

Supreme Court, Division Bench
Hon'ble Justice Min Bahadur Rayamajhee
Hon'ble Justice Kalyan Shrestha

Order
Writ No. 0863 of the Year 2064
Sub: Mandamus

Mr. Liladhar Bhandari and Others v. Prime Minister and Office of Council of Ministers, Singhadurbar, Kathmandu and Others

Abstract

The petitioners filed this writ petition claiming, they were deprived of the rights guaranteed by Art 12(1)(2) (3) (e) (f), Art 13, Art 19(1) (2), Annex 4 to Art 166(3) and Art 5.1.8 of the CPA annexed to the Interim Constitution. The Maoist had seized their land, house, industry, factory including movable and immovable property during the time of armed conflict and that property was not returned even after the restoration of peace and the signing of the comprehensive peace agreement annexed to the Constitution pursuant Article 166(3) by the Government of Nepal, the political parties and the respondents. Neither have any initiative been taken for the same.

The respondents submitted that they are sympathetic towards the situation of the petitioners and had been fulfilling their respective responsibilities towards the petitioners. Also that since the petition does not state as to which action of the respondent violated the rights of the petitioners and thus compelled the petitioner to file petition, the writ petition is to be quashed. The respondents also maintained that Article 36(1) provided that no question may be raised in the Court in regard to whether or not the matter of state policy and directive principles is implemented through a court order, the petitioners cannot be constitutionally or legally assisted.

The court issued an order of mandamus in the name of respondent Prime Minister and Office of Council of Ministers pursuant to Article 107(2) of the Interim Constitution of Nepal, 2063 to the effect that a Five- member Commission for the return of property with the representation of the victim community, law enforcement agencies including political persons at district level where the petitioners reside and in the similar districts where there is problem of seizure of property, be constituted, and through the committee, the property be returned to the actual owners, that within three months of the receipt of this order, the loss, depreciation and loss of income from the property thus seized be assessed, and as prayed by the petitioners compensation be paid to them after fulfilling the procedure as stated herein above, and also that a fund for providing compensation and relief to those who have become victims due to the damage caused by the seizure of the property be set up

This writ petition comes under the jurisdiction of this Court pursuant to Article 32 and Art 107(2) of the Interim Constitution of Nepal, 2063. The facts and the order are briefly as follows:

The petitioners who were living in their own ancestral place have been wandering as a landless paupers and internal refugees in different parts of the country due to the

conflict that started in the year 2052 following which the Maoist seized their land, house, industry, factory including movable and immovable property allegedly for professing political faith opposed by the Maoist. Since the internally displaced families had played very important role during the movement of 2062/2063 they were confident that following the success of the movement, peace and order would be restored in the country resulting in the onset of New Nepal. Then movable and immovable property seized during the conflict would be easily returned and all the families would be allowed to settle in their respective settlements and make their living. As expected, the movement was successful and the Interim Constitution of Nepal, 2063 was promulgated which guaranteed fundamental rights and also inscribed that the property seized during the armed conflict would be returned. But their owe took a further downturn.

The Government of Nepal, the political parties and the respondents who were signatory to Art 5.1.8 of the Comprehensive Peace Agreement annexed to the Constitution pursuant Article 166(3), did not return the seized movable and immovable property of the petitioners. Complaints were filed a number of times for the return of the property before the political party who were supposedly called the vanguards of the New Nepal, before the Human Rights Commission and the Nepal Government. However, no initiative was taken from them and as a result there is no any basis to live in a fearless environment.

The petitioners further submitted that it was their fundamental right under Art 19(1)(2) of the Constitution and the Land Revenue Act, 2034 to possess, use, dispose off their house, land factory, industry, that they had been suffering despite their rights to live as citizens and individuals guaranteed by the Universal Declaration of Human Rights 2048. They also submitted that the Supreme Court had issued an order in *Bhojraj Timalsina v GoN, Prime Minister and Office of Council of Ministers in the year 2064/9/2, writ No. 0920*, who had been displaced like the petitioner for the protection of the fundamental rights guaranteed by the Constitution.

The petitioners further submitted that despite the fact that their home, land, industry, factory including movable and immovable property had been seized and they were displaced since 2052 B.S (1996 AD) by the Maoists and their sister organization, that they had presented the reality of their agonies through the petition before the Political Parties who had signed the Constitution, before the Human Rights Commission and the Nepal Government, no any kind of initiative had been taken in the matter so far. As a result, their rights inscribed in the Constitution remained only on papers, that their life has become hell and that peace agreement had existed only in papers and no alternative remedy was available to them. That is why the petitioners had approached the Supreme Court with the petition by invoking its extra-ordinary jurisdiction.

The petitioners claimed that the respondent party and its sister organization had not allowed them to enjoy the achievements of 2062/2063 movement in equal manner. Since their industry, house, and land were not returned to them by the respondents, they were deprived of the rights guaranteed by Art 12(1)(2) (3) (e) (f), Art 13, Art 19(1) (2), Annex 4 to Art 166(3) and Art 5.1.8 of the CPA annexed to the Interim Constitution, 2007, an order of mandamus or other appropriate order pursuant to Art 32 and Art 107(2) be issued in the name of respondent Nepal Government, to return or cause to the return of around 250 Bigha of land of the petitioners seized during armed conflict in Banke, Salyan, Dang, Bardia and Kailali and the seized industry, house, land and factory be returned, provide and cause to provide compensation as per government criteria from the date of seizure to till date, that in a situation when the conflict had officially ended in the year 2063, the Constitution had been promulgated and that election of Constituent Assembly already held,

as they had to live a life of second class citizen due to non-return of their properties mentioned above they prayed that the issue was of public concern, and hence be given prioritized hearing.

