider as to when and under what circumstances did the impeachment proceedings deemed to have commenced, and when should the concerned official be barred from discharging his/her official duties. The disputed impeachment proposal was registered before the Legislature-Parliament on 2074/1/17 (corresponding to 30/04/2017) at 4:00 pm. With the registration of the proposal an order by the Honorable Speaker was issued on the same day to the General Secretary and thereafter, the General Secretary Manohar Prasad Bhattarai provided a letter addressed the President's Office, Sheetal Niwas, stating that **"where**

¹⁶ It is now well settled in United States that impeachment proceeding cannot be initiated on the basis that decision of a judges on the merit of a case is erroneous. This is illustrated by the failure of impeachment process in relation to justice chase in 1805.

¹⁷ Whittington, Keith. E. Constitutional Construction: Divided powers and Constitutional meaning, Cambridge, mass; Harvard University press. For further elaboration read Justice Samuel Case, 1805.

an impeachment proceedings against Honorable Chief Justice Sushila Karki has commenced pursuant to Article 101 (6) of the Constitution of Nepal and Rule 168 (9) of the Legislature-Parliament Regulations, 2073, she shall not be allowed to discharge her duties pending the settlement of the proceedings". It is for this Bench to decide as to whether or not such a correspondence is deemed to be in accordance with the Constitution?

22. In order to determine as to when the impeachment proceedings had commenced, it is necessary to cite the provision related to impeachment prescribed in the Constitution. Article 101 of the Constitution of Nepal prescribes the following provision regarding impeachment:

1. *"One fourth of the total number of the then members of the House of Representatives may move a motion of impeachment against the President or Vice-President on the grounds of serious violation of this Constitution and Federal law. If the motion is passed by at least two-thirds majority of the total number of the then members of both Houses of the Federal Parliament, they shall be removed from their office."*
2. *One fourth of the total number of the then members of the House of Representatives may move a motion of impeachment against the Chief Justice of Nepal or a Judge of the Supreme Court, member of the Judicial Council, chief or official of a Constitutional Body on the ground of his or her failure to fulfill his or her duties of office because of serious violation of this Constitution and law, incompetence or misconduct or failure to discharge the duties of office honestly or serious violation of the code of conduct. If the motion is passed by two thirds majority of the total number of the then members of the House of Representatives, the concerned person shall be relieved of his or her office.*
3. *There shall be an impeachment recommendation committee in the House of Representatives for the purpose of making recommendation after inquiring into whether there exist the ground and reason for moving a motion of impeachment against any person under clause (2).*
4. *The committee under clause (3) shall consist of eleven members of the House of Representatives.*
5. *If at least three members of the House of Representatives certify and submit a petition that the received information, notice or petition is admissible on the ground of serious violation of the Constitution or incompetence or misconduct or failure to discharge the duties of office honestly or serious violation of the code of conduct by the person relieving of office on impeachment under clause (2), and the committee under clause (3), upon inquiring into such petition in accordance with Federal law, makes recommendation to the House of Representatives for impeachment proceedings, a motion of impeachment under clause (2) may be moved.*
6. *After the commencement of impeachment proceedings under clause (2), the Chief Justice of Nepal or Judge of the Supreme Court, member of the Judicial Council, chief or official of the Constitutional Body shall not be allowed to discharge the duties of his or her office pending the settlement of such proceedings.*
7. *A person who is charged with impeachment under clause (1) or (2) shall be provided with*

a reasonable opportunity to defend himself or herself.

8. *Nothing shall bar the taking of action under the Federal law in relation to the offence, if any, committed while in office by the President or Vice-President, Chief Justice of Nepal or a Judge of the Supreme Court of Nepal, member of the Judicial Council, chief or official of a Constitutional Body who is relieved of office upon the passage of a motion of impeachment under this Article. (9) A pers*

9. *A person who is relieved of office on the passage of a motion of impeachment under clause (1) or (2) shall not be entitled to obtain any facility accruing from such office and to be appointed or nominated to any public office in the future..*

10. *Other matters relating to impeachment shall be as provided for in the Federal law.*

23. Article 101 (2) of the Constitution of Nepal prescribes that an impeachment proceeding can be initiated on the grounds of "**serious violation of the Constitution and laws, lack of competence or misconduct, or failure to discharge duties honestly or serious violation of the code of conduct**". From among the four grounds, the first three grounds are similar to practices that are prevalent in other countries. However, the fourth ground, "serious violation of the code of conduct", in comparison to prevailing system, appears to be a completely new provision. Other countries have prescribed "serious violation of the Constitution" whereas the Constitution of Nepal in addition to serious violation of the Constitution has added "serious violation of the code of conduct". However, the appropriateness and its jurisprudential interpretation and analysis of this provision remain yet to be seen.

