Supreme Court, Special Bench[•]

Honorable Justice Balaram K.C.
Honorable Justice Gauri Dhakal
Honorable Justice Bharatraj Upreti

Writ No. 0029 of the Year 2007
Subject: Certiorari/Mandamus

Advocate Subodhman Napit, resident of Kathmandu District, Kathmandu Metropolis Ward No. 32 v. Prime Minister and Council of Ministers, Singhadurbar

Abstract

The petitioner filed the writ petition demanding the declaration of the second amendment to article 155 (1) of the Constitution which required parliamentary hearing for the appointment of supreme court judges claiming it to be contrary to the spirit of the Preamble of the Constitution and Article 110, 103 (1), 163 (3), 164 (1) and also to the values and principles of an independent judiciary.

The respondents deliberated that the procedure of parliamentary hearing is to bring more clarity on the persons past conduct and activities prior to his nomination as a judge and as such the provision does not cause any effect on judicial independence and the amendment was constitutional as it was carried out through prescribed procedure.

One of the amicus curies opined that there might be probability of being appointed as judge by pleasing one particular party or leader and that since the constitution of 2047 had prescribed for substantive limitation where the basic infrastructure of the Constitution cannot not be amended. The other amicus curie viewed that parliamentary hearing of judges cannot be deemed to a detrimental effect on judicial independence but that the procedure of hearing must be reformed.

The court held that the objective behind the concept of parliamentary hearing made pursuant to the second amendment under Article 155 (1) of the Interim Constitution is to maintain check and balance by the Legislature-Parliament in relation to the nomination of judges and other important post of the State. The provision of parliamentary hearing was incorporated during the promulgation of the Constitution and clarity to the said provision was made by the second amendment and as such the provision does not cause any restrictions on the independent of judiciary and thus rejected the writ petition. However the court deemed it necessary to bring reforms in the procedures of the hearing.

[•] Nepal Law Reporter 2010, Part 6, Decision No. 8385

Order

Honorable Justice Balram K.C.:

The synopsis of the writ petition submitted before this court pursuant to Article 32 and Article 107 (1) of the Interim Constitution 2063 and the order made therein is as follows:

That the Preamble of the Interim Constitution, 2063, has envisaged for an independent judiciary and rule of law and has expressed its full commitment towards democratic norms and values. That Article 100 (1) and (2) of the Interim Constitution prescribes that powers relating to justice in Nepal shall be exercised by the courts and other judicial institutions in accordance with the provisions of the Constitution, the laws and recognized principles of justice. Likewise, Article 162 (3) stipulates that necessary legal arrangements shall be made on the basis of democratic norms and values to bring about gradual reforms in the judicial sector so as to make it independent, clean, impartial and competent. The provision prescribed in the said Articles clearly reflects the Constitution's fundamental objective and spirit of keeping the functions of the judiciary independent, competent and impartial. Pursuant to the principles of separation of powers and check and balance, it is but constitutional to guarantee independent judiciary.

Nevertheless, during the promulgation of the Constitution, Article 155 (1) prescribed for a parliamentary hearing in accordance to the provisions of the law prior to such appointments. The said provision was amended through the second amendment wherein the amended provision prescribed for a parliamentary hearing prior to appointments to constitutional positions for judges of the Supreme Court and to positions of ambassadors subsequently recommended by the Constitutional Council. The said provision is not only contrary to the spirit of the Preamble of the Constitution and Article 110, 103 (1), 163 (3), 164 (1) but is also contrary to the values and principles of an independent judiciary.

Summoning the position of the Chief Justice and justices of the Supreme Court for parliamentary hearing is deemed to be a direct intervention by the Executive and Legislative over the judiciary and is also deemed to be biased towards the judiciary and also curtails the general citizens from acquiring and exercising their fundamental rights.

The writ petition further states that pursuant to the amended provision prescribed under Article 155 (1), provided, there is an intervention by the government or the Legislature-Parliament over the judiciary and where the justices and judiciary are not independent but rather controlled, then it is evident that the morale of the judiciary would diminish and the justices would not be able to go against the decision of the government and function in accordance to the provisions of the Constitution thereby making the judiciary incompetent and unable to function independently. Likewise, access to justice pursuant to Article 24 (9) would be denied, right to equality guaranteed under Article 13 (1) would also be denied and right to live with dignity pursuant to Article 12 (1) may also not be exercised. The petitioner states that the amended provision has curtailed the fundamental rights of the citizens.

The petitioner contends that where the judiciary of a country is controlled, pure justice cannot be envisaged from such a judiciary. The writ petition contends that with the amendment of Article 115 (1), the fundamental rights which are not subject to suspension even during the period of emergency pursuant to Article 143 (7) may be infringed and in order to exercise this particular right, the judiciary needs to be independent.

The writ petition states that the orders or decisions and interpretations of the courts pursuant to Article 116 (1) and (2) shall be binding upon the government of Nepal and all offices and courts and that Article 102 (4) of the Constitution provides the Supreme Court with the final authority to interpret the Constitution and the laws and therefore, where judicial freedom is infringed, the judiciary cannot remain silent.

The writ petitioner contends that where the provisions prescribed under Article 155 (1) is contrary to the spirit prescribed under Article 100 (2), Article 164 (1), Article 162 (3) and Article 103 (1) and also the Preamble of the Constitution and the fundamental rights prescribed under Article 12 (1), (3) (f), Article 13 (1), Article 18 (1), Article 24 (9) and Article 143 (7), the petitioner pursuant to Article 107 (1) and (2) petitions the court to quash the term 'judges' prescribed under the amended Article 155 (1) through an order of certiorari.

An order had been set aside by a single bench on March 10, 2008, wherein the said order had directed the petitioner to provide legal provisions relating to hearing of the judges and also to submit national and international principles, law, precedents and resource materials substantiating the same and upon receipt of the materials to present the writ petition accordingly.

The petitioner through the writ petition claims that Article 155 (1) of the Interim Constitution, 2063 curtails the right of judicial independence and in this context it is deemed appropriate to hold an extensive discussion on the impact of the said Article. For the purpose of holding such a discussion and to acquire knowledge on the subject matter an order had been set aside by a single bench on April 21 2008 requesting the presence of a senior Advocate or an advocate each from Nepal Bar Association and Supreme Court Bar Association and senior Advocate or Advocate each engaged with Tribhuvan University, Nepal Law Campus and Kathmandu School of Law a college affiliated with Purwanchal University as amicus curie and to present the writ petition accordingly.

An order had been set aside by a single Bench on September 8, 2008, wherein the said order had directed to provide a copy of the writ petition to the respondents through the Office of the Attorney General seeking the respondents as to why the order sought by the petitioners need not be issued and had directed the respondents to submit their rejoinder within 15 days from the date of receipt of the order excluding the period of travel and to submit the writ petition upon receipt of the rejoinder or upon expiry of the date of submission of the rejoinder.

The rejoinder submitted by the Secretariat of the Legislature-Parliament reads as such: that rights prescribed under Article 1 and Article 107 (1) of the Constitution relates to the review of the laws and not a review of the Constitution. That the Legislature-Parliament has drafted the Interim Constitution of Nepal through the constituent power provided by the Nepali people and not through the rights provided by the law and provided where the writ petition is to accepted in toto and where the constitutional validity is to be examined, then it can be deemed that the constituent power of the sovereign Nepal is vested in the Supreme Court and not upon the Nepali people and as such this would be contrary to the principle of constitutional jurisprudence.

That the provision of constitutional hearing was a provision incorporated during the promulgation of the Constitution and not a provision incorporated through the second amendment. The second amendment merely clarifies the constitutional posts. The post of the judges of the Supreme Court cannot be deemed to be outside the purview of the Constitution. The Constitution has not provided any limitations to the Legislature-Parliament with regards to the amendment of the Constitution. That Article 148 (1) of the Constitution prescribes for the introduction of a Bill to amend or repeal any Article of the

Constitution which may be introduced in the Legislature-Parliament and therefore, the Legislature-Parliament is competent to make any kind of amendments to the Constitution.

That where issues of judicial independence are raised issues regarding judicial responsibilities should not forgotten. That the concept of judicial supremacy as claimed by the petitioner is not envisaged by the Constitution and likewise, the concept of judicial supremacy does not accept the judiciary and the judges to be above the Constitution. That pursuant to democracy and rule of law, no one under the pretext of any principle has the permission to exceed the limitations and conditions prescribed by the Constitution.

That prior to appointment to the post of a judge, the public through the Legislature-Parliament can be informed about the person being appointed to such post and that the public at large would have the opportunity to express their opinion and comments and that the system of hearing would make the appointment process of the judges more transparent thereby generating sense of public ownership over such appointments. Such process is deemed to be an important indicator towards judicial good governance. Such process determines people's participation in the appointment thereby strengthening the public and also contributes in making the legal system more competent and responsible. This process can be deemed to be a mechanism for balance of power and control and in making the Executive's right more transparent and liable.

That this is not a new concept implemented only in the context of Nepal. This system has been in practice and established in the United States for a long period. That pursuant to the principles of judicial independence, a person appointed to the post of a judge should be able to execute his functions independently without any coercion and interference and such independence should be guaranteed by the Constitution. Such process does not cause any encumbrance to the transparency process of appointment of judges, obligation towards the people and public participation. That the practice and system of parliamentary hearing of judges prior to his appointment to the post of a judge does not weaken the judiciary but on the contrary makes the judiciary more strong and people oriented and since this process further accelerates the spirit of people's ownership over the judiciary, the said writ petition should be quashed.

Likewise, the rejoinder submitted by the Ministry of Law, Justice and Parliamentary Affairs reads as such: that the provision relating to hearing prescribed under Article 155 (1) of the Constitution is for person recommended by the Judicial Council and the framers of the Constitution had prescribed the provision with the intent of selecting a matured, competent and an honest person to the post of a judge. Therefore, the said provision does not in any way whatsoever contradict the provisions of the Constitution.

That it cannot be deemed that the provision of parliamentary hearing weakens an individual's independence or position. Rather such a hearing strengthens the self-confidence of the concerned person. Such nomination processes creates transparency and impartiality for the person nominated to such public post and therefore, the writ petition should be quashed.

The content of the rejoinder submitted by the Prime Minister and Office of the Council of Ministers reads as follows: that Article 149 of the Interim Constitution of Nepal, 2063, has provisioned for a Constitutional Council for making recommendations for appointments of officials to constitutional Bodies. Pursuant to the provision prescribed under Article 155, officials to the constitutional bodies, judges of the Supreme Court and ambassadors prior to their appointment shall pursuant to the provisions prescribed in the law attend a parliamentary hearing and as such there cannot be any kind of interference during their work. Each constitutional body shall be independent under the law while executing its work and that there shall be no interference by another body against the

functioning of such body. That the principle of separation of power and check and balance has been envisaged by the Interim Constitution, 2063, and the prevailing laws of Nepal. In order to effectively implement the said principles, the impartiality, competency and high morale of such officials need to be examined prior to their appointments by the sovereign Nepali people or through their representative and as such the said provision should not be deemed otherwise.

That the State and its units and other bodies should be people centric and should be liable towards the people and as such the said provision in itself is a democratic practice which is in practice in other democratic countries. That pursuant to the constitutional provision, the appropriateness of the judges have been put to test and judges have been appointed following such parliamentary hearing and where such practice has been put to test, the petitioner after a long period has entered the writ jurisdiction and has failed to substantiate the appropriateness of his petition and therefore, the order sought by the petitioner need not be issued and hence the writ petition should be quashed.

Where the writ petition was sub-judice, a writ petition pursuant to Rule 41 (1) of the Supreme Court Regulation, 2049, had been submitted by the petitioner seeking for an interim order. The writ petition had been submitted pursuant to news published in The Kantipur Daily dated December 9, 2008 and December 11, 2008 citing that the respondents were in the process of appointing judges through the public hearing which was deemed to be contrary to the Constitution.

Pursuant to the gravity of the nature of the issue, an order had been set aside by this court on July 2, 2009 whereby the petitioner, respondents and the amicus curie were requested to submit their respective deliberation note.

Where the case pursuant to the rules had been submitted before this Bench, and where the case was presented for hearing on February 25, 2010 and March 18, 2010, the synopsis of the deliberation made by the learned Advocates on behalf of the petitioner, respondents and the deliberation made by the amicus curie is as follows:

Learned Advocate Subodhman Napit on Behalf of the Petitioner:

That the limitation of the fundamental rights provisioned in the current Interim Constitution is larger than that prescribed in the former Constitution. That the judiciary in order to protect the fundamental rights of the citizens guaranteed by the Constitution needs to be more independent. Where Nepal is in the process of entering into a federal state, it is deemed necessary that the judicial bodies of the State should be fully independent and competent. Article 100 of the Constitution guarantees judicial independence. The Constitution prescribes for a Judicial Council to recommendation nomination of judges to the Supreme Court and other courts whereas the Constitutional Council prescribes recommendation for nomination of the Chief Justice. Likewise, provided, the judges of the Supreme Court do not function pursuant to their code of conduct, they may be relieved from their post by the Parliament through a motion of impeachment.

