

Supreme Court Special Bench
Hon'ble Justice Kedar Prasad Giri
Hon'ble Justice Meen Bahadur Rayamajhee
Hon'ble Justice Ram Nagina Singh
Hon'ble Justice Anup Raj Sharma
Hon'ble Justice Ram Prasad Shrestha
Order

Writ No. 118 of the year 2062 B.S. (2005 AD)

Sub: Praying For Issuance of Appropriate Order, or Directive including Writs of *Habeas Corpus, Quo Warranto* etc. Pursuant to Articles 23 and 88 (1) and (2) of the Constitution of the Kingdom of Nepal, 1990

On behalf of Rajeev Parajuli, aged 47, a former Minister and central member of Rastriya Prajatantra Party and resident of Birgunj Sub-Metropolitan city, Ward No. 4, currently held in detention in District Police Office Lalitpur by the order of the Royal Commission on Corruption Control, Sanjeev Parajuli, aged 42 – Petitioner

v.

<i>Royal Commission on Corruption Control, Harihar Bhavan, Lalitpur</i>	1	
<i>Bhakta Bahadur Koirala, Chairperson of the above-mentioned Commission.....</i>	1	
<i>Shambhu Prasad Khanal, a member of the above-mentioned Commission....</i>	1	
<i>Hari Babu Chaudhary, a member of the above mentioned Commission.....</i>	1	
<i>Raghuchandra Bahadur Singh, a member of the above-mentioned Commission.....</i>	1	
<i>Prem Bahadur Khati, a member of the above-mentioned Commission</i>	1	
<i>Shambhu Bahadur Khadka, member-Secretary of the above-mentioned Commission.....</i>	1	– Respondents
<i>Office of the Prime Minister and the Council of Ministers of His Majesty's Government, Singh Durbar, Kathmandu.....</i>	1	
<i>Ministry of Home Affairs, HMG</i>	1	
<i>Attorney General, Office of Attorney General of the Kingdom of Nepal, Ramshahpath, Kathmandu</i>	1	
<i>District Police Office Kathmandu</i>	1	

Meen Bahadur Rayamajhee J. The details of the present writ petition filed under Articles 23 and 88 (1) and (2) of the Constitution of the Kingdom of Nepal, 1990 and the verdict thereupon are as follows:

After my elder brother Rajeev Parajuli, who had become a Minister for five times and assumed the responsibility of various Ministries, was relieved of his office, the Commission for the Investigation of Abuse of Authority (CIAA, henceforth) constituted in

accordance with the Constitution, raising doubts about the legality of the assets owned by my elder brother and his joint family members, conducted investigation into those assets and their sources and, having concluded that it warranted no further action, the CIAA decided to close the case-file on Baisakh 23, 2061 B.S. (May 05, 2004) as per Section 35 of the CIAA Act, 2048 B.S. (1991) and informed him about that decision through a letter dated Jyestha 1, 2061 (May 14, 2004). The respondent Royal Commission restarted investigation into a subject on which the case-file had been already closed and delivered a letter dated Baisakh 28, 2061 (May 10, 2004) to my elder brother asking him to appear before the Commission within 24 hours of the receipt of the letter for giving his statement. When, in response to that letter, my elder brother appeared before the Commission on Bhadra 13, 2061 (August 29, 2004) for giving his statement the process of taking his statement was initiated the same day and, as his statement could not be completed he was placed in detention whereupon he has been kept in illegal detention ever since in Lalitpur District Police Office. Since the notification regarding the establishment of the Commission is likely to be quashed as per Article 88 (1) of the Constitution, the Commission is not entitled to initiate any proceedings and, therefore, as the detention of the detainee was in contravention of Articles 11(1), 12(2)(d), (e) and 14(1) (2) of the Constitution of the Kingdom of Nepal, 1990, I have lodged this petition under Articles 23 and 88 (1) and (2) for his release from the illegal detention.

Investigation into the legality of the property and its sources about which the respondent Commission has issued the letter and recorded the statement of my elder brother has been already conducted as per the prevalent Nepal Law by the CIAA which is empowered by Article 97 of the Constitution of the Kingdom of Nepal, 1990 and Section 2(b) of the CIAA Act, 2048 (1991). After such an investigation it was held that no property had been acquired illegally and since all the property was found to be legal it was decided not to take any action in respect of that property and the sources thereof. Article 14 (1) and (2) of the Constitution of the Kingdom of Nepal, 1990 has imposed complete prohibition on subjecting any person to punishment greater than that prescribed by the law in force at the time of the commission of the offence, and also on prosecuting and punishing any person for the same offence more than once. This right of a citizen has been enshrined in the Constitution as a fundamental right. This fundamental constitutional right of a citizen cannot be altered or controlled. The act of investigation into an issue relating to the property kept in the name of my detained elder brother and members of our joint family which has been already investigated into and held lawful by the CIAA which is legally and constitutionally competent, and the detention ordered on the basis of such an investigation are violative of Section 14 (1) and (2) of the Constitution of the Kingdom of Nepal, 1990. Section 19 of the Judicial Administration Act, 2048 (1995) has provided that a decision made by a competent body shall remain valid and binding on all organs and bodies until held void in accordance with the law. No Prevalent Nepal law has granted jurisdiction to the respondent Commission to hear appeal on any decision made by the CIAA or to invalidate or void such a decision.

Article 84 of the Constitution of the Kingdom of Nepal, 1990 has provided that the powers relating to justice in the Kingdom of Nepal shall be exercised by the courts and

other judicial institutions in accordance with this Constitution, the laws and the recognized principles of justice. A study of the composition of the aforesaid constitutional provision clearly establishes the fact that, as intended and provided by the Constitution, it was the intention of the framers of the Constitution to allow the exercise of the judicial power only by the courts and other judicial institutions constituted and established in accordance with the Constitution and the laws. Since the Royal Commission on Corruption Control (RCCC, henceforth) has not been constituted in accordance with the Constitution and the prevalent laws as provided and envisioned by Article 84 of the Constitution, such a Commission cannot exercise the judicial powers in any circumstances. It is indisputable that the court must immediately declare the establishment of such a Commission void by issuing an appropriate order. The Constitution has also provided for the appointment of qualified persons having specific qualifications, experience and competence as judges in accordance with the provisions of the Constitution and the prevalent Nepal Law for carrying out the function of judicial adjudication. As the qualifications for the Chairperson and other members of the Commission have not been prescribed, it appears that any body can be appointed to those posts. Since discharging the function of judicial adjudication by such persons who do not possess the basic qualifications, experience and competence prescribed by the Constitution and the laws issued under the Constitution is also contrary to judicial norm as well as the Preamble of the Constitution the Commission is obviously without jurisdiction. The Commission seems to have been set up under an order issued pursuant to Article 115 (7) of the Constitution. The exercise of Art. 115 (7) may remain effective only so long as an order issued pursuant to Article 115 (1) remained effective. Article 115 is such an Article which cannot be exercised on a long term basis for attaining a long term objective. It may be rather exercised for a shorter period in order to take into control an immediately arisen grave emergency. It is absolutely contrary to the constitutional values and norms to establish and keep active, by exercising an Article meant for application for a completely shorter period, a Commission which can exist for an indefinite period and exercise unlimited powers. When the order relating to the declaration of the state of Emergency has already lapsed the continuity of such a Commission cannot remain effective by virtue of an order issued pursuant to Article 127. The RCCC also seems to have the powers to carry out investigation and enquiry into the matters which have been specified to be investigated by the CIAA as provided by Article 98 of the Constitution as well as the powers to carry out investigation, registration and adjudication of also such cases which should be tried and decided by the law courts as per Article 85 of the Constitution. Thus, by granting parallel jurisdiction to the Royal Commission in regard to the matters which should be investigated and inquired by the CIAA established as per the provisions of the Constitution and also the powers of the courts to entertain complaints and petitions and conduct trial and disposal of cases, an encroachment has been committed upon the jurisdiction of the CIAA and the concerned law courts. Theoretically it is not proper to set up any organ having parallel jurisdiction for similar objectives. Since the jurisdiction created by the Constitution itself cannot be circumscribed or controlled by any other means, the establishment of the Commission is in contravention of Articles 98 and 95 of the Constitution. Articles 115 and 127 cannot be mingled and activated equally for a similar

objective. The objectives and the conditions of activation of these Articles are absolutely different. The application of one Article cannot be made as complementary to the application of another Article. After the withdrawal and inactivation of the order relating to the application of Art. 115 it cannot be revived by the application of Art. 127. Moreover, as Art. 127 is concerned only with resolving any difficulty arising in connection with the implementation of the Constitution, this Article cannot be resorted to in regard to any matter falling outside the Constitution. Article 1 of the Constitution has provided for declaring any law inconsistent with the Constitution as void. All types of orders, directives etc. having the force of law automatically become included within it. Since the order relating to the formation of the Commission is tantamount to the Nepal law, it is indisputable that this order can be subjected to judicial review under Article 88 (1) and (2). The Rule of law does not envisage a state of absence of remedy. The right to remedy is always guaranteed. The Constitution of the Kingdom of Nepal, 1990 also does not envisage a state of absence of remedy. Under this provision, any person adversely affected by any order issued by His Majesty the King may also challenge such an order. Moreover, the legality of any act not authorized by Article 35 (2) and performed in the capacity of the executive must be established. The orders issued by His Majesty the King, exercising the powers of the Executive, shall become extra-judicial, unlawful and void if they fail to prove such legality. Under Art 88 this court has got the jurisdiction to decide, as per the Constitution, an issue relating to whether or not a right has been adversely affected. Hence, it is indisputable that the present issue shall be judicially resolved by this court. The present Constitution does not accept the system of someone starting the case as a plaintiff, conducting the investigation and filing the charge-sheet and also deciding himself whether or not punishment should be awarded according to the charge-sheet. No country imbibing the concept of the Rule of Law envisioned by the Constitution shall allow such a legal system. Such a provision is also contrary to the incontrovertible principle of Natural Justice. Because the Commission has been entrusted with all the powers of initiating a case, carrying out the investigation, proposing the punishment and filing the charge-sheet and also deciding about whether or not to award punishment as demanded by the charge-sheet, the Commission is obviously contrary to the incontrovertible principle of Natural Justice and, hence, it is void '*ab initio*'. Article 127 should not be exercised in such a way that it affects the provisions made by other Articles. This Article may be exercised only with a view to providing an outlet by maintaining constitutional control in regard to the matters not addressed by other Articles. In view of the fact that Article 84 has provided for judicial institutions including Special Courts and empowered them to exercise judicial powers, Article 127 cannot be resorted to for making other provisions in regard to the matters which have been already provided for. Therefore, the Commission is '*ultra vires*'. Section 6(2) of the Commission Formation Order has provided for filing appeal in this court on a decision made by the Commission. No prevalent Nepal law including the Constitution, the Supreme Court Act and the Judicial Administration Act has specified this court to entertain appeals on the decisions made by such a Commission and dispose those appeals. This court, entrusted with the jurisdiction of being the final arbiter of the Constitution, is not bound to implement an extra-constitutional Notification. Thus, when the Constitution and the laws

made under the Constitution have not conferred upon this apex court the jurisdiction of hearing appeal the order and the Notification regarding the powers of hearing appeal, which are devoid of constitutional and legal capacity, are obviously in contravention of Articles 84, 85 and 86 of the Constitution and Section 9 of the Judicial Administration Act, 2048 [1991]. Art. 110 of the Constitution has provided that the State cases shall be filed through the office of Attorney General and its subordinate Offices and also empowered them to decide whether or not to proceed further with those cases in the law courts. Section 23 of the State Cases Act, 2049 [1992] has provided that the State shall be a plaintiff in cases falling under schedules 1 and 2, and Section 17 has provided that such cases shall be filed in the law courts only through the Office of the Attorney General and its subordinate Offices. The so called Commission has not been conferred this power. The order regarding the setting up of the Commission also does not make any mention about this. While filing the charge-sheet and deciding the case His Majesty's Government has been mentioned as the plaintiff. Thus when there is no mention about this in the said schedules and neither the Constitution nor any prevalent Nepal law has conferred any power to initiate legal proceedings on behalf of His Majesty's Government the act of creating powers in a self declared manner and the Commission are contrary to the above-mentioned constitutional and legal provisions. Therefore, since the notice concerning the setting up of the respondent Commission is likely to be voided as per Article 88 (1) and the act of keeping the detenu in detention is contrary to Articles 11(1), 12 (2) (d) & (e), 14(1) & (2) of the Constitution of the Kingdom of Nepal, 1990, I have petitioned this court under Articles 23 and 88 (1) & (2) of the Constitution to seek his release from the illegal detention. I, therefore, request this court to declare the formation of the respondent Commission as void as per Article 88 (1) and immediately free the detenu from detention by allowing the writ of habeas corpus as none of the respondents are qualified to act in the capacity of judges, and also to issue necessary and appropriate orders, with a view to providing full justice as per Article 88 (2) of the Constitution, including the writ of *quo-warranto* restraining anyone from acting as a judge in contravention of the Constitution of the Kingdom of Nepal 1990, besides passing strictures in the name of the respondents Prime Minister and the Office of the Council of Ministers for the knowledge of the general public. As the detention made by a body devoid of legal capacity cannot get continuity, this apex court is also hereby requested to issue a writ of habeas corpus to immediately set free the detenu from detention and also to issue an interim order as per Rule 41 of the Supreme Court Rules, 2049 [1992] restraining the unauthorized body from taking any statement from the detenu, filing and entertaining any charge-sheet and performing other functions including passing any orders pending the disposal of this writ petition.

A Single Bench Judge issued an order on Bhadra 16, 2062 [2005] asking the respondents to explain the facts of the case and reply why an order as requested by the petitioner ought not to be issued. As the petition was scheduled for hearing on Bhadra 23, 2062 [2005], the Bench also issued an order to send notices to the respondent including the RCCC along with a copy of the petition asking them to file their written reply before that date through the Office of the Attorney General along with the concerned case-file and to also include a copy of the same for reference of the Office of the Attorney General. As

regards the request for the issuance of interim order, the Bench opined that there did not exist any ground for issuance of interim order presently in view of the fact that the legal practitioners appearing on behalf of the petitioner have themselves admitted that the act of recording the statement of the petitioner was already in progress. Considering, the gravity of the constitutional and legal questions the Bench further ordered to grant priority to the present petition as per the rule and thus to schedule it for hearing on Bhadra 23, 2062 [September 8, 2005].

The respondents the Royal Commission and its Chairperson and members, in their joint written reply, contended that as regards the first plea that Article 127 cannot be exercised to give continuity to the Commission constituted under Act 115 (7), during the activation of Art. 115 His Majesty the King, taking into consideration the then prevailing circumstances of the country, declared a state of Emergency in respect of the whole of the Kingdom of Nepal as per Article 115(1) and also constituted this Commission as per Art. 115 (7) on Falgun 5, 2061 (February 16, 2005) which started functioning thereafter from Falgun 10, 2061 (February 21, 2005). In the meantime, while the Commission was continuing with its regular functions such as entertaining complaints, carrying out investigation and enquiries and conducting trial under its specified jurisdiction, His Majesty the King withdrew the order relating to the declaration of Emergency through another order issued on Baisakh 16, 2062 (April 29, 2005) as per Art. 115(11). Realizing that there had arisen some difficulty in the implementation of the Constitution in regard to the continuity of the acts born out the activation of Art. 115 due to the withdrawal of the order relating to the declaration of the state of Emergency, His Majesty the King issued an order under Art. 127 in order to remove that difficulty prevailing at that time as a result of which this Commission has acquired continuity. As the petitioner was a person who had held public office and as a complaint had been filed that he had committed an offence of Corruption under the Corruption Control Act, he had been served with summons on Chaitra 18, 2062 (May 31, 2006) under the jurisdiction specified by Section 2 of the Order relating to the Constitution of the Commission in pursuance of which the acts like taking his statement, causing him to submit the particulars etc. were initiated by the investigation officer. In the initial stage of the investigation, accepting the legality of the Commission he had also cooperated with the Commission in regard to the investigation. After he was produced before the court along with the charge-sheet by the Investigation officer on Bhadra 13, 2062 (August 29, 2005) the act of taking his statement started and he was sent for detention as per the law since the act of recording his statement could not be finished. Following the completion of recording of his statement, while passing the bail order, he was asked to deposit Rs. 51,00,000 - as security pursuant to Section 7 (d) of the Special Court Act, 2059 (2002) which he failed to produce leading to his remand to judicial custody as per the authority granted by the law. Therefore, judicial detention made under an order passed by an authorized Commission under the authority of the law cannot be dubbed as illegal detention. As the petitioner Rajeev Parajuli did not make any counteraction in time in regard to the proceedings undertaken during the period ranging from Chaitra 18, 2061 (March 31, 2005) to Bhadra 13, 2062 (August 19, 2005) and thereby accepted those proceedings and approached the apex court on Bhadra 14, 2062 (August 30, 2005) only

after he had been placed under detention, the Doctrine of Election now restrains him from at once accepting and rejecting the same proceedings.

Article 14{1} of the Constitution provides that no person shall be punished for an act which was not punishable by law when the act was committed, and Art. 14{2} provides that no person shall be prosecuted and punished for the same offence in a court of law more than once. Section 2 of the Order relating to the Formation of this Commission has prescribed the functions, duties and powers of the Commission and the jurisdiction of the Commission has been also determined by the same Order. The Commission has been empowered to investigate and prosecute offences under the Corruption Prevention Act and also decide such cases. The investigation and prosecution made on the basis of six complaints received by this Commission against Rajeev Parajuli on various dates cannot be described as violative of Article 14{2} of the Constitution. Article 14{2} has basically prevented the act of prosecuting and punishing any person twice for the same offence. The petitioner has not shown that any charge-sheet has been filed against Rajeev Parajuli anywhere and the case has been duly disposed. The provisions of Section 35 of the Corruption Prevention Act, 2059 (2002) do not seem to eradicate the offence of corruption.

His Majesty the King constituted this Commission on Falgun 5, 2061 (February 16, 2005) and prescribed its functions, duties and powers in accordance with the declaration made by him to undertake immediately effective measures, not contravening the principles of justice, for prevention of corruption in order to fulfill the wishes of the people and the needs of good governance because, as declared in the Royal Proclamation made His Majesty to the nation on Magh 19, 2061 (February 1, 2005), the ever flourishing corruption has polluted the administration and obstructed the steps of the nation which should have moved towards development and thus given a jolt to the belief of the common man in the law.