An order had been issued on April 3, 2008 by this Court in the name of respondents asking them to reply within 15 days as to why the order sought by the petitioners need not be issued. The Court instructed to inform the respondents to present the case file before the Bench upon receipt of the rejoinders or after expiry of the prescribed time limit. It further instructed that since the matter involved many people and as it was a social issue, it deemed desirable that the case be disposed off at the earliest, let the case be given a priority hearing upon receipt of the rejoinders or after expiry of the prescribed time limit.

The written submission made by Joint-Secretary of Parliamentary-Secretariat on behalf of the Legislature-Parliament maintained that there was no justification or ground for making Legislature-Parliament as respondent. However, since the petition raised serious and touching the issues the same should be addressed. The Interim Constitution of Nepal, 2007 in Part 4, Article 33(p) (r) (s) imposed an obligation on the State to provide reparation to families of the individuals killed during the armed conflict and those displaced. The State should therefore continuously make effort to resolve the problem. Since the Article 36(1) provided that no question may be raised in the Court in regard to whether or not the matter is implemented through a court order, the petitioners cannot be constitutionally or legally assisted through the issue of an order of mandamus as sought by them. Since the petition does not state as to which action of the Legislature Parliament has compelled the petitioner to file petition, the petition should be quashed.

The written submission made on behalf Home Ministry maintained that the Ministry has not done any such act that violated the fundamental rights of the petitioners in any way, and as the writ petition had been filed without there being any valid grounds, it should be quashed.

The written submission made on behalf of GoN, Office of the Prime Minister and Council of Ministers maintained that the State may expropriate and confiscate individual's property only by enacting laws, that in the instant case the State had not seized the property as claimed by the petitioners. Rather in order to make necessary arrangements for the conflict victims, the Nepal Government had approved the norm titled the Standard for Economic Assistance and Relief to the Conflict Victims 2064 for conflict victims. Chapter 3.2 of the said Standard provided that in case any damage was caused to movable and immovable property of individuals by parties to the conflict, assistance would be provided as per the prescribed measures. While the matters raised in the petition were sensitive and touching, they could be addressed in accordance with the present law. The State could not be compelled to fulfill its obligations through Court orders by terming such obligations as constitutional and legal matters and hence the petition should be quashed.

The written submission made on behalf of the Special Committee to Monitor Rehabilitation of Conflict Victims and Mobilization of Relief, through its Secretary maintained that the State had the obligation to provide relief to the family members of those who were killed during the conflict or those displaced. Pursuant to Article 33(p) (r) and (s) of the Interim Constitution of Nepal 2007, the State was obligated to continuously work on this touching and sensitive issue. Since Article 36(1) stated that no question may be raised in the Court on whether or not matters written in this part have been implemented, the State could not be constitutionally and legally compelled to fulfill this obligation by taking assistance of the court. As a matter of fact, it was not the duty of this Committee to implement matters raised in the petition. The committee was constituted to

evaluate and monitor works carried out by the government and give necessary direction to it with regard to the grant of relief and rehabilitation to the family members of those individuals who died, families and individuals who were disappeared, maimed and displaced. And for this purpose six meetings had been already held from 2064/8/18 to 2064/10/11. During the said meetings held with the involvement of Ministry of Peace and Reconstruction, comprehensive discussion on the problems of the displaced, injured and for reparation of the victims had been held. In a situation where the committee was continuously working, and had performed no any such act which had infringed the rights of the petitioners the writ petition should be quashed.

The written submission made on behalf of Ministry of Land Reform and Management stated that the matters stated in the petition did not fall within the working areas of this Ministry. However, it was the duty of all to accord due respect to the claim of the petitioners and everyone had to work in creating a situation in solving the said problem and the Ministry would also work with full resolve to settle the problem. Since the record of the land said to be illegally seized remained in the name of actual land owner at Land Revenue Office, the Land Revenue Office would not recognize illegal seizure. The matters stated in the petition were of the nature which could be settled rather by mutual consent, commitment and collective efforts than by judicial decision. In this sense also the petition deserved to be quashed.

The written submission made on behalf of Ministry of Peace and Reconstruction stated that it was not clearly stated in the petition as to what kind of act of the Ministry of Peace and Reconstruction had violated the rights of the petitioners. In regard to return of the property seized by the CPN (Maoist) during the course of the armed conflict, a consensus had been reached among the parties on 2065/3/11/4 to work further in resolving it in line with comprehensive peace agreement and commitment expressed by the eight political parties including constitutional amendment for creating conducive environment. It had also been agreed that action would be taken by the administration against those who caused hindrance to the real owners in owning and using the property that the Maoists would implement it by making public declaration within 15 days. In such circumstances it cannot be said that government had been indifferent in implementing Interim Constitution and peace agreement. The Nepal Government adopted the Policy Relating to Internally Displaced Persons, 2063 and an institutional mechanism had been created to identify the displaced persons. As per the decision of by the Nepal Government, Council of Ministers on 2064/2/11 a task force had been formed to document the families and infrastructure affected by the conflict and the work of data collection was underway. The economic assistance had been provided to the individuals as stated in point (c) (1) of common consensus of the minimum program of dated 2063/12/16 of the Interim Government. In order to make the grant of economic assistance and assistance to the displaced and conflict victims more systematic, a guidelines had been issued in 2006 and Government had evolved a Standard on Economic Assistance and Relief to the Victim of Conflict in 2007 and since there was no reason and justification to file petition against the Ministry, the same should be quashed.