That where these provisions incorporated during the promulgation of the Interim Constitution provided judicial independence and liability, the second amendment to Article 155 (1) of the Constitution entitled the judges prior to their appointment to attend parliamentary hearing and as such the said provision is contrary to the letter and spirit and sentiments regarding the provision of judicial independence as envisaged by the original Constitution. Such provision tends to make judges more loyal towards the political parties. That people with criminal record are present in the Parliament and where decisions by judges are not made in favor of such persons, then such persons may be biased against the

judges. Where a judge has to experience fear, then the right to criminal justice and fundamental rights of the citizens cannot be determined. Therefore, the term 'judges' incorporated by the second amendment should be repealed. The learned advocate had submitted his deliberation note supporting his writ petition and deliberation made therein.

Learned Advocate Chandra Kanta Gyawali on Behalf of the Petitioner:

That the right to amend the Constitution pursuant to Article 148 of the Constitution is not an uncontrollable right. Where an amendment is made that is deemed to be contrary to the spirits, sentiments and provision of the original Constitution then such amendment is deemed to be void. Such constitutional practices have been observed in India and in other countries. That where a universal standard regarding judicial independence exists, then what issues should and should not be incorporated need not be a matter of debate. That the original Constitution may define the limitation and extent of judicial independence and this being a political and legal right of the people, judicial review cannot be exercised in such matters, but provided where rights guaranteed by the original Constitution is reduced, then questions may be raised on such issues.

That during the promulgation of the Interim Constitution, provision for parliamentary hearing for judges was not incorporated but rather the Constitution prescribed for an independent Judicial Council for recommending nomination of judges. The Judicial Council has representatives from the government of Nepal, Nepal Bar Association and representatives from other bodies and pursuant to the Constitution and law, the Council makes recommendation on the appointment of judges. Likewise, the Constitutional Council comprising of the Speaker, the Prime Minister and Ministers makes recommendation on the appointment of the Chief Justice. Provided, the judges appointed therein are unable to function pursuant to their code of conduct, the Constitution prescribes for a constitutional provision wherein the said judge may be relieved from their post through impeachment. Therefore, where through an independent mechanism an appropriate candidate is recommended to the post of Chief Justice and judges there is no rationality in conducting a hearing by the Parliament.

That other than the United States, the provision of conducting a hearing for judges is not practiced elsewhere. In the United States, the judges are nominated directly by the President and not by any other independent body and therefore, the practice of hearing are conducted so as to check and balance the procedure of appointment. In such hearings, processes not contrary to the values of judicial independence are predetermined. But in the context of Nepal, such circumstance does not prevail. A single judge has to participate in such hearing processes three times and that procedures and standards for hearings are not determined. Pursuant to Article 100 of the Constitution, the judiciary should be liable towards the Constitution, law and recognized principles of justice but the provision of hearing tends to make the judiciary to commit itself towards the political leaders which is contrary to the provisions prescribed in the original Constitution. Where the respondents have not been able to substantiate any rationality towards the incorporation of the provision of hearing which is contrary to the concept of independent judiciary, the order as sought by the petitioner should be issued.

Joint Attorney Mr. Krishna Bhattarai on behalf of the Government of Nepal:

That where the Interim Constitution has not provided any clear definition with regards to judicial independence this should be construed pursuant to the international values,

recognition and practices. That the procedure of parliamentary hearing is to bring more clarity on the persons past conduct and activities prior to his nomination as a judge and as such the provision does not cause any effect on judicial independence. That where the Parliament amends the Constitution contrary to the spirit and sentiment of the Constitution then such amendments may be a matter of judicial review but the present Interim Constitution has been declared by the House of Representative. That where the present Legislature is the Constituent Assembly and where the said Body has the authority to promulgate the new Constitution it would be improper to deem that the said Body does not possess the right to amend the Constitution. That where judicial review against the amendment made by the Legislature-Parliament on the Constitution cannot be carried out the writ petition should be quashed. Joint Attorney Mr. Krishna Bhattarai had submitted his deliberation note.

Amicus Curie Advocate Purnaman Shakya:

That judicial independence in the absence of interference and pressure determines judicial decision. Where question of independence arises, the issue of liability also subsequently arises. That the appointment of judges, conditions of service and termination of their post is related with judicial independence. That there is no uniform opinion as to whether the stage of independence arises prior to or after the appointment and that the matter of parliamentary hearing of judges is closer to institutional independence.

The nature of nomination is executive. In order prevent erroneous acts of the Executive relating to appointments, independent Bodies such as the Judicial Council have been constituted. That where a hearing of a recommended person is carried out, review of the act of the Executive and Council is also conducted and this should not be deemed to be a competitor but rather a supplement to the principles of separation of powers. That where a person desirous to be a judge intends to live a moral life and as such this should be positively accepted.

That as to whether or not the procedure of hearing has been properly determined is an issue to be determined. That where disapproval for recommendation for appointment requires unanimous decision, the approval of a single member also results in the approval of the recommendation and as such there is no need to fear from one particular party or leader. Likewise, there is also the negative probability of being appointed by pleasing one particular party or leader. That an extensive study vis-à-vis the principles, values and rules regarding hearing should be carried out and such principles, values and rules should be appropriate. That where there is a conflict of interest between the person in hearing and member of the Parliament, then such a member should not be a part of the hearing and that the procedure of hearing should be based on the values of independence.

That the right to amend the Constitution is not unlimited and there may be some definite limitations or restrictions and that the Interim Constitution is not permanent in nature. That the limitations of amendment should be viewed through procedural and substantive limitations. The Constitution of the Kingdom of Nepal, 2047, had prescribed for substantive limitation where the basic infrastructure of the Constitution cannot not be amended. Although, such limitation have not been prescribed under the Indian Constitution, the courts had proposed a middle path concept and had interpreted that the amendment to the Constitution could be done without spoiling the basic features of the principle Constitution. Although, Article 148 of the Interim Constitution does not explicitly provide any particular restriction on the amendment of the Constitution there are some interrelated limitations. For example, the Constitution cannot be amended to transform it into a

permanent Constitution. Likewise, demand for drafting the Constitution, dissolution of the Constituent Assembly, removal of fundamental rights and transformation of the democratic rule into autocratic rule cannot be done through the amendment.

Amicus Curie Advocate Gunanidhi Neupane:

That the Interim Constitution has not envisaged any basic infrastructure. That Article 148 of the Constitution has provisioned for amendment of any Article or provision through a two-third majority and as such any matter within the Constitution may be amended. That judicial independence is provisioned for protection of human rights and maintaining rule of law. That impartiality, financial and administrative autonomy, appointment, security of tenure and liability falls within the purview of judicial independence.

It cannot be deemed that parliamentary hearing of judges will have a detrimental effect on judicial independence. That certain procedures and standards have been maintained wherein the practice of hearing of judges have been developed in the United States but unfortunately where the procedure of hearing has been initiated in Nepal it has not been properly managed. That repeated hearing may have an impact on judicial independence. Therefore, reform should be made on the procedure of hearing and it would be deemed appropriate if hearing could be carried out once rather than carrying it out repeatedly. Learned Advocate had also submitted his deliberation note.

Today being the date set aside for rendering a verdict, the Bench upon perusal of the writ petition and the deliberations and the deliberation note submitted therein by the learned advocates and amicus curie, the Bench deems that decision should be rendered on the following issues:-

(1) As to whether or not the Legislature-Parliament can amend the Interim Constitution, 2063, and provided, such amendments can be done by the Legislature-Parliament what subject matters falls within the ambit of such amendment and as to whether or not there is any constitutional limitations or restriction on such amendments?
(2) What are the basic infrastructures of an independent judiciary and as to whether or not the present Constitution guarantees judicial independence?
(3) What is the concept of the provision prescribed through the second amendment under Article 155 (1)?
(4) As to whether or not the provision incorporated through the amendment under Article 155 (1) interferes with judicial independence?
(5) As to whether or not the constitutional and procedural provisions relating to parliamentary hearing is sufficient or is there a need to bring reforms to these provisions?
(6) As to whether or not the provision prescribed under Article 155 (1) should be repealed as sought by the petitioner?

2. With regards to the first issue, prior to the second amendment of the Interim Constitution, 2063, Article 155 (1) of the Constitution prescribed the following: "There shall be a parliamentary hearing prior to the appointments of officials to constitutional positions under the Constitution, in accordance with the provisions of law." With the second amendment, the said provision reads as follows: "Prior to the appointment of any persons to constitutional positions to which appointments are made on the recommendation of the Constitutional Council pursuant to this Constitution, to positions of judges of the Supreme Court and to positions of ambassadors, there shall be parliamentary hearing as provided by law." The petitioner had sought for repeal of

Article 155 (1) on the grounds that the amended provision would tantamount to interference by the government or Legislature-Parliament over the independence of judiciary and that the judiciary would be controlled by the Legislature-Parliament thereby reducing the morale of the judiciary and that the judiciary would not be able to go against the decision of the government and that the judiciary would not be competent to provide justice pursuant to the law which would result in restriction in the exercise of the fundamental rights of the citizens guaranteed by the Constitution. Based on the above rationality, the petitioner had sought for removal of the term 'judges' provisioned under Article 155 (1) and pursuant to Article 107 (1) of the Constitution had sought for repeal of the amended provision.

3. Although, the petition submitted by the petitioner, the deliberations made therein and the written deliberation note submitted by the petitioner is not clear, the petitioner contends that second amendment made against Article 155 (1) of the Constitution prescribing for parliamentary hearing for judges of the Supreme Court tantamount to interference on judicial independence and seeks the court to quash the amended provision through an order of certiorari.
4. Prior to addressing the said constitutional issue and the deliberation raised in the petition, it is deemed necessary to analyze the difference between constituent power and legislative power.
5. Democracy is inherent in the sovereign people and the provision is based on the belief and principle that the people are sovereign. In order to be ruled by law, and for the purpose of drafting the Constitution, the people have exercised their sovereign rights by nominating delegates to the Constituent Assembly and those delegates are deemed to be the Constituent Assembly and the Assembly through the exercise of its constituent power drafts the Constitution and by holding extensive discussion among the people, the delegate ratifies such Constitution thereby producing a fundamental law of the country.
6. According to the constitutional expert K.C. Wheare, the constitution primarily is drafted through two procedures. Firstly, pursuant to the mandate received by the sovereign people the Constitution is drafted through the exercise of the authority for drafting the Constitution that is vested in the draftsmen and secondly, by adherence or acceptance of the Constitution that is drafted, prepared or penned by someone else.
7. From among the procedures mentioned hereinabove, the first method is deemed to be original or democratic. Under this, the delegates nominated by the people for drafting the Constitution, drafts the Constitution independently without any illegal conditions or restriction and pursuant to the mandate prescribed by the Assembly in accordance to the commitment made to the people. In addition to drafting the Constitution they are also vested with the right to promulgate the Constitution.
8. On the pretext of being elected by the people, provided the elected representatives function contrary to the mandate given by the people or provided there is absence of public participation during the stage of drafting the Constitution or provided the Constitution is drafted contrary to the mandate provided therein or where the opinion of the people is not solicited and provided the Constitution is unilaterally drafted and promulgated, then such act shall be deemed to be erroneous and contrary to the spirit of drafting the Constitution. Provided, this is done people may not easily adopt the Constitution and the Constitution may not be owned by the people. The Constituent Assembly should consider such matters and provided the Constituent Assembly

pursuant to the mandate given by the people are able to move ahead with public participation then only can a basis for a democratic Constitution be established.

9. The second alternative for drafting the Constitution is the drafting of the Constitution during colonial domination or subjugation where the Constitution is mandatorily adhered to or owned and this process in comparison to the former is deemed to be less democratic. In such procedures, an ideal Constitution may be drafted with the participation of constitutional experts but where such a Constitution is drafted in the absence of people's active and direct participation, then such a Constitution may not be sunstainable.

Constitutional expert K.C. Wheare categorizes the Constitution in the following:

a) Written and Unwritten
b) Rigid and Flexible
c) Supreme and Subordinate
d) Federal and Unitary
e) Separated Powers and Fused Powers
f) Republican and Monarchical

10. Where the said petition relates to the validity of parliamentary hearing, it is not necessary to analyze the various Constitutions. Likewise, there is no universal standard acceptable to all as to which categorized Constitution is excellent and democratic. In many countries that have adopted a written Constitution, it has been observed that they have failed to observe the democratic norms whereas countries like England although in the absence of a written Constitution are recognized as founder of democracy and the Legislature of England is termed as mother of all Parliaments. The amendment procedures of the Constitution of the United States of America is deemed to be very complex but nevertheless, the Constitution of the United States has through limited amendments been able to address the people's changing aspirations and has already gone through more than two centuries whereas in comparison to the Constitution of the United States, the Constitution of India is considered to be more flexible and through repeated amendments, the country has successfully upheld democracy. Similarly, there are multiple examples where Constitutions that have followed parliamentary supremacy have been able to save the democratic image and subsequently there are examples where autocratic rule has flourished even within parliamentary supremacy. Constitutions that have embraced federalism have integrated national sovereignty and have taken the nation towards a progressive path whereas on the other it has also been observed where countries have been projected towards instability, civil war and dissolution. These matters are equally applicable to the Constitutions exercising unitary state system. From a comparative study of the Constitutions of the world, it has been observed that even if the Constitution is monarchical or republican, both these constitutions have given birth to democratic or autocratic Presidents or Kings.

