



**Supreme Court**

**Special Bench**

**Honorable Justice Kalyan Shrestha**

**Honorable Justice Girish Chandra Lal**

**Honorable Justice Sushila Karki**

**ORDER**

069-WS-0057

Subject: Appropriate order including the order in the nature of *mandamus* be issued

**Petitioners**

Advocate Madhav Kumar Basnet, General Secretary of Juri Nepal, a resident of Madhyapur Thimi Municipality-16 on behalf of Justice and Rights Organization (Juri- Nepal) 1

Advocate Bishnu Prasad Pokharel, Secretary of Juri Nepal, a permanent resident of Okharkot VDC-8 of Pyuthan district and currently residing at Kirtipur Municipality-2 of Kathmandu district on behalf of Justice and Rights Organization (Juri- Nepal) 1

**Versus**

**Respondents**

Honorable Chairperson, Government of Nepal, Interim Council of Ministers, Office of Prime Minister and Council of Ministers, Kathmandu 1

Government of Nepal, Interim Council of Ministers, Office of Prime Minister and Council of Ministers, Kathmandu 1

Honorable Minister, Ministry of Law, Justice, Constituent Assembly and Parliamentary Affairs, Singh Durbar, Kathmandu 1

Government of Nepal, Ministry of Law, Justice, Constituent Assembly and Parliamentary Affairs, Singh Durbar, Kathmandu 1

Honorable Minister, Government of Nepal, Ministry of Peace and Reconstruction, Singh Durbar, Kathmandu 1

Government of Nepal, Ministry of Peace and Reconstruction, Singh Durbar, Kathmandu 1

## Writ petition No 069-WS-0058

Subject: Issuance of Orders Including *Certiorari* and *Mandamus*

### **Petitioners**

Ram Kumar Bhandari, Chairperson of Committee for Social Justice, Simpani VDC-3 of Lamjung district	1
Suman Adhikari, Chairperson of Conflict Victims Orphan Society Nepal, a resident of Chandreshwor VDC-6 of Lamjung district	1
Bhagiram Chaudhari, Chairperson of Conflict Victim Society, Dhadhawar VDC-8 of Bardia district	1
Rupesh Shah, Chairperson of National Network of Families of Disappeared and Missing Nepal (NEFAD), Dumraha VDC-5 of Sunsari district	1
Gita Rasaili, Chairperson of Reena-Arpan Dalit Utthan Manch, Pokharichaur VDC-4 of Kavre district	1
Gyanendra Raj Aran, Chairperson of National Society for Conflict Victims Puranagaun VDC-5 of Ramechhap district	1
Prakash Chandra Shrestha, Central member of Conflict Victims Society for Justice (CVSJ), Tiplung VDC-9 of Ramechhap district	1
Srijana Shrestha Singh, Central member of Conflict Victims Society for Justice (CVSJ), Kirtipur Municipality-12 of Kathmandu district	1

### **Versus**

### **Respondents**

Hon'ble Chairperson, Government of Nepal, Interim Council of Ministers, Office of Prime Minister and Council of Ministers, Kathmandu	1
Government of Nepal, Interim Council of Ministers, Office of Prime Minister and Council of Ministers, Kathmandu	1
Government of Nepal, Ministry of Law, Justice, Constituent Assembly and Parliamentary Affairs, Singh Durbar, Kathmandu	1
Government of Nepal, Ministry of Peace and Reconstruction, Singh Durbar, Kathmandu	1
Honorable President, Office of President, Shital Niwas, Kathmandu	1
The Office of President, Shital Niwas, Maharajgunj, Kathmandu	1

### **Details of the Case:**

Brief facts of, and orders made in, these writ petitions filed under the extraordinary jurisdiction of this Court pursuant to clauses (1) and (2) of Article 107 of the Interim Constitution of Nepal, 2007, are as follows:-

### **Facts of Writ Petition No. 069-WS-0057:**

We, Juri Nepal, one of the petitioners, are a social organization established for making the Nepalese society to be based on rule of law and good governance; and we, the petitioners, are Advocates, also actively engaged for a long time in protection of human rights, and promotion of rule of law good governance. The comprehensive peace accord was concluded with the objectives of ending a decade-long armed conflict and maintaining lasting peace in the country. The current Interim Constitution of Nepal has been promulgated according to the peace accord. The obligation to form a Truth and Reconciliation Commission for developing the culture of rule of law and accountability having eliminated the present state of impunity and to find out truth as to the citizens forcedly disappeared in the course of the conflict is created by the Interim Constitution of Nepal. In addition, the state was directed by directive orders of this Court to ensure transitional justice. As provided for in the Interim Constitution of Nepal and the Comprehensive Peace Accord, the Bill for providing for Truth and Reconciliation Commission and the Bill against enforced disappearance were submitted in the Legislature-Parliament after having incorporated the comments and concerns expressed through consultation with the stakeholders. Instead of enacting laws with necessary modifications taking into account of the amendment proposals submitted in the Legislature-Parliament and outside discussions, it is reported from the press release of the Office of the President that the President on 2069-12-1 authenticated the Ordinance endorsed by the Council of Ministers which was prepared in non-transparent and vague manner.

Though the Preamble to the Ordinance states that it has been issued with the objective of ending impunity, the Ordinance has stressed on granting amnesty in serious crimes and immunity from criminal accountability. Section 23(1) of the Ordinance states, "in case the Commission deems it appropriate to grant amnesty to the perpetrator while investigating under this Ordinance, it shall make recommendation to Government of Nepal showing adequate reasons and bases." The Ordinance is silent as to what "adequate reasons and bases" means. Since section 40 of the Ordinance has delegated powers to frame Rules to the Commission itself, it seems that discretion of the commission has to be regarded as the "adequate reasons and bases"; therefore, this clause is vague in an uncontrollable manner. The impugned clause of the Ordinance had to be invalidated based on the doctrine of vagueness as well.

Though sub-section (2) of section 23 provides, "notwithstanding anything contained in sub-section (1), the Commission shall not make recommendation for granting amnesty to the perpetrators engaged in serious crimes including rape for which there are no adequate reasons and bases for granting amnesty from inquiry of the Commission, however, this clause only mentions about rape and opens other offences to the wide and uncontrolled discretion of the Commission again. The Ordinance does not offer any guidance as to what "adequate reasons and bases" include, and leaves the room for interpretation open thereby the doors for granting amnesty even in serious cases that are not liable for amnesty are open.

Sub-section (4) of section 23 provides, "in case any application is filed pursuant to sub-section (3) for amnesty, the Commission may, before making decisions as to granting amnesty to such person, have consultation with the victim on that matter." One of the fundamental bases for granting amnesty is the satisfaction of victim. A perpetrator has to ask for amnesty with the victim and not with the Commission. In this sense, the Commission is only a facilitating and process-completing mechanism. Therefore, the provision would have to be that the perpetrator has to ask the victim for amnesty and the Commission to record the amnesty so granted. Therefore, granting discretionary powers to the Commission either to consult or not to consult the victim while granting amnesty to the perpetrator is against the principle of transitional justice.

Similarly, section 25(1) provides, "the Commission may recommend for taking actions as per prevailing laws against the perpetrators who have not been recommended for granting amnesty pursuant to section 23 while inquiring by the Commission under the Ordinance". On the one hand, section 23 is incomplete and vague in itself, while on the other, the words "as per the prevailing laws" have further made the provisions of section 23 meaningless. The prevailing laws will not be enough for taking actions against the offences of violations of human rights committed during the conflicts, thus, more laws have to be enacted.

The amnesty-oriented provisions of the Ordinance are against International law, the established values, and Nepalese constitutional and jurisprudential positions. Nepal is a party to most of the important human rights Conventions including the International Covenant on Civil and Political Rights and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Moreover, it is a party to the International humanitarian law (Geneva Conventions). Under the international human rights laws, everyone aggrieved is entitled to have effective legal remedy against violations of rights or freedoms. This right is mainly secured by Article 8 of the Universal Declaration of Human Rights; Article 2 of the International Covenant on Civil and Political Rights; Article 14 of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment; Article 39 of the Convention on Rights of the Child; Article 91 of the Additional Protocol of the Geneva Conventions, 1949 and Articles 68 and 75 of the Rome Statute of the International Criminal Court. Some of the latest instruments of human rights have clearly defined this right and have provided ample guidance as to ensuring justice and reparation. The impugned clauses of the Ordinance are in utter disregard of the aforesaid provisions.

Some international and regional courts have passed some significant judgments having internalized the values enshrined in international human rights laws. In the case of *Borjous Altos* (serial C No. 75 (2001) IACHR 5 (March 14, 2001), the Inter-American Human Rights Court rejected two amnesty laws of Peru (No. 26479 and 26429) declaring them against the American Human Rights Convention and has declared that in case of serious violations, all measures for amnesty and pardons will be rejected. Similarly, in the case of *Rodriguez v. Honduras* (July 29, 1988), it has been laid down that the legal obligation to investigate and punish violations of laws rests with the state.

It is inevitable to consider the linkage of the aforesaid international legal values with the national law as well. Article 33 (e) of the Interim Constitution of Nepal, 2007 casts the constitutional duty for effective implementation of international treaties and agreements to which the state is a party. In addition, section 9(1) of the Nepal Treaties Act, 1991 provides that the provisions of Nepal laws which are inconsistent with the provisions of the treaties to which Nepal is a party will be invalid and the provisions of the treaties will prevail. The right to descent living (Article 12), right to equality (Article 13), right against torture (Article 26) and the right to constitutional remedies (Article 32) apply continuously, irrespective of war time or an emergency.

Compliance of the order of this Court issued (on 2064-2-18) in the case of *Rajendra Dhakal* to criminalize and penalize the act of enforced disappearance and to form a separate Commission in case of the disappeared persons has been ignored. We humbly request the Court that there is no situation of legitimacy and credibility of the impugned provisions of the Ordinance, which has been issued concealing the main stakeholders of the transitional justice, namely the victims and civil society, in deceitful manner. Since there is the condition of denial of justice within the country, it appears that universal jurisdiction is attracted and prosecutions could be made outside Nepal. In this circumstance, we have come to the Court bringing an issue of public concern that the framework of law relating to transitional justice has to be strengthened based on the Interim Constitution of Nepal and the treaty obligations of Nepal and the ways for legitimate course of justice be paved within the country.