Whereas pursuant to the rules the case has been duly placed in the cause list for decision before this Bench, the learned advocate Mr. Sher Bahadur K.C submitted that the petitioners are forced to live as a second grade citizens in different parts of Nepal after being displaced from their own home, land, industry, business, occupation based on political faith since the year 2062(2006) during the course of armed conflict. The movable and immovable properties that remained in the name of their families have been seized by

the CPN (Maoist) and its sister organization. Now despite the peace agreement being incorporated in the Interim Constitutions of Nepal, promulgated in 2007 and the election of Constituent Assembly already held the properties of the petitioners which were seized during the course of armed conflict have not been returned. The seizure of properties of the petitioners is in contrary to Universal Declaration of Human Rights. In a situation where the petitioners are not able to live as human being because of the act of the respondent, such acts are against Articles 12(1)(2)(3)(e)(f), 13, 19(1)(2), 166(3) of the Interim Constitution of Nepal, 2063, Schedule 4, Article 5.1.8 of the CPA and hence an order of mandamus should be issued for the return of all properties and reasonable compensation should be paid to the petitioners.

Likewise, Mr. Kumar Chudal, Joint Government Attorney on behalf of the Attorney General's Office submitted that there was no dispute as to the fact that the plight of the petitioner was painful. The government has been sensitive regarding the claim of the petitioners. There is no denying that during the course of the armed conflict, their property was seized and they were dispossessed of their occupation, displaced from their ancestral place where they had been residing for years. It is also true that they are now living in different parts of the country. This being so, the problem they were facing is of political nature. The government is taking initiatives to solve it politically. Several committees have also been formed in regard to returning the property to the petitioners seized during the course of the conflict. The ownership of such properties have not been transferred to anyone. Given that the current Land Revenue Act retains the name of actual owner of the property in the record, and since the real owner will remain the owner there is no ground to issue the writ and hence the writ petition should be quashed.

Now, when we delve on the decision, it is claimed by the petitioners that during the armed conflict launched by the Maoists since the year 2052, their movable and immovable properties such as homes, industries, factories and other private properties have been seized by the said Party and its sister organizations. And as a result, they are made homeless, left without occupation and are forced to live a life of displaced. Since the Interim Constitution of Nepal, 2063 also inscribed the commitment made by the parties who concluded peace agreement in relation to returning such properties, before coming to the court the petitioners had approached the Government of Nepal, political parties and Human Rights Commission a number of times for the return of such properties, home and land. But no initiation or interest was shown by them. And as a result, they have been compelled to live the life of displaced non-citizen within their own country. Now, therefore, in the absence of alternative remedy the petitioners have submitted the petition before this Court as per Article 32 and in the manner set forth in Article 107(2). The petitioners have prayed that an order of mandamus be issued for immediate return of the property seized by the respondents as mentioned above and they also be paid reasonable compensation. In their written submission the respondent agreed that the claim of the petitioners was touching but maintained that as various mechanisms are being created for the return of their properties, they could not be compelled through the court, and hence, the petition should be quashed.

It is seen that in Article 19 the Interim Constitution of Nepal, 2063 a provision on the Right to Property is inscribed. Clause 1 of the said Article provides that subject to the laws in force, every citizen shall have the right to acquire, own, sell, dispose of, and otherwise deal with property, Clause (2) provides that except in the public interest, the State shall not acquire, requisition or otherwise create any encumbrance on the property of any person. It however provided that the said clause shall not apply any property acquired in an illicit manner. Similarly, Clause (3) the same provides that compensation shall be

provided for any property requisitioned, acquired or encumbered by the State in the course of enforcing a scientific land reform program or in the public interest in accordance with law. The amount and basis of compensation and the procedure therefor shall be as determined by law.

The Clause (3) of the Article 166 of the Interim Constitution of Nepal, 2063 provides that the comprehensive peace agreement concluded between the Government of Nepal and CPN (Maoists) on November 21, 2006 and the agreement on Monitoring of the Management of Arms and Armies is annexed in Schedule 4. Clause 5.1.8 of the said Schedule 4 states that both the parties have expressed consensus to document and immediately return the seized, locked or government, public, private building, land and other properties, to the respective owners.

It is found that the petitioners have demanded remedy based on provisions pertaining to fundamental rights under Articles 12, 13 and 19(1), clause (k) (m) (n) of Article 33 and Article 166 including relevant schedule of the Interim Constitution.