11. Therefore, it cannot be deemed that there is only one single feature or kind of a Constitution and that only such Constitution can protect the democratic values and principles. The success or failure of the Constitution does not depend upon the contents of the Constitution but on the contrary it depends upon the successful implementation of the Constitution by the political representatives who pursuant to the letter and spirit of the Constitution have been chosen by the people. Therefore, the Constitution is the desire of the people and pursuant to the necessity of the country; the Constitution through practice becomes more mature and is deemed to be a live document. Rather than having ideals or baseless principles and over ambitious

provisions that cannot be fulfilled, a Constitution should incorporate proper checks and balances, political leadership that is accountable towards the Constitution, effective implementation of core human rights values by an independent judiciary and progressive realization and the Constitution should reflect the values and principles of the society. The Constitution should address the needs of the society and then only will the Constitution be ratified by the people and implemented.

12. The Constitution is a refined and dynamic document that is amended pursuant to the need and expectation of the society and by the interpretation of the court. The continuity and liveliness of the Constitution depends upon its dynamism. Therefore, a Constitution framed during a certain period is not a complete document forever. Even a written Constitution should be amended pursuant to the need and demand of the society and should be supplemented by the legislative laws. Since, the Constitution is framed through the exercise of the constituent power vested in the people, the Constitution is deemed to be the fundamental law of the country. Therefore, the Constitution like other general laws although cannot be easily amended through the exercise of legislative power nevertheless it can be amended through certain procedures and grounds.
13. It is deemed necessary to clarify the differences between the exercise of the State power or rights during the framing of the Constitution and the exercise of rights of the State during the amendment of the Constitution. There are some conceptual differences in the drafting and amendment process of the Constitution. The source of framing the Constitution lies with the representatives chosen for framing the Constitution who through the application of the sovereign rights vested in the people frame the Constitution and during the framing of the Constitution these representatives exercise the constituent power. Therefore, nobody has the right to raise question over the validity of the exercise of such sovereign rights. The Constituent Assembly formed through the exercise of the sovereign rights exercises the constituent power and pursuant to the mandate of the people, the Constituent Assembly is fully independent to frame a Constitution incorporating the fundamental values and principles of a republic and federal state. The Constituent Assembly is fully independent to frame a Constitution incorporating and recognizing democratic and federal values and principles thereby guaranteeing sufficient judicial independence, principles of separation of powers and maintaining the concept of a limited government, effective provisions relating to protection of fundamental rights and other basic matters.
14. Amendment of the Constitution is performed by the Legislature created by the Constitution. Therefore, there are some limitations vis-à-vis amendments to the Constitution. Limitations relating to amendment of the Constitution can be substantive or procedural. During the process of amendment of the Constitution, provided any substantive and procedural limitations have exceeded, then under such circumstance the legality as to whether or not such limitations have exceeded can be put to test.
15. The substantive limitation of the Constitution prohibits some of the fundamental and basic qualities of the original Constitution from being amended. The framers of the Constitution have incorporated some constitutional values and principles within the Constitution and where such values and principles are removed from the Constitution, the fundamental feature of the Constitution may not be maintained. Provided, where a Constitution has recognized any particular provision as a basic feature, then in such event the Legislature does not have the right to amend the Constitution thereby

spoiling the fundamental feature of the original Constitution. Therefore, where the Constitution has recognized some of the basic structure and where these structures are considered to be the soul of the Constitution, then such provisions incorporated in the Constitution cannot be amended. The Constitution of the Kingdom of Nepal, 2047 can be taken as an example.

16. The Constituent Assembly has identified the basic feature or basic structure in the Constitution and where such basic features are not amendable or provided rigid amending process has been incorporated for any such amendments then other than the provisions prescribed therein, other provisions of the Constitution may be amended through fulfilling the procedural processes but the basic features of the Constitution can only be amended through a provision declared by the Constitution.
17. The Bench has observed various opinions presented in favor and against this principle. The parties advocating in favor of this principle opines that such restrictions should be maintained for permanency of the Constitution. They further opine that where the basic feature of the Constitution need to be amended it would be appropriate to draft a new Constitution. On the contrary, thinkers having a different opinion are of the opinion that the Constitution made during a particular period reflects the sentiments of that particular generation and that later generations cannot be compelled to accept those matters. They further opine that the need of a society, values and principles and people's desire of a particular period cannot guide the society forever. Where the society is dynamic, the Constitution and laws should also accordingly be changed. Where the former generation cannot restrict the need, desire and expectation of the future generation, the provisions of the original Constitution should always be amendable.

    J.W. Garner in his book titled "Political Science and Government" states that the Constitution should not be rigid and provided the Constitution is rigid then such a Constitution shall not be able to incorporate the changed context and environment. In his words: "A permanent static Constitution is logically untenable, for human societies grow and develop with a lapse of time and unless provision is made for such constitutional readjustments as their internal developments require they must stagnate or retrograde." Similarly, Victor Rose Walter in the Political Science Quarterly 409 (1921) states that the Constitution should be amended as deemed necessary and only then will the Constitution be a workable document and sustainable. The Constitution of a nation must be responsive to the changes. Changes are the laws of life. Hence, to be responsive to the outward change a Constitution must have the essence of workableness and this can be achieved through an amending Clause. Any stagnation is sure to cause steadily deepening discontent and to invite recourse to extra constitutional devices which brings revolution. Therefore, the opinion that the Constitution should not be amended cannot be deemed to be appropriate.
18. Fundamental principles of the Constitution are either explicit or implicit. Nevertheless, the modern Constitution framed during the latter period has explicitly incorporated the basic features. The Preamble of the Constitution of the Kingdom of Nepal, 2047, has explicitly incorporated and recognized some basic structures such as multiparty democracy, constitutional monarchy, rule of law, independent judiciary, basic fundamental rights, adult franchise, periodic election, freedom of press to name a few. Pursuant to Article 116, these base structures prescribed under the Preamble of the Constitution is deemed to be non-negotiable and therefore, the amendment procedure of the said Constitution can be deemed to be rigid. Since, the said Constitution could not address the need of the society and the expectation of the people and could not be

amended pursuant to the need of time and expectation of the people, it was replaced by the Interim Constitution but nevertheless amendment could not be possible.

19. Basic structures cannot be found to be explicitly written in the traditional Constitutions. The United States of America that is considered to have the oldest written Constitution in the world and India that is considered to be one of the largest democracy do not have the basic structures explicitly stated in their respective Constitutions. Nevertheless, the courts in India through judicial interpretation have identified the basic structures of the Constitution. Although it is implicit in every Constitution, some basic structures are always interrelated. Rule of law, structure of the State, political provision, civil liberties and protection of these rights from an independent judiciary can be deemed to be the basis for examining the basic structures that have been implicitly prescribed in the Constitution.

    The Supreme Court of India has concluded that some of the basic structures incorporated in the Indian Constitution are non-negotiable and cannot be amended. In Keshavananda Bharati vs. State of Kerala, AIR, 1973, SC 1461 and Minerva Mills vs. Union of India AIR, 1980, SC 1789, the Indian Supreme Court has propounded that matters such democratic rule, federal republic, rule of law, independent judiciary, judicial review and secularism are the basic structures of the Indian Constitution which are non-negotiable and cannot be amended by the Indian Parliament.

    From the aforementioned paragraph, it can be said that basic structures are in one way or the other explicitly or implicitly expressed in the Constitution. While amending the Constitution, it is not easy to amend the basic structures prescribed in the original Constitution because the basic structures prescribe substantive limitations to the amendment of the Constitution. Where courts conduct a judicial review against the amendment of the Constitution and where basic features of a Constitution cannot be identified, the courts must give due attention to the basic structures of the original Constitution otherwise, it would be contrary and against the aspiration of the sentiments of the people.

20. There are some procedural limitations with regards to amendment of the Constitution. Procedural limitations prescribes that where procedures or processes relating to the amendment of the Constitution is explicitly stated than such procedures or processes should be followed or adhered to in letter and spirit. Issues such as who shall submit the Bill relating to the amendment of the Constitution before the Parliament, process relating to discussion over the Bill, as to whether not the Bill should be passed by a simple majority or two thirds or unanimous, as to whether or not a general referendum need to be held, and as to how many States provided the country follows a federal system should ratify the amendment are matters related to procedural limitations. The court can review as to whether or not the Constitution has been amended contrary to the amending Clause prescribed in the Constitution and can conduct a judicial review on those matters.

The Constitution can be amended in two ways which are as follows:

a) De-jure or formal amendment
b) De-facto or informal amendment

Where the processes prescribed in the Constitution are followed and where amendment to the Constitution is formally done then such amendment is known as de-jure or formal amendment. This process is formally concluded by the Legislature or by the Parliament. This is a valid path for amendment for written Constitution.

21. Based on the background of the above principle, the core contention claimed by the petitioner is as to whether or not the Legislature-Parliament can amend the Interim

Constitution 2063. Since, the Constitution is the fundamental law; the Constitution should be able to cope with the aspirations of the citizen. Although, the present Constitution is an Interim Constitution, it nevertheless reflects the aspiration of the Nepali people who have desired to see the country change from a unitary and monarchism State to a federal and democratic State. Therefore, during the process of amendment of the Interim Constitution these principles should be looked upon as the basic principles. Since procedures' relating to amendment of the Constitution also depends upon the kind or nature of the Constitution, it is relevant to understand the various classifications made in relation to the Constitution.

22. The Interim Constitution, 2063, pursuant to the classification made by K.C. Wheare is a written Constitution. This Constitution unlike the Constitution of the Kingdom of Nepal, 2047, does not possess any explicit basic structures and as such this Constitution should be deemed as a traditional Constitution. Where Article 148 (1) of the Constitution prescribes for introduction of Bill before the Legislature-Parliament for amendment or repeal of any Article of this Constitution, the Interim Constitution by virtue of such provision can be deemed to be a flexible Constitution. Likewise, the Constitution can also be deemed as a Constitution with separated powers since the structure of the State as to whether or not the State shall be democratic republic depends upon who shall be the President, the feature of the State is unitary and is multiparty and has accepted the principle of separation of powers.
23. The provision relating to amendment as prescribed under Article 148 of the Interim Constitution is a process relating to formal amendment. The present Interim Constitution does not recognize any Articles of the Constitution as basic structure and therefore, unlike Article 116 of the previous Constitution, this Constitution does not impose any kind of substantive limitations over the amendment of the Constitution. Having said that, it would not be proper to deem that the Constitution is devoid of any basic structure and it would also not be appropriate to conclude that the Constitution can be amended through any procedure. As discussed hereinabove, every Constitution possesses implied basic structures and the Interim Constitution also possesses such implied basic structure.
24. Unlike physical science or mathematics, there is no machine that can with mathematical precision accurately measure the basic structure underlined in a Constitution. Nevertheless, since the Constitution or the laws are a part of social science there are logical and rational basis for finding out the basic structure of a Constitution. Under what historical event was the Constitution promulgated, what kind of constitutional provisions does the new Constitution envisages to replace, what kind of new constitutional order does the new Constitutional envisage to maintain are some of the important matters that should be taken into consideration while determining the basic structure. Likewise, basic structures can also be identified by identifying what fundamental matters if removed from the Constitution shall prevent the Constitution from meeting its objective and the constitutional order.
25. It is necessary to examine what are the basic structures of the Interim Constitution of Nepal. Article 167 of the Interim Constitution, 2063, prescribes for provision relating to repeal wherein the said provision states the Constitution of the Kingdom, 2047 to be repealed. In other words, it is evident that the present Interim Constitution has replaced the Constitution of the Kingdom of Nepal, 2047. Provided, we are to examine the Preamble of the Constitution of the Kingdom of Nepal, 2047, the Preamble states that the Constitution has been promulgated to address the constitutional changes expressed by the people through the peoples' movement by the King through the

exercise of State authority vested in the King. Basic human rights, adult franchise, parliamentary system of government, constitutional monarchy, multi-party democracy, independent and competent system of justice have been recognized as the basic structures of the Constitution. Other than that, Article 116 prescribes substantive limitation with regards to amendment of the Constitution wherein no Article of the Constitution may be amended contrary to the spirit of the Preamble of the Constitution. In order to be clear as to what was the intention behind repealing the Constitution of the Kingdom of Nepal, 2047, and promulgating the Interim Constitution, 2063, it is necessary to look into the Preamble of the Interim Constitution. The following matters are expressed in the Preamble of the Interim Constitution:-

"We the sovereignty and State authority inherent in the people of Nepal;

Respecting the people's mandate expressed in favor of democracy, peace and progression through historical struggles and people's movement launched by the people of Nepal at various times since before 2047 till date;

Pledging to accomplish the progressive restructuring of the State in order to solve the problems existing in the country relating to class, ethnicity, region and gender;

Expressing our full commitment to democratic values and norms including the competitive multi-party democratic system of governance, civil liberties, fundamental rights, human rights, adult franchise, periodic elections, complete freedom of the press, independent judiciary and concept of the rule of law;

Guarantee the basic rights of the people of Nepal to make a Constitution for them on their own and to take part in a free and fair election to the Constituent Assembly in an environment without fear;

Putting democracy, peace, prosperity, progressive socio-economic transformation and sovereignty, integrity independence and prestige of the country in the center;

Declaring Nepal as a federal, democratic republican State upon duly abolishing the monarchy;

Hereby declare, with a view to institutionalizing the achievements made through the revolutions and movements till now, the promulgation of this Interim Constitution of Nepal, 2063, which has been made through a political understanding and to be in force until a new Constitution is framed by the Constituent Assembly."