Therefore, if the clause "adequate reasons and bases for granting amnesty from inquiry of the Commission" is separated from the provision of section 23 (2) of the Truth and Reconciliation Commission Ordinance, "notwithstanding anything contained in sub-section(1), the Commission shall not make recommendation for granting amnesty to the perpetrators engaged in serious crimes including rape for which there are no adequate reasons and bases for granting amnesty from inquiry of the Commission" from the remaining text based on the doctrine of severability, the remaining provisions could not give any meaning; we do hereby request to declare the whole provision of sub-section (2) of section 23 of the Ordinance as unconstitutional and invalid. Similarly, if only the clause "as per the prevailing law" appearing in sub-section (1) of the impugned section 25 is declared invalid and void, the sub-section could not give any meaning, thus, this clause also be declared invalid and *void ab initio*.

Since mere formation of the Truth and Reconciliation Commission without declaring the serious violations such as genocide, war crimes, crimes against humanity, enforced disappearance and torture as criminal offences as per international obligation and providing for punishment as per the seriousness of the offences could not ensure justice within the country, necessary order of *mandamus* be issued for making necessary law having considered the decisions of this courts in the past on transitional justice. Having considered the activities of the respondents, they are likely to implement the Ordinance immediately and if they acted on as per the impugned provisions, it would be meaningless for the petitioners to appear before this Court, thus, an interim order be issued in the

name of the respondents not to implement the impugned provisions for the time being pursuant to Rule 41 of the Supreme Court Rules, 2049 and since this subject is very sensitive and one to be decided very soon, the day for hearing be specified and the hearing be initiated asking the respondents to send written replies.

**Contents of the Order issued by this Court in the Writ Petition No. 069-WS-0057**

A Single Bench of this Court issued an order on 2069-12-19 asking the respondents as to why not to issue the order prayed for and to submit their written relies within 15 days excluding the time required for journey through the Office of the Attorney General and having regard to the seriousness of the issues raised by the petitioners, as the petitioners have claimed that provisions made in sections 3, 23, 25 and 29 of the Truth and Reconciliation Commission Ordinance are against Articles 12(1), (2), Article 13(1), and Article 26 of the Interim Constitution of Nepal, therefore, an interim order is issued pursuant to Rule 41(1) of the Supreme Court Rules, 2049 not to implement the said provisions for the time being; and asking the respondents and the petitioners to appear before the Court on 2070-1-4 to have discussions whether or not this interim order be continued.

**Contents of separate written replies submitted by the Peace and Reconstruction Minister Mr. Ram Kumar Shrestha and Secretary Mr. Dharanidhar Khatiwada on the Writ Petition No. 069-WS-0057:**

Since our country underwent prolong armed conflict, peace accord was concluded between Government of Nepal and the then Communist Party of Nepal (Maoists) and the Interim Constitution of Nepal, 2007 has provided the formation of Truth and Reconciliation Commission as one of the state obligations. Since it was necessary to settle the incidents of violations of human rights in the course of armed conflicts as soon as possible and as the Bill on it was submitted to the then Legislature-Parliament but the Legislature-Parliament was dissolved without passing the Bill, the Bill could not have been made as a law. Since it was expedient to make legal provisions as to formation of a transitional justice judicial mechanism but the Legislature-Parliament was not in existence, the Council of Ministers on 2069-11-30 made recommendation to the President to issue the Truth and Reconciliation Commission Ordinance, 2069 and accordingly, the President issued the Ordinance on 2069-12-1.

With regard to the claim of the petitioners that the provisions of section 23 (1) is uncontrollably vague, the sub-section provides, the Commission may make recommendation to Government of Nepal for granting amnesty to the perpetrator if it finds appropriate to grant amnesty while conducting inquiry as per the Ordinance.” While interpreting this clause, it must be interpreted in totality including the Preamble to the Ordinance and other legislative scheme. Preamble is also one of the parts of the Ordinance or Act and while interpreting a law or Ordinance, recourse should be had to the Preamble as well. It is illogical to doubt and to presume the independent, competent and impartial Commission, which has to be formed on the recommendation of the recommendation committee comprising of independent and impartial persons as provided for sub-section (3) of section 3 of the Ordinance, will act in such a manner as to promoting impunity or granting amnesty in the cases of serious violations of human rights and immunity from criminal liability. On the question what includes serious violations of human rights, clause (k) of section 2 of the Ordinance defines to include murder, kidnapping and hostage-taking, disappearance, maiming and mutilation, physical or mental torture, rape and sexual violence, looting, possessing, destruction, arson of private or public property; forced evacuation from house and land or other form of forced displacement or any act committed in violation of international law or international humanitarian law or crimes against humanity; thus, the Ordinance seems to have included substantial norms and values of international law. The provisions of sub-sections (1) and (2) of section 23 of the Ordinance must be read together with the provision of clause (k) of section 2. It would be totally against the overall objective and scheme of the Ordinance to claim that provisions of sub-sections (1) and (2) of section 23 have paved the way for amnesty to the persons engaged in serious violations of human rights. The use of the term of “if found appropriate for amnesty to the perpetrator upon showing the bases and reasons” in sub-section (1) of section 23 does not necessarily means that the Commission may grant amnesty to each and every type of incident of crime. No section of the Ordinance has empowered the Commission to grant amnesty to the perpetrators even in the cases of serious violations of human rights. Sub-section (1) of section 23 only authorizes the Commission to make recommendation for amnesty in the cases other than serious violation of human rights, if there are adequate bases and reasons. No section including section 23 of the Ordinance does provide for granting amnesty in the cases of serious violation of human rights and sub-section (1) of section 23 only indicates that even for the cases, other than those pertaining to serious violation of human rights, adequate reasons and bases are required for the Commission to make recommendation for amnesty. So far as the question as to what “adequate reasons and bases” constitutes is not enshrined in the Ordinance is concerned, the bases and criteria

are to be stated in the Rules to be framed under the power of section 40 and the said power has been entrusted to the Commission itself, therefore, the said provision cannot be claimed to be excessive delegation of powers.

Since the Commission does not have powers to grant amnesty in cases of serious violation of human rights as defined in clause (k) of section 2, and in such cases the Commission has to write to the Attorney General for filing prosecution by virtue of the provision of sub-section (3) of section 25 of the Ordinance, thus, there is no rationale for declaring the said clause contained in sub-section (2) of section 23 to be void. With regard to the claim of the petitioners that the provision of section 23 (4) which reads, "prior to making recommendation by the Commission pursuant to Sub-section (1), such person shall be required to submit an application in writing for amnesty to the Commission by repenting for the misdeeds carried out by himself/herself during the armed conflict to the satisfaction of the victim within a time period as prescribed by the Commission" is against the principles of transitional justice, sub-section (2) of section 22 provides that while making reconciliation between the victim and perpetrators, the Commission may cause the perpetrator to repent and beg a pardon from the victim. This provision clearly indicates that no reconciliation is possible without satisfaction of victim. Moreover, the provision of amnesty made in section 23 has to be read together with the provision of reconciliation made in section 22. There seems no situation where the Commission may grant amnesty unless and until the reconciliation is reached between the victim and perpetrator and the perpetrator begs a pardon from the victim. Satisfaction of the victim is necessary element for amnesty. Provision of sub-section (4) of section 23 applies only after begging a pardon by the perpetrator from the victim. Even in cases where the perpetrator has begged a pardon from the victim, it would not be appropriate to grant amnesty in some special circumstances from the perspectives of greater public interests and justice, provision of sub-section (4) must not be seen absolutely; therefore, there is no ground for the provision of the said sub-section to be declared void.

So far as the claim of invalidity of sub-section (1) of section 25 providing that the Commission may recommend for taking actions as per the prevailing laws against those perpetrators who have not been recommended for amnesty has completely blocked the way of making new laws, thus the said clause has to be invalidated is concerned; the clause "as per the prevailing law" does not necessarily means the law in force at the time of issuance of the Ordinance. Since human rights principles have been developed in the international law to apply universal jurisdiction in the cases of serious violations of human rights and in the crimes against humanity even by making the *ex post facto* laws and since the current laws are not sufficient for criminalizing the acts of enforced disappearance, therefore, the Supreme Court issued directive order in the name of Government of Nepal to make new law in the case of *Rajendra Dhakal v. Government of Nepal*. Section 27 of the Ordinance has raised the possibility of enacting new laws in addition to the current laws to bring the persons engaged in serious violation of human rights or in crimes against humanity to justice. Similarly, clause (d) of sub-section (2) of section 28 of the Ordinance provides that it shall be the responsibility of Ministry of Peace and Reconstruction to make laws for implementation of the report of the Commission. Therefore, there is no logic or justification to declare the clause *as per the prevailing law* appearing in sub-section (1) of section 25 is based on the misleading arguments of the petitioners.

The petitioners have raised the question as to the legality and credibility of the same Commission where separate commission have to be formed for finding truth of the disappeared persons and another Truth and Reconciliation Commission for reconciliation. The question of formation of a single Commission or separate commissions is not a constitutional or legal question; rather it is a policy issue or managerial issue.

So far as the petitioner's claim of issuance of the order of *mandamus* to make laws for criminalizing genocide, war crimes, crimes against humanity, enforced disappearance and torture and providing for penalty for them as per the gravity of the offences is concerned, there is no doubt that the obligation to criminalize serious violation of human rights and crimes against humanity and to ensure the right of the victim to get justice are state obligations. Nepal has already become a party to the Geneva Conventions, 1949, which regulate the crimes of genocide, war crimes and crimes against humanity and Nepal is also a party to the Convention against Torture, 1948. The act of formulation of the Bill made for implementation of the Geneva Conventions is at the final stage, while the Bill for Control of Tortures, 2011 was submitted to the then Legislature-Parliament. Moreover, the Penal Code Bill, 2010, which criminalizes the act of enforced disappearance and other acts was submitted to the then Legislature-Parliament.

Therefore, since the Ordinance does not contain any provision for absolute amnesty in case of serious violation of human rights and crimes against humanity; since the Ordinance has ensured independence, autonomy and competency of the Commission; since one needs to have a holistic view while interpreting a clause; since the

Ordinance has not granted powers to the Commission to make recommendation to the Government of Nepal for granting amnesty even in cases of serious violation of human rights and crimes against humanity; since the Ordinance requires the perpetrator to beg a pardon from the victim in satisfactory manner before granting amnesty; and since the Ordinance has not controlled the powers of the state to enact laws for criminalizing and penalizing the serious violation of human rights and crimes against humanity; therefore, the writ petition based on the false and misleading arguments needs to be quashed.