In their written submission the Office of the Prime Minister and Council of Ministers maintained that even though the petitioners have sought remedy based on fundamental rights including the right to property, in the case of the victims of conflict as the government is poised to implement the Standard Regarding Economic Assistance and Relief and as the provision of Article 33 cannot be enforced by the Court the matter is not justiciable. Similarly, in their written submission the Special Committee to Monitor Rehabilitation of Conflict Victims and Mobilization of Relief and the Legislature Parliament maintained that the State should be engaged in fulfilling its responsibilities, but the order of mandamus cannot be issued. Taking into cognizance the above, therefore, the Court is required to delve on questions such as whether or not the matters submitted is justiciable as sought by the petitioners, whether or not the Comprehensive Peace Agreement mentioned in the petition has any constitutional significance, whether or not the respondents have legal liabilities in regard to returning of the seized properties, and whether or not order as sought by the petitioners should be issued.

The petitioners have, besides the peace agreement, based their claim upon numerous rights stipulated in the Constitution such as the right to equality under Article 12, the right to freedom under Article 13 and the right to property under Article 19. They have stated that their rightfully held property was illegally seized by the insurgents during the time of conflict; it is yet to be returned to them. As they could not get remedy, they have approached the court pursuant to Art 32 and Article 107(2) of the Constitution which accord power to this Court.

The respondents have argued that even though the petitioners have raised the issue of providing relief pursuant to Art 33, it is determined only as an obligation of the State, and hence, cannot be taken as a matter of right. The Court cannot take the provision as judicially reviewable. This being so, the petitioners on the other have claimed that the Government of Nepal, the Nepali Congress and the CPN (Maoists) were compelled to respect Article 166 and the Comprehensive Peace Agreement of which they were signatories. Now therefore, in view of the above, it deems to us that the issue needs to be examined at the outset.

Even though the petitioners have made political parties as respondents, it is found that no written submission has been filed by them. The matter pertains to the agreement signed by the Government of Nepal with the political parties. Hence, it cannot be generally said that it is not obligatory upon the government and the said parties to abide by it. Yet, in the context of extraordinary jurisdiction of this Court vis-à-vis the rights of the

petitioners, the petitioners have not furnished grounds which would compel political parties to implement the peace agreement.

Apparently, it has been tried to be put forth that the peace agreement concluded to end the conflict is a political agreement. So its implementation should also be ensured by political procedure. However, from the view point of the Court, when an agreement of political nature is forged between the conflicting parties in the course of transforming conflict into peace, and when the framework of the Interim Constitution is also drawn based upon the same, the said document should be considered as important incident influencing the constitutional development process. All the agreements do not get directly transformed into legal form. Their spirit should be internalized through the legislative process. If the document such as Comprehensive Peace Agreement was taken in real sense as epoch-making incident by the political forces that would transform the conflict into peace, then the political forces should cause to bring several legislative, administrative and cultural arrangements in place. This matter is of multi-dimensional nature. Therefore, one incident cannot address the entire aspects and all situations. A comprehensive plan and strategy for its systematic and effective implementation should be in place. However, as can be seen, with the pace in which the peace agreement was concluded and the political process activated, leading to promulgation of the Interim Constitution and election of the Constituent Assembly and finally the formation of a new government, the same urgency and earnestness does not appear to have been shown with regard to studying causes of the conflict, their impacts and finding out right remedy; or consolidation and sustainable conclusion of the peace process.

The issue raised by the petitioners appears to be one representative problem of the several problems. It could be easily surmised that the nature of the problem and its expanse could be diverse than portrayed in this petition. Clearly, if the true reasons of the conflict or their impacts are disregarded, and if priority is given only to the implementation of political aspects of the peace agreement, then one cannot get to the root of the problem. The document such as Comprehensive Peace Agreement is not a document that could be taken more as a political and less as a legal, judicial or social, economic and cultural document. If it is to be believed that the present Interim Constitution has shown political commitment for the implementation of the spirit of the people's movement and intent of the peace agreement, then its search should be made in the operational part of the Constitution. It is also essential that the State and all other stakeholders are honest in the implementation of the provisions related to fundamental rights and each and every articles of the Constitution. The implementation of the provisions of the Constitution is not just a paper work, it is rather a matter that pertains to working on its objectives, reaching out to the targeted community and bringing about material change in terms of getting to the objective thus set out. In totality, it appears that the Interim Constitution aims to institutionalize peace and lead the country towards sustainable development by promoting happiness and prosperity of the people. In order to achieve this aspiration, the country in post conflict situation should find necessary recourse and strategy to transform conflict into peace and stability. Its connected issues and subsets of problems should be looked upon holistically and in a specialized manner. It seems necessary for the State and all associated to understand this fact seriously.

The Comprehensive Peace Agreement, related to Article 166 of the present Interim Constitution and annexed to Schedule 4, can be considered as a strategy to institutionalize peace, order and Justice in post conflict Nepal. Since it is included in Article 166 of the Constitution it may also be considered as part of the Constitution. But it is not clearly stated in the Constitution as to which body has the responsibility to execute this.

Therefore, the peace agreement is mainly an expression of political consensus. In order to implement this, while there is a need to forge continuous agreement and take forward strategic collaboration among the political powers and forces, it is also necessary to clarify the direction of implementation by evolving standard in the constitutional and legal form. Hence the Comprehensive Peace Agreement should be viewed in its totality

While considering the characteristics of peace agreement it appears to be a document exhibiting commitment to transform the past conflict and war into peace through ceasefire. It has emphasized on political, economic and social transformation and conflict management. As a matter of fact, there could be any reason for conflict. It is impossible to envision a society without conflict. If the conflicts are understood in real sense they may offer opportunities. This being the case, if the conflict is not managed in the right way then it may lead to destruction. That is why it seems to us that the management of conflict is important, and in this sense, the policies underlined the peace agreement for managing conflict should be clearly deciphered.