As regards the plea raised by the petitioner regarding the qualifications and competence of the officials of the Commission, His Majesty the King, while issuing the order on Falgun 5, 2061 (February 16, 2005), appointed those officials as per Section 1 of the Order relating to Formation of the Commission believing that they were qualified and competent to conduct the trial and disposal of the offences falling under the Corruption Prevention Act. So the petitioner does not seem to have any '*locus standi*' to raise any question about the qualifications and competence of the officials of the Commission appointed in the discretion of His Majesty the King. As a provision in the Order relating to the Formation of the Commission provides that any person not satisfied with any order or decision made by the officials of the Commission he may move an application or appeal before this honorable court and as this court is competent to review such an order or decision, the plea of the petitioner is not lawful. Since the Commission is competent to exercise the powers of the Special Court conferred on it by the Special Court Act, 2059 (2002) as per Section 2{4} of the Order relating to the Formation of the Commission, it is obvious that the Commission is functioning under the concept of a Tribunal which has been imbibed by Article 85 of the Constitution. Therefore, there is no question at all of the Commission violating the recognized principles of the Constitution, the laws and justice. In case there occurs any error in course of the exercise of judicial power by the Commission, there is a provision regarding this apex court dispensing justice exercising the appellate

jurisdiction granted by Section 6(2) of the Order relating to the Formation of the Commission, it cannot be contended that the formation of the Commission is contrary to the spirit of the Constitution and its Article 84.

Likewise, the contention of the petitioner describing the Commission's act of both filing the charge-sheet and also conducting the trial and disposing the case as being contrary to the Constitution is also not based on the facts. As shown by the provisions made in the Customs Act, 2019, the National Park and Wildlife Conservation Act, 2029 and the Forest Act, 2049, since the legal system of Nepal seems to have already accepted such a procedure, the contention of the petitioner is not lawful. As there is a provision empowering the Commission to lay down its own procedure as per Section 12 of the Order relating to Formation of the Commission, according to the provisions of the Procedure, 2061 (2004) issued by the Commission on Chaitra 1, 2061 (March 14, 2005) the Commission is empowered to appoint an Investigation Officer, and the Investigation Officer can file the charge-sheet as per Section 10 of the Procedure before the Bench of the Commission if the investigation shows that any offence has been committed. So as only after deciding whether an offence of corruption has been committed further proceedings are undertaken by the Umbrella body, it cannot be called as violative of the principles of Natural Justice. The above-mentioned contention of the petitioner is also negated by the judicial principle enunciated by the apex court in the writ of certiorari, *Advocate Jyoti Baniya v. the House of Representatives* (Nepal Kanoon Patrika 2056 (1999), No. 1, p. 23). As regards the contention of the petitioner that if the authorization under Article 35 (2) is not established in regard to an order issued by His Majesty the King exercising the executive powers, such an order is subject to judicial review under Article 88(1) and (2) and the aggrieved person may obtain relief. First of all, while issuing an order under Article 127 of the Constitution on Baisakh 16, 2062 (April 29, 2005) granting continuity to this Commission, His Majesty the King issued such an order not by exercising the executive powers but by exercising the discretionary power vested in him in accordance with the constitutional practices and customs of Nepal. Since such an order should be treated as an integral part of the Constitution pursuant to Article 127 of the Constitution it cannot become a subject of judicial review like the review of a legislative Act. Thus it is automatically proved that the act of specifying the functions, duties and powers of the Commission under an order issued in the discretion of His Majesty the King cannot fall under the confines of judicial review. Hence, since the act of giving continuity to this Commission along with its officials under Article 127 of the Constitution of the Kingdom of Nepal, 1990 in the discretion of His Majesty the King is in accordance with the Constitution, and as Article 31 of the Constitution has clearly provided that no question shall be raised in any court about any act performed by His Majesty, and because the business conducted by the Commission by exercising the functions, and powers and by observing the duties specified by the Order regarding the Formation of the Commission, is constitutional and lawful, the act of keeping Rajeev Parajuli, the brother of the petitioner, in judicial custody as per the order of this Commission under the authority granted by the law cannot be described as illegal detention and, therefore, the writ petition must be rejected.

The Office of the Prime Minister and the Council of Ministers, in its written reply, contended that as the petitioner had framed it as a respondent without explaining how and by which act of this Commission the rights of the petitioner have been infringed and because the person mentioned in the petition has been placed in detention by the concerned body as per the law, the writ petition must be rejected.

The Ministry of Home Affairs, in its written reply, contended that since Rajeev Parajuli has been placed in detention as per the law in connection with an offence of corruption by the RCCC, the writ petition must be quashed.

The Office of the Attorney General of Nepal, in its written reply contended that a cursory perusal of the writ petition shows that, except framing the Attorney General of Nepal as a respondent in the petition, the petitioner could not mention in the petition what type of acts of the Attorney General was directed against the petitioner and which acts of the Attorney General of Nepal infringed the rights of the petitioner and how those acts were violative of the Constitution. A writ cannot be issued only because of mentioning someone's name as a respondent. As the issue raised by the petitioner did not belong to the area of the functions, duties and powers of the Attorney General as specified by the Constitution nor was it related with the functions discharged by the Office of the Attorney General, the writ petition deserved to be rejected.

The District Police Office Lalitpur, in its written reply, praying for the rejection of the writ petition, contended that the petitioner Rajeev Parajuli was produced before that Office along with a letter of the RCCC having dispatch No.352 and dated Bhadra 13, 2062 [August 29, 2005] for keeping him in detention as the act of taking his statement in connection with the charge of corruption relating to acquisition of illegal property could not be completed for want of time and so the act of taking the petitioner to the Commission and bringing him back to that Office was performed as per the order of the Commission. And as Rajeev Parajuli was produced before that Office along with a letter of the RCCC having dispatch No. 385 and dated Bhadra 15, 2062 [August 31, 2005] asking it to keep him for safe custody as he had failed to produce the bail amount slapped on him in *His Majesty Government v. Rajeev Parajuli and Others* in connection with the case of corruption relating to acquisition of illegal property, the petitioner had been kept in detention not illegally but as per the law according to the order of the Commission.

A five member Special Bench of the apex court ordered for scheduling the case for hearing on Bhadra 28, 2062 [September 6, 2005] and producing the detenu Rajeev Parajuli before the Bench on that date along with the related writ petition numbered 57 and the petition numbered 745 for a simultaneous hearing.

Observing that since the CIAA had decided on Baisakh 23, 2061 [May 5, 2004] to close the proceedings regarding the investigation about the assets of Rajeev Parajuli whose sources were not accounted for as per Section 35 of the Corruption Prevention Act, 2059 and as the submissions to be made by the counsels were yet not complete, a five member Special Bench issued an order to release the prisoner Rajeev Parajuli pending disposal of the petition as per Rule 33(a) of the Supreme Court Rules, 2049 on the personal security of attendance given by his counsel Advocate Shambhu Thapa on the condition of

producing him before the court on the date scheduled for the hearing of that petition, and also to notify the RCCC in this regard.

The petitioner and thirty nine learned legal practitioners appearing on behalf of the petitioner and the respondents including the legal practitioners getting involved in the case as per rule 42 of the Supreme Court Rules, 2049 made their submissions as follows in the present writ petition and the writ petition No. 57 filed by petitioner Santosh Mahato in which a similar issue was involved and which had been simultaneously produced for hearing on various dates starting from Bhadra 23, 2062 (September 5, 2005) and continued on Bhadra 28 and 30, 2062 (September 13 and 15, 2005), Ashwin 6 and 12, 2062 (September 22 and 28, 2005), Kartik 27 and 29, 2062 (November 13 and 25, 2005) and Manshir 6, 7, 12, 13, 21, 23 and 29, 2062 (November 21, 22, 27, 28 and December 6, 8 and 14, 2005).

The Learned Counsels Appearing on behalf of the Petitioner

1. Advocate Shambhu Thapa (in both cases)

The learned Advocate Shambhu Thapa pleaded that Article 12 of the Constitution of the Kingdom of Nepal, 1990 stipulated that no person shall be deprived of his personal liberty save in accordance with law. Section 2(m) of Nepal Law Interpretation Act, 2010 (1953) has defined law and, as that definition is also applicable in the case of the Constitution, the order issued on the basis of Article 127 must be reviewed whether or not it is a law according to that interpretation. There is no scope for the continuity of the order issued under Article 115 of the Constitution. As Art. 115 is in itself an independent Article, an order issued under this Article may suspend some Articles of the Constitution but it cannot usurp the powers granted by the Constitution to other organs and delegate them to others. The Constitution is an instrument which keeps all persons including the Head of the State as well as the citizens in the same system. An order can be issued for dealing with the state of Emergency declared under Art. 115 and after withdrawal of the state of Emergency or after expiration of the declaration of the state of Emergency, the order issued under Art. 115 also becomes automatically inactive. An order issued under Art. 115 cannot be given continuity by exercising Art. 127. Following the issuance of an order under Art.127 for removing any difficulty in connection with the implementation of the Constitution, all the constitutional processes should be operated after the removal of such a difficulty. The constitutional deadlock which has arisen must be pointed out. How did a difficulty arise in regard to the establishment of the RCCC? There is also a provision regarding removal of similar difficulties in the implementation of the Constitution in India in Article 392 of the Indian Constitution. When questions were raised against an order issued by the President of India in the law court, the Indian Supreme Court had held that such an order intended for the removal of difficulties could be subjected to judicial review. The law court of England has also held that the powers regarding arresting any person, taking his statement, putting him into detention etc. did not come under the powers of the Crown. When the opinion of this apex court was sought by His Majesty the King in the dispute relating to Dasdhunga accident about the conditions regarding removal of difficulties as per Article 127, Article 127 has been interpreted in that opinion. Even though that was given in the form of an

opinion, actions were taken by His Majesty the King and the Government according to that opinion and, therefore, there shall be no difficulty in applying that opinion even in this case. As regards the written reply with the plea that since the order had been issued by His Majesty the King, no question could be raised in a law court as per the provision of Article 31. Because ours is a written Constitution it cannot be accepted that there is a provision of prerogative power as in the English Constitution. A decision has been already made regarding Article 31 in the case of the Dissolution of the House of Representatives by P.M. Manmohan Adhikari. Article 31 must be viewed in relation to Article 56. The powers of His Majesty, Parliament and the court --- all the three Organs have been provided by the Constitution and none of them can encroach upon the powers of the others. But if any dispute arises among these three Organs or bodies it can be decided only by the court. The petitioner has come to the court pleading that his liberty is being usurped. As every citizen has been granted by the Constitution the right to protect his personal liberty, if someone enters the court on that issue, it cannot be argued that a question cannot be raised in this regard. The provision of Article 88 does not preclude from judicial review the matters other than those relating to His Majesty the King and the status of Parliament. The context of the decision made in the writ petition of Jyoti Baniya mentioned in the written reply cannot be applicable to the present case. The Forest Act, the Local Administration Act, the Custom Act etc. are the matters falling under the law made by Parliament. The respondent Commission has not been constituted under the law. The qualifications of the officials of the Commission are not clear. Actions have been undertaken against the spirit of Articles 84 and 85. When a petition has been filed raising questions about the qualifications of the officials of the Commission there does arise an obligation to prove the qualifications. Any questions raised about the qualifications cannot be brushed aside. The Constitution is the fundamental law of the land. When the fundamental law itself has set up the CIAA under Art. 98 for the prevention of corruption and also when the Constitution has provided for the investigation of the cases falling under the Corruption Prevention Act and made specific provision for a court for hearing such cases it is not proper to set up a parallel body. The cases prosecuted by the Commission also fall under the purview of the Corruption Prevention Act and His Majesty's Government is the plaintiff of the cases to be filed under that Act. Article 110 has provided that the Attorney General of the Kingdom of Nepal and his subordinate government counsels have got the powers to make the final decision as to whether or not to initiate the proceeding in any case on behalf of His Majesty's Government. That provision has also been infringed by the formation and the activities of the Royal Commission. A decision of the Commission cannot be subjected to appeal in this court. The appellate jurisdiction of this court can be determined by the provisions made in Art. 88 (3) of the Constitution. Since an order issued by His Majesty is not a law it cannot be said that appeal can be filed as per that order even though it has provided for filing appeal. What is law has been interpreted by a Division Bench in the Reservation case. An order can be subject to judicial review provided that it was treated as the law. If an order is not the law it must be automatically inoperative. No law can be made without resorting to the procedure mentioned in Article 71 and 72 of the Constitution. Such a Commission has no power to slap punishment on the citizens. The judicial principle enunciated in the case of Iman Singh

Gurung also substantiates this point. The Indian Supreme Court has discussed the jurisdiction of the Supreme Court in AIR 2001 SC 180.

2. Advocate Subhash Nemwang (in both cases)

Advocate Subhash Nemwang submitted that as regards the contention made in the written reply that the Commission has been set up by His Majesty in his discretion by exercising the State authority vested in him and as per the customs and usages of Nepal, the Constitution of the Kingdom of Nepal, 1990 does not provide for, as in the Constitution of Nepal, 1962, vesting of the State authority in His Majesty the King. That is proved by the Preamble of the Constitution itself. His Majesty has promulgated the Constitution accepting Constitutional Monarchy in Nepal in the Preamble itself. That the interpretation of the Constitution must be based on the Preamble, too, has been already expressed by this court in Manmohan Adhikari's case relating to the Dissolution of the House of Representatives. No order can be issued affecting the basic principles of the Constitution. Nowhere does the Constitution talk about doing anything in accordance with the practices and customs. That the State authority and the sovereign powers shall be exercised in accordance with the provisions of the Constitution is a declaration made by His Majesty the King. Article 3 of the Constitution has mentioned that sovereignty is vested in the Nepalese people. The provision of Article 31 of the Constitution of the Kingdom of Nepal is based on the assumption that the King does no wrong. On the basis of the assumption of the King doing no wrong the powers conferred on the British Crown have been granted to HM the King by our Constitution. Our Constitution has not made any provision about any inherent or residuary power. The Constitution has not given even any hint about the likelihood of the formation of such a Commission. The Constitution has not provided for treating an order under Article 127 as a part of the Constitution. Even though the Constitution of India made a provision for removing any difficulty in Article 392, that provision was made for removing any difficulty while moving forward from the Government of India Act, 1935 to the Constitution of India, and it was also provided that such an order shall cease to be effective after the beginning of the first parliament. In Nepal, too, after the composition of Parliament Article 127 may be exercised in an extremely exceptional manner. As Parliament possesses the power to amend the Constitution, the issue of removing any difficulty is also concerned with Parliament. The Supreme Court has the power to make judicial review of even an Amendment of the Constitution. As Article 127 of the present Constitution has not made any provision, similar to Article 90A of the Constitution of Nepal, 1962, to treat the disputed order as a part of the Constitution, the contention made in the written reply that the order is a part of the Constitution is not constitutionally valid. The power under Art. 127 is not discretionary. With regard to the functions discharged by His Majesty or His Majesty alone or in the discretion of His Majesty, an interpretation has been made by this court in Advocate Radheshyam Adhikari's case. Also in the opinion given by the court in connection with the Dasdhunga accident it has been explained that in the changed circumstances no Commission can be set up by issuing an order relating to the formation of a Royal commission as was done in 2036 BS [1979]. Of course, the Constitution does not preclude from imposing restrictions on the fundamental rights by making law but it is not proper to negate fundamental right by issuing

such an order. In the same opinion, it has been also explained that Art. 127 could be applied only in the circumstances when there is no alternative arrangement. Even if some one wants to restrict something, he cannot be allowed to restrict it by taking recourse to a wrong way. Such works should be done by abiding by the Constitution and not fatally hurting the accepted principles of law and justice. In the Dasdhunga case also, it has been held that if need be to interfere with the rights of the citizens, it can be done only through the law made by Parliament. When an organ visualized and provided by Articles 97 and 98 in connection with the prevention of corruption has been set up and is already functioning, the disputed Commission established under the assumption as if there was no alternative arrangement, was not constitutionally valid. The written reply does not clarify what kind of reason cropped up which called for the removal of difficulty. If Article 127 is allowed to be exercised in this way, it will give the impression that other parallel constitutional organs can be also created by resorting to the same Article. That is, however, not the intention of Article 127. An order issued in this manner has virtually acquired the form of amendment of the Constitution. But the Constitution cannot be amended in this manner. Even an amendment of the Constitution cannot be allowed to adversely affect the independent judiciary. An order under Art.127 cannot displace an already existing constitutional organ. To effect such a displacement an amendment must be introduced. As the formation of the RCCC has led to undertaking two types of investigation in a case of similar nature, it has resulted in unequal treatment among citizens of equal status. This has acted against the principle of equality regarding equal protection of the law for all citizens in an equal situation. Since the provision of appointing anybody whatsoever in the Commission is based on arbitrariness, this is also an unequal treatment. There is no question of the incompetence of the court to review a subject which belongs to the Constitution. Since our Constitution has accepted the principle of Constitutional Supremacy, it is not proper to say that it cannot be examined whether or not the impugned order is violative of the Constitution. It cannot be said that the Supreme Court cannot examine an issue raised in a complaint alleging the violation of the Preamble of the Constitution. In the case of Sampat Kumar, the Indian Supreme Court has agreed that the power of judicial review is one of the basic features of the Constitution. The written reply intends to restrict the powers of the Supreme Court. What Advocate Shambhu Thapa has said while throwing light on Article 31 also shows that the impugned order is subject to judicial review. As the Commission has been constituted also against the principle of "No one should be a judge in his own case", the writ should be issued as prayed for.