**Contents of separate written replies submitted by the Minister of Law, Justice, Parliamentary Affairs and Constituent Assembly Mr. Hari Prasad Neupane and Secretary Mr. Bhesh Raj Sharma on the Writ Petition No. 069-WS-0057:**

As provided for in clause (s) of Article 33 of the Interim Constitution of Nepal, 2007 and Para 5.2.5 of the Comprehensive Peace Accord, the Bill to provide for Truth and Reconciliation Commission and the Bill to provide for Commission on Investigation of the Disappeared Persons were drafted and submitted to Legislature-Parliament for maintaining lasting peace having resolved conflict in the country; however, as the term of the office of the Legislature-Parliament was expired *ipso facto*, therefore, the Ordinance concerning the Commission for Investigation of the Disappeared Persons, Truth Finding and Conciliation has been issued by the President on 2069-12-1 as recommended by the Government of Nepal (Council of Ministers) to issue the Ordinance pursuant to clause (1) of Article 88 of the Constitution.

Since clause (k) of section 2 of the Ordinance clearly defines “serious violations of human rights” and the said definition includes various crimes including rape, therefore the terminologies “including rape” referred to in sub-section (2) of section 23 also includes all types of serious violations of human rights as defined above. Therefore, it is illogical to claim that discretionary powers have been prioritized for the use of the terms “including rape” and the door for amnesty is open even for the serious offences which are not liable for amnesty.

So far as the claim of the petitioner that as sub-section (4) of section 23 of the Ordinance provides, “in case of application for amnesty pursuant to Sub-section (2), the Commission may, prior to deciding in relation to make recommendation or not for amnesty to such person, consult the victim as per need in such matter”, thus, the Ordinance grants discretionary powers to the Commission whether or not to consult the victim before granting amnesty to the perpetrator is concerned; since the very purpose of the Ordinance is to find truth as to the persons disappeared in the course of the armed conflict and serious violations of human rights and other incidents of crimes against humanity and to come up with truth as to the actual facts about the persons engaged in such incidents, and to promote the atmosphere of mutual good faith and tolerance having made reconciliation between victims and perpetrators; therefore, it would not be justifiable to presume that the independent and autonomous Commission to be formed as per the Ordinance would not consult the victims before making recommendations on sensitive and important issue of granting amnesty. Moreover, reading of the provisions of section 25 concerning amnesty proceedings in totality, for the proceedings of amnesty to be initiated, the perpetrator has to submit application, he/she has to accept serious violations of human rights, he/she has to disclose all facts relating to it and to repent with the victim in a satisfactory manner. Therefore, the Ordinance does not have presumed a situation of granting of amnesty in absence of consultation with and consent of the victim, thus, the claim of the petitioners that the Commission has power even not to consult the victim before granting amnesty to the perpetrators is false and misleading.

So far as the claim of the petitioner that provision of sub-section (1) of section 25 providing that the Commission may recommend for taking actions as per the prevailing laws against those perpetrators who have not been recommended for amnesty has completely blocked the way of making new laws, thus the said clause has to be invalidated is concerned; this Ordinance itself has stressed on the need and possibility of making new laws to end impunity by bringing to justice the perpetrators engaged in serious violations of human rights and crimes against humanity. Clause (g) of sub-section (1) of Section 27 of the Ordinance provides that if there is the need of making laws for implementation of report of the Commission, the Commission has to make report of the same to Government of Nepal and clause (d) of sub-section (2) of section 28 of the Ordinance provides that it shall be the responsibility of Ministry of Peace and Reconstruction to make laws for implementation of the report of the Commission. These provisions do not close the ways for making new laws rather they have widen the ways to make laws, thus, the writ petitions have to be quashed.

**Contents of written replies submitted by Mr. Khilaraj Regmi, Chairperson of the Council of Ministers of Government of Nepal on his behalf and on behalf of the Office of Prime Ministers and Council of Ministers on the Writ Petition No. 069-WS-0057:**

On behalf of the Office of Prime Ministers and Council of Ministers, the chairperson of the Council of Ministers filed the written replies stating that since the said Ordinance has been issued upon recommendation of the Council of Ministers before formation of the current Council of Ministers under his chairpersonship on 2069-12-, therefore, there is no reason and basis for him to be made respondent alleging that the draft of the Ordinance has been prepared in deceitful and non-transparent manner by the Council of Ministers and sent to the President for assent. It is not logical and justifiable to doubt and presume that the independent and impartial Commission would act in such a manner as to promoting impunity or granting amnesty in serious violations of human rights and immunity from criminal liability. It could not be expected theoretically and practically as well to have all provisions included in an Act or Ordinance as necessary measures may be made in the Rules to be framed under the delegated authority of the Act or Ordinance. There seems no situation that the Commission may make recommendation for granting amnesty to the perpetrator unless and until an understanding is developed between the victim and perpetrator and the perpetrator begs a pardon with the victim. The present Ordinance has stressed on the need and possibility to make additional laws for ending up impunity by bringing the persons engaged in serious violations of human rights or crimes against humanity to justice.

The issue of formation of a single Commission or separate commission is not a constitutional or legal question; rather it is a policy issue or managerial issue. Far more important than single or separate Commission is the issue of commitment to independence, competency and autonomy of the Commission and to see whether or not the Commission is competent enough or has the mandate to carry out its functions effectively. Since the Ordinance has made due provisions for independence, competency and autonomy of the Commission and has provided for adequate measures for its functions, duties and powers, thus, there is no need to mention more on such claim of the petitioners. There is no doubt as to the obligation of the government to criminalize serious violations of human rights or crimes against humanity and to ensure right to justice to the victims. It is a matter of common knowledge to the Court as well that there is no Legislature-Parliament at present and the current Council of Ministers has been formed with specific tasks in the special circumstance. There is no reason for him and the current Council of Ministers to disagree with the petitioners as to the need of enactment of laws on the matters raised by them.

Since the Ordinance does not contain any provision for absolute amnesty in case of serious violation of human rights and crimes against humanity; since the Ordinance has guaranteed independence, autonomy and competency of the Commission; since there is the need to have a holistic view while interpreting a clause; since the Ordinance has not granted powers to the Commission to make recommendation to the Government of Nepal for granting amnesty even in cases of serious violation of human rights and crimes against humanity; since the Ordinance requires the perpetrator to repent with the victim in satisfactory manner before being recommended for granting amnesty; and since the Ordinance has not controlled the powers of the state to enact laws for criminalizing and penalizing the serious violation of human rights and crimes against humanity; nor could any Ordinance ban the state to make laws in the future; therefore, there is no reason for the Court to issue the order requested by the writ petition based on the false presumptions and misleading arguments; and since the concerns and issues raised by the petitioners have been well-addressed by the Ordinance, the writ petitions needs to be quashed.

**Contents of Writ Petition No. 069-WS-0058:**

We are survivors of victims of conflict directly affected by the past armed conflicts. According to a notification published in the Nepal Gazette, Part 62, dated 2069-12-1, we came to know about the authentication and issuance of the "Ordinance on Commission on Investigation of Disappeared Persons, Truth and Reconciliation, 2069" by the President on the recommendation of the Government of Nepal (Council of Ministers). Since we are the victims, members of families of the victims and advocates engaged in this field, we have direct concerns and interests in this matter.

It is known to all that Sections 5.2.3 and 5.2.5 of the Comprehensive Peace Accord concluded on November 21, 2006 visualizes the need of Truth and Reconciliation Commission and Commission on Disappearance; similarly, clauses (q) and (s) of Article 33 of the Interim Constitution of Nepal, 2007 also have stated as to these matters and the Supreme Court has also highlighted the need of formation of Truth and Reconciliation Commission for

settling disputes of human rights violation and crimes committed during the conflict period. Though the government has made efforts to make laws on enforced disappearance and on Truth and Reconciliation Commission right from the year 2007, and the Council of Ministers decided on 2066-7-12 and on 2066-8-19 to introduce those Bills in the Legislature-Parliament and the Ministry of Peace and Reconstruction introduced the Bills to the House in the same year, however, the Ministry of Peace and Reconstruction had filed a resolution to withdraw those Bills in the month of Jestha of the year 2069 before the Legislature-Parliament was dissolved. Meanwhile, the Constituent Assembly was dissolved on 14<sup>th</sup> of Jestha of 2069 and the Legislature-Parliament was also dissolved and the Bills under consideration of the Legislature-Parliament were inactivated *ipso facto*.

For the last six years after conclusion of the Comprehensive Peace Accord, the Commission had to be formed addressing the voices being vociferously raised by the victims for investigation into truth, and vindication of justice and reparation to the victims, however, the President has authenticated and issued the Ordinance on 2069-12-1 on the recommendation of the Council of Ministers even without any discussions and consultation with the victims, human rights organizations and civil society with a view to grant amnesty to those involved in gross violation of human rights as defined in the international humanitarian law. The said Ordinance has eliminated all possibilities of securing justice to the victims and members of their families which undermines the rule of law and creates mistrusts to the system of justice and it is clear that it has severely affected the rights and interests of the victims.

The then Government of Nepal had framed and introduced in Legislature-Parliament the Bill on Truth and Reconciliation Commission and Bill on disappearance as per the letter and spirit of the Comprehensive Peace Accord and the Constitution; and according to the Comprehensive Peace Accord, Interim Constitution of Nepal, 2007 and order of the Supreme Court, the Truth and Reconciliation Commission and Commission on Investigation of Disappeared Persons; however, the impugned Ordinance establishing single Commission is invalid as it is inconsistent with clauses (r) and (t) of Article 33 of the Constitution. Clause (a) of section 13 (1) of the Ordinance provides that one of the functions of the Commission is to bring facts before the public by investigating "serious violations of human rights" and clause (k) of section 2 of the Ordinance delimits the incidents by giving a list of the "serious violations of human rights." From this, other violations of human rights will be out of the jurisdiction of the Commission and section 13 is incomplete which denies, delimits and narrows down the right of victims to secure justice. Therefore, an order of *mandamus* be issued to ascertain the jurisdiction of the Commission to investigate into all incidents of violation of human rights committed in the course of armed conflicts as per the recognized principles of transitional justice, by setting aside the said provisions of the Ordinance.