The peace agreement among others is found to have inscribed important matters such as [proscription on] collection of tax without consent ,[and provided for] making public the whereabouts of the detained people and the disappeared persons, forming National Peace and Rehabilitation Commission for the victims of the conflict, investigating the truth regarding the human rights violations committed during the conflict period and creating the environment of reconciliation in the society, forming Truth and Reconciliation Commission, expressing commitment against discrimination or exertion of pressure on members of the families of both [warring] sides on the ground of their affiliation with one another. It has also made commitment to ending war, abidance to human rights, fundamental rights and humanitarian laws. It has specifically mentioned matters such as not aiding impunity, providing compensation to the victims and the disappeared, according respect to the right to life, respecting the right of the displaced persons and families to return to their place of dwelling or their right to habitation at other places as per their wish, and respecting rights relating to food and not seizing or confiscating personal property of anyone except in accordance with law.

The said Peace Agreement has while providing for the establishment of National Peace and Rehabilitation Commission also mentioned that the said Commission may create necessary institutional mechanism in order to successfully execute the peace agreement. It has provided further that the creation of the Commission and the process for the same shall be as determined by the Interim Council of Ministers. It also provides that the Office of the High commissioner for Human Rights situated in Nepal will oversee and monitor the implementation of the agreement.

Looking at the abovementioned characteristics, it seems to us that the peace agreement has expressed commitment to transform conflict into peace by forsaking the split mental state of the conflict period, to provide compensation and rehabilitate persons and families affected by the conflict, to provide remedy for the human rights violations by investigating the truth and to institutionalize peace by creating an environment of reconciliation. Given that the conflict had a bearing on matters ranging from infrastructure development to social relations, the exercise of fundamental and legal rights of the people, honest execution of the peace agreement appears relevant in order to maintain proper legal order and environment for the people to exercise their rights.

In order to secure respect for the right to life of a person, it is important to protect the right to property and the right to profession and avocation which are the basis of livelihood. In the absence of this, neither the right to food is protected, nor can daily

necessities for maintaining life can be fulfilled. It is not possible to realize the right to self-determination in the absence of property, habitation and profession. Therefore, provisions regarding respect to these rights, and the resolve not to seize or capture property, respect to the residence and the resolve to return the property can be said to be important commitments of the Comprehensive Peace Agreement.

For the purpose of safeguarding this right, even though the Comprehensive Peace Agreement entrusts the responsibility in the Cabinet for the constitution of the Peace and Rehabilitation Commission, such a Commission does not seem to have been constituted till date. Whereas in the internal conflict, never ever in the history, monitoring by international organization was invited, and under the peace agreement, the responsibility of execution and follow up has been given to the Nepal Office of the OHCHR. Even then positive results of its role are yet to trickle down.

Though peace agreement was meant to be one guiding document for transforming peace and respected as such, its effective implementation for the protection of the life and livelihood of the people is yet to be witnessed. On the contrary, an undeclared silence, indifference, and fatigue seem prevalent. As a result, beside other things, it has given rise to a feeling that hindrances in the restoration of the rule of law are yet to be removed.

It should be noted that that the causes of war rest in human mind rather than in the environment he lives in. Unless the rights are properly protected and restored, the conflict in the human mind does not wither away. So long as the individual is not assured of the protection of the rights, he/she in one way or the other is afflicted by the feeling of fear, revenge, neglect etc. and as a result keeps on supporting and favoring conflict.

War destroys economic, social and all other aspects. It hinders construction and development, and invites the possibility of further destruction. That is why, it is especially crucial to protect social justice and human rights in order to establish peace in the post conflict society.

During the time of conflict and afterwards, in a situation where the properties have not been restored, habitations/residences not protected, or where the people are not allowed to embrace the profession they wish to, the feeling of insecurity prevails. This in essence indicates the perpetuation of the aftershocks of the conflict. Therefore, it is imperative for all concerned to keep in mind that the lack of honest implementation of the peace agreement keeps the potency of revival of the conflict.

In the process of restoring peace, therefore, it is necessary to take stock of the incidents of violations of human rights that occurred during the course of the conflict, study their impacts and address them through restorative and remedial measures. The structural aspect of Nepal's conflict appears very complicated and pervasive in nature. It has among others, put to question the traditional monarchy and organizational structure of the state along with the philosophy of governance. And as a corollary, it has raised many questions regarding socio- economic relations as well. Several of these questions seem to be of nature that could be addressed through the process of constitution enactment. And, for this to happen, several rights and obligations need to be properly implemented. For that purpose fundamental measures for reconciliation such as such as eradicating social and economic injustice, granting relief to the victims of conflict, launching effective management of restorative justice, preventing possibility of repetition of the conflict by making rule of law the basis of stability, and checking impunity by taking note of the need of transitional justice and normalizing and facilitating normalization of relations among the parties to the conflict and the victims are important.

Though the petition does not pertain to over all implementation of the peace agreement, since the Comprehensive Peace Agreement has expressed commitment to respect the realization of the right to property and other fundamental rights guaranteed by the Interim Constitution, the implementation of the noted agreement seems relevant in the context of the remedy sought by the petitioners.