26. Primarily, the sources of authority for promulgating the Constitution of the Kingdom of Nepal, 2047, and the Interim Constitution 2063 are different. The former Constitution has been promulgated by the King through the exercise of State power inherent in him whereas the latter Constitution has been promulgated through the sovereignty and State authority inherent in the people of Nepal. The Interim Constitution in addition to the basic structure incorporated in the former Constitution has also incorporated multi-party democratic system of governance, civil liberties, fundamental human rights, adult franchise, periodic elections, and complete freedom of the press, independent judiciary and concepts of the rule of law. The Interim Constitution has embrace rule of law, fundamental human rights and in order to protect these human rights has also envisaged an independent and competent judiciary and although the Interim Constitution does not explicitly state people's desire of change from unitary and monarchial system of government to a federal and democratic republic system of government in the Constitution, these can be construed as the basic structures of the Interim Constitution.

27. Likewise, if we are to look into the background with regards to the promulgation of the Interim Constitution, the Preamble of the Interim Constitution underlines the mandate expressed by the people that are in favor of democracy, peace and progression. Likewise, the Preamble also pledges to accomplish the progressive restructuring of the State in order to solve the problems existing in the country relating to class, ethnicity, region and gender and has abolished monarchy by declaring Nepal as a federal, democratic republican State. The Interim Constitution has declared Nepal to be a federal system thereby abolishing the unitary system of government. These matters are to be realized upon the framing of the Constitution by the Constituent Assembly and as such the Constitution cannot be amended contrary to these declarations. Likewise, the monarchical system of government has been changed to democratic republican system of government. The Preamble also states that the Interim Constitution has been promulgated with a view to institutionalizing the achievements made and that the Interim Constitution shall be in force until a new Constitution is framed by the Constituent Assembly.
28. The Preamble of the Constitution is considered to be an important tool in interpreting the Constitution. In many instances, the Preamble functions as an un-codified limitation for amendment of the Constitution. Objectives to be fulfilled, authority for promulgation of the Constitution and what are the fundamental provisions or specialties of the Constitution are reflected from the Preamble. Therefore, the Preamble is considered to be the key to understand the sentiments of the framers of the Constitution.
29. Upon perusal of the matters expressed in the Preamble of the Interim Constitution, three important provisions not incorporated in the Constitution of the Kingdom of Nepal, 2047, has been incorporated in the Preamble of the Interim Constitution. From among them, is the declaration of a democratic republic instead of monarchy; second is the federal system of government instead of a unitary system of government and thirdly promulgation of a new Constitution through the Constituent Assembly for institutionalization of the achievements. The function and duties of the Constituent Assembly constituted pursuant to Article 63 is prescribed under Article 63 (1). Sub-Article (1) states that a Constituent Assembly shall, subject to this Constitution, be constituted for the making of a new Constitution by the people of Nepal themselves. The Constituent Assembly constituted pursuant to Article 63 has been constituted for drafting the Constitution with the purpose of ending the unitary and monarchial system of government and replacing it with democratic republic federal system and therefore, the Constitution cannot be amended contrary to the said objective. That none of the Articles of the Interim Constitution may be amended so as to frustrate the mandate provided for drafting the Constitution so as to transform the country from monarchial and unitary system of government to a democratic republic state of government.
30. From among the various specialties incorporated in the Interim Constitution, the three specialties mentioned hereinabove may be deemed to be the pillar of the Constitution. Provided, the above three subject matters are to be removed from the present Interim Constitution, the fundamental identity of the Constitution may lost and therefore, the said provisions are deemed to be non-negotiable basic structure of the present Constitution. Therefore, on the pretext that any Article of the Constitution may be amended pursuant to the provision prescribed under Article 148, it cannot be deemed that the Constitution may be amended to change the country from a democratic republic system of government to a monarchial system of government and from a

federal system of government to a unitary system of government and neither can the Constitution be amended contrary to framing the new Constitution.

31. In addition to this, the primary objective of the Interim Constitution is to provide a new Constitution for the country through the Constituent Assembly by managing the transition phase and this is the basic characteristic of the Interim Constitution. The current Interim Constitution has been framed for the transitional phase during which period the country shall witness its transformation from unitary and monarchial state of government to a federal and republic state of government and the transitional Constitution has prescribed for a Constituent Assembly. The Preamble of the Interim Constitution states competitive multi-party democratic system of governanceƐƐ full commitment to democratic values and norms and that the Interim Constitution has been promulgated until a new Constitution is framed by the Constituent Assembly. Therefore, the Constituent Assembly may amend any Article of the Constitution to fulfill the aim and objective of the Interim Constitution subject to the condition that such amendment is not contrary to the sentiment of the people's revolution. The Constitution shall not be amended with the objective of changing the basic structure of the Interim Constitution and contrary to the values and principles of democracy and federal and republic system of governance. The former Constitution had accepted Hindu religion as the State religion whereas the Interim Constitution has accepted secularism citing that the mandate was given by the people's revolution in favor of democracy, peace and progression. The Interim Constitution cannot be amended so as to transform the country from secularism to Hindu religion. The Interim Constitution has also recognized the principle of inclusiveness in all the Bodies of the State.
32. Likewise, Nepal has ratified more than 20 human right Conventions including core human right Convention and the present Interim Constitution has also guaranteed fundamental rights to its citizens and for the protection of the fundamental rights an independent judiciary has been provisioned in the Constitution and as such the judiciary also falls within the ambit of the basic feature of the Constitution. The Interim Constitution has been provided with a clear mandate of framing a democratic Constitution and also taking the peace process to its logical end and therefore, pursuant to Article 148 the Constitution cannot be amended contrary to the mandate provided therein. Other than the provisions mentioned hereinabove, any other Articles of the Interim Constitution may be amended pursuant to Article 148 upon fulfilling the necessary procedures.
33. Other than the matters stated hereinabove, the Constituent Assembly has the mandate of framing the Constitution based on democratic republic feature and for the management of the transitional phase the Constituent Assembly may in furtherance and pursuant to the doctrine of necessity may amend the Constitution pursuant to Article 148 subject to the conditions that proper procedures are fulfilled. With regards to the amendment of any other Articles of the Constitution, this court shall review as to whether or not the amendment procedures pursuant to Article 148 have been fulfilled. Where the Constitution is the fundamental law and provided any act is done contrary to the Constitution then such act shall be compared with Constitution. The Indian Supreme Court in Raghu Nath Rao, Ganpat Rao vs. Union of India has laid down an important precedent with regards to judicial review. In the said case the Supreme Court underlines the following: The courts are entrusted with the important constitutional responsibilities of upholding the supremacy of the Constitution. An amendment of a Constitution becomes ultra vires if the same contravenes or transgresses the limitations put on the amending power because there is no touchstone outside the

Constitution by which the validity of the exercise of the said powers conferred by it can be tested.

The court is not concerned with the wisdom behind or propriety of the constitutional amendment because these are the matters for those to consider who are vested with the authority to make the constitutional amendment. All that the court is concerned with are (1) whether the procedure prescribed by Article 368 is strictly complied with and (2) whether the amendment has destroyed or damaged the basic structure of the essential features of the Constitution.

If an amendment transgresses its limits and impairs or alters the basic structure or essential features of the Constitution, then the court has power to undo that amendment.

34. With regards to the second issue, the petitioner's principal contention is that the second amendment made under Article 155 (1) impairs judicial independence. Prior to reaching any conclusion in this regard, it is deemed necessary to peruse over the provisions made in the Interim Constitution with regards to independent judiciary and the international standards and recognized principles regarding the independence of judiciary.
35. Article 10 of the Universal Declaration of Human Rights stipulates that "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." Judicial independence prescribed in the Charter has been further defined in various international and regional treaties, agreements and declarations and standards. It is also debated that matters expressed in the universal declaration are not mandatory but rather imploratory. The Declaration has been the source of all international treaties and agreements relating to human rights and where a country is a Member of the United Nations, it is the obligation of the Member State to adhere to the Declaration. Being a Member of the United Nations, Nepal is obligated to express its full commitment and respect to the Declaration.
36. Likewise, the core Human Rights Treaty also determines and guarantees citizens right to receive impartial justice from an independent and competent judiciary. International Covenant on Civil and Political Rights, 1966, was acceded by Nepal on 14 May 1991. Article 14 (1) of ICCPR among others states all persons to be equal before the courts and tribunals. The Article further stipulates that "All persons shall be equal before the courts and tribunals. In the determinations of any criminal charge against him, or his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."
37. Although, Article 4 (2) of the Convention does not recognize the provision prescribed under Article 14 to be non-derogable, the Human Rights Committee constituted pursuant to Article 28 has in M. Gonjalez del Rioi vs. Peru (UN Document GAOR, a/48/40 (Vol. II), P. 20, Para 5.2) stated that the right to hearing of a dispute from an independent and impartial tribunal is an inherent right. Likewise, the General Comment No. 29 of the Human Rights Committee states that even during war or emergency criminal prosecution and trial should be carried out by regular court established by law and that the citizen's right to access justice from an independent court shall not be infringed upon even during adverse conditions. From this, it can be deemed that judicial independence is a non-derogable subject matter.
38. Article 26 and 27 of the Vienna Convention on the Law of Treaties, 1969, prescribes that it shall be the duty of each country to implement the commitment expressed before the international communities and that under no circumstances and contrary

to the international principles of judicial independence shall anyone interpret or make provisions of any Constitution or law in Nepal.

Some regional treaties such as Core Human Rights Treaty which may not be binding to Nepal but may be relevant to the concerned State also guarantee independent and competent judiciary. Article 6 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, Article 8 (1) of the American Convention on Human Rights, 1969, and Article 7 (1) of the African Charter on Human and People's Rights, 1981, has prescribed civil rights and obligations for its citizens and has also prescribed for hearing of any criminal offense within a reasonable time through an independent, competent and impartial tribunal established pursuant to law.

39. Citizen's right to access to impartial justice through an independent and competent tribunal has not only been given high recognition in the international and regional treaties relating to human rights but is also highly recognized in the international humanitarian law. Article 75 (4) of the Protocol Additional on the Geneva Convention, 1977, prescribes that no sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure and the said Article also provides that sentence or fine shall not exceed the sentence or fine delivered by an impartial court.
40. International and regional Bodies of the United Nations and other judicial activists have determined basic standards of judicial independence and obligations. The following principles, Declarations, Directives etc. are important while determining the infrastructure or standard of judicial independence:-
    a) United Nations Basic Principles on the Independence of the Judiciary, 1985
    b) Universal Charter of the Judges, 1999
    c) Beijing Statements of Principle on the Independence of the Judiciary, 1995
    d) Bangalore Declaration for the Judges, 2002
    e) European Charter on the Statue for Judges, 1998
    f) Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence, 1998.

From among the above mentioned principles, Declarations, Directives regarding judicial independence, the United Nations Basic Principles on the Independence of the Judiciary, 1985, ratified by the UN General Assembly is deemed to be the important principle. The following subject matters have been prescribed in the said principle:-

    a) Independence of the judiciary
    b) Freedom of expression and association
    c) Qualifications, selection and training
    d) Condition of service and security of tenure
    e) Discipline, suspension and removal

41. The standards prescribed in the Declaration are considered to be universally accepted for the purpose of determining and measuring as to whether or not a judiciary is independent. With regards to appointment of judges, Section 10 of the UN Basic Principles underlines the following: "Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointment for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, color, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement that a candidate for judicial

office must be a national of the country concerned, shall not be considered discriminatory."