3. Advocate Yagya Murti Banjade (on behalf of petitioner Rajeev Parajuli)

It has been contended in the written reply that, as the order has been issued by His Majesty the King, it cannot be reviewed. But since it has been already decided by this court in the writ petitions filed by Rabi Raj Bhandari and Hari Prasad Nepal, in connection with the dissolution of the House of Representatives that an order issued by His Majesty the King can be subjected to judicial review, there is no need of getting confused about this issue. As required by the provision made in Article 27(3) of the Constitution, His Majesty, too, must uphold the Constitution. His Majesty does not have any power to transgress the constitutional limits. Lord Denning has observed in the context of the British Crown that the

King, too, must remain under the law. If an order issued by His Majesty is not treated as the law, it cannot be resorted to punish any person. If it is the law, it can be subject to judicial review under Article 88 (1) of the Constitution. The respondents must first clarify this matter. If judicial review is not allowed, the Constitution can be viewed as almost non-existent. The Commission has been formed by an order issued as per Art. 115(7). There is no provision in Article 115 to declare the state of Emergency on the ground of increase in corruption. The formation of the Royal Commission is not in consonance with Art. 115(7). Since an order issued under Art. 115(7) is as good as the law, it can be also subject to judicial review. If the order issued under Art. 115(7) for the prevention of the state of Emergency is given continuity even after the withdrawal of the order of the declaration of the state of Emergency that is tantamount to committing a fraud upon the Constitution. After His Majesty himself has agreed to act according to the Constitution, it is not justifiable to do any work in the name of custom and practices. In England, too, it has been admitted that the Royal Prerogative cannot grant any new thing. It is a recognized principle of justice that the act of justice dispensation must be done by those who possess the knowledge of law. It is believed that the recognized principle of law and justice are applied only in the justice delivered by independent and impartial judges. It has been admitted in **the Basic Principles on the Independence of the Judiciary** adopted by the UNO in 1985 that the act of justice dispensation must be done by a person who has got knowledge of law and justice. Even though a question has been raised about the qualifications of the members of the respondent Commission entrusted with the responsibility of justice dispensation, none of them have clarified about their qualifications. The Commission has been formed in contravention of the above mentioned principles adopted by the UNO. An order issued under Article 127 is not of permanent nature. In case there is no provision in the Constitution but it is promptly required for the time being only then an order can be issued under Article 127 to serve the purpose. Its relevance is over after the purpose has been served. The formation of the Commission and the functions assigned to it have adversely affected the recognized principles of law and justice such as the principles of Natural Justice relating to fair trial. All the issues raised can be resolved even by a writ petition of *habeas corpus*. That an appropriate order can be issued even through a writ petition of *habeas corpus* has been admitted in a 2027 (1970) case in which I was myself the writ petitioner and also in the case of petitioner *Omkar Shrestha v. Office of Bagmati Zonal Commissioner*.

4. Senior Advocate Shree Hari Aryal (in both cases)

The present Constitution has outlined the form and structure of democracy and has bound everyone together. Article 1 of the Constitution has specified the compliance with the Constitution as everybody's duty. Article 14 has guaranteed that no person shall be punished except according to the law. The Constitution has constituted a Commission in regard to the prevention of corruption. It has also prescribed what should be the qualifications of every constitutional organ. As it has been also mentioned in the declaration of Magh 19, 2061 (February 1, 2005) to constitute the Commission not contravening the recognized principles of justice, it does not seem to stake a claim to make

a declaration going beyond the constitutional limits. The formation of the Royal Commission, being violative of this declaration, is contradictory to the declaration. As a constitutional dispute has been raised, it should be resolved taking into consideration all the matters related with the Constitution. It has been held in the decision published in the Supreme Court Bulletin (Year 11 No. 8 Full No. 242 P.7) that the Explanatory Comments prepared in course of making of the Constitution may be also relied on. Only the courts and other judicial institutions falling under Article 84 may follow the recognized principles of law and justice. Although a provision has been made for filing appeal on the decisions made by the Royal Commission, there is, however, no provision for its supervision and control by the Supreme Court as in the case of the District Courts, the Appellate Courts, the Special Court and other quasi-judicial institutions. Therefore, the formation of the Royal Commission is not constitutional. The provision of Art 35(2) does not permit the issuance of such an order by His Majesty in his discretion. The interpretation of the Constitution must be made in such a way as to preserve the Constitution. The Royal Commission, which is violative of the Constitution, cannot be allowed to continue.

5. Advocate Harihar Dahal (in both cases)

The order constituting the Royal Commission was not issued along with the declaration of the state of Emergency. The order issued in regard to the formation of the Commission under Article 127 is concerned with an unrelated issue and hence it is not constitutionally valid. The order issued under Art. 127, meant for removing difficulty, has been issued to give continuity to such an unconstitutional Commission. Article 127 cannot be exercised to create any institution. Article 127 does not provide any authority to give birth to such a Commission. It has been held in the opinion given by this court in regard to the Dasdhunga accident that Article 127 can be exercised only in a case where there is an absence of any alternative. No order can circumscribe or extend the jurisdiction of the Supreme Court. The Order relating to the Formation of the Royal Commission has violated the provisions of the Constitution. The jurisdiction of the Supreme Court can be extended only through the law made by Parliament. An order issued under Art. 127 cannot get the protection under Article 31. Art. 127 has been applied in a way that affects the basic structure of the Constitution. The protection under Art. 31 is based on the principle that "the King can do no wrong". This constitutional protection has been granted because the King himself does not do anything. Even His Majesty cannot transgress the confines of the Constitution. It cannot be held that the functions discharged by His Majesty in the capacity of the Chief of the Executive can be granted protection by Art. 31. If the Supreme Court is not allowed to make judicial review of such an order, the very soul of the Constitution will be taken away. Art. 31 cannot shrink the power of the Supreme Court to make judicial review. Art. 27(3) has provided protection only for the acts done in accordance with the spirit and intention of the Constitution. This is a positive matter. But in the present dispute, there is a state of violation of the Constitution. Protection is meant for positive things. The courts other than those mentioned in Art. 85, are not entitled to conduct hearing of cases. Since the Commission has been formed going beyond the orbit of Art. 85, such an act is not entitled to get any protection.

6. Advocate Kumar Regmi (on behalf of only Rajeev Parajuli)

In the present dispute there is the need for discussion about four matters including *quo-warranto*, *certiorari*, seeking invalidity of a law and *habeas corpus*. As the petitioner has, exercising his right under *quo-warranto*, raised a question regarding the qualifications of the officials of the Commission, such a question must be answered by the persons to whom it has been addressed. *Quo-warranto* is not a matter to be asked to the appointing authority. It is concerned with the person who has been appointed. He is asked to show by which authority he is occupying the chair. Since such a question is asked in the case of a person holding a post of public accountability, he cannot be allowed to refuse to give reply. It does not suffice to say that he is occupying the office because he has been appointed by His Majesty. He must answer what are his qualifications for occupying that post. Since an order issued under Art. 127 is required to be presented before Parliament Art. 127 cannot be exercised in a situation when there are no Parliament and no Council of Ministers. There is a need for interpretation to find out the place where His Majesty has been placed by the Constitution. In *B.K. Kapoor v. State of Tamil Nadu* (AIR 2001 SC 3435) the Indian Supreme Court has decided about *quo-warranto* and the protection or immunity granted to the Head of the State. That may be relevant also in the present context. There has been a principle that five methods should be adopted in regard to the interpretation of the Constitution. The first among this says that the interpretation of a Constitution should be made on the basis of the books on Constitution. Thereafter, a Constitution should be interpreted on the basis of its original intention, structural reasoning, moral reasoning i.e., liberal interpretation and earlier court practices or precedents. Articles 31 and 127 must be interpreted in the context of the orbit of this principle of interpretation. Article 31 is related to Art. 35. Art. 31 is an Article independent in itself. Art. 31 acquires perfection only from Art. 35(2). Viewing Art. 31 in isolation creates confusion. Art. 35(2) makes it clear what type of work can be done by His Majesty and what are his acts which cannot be questioned. Since ours is a written Constitution, even His Majesty cannot go beyond the Constitution. In the *State of Rajasthan v. Union of India* it has been held that although the Indian Supreme Court cannot look into what type of recommendation has been made to the President, the order of the President can be subject to judicial review. Also, the interpretation made in the case of *S. R. Bomai* is relevant for the interpretation of Art. 35(6) of our Constitution. It has been decided in this case that it may fall under the orbit of judicial review as to what kind of recommendation was made by the Council of Ministers for the sake of public interest. If the order issued presently had been issued by His Majesty as per Article 35(2), on the recommendation of the Council of Ministers, no question could have been raised as per Art. 31 about the function discharged by His Majesty. If we omit Article 35(2) and then look at the Constitution there would be nothing left in it. Therefore, any claim for the immunity must be constitutionally valid.

7. Advocate Madhav Kumar Basnet (in both cases)

The courts are granted final authority to decide disputes in accordance with the inherent character of the written Constitution. Whether or not the declaration of the state of Emergency is justified is not examined. If it is argued that this court has no power to review the matters involved in the present dispute, then who shall resolve the inner conflicts

occurred among various organs of the Constitution or who should clarify the ambiguity present in the Constitution. It is the court which resolves all these issues. In the United States whatever the nine justices opine in regard to even the law made by the American people is made to prevail. These things are accepted on the basis of the fact that in the law court there are persons who are well versed in the concerned subjects. It is the court which has the power to decide whether or not there has arisen a situation to resolve any difficulty. The grounds put forward against raising any question are not clear. If it is so due to political reasons the case of Rabi Raj has already resolved many issues. Since an order issued under Art.115 (7) is to remain effective till the continuation of the state of Emergency, it automatically ceases to operate once the state of Emergency is withdrawn by His Majesty. It cannot be given continuity. If it is argued that the same can be given continuity that could be tantamount to committing a fraud against the Constitution. Article 127 can be exercised only if any difficulty arises in connection with the implementation of the Constitution and not in the event of any difficulty arising in connection with the implementation of any order. If it is believed that the order issued under Art.115 (7) is active then it will show that the state of Emergency is still operative. Even if it is treated as an order issued under Art.115 (7) that order is equivalent to the law and it cannot be viewed as a part of the Constitution. Since the Constitution has provided for vesting sovereignty in the people, it cannot be accepted that the state authority is still vested in His Majesty. The provision for His Majesty exercising his discretion has been made in Articles 28 and 121. Except that His Majesty can do any other thing only on the recommendation of the council of Ministers pursuant to Article 35 (2).

8. Advocate Badri Bahadur Karki (in both cases)

We are ruled by a written Constitution. The Constitution has not only prescribed the jurisdiction of all the organs of the State rather it has also specified how to use those organs. This is the Constitution also applicable to the respondents. Presently, the executive powers provided by the Constitution also need to be interpreted and analyzed. It has been held by the Pakistani Supreme Court in the case of Dissolution of the Pakistan Parliament that, while interpreting the Constitution, basically a particular Article must be interpreted also in the context of all the provisions of the Constitution and the relevant precedents. The provisions of the Constitution of the Philippines as well as those of ours are similar to a great extent. While making interpretation of the Constitution in the case relating to the oath taking of the President of Philippines Astarada, it was decided to use the rule of construction and it was also held that the interpretation should be made in the context of all the provisions of the Constitution. The court is described as the faithful guardian of the Constitution. If a dispute arises that some organ enjoined to work under the Constitution has not done accordingly, the power and responsibility to resolve such a dispute lies in none other than the Supreme Court. Article 127 has not obstructed the power of this court to make decisions by making interpretation under Article 88. Judicial review of matters under Article 116 is not precluded. Likewise, it can be said that an order issued under Article 127 cannot be reviewed. The powers relating to justice cannot be given to others in contravention of the spirit and intention of the Constitution. That although Art. 28(3) has

granted powers only to His Majesty to make law relating to succession to the throne, the issues relating to that law can also be subject to judicial review has been substantiated also by the case of petitioner *Krishna Prasad Shiwakoti v. the Secretariat of the Council of Ministers* published in *Nepal Kanoon Patrika*, 2054{1997} P. 295. In such a situation it cannot be said that the impugned formation of the Commission cannot be subjected to review. Since all the Statutes, Rules and orders issued by His Majesty are published in the *Nepal Gazette*, it cannot be said that their judicial review is not possible. Article 27 of the Constitution has provided immunity on the basis of the principle that in Constitutional Monarchy, all the actions are performed on the recommendation of others and no action is performed in one's discretion. Written Constitution means not giving recognition to customs and usages. As a Constitution is enforced to preclude the possibility of occurrence of matters relating to customs and usages, the respondents should have presented their written reply agreeing to abide by the decision to be made by the Supreme Court. But since they have pleaded in stead that no question can be raised in this regard, an organ of the State cannot get immunity by making such pleas. Since all the Articles of our Constitution came into force on the same date of Kartik 23, 2047 {1990}, in fact the provision of removing difficulty enshrined in Article 127 should not have existed. Such a provision is not needed at all after the Constitution has become active. Even if such a provision exists it cannot be used to usurp the functions of one organ and to give it to another. An order issued under Art. 127 is of a legislative nature. It is for this reason that such an order is required to be placed before Parliament. Only because it is a matter to be presented before Parliament, it cannot be argued that its judicial review is not possible under the powers granted by Article 88{1}. Since the provision enshrined in Article 115 is to be enforced on the recommendation of the Council of Ministers, His Majesty cannot claim immunity in regard to such an order. The impugned Order relating to the Formation of the Commission has granted powers to the Commission at par with those granted to the law courts including the powers of arresting a person, taking his statement etc. But this is contrary to the opinion given by this court in regard to the Dasdhunga accident that such an order cannot be issued under Art. 127. If any act done by His Majesty results in causing infringement to or interference in the rights of any citizen, he cannot be debarred from coming to this court for safeguarding his right as per the provisions made in the Constitution itself. Thus, it cannot be argued that the court cannot look into the matter after a case is filed claiming infringement of one's right.

9. Petitioner Santosh Mahato

As the Royal Commission has been entrusted with the authority to exercise legal powers and to award punishment, the Order Constituting the Commission is a law. The issue relating to Article 31 has been already resolved while issuing the order relating to the registration of the petition. It cannot be allowed to raise this issue again. Article 31 must be interpreted in consonance with Art. 35{2}. No question can be raised in regard to the functions discharged by His Majesty in his discretion. Besides that, in case of actions related to the rights of the people it is not proper to say that no questions can be raised. Because the impugned order is not issued in the discretion of His Majesty it cannot be

deemed as having the immunity provisioned in Art. 31. Article 137 was exercised for the first time on the recommendation of the Prime Minister. Where the difficulty has arisen and how it is intended to resolve must be mentioned in the same order. The Order relating to the Formation of the Royal Commission does not point out the Article which has been faced with difficulty in its implementation. The order issued on Ashwin 18, 2059 (October 4, 2002) makes it clear that the order was issued following difficulty in the implementation of the Constitution. As the order issued on Magh 25, 2061 (February 7, 2005) is equivalent to the law, it can be said that some difficulty has arisen in the implementation of such a law. If there is any difficulty in the implementation of the law it should be implemented either by amending the concerned Statute or by repealing it. As Parliament is presently not in operation the writ petition cannot be rejected holding that it lies under the jurisdiction of Parliament.

10. Advocate Arun Gyawali (on behalf of Rajeev Parajuli)

A previous decision of this court published in Nepal Kanoon Patrika, [Decision No. 6205, P. 450] has held that the Commission for the Investigation of the Abuse of Authority has been established as a powerful and effective body. As the nature of the work of the Commission for the Prevention of Abuse of Authority established under the Constitution of Nepal, 1962 to undertake both investigation as well as disposal of cases was considered as contrary to the principle of Natural Justice, the present Constitution has set up separate bodies to conduct investigation and trial of the cases. Therefore, the formation of the Royal Commission is not in consonance with the Constitution.

11. Advocate Hari Prasad Upreti (on behalf of Rajeev Parajuli)

The responsibility specified by Art.27 (3) can materialize only after the fulfillment of the condition laid down in Art.35 (2). As it has been mentioned in the Preamble of the Constitution that the State power shall be exercised in accordance with the provisions of this Constitution, it cannot be exercised without acting according to Art.35 (2). As there is no provision in Art.127 permitting the issuance of an order by His Majesty alone or in his discretion, Art.127 cannot be exercised without acting in accordance with Art.35 (2). There is no legal basis in the order issued under Art.127. Because the formation and jurisdiction of the Commission are not specified by law the Commission is not empowered to take any action. The order under Art.127 is an executive order. If Articles 27, 35 and 127 are read together then there shall be more clarity. Placing [an order] before Parliament is possible only in the event of the presence of Parliament. Also, because the order has not acquired a legal status the order must be voided even according to Art 88 (2).

12. Advocate Hari Krishna Karki (on behalf of petitioner Rajeev Parajuli)

The issue to be resolved in the present dispute is not a political one. The Constitution is in itself a political document. There is a need for resolution of a constitutional issue. Article 31(3) has been interpreted in Rabi Raj Bhandari's House of Representatives Dissolution case. Since the reference to corruption has not been made in the order relating to the declaration of the state of Emergency, after the execution of the work according to Art. 127

there is no meaning of placing or not placing the order issued under Art. 115(7) before Parliament. In the event of emergence of a question regarding unconstitutionality, it cannot be said that the issue cannot be examined by the court.

13. Advocate Prakash Raut (on behalf of petitioner Santosh Mahato)

In order to exercise Art.127 there must arise any difficulty in the implementation of the Constitution. It has not been mentioned in the Notification which provision of the Constitution is faced with difficulty in its implementation. An order cannot be issued advancing a false plea regarding emergence of some difficulty. At the time of constitutional review the constitutionality must be proved. Art.127 is not Article which can be invoked by His Majesty in his discretion. Even if there is discretion, it cannot be unlimited or unrestrained. The Constitution has not visualized such a Royal Commission. Only because Art.127 has been exercised several times cannot be a ground to grant recognition to such a Commission. Also, according to the provision of the Law Interpretation Act, 2010 (1953) an order may be equivalent to the law but it cannot become a part of the Constitution. A provision allowing both investigation and trial of the case by one and the same body cannot help to conduct impartial hearing and impartial disposal of the case. There is no constitutional provision to grant continuity to an order issued under Art.115 (7). It has, therefore, harmed the Constitutional Supremacy and the Rule of Law.

14. Senior Advocate Basudev Prasad Dhungana (in both cases)

In order to issue an order under Article 127 one must show the difficulty caused in the implementation of the Constitution. The existence of that condition must be shown objectively. Deprivation of the rights of the citizens cannot be allowed by exercising that Article in the absence of such a condition. When Article 127 was exercised for the first time in the year 2051 BS (1994) for the purpose of extending the date of elections, that act did not infringe the rights of the citizens. The impugned order could not show the existence of the precondition of emergence of any difficulty. In order to conduct business by forming a body outside the confines of the Constitution Article 127 cannot be exercised by taking the plea that there has arisen a difficulty in the implementation of the Constitution. The provision made in Art. 88(5) allowing His Majesty to seek opinion of the Supreme Court makes it clear that the powers of His Majesty are limited. Final interpretation of the law cannot be made by others except the Supreme Court. In the case of Bed Krishna Shrestha (1952), too, a judicial principle was laid down that even though His Majesty is not made a respondent in regard to any act done by His Majesty such an act could be declared void if that accomplished work appeared to be unlawful and unconstitutional. His Majesty cannot be made a respondent also on the basis of the principle "the King can do no wrong". Whatever executive functions are discharged by His Majesty are all done on the recommendation of the Council of Ministers. Therefore, there is no obstacle to proceed with the hearing of the writ petition.