At a time following the conclusion of the peace agreement, when the parties who were in conflict have tried to re-establish the relations in a new way, a question may be raised as to whether by scratching the issue of injustice of the past would not jeopardize the already established new relations. In this, there may also be people who would like to see justice and peace as mutually opposing. *True, one cannot always say that every past atrocity should be settled through judicial process and payment of reparation. Several disputes that occur in the course of the conflict may be settled by dialogue and amicable settlement forged between the parties. Inconveniences of the people may be removed by infrastructure development as well. But when incidents causing damage to the life, body and property occur or where violations of humanitarian laws also take place, such matters need to be dealt with by providing rehabilitation and reparation where the nature of case so demands, and in others through the judicial process. Where violations of humanitarian laws results in the destruction of life and property, in such cases if due attention is not paid to such incidents, this may give rise to growth or flourishing of impunity. The impunity in reality is a situation opposed to the rule of law. Whether in peace or war, there are fundamental principles of rule of law that unite the society, and if they are disregarded, then justification of living in such society vanishes.*

Therefore, there should be no negligence in the enforcement of human rights and humanitarian laws. Rather every situation of violations of human rights laws and humanitarian laws should be brought within the legal process and taken to the right conclusion. The society should be assured of the protection that could be offered by the law. If the State tries to escape from shouldering responsibility that result from the acts causing damage to the person's body and property or gross violations of humanitarian laws, then the impact caused by such incidents to the person, family or society lingers. They may at any time and in any pretext resurface in the society in the form of reaction. Therefore, *until the impacts of the conflicts are satisfactorily resolved, sustainable peace seems to be impossible. For that reason also the proper management of transitional justice appears important.*

It is important here to reiterate the concept expressed by Secretary-General of the United Nations in the report submitted in the Security Council regarding rule of law and transitional justice in conflict and post-conflict societies. According to him, the rule of law "refers to a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws, that are publicly promulgated, equally enforced and independently adjudicated and which are constant with international human rights works and standards. It requires, as well, measures to endure adherence to the principle of supremacy of law, separation of powers participation in decision making legal certainty, avoidance of arbitrariness and procedural and legal transparency".

Immediately after the signing of the Comprehensive Peace Agreement between the parties to the conflict, initiatives for the establishment of appropriate commission or mechanism for the purpose of documentation and collection of evidence of the incidents that had taken place during the conflict, conducting of investigation, assessment and evaluation of loss of individuals, families and overall damage caused to nation should be made. Priority should be given to repair, reconstruction, rehabilitation and providing justice

and compensation. But this process of conflict resolution does not seem to have been adopted. Apparently, the political parties seem to be contended with the conclusion of the peace accord taking it as an overarching solution. As it seems to us, even though the political events are moving ahead in the post conflict situation, lesser attention has been paid to the incidents of conflict.

The claim made in the petition has given rise the question of transitional justice. It has required us to examine why the life and property of the petitioners and many others like them had affected during the conflict period. Despite the laws, entities and processes being in place to protect the property and life of the person, why the property or the rights were not protected at the law enforcement level? Why did not the petitioners immediately come to seek justice through the legal process? Why was access to justice not made easy? Were all the aforesaid matters in the right order, and despite that, the petitioners had given up their rights to seek justice? Can the present law give satisfactory resolution of all those issues? The list of such questions might be long. In fact, *it cannot be imagined that any person of simple prudence would have tolerated the seizure of life and property had the laws and the possibility of their implementation remained in- tact, or had there been an environment of easy access to justice.* It is seen that during the conflict period the infrastructures of the Court were destroyed. In several conflict-affected-areas, prohibitory situations prevailed where execution of court notices could not be performed. It is found that many of those who had come to seek justice had to withdraw their lawsuits due to threat. They were forced to put up with the situation in the lack of courage or assurance that they could reach the destination of justice. Despite there being reasons to file lawsuit, they did not come to the court due to the obstruction on the way to justice. The petitioners had to wait for long even after the conclusion of the peace agreement for the return of their illegally seized property. This is possibly because unlike in normal situation it was not easy to claim the right or property in situation where there was still threat to their own life. That is why in such matters if only legal remedy is sought for all the problems of the conflict period by the conventional and traditional thought and process, then to a great extent our resolutions will be more fictitious and less genuine. For this reason it is said that the implementation of the concept of transitional justice is relevant.

Transitional justice takes the approach of providing strategic remedy by making holistic assessment of incidents of the conflict period. That is why step-by-step approach needs to be taken on matters such as investigation of crime and prosecution, truth seeking, reparation, institutional reforms, vetting etc. It is necessary to have laws, skills and institutional competence in place for ensuring robustness and effectiveness in all of these activities.

The main aspiration of transitional justice is to prevent acts against humanitarian laws and serious violations of human rights committed in the course of the conflict, to disallow their non-repetition, to create the feeling of security and self-respect in victims, to document the real occurrence of incidents, to create environment of national conciliation, to reinstate the rule of law, and to eventually make positive contribution in the restoration of sustainable peace in the country.

There may be no disagreement that the aforesaid situations are desired. But they do not automatically or easily take place. In this, it is necessary for the State including the judiciary to think in a new way. It is not that there were no law enforcement agencies in the pre-conflict, during the conflict or post conflict periods. However, the rule of law was obstructed, and as a result the petitioners and others sustained the loss of life and property in such an extent. Even when they sustained, they had to live without remedy till date. That is why the thought that rule of law in our country was without any problems, may

not be correct. It would not be correct to take an indifferent approach to the challenges of transitional justice with regard to keeping the rule of law intact in line with its correct principles or restoring the same.