Section 23 (1) of the Ordinance provides, "while carrying out investigation pursuant to the Ordinance, the Commission may, if deemed reasonable for amnesty to perpetrator, make recommendation to the Government of Nepal explaining sufficient grounds and reasons thereof." This clause has created a condition of granting amnesty even to the crimes of serious nature committed in the course of the past conflict. This has violated the provisions contained in Article 2(2) of the International Covenant on Civil and Political Rights, Article 2 (c) and (d) of the Genocide Convention, Article 4 of the Convention on Rights of the Child, and Article 2(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. By virtue of the state obligation enshrined in the United Nations Resolution No. 147, jurisprudence has emerged at international level that if any of the rights under the Convention is violated, the state has the obligation to prevent it, to investigate into it and to punish against those found guilty. The provision made in section 23 (1) of the Ordinance has entrusted powers to the Commission to grant amnesty even in the serious violations of human rights, thus, the said section has violated the right guaranteed by international law. By virtue of section 9(1) of the Nepal Treaty Act, 1991, a treaty provision is applicable as a Nepal law. In addition, the Supreme Court in the case of *habeas corpus* involving *Rabindra Dhakal* on behalf of *Rajendra Dhakal v. Ministry of Home Affairs* has clearly laid down that those found guilty in the case of enforced disappearance could not be granted amnesty nor pardon. Principle No. 10 of the United Nations Basic Principles on Right to Remedy and Reparation for the victims of Widespread Violations of International Human Rights and International Humanitarian Law provides that to the extent possible, the state has to make special measures and care in the course of securing justice and reparation to the victims that he/she is not subjected to embarrassment again and to get additional advantages. Therefore, the said provision of section 22 of the Ordinance be invalidated and an order be issued requiring to take compulsory consent of the victim.

Section 29 (1) of the Ordinance provides, “the Attorney General or a Government Attorney designated by him shall, after necessary investigation, decide on the matter whether a case may be prosecuted or not against any person, if the Commission itself or the Ministry writes to it based on the report of the Commission to initiate a case against any persons who were found guilty on allegation of serious human rights violations.” It shows that the Attorney General or a Government Attorney will decide whether or not to file a case not on the recommendation of the Commission but only on the recommendation of the Ministry of Peace and Reconstruction. This provision of the Ordinance has degraded the Attorney General from its constitutional roles and for being inconsistent with Article 135; such a provision is liable to be invalidated.

In addition to the above, section 29 (4) of the Ordinance provides, “if the Attorney General or a Government Attorney designated by him decides to prosecute pursuant to Sub-section (1), case may be filed within thirty five days of such decision notwithstanding anything contained in any other existing law.” On the one hand, this provision has violated the internationally recognized principle that there will be no statute of limitations to file cases of serious violations of human rights and on the other hand, it is next to impossible to complete investigation and file the hundreds of cases within the short span of thirty five days. Principle No. 4 of the United Nations Basic Principles on the Right to Remedy and Reparation provides, “Where so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law.” Therefore, the provision made in sub-section (4) of section 29 is liable to be invalidated.

Clause (s) of the Interim Constitution of Nepal, 2007 provides for establishing a high-level Truth and Reconciliation Commission to investigate the facts about those persons involved in serious violations of human rights and crimes against humanity committed during the course of conflict while Article 33 (m) provides for effective implementation of the international treaties and agreements to which the State is a party. Under this obligation, the state is under a duty to criminalize genocide, crimes against humanity, war crimes, enforced disappearance and to penalize the persons found guilty as provided for in the Geneva Convention, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and International Covenant on Civil and Political Rights to which Nepal is a party, however, the Ordinance provides for “taking actions as per the prevailing laws” without penalizing such persons in such crimes and thereby granting amnesty, thus, section 25 (1) of the Ordinance is liable to be invalidated.

Article 12 of the Interim Constitution of Nepal, 2007 guarantees the right to freedom; Article 13 guarantees the right to equality; and Article 24 secures the right to Justice which in Article 24(9) provides that everyone has the right to fair trial from a competent Court or judicial body. Similarly, Article 26 provides for right against torture. Article 6 of the International Covenant on Civil and Political Rights, 1966 to which Nepal is a party, provides, “every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” Article 7 of the same covenant provides, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Article 12 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides, “each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction’ and Article 13 of the same provides for protection from degrading treatment or threat.

It is inevitable that the issued Ordinance will derail the Commission to act in the significant process of finding truth and securing justice to victims. We are the persons amongst thousands of those victims, their families and other victimized in the course of the armed conflicts going to the proposed Commission demanding for finding the truth and securing justice and reparation, who have right to remedy in case of violation of the constitutionally protected rights and a series of rights guaranteed by the various international treaties and agreements and standards, which even secure the right to seek effective remedies in case of violation of those rights. The perpetrator-centric provisions which, in the name of granting remedies to the victims, offer amnesty and other remedies to the perpetrators; reparation to be defined as facility provided rather than right of victims; victims to be forced to enter into reconciliation; granting powers to the Attorney General to decide whether or not to file a case instead of ensuring prosecution in the future, will prevent the course of enforcing the right to remedies of the victims. Not only are the provisions of the Ordinance ineffective, irrational and erroneous, they, if enforced as such, will result in further victimization of the victims.

Based on the facts, laws, evidences enumerated in the foregoing paragraphs and precedents laid down by the esteemed Supreme Court in the various cases, the Ordinance issued as a political bargain in utter disregard of the provisions made in Articles 12(1), 13 (1) and 24(9) of the Interim Constitution of Nepal, 2007 will act only as a tool of further victimization by granting amnesty to the perpetrators of serious violations of human rights and other heinous crimes, therefore, sections 13, 23, 25 and 29 of the Ordinance for formation of the Truth and Reconciliation Commission be declared invalid having issued an order of *certiorari* pursuant to Articles 107 (1) and (2) of the Interim Constitution of Nepal, 2007 and an order of *mandamus* or other appropriate order be issued to amend to the impugned law.

In addition to invalidating the said sections of the Ordinance, a directive order be issued to formulate and enact a law within three months based on a report of a taskforce comprising of human rights activists and experts in the field of transitional justice to make recommendations of law reform for ensuring finding of truth, securing justice and reparation to the victims and for effective remedies and ensuring prosecution of the persons engaged in serious violations of human rights taking into account the need of formation of an independent, impartial and competent mechanism like Truth and Reconciliation Commission taking into account the gender sensitive aspects of the issues and to have wider consultation and discussions in this areas. Moreover, until the final decision of this writ, an interim order be issued in the names of the respondents not to form the Commission as provided for in the Ordinance. Moreover, being an issue of urgent public issue, this writ be accorded priority in hearing as the formation of the Commission as transitional justice mechanism is of very importance and to settle the case as soon as possible.

**Contents of the Order issued by this Court in the Writ Petition No. 069-WS-0058**

A Single Bench of this Court issued an order on 2069-12-19 asking the respondents as to why not to issue the order prayed for and to submit their written relies within 15 days excluding the time required for journey through the Office of the Attorney General and having regard to the seriousness of the issues raised by the petitioners, as the petitioners have claimed that provisions made in sections 3, 23, 25 and 29 of the Truth and Reconciliation Commission Ordinance are against Articles 12(1), (2), Article 13(1), and Article 26 of the Interim Constitution of Nepal, therefore, interim order is issued pursuant to Rule 41(1) of the Supreme Court Rules, 2049 not to implement the said provisions for the time being; and asking the respondents and the petitioners to appear before the Court on 2070-1-4 to have discussions whether or not this interim order be continued.

**Contents of separate written replies having the same contents submitted by Mr. Khilraj Regmi, Chairperson of the respondent Interim Council of Ministers, Office of the Prime Minister and Council of Ministers; and by the Secretary Mr. Dharanidhar Khatiwada on behalf of Ministry of Peace and Reconstruction on the Writ Petition No. 069-WS-0058:**

Since our country underwent prolong armed conflict, the comprehensive peace accord was concluded between Government of Nepal and the then Communist Party of Nepal (Maoists) and the Interim Constitution of Nepal, 2007 has provided the formation of Truth and Reconciliation Commission as one of the state obligations. Since it was necessary to settle the incidents of violations of human rights in the course of armed conflicts as soon as possible and a Bill on it was submitted to the then Legislature-Parliament but the Legislature-Parliament was dissolved without passing the Bill, the Bill could not have been made as a law. Since it was expedient to make legal provisions as to formation of a transitional justice judicial mechanism but the Legislature-Parliament was not in existence, the Council of Ministers on 2069-11-30 made recommendation to the President to issue the Truth and Reconciliation Commission Ordinance, 2069 and accordingly, the President issued the Ordinance on 2069-12-1. Since the said Ordinance has been issued upon recommendation of the Council of Ministers before formation of the current Council of Ministers under his chairpersonship on 2069-12, therefore, there is no reason and basis for him to be made respondent alleging that the draft of the Ordinance has been prepared in deceitful and non-transparent manner by the Council of Ministers and sent to the President for assent. Thus, it is a *prima facie* requirement that the writ petitions be quashed.

With regard to the claim of the petitioners that the provision of section 13 stating about mandate of the Commission to investigate into the disappeared persons in the course of conflict and finding of truth as to the serious violation of human rights and bring the facts to the general public, the Commission is not provided with powers to investigate all cases of human rights violations, thus, the right of victims to receive justice is infringed, the definition made in clause (k) of section has to be taken into consideration. According to clause (k), serious violation of human rights include murder, kidnapping and hostage-taking, disappearance, maiming and

mutilation, physical or mental torture, rape and sexual violence, looting, possessing, destruction, arson of private or public property; forced evacuation from house and land or other form of forced displacement or any act committed in violation of international law or international humanitarian law or crimes against humanity.