24. When an impeachment proposal is submitted pursuant to Article 101 (2) of the Constitution of Nepal, it is for this Bench to determine as to when the concerned official is not allowed to discharge his/her duties. Article 101 (6) of the Constitution stipulates that "**with the commencement of the impeachment proceedings**"¹⁸ the Chief Justice or Justice of the Supreme Court, members of the Judicial Council, chief or official of the Constitutional Body shall not be allowed to discharge the duties pending the settlement of such proceedings. The significance, purpose, and implementation of this provision, as well as the authority to implement it, are subject to consideration. The Constitution has vested the Parliament the authority to initiate impeachment process. This right has not been provided to any individual including the Speaker of the Parliament, that can be exercised in single or whole. No one can exercise a right that is not vested upon them. Where a decision to initiate impeachment proceedings has not been passed by the Parliament (House of Representatives) and where a decision to forward the impeachment motion to the Impeachment Recommendation Committee formed pursuant to Article 101 (3) of the Constitution has not been made, it cannot be deemed that impeachment proceedings have commenced. The proposal to be submitted by the members of the House of Representatives cannot be deemed to be the decision of the

¹⁸ Rule 168 sub-rule (9) of the Legislature-Parliament, 2073 states "...an official against who an impeachment proceeding has commenced, the official shall not discharge the duties pending the proceeding of the impeachment". The General-Secretary pursuant to this provision and corresponded on 2074/01/17 (corresponding to 30/05/2017). Article 87 (9) of the Constitution of the Kingdom of Nepal, 2047 stipulates "with the commencement of the impeachment proceedings, the Chief Justice or justice of the Supreme Court shall not discharge his/her duties pending the impeachment proceedings". The same provision was prescribed under Article 105 (3) of the Interim Constitution, 2063.

Parliament. The proceedings are deemed to commence only upon the formal acceptance and ownership of the impeachment proposal. Until and unless, the Parliament does not formally accept the proposal and endorses the proceeding, it cannot be deemed that the impeachment proceedings have commenced. The submission made by the members of the House of Representatives is merely a "proposal." Submission of "proposal" on an unspecified subject before any Body does not deem that the proceedings have commenced. Provided, any judge or constitutional official is not allowed to discharge their duty based on the proposal submitted by one-fourth of the members of the House of Representatives, then the provision of the Constitution requiring two-thirds majority to pass the impeachment proposal would be rendered ineffective. Likewise, provided the impeachment proposal without being endorsed by the House of Representative and in the absence of any decision made by the House of Representative is said that the "impeachment proceedings have commenced" then that would be a misinterpretation of the Constitution. Article 124 of the Indian Constitution and the Judges (Inquiry) Act, 1968, prescribes that an accused judge cannot be suspended without the recommendation of the committee constituted to investigate the impeachment. Article 65 of the Constitution of South Korea¹⁹ provides that the concerned person (including the judges) shall be suspended from their post until the impeachment has been adjudicated. The objective or the intention of Article 101 of the Constitution of Nepal is also the same. Provided, any order, decision, directive, rule, law, etc. are enacted that is contrary cannot be deemed to be constitutional.

25. With regards to the proceedings performed by the General-Secretary in relation to the disputed impeachment, it is evident that the Honorable Speaker had provided a directive on the impeachment proposal by addressing the directive as "General Secretary, N.A.") The natural implication of the term "N.A.." means "to make necessary arrangements to present the proposed before the House of Representative Assembly pursuant to the Rules". The Constitution does not authorize the Speaker to issue an order to the Chief Justice refraining the Chief Justice from discharging his/her official duties. It is also evident that the Speaker has not provided any clear instruction to the General-Secretary asking the General-Secretary to inform the Chief Justice Sushila Karki to refrain from discharging the official duties and therefore, the correspondence made by the General-Secretary is entirely inappropriate and unauthorized. The General-Secretary pursuant to the law is required to certify the decision made by the Parliament, and cannot exercise the authority of the Parliament. The authority to make decisions regarding impeachment is vested in the House of Representative and this right cannot be exercised by any other officials other than the House of Representative. The issue of impeachment should not be a matter of personal prestige. While submitting the impeachment proposal, it is expedient that the proposer and supporter of the impeachment proposal should be confident that the allegations made will be objectively substantiated. Similarly, the proposer and the supporter should also be conscious about the political and constitutional ethics they might have to be accountable for, provided, the proposal presented is not passed. Right relating to impeachment is a special provision that can be exercised under exceptional circumstances in order to maintain constitutional dignity. Impeachment should not be exercised as a means to interfere with or to control the judiciary. Provided, there are sufficient grounds and reasons for impeachment, and if exercised with good intentions, then impeachment can be exercised to