Mostly the transitional condition is painful. The present is maligned with a feeling of insecurity amidst inconveniences of the past and uncertainty of the future. That is why everyone makes an effort to be free from transition. Given that the very nature of the work undertaken during the transition determines whether or not the transition could be pushed back, if one is to take the road to stability from transition, then the management of transition should be undertaken with due care. Transition does not get over on its own. Conscious efforts should be made to push it back.

Various kinds of injustices do occur during the conflict period. If assessment of the overall situation and evaluation of the damage caused by them is not made, and also if the overall planning for remedying the damage is not drawn, then it is possible that transformation of conflict into peace will remain ineffective. If the State is not found to be willing to implement the concept of justice with reparation for remedying the injustices committed during the conflict period, then whatsoever assurances is given, all of it will appear hollow. The question of justice appears important especially with regard to victims. In the Gulf, Iraq for its attack against Kuwait was made to pay compensation to the victims to the tune of millions of US dollar for the damage caused to them. Therefore, in order to address the past injustices through a process of justice, it is really important for the State to provide active assistance along with resources. From this point of view, evolving standards for the right to remedy, providing relief and awarding of appropriate compensation to the victim and returning property seem important.

Even though the problems stated by the petitioners are cursorily seen as matters of private inconvenience, they represent many stated and un-stated problems and sufferings of the conflict. It is therefore necessary to provide quick and satisfactory resolution of such a situation, irrespective of whether the injustice committed to the victim was by the State or others. It is desirable for the State to develop a comprehensive program for addressing injustices. It is, thus, crucial to draw the attention of the government on this issue.

In these petitions the petitioners have claimed that their properties were captured by the Maoist which had launched the peoples' war. In the written submissions made to us the respondents have not termed the claims as fictitious or unreal, rather conceded that they are touching. This being so, it is not stated in what way the properties of each of these individuals were seized. In the light of the exercise of the writ jurisdiction, it is therefore not possible to go deeper to investigate into detail to find out how the property of each and every petitioner was seized. In reality, such incidents have taken place in many places many times during the conflict, and they should not be looked upon like individual incidents deserving private recourse. Conflict is an unusual situation where the largest organization such as the State remains unable to handle and is tackled through agreement. Thus, it is not even thinkable that the victims or their families can face the situation by taking individual action or recourse. Clearly, it is for this reason that the petitioners have been organized and entered the Court collectively.

So far as the execution of peace agreement is concerned, the petitioners have not made implementation of the whole agreement as the subject matter in the petition. Yet, as it appears, the house, land and property of the petitioners have been seized during the conflict period. *Due to these incidents, people have been victimized and they have been left without property. They have thus been directly hit due to noted acts in terms of losing food*

and shelter. Indirectly, they have lost self-respect, feeling of security and productive opportunities and competencies. That is why the claims made in the petition should be considered in the broader ambit of the causes of conflict and their management. The resolution of the problem through political, administrative, moral and other various means are there in their own place, but since the matter has already entered the Court, the question before us is how this Court can resolve the problem under the judicial process.

Before this Court, the petitioners have stated that the rights enshrined under Articles, 12(1), and (2), (3) (e) and (f), 13, 19(1) and (2) of the constitution Schedule 4, and Article 5.1.8 of the same have been violated, and based on it, have demanded for the issuance of order pursuant to Article 32 and Article 107. Considering in this light, the undisputed properties of the petitioners are the properties that they can possess, enjoy and alienate. *While it is the primary duty of the state is to protect such properties, it is also the duty of others not to interfere or create impediments in the enjoyment of fundamental rights or legal rights of individuals. Whatever be the reasons of conflict the life and properties of individuals are inviolable. The mere breakout of the conflict cannot justify the violation of individual's liberty or property. Even if committed during the conflict, any affront to the rights provided by the law is illegal.*

As raised in the petition, in the post conflict period, or say at a time when the new Interim Constitution is being implemented, the properties illegally seized during the conflict are still allowed to be continuously held back. Due to this, hindrance has been created not only in the enjoyment of properties, but also in their diverse use or enjoyment of benefit. Since such situation of deprivation gives rise to a state of continuous loss, in order to provide adequate and effective justice, property should be returned by taking into account the recurrent loss, and permanent solution should be found out so that such incidents do not recur.

Now therefore, a fundamental question has in fact arisen as to whose obligation is this. While the petitioners have filed the petition primarily relying on the right to property under Article 19, they have also touched upon the provisions of the peace agreement by way of reference. The Court can look into this, under its extraordinary jurisdiction, only in the course of enforcing fundamental rights of the petitioners. So far as judicial enforcement of the peace agreement is concerned, the provisions of peace agreement are not in themselves the source of right. Since the agreement cannot impose restriction on fundamental and legal rights of the people, the ordinary and extraordinary jurisdiction of the Court cannot be invoked by taking provisions of the peace agreement as a matter of right. However, in the post-conflict period, the agreement can be viewed as a document of consensus in the context of discharge of state obligation in the resolution of conflict and institutional development of peace. Therefore, given that the peace agreement has also expressed commitment to the enforcement of rights inscribed in the Constitution, there is no reason why in the course of enforcing the rights, the Court cannot draw attention of the state about the norms or values stipulated in the peace agreement by way of reference.