42. While selecting individuals for judicial bodies, the individual should be competent, possessing integrity and having appropriate training and qualifications in law. Any method of judicial selection shall safeguard against improper motives. No discrimination against a person on the grounds of race, color, sex, religion, political or other opinion, national or social origin, property, birth or status shall be done while selecting judges and this can be deemed to be international standard determined for selection of judges.
43. The principle recognized and incorporated by Section 10 of the UN Basic Principles has been recognized by a majority of international and regional documents. Article 9 of the Universal Charter of the Judges prescribes that the selection and appointment of a judge must be carried out according to objective and transparent criteria based on proper professional qualification. Likewise, Paragraph 2.1 of the European Charter on the Statute for Judges prescribes that the rules of the statute relating to the selection and recruitment of judges by an independent body or panel, base the choice of candidates on their ability to assess freely and impartially the legal matters which will be referred to them, and to apply the law to them with respect for individual dignity and rejects improper discrimination.
44. The Human Rights Committee established pursuant to the Economic and Social Council has from time to time provided comments and directives on the constitutional provision and practice regarding the appointment of judges of various countries. The Committee has commented that the appointment of judges in Bolivia has been done on the basis of political relations rather than professional qualifications. Likewise, in the case of Azerbaijan, the Committee has commented that clear and transparent procedures had not been followed while appointing the judges. In the case of Sudan, the Committee had commented that the judiciary in Sudan was not independent and that the judicial posts did not represent the populace and that the appointments were not only based on legal qualifications. Likewise, when Slovakia had introduced the procedure of ratification of appointment of judges by the Parliament, the Committee expressed its concern and stated that this procedure would have an impact on the independence of judiciary and subsequently provided suggestions and recommendations with regards to appointment of judges, remuneration, tenure and provisions relating to their retirement and suggested that in order to guarantee judicial independence, and to safeguard the judiciary from political influence and to make the members of the judiciary disciplined these provisions should be prescribed by the law.
45. Paragraph 1.3 of the European Charter on the Statute for Judges, 1998, prescribes that in respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary. This principle has been accepted by the European Council and the Body responsible for the selection of judges and decisions regarding their professional life should be independent from the government and administration. For the protection of its independence, the members should be selected from the judiciary and decisions relating to their procedural rules should be left to be decided by them and these provisions should be incorporated and determined by the law.

46. The international and regional documents have followed various concepts relating to appointment or selection of judges. Majority of the European countries emphasize that the appointment of judges should be done by a separate and independent Council rather than the Executive and judiciary and that majority of members to the Council should be from the judiciary. Some other documents do not prescribe such restrictions but rather they emphasize that the basis of appointment of judges should be impartial and transparent and that the judges should be appointed on the basis of their qualification, experience and competency. Likewise, through the conference of judges, issues relating to judicial independence, judicial obligation and code of conduct of judges are also being raised.
47. The principle issue raised by the petitioner in the said writ petition is the issue of appointment of judges rather than the independence of the judiciary and it is deemed relevant to focus on the issue raised by the petitioner. Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, Professional Training Series No. 9 OHCHR, Geneva, 2003, stipulates that in order to guarantee judicial independence and impartiality pursuant to international laws, the State should appoint judges through a complex and transparent procedure. Where appointments and promotion of judges is not done on the basis of their legal competency then the judiciary may not be able to execute its function impartially and independently. Therefore, selection of judges on the basis of their qualification is deemed to be a guarantee for judicial independence. Nevertheless, there is no agreement under international law regarding the procedural appointment of judges. In this regard, selection of judges should be done on the professional qualification and individual integrity of the candidate and the States in this regard have been provided with certain discretionary rights. Appointment of judges should not be based on any discrimination but rather they should be appointed on the basis of their qualification, competency, integrity, experience and impartiality and this has been evidenced by international documents and practices.
48. In the national context, the Preamble of the Interim Constitution, 2063, among others has recognized the concept of an independent judiciary and has incorporated this under its basic feature. Article 100 of the Constitution underlines courts to exercise powers relating to justice and Sub-article (1) stipulates that powers relating to justice in Nepal shall be exercised by courts and other judicial bodies in accordance with the provisions of the Constitution, other laws and the recognized principles of justice. This provision is a constitutional guarantee towards institutional independence of the judiciary. Through this constitutional provision, the judicial works has been separated from the Executive and Legislative unit. For the exercise of the judicial rights, the Constitution pursuant to Article 101 has prescribed three tiers courts' including the Supreme Court and the Constitution also prescribes for the establishment of any other courts, judicial bodies or tribunals for the purpose of trying and disposing cases of special types and nature. The provision of establishment of court for the purpose of trying special types of cases against any individual is unconstitutional and contrary to the accepted principles of independent judiciary. In Nepal, there was the tradition of establishing special courts for the purpose of trying special types of criminal cases for special individual. Taking this into consideration, the present Interim Constitution has pursuant to Article 101 put restriction on the Special Court and has prescribed for the constitution of Specialized Courts. This provision falls within standard relating to independence of judiciary.

49. Likewise, Article 102 (1) of the Constitution has defined the Supreme Court as the highest court in the judicial hierarchy and Sub-article (3) prescribes the Supreme Court as the court of record and allows the Supreme Court to initiate proceedings and impose punishment in accordance with law for contempt of itself and of its subordinate courts or judicial bodies. Article 102 (4) of the Constitution provides the Supreme Court with the final authority to interpret the Constitution and prevailing laws, right to move the Supreme Court under Article 32, right to declare any law void on the ground of inconsistency with the Constitution under Article 107 (1), provision of prerogative writ under Article 107 (2) and provisions relating to the locus standi of public interest and public interest litigation clearly specifies that the Constitution has incorporated constitutional supremacy and not parliamentary supremacy. Article 107 prescribes jurisdiction for the Supreme Court wherein the Constitution has provided the Supreme Court with ordinary and extra-ordinary jurisdiction including judicial review and as such it can be deemed that the jurisdiction of the judiciary has been protected by the Constitution.
50. Article 103 of the Constitution prescribes provisions relating to the appointment and qualification of judges whereas Article 104 prescribes for conditions of service and facilities for judges. The remuneration, facilities and pension payable to justices of the Supreme Court and administrative expenses of the Supreme Court is pursuant to Article 92 (a1) and (c) chargeable on the consolidated fund and as such the provision is non-votable and need not be passed by the Parliament. Article 104 (4) of the Constitution prescribes that the remuneration, facilities and other conditions of service of the Chief Justice or other justices of the Supreme Court shall not be altered to their disadvantage and as such the condition of service cannot be deemed otherwise by the government or by the Parliament and therefore, this provision is deemed to be constitutionally protected. Likewise, the Constitution also provides security to the tenure of the Chief Justice and other justices of the Supreme Court wherein the tenure of the Chief Justice and other justices of the Supreme Court shall be deemed to expire upon attaining 65 years of age and provided any justices of the Supreme Court are to be removed prior to his/her reaching the age of 65, then the judge may be relieved from office if the motion of impeachment against him is passed by a two-third majority and other judges may be relieved from their services by the Judicial Council. These provisions are deemed to be the basic features of an independent judiciary.
51. With regards to the functions, duties and rights of a judge, the same has been provided in Article 106 of the Constitution wherein a judge may not be deputed to any other assignment other than that of a judge. Provided, any judge is to be assigned to any other work other than that of a judge concerning judicial inquiry, or to legal or any judicial investigation or research or to any other work of national concern, the same can be done in consultation with the Judicial Council. This is a mandatory provision prescribed under the Constitution. Article 114 prescribes that the Government of Nepal and officials subordinate to it shall act in aid of the courts in carrying out the functions of dispensing of justice and likewise, Article 116 prescribes that the orders and decisions of the courts and any legal principles laid down by the Supreme Court shall be binding to all. From the said provision it can be deemed that the Executive and other Bodies of the State cannot refuse to implement the judicial decision laid down by the courts.
52. Article 113 prescribes for the constitution of a Judicial Council so as to provide recommendation on the appointment, transfer, disciplinary action and dismissal of

judges and other matters relating to the administration of justice. The Judicial Council constituted for appointment of judges is chaired by the Chief Justice and other Members of the Council include the Ministry of Law and Justice, two members representing the Prime Minister and one senior most judge of the Supreme Court and a senior advocate appointed by the Chief Justice on the recommendation of Nepal Bar Association. From the constitution of the Judicial Council, it can be deemed that the Council is independent. In addition, Article 149 prescribes for a Constitutional Council for making recommendations for appointment of the Chief Justice and other officials to Constitutional Bodies. The Council is chaired by the Prime Minister representing the Executive, along with the Legislative and Judiciary and Leader of the opposition Party. These provisions are the basic features of an independent judiciary. On the basis of these provisions, the Constitution has guaranteed the independence of the Nepali judiciary.

53. Nevertheless, there may not be a unanimous opinion on the issue that the present Interim Constitution has fully incorporated the basic features relating to the independence of the judiciary. Some provisions of the Interim Constitution are contrary to the independence of judiciary whereas some provide restrictions on the judicial independence. In particular, the present Interim Constitution does not provide the judiciary the autonomy to determine its financial, administrative and judicial procedures. On the contrary the United Nations Basic Principles on the Independence of Judiciary has accepted and recognized those matters as one of the fundamental principles for an independent judiciary. Likewise, in addition to other matters, the Constitution prescribes the Nepali judiciary to adhere to the sentiments of democracy and the people's revolution and contrary to the international practice relating to impeachment, the Constitution under Article 105 (2) prescribes for impeachment where a motion of impeachment may be passed against a judge provided the judge is question is unable to discharge his duty because of physical or mental reason and the deputation of the Chief Justice and other judges in work of national concern as provided under proviso (1) of Article 106 are matters that need to be taken into consideration.
54. As to whether or not, the present constitutional provision relating to appointment of ad-hoc judges to the Supreme Court, provision prescribing that the tenure of such judges shall not exceed two years, provision relating to repeated appointment of ad-hoc judges to the post of ad-hoc judges or appointment to permanent judges and the provision of ratification by the Parliament for each appointments is in accordance with the concept and recognized principles of an independent judiciary needs to be debated and a national concept need to be developed in this regard.
55. Countries such as the United States and Britain do not have provisions of appointing ad-hoc judges or appointment to other posts upon their retirement from the post of Chief Justice or justices. Provision of re-appointment of judges retiring from the superior courts not only has an impact on the independent of judiciary but also has an impact on the dignity and decorum of the superior courts.
56. Appointment of retired Chief Justice or judges of the Supreme Court to the post of Chairman of the National Human Rights Commission pursuant to Article 131 (1) of the Constitution may have an impact on the independence of the judiciary. In defense to Article 131 (1) (a) of the present Interim Constitution, the NHRC Act of India may be cited as an example but nevertheless, in our context we have experienced good as well as bad and bitter history. Under the party less Panchayat system and pursuant to the then Constitution, the judges of the Supreme Court or retired judges were appointed to

the post of ambassadors or to the post of Commissioners in the Commission for Investigation of Abuse of Authority or to the post of Chairman of the University Service Commission. Such appointments not only raised question on the impartiality of the judges but also obligated them to be loyal towards their employer the King.

57. Upon attaining 65 years of age and retiring from the post of judge of the Supreme Court provided, the retired judge or the Chief Justice pursuant to the constitutional provisions underlined in the Interim Constitution is appointed to the post of Chairman of the National Human Rights Commission, then at the time of such retirement there could be high probability of questions being raised with regards to his impartiality. History has been a witness to this matter. During the end of his tenure a judge may be attracted towards the provision underlined in Article 131 (1) (a) and may compromise his impartiality and therefore appropriate and careful deliberation should be made in this regard.

Composition and Guarantees of Independence and Pluralism prescribed under Article 3 (1) of the Paris Principles adopted by the General Assembly of the United Nations do not prescribe any qualification and neither does it state that the Chairman of the Commission regarding human rights shall be a retired judge. The Paris Principles merely states that there should be a pluralist representation in the constitution of the Commission.

The Paris Principles on the one hand does not prescribe for a retired judge or Chief Justice to be the Chairman of the Human Rights Commission whereas, on the other the provision of re-appointing retired Chief Justice or judge of a Supreme Court to the National Human Rights Commission or public office may have an impact on the dignity of the judiciary. Pursuant to the provision of the Interim Constitution, the post of the Chairman of the National Human Rights Commission is a constitutional post. Unlike the Judicial Council, there is no provision for an independent Body for recommending persons to the post of Chairman and Members of the Human Rights Commission. Therefore, it cannot be deemed that undue influence may not occur at the time of appointing the Chairman of the Human Rights Commission and at the time of retirement of the judges. Appointment of retired judges or Chief Justice of the Supreme Court to other posts on the basis of political blessing is contrary to the accepted norms, values and principles of independent judiciary.

The question as to whether or not a retired judge of the Supreme Court or a retired judge of a High Court can be appointed to a public office or office of profit has been entertained by the Kerala High Court in Nixon M. Joseph and others vs. Union of India and others AIR 1998 Ker. 385. The court has laid down the following principle:

£..Except for jobs in the private sector, the other jobs require political blessing. Whatever the job and whoever may offer it, it will be too simplistic to presume that all the jobs without exception, are offered purely on the basis of the qualitative requirements dictated by the job and that no extraneous considerations whatsoever come into play while selecting a retiring/retired judged for a job. However, in the same breath one must stress that in the majority of cases, the assignments are offered solely on merit and such other aspects as dictated purely by the nature of the job and that there are strings attached to them. But then, the possibility of a judge securing a job or a political post or constitutional office owing to extraneous consideration cannot be altogether excluded. Even if only one such case were to take place, it would have debilitating effect on the entire judiciary. The independence of the judiciary will be in question, the impartiality of the courts will be in doubt. It will cause the erosion of the strength and vitality of the judiciary. The respect and confidence that the people have

in judiciary will diminish. Judiciary, as the bulwark of democracy, the last bastion will slowly but surely begin to crumble.