Submissions made by the Legal Practitioners Appearing on behalf of the Respondents

1. Attorney General Pawan Kumar Ojha (on behalf of the respondent Royal Commission)

The investigation about petitioner Rajeev Parajuli had been started by the Commission formed by the first Royal order issued on Falgun 6, 2061 (February 17, 2005). After the petitioner, appearing before the Commission, gave his statement and participated in the bail proceedings and after having been placed in detention for failing to produce the bail amount he filed this petition long after the completion of the investigation. He should have petitioned the court immediately after the action had been initiated. Both the petitioners have accepted the order issued during the period of the state of Emergency in their writ petitions. The Government of elected representatives of the people could not be formed because the elections to Parliament did not take place. Had the elections been conducted the Constitution could have come to its original place. The present problem has been created due to the dissolution of Parliament. As presently, there is no Government made under Articles 36 and 42 of the Constitution of the Kingdom of Nepal, 1990, following the elections to Parliament, all the executive and legislative powers except the judicial powers have become vested in His Majesty. Even when those powers were vested in others the responsibility to uphold and protect the Constitution is vested in His Majesty as per Article 27(3) and Article 43 of the Constitution. Article 27(3) has granted the authority to His Majesty to take appropriate steps in the best interest of and for the progress of the people of the Kingdom of Nepal. The act done in the best interest of the people is the law. His Majesty has got this power even when a Council of Ministers having the executive power has been formed. These are Articles 72 and 127 which are said to remain operative in the event of the failure to conduct the elections to Parliament. The State affairs are being conducted by exercising these two Articles. In the Royal Proclamation of Magh 19, 2061 (February 1, 2005) it has been mentioned that there is need to prevent corruption due to factors like wide spreading corruption and obstacles caused to the development of the nation. The Council of Ministers mentioned in Article 35(2) is a Council of Ministers which is comprised of the elected representatives. But at present there is no such situation. Because the present Council of Ministers has been constituted under Art. 127, the decisions to be made by His Majesty are not to be made on any one's recommendation. It has to be made by His Majesty himself. As the executive powers are vested in His Majesty himself, there is no meaning of the plea that, while exercising Art. 127, there must be a recommendation made by the Council of Ministers as per Art. 35(2). The present state of Nepal is of a special nature. His Majesty has not formed a caretaker government. The situation of His Majesty himself conducting the State affairs is something of a special nature. Action has been taken to rectify the spoiled works. The provision for His Majesty has been made by Art. 27 of the Constitution. Because Article 27(1) has enjoined that His Majesty must be a follower of the Hindu religion a consideration of the Eastern tradition and customary practices also suggest that His Majesty is required to undertake the responsibility. It has been the tradition and position of the King to be patron of the Hindu religion and culture and to be guided by that. According to the Vedic tradition, he is supposed to take into consideration every pain and pleasure of the people. The present

state of affairs has cropped up only due to increase in corruption and lack of good governance. The situation of conflict caused also due to the factor of corruption has led to the declaration of the state of Emergency. The report prepared by the Committee constituted under the convenorship of the then member of the National Assembly Mahadev Prasad Yadav has also proved that corruption is deeply rooted and has spread perversion in the country. One of the reasons why the country has reached the present state is also the factor of corruption. Monarchy is today the only institution which can take the responsibility for effectively curbing and controlling corruption. Every work is to be done in accordance with the satisfaction of His Majesty. No question can be raised in the law court in regard to the acts done in accordance with the satisfaction of His Majesty under Article 115(7). It has been also mentioned in the Proclamation of Magh 19, 2061 (February 1, 2005) to form such a Commission. Only because no condition other than the one relating to preventing the state of Emergency has been specified in Article 115 (7), it is erroneous to say that such a Commission cannot be formed. There is a provision that an order issued under that Article can be effective as the law. But this is not equivalent to the law. This is equivalent to the Constitution. As the Constitution is also the law that order is also a part of the Constitution. As it has been held by the court in the petition filed by Jhank Kandel and Others that the Constitution should also be treated as the law this order is also a part of the Constitution. As the Commission was formed under Art. 115(7) and the functions including investigation of complaints, registration and disposal of cases etc. were started and as His Majesty had withdrawn the state of Emergency since Baisakh 5, 2062 (April 18, 2005) while those works were still under consideration and as there was no provision to transfer the cases under consideration of the Commission to other bodies, a difficulty has arisen to conduct those affairs and activities. Therefore, His Majesty has issued an order under Article 127 to give continuity to the acts of the Commission. The Government of Nepal Act, 1948 and the Constitutions of 1959 and 1962 had granted powers to His Majesty in regard to removing difficulty in the implementation of the Constitution. The 1962 Constitution had declared that such an order shall be a part of the Constitution. But as such provision is missing from Art. 127 of the present Constitution, there is a need for interpretation in this regard. Because such an order removing the difficulty in the implementation of the Constitution gives momentum to the implementation of the Constitution, such an order must be treated as included under the Constitution. Also because an order issued to remove some difficulty of a statute is regarded as a part of that statute, an order issued with a view to removing difficulty in the implementation of the Constitution must be treated as a part of the Constitution. That the provision regarding removal of difficulty is a wider provision has been also accepted by the Indian Courts. So it cannot be said that only this can be done or only in this way it can be done. As the order issued under Art. 115 (7), being equivalent to the law, is a part of the Constitution, an order has been issued under Art. 127 to give continuity to the acts initiated by the former. It has been an accepted principle that a Constitution should be interpreted in a harmonious way as much as possible. Art. 98 has given power to the CIAA to conduct investigation and make prosecution only in case of the persons holding any public office. But as the Royal Commission has been granted authority to investigate, prosecute and try other persons as well such as private individuals working

in the public organization, banks and financial institutions and also offences concerning contract and lease, revenue cheating, smuggling etc., there is no duplication of composition of two institutions for the same work. The powers granted to the Commission as per Section 2 of the Order relating to the Formation of the Commission, and the basis of composition of the CIAA under Art. 98 are separate. The Royal Commission has been formed also to lessen the burden of work of the CIAA. Although the activities and powers of both these bodies appear similar to some extent, since their activities have been conducted in separate ways and also because the CIAA has not complained about any adverse effect on its jurisdiction, the formation of the Royal Commission must be declared constitutional through harmonious interpretation of the Constitution. It has not been mentioned that the present Constitution has accepted only the Adversarial system out of the two systems of criminal justice. The provisions made in the Forest Act, the Customs Act and the Local Administration Act have also accepted the Inquisitorial system. And as this court has accepted this system as constitutional, the remark that the powers granted to the Commission in regard to investigation, prosecution as well as disposal of cases is contrary to the recognized principles of justice and the principle of Natural Justice, is not constitutionally and legally valid. Moreover, as the cases are tried by the Commission only after the officers deputed by the Office of Attorney General have conducted the investigation in the capacity of Investigation Officers and file the charge sheet, it is not correct to say that all the works have been done by one and the same body. Those willing to defend have been also granted appropriate time. There is provision for dispensation of clean and impartial justice. As there is also provision for filing appeal on the decisions made by the Commission in the Supreme Court, the Supreme Court can exercise control in case any decision has been made by the Commission contrary to the recognized principles of law and justice. There are persons having long administrative experience in the Commission. They are also equipped with qualifications and competence. Even though it is not in the form of a law court, the Commission has been formed on the pattern adopted by quasi-judicial bodies. Its activities are almost similar to those of judicial bodies. As there is a provision requiring the placement of the order issued under Article 127 before Parliament, this question first of all needs to be viewed from the political angle. It is the responsibility of Parliament to examine this order. Article 31 does not allow the filing of a case in respect of any act performed by His Majesty. As an Ordinance promulgated under Art. 72 falls under the legislative powers, it may be subjected to judicial review. However, judicial review of an order issued under Art. 127 cannot be made. The petitioners have not presented any decisions resembling our present situation and related official documents. Since such an order has been issued as an attempt to prevent corruption prevailing in the country, there is no place for issuance of the order prayed for by the petitioners.

2. Deputy Attorney General Drona Raj Regmi (on behalf of also the Royal Commission)

The present situation has evolved in course of constitutional practice. As mentioned in Section 12 of the Royal Proclamation of Magh 19, 2061 (February 1, 2005) emphasizing the need for control of corruption, His Majesty has promulgated the formation of the RCCC. As it has been also mentioned in the Royal Proclamation to further equip the CIAA with

means and resources, it is clear that the Royal Commission has not been formed to interfere in the functions of that Commission. In the petition of Santosh Mahato the first order issued on Falgun 5, 2061 (February 16, 2005) has been accorded recognition. The Royal Commission has been formed in order to prevent corruption which is prevalent as a national crime. After the withdrawal of the state of Emergency by His Majesty, it is obvious that difficulty has arisen in respect of the functioning and proceedings of the Commission formed by the order issued under Art.115 (7). As there has arisen a condition asking for giving continuity to the Royal Commission in view of the requirement of the State, the order has been issued in accordance with Art. 127. If it is held that the order issued under Art. 115(7) cannot be given continuity it will be virtually tantamount to exercising control over Art. 127. No preconditions have laid down which need to be fulfilled before issuing an order under Art 127. An order issued under this Article is a kind of order which ought to be placed before Parliament and which can be resolved by political discussion. If this court enters into consideration in this regard that will be tantamount to interference in the powers of Parliament. In the writ petition of Purna Man Shakya, the jurisdiction of Parliament has been analytically discussed. The nature of the Commission which has acquired continuity in accordance with Art.127 is constitutional. In the order issued by the court in the petition filed by Jhanka Kandel and Upendra Nandan Timalsena, this court has admitted that an order issued under Art.127 shall also have the immunity contained in Art.31. As the Commission has been constituted taking recourse to a constitutional provision, it cannot be questioned as being unconstitutional. Because a provision has been made for filing appeal in the Supreme Court, even if the Commission delivers any decision in contravention of the recognized principles of justice that can be controlled by this court through judicial review of that decision. The proceedings of the Commission have been conducted in accordance with the judicial system. Because the decisions of the Commission have been subjected to appeal in this court, and the appeals have been already disposed by this court, the Commission cannot be dubbed as unconstitutional. Article 127 has been exercised in the form of a constitutional practice. This process has come as a source of the Constitution. As the impugned order is a part of the Constitution, it cannot be subjected to judicial review.

3. Deputy Attorney General Narendra Pathak (also on behalf of the Respondent Royal Commission)

To resolve the present dispute Articles 115 (7) and 127, Articles 84 and 85 and Articles 35 (2) and 27 need to be interpreted. The justification for constituting the Royal Commission has been already mentioned in the Royal Proclamation of Magh 19, 2061 (February 1, 2005). It has been conferred powers to determine the nature of the offence and conduct investigation, file charge sheet and decide the case. An order issued under Article 115(7) has been described as equivalent to the law and as the Constitution is also the law, this order is a part of the Constitution. Only because of a difficulty arising in the functioning of the Commission which is already working after its constitution, continuity has been granted to the activities of the Commission by removing the difficulty. Irrespective of whether or not Parliament is in Session, the power to exercise Art. 127 has been entrusted only to His Majesty by the Constitution. This much is the difference

between the provision concerning removal of difficulty contained in Article 392 of the Indian Constitution and that of our system. Other provisions are similar. How to interpret the Constitution in an abnormal situation has been already discussed by this court in the writ petition filed by Santosh Mahato against Speaker Tara Nath Ranabhat. Our Constitution has provided for the Executive and the Legislature along with His Majesty. As other Articles of the Constitution are implemented through an order issued under Article 127, such an order issued under this Article is a part of the Constitution. That an order issued under Article 127 is a part of the Constitution is also proved by the fact that the Constitution was activated by removing the difficulty in the formation of the Constitutional Council for the appointment of the Chief Justice. Article 127 is an Article which can be exercised similarly as other Articles. This Article has been exercised in accordance with the Doctrine of Necessity on the basis of the needs of the State. It has been held by a Special Bench of this court in the writ petition of Binod Karki [Nepal Kanoon Patrika, 2051, p. 553] that an Ordinance shall be promulgated on the basis of the needs of the State and that old laws shall get recognition. There has been a practice of justice dispensation by three types of courts. General Courts, Special Court established for hearing special type of cases and judicial institutions fall under this. Under this there are also institutions functioning as Tribunals which dispense justice but which do not appear to be of the nature of general or Special Court but which discharge functions similar to those of the law courts. Such Tribunals are also accommodated under the recognized principles of law. However, the functions discharged by them must be open and reasonable. The decision made in the case of Iman Singh Gurung does not resemble in this context. It cannot be rightly said that justice cannot be done only because one and the same institution carries out the investigation and conducts hearing of that case. There is greater credibility in the evidences collected at one's own initiative in comparison to those collected by other institutions. Disputes regarding judicial functions or system have entered this court even before. In the decision made on Jyestha 5, 2058 (May 18, 2001) in writ No. 3264 [published in Nepal Kanoon Patrika, p. 23], Special Court and quasi-judicial institutions have been declared constitutionally valid also in the context of Articles 84 and 85 of the Constitution. As there has been made a provision for presenting one's version right from the time the Commission starts investigation, for making arguments and submissions before the Commission and also for filing appeal on the decisions made by the Commission it cannot be said that the formation and the functions of the Commission are violative of the recognized principles of justice. It is a policy matter of the Executive to decide what types of courts or institutions should be established and what types of cases should be entrusted to them for hearing. Section 65 of the Corruption Prevention Act, 2059 (2002) has accepted that the cases falling under this Act may be heard by other institutions. Decision has been also made that investigation may be conducted by general courts, too. It does not suffice only to allege that some work has been done in a *mala fide* way or with evil intention, it must also be proved. It has been already decided that an order issued by His Majesty under Art. 127 cannot be reviewed. Also, in the opinion given by this court in respect of the Citizenship Bill, Article 27 (3) has been discussed and analyzed. It has been held by a Special Bench of this court in the writ petition of Chandra Kant Gyawali that in

order to exercise the powers of this court under Art. 88 (1) the provisions of any law must be inconsistent with the Constitution and that the issue of the provisions of the Constitution being inconsistent with one another may not be reviewed under Art. 88 (1). Also, on account of the previous decisions made by this court, propounding the principle that the courts do not decide about hypothetical issues, the present writ petition cannot be entertained.

4. Acting Deputy Attorney General Puspa Raj Koirala (also on behalf of the respondent Royal Commission)

His Majesty has constituted the Royal commission. The court has already accepted the exercise of Article 127 in the writ petition filed in connection with the appointment of the Prime Minister by His Majesty by exercising Art 127. The provision of upholding and preserving the Constitution has been already accepted in a conventional manner. The order issued by His Majesty by exercising Article 127 is the Supreme law. This has not come under any law, rule or byelaw. Therefore, it cannot come under the orbit of Art 88 Article 98 has not provided that no institution other than the CIAA shall be established in respect of prevention of corruption. As the proceedings are being conducted adopting the procedure prescribed by the Special Court Act, 2059 (2002) it can not be said that the Commission has been constituted in contravention of Articles 84 and 85. The order issued under Art.127 is only an order aimed at removing the difficulty. The Constitution has not been amended by it. In the present Nepal law still the Inquisitorial system has been adopted. This fact is substantiated also by the provision made in the Trafficking in Human Beings (Prevention) Act, 2043 which provides that no case shall be initiated without the permission of the court. There is also a provision which empowers the CIAA to not only investigate but also to make decisions. There is no provision which restrains from establishing another institution of a parallel form by exercising in Art.127. The words used in Art. 127 must be interpreted accordingly.

5. Joint Government Attorney Tika Bahadur Hamal (on behalf of the respondent Royal Commission)

In the writ petition of the petitioner Rajeev Parajuli it has not mentioned which the order (specifying its date) has been sought to be declared void. How the order is contradictory has also not been clearly explained. In the writ petition of Santosh Mahato only the order dated Baisakh 16, 2062 (April 29, 2005) has been sought to be voided, thereby giving recognition to the order dated Falgun 5, 2061 (February 16, 2005). On Baisakh 16, 2062 (April 29, 2005) the order was issued to give continuity to the order dated Falgun 5, 2061 (February 16, 2005). The person having power to issue an order also possesses the power to issue an order for the sake of giving continuity. The provision contained in Section 21 of the Law Interpretation Act, 2010 (1952) establishes this matter. As no clear plea has been taken in the writ petition of Rajeev Parajuli, the petition cannot be entertained according to the judicial principle propounded in decision No. 2346 published in Nepal Kanoon Patrika, 2046 (1989). Art. 31 (3) denotes the acts discharged by His Majesty. No question can be raised in that regard. Article 27 (3) is an Article to be exercised in the

discretion of His Majesty. Except the provisions of Articles 28, 43 and 121 there has been a provision in practice for long time for His Majesty discharging the functions by exercising the State authority inherent in him and in accordance with the customs. This is established also by the fact that His Majesty had sought the opinion of this court in respect of the recommendation for the dissolution of the House of Representatives and the citizenship Bill. In the opinion submitted by this court in connection with the Dasdhunga accident it has been mentioned that Article 127 can be exercised to resolve the immediate problems if there emerges a situation in which any institution fails to discharge its functions. In the writ petition of Hari Prasad Nepal also the court has held that His Majesty has got constitutional immunity. In the case of Ved Krishna Shrestha published in Nepal Kanoon Patrika 2016 (1959) it was held that the King can do no wrong. The issues raised by the petitioner are of political nature. Taking into consideration the best interests of the people the order has been issued also on the basis of Article 27 (3) and, therefore, the order is constitutionally valid. Article 14 (2) does not say that investigation cannot be made twice. That it is permissible to take action under separate laws in connection with the same dispute has been held in the writ petition filed by Kishor Shrestha (writ No. 2845 of the year 2059). The Indian Supreme Court has also decided that the Head of the State is vested with the inherent powers to take any step whatsoever in the best interest of the people. When there is no existence of a government elected by the people, it is not proper to say that a recommendation under Art 35 (2) is essential.