The aforesaid definition seems to be very wide. This definition includes any act committed against international human rights law, international humanitarian law of a crime against humanity as defined in the international human rights instruments to which Nepal is a party and principles and standards of customary international law are applicable to it. The writ petitioners have failed to show with reasons and justification as to how and why the definition referred to in the clause (k) is narrowed or what types of offences it has not included in its definition or it is against international principles or norms. Thus, the claim of the petitioners seems to be baseless. So far as the claim of the petitioners that by virtue of the provision of clause (a) of sub-section (1) of section 13, the Commission could not investigate into all incidents of human rights violations and thereby the right of the victims to get justice is infringed, violation of human rights is not justifiable in whatsoever circumstance it is committed. Human beings are entitled to enjoy human rights and fundamental freedoms secured by International Law and national laws all the times. The transitional justice mechanism is established as a complementary mechanism to the regular criminal justice system for maintaining lasting and sustainable peace having investigated into the serious violations of human rights during the armed conflicts. Clause (s) of Article 33 of the Interim Constitution of Nepal provides that a high-level Truth and Reconciliation Commission will be constituted to investigate the facts about those persons involved in serious violations of human rights and crimes against humanity committed during the course of conflict, therefore, it seems that clause (a) of sub-section (1) of section 23 aims to implement the constitutional provision. No Act or Ordinance may be enacted or issued against a prevailing constitutional provision.

Sub-section (1) of section 23 of the Ordinance provides, "while carrying out investigation pursuant to the Ordinance, the Commission may, if deemed reasonable for amnesty to perpetrator, make recommendation to the Government of Nepal explaining sufficient grounds and reasons thereof". While interpreting this clause, it must be interpreted in totality including the Preamble to the Ordinance and other legislative scheme. Preamble is also one of the parts of the Ordinance or Act and while interpreting a law or Ordinance, recourse should be had to the Preamble as well. It is illogical to doubt and to presume that the independent, competent and impartial Commission, which has to be formed on the recommendation of the recommendation committee comprising of independent and impartial persons as provided for sub-section (3) of section 3 of the Ordinance, will act in a manner so as to promoting impunity or granting amnesty in the cases of serious violations of human rights and immunity from criminal liability. The provisions contained in sub-sections (1) and (2) of section 23 must be looked together with clause (k) of section 2. It would be against the overall objective and scheme of the Ordinance to presume that provisions contained in sub-sections (1) and (2) of section 23 do provide a blanket amnesty to the persons engaged in serious violation of human rights. No section of the Ordinance does provide the powers of amnesty in the case of serious violations of human rights. Sub-section (1) of section 23 does provide the right to make recommendation to the Government of Nepal for granting amnesty in cases other than serious violation of human rights if it deems appropriate to grant amnesty to the perpetrator showing the reasons and bases thereof. So far as the question as to what "adequate reasons and bases" is not enshrined in the Ordinance is concerned, the bases and criteria are to be stated in the Rules to be framed under the power of section 40 and the said power has been entrusted to the Commission itself, the said provision cannot be claimed to be excessive delegation of powers.

With regard to the claim of the petitioners that the provision of section 23 (4) which reads, "if any application is filed for amnesty pursuant to sub-section (3), the Commission may have consultation with the victim as to whether or not to make recommendation for amnesty to such person" is against principles of transitional justice, sub-section (2) of section 22 provides that while making reconciliation between the victim and perpetrators, the Commission may cause the perpetrator to repent and beg a pardon from the victim. This provision clearly indicates that no reconciliation is possible without the victim is satisfied. Moreover, the provision of amnesty made in section 23 has to be read together with the provision of reconciliation made in section 22. There seems no situation where the Commission may grant amnesty unless and until the reconciliation is reached between the victim and perpetrator and the perpetrator begs a pardon from the victim. Satisfaction of the victim is necessary element for amnesty. Provision of sub-section (4) of section 23 applies only after begging a pardon by the perpetrator from the victim. Even in cases where the perpetrator has begged a pardon from the victim, it would not be appropriate to grant amnesty in some special circumstances from the perspectives of greater public

interests and justice, provision of sub-section (4) must not be seen absolutely; therefore, there is no ground for the provision of the said sub-section to be declared void.

So far as the claim of invalidity of sub-section (1) of section 25 providing that the Commission may recommend for taking actions as per the prevailing laws against those perpetrators who have not been recommended for amnesty has completely blocked the way of making new laws, thus, the said clause has to be invalidated is concerned, the clause “as per the prevailing law” does not necessarily means the law in force at the time of issuance of the Ordinance. Since human rights principles have been developed in the international law to apply universal jurisdiction in the cases of serious violations of human rights and in the crimes against humanity even by making the *ex post facto* laws and since the current laws are not sufficient for criminalizing the acts of enforced disappearance, therefore, the Supreme Court issued directive order in the name of Government of Nepal to make new law in the case of *Rajendra Dhakal v. Government of Nepal*. Section 27 of the Ordinance has raised the possibility of enacting new laws in addition to the current laws to bring the persons engaged in serious violation of human rights or in crimes against humanity to justice. Similarly, clause (d) of sub-section (2) of section 28 of the Ordinance provides that it is the responsibility of Ministry of Peace and Reconstruction to make laws for implementation of the report of the Commission. Therefore, there is no logic or justification to declare the clause *as per the prevailing law* appearing in sub-section (1) of section 25 based on the misleading arguments of the petitioners.

With regard to the claim of the petitioners that the jurisdiction of the Commission and Attorney General is narrowed by virtue of the provision of Section 29 (1) of the Ordinance that the Attorney General will decide whether or not file the cases not on the recommendation of the Commission but on the recommendation of the Ministry of Peace and Reconstruction, conclusion should not be drawn only after study of the sub-section alone rather it must be read together with the provision of sub-section (3) of section 25, which provides that notwithstanding anything contained in sub-section (2), the Commission may, before submitting report pursuant to sub-section (1) of section 27, write to the Attorney General to file cases against those persons not included in the recommendation for amnesty. The Ordinance has granted two types of powers to the Commission with regard to taking actions against the persons not included in the recommendation for amnesty for being engaged in serious violation of human rights: first, to recommend Government of Nepal to take actions against such persons; second, to write directly to the Attorney General to take actions. Thus, the provision of sub-section (1) of section 29 is not absolute provision; rather it is one of the options available to the Commission as to taking actions by giving report to the Government of Nepal. Since the provision of sub-section (1) of section 29 has to be read together with sub-section (3) of section 25 and clause (c) of sub-section (2) of section 28, thus, it is irrational and inappropriate to argue that provision of sub-section (1) of section 29 has narrowed the roles of the Commission and the constitutional roles of the Attorney General is also narrowed.

Therefore, since the Ordinance does not contain any provision for absolute amnesty in case of serious violation of human rights and crimes against humanity; since the Ordinance has ensured independence, autonomy and competency of the Commission; since one needs to have a holistic view while interpreting a clause; since the Ordinance has not granted powers to the Commission to make recommendation to the Government of Nepal for granting amnesty even in serious violation of human rights and crimes against humanity; since the Ordinance requires the perpetrator to beg a pardon from the victim in satisfactory manner before granting amnesty; and since the Ordinance has not controlled the powers of the state to enact laws for criminalizing and penalizing the serious violation of human rights and crimes against humanity; therefore, the writ petition based on the false and misleading arguments needs to be quashed.

**Contents of separate written replies submitted on behalf of respondent Office of the President by Secretary Mr. Sheetal Babu Regmi on the Writ Petition No. 069-WS-0058:**

The claims of the petitioners are not maintainable as the Ordinance on the Commission for Investigation of the Disappeared Persons, Truth Finding and Conciliation, 2069 is related to clauses (o) (p) and (s) of Article 33 of the Interim Constitution of Nepal, 2007 and Paragraphs 5.2.3; 5.2.4; 5.2.5 and 7.1.3 of the Comprehensive Peace Accord and it has been issued following a “political consensus.” With regard the transitional justice, the Commission had to be formed long back as per the constitutional provision, however, as the Council of Ministers made recommendation for it, the Ordinance has been issued accordingly. The making of law is based on the country’s economic, social, cultural and geo-political realities. Mere making of law is not adequate, its implementation is far more important. The treaties to which Nepal is a party are not executed on their own, we have to internalize them by making laws. The Ordinance provides for filing prosecutions on the recommendation

of the Commission by the Attorney General as per the Nepalese legal system and while making laws in Nepal, there is the practice of having discussions and consultations as it is in other developed countries, therefore, the demand for formation of a task force and making of a law based on the report of the task force is biased one, therefore, the writ petitions be quashed.

**Contents of separate written replies submitted on behalf of respondent Ministry of Law, Justice, Parliamentary Affairs and Constituent Assembly, Singhdurbar by Secretary Mr. Bhesh Raj Sharma on the Writ Petition No. 069-WS-0058:**

As provided for in clause (s) of Article 33 of the Interim Constitution of Nepal, 2007 and Para 5.2.5 of the Comprehensive Peace Accord, the Bill to provide for Truth and Reconciliation Commission and the Bill to provide for Commission on investigation of the disappeared persons were drafted and submitted to Legislature-Parliament for maintaining lasting peace having resolved conflict in the country; however, the term of the office of the Legislature-Parliament was expired *ipso facto*, therefore, the Bill concerning the Commission for Investigation of the Disappeared Persons, Truth Finding and Conciliation has been issued by the President on 2069-12-1 as recommended by the Government of Nepal (Council of Ministers) to issue the Ordinance pursuant to clause (1) of Article 88 of the Constitution.

Since sub-section (1) of Section 29 of the Ordinance provides that if the Ministry writes on the basis of the recommendation of the Commission to file cases against the persons found guilty in the serious violation of human rights, the Attorney General or the public attorney assigned by him/her will decide whether or not file the case and sub-section (4) of the same provides that if the Attorney General or the public attorney assigned by him/her decides to file the case, the case may be filed within thirty five days, notwithstanding anything contained in the Nepal laws; thus, the claim of the petitioners is not appropriate. Therefore, since sections 13, 23, 25 and 29 of the Ordinance are not inconsistent with Articles 12(1), 13(1) and 24(9) of the Interim Constitution of Nepal, 2007, the writ petitions are liable to be quashed;

Since a petition filed by Ms. Maina Karki on behalf of herself and other 25 persons as in the capacity of the victims of the conflict and families of the martyrs stating that as the matters raised in the writ petitions are also related to their rights and interests, they also requested the Court to join and defend the case.

While issuing an order by a single bench of this Court on 2069-12-19 with regard to the issues raised by the petitioners that sections 13, 23, 25 and 29 of the Ordinance are inconsistent with Articles 12(1), 13(1) and 24(9) of the Interim Constitution of Nepal, 2007, the bench had issued an interim order not to implement the said sections and the present writ petition was submitted to full hearing to the bench.