The decision further states one cannot rule out persons nurturing political ambitions unwillingly taking command from political masters. Nothing can be more catastrophic than that. It is well nigh impossible for a person who has been dreaming of making a mark in the political arena the moment he quits office, be presumed to be unbiased in the discharge of his judicial functions. Judges making a bee-line for plum assignments, running after office of profit after retirement, or joining the political band-wagon will certainly erode the confidence of the people in the judiciary. The issue needs urgent and careful deliberation by a competent body in the interest of the judiciary and the nation.

58. Based on our past experience, the present constitutional provision regarding re-appointment of retired Chief Justice or judges of the Supreme Court to the post of Chairman and Members of the Human Rights Commission or to any other office of profit should not be provisioned in the Constitution and therefore the Constituent Assembly should seriously deliberate on this issue.
59. The provision of re-appointing retired judge or Chief Justice of the Supreme Court to a public post is not deemed appropriate. Such provisions do not match with the concept and recognized principles of an independent judiciary. Rather than re-appointing retired Chief Justice or judge of the Supreme Court, it would deem to be more appropriate provided the Constitution put a complete restriction on appointment to such public post and rather than making such appointments, the pension received in lieu of their retirement be increased equivalent to their remuneration. The Bench is confident that the Constituent Assembly shall take this issue into consideration.
60. Provision regarding submission of annual report along with other nitty-gritty and impractical matters as prescribed under Article 117 (1) and (2) before the President, and where the remuneration of the Appellate Court and District Court judges and the administrative expenses are not chargeable on the consolidated fund, the said provision is deemed to be votable from the Parliament and likewise, the Constitution does not provide any administrative autonomy to the judiciary for management of its employees. Other than these provisions, the present Interim Constitution on other matters has to an extent guaranteed independence of judiciary. In order to make the judiciary fully independent, the Bench anticipates that these issues shall be deliberated and reforms shall be subsequently made in the new Constitution. Other than some exceptional provisions mentioned hereinabove, the Constitution has comparatively protected the values and principles of judicial independence guaranteed by various international human rights treaties to which Nepal has ratified, acceded or has been a signatory.
61. With regards to the third question and prior to reaching any conclusion as to why the concept of parliamentary hearing for constitutional posts had been incorporated, it is imperative to look into the provision incorporated by the second amendment under Article 155 (1) of the Constitution. The amended version reads as such: "Prior to the appointment of any persons to constitutional positions to which appointments are made on the recommendation of the Constitutional Council pursuant to this Constitution, to positions of judges of the Supreme Court and to positions of ambassadors there shall be a parliamentary hearing about them as provided in law."
62. The petitioner contends that where security of service such as constitution of the judiciary, its jurisdiction, appointment of judges and their removal from service has been prescribed under Article 100 to Article 117, the provision of parliamentary hearing of judges prior to their appointment made pursuant to the second amendment

is not deemed necessary. Upon perusal of the rejoinder submitted by the respondents, the respondents contend that the provision of parliamentary hearing prior to the appointment of judges had been incorporated under Article 155 (1) of the original Constitution and that clarity on the said provision was made through the second amendment. The respondents had also contended that the constitutional provision of parliamentary hearing over the appointment of judges was made on the basis of the principle of check and balance.

63. Executive, Judicial and Legislative power should not be vested in any particular individual or Body. These powers should be divided among the three principal body of the State and this is the concept of separation of powers. The underlying principle regarding separation of powers is that provided, the powers of the State is vested in one particular Body then such powers cannot be checked and centralization of such powers may invite misuse of powers. The objective of separation of powers is to maintain good governance in the modern scenario. Nevertheless, it was not possible to divide the powers of the State among the three Bodies of the State and neither has the constitution of the world has been able to do so. Where the overlapping of the function of the Executive, Legislative and Judiciary cannot be overlooked, the principle of separation of powers should be understood in a relative way. Separation of powers stresses that the basic nature of function related with the three Bodies of the State cannot be exercised by another Body. In the strict sense, separation of power is not possible.
64. Provided, the power of the State was left uncontrolled among the Executive, Legislative and Judiciary this would create a breeding ground for arbitrariness and there would be misuse of power and in order to check such arbitrariness and misuse of power, the principle of check and balance has developed as an alternative to separation of power. Judicial review over the Executive and Legislative, control of the Parliament through the vote of no-confidence, right to dissolve the Parliament by the government, impeachment of judges and parliamentary hearing of judges prior to their appointment, parliamentary ratification of treaties or agreements made by the Executive are some examples of check and balance. Countries having written Constitution has along with the separation of powers have also incorporated the principle of check and balance in one form or the other. Separation of power and check envisages a responsible and limited government. Since, this assists in maintaining the rule of law it is also deemed to be the basis for constitutionalism. Chapter V of MJC Ville's "Constitutionalism and the Separation of Powers" states the following: "the essence of the doctrine is that powers vested in the principal institutions of the State-Legislature, Executive and Judiciary should not be concentrated in the hands of anyone institution."

Likewise, Hilaire Barnett's Constitutional and Administrative Law the author opines that "the object of such separation is to provide checks on the exercise of powers by each institution and also to prevent the potential for tyranny which might otherwise exist. A Constitution with clearly defined boundaries to powers and provisions restraining one institution from exercising the power of another is one in conformity with the doctrine of separation of powers.

65. The Interim Constitution of Nepal is a document that has been promulgated through the people's revolution. The Interim Constitution that has been promulgated with the objective of managing the transitional phase of the country and to provide the country with a new Constitution through the elected Constituent Assembly which has also incorporated the principle of separation of power and check and balance. Part 5 of the

Constitution prescribes provisions relating to the Executive and this Part also prescribes provisions relating to formation of the Executive and also prescribes the function, rights and duties of the Executive. In particular Article 37 of the Constitution prescribes the executive power of Nepal to be vested in the Council of Ministers which shall be pursuant to the Constitution and other laws and rights which are executive in nature have been vested in the Executive. Article 38 (1) prescribes that the Council of Ministers shall be formed under the chairpersonship of the Prime Minister on the basis of political understanding, Sub-article (2) prescribes that where an understanding as referred to in Clause 38 (1) cannot be reached, the Prime Minister shall be elected by a majority of the total number of the then members of the Legislature-Parliament. Likewise, Sub-article (6) of Article 38 prescribes that the Prime Minister and other Ministers shall be collectively responsible to the Legislature-Parliament, and that the Ministers shall be individually responsible for the work of their respective Ministries to the Prime Minister and the Legislature-Parliament. Sub-article (1) of Article 55 stipulates that the Prime Minister may, whenever he is of the opinion that it is necessary or appropriate to make it clear that the Legislature-Parliament has confidence in him, the Prime Minister may table a resolution in the Legislature-Parliament for a vote of confidence and likewise, Sub-article (2) of the said Article prescribes that provided at least one-fourth of the total number of Members of the Legislature-Parliament deem that they do not have confidence in the Prime Minister then a no-confidence motion may be tabled in writing in the Legislature-Parliament and subsequent to Sub-article (3) of Article 55 provided a decision on the resolution or motion tabled is made by a majority of the number of the then Members of the Legislature-Parliament, the Prime Minister may be relieved from his post. From the above mentioned constitutional provisions, it can be deemed that Nepal follows a parliamentary system of governance.

66. Likewise, Part 6 of the Constitution prescribes for the provision of a Legislature-Parliament. Although the Constitution does not explicitly state the legislative powers of Nepal to be vested in the Legislature-Parliament, Article 83 stipulates that the legislative rights shall be exercised by the Constituent Assembly and Article 100 prescribes that powers relating to justice shall be exercised by the courts.
67. Other than some exceptional provisions in the Constitution, the rights of the Executive, Legislative and Judiciary are separated and checked. Other than the provisions such as framing of Rules by the Council of Ministers and the Supreme Court pursuant to the jurisdiction prescribed by the law, punishment by the Parliament with regards to its contempt and exercise of quasi-judicial rights for operation of the administration, it can be deemed that the Constitution has provided for separation of powers. Likewise, formation of government from the Legislature-Parliament, removal of the Prime Minister through a vote of no confidence, judicial review by the Supreme Court over the laws made by the Legislature-Parliament and decisions made by the Executive and removal of Supreme Court judges through impeachment are provisions based on the principle of check and balance.
68. Provision of parliamentary hearing prescribed under Article 155 (1) of the Interim Constitution is a provision of check and balance. This provision allows and assists the Members involved in the parliamentary hearing to better understand the qualification of the judges recommended for appointment by the Judicial Council, their experience and background, their capacity and competency with regards to executing their judicial obligations guaranteed by the Constitution, their commitment towards the Constitution and laws and as to whether or not the appointment of persons

recommended to the post of a judge is appropriate. Although clarity has been made in Article 155 (1) through the second amendment, the provision of parliamentary hearing prior to the appointment of any persons to constitutional positions had been incorporated at the time of promulgation of the Interim Constitution. The Supreme Court is a constitutional body and the post of the Chief Justice and judges of the Supreme Court have not been created through any particular Act but rather it has been provisioned by the Constitution and therefore, it cannot be deemed that the said post is not constitutional.

69. In addition to this, the Nepali people's desire to make the bodies of the State more responsible and to have an effective rule in place has been reflected in the 2062-2063 people's movement and in order to incorporate the sentiments of the people some constitutional amendments have been made in the original Constitution wherein confirmation of appointment of judges through parliamentary hearing has been incorporated and this is a provision of check and balance incorporated by the elected Parliament. The reason as to why such provision has been incorporated in the Constitution is not a judicial matter but rather it is a political issue and as such this court cannot look into the appropriateness of such provision. Therefore, with the purpose of maintaining checks and balance the said provision had been incorporated in Article 155 (1) and it is to be deemed that the second amendment has been made to bring more clarity to the aforementioned provision.
70. It is now for this Bench to decide as to whether or not the provision prescribed under Article 155 (1) through the second amendment causes undue restriction on the independence of the judiciary. With regards to the fourth question, the petitioner contends that the provision of parliamentary hearing of judges causes undue political impact, that the judges would not be independent while delivering decisions resulting in the deprivation of the petitioner's rights along with other Nepali citizen's rights in exercising their rights relating to justice and the fundamental rights as guaranteed by the Constitution. The amicus curie on behalf of the petitioner did not concur with the opinion of the petitioner and stated that negative concept such as the functioning of a judge would be effected by parliamentary hearing should not be taken into consideration but rather the person desirous to be a judge should be bold enough to face such parliamentary hearing and due to such boldness he would maintain moral standard. The amicus curie further contended that probability of appointing qualified, experience, honest and competent persons to the post of judge would be made possible through the process of parliamentary hearing.
71. The practice of appointment of judges is not uniform in the world. The Constitution of the United States of America vests the President with the power of appointing the judges and other important posts of the State and there is a constitutional provision of ratifying such appointments made by the President by the Senate. Judges are appointed by the Queen in England and by the President in India. Nevertheless, in practice this act is performed by the Head of the State upon the recommendation of the Council of Ministers. During the process of appointment, the Chief Justice of the Supreme Court is consulted.
72. Appointment of judges by the Head of the State is a practice that is practiced in countries having the common law system whereas countries following the civil law system in comparison to the common law system have some different practices. In such countries, the Executive or the Legislative do not have a direct role in the appointment of judges and the judges are appointed by the Head of the State through the recommendation of an independent Council just like our Judicial Council. In

countries like the United States and Britain, Members of the Bar are generally appointment as judges to the higher level.

In Spain there is a constitutional provision for an independent and powerful body called Consejo General del Poder Judicial, CGPP which deals with the formulation of policies regarding judicial administration, conducting entrance examination of judges for the court of first instance, conducting two years basic training and recommendation for appointment of judges to the higher level. This Body is chaired by the President and comprises of 20 Members. From among the 20 Members, 12 are judges from various tiers and 8 are Magistrates. Likewise, 4-4 renowned jurists who have been involved for more than 15 years in the field of legal practice or in the judicial sector are nominated by both the House of the Parliament and are appointed by the Head of the State. The President of the Council is the President of the Supreme Court. Although the appointment of judges is done by the President in France, there is a High Council of Judiciary comprising of the President and Justice Minister who are the ex-officio President and Vice President and 11 Members.

73. Parliamentary hearing or in other words confirmation hearing is based on an established procedure that has evolved through an original practice and as such the procedure of appointment of judges according to both legal systems is relevant with the basic principles of independent judiciary. In the United States, although the President through the exercise of his discretionary power nominates the Chief Justice and judges of the Federal Courts, such nominations are not deemed to be final until and unless the same is ratified by the Senate and through hearing process it is evident that unqualified, incompetent and person with bad conduct are not appointed to the post of a judge. In England, although judges are appointed by the Queen on the recommendation of the Council of Ministers, the government recommends the name of judges only upon extensive consultation with the Law Minister and Chief Justice and as such there is an established practice of appointing competent and qualified persons to the post of judge. Likewise, in India although judges are nominated by the President, in practice judicial appointments are not done without consulting the Chief Justice. Therefore, rather than looking into what kind of constitutional provisions are best suited for appointing judges it is important to look into what kind of culture has evolved during the practice of appointing judges.