¹⁹ Article 65(3) of the Constitution of the Republic of Korea, 1987 "Any person against whom a motion for impeachment has been passed shall be suspended from exercising his power until the impeachment has been adjudicated".

maintain judicial integrity, prevent arbitrariness, to make accountable for any misconduct, and maintain judicial competence. However, in the context of the present dispute, it is evident that the impeachment proceedings were initiated hastily by the House of Representative and the Secretary General had exceeded his jurisdiction and on 2074/01/17 (corresponding to 30/04/2017) had informed the Chief Justice not to discharge her official duties. Such actions cannot be deemed to be constitutional.

26. With the submission of the impeachment proposal, the law expects speedy commencement of the proceedings. Pursuant to Rule 168 of the then prevailing Legislature-Parliament, 2073, the General-Secretary upon receipt of the impeachment proposal, should submit the proposal to the Speaker, wherein the Speaker within seven days from the date of registration of the proposal should allocate a date and time for discussion in any meeting (meeting of the House of Representatives). Provided, the Legislature-Parliament is not in session, the member submitting the impeachment proposal should within a maximum period of fifteen days from the date of registration of the proposal and pursuant to Article 93 (3) of the Constitution call for a session of the House. Where a call for a session has been made, a date and time should be fixed within three days from the commencement of the session and upon discussion on the impeachment proposal a recommendation should be sent to the Impeachment Recommendation Committee. Procedural provisions have also been prescribed in the Impeachment (Regulation for Procedure) Act, 2059. The Constitution of Nepal and the laws enacted to determine the procedure for impeachment expects the impeachment proposal to be addressed speedily and with expeditiously. These provisions have been prescribed on the principle that a judge or any other constitutional office-bearer should not be kept in a state of uncertainty for a long time.²⁰ It cannot be prolonged indefinitely, delayed, or made a subject of bargaining. In order to guarantee the trust, effectiveness and independence of constitutional Bodies including the judiciary, it is imperative that the impeachment proceedings be carried out within an appropriate and reasonable time period. This is also a subject matter of accountability for office-bearers who exercise legal authority and receive remuneration and other payments from the state treasury. However, looking at the dispute, and upon perusal of the rejoinder submitted by the respondent, the Bench observes that the respondents have failed to submit any proposal and agenda within the time period determined by the Regulation and Article 101 of the Constitution for discussion before the House of Representative Therefore, the Bench defers to deem that the impeachment proceedings had been initiated by the House of Representative upon accepting the disputed impeachment proposal
27. It is now for this Bench to decide as to whether or not any kind of writ order should be issued as sought by the writ petitioner? An impeachment proposal in relation to the judicial decision made by the then Honorable Chief Justice Sushila Karki was submitted against the Chief Justice and subsequently correspondence stating the commencement of the impeachment was provided by the General-Secretary of the Parliament on 2074/01/17 (corresponding to 30/04/2017) and the respondents rejoinder stated that since it was a prerogative right of the Parliament, the court could not entertain the matter. Upon observing the judicial practices relating to impeachment in other countries, the Court hereby deems that the proceedings relating to impeachment is contrary to the Constitution. However, the Bench has taken notice

²⁰ Article 17 of UN Basic Principles on the Independence of the Judiciary, 1985 states “A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure”.

that the impeachment proposal presented against the then Honorable Chief Justice Sushila Karki on 2074/1/17 (corresponding to 30/04/2017) was withdrawn by the proposers on 2074/2/15, (corresponding to 29/05/2017) and subsequently, the proposal was also withdrawn from the meeting of the Legislature-Parliament on 2074/2/23 (corresponding to 06/06/2017). Where the then Honorable Chief Justice Sushila Karki owing to her age limit has retired from her service on 2074/02/24 (corresponding to 07/06/2017), the Bench deems that no constitutional or legal remedies need to be issued and hence the writ petition is hereby dismissed. Order is hereby set aside to do according to the particulars provided herein:

Particulars

1. Where the present writ petition was registered to be heard by this court, and where the petitioner did not submit the deposit pursuant to Rule 15 (3) of the Supreme Court (Constitutional Bench Procedure) Rules, 2015, the Bench exempts the petitioner from submitting the said deposit.
2. An order is hereby issued to provide a copy of this order to all the respondents through the Office of the Attorney General.
3. An order is hereby issued to provide a copy of this order, to the General-Secretary of the Federal Parliament for necessary action.
4. Where correspondence contrary to the provisions of the Constitution had been made by the General-Secretary Manohar Prasad Bhattarai wherein such acts could be a subject of departmental action. However, since he has already retired from his service, the Bench deems that no further actions be taken against him.
5. Order is hereby set aside to enter this order into the electronic system of this Court, and to remove the petition from the log and accordingly submit the case file to the Record Section.

Concurring with the above Opinion:

Acting Chief Justice, Honorable Hari Krishna Karki

Honorable Justice Vishwambhar Prasad Shrestha

Honorable Justice Anil Kumar Sinha

Concurring opinion of Honorable Justice Dr. Anand Mohan Bhattarai

I have gone through the opinions of my Honorable colleagues with interest and I fully agree with all the points mentioned therein. I would also like to thank my colleagues for preparing their opinions with diligence.

The manner in which the then Chief Justice Sushila Karki was subjected to an impeachment motion, replete with constitutional and legal flaws, and the subsequent withdrawal of the same in

a mysterious manner, suggests to me that there is a flaw somewhere in our constitutional system or in our thought process that needs to be rectified. On the one hand, this is a dispute that has come to an end. However, the wound that has inflicted on the proponents of the rule of law, democracy, and independent judiciary is a matter that needs to be addressed, and we must ensure that such incidents are not repeated in the future. Therefore, I would like to raise some additional points for constitutional discussion, which have not been expressed by my colleagues.

While discussing about the present dispute, I feel that it is imperative for us to first delve and look into our constitutional journey, the role played by the judiciary, and the role expected of the stakeholders by the Constitution. It is evident that the foundation of the present constitutional system was laid down by our ancestors nearly a century ago, and if we consider the year 2007 peoples' movement as the starting point, we can conclude that our constitutional foundation commenced 72 years ago. During this long constitutional journey, there certainly have been many obstacles, twists and turns, and ups and downs. However, it can be said with pride that the faith and commitment of the general Nepali people towards democracy, the rule of law, and human rights have always remained unwavering; and that the Nepali people have been fully engaged in the democratic struggle. In a country that is behind in terms of development, modern education, and technology, and where most people are struggling to make a living, the unwavering faith and commitment of the common citizens towards democracy is indeed inspiring. Therefore, the present constitutional system is not just our current achievement, but it is also a sacred document of the Nepali people built on the foundation laid by our ancestors. In that sense, it is a pledge made by our ancestors and also a roadmap for the future and it is essential to implement the values of the Constitution in the practical life of the nation.

Various sectors have contributed to the current constitutional achievements and to the protection of the constitutional values; the contribution of the judiciary is also significant. In its long constitutional journey, the judiciary like other sectors has also faced many difficulties. However, historically, the court has within the limitations set to it by the Constitution and the laws, has always stood in favor of constitutionalism, democracy, the rule of law, and human rights and this is evident from the several historic decisions made in various periods after 2007. Since all the scholars engaged in the field of law and justice has sound knowledge on this issue, it is not necessary to enter into a detailed discourse. If we are to say that the judiciary has not made any contribution to what we have achieved constitutionally, then such opinions would not be a correct and would also not be a balanced evaluation of the history.