6. Senior Advocate Kunja Bihari Prasad Singh (on behalf of the respondent Royal Commission)

The provisions made by the Constitution of the Kingdom of Nepal, 1990 are extremely good. Had there been no provision of Article 127 in the Constitution for removing any difficulty in the implementation of the Constitution no, organ would have functioned in the nation at present. As a result of some difficulty arising in the implementation of Article 53 (4) of the Constitution, His Majesty has made the Royal Proclamation by invoking Article 127. In the writ petition of Jhank Kandel and others, this court has already interpreted Article 31 (3) and held that no writ petition can be entertained against the Council of Ministers constituted by His Majesty by exercising Article 127. Against the backdrop of the failure to hold the elections following the dissolution of Parliament His Majesty the King, upholding and protecting the constitution as per Article 27 (3), made the Royal Proclamation of Magh 19, 2061 (February 1, 2005) to declare the state of Emergency, and established the RCCC on Falgun 11, 2061 (February 22, 2005) by issuing an order as per the constitutional provision of Art 115 (7) in order to prevent corruption which is ever increasing, as mentioned in that Proclamation, in the country. As the order issued under Art. 115 (7) was to remain effective till the continuation of the state of Emergency, after the withdrawal of the state of Emergency by His Majesty on Baisakh 16, 2062 (April 29, 2005) there arose some difficulty in conducting the proceedings of the Royal Commission constituted in accordance with the order issued on Falgun 5, 2061 (February 16, 2005). And, therefore, the Royal Commission was granted continuity in order to investigate the complaints and dispose off the cases pending in the Commission. Petitioner Santosh Mahato has failed to

point out in his petition the reasons which could explain why the order is violative of the Constitution. The court has to remain confined to the request of the petitioner. If the Council of Ministers can be constituted by exercising Art. 127, how come the Royal Commission which is just a small part of the Executive cannot be formed. There is no request for interpretation of Art.27 in the petition. There is no dispute that the impugned order has been issued by His Majesty. As this act has not been done by any employee of His Majesty's Government nor is His Majesty's Government, a respondent in the case, there is no question why the immunity under Art.31 cannot be available in this dispute. So far as the question of the opinion given in the Dasdhunga accident is concerned, that cannot be treated as a precedent because it is merely an opinion which has not come from any decision made in the course of disposal a case. The constitutionality of an order issued under Art.127 can be examined by the court only after it has been presented first in Parliament. As this writ petition has been filed without presentation of the impugned order in Parliament the writ petition cannot be considered as mature. The order directing the registration of the petition is not lawful. No full hearing of the writ petition can be made by this Bench because all the respondents have not been asked to submit their written reply. Therefore, first the petition must be forwarded to a Single Bench to complete that formality.

7. Advocate Prem Bahadur Bista (on behalf of the Chairperson of the Royal Commission Bhakta Bahadur Koirala)

There is a situation of recognizing the Council of Ministers constituted under Art.127 because of the absence of an elected Prime Minister. The Royal Commission has been established as mentioned in the Proclamation of Magh 19, 2061 (February 1, 2005). Since the qualifications, functions and powers of the Commission have been specified in the Order relating to the Formation of the Commission, the Commission cannot be viewed as an institution parallel to the CIAA. The petition has been filed challenging only the continuity granted to the Commission without challenging the establishment of the Commission under Art.115 (7). The Royal Proclamation has been made by His Majesty within the orbit of Art.27 (3) and the Commission has also been established accordingly. It has also been substantiated by the written reply that as it has been accepted by the Preamble of the Constitution that the State power is vested in His Majesty the Commission has been established on that very basis. As no previous charge-sheet has been filed in the case of Rajeev Parajuli in a law court, it cannot be said that he has been placed into double jeopardy. Only because the trial of a graft case in a general court shall consume more time, this type of Commission has been formed. This Commission is of temporary nature. Thus, the problem shall be automatically solved after the formation of Parliament.

8. Advocate Krishna Ram Shrestha (on behalf of the Chairperson of the respondent Royal Commission Bhakta Bahadur Koirala)

As the Commission has been formed by exercising Art.127 of the Constitution of the Kingdom of Nepal, 1990 it is not proper to say that it has been formed by His Majesty by exercising the state authority or in his discretion. Notwithstanding the fact that Article 127 has been kept towards later part end of the Constitution, this Article is significant and

powerful. This Article may also contract or control other Articles of the Constitution. As the recommendation for extending the date for holding elections to Parliament, which must be held not exceeding six months as provisioned in Article 53, has been made in accordance with Article 127, it should be considered to have contracted the provision contained in Article 53. As the Council of Ministers is also constituted by exercising this Article, when there is absence of an elected government, this Article seems capable of making additions to or detractions from other provisions of the Constitution in regard to the formation of the government. An order issued under Article 127 is a part of the Constitution. The Royal Commission seems to have been established probably because the CIAA failed to fulfill the objective of the formation of the latter. As mention has been also made about the prevention of corruption in the Royal message and the twenty one program of the Government, the Commission has been established for the prevention of corruption caused by economic disarray. The order under Article 127 has been issued in order to give continuity to the Commission which is already functioning after its formation. Nothing can prevent the act of giving continuity to the Commission. The opinion given in the Dasdhunga accident by the apex court cannot be treated as a precedent within the meaning of Article 96 as it has come out of the internal discussion of the court. The order issued under Article 127 cannot be constitutionally tested under Article 88 (1) because it a part of the Constitution as it can contract or extend the other provisions of the Constitution. The qualifications of an official can be looked into only if the provision under which he has been appointed has prescribed any qualifications. If nothing has been mentioned in that order, or if that order has not imposed any restrictions, there is no obstacle in appointing any person to the post. As the order has also provided that the Supreme Court may scrutinize whether or not the proceedings of the Commission are lawful, the apex court may cause the observance of the recognized principles of justice if the proceedings of the Commission are inconsistent with them. The Commission is an organ subordinate to the Supreme Court. It cannot be described that all the functions have been discharged by only one institution because the Rules have provided for separate investigation and disposal while addressing the issue how the Commission shall perform its work. As the formation of the Commission has been guided by the objective of benefiting the nation and the citizens by preventing corruption, it cannot be described that it has amended the Constitution.

9. Advocate Ganesh Bahadur Dhungaana (on behalf of Prem Bahadur Khati, a member of the respondent Royal Commission)

There are persons in the Commission who fulfill the qualifications and are competent. The Commission has been set up under pressure from the people as the nation has reached a state of failure due to widespread corruption in the country. The Commission has been formed by exercising the special powers inherent in His Majesty following the transfer of the powers of Art.35 (2) and Parliament to His Majesty. Therefore, the formation of the Commission is constitutional.

10. Advocate Kaushal Kishor Dwivedi (on behalf of Hari Babu Chaudhary, a member of the respondent Royal Commission)

Our constitutional provisions are quite adequate for the resolution of the issues raised by the petitioner. There is no need for the reference to alien provisions. The Constitution cannot be activated at a time when the nation is engulfed in an abnormal situation. It had become urgent to undertake some appropriate measures from the viewpoint of the law and order situation prevailing in the country. The system of Monarchy in the foreign countries is different from that of ours. The American as well as the Indian constitutional systems also do not resemble our constitutional system. Our Constitution has not placed His Majesty in a situation where he has to sit silently, no matter a situation whatsoever may arise. His Majesty had to undertake the step of Magh 19, 2061 (February 1, 2005) due to impediments caused to the functioning of the system of governance of the country. The reasons and the objectives have been already mentioned in the proclamation. The order has been issued under Art.127 in order to give continuity to the order issued during the state of Emergency which was declared following the Royal Proclamation. As Rajeev Parajuli has not been prosecuted and punished for the same offence prior to the investigation made by the Royal Commission in that connection and only because the CIAA had closed the case-file after making investigation and enquiry, it is not proper to say that he has been prosecuted twice for the same offence in contravention of Article 14 of the Constitution. The Constitution has not imposed any restriction establishing another institution in connection with prevention of corruption. The commission has been established to expedite the proceedings regarding the offences related to corruption. Article 127 is itself clear. There is no need for interpretation. An order issued under this Article does not fall under the purview of judicial review. The facts of the opinion given by this court in the Dasdhunga accident and those of the present dispute are entirely different; there is no resemblance between the two. The acts performed under Art.27 (3) have been performed in accordance with the responsibilities entrusted by that Article. The members of the Royal Commission have not been appointed in the capacity of judges. They have been appointed as the members of the Commission taking into consideration their skills and competence. This matter cannot be an issue of judicial review.

11. Advocate Mithilesh Kumar Singh (on behalf of Hari Babu Chaudhary, a member of the respondent Royal Commission)

It is a constitutional provision that the orders issued under Art.127 must be first approved by Parliament like an Ordinance promulgated under Art.72. A judicial principle has been enunciated in the decision No. 4852 published in Nepal Kanoon Patrika of the year 2051 (1991) stating that the interpretation of the Constitution should be made in a harmonious manner and not according to its letters. Because currently the country is faced with a state of conflict there has arisen a need requiring His Majesty to make some sort of arrangement. In a similar situation important arrangements have been made by the Head of the state in all the South Asian countries. The Constitutions of 1959, 1962 and 1990 have accepted that the State authority vests in His Majesty. When the 1990 Constitution was promulgated it was so done by exercising the State authority. Corruption is a disease which has spread

in the society like plague. The Royal Commission has been established to prevent such a disease. Neither the CIAA nor the National Vigilance Centre has entered the court with a petition claiming interference in their jurisdiction by the formation of the Royal Commission. Even though the Commission has been established through an order dated Falgun 5, 2061 [February 16, 2005] that has not been challenged by the petitioner. All the three Constitutions of 1959, 1962, and 1990 have made a provision in respect of removing any difficulty in the implementation of the Constitution, and in all of them, a provision has been made for the issuance of order by His Majesty. The petition filed by Santosh Mahato does not explain which law contravenes which provisions of the Constitution and how. The order cannot be invalid as it is of a temporary nature. The order issued on Baisakh 16, 2061 [April 28, 2004] is a new one and it has not given continuity to the earlier order. The later order is different from the earlier order. According to the new composition, there could have been changes also in regard to the Chairperson and the members. It has not been mentioned in the petition as to which right has been deprived of by the impugned order. For this reason the petition can be neither registered under Art.88 {1} nor can it be scrutinized by this court. His Majesty used to form Commission of different types also under the earlier Constitutions. Since various Commissions have been formed by His Majesty from time to time since the year 2007 [BS] [1951], it is not proper to say that only this very Commission cannot be formed by him. Such types of orders are passed from time to time in a Monarchical country. The order issued by His Majesty cannot be scrutinized by this court under Article 31 {3} also according to the recognized principle that "the King can do no wrong".

12. Advocate Jukti Jung Lamichhane (on behalf of Raghuchandra Bahadur Singh, a member of the respondent Royal Commission)

The present writ petition is about a serious and complex matter. It needs to be decided on the basis of the customs, the laws and the Rules. The petitioner has entered the court with the petition after the proceedings have already reached the mid stage, and he has not taken the plea that the formation of the Commission is unconstitutional. The petitioner does not have the right to raise questions about the members of the Commission. Had he been adversely affected, he should have approached the court in time. The petitioner has not entered the court with a clean hand. The writ petition filed after the lapse of time related to the order issued under Art.115 {7} has been clearly responded through the written reply. There does not exist a situation as pointed out by the petitioner. The Royal Commission not a court; it is a Tribunal. That a Tribunal can be constituted is a provision of the Constitution. As our system is one which also comprises Monarchy, the Eastern Philosophy related to the Kingship should be also taken into consideration. It cannot be viewed from the angle of the Western principles and decisions. While dealing with the present dispute it is not suffice to consider only the foreign constitutional and legal systems. The Vedas, the Upanishads and the Smritis should be also looked into. The provision of Art 27 {3} means that all the powers are vested in His Majesty. The term "in the best interests and welfare of the people" does not mean that the Constitution must be literally complied with. If the best interests of the people are not served, His Majesty may undertake any step whatsoever. Article 127 has

not been exercised directly by His Majesty. It was exercised on the recommendation of the then Prime Minister. Article 127 is not conditional. Article 115 (7) is a minor Article. If His Majesty can exercise a minor Article, it cannot be held that he is not capable of exercising a major Art.127 in his own discretion.

13. Advocate Krishna Kumar Thapa (on behalf of Raghuchandra Bahadur Singh, a member of the respondent Royal Commission)

The Royal Commission was formed on account of an abnormal situation engulfing the country caused by corruption. By exercising Art.127 His Majesty has preserved the honor and dignity of the Nepali people. The orbit of Article 127 is pervasive. The process of the composition of the Commission and its jurisdiction are entirely different from that of the CIAA. The CIAA is of a permanent nature whereas this Commission is of a temporary nature. The Royal Commission has been formed to deal with the works which the CIAA could not find out, which it could not see and what it could not do. It is Parliament which can look into an order issued for removing any difficulty. The court is not empowered to examine its need and justification.

14. Advocate Trilochan Gautam (on behalf of Shambhu Prasad Khanal, a member of the respondent Royal Commission)

The formation of the Commission has not affected the basic structure of the Constitution. The commission has been formed with a view to securing the objective of social justice provisioned in Article 25. The fundamental rights may be restrained if any action is initiated in accordance with the Directive Principles of the State. The Constitution is not an absolute document. The major responsibility of the State lies in fulfilling the positive obligation. The duty of fulfilling the positive obligation in an abnormal situation lies in the Crown in a Monarchical country. There is a relation between Article 27 (3) and Article 127 of the Constitution. An order issued under Art.127 cannot attain maturity unless it is placed before Parliament. So long as Parliament does not come into existence, it shall remain valid like Article 90A of the Constitution of Nepal, 1962 and, thus, as a part of the Constitution. Our Constitution has not accepted that an interpretation ought to be made in the way it has been written in the Constitution. If the opinion given by the court in the Dasdhunga accident was not acceptable to the party which sought that opinion, how could it be acceptable to the court? Articles 84 and 85 have not accepted that the powers relating to justice dispensation can be exercised only by the law courts. Our Constitution has not made any provision similar to the provision of the American Constitution- "Total judicial power vested to the Supreme Court". It is also proved by the fact that our Constitution has granted the authority to the Legislature to decide how the powers relating to justice shall be exercised. If the powers given by Articles 27 (3) and 127 are controlled powers, it is the Constitution which should exercise that control. The court cannot exercise that control. The order relating to the formation of the Royal Commission is not violative of Article 98. The very name of the Commission has reflected the difference. The Royal Commission has been conferred powers to take action against not only public domain but also private domain.

15. Advocate Bal Krishna Neupane (on behalf of the Chairperson of the respondent Royal Commission Bhakta Bahadur Koirala)

As the provision of presenting an order issued under Art.127 before a joint session of both Houses of Parliament is a provision relating to the procedure of conducting the joint session of Parliament, the order issued under Art.127 remains on a higher level than Art.115 (7). If His Majesty so desires, an order relating to the amendment of the Constitution may be also issued under Article 127. Such an order cannot be a subject of judicial review under Article 88 (1). As the Constitution has also given continuity to the Citizenship Act, 2020 (1963) and as an order issued under Art.115 (7) is also equivalent to the law and as the Constitution is also the law, continuity can be given to an order issued under Art.115 (7) by exercising Article 127. The country is being governed through the exercise of Art.127. Article 127 has been exercised several times. So far as the merits and demerits are concerned, the responsibility for them should be borne by one who has constituted it. If any changes are to be introduced in the Constitution, or if any institution is to be established, it can be done only through the exercise of Article 127. But that should be done not permanently but only for some time. The matters not covered by an Ordinance can also come through the exercise of Art. 127. The order issued under Art.127 can be looked into by the elected representatives. The present order has not been placed before Parliament. It has remained in the form of a kind of Bill. Although the court may make judicial review of a constitutional Amendment the decision has been made under Art 88 (1). It is not proper to say that an institution can be established under Art.115 (7) but not under Art.127. The orbit of Article 127 must be expanded; it is not proper to contract it. The necessity does not look for the law. A decision should not be made by looking at the face of the Commission. If the CIAA did not work effectively why should another Commission not be constituted? Article 98 does not restrain from constituting another Commission. The Corruption Prevention Act, 2059 (2002) has also accepted that another institution for taking action under that law may be created. It cannot be described as a violation of the principle of Natural Justice only because of a provision made by the law empowering any institution to conduct both the investigation as well as the trial of cases.

16. Advocate Hari Gautam (on behalf of Hari Babu Chaudhary, a member of the respondent Commission)

The present dispute is not a legal dispute, it is simply political. It is not a matter to be resolved by the court. Our country cannot avoid looking at the Eastern culture. To say that there is no need of the Royal Commission is tantamount to saying that corrupts should not be punished. Upholding the Constitution is the duty of His Majesty. The Commission has been formed in the interest of the country and the countrymen. The formation of the Commission is constitutional.

17. Advocate Laxman Prasad Pokharel (on behalf of Hari-Babu Chaudhary, a member of the respondent Royal Commission)

As the CIAA had closed the case-file of Rajeev Parajuli after having only conducted the investigation, it cannot be described as prosecuting him twice. Proceedings can be reopened in respect of a file which had been closed earlier. The request for also quashing the order issued under Art.115 (7) which has been already withdrawn is not justifiable. All the Constitutions of Nepal have been granted by His Majesty. His Majesty, who is equipped with the State authority of promulgating the Constitution, cannot be considered as incapable of issuing other orders.

18. Advocate Kamakhya Lal Karna (on behalf of Raghu Chandra Bahadur Singh, a member of the respondent Royal Commission)

All the Constitutions of Nepal have been granted by His Majesty. That all the authority is vested in His Majesty also on the basis of customs is established by Art.20 of the Constitution of Nepal, 1962. The present constitution has provided that sovereignty granted to the people shall be exercised as mentioned in the Constitution. Articles 28, 72, 115 and 121 have conferred on His Majesty all powerful authority. The acts performed by His Majesty are treated as acceptable to all. Even if there is any difficulty in the implementation of the order issued under Art.115 (7). Article 127 may be exercised. Article 88 (1) is applicable only in connection with the laws made by Parliament. It is only Article 127 which is competent to remove all types of difficulties. As economic disarray is still prevailing in the country, the act of giving continuity to the commission is constitutionally correct.

19. Advocate Raj Kumar Thapa (on behalf of Prem Bahadur Khati, a member of the respondent Royal Commission)

If the court status examining the matters related to Art.127 it shall result in the amendment to several Articles. The Constitution has itself provided that the State authority shall be vested in His Majesty. All the Executive, Legislative and Judicial powers are vested in His Majesty. The State authority is the official power of the Head of the State. The state authority and the sovereign powers are the two sides of the same coin. The judicial power is also vested in His Majesty by virtue of the provision contained in Art.122. The exercise of Article 127 has been made since 2051 (1994).

20. Advocate Mohan Prasad Acharya (on behalf of Prem Bahadur Khati, a member of the respondent Royal Commission)

Law should be always directed towards the good of the society. Even at present such an interpretation should be made. At present there is prevailing a state of immunity from punishment in the country. The Royal Commission has been set up due to extreme explosion of corruption resulting in gradual emptying of the State coffer. As the Commission has been given continuity on the basis of Article 127 remaining within the constitution it cannot be termed as unconstitutional. As it has been a tradition that orders are issued or promulgated by His Majesty, such an order cannot be described as extra-constitutional

also for this reason. The provision for removing difficulties is made aiming at the action which may happen in the future. As there is such a provision in the constitution it may be used for any action or purpose whatsoever. The importance of the king has been recognized by the history and every work done by us. The constitution of 1962 has not yet been replaced. Full powers are vested in His Majesty. Prof. Dicey has opined that in the time of abnormal situation confronted by the nation the British Crown may also undertake any action whatsoever. The order issued under Article 115 (7) may be granted continuity by exercising Art 127. His Majesty has got powers to perform special acts. Article 27 (3) of the present Constitution has accepted that constitutionally those powers are vested in His Majesty. It has been explained in the contempt of the court case of Kusum Shrestha that the principle of Natural Justice is not attracted in a matter for which provision has been made by the law. The order is constitutional from every angle. The fundamental rights of the petitioner have not been infringed.