74. From among the two principal practices regarding the appointment of judges, Nepal had the practice of direct appointment by the Executive or by the Head of the State and at times appointments was made on the recommendations of another Body. This practice has been abolished and provisions for appointments are now made through the Judicial Council which is a multi-member body. Traditionally in Nepal, the Head of the State was deemed to be the judge and this right even during the Rana era was exercised by the Rana Prime Ministers. Pursuant to Article 53 of Valid Law of the Government of Nepal, 2004 (***Nepal Sarkarko Baidhanik Kanoon, 2004***), the Chief Justice of the Supreme Court and other judges were appointed by Shree 3. Likewise, pursuant to Article 30 of the Nepal Interim Rule, 2007 (***Nepal Interim Sashan Bidhan, 2007)***, the Chief Justice and other judges were appointed by the King on the recommendation of the Council of Ministers. This provision was later amended by Article 32 wherein the amended Article prescribed for the establishment of the Supreme Court and furthermore prescribed that the functions, duties and rights of the Supreme Court shall be as prescribed by law. The Supreme Court Act, 2009 (***Pradhan Nyayalay Act, 2009)***, and the Supreme Court Act, 2013 vests this right on the King. Former Chief Justice Hari Prasad Pradhan who was appointed pursuant to the Supreme Court Act, 2009, had rendered some decisions pursuant to the spirit of independent

judiciary and is taken as examples and as such there is some basis to state that there were some positive aspects in the initial appointments.

75. Pursuant to the constitutional provision prescribed under Article 57 of the Constitution of the Kingdom of Nepal, 2015, the Chief Justice and other judges of the Supreme Court were appointed at the discretion of the King. Although, the provision for consultation with the Prime Minister or judge of the Supreme Court as deemed appropriate were prescribed in the Constitution, appointments nevertheless were made pursuant to the discretion of the King and as such the consultations were limited to mere formalities. Article 69 of the Constitution of Nepal, 2019, had similar provisions like the provisions prescribed under the Constitution of 2015 and as such the Chief Justice and other judges were appointed pursuant to the discretion of the King.
76. The Constitution of the Kingdom of Nepal, 2047, for the first time provided an independent recognition to the judiciary and recognized independent judiciary as one of the basic features of the Constitution and also guaranteed it a non-negotiable characteristic. The tradition of appointing judges at the discretion of the King had been alienated from the controls of the Executive and appointments of judges through the Judicial Council; a constitutional Body established pursuant to the Constitution was initiated. Pursuant to Article 117 of the Constitution, a Constitutional Council under the Chairperson of the Prime Minister was established for recommending appointment of the Chief Justice. The Chief Justice, Speaker of the House of Representatives, Chairman of the National Assembly, Leader of the Opposition Party and the Law Minister were the ex-officio Members of the Constitutional Council. While recommending the name of the Chief Justice, the Constitution prescribed for the presence of the Law Minister and a judge of the Supreme Court as Members to the Constitutional Council and from the perusal of the constitutional provision, recommendation for appointment of the Chief Justice was kept beyond the control of the government. The tradition of keeping the judiciary under the control of the Executive was freed by the Constitution of the Kingdom of Nepal, 2047, and therefore, the contribution made by the framers of that Constitution cannot be forgotten.
77. Article 93 of the Constitution of the Kingdom of Nepal, 1990, prescribed for a Judicial Council to make recommendations for appointments of judges. The Judicial Council comprises of the Chief Justice as the Chairperson, Law Minister and two senior most judges of the Supreme Court as ex-officio Members and one jurist to be nominated by the King on the recommendation of the Prime Minister. Although, there was representation from the Law Minister and a Member nominated by the King, decisive opinion vested on the Members of the judiciary. Looking at the construction of the then Council, it can be concluded that the judiciary was directly involved in the appointment of judges.
78. The Constitution of the Kingdom of Nepal, 2047, was repealed by the Interim Constitution, 2063 and pursuant to Article 149 of the Interim Constitution, the Chief Justice and other judges were appointed by the Constitutional Council and likewise constitutional provision for a Judicial Council was prescribed under Article 113. Unlike the former Constitution, there have been some changes in the establishment procedure of the Constitutional Council and the Judicial Council. While recommending the appointment of the Chief Justice, the Constitutional Council comprises of 8 Members and is headed by the Prime Minister including 5 Ministers whereas there is no major representation of the judiciary in the Judicial Council and presence of the Executive overshadows the representation of the judiciary. Due to this changed

provision, there are comments that political interference may rise in the appointment of judges and that independent individuals may not be appointed as judges. The Bench is confident that a factual evaluation of this shall be carried out in the future.

79. It is indisputable that individuals appointed to the constitutional posts should be qualified, competent, experienced and honest. Sometimes knowingly or unknowingly a qualified person with no experience or a tainted person or a person affiliated to a particular political party or a person who by any reason is incompetent or unqualified or inexperienced may be recommended by the independent Body. Nepali society suffers from the syndrome of "our man" rather than "good man" wherein a person less qualified may be recommended in place of a qualified person. This practice of "our man" was also witnessed during the existence of the former Judicial Council where majority of the Members were from the judiciary.
80. Where an individual is to be appointed to the post of a judge, the person in question should be able to dispense justice with full honesty and impartiality. Therefore, cautious screening of the persons conduct, work executed by him during the past years, his experience, knowledge, skill, contribution and impartiality during the process of appointment should not be objectionable in itself. This is deemed necessary for check and balance. Where an individual is appointed to the post of a judge of the Supreme Court, the person in question can only be relieved from office through a motion of impeachment and the procedure of impeachment in itself is very complex. In the absence of a two-third majority, a resolution for motion for impeachment may not be passed. Persons close to the power center and vested with personal interest may be used to appoint persons as judges who are unqualified, inexperienced and who are not able to maintain the dignity of the post and with support of such persons they may remain in their post. Independence of judiciary cannot be possible under such conditions.
81. Therefore, each people's movement has provided a mandate to remove the bad practices from the society and to move ahead by maintaining peace and progress. Due to the ineffective implementation of the Constitution, the democratic rule that was established through the people's movement of 2046 B.S. was later overturned by the people's movement of 2062-2063 B.S. which also reflects people's sentiments for change. The Interim Constitution promulgated pursuant to the people's movement has brought some changes in constitutional provisions and system of rule. In this process Article 155 (1) of the Interim Constitution provided for parliamentary hearing for persons recommended for constitutional positions prior to their appointments. Where the post of the Chief Justice and judges are constitutional posts, the Constitution at the time of its promulgation had impliedly provided provision for a parliamentary hearing prior to appointment to such posts. The intention that was impliedly expressed in the original Constitution has been further clarified through the second amendment where the term Chief Justice and judges of the Supreme Court has been incorporated. Therefore, it cannot be deemed that the provision of parliamentary hearing of judges incorporated through the second amendment is contrary to the spirit and sentiment of the framers of the Constitution.
82. The constitutional provision of keeping a watch over the appointment of important public posts including that of the judges cannot be deemed to be objectionable. Even in the United States that has the oldest written Constitution of the world, the judges recommended for appointment to the Supreme Court have to undergo a confirmation hearing and when passed by a majority from the Senate, the judges are nominated to the post of judge and therefore, looking through the lens of an independent judiciary it

cannot be concluded that the judiciary of the United States is not independent. In this context, the Bench does not concur with the petitioner's contention that parliamentary hearing interferes with the independence of judiciary.

83. Judicial independence cannot be a protective shield for judges to be arbitrary and tyrannical. Pursuant to the principles of constitutionalism and in order to maintain the rule of law judicial independence is deemed necessary to protect the fundamental rights of minorities. While advocating for judicial independence one cannot alienate from the issue of judicial obligation or responsibilities. Parliamentary hearing should be conducted so as to inform the people's representatives as to what kind of person is being recommended for the post of judge, as to whether or not such a person has the qualification, experience and commitment to dispense justice, and as to what kind of experience and expertise the person possesses and also to inform the people's representatives as to his past conduct.
84. Therefore, the provision prescribed under Article 155 (1) should be deemed to be a provision relating to check and balance. The second amendment made under Article 155 (1) of the Constitution has been made by the Legislature-Parliament by exercising the legislative rights vested in the Legislature-Parliament and that the said amendment has been done upon fulfilling the procedures prescribed under Article 148 where the said amendment is not contrary to the mandate given for framing a federal and democratic Constitution it is deemed to be a perfectly valid amendment and therefore the court cannot pursuant to Article 107 (1) and (2), intervene in this matter. Therefore, it cannot be deemed that the amendment made through the wisdom, competence and mandate of the Constituent Assembly to Article 155 (1) interferes with the independence of judiciary.
85. Prescription of parliamentary hearing or confirmation hearing in the Constitution and parliamentary hearing in itself is unconstitutional or against independent judiciary or as contested by the petitioner is not a provision that interferes with the values of independent judiciary. The provision of parliamentary hearing assists in identifying the qualification, competency and efficiency of a person nominated. The petitioner's contention to declare void the provision prescribed under Article 155 (1) is an amending power of the Legislature-Parliament and neither has this Bench observed any procedural errors during the amendment process. Provisions that are deemed necessary for the country and the society are incorporated in the Constitution. Therefore, the provision prescribed under Article 155 (1) is not deemed unnecessary and neither is it deemed to be against the values of an independent judiciary.
86. With regards to the fifth question, it is for this Bench to decide as to whether or not the constitutional and procedural provisions relating to parliamentary hearing is sufficient or as to whether or not it is necessary to make timely reforms in these procedures. Reform adds life to a system but it would not be wise to reach a conclusion that the prevailing constitutional or legal provisions are complete in itself. Provided, we are to reach to a conclusion, then we would be denying ourselves the probability of introducing reforms to the recently initiated parliamentary hearing process. Although the petitioner contends that parliamentary hearing should not be provisioned in the Constitution, the learned advocates on behalf of the petitioner and the amicus curie do not concur with the views of the petitioner and they contend that rather than removing this provision sufficient procedural reforms should be made therein and that the procedure should be made rationale. The Bench concurs with the views of the learned advocates. Where the process of parliamentary hearing has been recently initiated in

our country, it is deemed necessary that efforts should be made towards making this process effective and dignified.

The American practice of ratifying the nomination of the post of a judge by the Senate may also be appropriate in our context. It is relevant to discussion on the basic issues of Senate hearing of the United States.

Article II, Section 2, Clause 2 of the Constitution of the United States prescribes the following provisions regarding appointment and hearing:-

The President shall have the power, by and with the advice and consent of the Senate to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public Ministers and Consuls, judges of the Supreme Court and all other officers of the United States, whose appointment are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law or in the Heads of Departments.

The Constitution provides authority to the President to nominate judges with the advice and consent of the Senate and therefore, the practice of Senate hearing has been initiated with the appointment made by the President. The word advice and consent has been used in the Constitution and as such it may be inferred that advice should be procured prior to such appointments. It has been argued by some learned people that consent would be easily acquired provided advice prior to such nominations is sought. George Washington the first President of the United States although could have sought consultation prior to any nomination the said provision is not deemed to be mandatory.

87. The Senate is deemed to the highest legislative body in the United States. Representation to this House is not done on the basis of population but rather on the principle of equality wherein 100 people represent the Senate from each State. The tenure of the Senate is for a period of six years and pursuant to rotation system, the tenure of one-third of the Members expires every two year. In many issues, the Senate acquires special importance and role than the House of Representative. On issues such ratification of treaties, consent over important appointments and impeachment, the Senate unlike the House of Representative has special rights. Likewise, the Senators unlike the Members of the House of Representative are deemed more prestigious. This could be due to their small presence, long tenure and extensive electoral area. The Senate is chaired by the Vice-President. The Senate has various committees, sub-committees and permanent committees and the Senators according to their interests are affiliated to thse various committees. There is a separate standing rule for operation of the Senate.

88. From among the various committees in the Senate, the United States Senate Committee on the Judiciary is the oldest Standing Committee which was first created in 1816 and consists of 14 Senators as Members. Deliberation over the nomination of the judges of the Supreme Court of America, judges of the Federal Court of Appeals, judges of the Federal District Courts and judges of the International Trade Court is carried out and is then sent to this Judicial Committee of the Senate for its subsequent approval. Likewise, this Committee also has extensive jurisdiction in the federal criminal law. In addition to this, all proposed Bills relating to the amendment of the Constitution is sent for further consultation only upon ratification by the Judicial Committee. Under this Committee there are 7 Sub-committees which are as follows:

a. Administrative oversight and the Courts
b. Antitrust, Competition Policy and Consumer Rights
c. The Constitution
d. Crime and Drugs
e. Human Rights and Law
f. Immigration, Refugees and Border Security
g. Terrorism and Homeland Security.

The Senate conducts extensive confirmation hearing for each candidate nominated by the President for any judicial post. Prior to conducting such hearing, the Sub-committee investigates on any complaints and subject matters.