When considering the constitutional development of Nepal, in particular the achievements made during the past 32 years, the establishment of an independent and capable judiciary appears to be one of the achievements. However, we are doubtful as to whether or not we are actively pursuing in protecting these achievements. Looking at the past, the Constitution of the Kingdom of Nepal, 2047, for the first time declared the establishment of **"an independent and competent judiciary to materialize the concept of a rule of law"**; and the right to judicial review was also clearly incorporated in the same Constitution for the first time. Although we claim to have an "independent, impartial, and competent judiciary" and also claim that the judiciary has been granted functional autonomy, including the right to judicial review, we need to see how clear and confident we are in this regard? As of late, the role that we are playing in order to make the judiciary self-sufficient and efficient has become a subject of serious review. Are the executive or the legislative branches working to strengthen the concept of institutional development of an

independent and competent judiciary? As per the constitutional expectations, is there any professionalism in the decision-making process of the Constitutional Council and the Judicial Council? Have these two bodies not been transformed into a "work postponement institutions"? The questions as to whether the justices of the Supreme Court, including the Chief Justice, need to face the ordeal of parliamentary hearings, as required by the Constitution, requires a serious review. Honorable Sushila Karki became a senior most justice of the Supreme Court and later got the opportunity of being the first female Chief Justice of Nepal. However, the ordeals that she had to face and the months in waiting to become the Chief Justice and the challenges that she had to face can be unraveled from the book penned by her.²¹ What ought to be done or in what manner should one fulfill their constitutional roles in order to ensure a smooth constitutional journey? What roles should the concerned individuals play in order to ensure that the constitutional bodies can professionally function as the guardians of democracy? In order to move our constitutional journey forward, we also need to find answers to these uncomfortable and unexpected questions.

The opinions expressed by my fellow honorable justices against the impeachment motion filed against the then Chief Justice Sushila Karki have already been recorded and need not be reiterated. The impeachment proposal against the Chief Justice has been made based upon a decision made by her along with other justices presiding over the Bench. Upon perusal of the impeachment proposal, it seems that the proposers are conveying their dissatisfaction over the decision and are trying to state that the decision was made in a certain way, or that the executive power of the Council of Ministers should not have been encroached upon and that an attempt was made to bring it under the purview of the law. Pursuant to Article 75, the executive power of the Council of Ministers is subordinate to the Constitution and the law; and provided a person had a better understanding of the constitutional and legal provisions, and then the Chief Justice would not have had to face impeachment while making a decision on the appointment of an employee.

While expressing my opinion, my attention has been drawn to the concept expressed by the then Justice Vishwanath Upadhyaya, which has also been opined by my fellow Honorable Justices, regarding the case of Sarvagya Ratna. Justice Upadhyaya had opined that the Supreme Court pursuant to the Constitution could conduct judicial review of the laws made by the legislature....and that right to interpret the laws and the Constitution is vested in the court and this need not be explicitly expressed in the laws or the Constitution. This opinion was expressed at the time when the concept of independent judiciary was not recognized and the right to judicial review was not granted to the Supreme Court. Justice Upadhyaya stated that this was an inherent right of the court".²² This was a very courageous opinion during that time and Justice Vishwanath Upadhyaya had to experience some difficulties but he was not removed from the position of a judge. Provided, judgments were to be the basis of removal from office, justice Upadhyaya would have been removed from office for rendering judgments on the Mahakali Treaty²³, the dissolution and reinstatement of Parliament²⁴, the constitution of the Royal Commission²⁵, the election of the

²¹ Please refer to Nyaya, Pg. 143-149, Sushila Karki, Book Hill Publication

²² Sarbagya Ratna Tuladhar vs. Chairman, National Panchayat, Nepal Law Magazine, 2035, Decision No 1197, pg. 168

²³ Bal Krishna Neupane vs. Prime Minister Girija Prasad Koirala, Nepal Law Magazine 2054, Decision No. 6313, pg. 77

²⁴ Hari Prasad Nepal vs. Prime Minister Girija Prasad Koirala, Nepal Law Magazine Golden Jubilee Publication, 2052, pg. 88; Rabi Raj Bhandari vs. Prime Minister Manmohan Adhikari *ibid*, pg. 1

²⁵ Rabi Raj Parajuli vs. Special Court, Nepal Law Magazine 2062, Decision No. 7618, pg. 937

Prime Minister²⁶, and the extension and dissolution of the Constituent Assembly²⁷, which were constitutionally important and politically sensitive. During that period, we have witnessed that the judges making those judgments were not subjected to bad behavior. Democratic practices are being refined, tolerance level at the political level should be increasing but on the contrary it is unfortunate to see that we are attempting to embark on a regressive journey. It is very difficult to comprehend why a Chief Justice who has made a long contribution in the legal and judicial sector is being targeted at the end of her career.²⁸

Theoretically, it is a matter of review on how we are to understand and how are we understanding the right to judicial review relating to the controversial impeachment. In order to understand how the right to judicial review is embedded within the concept of an independent judiciary, we need to study not only the structure of the judiciary as enshrined in the current Constitution, but also need to conduct a microscopic study of the provisions prescribed under Article 133, Article 126, Article 128, Article 137, Article 144, Article 153, and Article 284 of the Constitution. However, it should be understood that this right has been vested upon the judiciary by all Constitutions promulgated after 2047 and the present Constitution has also vested this right to the Supreme Court.