21. Advocate Awadhesh Kumar Singh (on behalf of the Chairperson of the respondent Royal Commission Bhakta Bahadur Koirala)

Article 127 has been exercised time and again. It has been decided in Rabi Raj Bhandari's case of dissolution of Parliament that an act performed by His Majesty in his discretion cannot be subjected to judicial review. As the Commission has been given continuity by exercising Article 127 with the satisfaction and in the discretion of His Majesty, it cannot be subjected to judicial review.

22. Senior Advocate Laxmi Bahadur Nirala (on behalf of the Chairperson of the respondent Royal Commission Bhakta Bahadur Koirala)

A dispute is resolved through the interpretation of the Constitution. An interpretation is not mathematical; it depends on the needs. Interpretation must be moved forward in accordance with time and circumstances. Anything should be interpreted according to the circumstances prevailing in the country. Because a constitutional void had been created following the recommendation made for postponing the elections, Article 127 has been exercised in order to activate Article 35 (2). His Majesty has taken this step in compulsion due to the provision made in Art.27 (3). It has been already ruled in the petition of Upendra Nandan that as per Article 31 no question can be raised in regard to the measures taken by His Majesty. Article 35 (2) is currently inactive. As it is an order issued directly by His Majesty, it has got the immunity under Art.31 (3). Because there is a provision for the review of the laws an ordinance can be reviewed. But as an order issued under Art.127 is not equivalent to an Ordinance, it cannot be forcefully interpreted as being similar to an Ordinance. Whether or not His Majesty can govern the country is a political question. The court cannot look into this matter either directly or indirectly. Article 127 is clear. It is not proper to interpret it through other means. It is not that a parallel institution has been created. The Royal Commission and the CIAA are obviously different by their names, functions and jurisdiction. The Preamble of the Constitution has not provided that from now onwards the State authority shall cease to vest in His Majesty. Where corruption is rampant the rule of law cannot survive. Section 85 of the chapter on the Court Procedures in the

National Civil Code cannot be applicable to an action taken in course of investigation. In India CBI conducts reinvestigation even after ten agencies had conducted investigation earlier. Since the impugned order cannot be reviewed there is no place for considering the request for quo-warrant in that regard.

On behalf of the Legal Practitioners Appearing in the Proceedings under Rule 42 of the Supreme Court Rules, 2049 (1992)

1. Advocate Basudev Sharma

The legal interpretation of Article 127 could not be made clearly by both the parties. An order to be issued under Art.127 is an executive order. As it has to be presented before Parliament it cannot attain maturity without examination by Parliament. Article 127 is meant for application for removing any difficulty or obstacle. The difficulty or obstacle must have been caused in a legal way. It cannot be contended that some difficulty or obstacle has arisen under Art.127 in order to fulfill any political objective. Whereas the Constitution of 1959 had provided that the provision for removing any difficulty ought to be considered as included in the Constitution itself, there is no such provision in the present Constitution. In order to exercise Article 127, first of all it must be ascertained that any difficulty has cropped up. Art.127 cannot be exercised simply because it has been alleged that there is widespread corruption in the country. There is no ground for Parliament to accept the formation of the Royal Commission. The Royal Commission is not constitutional. The nature of the order issued for giving continuity to the Royal Commission and of an order issued for some other purpose are different. Article 127 cannot be exercised in anyway. The order issued on Ashwin 18, 2059 (October 4, 2002) has come to fulfill a constitutional lacuna. While interpreting any Article of the Constitution all the Articles and sub-Articles must be taken into consideration. As the order issued under Article 127 has been issued for Parliament it must be presented before Parliament and Parliament must look into it. The constitutional provision regarding removal of any difficulty cannot be treated as the one relating to the law. As it is concerned with the infringement of the fundamental rights of an individual, it cannot be argued that because the order issued under Article 127 is a matter to be presented before Parliament, it cannot be scrutinized by the court. There is no obstacle in granting relief under Article 88 (1). There must be judicial settlement of the issued raised by the petitioner along with the proper remedies in view of the fact that the order issued under Article 127 has to be presented before Parliament.

2. Advocate Dharma Raj Regmi

How the act of giving continuity to the formation of the Royal Commission is incongruous with the Preamble and Article 127 of the Constitution has not been explained in the writ petition. There is a clear provision about presenting the order issued under Article 127 before Parliament. That order is a law. It shall amount to encroachment upon the powers of Parliament, if the court gives its opinion in this regard prior to its presentation before Parliament.

In the present writ petition scheduled for today for the sake of delivering judgment a perusal of the pleas and contention of the writ petitioner, written replies

submitted by the respondents and the submissions made by the learned Counsels representing both the parties and the written briefs submitted by them shows that the following issues need to be decided:

1. *What are the provisions made by the Constitution of the Kingdom of Nepal, 1990 in regard to the exercise of the State authority?*
2. *Can questions be raised in a law court in respect of the acts performed by His Majesty and whether or not such acts can be subjected to constitutional review?*
3. *What is the nature of the present dispute- political or constitutional?*
4. *Whether or not the acts of constituting the RCCC and giving it continuity constitutionally valid?*
5. *Should or shouldn't an order requested by the petitioner be issued?*

So far the first question is concerned, it has been contended in the written reply presented by the Royal Commission that His Majesty has promulgated the order pursuant to Article 127 in accordance with the constitutional practices, customs and usages of Nepal, and by exercising the discretionary powers used to be exercised by His Majesty since the long past. Besides, the learned Counsels appearing on behalf of the Royal Commission and its members have raised in their submissions various issues, such as, His Majesty is a Hindu King; the King is required to discharge his duties in accordance with the Hindu religion; the Constitution cannot exercise control over the King; as the State authority is vested in His Majesty, the King can perform the acts which serve the interests of the people; as the Constitution of Nepal, 1962 has not yet been replaced, the sovereign power still resides in His Majesty. In this context it becomes essential for this Bench to look into what type of provision was present in respect of the exercise of the State authority before the enforcement of the Constitution of the Kingdom of Nepal, 1990 and what has been the provision in this regard after the promulgation of the present Constitution. Article 68 of the Constitution of the Kingdom of Nepal, 1959 had made a clear-cut provision in respect of the State authority by declaring that all other State powers except those provided in the Constitution and the prevalent laws vested in His Majesty. As per Article 20 (2) of the Constitution of Nepal, 1962 the sovereignty of Nepal resides in His Majesty. Besides providing that all the executive, legislative and judicial powers emanated from His Majesty, Article 90 also provided that all the inherent powers of His Majesty except those described in the Constitution or the prevalent laws are vested in him. This clearly shows that all the residuary powers relating to the State authority including the executive, legislative and judicial powers, which emanate from His Majesty as per Article 20(2), appear to be apparently inherent in His Majesty.

While going through the Preamble of the present Constitution to find out what kind of provisions have been made regarding the State authority and the sovereign powers in the Constitution of the Kingdom of Nepal, 1990, which was promulgated after the revocation of the Constitution of Nepal, 1962, it is found that, having been convinced that the source of State authority of independent and sovereign Nepal is inherent in the Nepali people and as from time to time a determination has been expressed to conduct the State administration in consonance with the popular will and as the Nepali people had expressed some time back their desire to bring about constitutional changes, the Constitution of the

Kingdom of Nepal, 1990 has been prepared with the objective of securing to the Nepali people social, political and economic justice long into the future.

It is clear from the aforesaid matters mentioned in the Preamble that the Nepalese people have been recognized as the source of the State authority and that the need for the Constitution of the Kingdom of Nepal, 1990 arose from the main reason of the Nepali people's desire for introducing changes, expressed through the people's movement, in the constitutional system introduced by the Constitution of Nepal, 1962. In the second paragraph of the Preamble describing what should be the form of the system of governance in the Kingdom of Nepal, the Constitution has laid down the objectives of achieving the goal of safeguarding the basic human rights of every Nepali citizen, maintaining fraternity and unity among the Nepali people on the basis of liberty and equality, consolidating adult franchise, Parliamentary System of Government, Constitutional Monarchy and multi-party democracy and transforming the concept of the rule of law into a living reality by making arrangements for an independent and effective justice system. In the third paragraph of the Preamble, providing that after the promulgation of the present Constitution according to the wishes of the Nepali people, the State authority and sovereignty of the Kingdom of Nepal shall be exercised in accordance with the provisions of this Constitution, it has been mentioned that the Constitution has been promulgated and enforced with the advice and consent of the Council of Ministers by His Majesty by exercising the State authority hitherto exercised by him. It has been provided in Article 3 of the Constitution that the sovereignty of the Kingdom of Nepal shall reside in the Nepali people which shall be exercised in accordance with the provisions made in this Constitution. Likewise, the present Constitution has also adopted the Doctrine of Separation of Powers by distributing the executive, legislative and judicial powers relating to the system of governance among the three major organs of the State.

It has been clearly expressed in the Preamble of the present Constitution that after the beginning of this Constitution according to the desire of the Nepali people the State authority and the sovereign powers shall be exercised in accordance with the provisions of this Constitution. As the State authority and the sovereignty shall be exercised in accordance with the Constitution of the Kingdom of Nepal, 1990, it is not proper to believe that the sovereignty of Nepal is vested in His Majesty and that all the executive, legislative and judicial powers emanate from His Majesty as had been provided in the Constitution of Nepal, 1962 which was in force prior to the introduction of the Constitution of the Kingdom of Nepal, 1990. In the present context of these clear-cut constitutional provisions, which stated that after the constitutional change the State authority and sovereignty of the Kingdom of Nepal shall be exercised only as provided by the Constitution of the Kingdom of Nepal, 1990, it shall be contrary to the constitutional basis and provisions to raise dispute about the State authority and to put forward arguments as if the Constitution of Nepal, 1962 had not been repealed. The Constitution occupies the position of a fundamental and powerful law. In the countries having written Constitutions matters such as the principle and system of governance, its functions, distributions of the State authority among various Organs of the State etc. are decided by the Constitution itself. It is contrary to the Constitution to violate the provisions made by

the Constitution and the subject matters determined by it. As the violation of the system and the subject matter determined by the Constitution shall result in the creation of constitutional problems, it is in the best interest of the State to take precaution against the prospective emergence of such a situation or to avoid it.

As regards the second question, the learned Counsels appearing on behalf of the respondents have argued that as the Constitution does not provide for raising any question in the law court in regard to any act performed by His Majesty, the issue of formation of the RCCC cannot be brought before the court. In the writ petition of Certiorari, *Hari Prasad Nepal and Others v. Prime Minister Girija Prasad Koirala and Others* (Nepal Kanoon Patrika, Golden Jubilee Birthday Celebration Issue 2052 p. 88), an eleven member Special Bench of this court has, in regard to Art. 31 of the Constitution of the Kingdom of Nepal, 1990, observed that the responsibility for the act performed by His Majesty on the advice and recommendation of the Council of Ministers or any other official or body shall have to be borne by the concerned official or body who had given that advice. Likewise, in the writ petition of Certiorari, *Rabi Raj Bhandari v. Prime Minister Man Mohan Adhikari and Others* (Nepal Kanoon Patrika, Golden Jubilee Birthday Celebration Issue 2052, p. 1), an eleven member Special Bench of this court has opined that the nature and extent of the acts to be performed by His Majesty in his discretion, in accordance with the spirit and ideal of the system of Constitutional Monarchy, have been delineated by the Constitution itself. As those types of acts are generally of political nature, the provision of Article 31 in respect of the acts performed by His Majesty in his discretion according to the Constitution is undoubtedly worthy of consideration. It has been further held that if the acts to be performed or already performed by His Majesty on the advice or recommendation of other constitutional organs, bodies or officials in accordance with the Constitution are also kept out of the purview of judicial review on the basis of Article 31, in that case there shall be no meaning of the concepts adopted by the Constitution such as written constitution, limited government, accountable system of governance, the rule of law etc.

The concept that "the King can do no wrong" was developed in course of the constitutional development in the United Kingdom due to the customary practices like the King conducting the system of governance and exercising the State authority only on the recommendation or advice of the Council of Ministers or responsible officials. In fact, when any act is performed by the King only on the recommendation or advice of somebody, there is no question of the King doing any wrong. In case there occurred any mistake, the responsibility for such an act goes to the official who had given the advice or made the recommendation. This very principle has been also adopted by Article 31 of the Constitution of the Kingdom of Nepal, 1990. In order to recognize the scope of Article 31 of the present Constitution, the nature of the acts to be performed by His Majesty needs to be analyzed. For this purpose the provisions made in the Constitution in respect of the acts to be performed by His Majesty, particularly the provision of Article 35 (2), need to be specially discussed. There is no scope of the interpretation of Article 31 by excluding Article 35 (2) of the Constitution.

Article 35 (2) of the present Constitution seems to have classified the acts to be performed by His Majesty in three categories. Firstly, the acts to be performed by His

Majesty or in his discretion; secondly, the acts to be performed specifically on the recommendation of any institution or official; and thirdly, the acts to be performed with the advice and consent of the Council of Ministers. It is but natural that sometimes serious questions may arise about the constitutionality of the acts performed by His Majesty alone or in his discretion in accordance with the Constitution. It does not seem appropriate to raise any question in the law courts about matters other than the serious issue of the constitutionality of the acts performed by His Majesty alone or in his discretion in accordance with the Constitution. The Constitution of the Kingdom of Nepal, 1990 has accepted the provisions of the present Constitution as a cornerstone of the social, political and economic affluence of Nepal and has, thus, assimilated the concept of constitutional supremacy. As it has been provided in Art.27 [3] of the Constitution that His Majesty shall uphold and preserve the Constitution keeping in view the best interests and welfare of the Nepali people, such best interests of the Nepali people will be served only through the Constitutional provisions. Therefore, the Constitution has entrusted His Majesty with the duty of upholding and preserving the Constitution keeping in view the best interests and welfare of the Nepali people. As it has been a resolution of the Constitution that the constitutional provisions are the cornerstone of the overall development of the Nepali people and as the concept of constitutional supremacy has been recognized, if the Supreme Court refuses to resolve a constitutional question placed before it regarding an allegation involving a constitutional dispute that the State authority has been exercised in contravention of the constitutional provisions, disturbance may be caused to the constitutional foundation of peace and development of the Nepali people. Constitutional disputes should not remain unresolved. If such disputes are not resolved through suitable means, it may result in the emergence of a difficult and abnormal situation, and the State system may be engulfed by such an abnormal situation. As the Supreme Court has been entrusted with the responsibility, under Article 88 of the Constitution, for the enforcement of the rights of the people guaranteed by the Constitution and the laws or for the judicial resolution of any constitutional dispute, it shall be contrary to the Constitution if the Supreme Court is not allowed to enter into a question of constitutionality.

The provision contained in Article 87 of the Constitution of Nepal, 1962 looks very similar to Article 31 of the Constitution of the Kingdom of Nepal, 1990. According to Article 21[2] of that Constitution of 1962 the powers of making, amending or repealing the law relating to succession to the throne vested only in His Majesty. His Majesty has enacted the Succession to the Throne Act, 2044 [1987] by exercising those powers. In the writ petition of *Krishna Prasad Shiwakoti v. Secretariat of the Council of Ministers & Others*, the provision of Section 13 of the Succession to the Throne Act, 2044 [1987] relating to capital punishment was challenged and a request was made by the petitioner to declare the impugned law void as it was violative of the Constitution [Nepal Kanoon Patrika 2054, Decision No. 6387 p. 295]. That legal provision was subjected to constitutional scrutiny and it was held that, as the proviso to Article 131 of the present Constitution provided that the laws inconsistent with this Constitution shall 'ipso facto' cease to operate one year after the commencement of this Constitution, although not void and invalid, such laws cannot remain active. As this constitutional question was subjected to constitutional scrutiny and the constitutional

dispute was also resolved, this showed that this court has already examined a constitutional question relating to the provision of a law made by His Majesty exercising the powers vested in His Majesty alone. Thus it cannot be argued that no question can be raised in the Supreme Court in regard to a constitutional dispute which has arisen in connection with the Emergency powers enshrined in Art. 115 and the power to remove any difficulty provided in Art. 127 of the Constitution of the Kingdom of Nepal, 1990.

It is essential for judges to remain committed to the principle they have propounded or their earlier concepts. Nevertheless, in the changed circumstances there may arise such situations when it may not be appropriate for a judge to remain committed to his earlier concept. If a judge is confronted with such a situation requiring him to dispense justice in contradiction to the principle he had himself propounded earlier or his earlier concepts or stand, the judge must clearly explain the grounds and reasons why his earlier conception was erroneous or not appropriate in the changed circumstances. The learned counsels appearing on behalf of the respondents have argued that, as in *Advocate Upendra Nandan Timalsena v. HMG & Others* (writ No. 3130 of the year 2059 BS) a Single Bench Judge has ruled on Manshir 17, 2059 (December 3, 2002) that Article 31 of the Constitution shall be attracted in regard to the exercise of Article 127 by His Majesty in order to remove any difficulty in the implementation of the Constitution, in view of that ruling it is not proper for this court to raise any question, as per Article 31, also in connection with the present dispute. As the responsibility for directing, controlling and conducting the system of governance of the country in a general way is vested in the Council of Ministers pursuant to Article 35(3) of the Constitution, the above mentioned petition seems to be concerned with the formation of the Council of Ministers by His Majesty by exercising Article 127 in order to activate that provision contained in Article 35(3). Unlike in the present petition, that petition does not seem to involve a dispute regarding formation of a separate institution by exercising Article 127 of the Constitution. It is, therefore, not possible to agree to the plea made by the learned counsels of the respondents that this court is not competent to look into the matter raised in the present writ petition as per Article 31 of the Constitution on the basis of an order passed by a Single Bench Judge on Manshir 17, 2059 (December 3, 2002) in a dispute which is entirely different from the present dispute.