Our constitution has accorded due respect and effectual position to property in the form of fundamental right. Except when the property is acquired according to law, any political or other move validating illegal seizure cannot be acceptable. It is like giving a blow to the fundamental basis of constitutional state to not let the actual owner of the property to enjoy the property or not letting the enjoyment of the right contrary to fundamental norms including the right to property, rule of law and principles of responsible governments which have been accepted as cardinal principle of the constitution. If such thoughts or behavior contrary to the constitution are tolerated, then the making of the constitution or

having provisions relating to the rule of law, independent judiciary, and fundamental rights and so on will have no meaning.

Regarding the question that the State or the government has not seized the petitioners' house, land or property in an unauthorized manner or that it has been seized by other parties of the conflict, it seems to us that it is the fundamental duty of the State or the government to protect the people's life and property and safeguard the border of the country. Besides, it is its duty to maintain law and order in the society, to develop infrastructure and create necessary environment so that people can enjoy the right to development. It is also the duty of the State to guarantee the social peace and social justice. When viewed from this perspective, to say that the State or the government itself has not interfered with any specific property of any particular person cannot be considered as an excuse to discharge of responsibility by the state. True, that the State itself might not have violated people's right. However, in circumstances like the one stated in the petition, responsibility is not determined based on whose and what kind of right has been illegally violated. Rather the assessment of fulfillment of state responsibility is to be made based on whether or not the State has become convincingly successful in protecting the people's right.

If the State in general has failed to remove the obstruction that has appeared in the enjoyment or enforcement of the rights conferred by the law, then it is to be principally believed that the State has been unable to discharge its obligation. *Generally, the right to property is a matter of personal right but where the repetition of the incident of the violation of right affecting the rights of many individuals or community occurs and the State remains an indifferent spectator, does not take any substantive and effective measures for resolving them, then such a State is said to be fundamentally unconcerned about its obligation. Therefore, it is a mandatory duty of the State to take interventionist role for bringing the law enforcement situation to normalcy where colossal violation of the right to property or individual freedom continues to take place.* If [the state] fails to discharge such duty and the right holders enter the Court seeking constitutional recourse to remedy, it becomes incumbent upon the Court to issue obligatory orders under all available constitutional means for the protection of people's rights. The human rights Jurisprudence developed under international human rights law includes not only matters relating to violations of human rights committed by public entity or officials but also matters relating to violation of rights of individuals or communities by non-state actors. In such cases, if the State fails to guarantee the prevention of the violation, and as a result the rights of the people are not protected, such matters are also considered as violation of human rights, and the State is held accountable in the eye of international human rights law.

In the present situation, the erstwhile non-state actor of the peace agreement itself is involved in the government and now it is also heading the State. Since it is heading Council of Ministers and as stated above, it is its duty to respect all rights, and guarantee their enforcement. Having such dual role, the present government should be even more sensitive and responsible. *And since it is one of the actors of the conflict and now a part of the government, it seems to us that it is its duty to return and cause the return of seized property as mentioned by the petitioners.*

In conclusion, it is deemed that the demand of the petitioners are based on the constitution and law, that it is the duty of all organs of the state to respect their right to property and that the state does have a key role in their enforcement. In the present situation when the peace agreement has been concluded, and following it, the New Interim

Constitution has been promulgated and even the government is being headed by the then party to conflict CPN (Maoist) party, not returning the property which was seized in unauthorized manner to its legitimate owners, and depriving and restricting the actual owners or not causing its return, or being unable to do so, is deemed objectionable in the eye of constitution and law. Due to unauthorized seizure of homes, land and property for years, quality of life of the owner has been affected and as the loss incurred or to be incurred is of continuous nature, it is imperative that such a situation should come to an end at the earliest. It seems to us that problems of transitional justice including the seizure of property during the conflict and violation of fundamental and human rights should be addressed through a particular institutional mechanism and program, and the attention of the government should be drawn towards this.

Since the petitioners have prayed for the return of property held in an unauthorized manner along with payment of compensation for the loss incurred till date, it deems that the matter should be resolved by making an assessment of the loss incurred by them also looking into the record of particular property, their use and earning that would be made from such property.

For that purpose, an order of mandamus is hereby issued in the name of respondent Prime Minister and Office of Council of Ministers pursuant to Article 107(2) of the Interim Constitution of Nepal, 2063 to the effect that *a Five- member Commission for the return of property* with the representation of the victim community, law enforcement agencies including political persons at district level where the petitioners reside and in the similar districts where there is problem of seizure of property, *be constituted*, and through the committee, *the property be returned to the actual owners*, that within three months of the receipt of this order, *the loss, depreciation and loss of income from the property thus seized be assessed*, and as prayed by the petitioners *compensation be paid to them* after fulfilling the procedure as stated herein above, and also that *a fund for providing compensation and relief* to those who have become victims due to the damage caused by the seizure of the property *be set up*. Let the copy of the order be sent to the respondents through the office of the Attorney General.

S/d
Kalyan Shrestha
Justice

I concur.

S/d

Min Bahadur Rayamajhi

Justice

The decision is delivered on Wednesday, 23rd of the Month of Poush of the year 2065 of the Vikram Era. (i.e. January 7, 2009)