The right to judicial review strengthens the concept of constitutionalism by preventing unwanted interventions to the Constitution and the values constitutionalism it has adopted. This right enables the Supreme Court to play a guardian and creative role in the protection and development of the Constitution. Where the Constitution has vested the Supreme Court the right to review the Constitution, laws, and the executive or legislative decisions, it is inevitable that the court will apply this right. In the course of applying this right, the court will at times encounter very uncomfortable and politically charged questions. The Constitution in itself is a legal and a political document, and therefore, it cannot be assumed that disputes or issues arising under the Constitution would not have political color. Even if the subject matter presented has a political color or has political implications or provided even if the decisions made therein will create a tremor in the political arena, the court should not refrain from dispensing justice pursuant to the Constitution and law. Provided, the court refrains from doing so, then such matters will not fall within the ambit of judicial duty. The study of comparative constitutional jurisprudence highlights that along with the right to exercise the power to make the final interpretation of the Constitution, the scope of the Supreme Court's jurisdiction has expanded. For example, in the 1960s, the court did not entertain political questions, however, in recent decades the court has been compelled to intervene in those matters. Perhaps this is inevitable for the consolidation of constitutionalism. In our context, matters relating to parliamentary supremacy and prerogatives rights such as the election of the Prime Minister or the extension of the tenure of the Constituent Assembly have been entertained by us. Therefore, it is necessary to understand that whenever the question of violation of an individual's rights arises, or where the executive or legislative action and omission arises, then such questions falls under the judicial radar. It is only through a process of rigorous review that constitutionalism, the rule of law, and human rights can be protected; and it is only through such reviews that

²⁶ Prabhu Krishna Koirala vs. Parliament Secretariat et.al. Nepal Law Magazine 2067, Decision No. 8420, pg. 1200

²⁷ Bal Krishna Neupane vs. Office of the President et.al. Nepal Law Magazine 2068, Decision No. 8588, pg. 545; Bharat Mani Jangam vs. Office of the President et.al. Nepal Law Magazine, Decision No. 8662, Pg. 1257

²⁸ The controversial proposal was submitted on 2074/01/17 (corresponding to 30/04/2017) and she retired from her service due to age on 2074/2/24 (corresponding to 07/06/2017)

constitutional jurisprudence can move forward in a meaningful way. Prior to initiating the impeachment weapon, provided if we had thought about our constitutional structure, the practice that we have adopted, the narrowed concept of political questions, and the expanding scope of judicial review, then perhaps we would not have proceeded in taking such a step over a decision related to the appointment of an employee. It is my understanding, that even if the impeachment is linked to parliamentary prerogatives, it is the right of a member to participate in the entire proceedings of the House, not a prerogative right to be used for personal gain.