Learned senior Advocate Kunj Bihari Prasad Singh and others appearing on behalf of the respondent RCCC have submitted that the order issued by a Single Bench Judge of this Court on Bhadra 19, 2059 (September 4, 2002) asking for the submission of written reply in the writ petition filed by Advocate Santosh Kumar Mahato (Writ No. 57) is unconstitutional and unlawful. The extra-ordinary jurisdiction of this court provided by Article 88 of the Constitution of the Kingdom of Nepal, 1990 is of equitable and discretionary nature. Under this jurisdiction, on the basis of the nature of the dispute, this court is competent to issue appropriate orders including the order for the submission of written reply. In this context it has been provided in Rule 40(4) of the Supreme Court Rules, 2049 that in course of initial hearing of a petition filed under Article 88(1) and (2) of the Constitution, if the contention of the petitioner appears just and lawful, the court must issue an order in the name of the respondent to be present before the court on a specified

date with a written reply provided that there was any reason justifying denial of the issuance of an order as prayed for by the petitioner. In writ petition No. 57 questions have been raised against the constitutionality of the respondent Royal Commission citing various Articles of the Constitution on the ground that the Order relating to the Formation of the RCCC was issued on Falgun 5, 2061 [February 16, 2005] as per Article 115(7) of the Constitution and the act of giving continuity to the Royal Commission by exercising Article 127 after the withdrawal of the proclamation of the state of Emergency as per Article 115(11) on Baisakh 16, 2062 [April 29, 2005] was contrary to Article 127 of the Constitution. And as basically a similar type of dispute seems to be involved in writ petition No. 118 relating to Habeas Corpus filed by Sanjeev Parajuli on behalf of Rajeev Parajuli, and also taking into consideration the order already issued for presenting that writ petition on Bhadra 23, 2062 [September 8, 2005] for hearing, and as it shall also be proper from the viewpoint of judicial administration to conduct simultaneous hearing of both the writ petitions involving issues relating to similar disputes, the order instructing for scheduling both the writ petitions for simultaneous hearing cannot be treated as contrary to the Constitution and the law. Besides, in response to the order issued by a Single Bench Judge on Bhadra 19, 2062 [September 4, 2005] instructing the respondent Royal Commission to file a written reply the latter has already submitted the written reply in this court as per that order. In that order no plea has been taken in respect of the order issued by this court. As the written reply has been already submitted in compliance with the order issued by this court and as the concerned party has not raised any plea in that regard, the contention made by the learned counsels appearing on behalf of that party raising objections to an issue which has not been originally raised in the written reply and calling it illegal and unconstitutional cannot be treated as lawful.

As regards the third question, there is a need to decide whether or not the dispute presented before the court falls under 'the judicially manageable standard'. There is no denying the fact that the court must not enter into a political question which does not involve a constitutional or legal question and which is not fit for judicial resolution. No dispute shall become political simply because it has been described as a political one. It is necessary to understand the nature or character of such a dispute in order to find out whether or not the subject matter of the dispute is political. The policy matters relating to the State and the system of governance not falling under the constitutional, legal or judicial resolution standard as well as the political disputes which can be effectively resolved by the Executive, the Legislature or other organs instead of the Judiciary ought to be treated as political disputes. It is the contention of the respondents that as the order issued by His Majesty on Baisakh 16, 2062 [April 29, 2005] under Article 127 of the Constitution giving continuity to the formation of the RCCC constituted by His Majesty as per Article 115(7) was an act carried out by His Majesty in accordance with the Royal Proclamation made on Magh 19, 2061 [February 1, 2005] in the interest of the general public by exercising the State authority vested in His Majesty, it is a subject matter involving a political question. In view of the fact that the Constitution of the Kingdom of Nepal, 1990 has been proclaimed by His Majesty providing that the State authority and sovereignty of Nepal shall be exercised in accordance with this Constitution and since the constitutional dispute of the

formation of the RCCC needs to be decided also on the basis of the provisions relating to the exercise of the State authority as determined by the Constitution, it is not proper to call such an indisputably constitutional matter a political dispute.

As regards the fourth question whether or not the act of the establishment of the RCCC and that of giving continuity to its formation are constitutional, the writ petition, the submission made by the learned counsels of the petitioner and the written briefs submitted by them maintain that the formation of the Royal Commission was not related with the purpose of the prevention of the state of Emergency as mentioned in the Proclamation of the State of Emergency; no such Commission can be established under Article 115(7) of the Constitution of the Kingdom of Nepal, 1990; such a Commission can be neither constituted under Article 127 nor such a Commission constituted under Art. 127 can be given continuity under Art. 115 (7); the activities and proceedings of the Commission are not in accordance with the principle of Natural Justice and are also contrary to the provision contained in Art. 98 of the Constitution of the Kingdom of Nepal, 1990. On the other hand, the written reply of the respondents and the submissions made by the learned counsels including the learned Attorney General and the written briefs submitted by them contend that due to the emergence of a situation of conflict caused by widespread corruption in the country, the State felt the need for its prevention for which it constituted the RCCC. As the jurisdictions of the Royal Commission and that of the CIAA are different, the Royal Commission has not been constituted in contravention of Article 98. Although Article 127 has provided for presenting an order issued under that Article before Parliament, that procedure has not been complied with as yet. Also, the court is not competent to look into a matter which has been given continuity under Article 127 in the satisfaction of His Majesty.

As regards the plea made by the respondents that no question can be raised in a law court regarding the Order relating to the Formation of the RCCC since it had been issued by His Majesty, in view of the conclusion arrived at on the basis of the analysis of Articles 27(3) and 31(3) in question No. 2 and the mention made in paragraph 6 page 4 of the written reply received from the Office of Attorney General to the effect that "the matter to be examined by the honourable court through judicial review is only whether or not the order relating to the Royal Commission is constitutional", it is not proper to say that the impugned order cannot be looked into.

It has been contended in the written submission produced by the office of the Attorney General that the Royal Commission has been formed under the Doctrine of State Necessity in the context of taking effective action against the culprits for preventing wide spread corruption in the country and the need for making the procedure for taking such action expeditious and simple. The establishment of the Commission is constitutionally valid also on the basis of the decision made by this court on Jyestha 27, 2062 (June 9, 2005) in Writ No. 29 of the year 2061 (2004) in which it was held that the State was competent to undertake appropriate measures on the basis of State Necessity or the Doctrine of Necessity. Moreover, as it has also been mentioned in the written reply and the written submission produced by the respondents that the Commission has been formed as per the provision empowering His Majesty to constitute such a Commission by issuing an

order in accordance with Article 115(7) during the proclamation of the state of Emergency under Article 115(1), at this point here, it has also become essential to undertake a minute study of the various provisions of Article 115 of the Constitution of the Kingdom of Nepal, 1990 and the order relating to the proclamation of the state of Emergency by His Majesty. The Notification issued by the Chief Secretariat of His Majesty and published in the Nepal Gazette of Magh 19, 2061 [February 1, 2005] [Additional Issue 47 (B) Part 4, Section 54, Kathmandu] is as follows:

"On account of occurrence of serious threat to the sovereignty, integrity and security of the Kingdom of Nepal, His Majesty the King has proclaimed, in accordance with Article 115(1) of the Constitution of the Kingdom of Nepal, 1990, the order of the State of Emergency to be effective with immediate effect throughout the Kingdom of Nepal and, in accordance with clause (8) of the same Article, has suspended parts (a), (b), (c) and (d) of clause (2) of Article 12, Section (1) of Article 13 and Articles 15, 16, 17, 22 and 23 (except the remedial right to habeas corpus)".

There are several clauses of Article 115 of the Constitution of the Kingdom of Nepal, 1990. Of them the following provisions are there in clause (1), clause (7) and clause (11) of that Article.

"Article 115 (1): In the event of occurrence of a serious threat to the sovereignty and integrity of the Kingdom of Nepal or security of any part thereof on account of war, external aggression, armed rebellion or extreme economic disarray, His Majesty may proclaim or issue an order of the state of Emergency to be effective throughout the Kingdom of Nepal or in any specific part thereof."

"Article 115 (7): In the event of the proclamation or issuance of the order of the State of Emergency pursuant to clause (1) His Majesty may issue appropriate orders for the prevention of such a state. An order thus issued shall remain in force as law during the continuation of the state of Emergency."

"Article 115 (11): The Proclamation or order of state of Emergency issued pursuant to clause (1) may be revoked by His Majesty at any time during its continuation."

It is necessary to mention in the Proclamation or the order of the declaration of the state of Emergency why the threat had emerged, in contravention of the constitutional provisions, to the sovereignty or integrity of the Kingdom of Nepal or the security of any part thereof whether by war, external aggression, armed rebellion or extreme economic disarray. If the Proclamation or the order relating to the State of Emergency has been issued it is to be presumed that the state of Emergency has occurred due to the very reason which has been pointed out in the Proclamation or the order. As there is a provision that after the Proclamation or issuance of the Order of the state of Emergency, His Majesty may issue, pursuant to Section 115(7), such orders as are necessary to meet the exigencies, and such orders shall be operative with the same force and effect as law so long as the state of Emergency is in operation, it seems that His Majesty may issue an order pursuant to Article 115(7) only for addressing the reason which has led to the proclamation of the state of Emergency whether due to threat to sovereignty or integrity of the Kingdom of Nepal or the security of any part thereof or war, external aggression, armed rebellion or extreme economic disarray. There seems to be the absence of a clear constitutional provision permitting the

application of the provision contained in Article 115(7) in respect of any state other than that mentioned in the Proclamation or order relating to the state of Emergency. It has been submitted that corruption has become widespread as it has engulfed the nation leading to extreme economic disarray and, therefore, the RCCC has been constituted for preventing corruption. A study of the Notification issued by the Chief Secretariat of His Majesty, Royal Palace, and published in the Nepal Gazette Additional Issue 47(B) Part 4 on Magh 19, 2061 (February 1, 2005) shows that as a grave emergency has arisen in regard to the sovereignty or integrity or security of the Kingdom of Nepal, His Majesty has, by Proclamation, declared or ordered a state of Emergency pursuant to Article 115(1) in respect of the whole of the Kingdom of Nepal. It is not constitutionally proper to presume that the state of Emergency has been declared on account of the grounds and reasons separate and different from those which have been mentioned in the order proclaiming the state of Emergency to justify such a declaration. In the order proclaiming the state of Emergency issued on Magh 19, 2061 (February 1, 2005), there is no mention of economic disarray as one of the reasons for proclaiming the state of Emergency. Also, His Majesty did not mention the factor of economic disarray in Section 12 of the Royal Proclamation issued on the same date. It has been simply mentioned in the said proclamation that measures for the prevention of corruption shall be undertaken not contravening the principles of justice. Due to these reasons no constitutional ground has been put forward which may justify that the RCCC has been constituted on account of economic disarray as pleaded by the learned counsels of the respondents. As an order pursuant to Article 115(7) may be issued to meet the particular exigency due to which the proclamation or the order of the state of Emergency has been issued, it seems to be a clear constitutional intent that the provision of Article 115(7) cannot be resorted to in respect of a constitutional condition or reason which does not appear in the Proclamation or order of the state of Emergency. Moreover, as the Royal Notification published in the Nepal Gazette of Baisakh 16, 2062 (April 29, 2005) (Additional Issue No. 7, Vol. 55, the Chief Secretariat of His Majesty, the Royal Palace Kathmandu) states that " His Majesty has withdrawn the order of the state of Emergency, proclaimed by him on Magh 19, 2061 (February 1, 2005) to become operative throughout the Kingdom of Nepal pursuant to Article 115(1) of the Constitution of the Kingdom of Nepal, 1990, effective from today as per Section 11 of that Article," the constitutional provision very clearly shows that the state of Emergency proclaimed under Article 115(1) and the order issued under Article 115(7) for the purpose of its prevention have automatically become purposeless and void. Thus, when a particular act performed by activating some constitutional provision becomes void by virtue of another act performed in accordance with the provisions of the same Constitution, it shall be viewed as an act performed by the use of force if it is interpreted that in the absence of a clear constitutional provision something which has already become void can be given continuity or is worthy of acquiring continuity. Also, such an act causes an impediment to the course of constitutional evolution.

The Office of the Attorney General, learned Senior Advocate Kunj Bihari Prasad Singh and learned Advocates including Mithilesh Kumar Singh, Awadhesh Kumar Singh and others have also laid special emphasis even in the written submissions made by them that the Royal Commission had to be constituted due to State Necessity. The written

submission presented by the Office of the Attorney General has also advanced the following ground: "That is necessary which cannot be otherwise. Necessity defences or justifies what it compels. Necessity is the law of time and place. Necessity makes the lawful which otherwise is not lawful". Besides, it has also referred to the decisions made by this court in the writ petitions filed by Binod Karki, Krishna Prasad Lamsal and Binod Prasad Adhikari as mentioned above and put forward the grounds in support of its contention.

Since almost all the learned counsels appearing on behalf of the respondents have cited, in their submissions, the interpretation made by this court in respect of the Doctrine of Necessity in the writ petition of Binod Karki, it is appropriate to discuss what type of decision has been made in that writ petition. That writ petition was filed seeking voidance of the economic Ordinances of the fiscal years 2059÷060 B.S. [2002÷2003], 2060÷061 and 2061÷062 promulgated during the state of dissolution of the House of Representatives contending that the ratio of taxation could be subjected to alteration only through the annual Estimate of Revenue and Expenses to be presented only before Parliament and the economic legislation to be presented only before the House of Representatives, thereby requiring that no taxation could be imposed without people's representation. Disposing that writ petition, this court discussed **the Doctrine of Necessity** and observed that "it is highly essential to conduct the State affairs even in an extraordinary and abnormal situation whatsoever in order to protect the nation. Even though the activities undertaken by the government in such a situation are not in accordance with the provisions stipulated for normal condition by the Constitution, such activities tend to acquire justification as per the Doctrine of Necessity provided that they don't contravene the constitutional provisions. In the normal circumstances every activity of the State must be performed in accordance with the letter and spirit of the Constitution, and if it is found to have been performed not in consonance with that manner such an activity cannot be granted constitutional and legal recognition. But in an abnormal situation where there is no alternative the minimal functions discharged by the State while conducting the State affairs in contravention of the basic structure of the fundamental concepts adopted and assimilated by the Constitution shall be deemed as proper on the basis of inevitable necessity even from the viewpoint of judicial propriety except in the condition that such functions do not infringe any clear provision of the Constitution." On the basis of this interpretation the court held that the economic Ordinance promulgated pursuant to Article 72 of the Constitution of the Kingdom of Nepal, 1990 during the period of dissolution of the House of Representatives is not incongruous with the provisions of the Constitution. While disposing that writ petition, as it had not been clearly observed that an activity incongruous with any constitutional provisions shall acquire constitutional recognition on the basis of the Doctrine of Necessity even though, constitutional or legal alternatives are available, the present dispute does not seem to get any support or justification on the basis of the Doctrine of Necessity analyzed in that decision. And the other writ petitions are related with the issues concerning the civil servants and, therefore, the decisions made in those writ petitions do not seem to bear any direct or indirect resemblance to the present dispute. The Doctrine of Necessity does not intend to destroy the prevailing constitutional structure. It simply endeavors to resolve a situation which

requires immediate resolution and which has no alternative to its resolution without contravening the constitutional provisions.

Corruption is a stigma for the country. It destroys the concepts of good governance. It is, therefore, essential to keep corruption under control without allowing it to flourish as it acts as an enemy to the moral values and norms. The Rule of Law has been specified by our Constitution as the basic foundation of governance. Therefore, nothing but a constitutionally reliable and effective legal provision can be a strong basis for the prevention of corruption. If there was a need for an effective legal mechanism for the prevention of corruption, and there was no alternative to such an arrangement, there was no obstacle before the State to make suitable arrangements through the law without contravening the constitutional provisions. But before making such an addition arrangement, it is necessary to look into what type of arrangement the Constitution, which is the fundamental law of the land, has made in this regard, and thus, only the provision which is required constitutionally should be made. As regards the endeavors and the provisions made before the promulgation of the Constitution of the Kingdom of Nepal, 1990 in respect of the prevention of corruption, there is a provision of the CIAA in Part 12 of the 1990 Constitution. Article 98(1) of the Constitution has empowered the CIAA to conduct or cause to conduct investigation or enquiry in accordance with the law in connection with the abuse of authority by a person holding a public office by committing an improper act or corruption. And if a person holding a public office seems to have committed an act which may be treated as corruption according to the law, there is a provision for prosecuting as per the law such a person holding public office and other accomplices to the crime in a competent court. This shows that the CIAA is vested with the authority to conduct investigation in respect of improper act or corruption and to file charge-sheet in a competent court. Since the CIAA is constitutionally a significant mechanism in regard to the prevention of improper acts or corruption, it shall be constitutionally proper to follow the constitutional provision so long as that constitutional provision regarding the responsibility entrusted to the CIAA remains active. The act of directly or indirectly affecting adversely or encroaching upon the functions, duties or powers conferred on any constitutional organ or the act of rendering a constitutional organ ineffective on any pretext whatsoever not only weakens the constitutional foundation rather also disrupts it, and creates obstacles to Constitutionalism and constitutional development as well.

A perusal of the order issued by His Majesty and published in the Additional Issue No. 55 of the Nepal Gazette on Falgun 5, 2061 (February 16, 2005) regarding formation of the RCCC pursuant to Article 115(7) of the Constitution of the Kingdom of Nepal, 1990 shows that, as per Section 2 of the order, the Royal Commission has been entrusted with the functions, duties and powers to conduct investigation and take action if there is 'prima facie' case of smuggling, revenue evasion, involvement in illegal contracts or lease or commission or committing any other act which may be treated as corruption. In addition to that, the Commission has been also conferred upon, as per Section 2(4) of the Order, all the powers to be exercised by the Investigation Officer in accordance with the prevalent law relating to corruption and the powers of the Special Court. As Section 6 has provided that the Commission can punish any person according to the relevant law if he is proved to have

committed any act of corruption defined by the prevalent law on corruption, all the activities related to investigation undertaken by the Commission in the name of the Commission and the punishment slapped and the powers exercised by the Commission seem to be related to corruption. As it is clear from the provisions of Sections 2 and 6 that both the powers of conducting investigation as well as awarding punishment are vested in the RCCC, from the legal viewpoint there is no significance of the contention that it is a separate unit of the Commission which files the prosecution charge-sheet after conducting investigation. It is abundantly clear that both the powers of investigation as well as prosecution are vested in the RCCC. Because Article 98 of the Constitution of the Kingdom of Nepal, 1990 has conferred on the CIAA the functions, duties and powers to file a charge-sheet in a competent court as per the law against a person holding a public office who is found, through investigation, to have committed, by misusing his powers, an improper act or corruption in the eyes of the law. This shows that there is a clear constitutional provision requiring that there must be separate organs for conducting investigation and for hearing the case, and there must not be only one organ for discharging both these functions. In view of the fact that the Constitution of the Kingdom of Nepal, 1990 has provided for the separate entity of an organ investigating corruption cases and an organ conducting trial of such cases, it cannot be proper to say that the act of empowering one and the same organ to conduct both investigation and trial is in consonance with the objective and spirit of the Constitution. The persons entrusted with judicial responsibility following their appointment to the judicial posts, are required to take oath of office prior to assuming their office. The act of taking oath in regard to judicial responsibility remains as an integral part of the legal system. The very use of the word 'oath' is meant to imply a commitment or declaration on the part of the person who is required to make that commitment or declaration in accordance with the law. And it is the moral obligation of the person who takes such an oath to remain committed to the oath taken by him. It is for this reason that there is a special significance of oath. The Supreme Court justices take an oath to remain loyal and sincere to the Constitution of the Kingdom of Nepal, 1990. The Appellate Court, Special Court and Administrative Court judges and the District Court judges are required to take an oath of loyalty and sincerity to the law and the Constitution. Such provisions indicate that any person entrusted with a judicial duty or a duty equivalent to that of a judge is required to take an oath of loyalty and sincerity to the law and the Constitution. But as provided in the Order relating to the Formation of the RCCC the Chairperson and the members of the Commission are required to take the oath of office and secrecy but they are not required to take an oath of loyalty to the law and the Constitution. It is not unnatural to believe that a person who is not required to take an oath of loyalty to the law and the Constitution, and who is required in stead to take an oath relating to other matters, shall be committed to those matters regarding which he has taken the oath.