**Brief of the pleadings of the learned Advocates Madhav Kumar Basnet, Bishnu Prasad Pokhrel, Raju Prasad Chapagain and Om Prasad Aryal appearing on behalf of the writ petitioners in the writ petition No. 069-WS-0057**

Before the Ordinance on the Commission for Investigation of the Disappeared Persons, Truth Finding and Conciliation, 2069 was issued, two separate Bills namely the Bill on Truth and Reconciliation Commission, 2066 and the Bill of the Commission for Investigation of the Disappeared Persons, 2066 were tabled in the then Constituent Assembly (Constituent Assembly) incorporating the comments from stakeholders and the lawmaking process was going on in participatory manner. However, this controversial Ordinance has been issued completely ignoring the comments of the stakeholders and by adopting a deceitful process. The Ordinance has institutionalized impunity, it has ignored the Supreme Court order to form a separate high-level Commission for disappearance of persons by making one Commission with the mandates of investigation of disappeared persons and all types of cases of violation of human rights. Though the respondents have argued that the provisions of the Ordinance may be reviewed by Parliament, thus, there is no need of judicial review. Despite this, this Court has the constitutional duty and powers to adjudicate any case involving constitutional validity duly submitted to it. The Court has already had the use of judicial review of an Ordinance in *Raju Prasad Chapagain v. Government of Nepal* (Writ No. 78 of 2062, NKP 2063 Vol. 2 P. 203).

The Interim Constitution of Nepal, 2007 does not allow any type of legal or factual amnesty except the grant of pardon on the ground of judicial rationality after final decision by judiciary upon being prosecuted for any offence. Constitutions of various countries have prohibited the grant of pardons, remissions and commuting sentences imposed or any form of impunity in case of serious offences under International Law including enforced

disappearance, torture and rape. The provision of section 33 of the Ordinance which opens the door for granting amnesty in any type of cases of whatsoever gravity and seriousness is totally against Nepal's international legal obligation that amnesty is not granted for serious crimes and criminal liability must be ensured. Section 23 (1) of the Ordinance provides that while carrying out investigation pursuant to the Ordinance, the Commission may, if deemed reasonable for amnesty to perpetrator, make recommendation to the Government of Nepal explaining sufficient grounds and reasons thereof. Since the Ordinance has not provided the Commission with any guidelines as to what "sufficient grounds and reasons" constitute or what does not constitute, it has left the door open for granting amnesty even in cases of serious crimes. Since only the word "rape" is used and thereafter the word "including" has been used in sub-section (2) of section 23, there are chances of granting amnesty in serious crimes. The current international legal principles do reject any measures motivated to impunity including granting amnesty in serious violation of human rights including genocide, war crimes, and crimes against humanity, extra-judicial killings, torture, disappearance, slavery and rape. The state has an obligation to prosecute, penalize the violators of human rights and to prevent the commission of such crimes in the future. Nepal is a party to all the four Geneva Conventions. Clause (m) of Article 33 of the Interim Constitution of Nepal, 2007 has provided the state with the constitutional duty to effective implementation of international obligations arising out of international law. In addition, section 9(1) of the Nepal Treaties Act, 1991 provides that the provisions of Nepal laws which are inconsistent with the provisions of the treaties to which Nepal is a party will be invalid and the provisions of the treaties will prevail. Therefore, the impugned provisions of the Ordinance which opens the doors of granting amnesty to the perpetrators of the serious crimes during the period of armed conflict are liable to be invalidated.

Though the directive orders (*Rajaram Dhakal v. Office of the Prime Ministers; Rabindra Prasad Dhakal v. Government of Nepal; and Rajendra Ghimire v. Office of the Prime Minister*) issued by the Supreme Court are binding on the respondents by virtue of the provision of Article 116 of the Interim Constitution of Nepal, 2007, however, no legal provisions as per those orders have been framed as yet.

Therefore, if the clause "adequate reasons and bases for granting amnesty from inquiry of the Commission" is separated from the provision of section 23 (2) of the Truth and Reconciliation Commission Ordinance based on the doctrine of severability, the remaining provisions could not give any meaning; we do hereby request to declare the whole provision of sub-section (2) of section 23 of the Ordinance and the words "as per the prevailing law" appearing in sub-section (1) of the impugned section 25 as invalid and *void ab initio*. Moreover, since mere formation of the Truth and Reconciliation Commission without declaring the serious violations such as genocide, war crimes, crimes against humanity, enforced disappearance and torture as criminal offences as per international obligation and providing for punishment as per the seriousness of the offences could not ensure justice within the country, necessary order of *mandamus* be issued for making necessary law having considered the decisions of this courts in the past on transitional justice.

**Brief of the pleadings of the learned Senior Advocate Mr. Satish Krishna Kharel, and learned Advocates Govind Sharma Bandi, Hari Phuyal, Ramkrishna Kaphle, Pawan Kumar Jayasawal, Satish Raj Mainali, Laxmi Pokhrel, Reshma Thapa and Gyanendra Raj Aran appearing on behalf of the writ petitioners in the writ petition No. 069-WS-0058**

The Ordinance on Commission on Investigation of Disappeared Persons, Truth and Reconciliation, 2069 issued by the President according to a notification published in the Nepal Gazette Part 62 dated 2069-12-1, has multiplied the pains and suffering inflicted during the armed conflict and the victims have been more and more affected by it. Section 23 (1) of the said Ordinance has legalized amnesty by providing that the Commission may make recommendation to the Government of Nepal for amnesty explaining sufficient grounds and reasons thereof. The Ordinance has established the Commission as a judicial entity going beyond its terms of reference and jurisdiction. Initiation of the idea of blanket amnesty well before proving guilty by a Court of law gives an impression that the very idea of establishing the Commission is motivated by the desire to give amnesty to the perpetrators than to find out truth and defend the victims' right to justice.

The provision of section 23 (2) of the Ordinance makes a serious provision by providing, "notwithstanding anything contained in Sub Section (1), serious crimes which lack sufficient reasons and grounds for granting amnesty following the investigation of the Commission, including rape, shall not be recommended for amnesty by the Commission." On the one hand, the Ordinance has not defined the crimes of serious nature, while on the other hand, it has entrusted sensitive judicial powers of discretion of granting amnesty even in the serious crimes if there are sufficient ground and reasons, which is against the rationale of formation of the Commission. The

definition of "serious violation of human rights" given in clause (k) of section 2 does not match with international human rights law and basic principles of International Law.

Section 29 (1) of the Ordinance provides, "the Attorney General or a Government Attorney designated by him shall, after necessary investigation, decide on the matter whether a case may be prosecuted or not against any person, if the Commission itself or the Ministry writes to it based on the report of the Commission to initiate a case against any persons who were found guilty on allegation of serious human rights violations." It shows that the Attorney General or a Government Attorney will decide whether or not to file a case not on the recommendation of the Commission but only on the recommendation of the Ministry of Peace and Reconstruction. This provision of the Ordinance has degraded the Attorney General from its constitutional roles and is inconsistent with Article 135, thus, it is liable to be invalidated.

Similarly, section 25 (3) of the Ordinance pays the lip service of bringing prosecution by providing that the Commission may correspond to the Office of the Attorney General to prosecute perpetrators not recommended for amnesty prior to submission of the report pursuant to Section 27(1). As provided in section 29(1) of the Ordinance, the Attorney General or a Government Attorney designated by him decides to prosecute on the recommendation of the Ministry of Peace and Reconstruction rather than on the recommendation of the Commission. There is malafide intention of minimizing the filing prosecution as the Ministry of Peace and Reconstruction will have more rooms for manipulations and giving the Attorney General discretionary powers to decide whether or not to file cases.

As per section 24(4) of the Ordinance, if the Attorney General or the Government Attorney designated by him/her decides to file a case, notwithstanding anything contained in the prevailing laws, the case may be filed within thirty five days of such decision. On the one hand, this provision has violated the internationally recognized principle that there will be no statute of limitations to file cases of serious violations of human rights. The Supreme Court in the case of *habeas corpus* involving *Rabindra Dhakal on behalf of Rajendra Dhakal v. Ministry of Home Affairs* has clearly laid down that those found guilty in the case of enforced disappearance could not be granted amnesty nor pardon. (NKP 2064 Vol. 2, Decision No. 7817 p. 169). In the same manner, in *Om Prasad Aryal v. Office of Prime Ministers and Council of Ministers* concerning statute of limitation contained in the Human Rights Protection Act, the Court has held that no statute of limitation is applicable in cases of violation of human rights.

Therefore, the Ordinance issued as a political bargain in utter disregard of the provisions made in Articles 12(1), 13 (1) and 24(9) of the Interim Constitution of Nepal, 2007 will act only as a tool of further victimization of the victims of the armed conflict by granting amnesty to the perpetrators of serious violations of human rights and other heinous crimes, therefore, an order be issued for forming a Commission ensuring truth, justice, reparation and institutional reforms pursuant to Article 107 (1) and (2) and sections 13, 23, 25 and 29 of the Ordinance for formation of the Truth and Reconciliation Commission be declared invalid having issued an order of *certiorari* and a directive order of *mandamus* or other appropriate order be issued to amend to the impugned law.

**Brief of the pleadings of the learned Joint Government Attorney Mr. Kiran Prasad Paudel, Sanjeev Regmi and Deputy Government Attorney Mr. Madan Bahadur Dhami appearing on behalf of the respondent Government of Nepal in the writ petition No. 069-WS-0057 and 069-WS-0058**

Since the Ordinance on Commission on Investigation of Disappeared Persons, Truth and Reconciliation, 2069 is yet to be given final shape of a law by the Parliament; there is no need of its judicial review at present. As the petitioners have claimed the Ordinance as an imperfect law, the Court must not activate its jurisdiction in such matters. This Court has issued several orders to make laws on the matters on which there is no law, it is quite normal for the petitioners to appear before the Court with such an issue. However, they are required to show the inconsistency of the Ordinance with the Constitution. If there is a question as to the legitimacy of the Ordinance, we have to be serious to examine it, but it does not matter whether a single Commission is to be formed or separate commissions are to be formed. Section 23(1) of the Ordinance provides that in case the Commission deems it appropriate to grant amnesty to the perpetrator while investigating under the Ordinance, it shall make recommendation to Government of Nepal showing adequate reasons and bases. It does entail that the Commission does not decide the matter on its discretion, but it has to make recommendation showing clear reasons and bases. Section 23(6) of the Ordinance provides that the reasons and bases to be taken by the Commission while making recommendation for amnesty will be as prescribed and the Commission has to mention those reasons and bases while framing Rules to implement the Ordinance pursuant to Rule 40 of the

Ordinance. As the requirement of making recommendation for amnesty based on the prescribed reasons and criteria is made to make the Commission even more accountable, the claim of the petitioners that the provisions made in sub-section (1) and (6) of section 23 are excessive and uncontrollably vague is not appropriate.