Whenever an issue of impeachment arises, it is necessary for us to pay attention to the flawed arrangement made by the Constitution. One of the important aspects of an independent judiciary is the guarantee of security of the judges' position. In other words, it is recognized that as long as the judge behave properly, or in other words does not become a bad actor, then such a person can remain in office until the age limit prescribed for him. In the democratic countries in South Asia, it is found that the justices of the Supreme Court can be removed from office if they lack of efficiency and bad conduct.²⁹ These are the substantive conditions for impeachment. However, when we read our Constitution, we do not find any clarity on these substantive conditions. Although there was some clarity on this issue under the Constitution of 2047, the latter Constitutions have some kind of theoretical ambiguity regarding the conditions.³⁰ Perhaps this may be one of the reasons for adding conditions to the Constitution in recent years. Under the present Constitution, actions can be initiated against the justices of the Supreme Court provided: there is (a) serious violation of the Constitution and law, (b) lack of efficiency, (c) misconduct, (d) failure to discharge their duties honestly, and (e) serious violation of the code of conduct.³¹ Provided, if we were clear on the need for impeachment, and its substantive and procedural conditions, or provided there had been serious consultations with constitutional experts then such wanton grounds would not have been incorporated in the Constitution? This has become a matter of speculation. While discussing the issue of impeachment, there is a provision incorporated in the present Constitution that is not only unnecessary but also creates procedural anomaly. Pursuant to Sub-article (2) of Article 101 of the Constitution, one-fourth of the total number of then members of the House of Representatives may move a motion of impeachment and this a procedural condition prescribed by the Constitution. However, Sub-article (5) prescribes that at least three members of the House of Representative can certify and present the relevant information to the Impeachment Recommendation Committee constituted pursuant to Sub-article (3), and the Committee upon investigation may recommend the House of Representative for impeachment then a motion of impeachment under clause (2) may be moved. Even though it is not clear as to why such a rollercoaster route was adopted and for what purpose, this certainly raises various questions. Does this signify that even in the absence of one-fourth of the total number of the then members of the House of Representatives an impeachment can still be presented through the Impeachment Recommendation Committee under Sub-article (5)? However, Sub-rule (7) and (8) of House of Representatives Rule 2075, states that the impeachment procedures can only commence if one-fourth of the total number of the then members of the House of Representatives support the motion.

²⁹ Please refer to Article 124 of the Indian Constitution (for High Court) and Article 218 (for High Court); Article 209 of Constitution of Pakistan, Article 96 of the Constitution of Bangladesh, John Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, 39 *FORDHAM L. REV.* 5 (1970) available at: <http://core.ac.uk/download/pdf/144230866.pdf>

³⁰ Please refer to Article 87 (7) of the Constitution of the Kingdom of Nepal

³¹ Actions can also be initiated against High Court Judges and District Judges on the basis of misconduct. Please refer to Article 142 (1) and Article 149 (6) of the Constitution of Nepal

Therefore, for an impeachment to be a proposal, there has to be a minimum of one-fourth of the total number of the then members of the House of Representatives. Furthermore, my fellow justices have opined that, "..... until and unless a decision to initiate an impeachment process has not been made by the Parliament (House of Representatives) and until and unless a decision to submit the proposal before the Impeachment Recommendation Committee constituted pursuant to Sub-article (3) of Article 101 of the Constitution has not been made, we cannot deem that the impeachment process has commenced. This opinion expressed by my fellow justices clarifies the procedural conditions and clears any doubts remaining therein. When 25 percent of the members are required for the proposal, then isn't it fraudulent that the Impeachment Recommendation Committee can be brought into motion merely on the complaint of three members? It is difficult to comprehend as to why and for whom this provision has incorporated.

Retrospectively looking at the proposal of the controversial impeachment, minor accusations such as factionalism among justices, undue interference and pressure have been targeted against the Chief Justice Sushila Karki. However, it is not clear on what facts and information these accusations are based on. It is not acceptable for the representatives of the sovereign people to be so superficial and biased. These accusations do not seem to have any relevance to the criteria set for impeachment nor does it meet the necessary threshold. Upon perusal of the proposal, it appears that the grounds prescribed under Article 101 (2) have only been mentioned. Provided, there are no objective information detailing which allegations supports which title of offence then such proposal cannot even acquire the form of an impeachment proposal. After making accusations, it is the moral duty of the representatives of the people to stand by such allegations but surprisingly they withdrew the proposal and therefore, their action raises question on the democratic legitimacy. Another surprising aspect regarding the withdrawal of the impeachment proposal is that rather than emphasizing on the facts they have raised issues such as "'harmony, positive cooperation, and understanding among constitutional Bodies", which from the very inception I have described it as a mysterious event. This indirectly acknowledges that the accusations were not based on facts. It is not befitting the dignity of a constitutional body like the legislature to make light of such serious allegations. The Constitution definitely seeks harmony, positive cooperation, and understanding among the three branches of the State, but seeking to achieve the obligations entrusted by the Constitution through compromise is a betrayal of the Constitution, which is not acceptable. Only a judicial leadership that is committed to judicial integrity, which understands the values of the Constitution, and is dedicated to fulfilling its judicial duties can guide the Constitution in the right direction, and this requires courage, not hypocrisy.