89. Where the Senate receives the judicial nomination from the President it is directly sent to the Judicial Committee. For the purpose of conducting a hearing in the Sub-committee the Judicial Committee publishes a public notice 7 days in advance specifying the date, time and venue for such hearing. Prior to initiating the hearing, a comprehensive questionnaire of the person proposed for appointment is filled and during the process of hearing Senators from the candidate's home State are also invited. The Committee prepares a "Blue Slip" consisting of the candidate's qualification, capacity, experience, contribution made during his professional and social life and matters relating to his conduct and is provided to the Senators of his home State for their comments. The American Bar Association's Standing Committee provides a "Blue Slip" consisting descriptions of the candidates professional qualification, experience and conduct.
90. In addition to this, written comments are also solicited about the proposed person from the civil society, women rights organization, organization involved in various rights, universities and from various right based organizations. From the description available, the integrity, professional ethics, experience and judicial temperament of the person can be evaluated and where the persons nomination is confirmed, the hearing allows to the candidate to express his concept, thought, values and principles and responsibilities vis-à-vis his work.
91. On the basis of the information collected therein, grounds for a parliamentary hearing are prepared. Primarily the Members of the Committee present their concept and thereafter the candidate is provided with an opportunity to make his presentation. Thereafter, officials of the university to which the candidate was associated with, members of the Bar, right groups, governmental or non-governmental organizations, former and present officials of offices are summoned as witnesses wherein the candidate's appropriateness and competency is examined. The Senators ask very tough questions on the issues raised during the process of hearing and also ask questions on the candidate's future visions or commitments wherein the candidate needs to provide satisfactory answers. Owing to the variation occurring during the hearing process there are instances where candidate's nomination has been withdrawn and looking at the past experience very few nominations have been rejected. Upon concluding the hearing process, the Judicial Committee submits its report along with its opinion to the full session of the Senate and provided it is passed through a majority the nomination is deemed to be final.

No other country other than the United States has remarkable hearing procedures relating to the nomination of judges and since this provision is new in the context of Nepal it is but natural to have doubts over such provision. Since it is a new provision there may be errors in its application which cannot be deemed to be unnatural.

92. In the procedure of appointing judges under the Interim Constitution, since the role of 5 Member independent Council is more important than the Executive, judges cannot be appointed through a single decision of the Executive. The Judicial Council which is chaired by the Chief Justice recommends appointment of judges pursuant to the process and grounds determined by the Judicial Council Act, 2047. Since the Judicial Council recommends for appointment of judges and where the Executive does not have a hand or role in the appointment of judges, question may be raised as to the reasonableness of a parliamentary hearing. There is a school of thought which opines that the provision of parliamentary hearing is not necessary since the Executive does not have any role in the appointment of judges. But this is not the situation. The Judicial Council looks into the person's qualification, competency, experience, past conduct and impartiality but unlike confirmation hearing the person is not grilled on issues related to his competency, conduct and skills and neither are any questions raised by the concerned person or organization or neither does the candidate provide any answers to the question raised therein. Where a person selected by an independent constitutional body is subjected to parliamentary hearing questions relating to the candidates' experience, competency and skills may be raised and answers to those questions may be provided by the candidate wherein through this process it can be determined as to whether or not the candidate is qualified or unqualified.
93. Although the objective of parliamentary hearing is good, the procedure is not based on subjective and concrete ground. The Legislature-Parliament Operation Regulation, 2065, does not prescribe comparative grounds as to how parliamentary hearing should be conducted against a person recommended for the post of judge. The Committee has not been able to collect authentic data on the proposed persons professional career and conduct and likewise, the Members of the Committee are not aware as to what kind of questions should be posed against the proposed person and what kind of information should be solicited from such a person and therefore, there is no public information as to whether or not the Members are familiar with the recognized principles of confirmation hearing.
94. In addition to this there is no mechanism or standard determined for collection of records. In the absence of any concrete and dependable information and records about the recommended persons qualification, experience, work area, contribution and his professional and social career, participation in parliamentary hearing is but a mere formality and the hearing process may be a ritual process for the Members of the Committee. Confirmation hearing is a very good provision and in the context of Nepal it is deemed imperative but unfortunately proper utilization and exercise of this process has not been done.
95. The constitutional provision under Article 155 (1) regarding parliamentary hearing of appointment of judges has already been discussed hereinabove. Article II, Section 2, Clause 2 of the Constitution of the United States of America that has a federal structure also has similar provisions. Successful implementation of the provisions of the Constitution depends upon the users of the Constitution. Provided, the person exercising Article 155 (1) is competent, intellectual, experienced and knowledgeable and is familiar with the letter and spirit of Article 155 (1), good results may be derived from its application. Where the user himself is incompetent then its application and the result derived therein would not be good.

It is relevant to mention the words of Dr. Amedkar who was the Chairperson of the Constitution Drafting Committee, who in 1949 stated that the Constitution in itself is not bad. Even if the Constitution is very good, the result may be bad provided the user is bad.

However, good a Constitution may be, it is sure to turn out bad because those who are called to work it happen to be a bad lot. However, bad a Constitution may be, it may turn out to be good if those who are called to work it happen to be a good lot. The working of a Constitution does not depend wholly upon the nature of the Constitution. The Constitution can provide only the organ of state such as the Legislature, Executive and the Judiciary. The factors won which the working of these organs of the state depends are the people and their political parties they will set up as their instruments to carry out their wishes and their policies. Who can say how people of India and their parties will behave? Will they uphold constitutional methods of achieving their purposes or will they prefer revolutionary methods of achieving them? If they adopt the revolutionary methods, however good the Constitution may be, it requires no prophet to say that it will fail. It is, therefore, futile to pass any judgment upon the Constitution without reference to the part which the people and their parties are likely to pay.

Although the doubts expressed by Ambedkar during the drafting of the Indian Constitution has not been realized in Nepal till date, history has been a witness to the past bitter experience that Nepal has witnessed. The weakness in the context of Nepal lies in its implementation rather than in the lacunas in the Constitution. The failure of the Constitution of the Kingdom, 2047, without a single amendment is one burning example. The Bench envisages that such situation will not be witnessed in the days to come.

96. Constitutionally, when the system of parliamentary hearing has been incorporated in the Constitution, the persons participating in the parliamentary hearing should not only be informed and knowledgeable about the objective of such parliamentary hearing but should also be informed about the usage and practice of such system and should play an active role and should be able to identify as to whether or not the person recommended for appointment is qualified or unqualified.

97. Provided, a person is biased against a judge appearing for parliamentary hearing, the Regulation is silent as to whether or not such biased person is eligible to take part in such hearings. Through public notification, petition against proposed persons are entertained and based on the petition the Members of the Committee base their questions in a rude manner and the objective of parliamentary hearing as envisaged by the Constitution cannot be fulfilled in such a manner. Parliamentary hearing of judges, ambassadors and officials of constitutional posts through the same Committee in itself is not effective. During the hearing of judges extra precautions must be adopted. Petitions against the proposed person may be submitted with different motives. Person against whom a judge may have rendered a decision may be biased and may submit fabricated petition. Therefore, with regards to such petition rather than publishing public notices for submission of petitions and asking questions, the Committee should develop a procedure and mechanism wherein the Committee in person or through an expert or through a Sub-committee comprising of Members prescribed by the Committee should cause to investigate the truth and reach a conclusion.

98. It is also not clear as to how many times a judge should attend parliamentary hearings. With regards to the judges, a judge has to attend parliamentary hearing firstly as an ad-hoc judge, then as a permanent judge and lastly on being nominated as the Chief Justice and therefore, there is no appropriateness in these three hearings. It would not be appropriate to include the constitutional provision of appointing ad-hoc judges in

the new Constitution. It is not deemed appropriate to conduct repeated parliamentary hearings for a judge when the judge in question has been appointed as judge of the Supreme Court through a parliamentary hearing and as such continuity should not be given for such impractical and erroneous provisions in the new Constitution since such a provision pursuant to the concept, values and principles of independent justice is not deemed appropriate. Likewise, the Regulation prescribes that recommendation may be rejected provided there is a unanimous decision over the parliamentary proposal and this provision is not appropriate and erroneous. Provided, any one Member expresses his consent in favor of the proposed person, the consent is deemed to be the consent of the parliamentary committee and therefore, although the objective is good the hearing process is laughable. Therefore, reform should be made wherein confirmation or rejection of a candidate should be based on a two-third majority.

99. With the regards to last issue raised by the petitioner, it is for this Bench to decide as to whether or not an order as sought by the petitioner need be issued. From the analysis made hereinabove, except for some basic features like the federal democratic republic, human rights, fundamental rights, independent judiciary incorporated under the Interim Constitution, 2063, the Legislature-Parliament may amend any other Articles of the Interim Constitution. The basic structures of an independent judiciary passed by the General Assembly of the United Nations has been incorporated by the present Interim Constitution of Nepal and therefore, it is indisputable that no Body in Nepal can contrary to the values and principles of independent judiciary make any constitutional or legal provisions.

100. The objective behind the concept of parliamentary hearing made pursuant to the second amendment under Article 155 (1) of the Interim Constitution is to maintain check and balance by the Legislature-Parliament in relation to the nomination of judges and other important post of the State. The provision of parliamentary hearing was incorporated during the promulgation of the Constitution and clarity to the said provision was made by the second amendment and as such the provision does not cause any restrictions on the independent of judiciary. The petitioner through the writ petition had sought to quash the term "Supreme Court Judges" that was added through the second amendment and since the Bench does not concur with the views of the petitioner, the Bench does not deem fit to quash the term whereby the writ petition is hereby rejected.

101. Upon hearing the deliberations made by the learned advocates on behalf of the petitioner, respondents and amicus curie, the Bench recognizes that there are some contradictions and weaknesses in the constitutional and procedural provisions relating to parliamentary hearing and this has been established from the analysis of the above mentioned paragraphs and it is deemed necessary that reforms should be made in this regard. In order to make the conceptual and procedural aspect of parliamentary hearing rational, the following reforms are deemed necessary wherein the Bench hereby draws the attention of the respondents:-

1. **Procedure Relating to Establishment of Committee**: Legal provisions for establishment of a separate Judicial Hearing Committee shall be prescribed for parliamentary hearing of judges.
2. **Procedures Relating to Hearing**: Separate Regulation relating to procedures for the hearing Committee shall be framed and promulgated. Pursuant to the constitutional provisions judges, heads of other constitutional bodies and Members and ambassadors falls within the ambit of parliamentary hearing. The work, duties and rights of these officials are different. Since the obligations and

responsibilities of these officials are different it is not appropriate to conduct hearing through the same Committee or Members. For example the judges are involved in dispensing justice. Likewise, matters relating to responsibilities and skills of officials appointed in other constitutional posts are different. For example some post may be related to investigation and prosecution of crimes related to corruption and irregularities, some may be related to staff administration, Audit and some may be related to election. Therefore, the Members of the Committee should be interested and skilled in matters relating to one particular constitutional post. Hearing procedures of these posts shall be incorporated in the Regulation.

3. **Collection of Record**: Factual description regarding the qualification, experience, and competency, and professional conduct, social and professional life of the person appointed to the post of a judge shall be acquired. Where a person is recommended to the post of a judge, it would be appropriate and practical to look into his academic qualification, experience, conduct, past contributions made in the area of judicial administration, competency, and quality. Likewise, provided the person recommended is a legal professional then the contribution made by him in the legal field, his area of expertise and books, articles published by him with the aim of contributing towards the development of the legal sector, opinions expressed by him with regards to the justice system and justice administration, his personal professional character and conduct are some important issues that should be considered during the hearing. In addition to this, provided a person is nominated to the post of a judge, the person in question should be committed towards the Constitution, recognized principles of law and justice, international laws, human rights and fundamental rights. It is important to microscopically examine his past commitments in these issues and also as to whether or not he was strict in his behavior and conduct. Likewise, the Members of the Committee should ask extensive questions in order to acquire his knowledge and concept on the Constitution, law and new developments regarding recognized principles of justice made in the national and international sector and for this there should be records on these subject matters.
4. **Hearing Procedure**: Shall publish public notice in advance prior to the commencement of the hearing specifying the date, time and venue of the hearing and procedures relating to participation in such hearing. Hearing process shall be open and transparent and representation of all concerned stakeholders shall be determined.
5. **One time Hearing**: Pursuant to the present hearing procedure, a person nominated to the post has to undergo repeated hearings. At the time of his appointment as an ad-hoc judge, extension of his tenure as ad-hoc judge, re-appointment as a permanent judge and appointment to the post of the Chief Justice, the judge in question has to undergo repeated hearings. Where a person has completed parliamentary hearing and is appointed to the post of a judge, there is no rationality or logic behind in conducting repeated hearings for such a person. The practice of appointment of ad-hoc judges to the Supreme Court in itself is contrary to the concept, values and principles of independent judiciary. Appointment of ad-hoc judges to the Supreme Court is not prevalent in the United States and other countries. From an ad-hoc to a permanent judge, the judge needs to go through various stages of parliamentary hearing and as such he may not be able to function independently and therefore, provisions of appointing ad-