As clause (k) of section 2 of the Ordinance clearly defines “serious violations of human rights” to include various crimes including rape, the terminology “including rape” used in sub-section (2) of section 23 also includes all types of serious crimes. Therefore, the claims of the petitioners that the Ordinance has accorded priority to discretion and has left the doors open for granting amnesty even in the serious crimes that are not liable to grant amnesty are misplaced. Overall reading of section 25 as to granting amnesty suggests some mandatory procedures to be fulfilled: the perpetrator has to submit a written application confessing that he has committed serious violation of human rights; he/she has to disclose all the facts relating thereto and he/she has to repent with the victim to the satisfaction of the victim. Thus, the Ordinance does not imagine a situation where recommendation of amnesty could be made without consultation with, and information to, the victim, the argument of the petitioners that the Commission has the discretion even not to consult the victim is baseless and illogical. Since this Ordinance has underscored the need and possibility of making of additional laws for ending up impunity by bringing the perpetrators of serious violations of human rights and those engaged in the crimes against humanity to justice, the logic of the petitioners is baseless. Thus, as there is no need to issue the orders prayed for, the writ petitions must be quashed.

The contents of the writ petitions, which have been submitted for decision having been duly enlisted in the schedule of the Court, and documents attached thereto are studied and pleadings of the learned legal practitioners appearing on behalf of the petitioners and of the learned Joint-Attorneys and Deputy-Attorneys have been listened to and this date has been assigned for pronouncement of the verdict and the pleading notes submitted as per order of this Court have also been studied.

**Main claim of the writ petitioners No. 069-WS-0057:**

Sub-section (2) of Section 23 of the Ordinance on Commission on Investigation of Disappeared Persons, Truth and Reconciliation, 2069 provides, “notwithstanding anything contained in sub-section (1), the Commission shall not make recommendation for granting amnesty to the perpetrators engaged in serious crimes including rape for which there are no adequate reasons and bases for granting amnesty from inquiry of the Commission.” The terms “adequate reasons and bases” are not defined in the Ordinance. Sub-section (6) of the same section provides that the bases and criteria for making recommendation of amnesty will be as prescribed. Since section 40 of the Ordinance has delegated the powers to frame those Rules to the Commission itself, it seems that discretion of the Commission is the “adequate reasons and bases.” Therefore, these provisions are uncontrollably vague and if we separate the clause “having no adequate reasons and bases for granting amnesty from inquiry of the Commission” from the provision of section 23 of the Ordinance based on the doctrine of severability, the remaining provisions could not give any meaning; therefore, we request to declare the whole provision of sub-section (2) of section 23 of the Ordinance as unconstitutional and invalid. Moreover, the words “as per the prevailing laws” used in sub-section (1) of section 25 has made the provisions of section 23 further redundant. Again, if we declare only the words “as per the prevailing laws” invalid and void, the said sub-section will also be meaningless, whole of the sub-section be declared invalid and *void ab initio*. Moreover, unless and until serious violations such as genocide, war crimes, crimes against humanity, enforced disappearance and torture are declared as criminal offences as per the international legal obligation and provisions of penalty is made for them as per the gravity of the offences concerned, mere formation of the transitional justice mechanism does not ensure vindication of justice within the country for the victims, therefore, an order of *mandamus* must be issued for making necessary law taking into account of the past decisions of this Court relating to transitional justice.

**Main points of defense in the written replies submitted by the respondents of the writ petitioners No. 069-WS-0057:**

The clause used in Section 23(1) of the Ordinance that in case....deems appropriate to grant amnesty showing adequate reasons and bases does entail that the Commission may decide to grant amnesty for persons engaged in whatsoever type of crimes. The provision of section 23(1) is attracted in cases other than serious violation of human rights and even in such cases, adequate reasons and bases are required for grant of amnesty. The Commission does not have powers to make recommendation in case of the offences referred to in clause (k) of section 2 of the Ordinance and section 25 (3) provides that in case of the offences in which the Commission

could not recommend for amnesty, the Commission has to correspond the Attorney General for filing prosecution, therefore, there is no need of invalidating the words “not found adequate reasons and bases for granting amnesty from investigation of the Commission” appearing in 23 (2).

The clause “as per the prevailing law” challenged by the petitioners does not necessarily means only the law in force at the time of issuance of the Ordinance. Since this Ordinance has underscored the need and possibility of making of additional laws for ending up impunity by bringing the perpetrators of serious violations of human rights and those engaged in the crimes against humanity to justice, the logic of the petitioners is misleading and baseless and there is no need or justification for declaring invalid the clause *as per the prevailing law* appearing in sub-section (1) of section 25. The petitioners have requested the Court for issuing an order to make necessary provisions for criminalizing the serious violations such as genocide, war crimes, crimes against humanity, enforced disappearance and torture as per international obligation and providing for punishment as per the seriousness of the offences. The act of formulation of the Bill made for implementation of the Geneva Conventions is at the final stage, while the Bill for Control of Tortures, 2011 was submitted to the then Legislature-Parliament. Moreover, the Penal Code Bill, 2010, which criminalizes the act of enforced disappearance and other acts was submitted to the then Legislature-Parliament. Therefore, as the matters raised by the petitioners are not justifiable, the writ petitions must be quashed.

**Main claim of the writ petitioners No. 069-WS-0057:**

Since the Commission on Investigation of Disappeared Persons, Truth and Reconciliation Ordinance issued as a political bargain in utter disregard of the provisions made in Articles 12(1), 13 (1) and 24(9) of the Interim Constitution of Nepal, 2007 will act only as a tool of further victimization of the victims by granting amnesty to the perpetrators of serious violations of human rights and other heinous crimes, therefore, in order to form the Commission ensuring truth, justice, reparation and institutional reforms, we request to declare sections 13, 23, 25 and 29 of the Ordinance as invalid by an order of *certiorari* pursuant to Articles 107 (1) and (2) of the Interim Constitution of Nepal, 2007. Moreover, a directive order be issued to formulate and issue a law within three months based on a report of a taskforce comprising of human rights activists and experts in the field of transitional justice to make recommendations of law reform for ensuring the finding of truth, securing justice and reparation to the victims and for effective remedies and ensuring prosecution of the persons engaged in serious violations of human rights taking into account the need of formation of an independent, impartial and competent mechanisms like Truth and Reconciliation Commission also considering the gender sensitive aspects of the issues and to have wider consultation and discussions in this areas.

**Main points of defense in the written replies submitted by the respondents of the writ petitioners No. 069-WS-0058:**

As Section 23(1) of the Ordinance provides that in case the Commission deems appropriate to grant amnesty to the perpetrator while investigating under the Ordinance, it shall make recommendation to Government of Nepal showing adequate reasons and bases, it seems that the Commission is prevented to make rampant recommendation for granting amnesty. Sub-section (6) of the same section provides that the reasons and bases to be taken by the Commission while making recommendation for amnesty have to be prescribed by the Commission to make the Commission more accountable. Thus, the writ must not be issued to invalidate section 23. Clause (a) of sub-section (1) of Section 13 provides for investigation of the persons disappeared in the course of conflict and finding of truth as to the serious violation of human rights and bringing the facts to the general public; and sub-section (1) of section 22 provides that if the perpetrator or victim files an application at the Commission for reconciliation, the Commission may execute reconciliation between the perpetrator and victim; and sub-section (5) of the same provides that the Commission may obtain necessary consent from the victim before executing reconciliation between the victim and perpetrator; thus, the claims of the petitioners are not logical. So far as section 25 of the Ordinance is concerned, the Ordinance has underscored need and possibility of making of additional laws for ending up impunity by bringing the perpetrators of serious violations of human rights and those engaged in the crimes against humanity to justice, the logic of the petitioners is baseless. As the provision made in sub-section (1) of section 29 has to be looked together with sub-section (3) of section 25 and clause (c) of sub-section (2) of section 28; the contentions that sub-section (1) of section 29 has minimized the roles of the Commission and that the constitutional roles of the Attorney General is narrowed down for its being unable to decide whether or not to bring prosecution unless and until the Ministry makes correspondence to it are baseless. Therefore, Sections 13, 23, 25 and 29 of the Ordinance on Investigation of

Disappeared Persons, Truth and Reconciliation Commission, 2013, are not against Articles 12 (1), 13 (1) and 24 (9) of the Interim Constitution of Nepal 2006; thus, the writ petitions be quashed.

Having studied the writ petitions and the written replies submitted, the main issues raised by the petitioners and to be decided by the Court appear to be as follows:-

- (a) Whether the Commission for investigation of disappeared persons and Truth and Reconciliation Commission to be constituted separately or the same Commission is to be formed for the both purpose and whether or not the functions, duties and powers of the single Commission for Investigation of Disappeared Persons and Truth and Reconciliation Commission, as stated in section 13 of the Ordinance on Investigation of Disappeared Persons, Truth and Reconciliation Commission, 2013 are inconsistent with the Interim Constitution of Nepal, 2007 for being narrow?
- (b) Whether or not the provisions made in section 23 of the Ordinance gives uncontrolled discretionary powers to the Commission and whether or not the Commission under the provision of that section may grant amnesty without consent of victim and whether or not the section 23 is inconsistent with the Interim Constitution of Nepal, 2007?
- (c) Whether or not the provision made in section 25 of the Ordinance creates a situation of immunity for those involved in serious crimes and whether or not the said section 25 is inconsistent with Interim Constitution of Nepal, 2007?
- (d) Whether or not the power of the Attorney General to decide as to bringing or not bringing prosecution is narrowed by virtue of the provision made in section 29 and whether or not the limitation of filing of the cases within thirty five days from the date of decision of filing the cases is against the universal principle that there is no statute of limitations in cases of criminal offences of serious nature?
- (e) Whether or not the order requested by the petitioners has to be issued?