There are some theoretical grounds to prove that the impeachment motion was introduced by overriding constitutional and legal provisions. Article 101, Sub-article (1) of the Constitution provides that the President and Vice-President can only be impeached if there is a serious violation of the Constitution and laws, whereas there is a list of grounds for the impeachment of the Chief Justice and other justices of the Supreme Court, including other constitutional officials. I agree that there can be different grounds for the removal of a political figure and a non-political figure from office and there are examples of countries following this process. However, all the officials mentioned in Sub-article (2) of Article 101 do not have the same jurisdiction. For example, officials other than the Chief Justice and the justices do not perform judicial functions. In the true sense, the nature of their work and the nature of the work performed by the justices are fundamentally different. In the works performed by the judges, there is always a party and an opponent, whereas in the works executed by other officials there may not be a party and an

opponent. Therefore, the standards and criteria of impeachment for these different officials can be different and therefore, it is appropriate to develop jurisprudence on impeachment according to the standards that need to be established for each post.³² In countries where democracy is not mature, the Executive at times based on the success or failure of a case tends to influence and exert its supremacy over the legislature and the judiciary. In our country, it is also heard that individuals having close affinity are appointed to judicial leadership and through these individuals attempts are made to manage the judiciary. Therefore, for the development of constitutional values, we need to cautiously examine as to whether or not policies based on the issue of success or failure of case are being framed with the intention of capturing the judiciary or as to whether or not attempts are being made to discourage the judges from performing their duties. To prevent such tendencies, it is desirable to ensure professionalism in appointments and is expedient to set a high threshold for impeachment. In this regards, Ajiz Haq, Tom Ginsburg, and David Landau have said: "Allowing removal of judges on ... broad grounds may give the political branches too much power to retaliate against the judiciary. For this reason, it may make sense to tether judicial removal to a narrower set of grounds tied to serious criminality³³." Provided, impeachment can be provisioned as a ground for removing the bad and the incompetent without being caught in the trap of partisan political interests, then only the sanctity of constitutional provisions will be maintained.

Lastly, I believe and we must all acknowledge that the present Constitution is not a mere document written in a vacuum. At the very outset, I had stated that it embodies the collective wisdom, reasoning, and conscience of generations.³⁴ From the first Constitution of Nepal to the present seventh Constitution, this Constitution has not only been a symbol of faith and trust for all Nepali but maximum efforts have been made to transform the Constitution into a document of social justice, and inclusivity. The Constitution is not just a repository of words, but rather it is a symbol and a sacred scripture of the agreement between past, present, and future generations.³⁵ Therefore, in order to maintain its sanctity and to achieve social transformation, it is imperative that the state organs perform their roles based on the fundamental values and principles of the Constitution. The judiciary is the most important institution to give life to the Constitution, and it is also its constitutional duty. The use of power for temporary self-interest, rather than for the greater good, will not promote constitutionalism, and neither will it promote the coexistence and harmonious functioning of the state organs. The thought that we created the Constitution and that the Constitution did not create us will pose a threat to the concept of constitutional supremacy. Therefore, I expect that in the coming days, the executive and legislative branches will focus on these fundamental issues and respect the independence of the judiciary, which I believe is essential for the development of the Constitution. With these opinions, I hereby provide my full support and

³² See CASS R. SUNSTEIN, IMPEACHMENT: A CITIZEN'S GUIDE (2017) at p 115

³³ Aziz Huq, Tom Ginsburg and David Landau, The Comparative Constitutional Law of Presidential Impeachment 88 UNIVERSITY OF CHICAGO LAW REVIEW 81, 154 (2021)

³⁴ According to Hegel, a constitution is '*the work of centuries, the consciousness of rationality so far as that consciousness is developed in a particular nation.*' See Mark Tushnet, The Possibilities of Comparative Constitutional Law, 108 YALE L.J. 1225, 1269 (April 1999) referring to Hegel.

³⁵ Prof. Michelman, uses the term "scripture" to refer to constitution. He states: A constitution ...is a *basic legal, scriptural* production. "Scripture" connotes the constitution as a publicly identified corpus of canonically worded prescriptive sentences, See Prof. Frank I Michelman, in CONSTITUTIONAL TRIUMPHS, CONSTITUTIONAL DISAPPOINTMENTS: A critical Assessment of the 1996 South African Constitution's local and international Influence, (Rosalind Dixon and Theunis Roux eds. CUP,2018)

concur with the opinions of my fellow honorable justices.

Bench Officers: Yaduraj Sharma / Anjan Raj Sapkota

Year 2079 of the Month of Mangsir Date 7 and Day 4

(Corresponding to 23 November, 2022)