The Constitution has made it clear that the duration of the promulgation or the order of the state of Emergency pursuant to Article 115 (1) of the Constitution of the Kingdom of Nepal, 1990 is intended to remain in force for a limited period. In the event of the Proclamation or order of the state of Emergency, the Constitution has provided that such a Proclamation or Order shall have to be placed before a meeting of the House of

Representatives for approval within three months from the date of its issuance, and if it is approved by a two-thirds majority of the House of Representatives present at the meeting such Proclamation or Order shall continue in force for a period of six months from the date of issuance, and before the expiration of the period of six months a meeting of the House of Representatives, by a majority of two-thirds of the members present, may extend the period of the Proclamation or Order of the state of Emergency for one other period, not exceeding six months. The Constitution has determined the status of the order, issued pursuant to Article 115(7), to meet the exigencies by providing that His Majesty may issue such orders as are necessary to meet the exigencies which have caused the occurrence of the state of Emergency as mentioned in the Proclamation or Order relating to the declaration of the state of Emergency, and such an order shall be operative with the same force and effect as law so long as the state of Emergency is in operation. In view of the fact that the Constitution has made clear and specific provision that an order issued pursuant to Article 115(7) shall continue to remain in force so long as the state of Emergency is in operation, the act of giving continuity to the order issued for meeting the exigencies during the state of Emergency by resorting to any other Article shall virtually result indirectly into maintaining the state of Emergency. Therefore, it is not constitutionally valid to indulge in an act contrary to what has been clearly provisioned by the Constitution.

Article 98 of the Constitution of the Kingdom of Nepal, 1990 has made a clear provision that if any person holding a public office seems to have committed any act which may be treated as corruption in the eyes of the law the CIAA may file or cause to file charge-sheet against such a person or an accomplice to the crime in a competent court as per the law. Article 84 of the Constitution has provided that the powers relating to justice shall be exercised by the law courts and other judicial institutions in accordance with the Constitution, the laws and the recognized principles of Justice. Likewise, Article 85 has provided that there shall be three tiers of courts including the Supreme Court, the Appellate Courts and the District Courts, and special type of court or judicial institutions may be established to look into special types of cases. Thus, there is a clear cut constitutional provision prohibiting establishment of an institution exercising judicial power except according to the law. As for the provision made in Section 6(2) of the Order relating to the Formation of the Commission permitting a person not satisfied with the decision made by the Commission to file an appeal in the Supreme Court, according to Article 88(3) the Supreme Court is empowered to hear appeal only as provided by the law. In addition to the general courts including the Supreme Courts, the Appellate Courts and the District Courts created by the Constitution, there are also functioning some other courts constituted by the law such as the Administrative Court, the Special Court, the Revenue Court, the Labour Court etc. All these are the courts and judicial institutions constituted by the law, and their functions, duties and powers have been prescribed by the law. The RCCC has not come into existence by virtue of the provision of any Statutory Act or Ordinance. As it has been created by an order issued pursuant to Article 115 (7), such an order cannot remain active and operative as a law after the termination of the state of Emergency according to the same Article 115 (7). After the withdrawal of the state of Emergency, promulgated by His Majesty on Magh 19, 2061 [February 1, 2005], effective from Baisakh 16, 2062 [April 29,

2005] the RCCC seems to have acquired continuity through an Order promulgated under Article 127 by His Majesty. Therefore, what is the scope of Article 127 needs to be examined in view of the constitutional provision contained in this Article which empowers His Majesty to promulgate an order for removing any difficulty which may occur in the implementation of this Constitution and also requires such an order to be placed before Parliament. As regards the nature of a relevant provision contained in the previous Constitutions in respect of removing difficulties in the implementation of the constitution, Article 77 of the Constitution of the Kingdom of Nepal, 1959 provided that the power to remove any difficulty was inherent in His Majesty, and every order issued for removing any difficulty was required to be laid before both Houses of Parliament, and it could be repealed or amended by law, and it had to be treated as included in the Constitution so long as it was not amended or repealed. Likewise, Article 90A of the Constitution of Nepal, 1962 provided that His Majesty may promulgate any order deemed necessary by him in order to remove any difficulty which may occur in the implementation of the Constitution, and such an order shall be deemed as included in the Constitution. Thus, whereas the Constitution of Kingdom of Nepal, 1959 and the Constitution of Nepal, 1962 had made clear provisions regarding the status of the order promulgated by His Majesty to remove any difficulty, Article 127 of the Constitution of the Kingdom of Nepal, 1990 does not seem to make any mention about the status of the order which is issued to remove any difficulty in the implementation of the Constitution and also does not clarify whether it is constitutional or legal. The power relating to the removal of any difficulty needs to be understood in the perspective of the status which the Constitution has bestowed on it. The Constitutions, which were in force prior to the Constitution of the Kingdom of Nepal, 1990, had declared the power concerning the removal of any difficulty as being at par with the Constitution. But since Article 127 of the Constitution of the Kingdom of Nepal, 1990 does not clearly mention that the order relating to the removal of any difficulty shall be equivalent to the Constitution; there is no scope for understanding that such an order shall enjoy the same status as enjoyed by the similar orders in the previous Constitutions.

The purpose and objective of Article 127 of the present Constitution seems to activate the constitutional provision or mechanism by removing any difficulty which may arise in the implementation of any provision of the Constitution. To put it more clearly, it is the spirit and objective of Article 127 to conduct systematically the constitutional provisions by providing nectar (life saving drug) to the existing constitutional provisions if there arises any obstacles to the implementation of the constitutional provisions. As after the dissolution of the House of Representatives on Jyestha 8, 2059 (May 22, 2002) the elections could not be held on account of various reasons and the Council of Ministers could not be constituted as per Article 36 or 42 of the Constitution, it might have been a necessity of the State to resort to the exercise of Article 127 in order to activate Article 35(1) for the sake of constituting the Council of Ministers under the Premiership of Lokendra Bahadur Chand or the Council of Ministers constituted thereafter in order to remove the difficulty regarding the failure of the constitution of the Council of Ministers as per Article 36 or 42. The constitution of the Constitutional Council under the Chairmanship of the then incumbent Chief Justice for the sake of the appointment of the next Chief Justice could be treated as falling within the

objective of Article 127, as it was intended to remove the difficulty caused by the failure of appointment of the Chief Justice due to the constitutional obstacle confronted in the formation of the Constitutional Council in accordance with Article 117. The provision made in the Constitution regarding removal of any difficulty can be exercised to activate the Constitution if any constitutional provision could not be implemented due to any impediment confronted in the process of its implementation. Article 127, therefore, cannot be attracted in case of matters other than those provided by the Constitution. Besides, it cannot be so exercised as to create a situation where the constitutional system becomes inactive or the constitutional mechanism under goes a change.

In the Special Constitutional Directive No. 1 of the year 2050 [1993] submitted to His Majesty pursuant to Article 88(5) of the Constitution of the Kingdom of Nepal, 1990 on Baisakh 18, 2050 [April 30, 1993] a Special Bench of this Court has expressed the following opinion in regard to the exercise of Article 127 of the Constitution: "If there arises a situation obstructing the implementation of any constitutional provision due to the failure to constitute any constitutional organ or institution or if a void or a constitutional stalemate is created due to the failure of any constitutional mechanism to function as provided in the Constitution, the power of removing any obstacle or difficulty may be exercised to prevent such a situation by making suitable and necessary arrangements for its immediate resolution in order to activate the constitutional mechanism. The extra-ordinary power of removing any obstacle or difficulty may be exercised only if there was no other constitutional or legal alternative to end the constitutional stalemate or lacuna which has emerged unexpectedly. But if any obstacle or difficulty can be removed by a law enacted by Parliament or by the promulgation of an Ordinance by His Majesty when there is no Parliament it will not at all be appropriate to resort to the exercise of Article 127 for this purpose by forming a false conception of the failure of the implementation of the Constitution. It is one thing to issue an order pursuant to that Article in order to fill a constitutional void or end a constitutional stalemate; it does not infringe the personal right of any person. But it is entirely another thing to grant powers to perform such acts which infringe the fundamental rights guaranteed by the Constitution, such as, taking someone's statement against his will, administering oath to him, compelling him to be present somewhere, conducting search of some house or place etc. Article 127 cannot be exercised for that purpose. In order to exercise any powers which tend to encroach upon the personal freedom or the right to property guaranteed by the Constitution, such powers must be granted by the law made by Parliament in accordance with the legislative procedure prescribed by the Constitution. The power to remove any obstacle or difficulty provided for activating the constitutional mechanism by ending the constitutional stalemate or lacuna cannot be exercised to encroach upon the personal freedom or any other fundamental right of any person. If any order is issued pursuant to Article 127 resulting in that manner it shall be unconstitutional."

A question has arisen as to how much relevant and important is the opinion submitted to His Majesty by a Special Bench of the Supreme Court in regard to a reference made by His Majesty seeking its opinion pursuant to Article 88(5) of the Constitution in connection with the formation of a Commission for conducting enquiry into the Dasdhunga accident. The respondents have contended that as the opinion given under Article 88(5)

cannot assume the position of Article 96 of the Constitution, the court cannot take into consideration such an opinion. No doubt an opinion sought by His Majesty pursuant to Article 88(5) and submitted by the Supreme Court cannot enjoy the status of a verdict delivered by the Supreme Court for the purpose of Article 96 of the Constitution. Since an opinion and a decision have entirely different status an opinion given pursuant to Article 88(5) and a decision made by the court cannot be compared as being equivalent. The compliance with a decision is mandatory whereas it cannot be said that the compliance with an opinion even by the person who has sought such an opinion is mandatory. Before giving its opinion under Article 88(5) the court forms its opinion in the light of the opinion given by the experts on the subject considered fit for consultation by the court and the submissions made and views expressed by the learned counsels appearing as 'amicus curiae', and only then that opinion is submitted to His Majesty. Although His Majesty is not bound by the opinion given by the court, as the Constitution does not obligate His Majesty to comply with such an opinion, it is an important responsibility of the Supreme Court to report its opinion to His Majesty in case His Majesty wishes to have an opinion of the Supreme Court on any complicated legal question of interpretation of the Constitution or any other law. And, this responsibility must be discharged with utmost care and caution not contravening the Constitution and the laws. And such an opinion leads to the resolution of a constitutional dispute. Ever since the promulgation of the Constitution of the Kingdom of Nepal, 1990, so far there has been no instance when His Majesty rejected the opinion which was sought by him and submitted by the court under Article 88(5), it cannot be said that such an opinion reported by the Supreme Court and not rejected by His Majesty does not have any constitutional significance. In case any act is proceeded with or it is given an outlet on the basis of the opinion reported by the Supreme Court, later on it would not be proper to say from any angle that such an opinion has no constitutional base. It is also not proper to say that the process of constitutional development in regard to Article 127 of the present Constitution did not take place when His Majesty undertook suitable steps on the basis of the following opinion reported to His Majesty by a Special Bench comprising seven Justices, "If there arises a situation obstructing the implementation of any constitutional provision due to the failure to constitute any constitutional organ or institution or if a void or constitutional stalemate is created due to the failure of any constitutional mechanism to function as provided in the Constitution, the power of removing any obstacle or difficulty may be exercised to present such a situation by making suitable and necessary arrangements for its immediate resolution in order to activate the constitutional mechanism. The extra-ordinary power of removing any obstacle or difficulty may be exercised only if there was no constitutional or legal alternative to end the constitutional stalemate or void which has emerged unexpectedly. But if any obstacle or difficulty can be removed by a law enacted by Parliament or by promulgating an Ordinance by His Majesty when there is no Parliament, it will not at all be appropriate to resort to the exercise of Article 127 for this purpose by forming a false conception of the failure of the implementation of the Constitution." According to the provisions of the Constitution there can be no authoritative institution other than the Supreme Court in respect to the interpretation of the Constitution. In the event of His Majesty seeking an opinion of the

Supreme Court pursuant to Article 88(5) on any complicated legal question of interpretation of this Constitution, the opinion reported to His Majesty helps to resolve the question of constitutionality of the issue and, as such, such an opinion plays a significant role in the proper compliance with the Constitution and the process of constitutional development. Therefore, such an opinion carries a special significance in regard to the constitutional development. Therefore, it is not proper to say on the basis of superficial arguments that it does not have any significance.

As regards the plea of the respondents that an order issued under Article 127 needs to be first examined by Parliament, the Constitution does not seem to clarify the nature of the order issued pursuant to Article 127 whether it has got a constitutional or legal or statutory status or that of a by-law. It has been only provided that an order issued pursuant to Article 127 must be placed before Parliament. However, the Constitution has not specified the procedure of its presentation in Parliament. Rule 22 of the Joint Parliamentary Meeting and Joint Committee (Conduct of Proceedings) Rules, 2048 has provided: "The Prime Minister shall present, before the joint meeting, an order promulgated by His Majesty pursuant to Article 127 in order to remove any obstacle or difficulty in the implementation of the Constitution." No other provision seems to have been made in this regard. There is no indication about complying with any procedure such as holding discussion on the Bill in the Joint Committee or adopting the Bill as per Rule 12 or moving amendment to the Bill under Rule 13 or holding discussion or moving amendment in regard to an order issued under Article 127. This shows that the constitutional provision requires an order issued under Article 127 to be ordinarily presented before Parliament only for the purpose of its knowledge. Even though the impugned Order relating to the Formation of the Royal Commission is not of the nature of a Constitution or law or Ordinance, nevertheless the Royal Commission seems to be an institution which has acquired the powers of a court including the Special Court through the impugned Order. Therefore, the contention of the respondents is not acceptable that the impugned Order which is vested with a legal authority does not fall under the purview of Article 88(1) and (2) only because it has not been brought to the knowledge of Parliament.

On account of the grounds and reasons mentioned above the notification of the Chief Secretariat of His Majesty dated Falgun 5, 2061 (February 16, 2005) regarding the establishment of the RCCC and the Notification of the Chief Secretariat of His Majesty dated Baisakh 16, 2062 (April 29, 2005) in regard to giving continuity to that order do not seem to be in consonance with the objectives and spirit of Articles 84, 85, 88 (3), 98, 115 (7) and 127 of the Constitution of the Kingdom of Nepal, 1990.

Now to consider the question whether or not an order should be issued as requested by the petitioner, it appears from the above-mentioned grounds and reasons that the Order issued on Baisakh 16, 2062 (April 29, 2005) for the sake of giving continuity to the RCCC, established by the Order dated Falgun 5, 2061, is inconsistent with the Constitution of the Kingdom of Nepal, 1990 as it is contrary to the objectives and spirit of Articles 84, 85, 88 (3), 98, 115 (7) and 127 of the Constitution. Even though the Order relating to the Formation of the Commission and the Order giving continuity to the same are neither a Statutory Act in accordance with the provision of Article 71 nor a law in

accordance with an Ordinance issued as per Article 72 of the Constitution, the Royal Commission seems to have acquired all the powers exercised by an Investigation Officer in relation to corruption as per the prevalent law, the powers exercised by the Special Court as per the Special Court Act, 2059 and the powers equivalent to those exercised by the law courts in certain matters, and thus the impugned Orders appear to have granted such powers which could be given only by the law.

As the Order dated Falgun 5, 2061 (February 16, 2005) establishing the RCCC has become infructuous due to the withdrawal, pursuant to clause (11) of Article 115, of the Order declaring the state of Emergency on Baisakh 16, 2062 (April 29, 2005) issued earlier pursuant to Article 115 (1) of the Constitution of the Kingdom of Nepal, 1990, there is no need of declaring such an Order which has already become infructuous as 'ultra vires' or void'. Therefore, the currently active Order issued on Baisakh 16, 2062 (April 29, 2005) intending to give continuity to the Royal Commission, is hereby declared 'ultra vires' effective from today as per Article 88(1) of the Constitution of the Kingdom of Nepal, 1990.

Since the order issued on Baisakh 16, 2062 (April 29, 2005) to give continuity to the RCCC has been declared 'ultra vires' there is now no place for the continuing existence of the RCCC and, therefore, it is hereby declared annulled effective from today.

As on the basis of the grounds and reasons discussed above, the acts of establishing and subsequently giving continuity to the RCCC are unconstitutional due to their inconsistency with the provisions and objectives of the present Constitution, and as for this reason the Order promulgated on Baisakh 16, 2062 (April 29, 2005) giving continuity to the Order promulgated earlier on Falgun 5, 2061 (February 16, 2005) has been declared 'ultra vires', the act performed by such an unconstitutional commission cannot receive legal recognition. Therefore, the act of asking the petitioner to produce a security deposit to the tune of Rs. 51,00,000 .- as per Section 7(d) of the Special Court Act, 2002 on the basis of the unlawful proceedings conducted by the respondent Commission, and the order and the act of remanding him to judicial custody for his failure to deposit the bail amount, obviously appear to be unlawful and, hence, the writ of 'habeas corpus' is hereby issued. Because the petitioner has been already set free on the guarantee of the President of Nepal Bar Association Advocate Sambhu Thapa as per the order of this court dated Bhadra 28, 2062 (September 13, 2005), there is no need of further doing anything else.

Let the copies of this order be sent to the respondents through the Office of the Attorney General for their knowledge, and let the case file be handed over as per the Rule.

Meen Bahadur Rayamajhee

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{Justice}

We concur with the aforesaid opinion.

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{Justice}

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{Justice}

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{Justice}

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{Justice}

Done on day 1st of the month of Falgun, 2062 (February 13, 2006).