With regard to the first question raised by the petitioners, raising objection to the provisions made in sections 13, 23, 25 and 29 of the Ordinance on Investigation of Disappeared Persons, Truth and Reconciliation Commission, 2013 (Ordinance No. 8 of the year 2969) for their being inconsistent with Articles 12(1), 13(1) and 24(9) of the Interim Constitution of Nepal, 2007, the petitioners have requested to invalidate those sections by an order of *certiorari* pursuant to Article 107(1) and (2) of the Interim Constitution of Nepal, 2007 and an order of *mandamus* be issued in the names of the respondents to amend to the law. Looking at the preamble to the said Ordinance, the Ordinance seems to have been issued with the objectives of providing for legal measures to establish a competent, independent, accountable and impartial Commission on Investigation of Disappeared, Truth and Reconciliation to bring the actual facts to the public by investigating the truth on gross violation of human rights, incidents regarding crimes against humanity and the persons involved in such incidents during the course of armed conflict including for the investigation of the person disappeared; to create an environment of peace and reconciliation in the society by enhancing mutual good wishes, and tolerance between the victims and perpetrators; to recommend reparation for the persons victimized by the incidents; and to end state of impunity by bringing perpetrators involved in incidents relating to serious violations under the ambit of law.

Section 5.2.5 of the Comprehensive Peace Accord concluded between Government of Nepal and the then Communist Party of Nepal (Maoists) on November 21, 2006 (annexed as Annex-4 of the Interim Constitution of Nepal, 2007) makes a substantial provision that both sides agree to constitute a High-level Truth and Reconciliation Commission through mutual agreement in order to investigate truth about those who have seriously violated human rights and those who were involved in crimes against humanity in course of the conflict and to create an environment for reconciliation in the society.

Clause (q) of Article 33 of the Interim Constitution of Nepal, 2007 provides that relief will be made available to the families of the victims, on the basis of the report of the Investigation Commission constituted to investigate the cases of persons who were the subject of enforced disappearance during the course of the conflict. Similarly, Article 33 (s) provides for constituting a high-level Truth and Reconciliation Commission to investigate the facts about those persons involved in serious violations of human rights and crimes against humanity committed during the course of conflict, and to create an atmosphere of reconciliation in the society. According to the aforesaid provisions of the Constitution, two separate commissions namely, one on investigation for the disappeared persons and another on investigation of the facts about those involved in serious violations of human rights and crimes against humanity committed during the course of conflict, and to create an atmosphere of reconciliation in the society. However, Ordinance on Investigation of Disappeared Persons, Truth and Reconciliation Commission issued by the President on 2069-12-1 on the recommendation of the Council of

Ministers provides for the single Commission for investigation of the disappeared persons and truth finding and reconciliation and the structure, functions, duties and powers of the Commission have also been provided in the Ordinance.

Though separate provisions had to be made for substantive provisions of the formation of the commissions, functions, duties and powers of the commissions to be formed according to the Comprehensive Peace Accord and the said Articles of Constitution, however, it was not done so and the same Ordinance provides for the single Commission and serious violation of human rights and enforced disappearance have been defined in clauses (k) and (l) of section 2 respectively.

Every act committed against any human rights must be defined in consistence with laws relating to human rights, Universal Declaration of Human Rights, and international instruments relating to human rights. Section 2(K) of the said Ordinance defines serious violations of human rights that includes eight acts such as genocide, kidnapping and hostage taking, enforced disappearance, and all inhuman acts against international human rights and humanitarian law and other crimes against humanity. Similarly, section 2 (l) defines enforced disappearance. Since clauses (q) and (s) of Article 33 provides a design of formation of two separate commissions and section 5.2.5 of the Comprehensive Peace Accord also provides for Truth and Reconciliation Commission, it would be against the constitutional design to form single Commission and provide for its functions, duties and powers by the Ordinance. Moreover, it would be against section 7 of the Comprehensive Peace Accord which expresses commitment to Universal Declaration of Human Rights, 1948 and international humanitarian law and basic principles and norms of human rights.

The Preamble to the Declaration on the Protection of All Persons from Enforced Disappearance adopted by the United Nations (United Nations Resolution No. 47/133) provides that in many countries often in the persistent manner, enforced disappearances occur, in the sense that persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials or different branches or level of government or by organized groups or private individuals acting on behalf of or with the support, direct or indirect consent or acquiescence of the government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty which places such persons outside the protection of law.

Article 1 of the said Declaration defines enforced disappearance as a crime against humanity and Article 2 provides that no state shall practice enforced disappearance, nor should it allow other to do it nor should tolerate such acts. Similarly, Article 3 requires all states to take all legislative, administrative judicial and other necessary measures effectively against the acts of enforced disappearance and Article 4 requires all states to criminalize such acts and provide for penalty. Similarly, the United Nations has expressed concerns and dismay over enforced disappearance by adopting the International Convention for the Protection of All Persons from Enforced Disappearance on December 20, 2006. Though Nepal has not become a party to that convention as yet, however, this Court has explained the relevancy of the convention in the case of *Rajendra Dhakal*, and in the context of Nepal's being a party to the mainstream human rights instruments, therefore, there is no doubt as to Nepal's inalienable obligation to eliminate enforced disappearance which is one of the serious violation of human rights. No one can doubt as to necessary legislative, administrative and judicial measures by the state with regard to the disappeared persons.

Since the act of enforced disappearance is a serious offence by virtue of Article 2 of the Convention, thus, it must not be seen as other normal criminal offence. Nepal has become a party to a series of human rights instruments starting from the Slavery Convention, 1926 to the Convention on Rights of the Child, 1989. Being a member of the United Nations, it is inevitable for Nepal to make provisions in laws with regard to the provisions of important instruments concerning human rights and harmonize the Nepal law as per such conventions.

Article 6 of the International Covenant on Civil and Political Rights, 1966 to which Nepal is a party, provides that every human being has the inherent right to life and this right shall be protected by law. No one shall be arbitrarily deprived of his life. Article 7 of the same covenant provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has also prohibited inflicting inhuman torture to any person. In such significant matter, the state must not remain inactive and must not take the offence of disappearing person as a light offence like other normal criminal offence and courts also must not take such a matter as a simple issue.

Violation of human rights and its offenders must be compelled to bear criminal liability as per the established values and norms of criminal law. Nepal cannot overlook the issue of enforced disappearance of persons simply for the reason that it is not a party to the aforesaid Convention on enforced disappearance or of such Declaration. Because of acceptance of various important international human rights instruments right from the Universal Declaration of Human Rights, 1948 and because of commitment expressed time again towards human rights and civil liberty through the Constitution and other legal measures, it is inevitable for Nepal to make appropriate legislative, administrative and judicial measures to fulfill its international obligation towards the disappeared persons. The state's indifference in such a crucial issue by taking lightly the issue of formation of two separate commissions as claimed by the petitioners and to pay lip service could not be said to be appropriate.

The act of enforced disappearance of any person deprives such person from equal protection of law, deprives his/her individual liberty and it involves the violations of minimum human values and norms. Such acts end up his/her entire individual liberty then and there. It is therefore, any country having accepted the obligation of universal recognition, compliance and promotion of human rights and fundamental freedoms must be serious and sensitive to those incidents of enforced disappearance. Though the issue of disappearance has been addressed in the draft of the Penal Code which has been submitted to the Legislature-Parliament as a Bill in Nepal, the Bill could become law and separate law is not also being made. In this context, this Court has already spoke about the need of special law providing for investigation into enforced disappearance, to ascertain the whereabouts of those disappeared, and for making available relief to the victims and other measures in the case of *Rajendra Prasad Dhakal v. Ministry of Home Affairs*. Non-implementation of the said directive order symbolizes the state's insensitivity towards the issue.

It is also one of the state's obligations to create an atmosphere of raising the confidence and faith of the victim's side towards the justice system of the state and to give a lesson to the accountable officials that no immunity could be granted from the consequences of violation of laws. This is not a separate and special obligation of the state; rather it is the minimum and basic obligation of the state for protection of basic fundamental rights and human rights. It is also stated in the said judgment that for fulfilling this obligation, the state must have to enact special law.

Resolution No. 71 (A) adopted by the General Assembly of the United Nations (A/RES/60/147) in its 60th session, provides, in its Para 7, that the victims of gross violation of human rights and international humanitarian law must have equal and effective access to justice; they must be provided with adequate, effective and prompt reparation for harm suffered and they must have access to relevant information concerning violations and reparation mechanisms; and since Nepal is one of the members of the United Nations, the member-state could not ignore the commitment it has expressed through such Resolutions.

In the course of interpretation of Articles 2 and 9 of the International Covenant on Civil and Political Rights, to which Nepal is also a party, the United Nations Human Rights Committee has explained that in the event of violation of the rights referred to in those Articles, the state has to pay appropriate amount of compensation in addition to other remedies and interim measures have to be taken as immediate relief. From the enforced disappearance of a person in the course of an armed conflict, not only the victim is victimized but whole of his/her family members and his/her close relatives will also be victimized. If such cases are not effectively investigated, prosecuted and judicially settled, the act of enforced disappearance will ultimately terrorize the society and make the society insecure place. With such consequences, no state can develop and no civilization could be expected. Based on the constitutional provisions of Nepal, judgments of foreign courts and regional courts of human rights, the international instruments of human rights Nepal has ratified and the Resolutions and Declarations issued by the United Nations, victims could not be deprived of the advantages and opportunities having been involved them in the investigation of the incidents of gross violation of human rights.

The respondent Government of Nepal is found to have issued this Ordinance by making a single law on enforced disappearance and Truth and Reconciliation Commission despite of the fact that a directive order has already been issued in the name of Government of Nepal, Ministry of Home Affairs and the Office of the Attorney General to make separate law for protection of persons subjected to enforced disappearance; to investigate all incidents of enforced disappearance falling under the ambit of the said Act; to clearly demarcate the jurisdiction of such commissions; to clarify that that such jurisdiction does not replace the Court's jurisdiction; to have continuous investigation until the actual situation is identified; to provide measures for protection of the victims, witnesses complainant, lawyers, investigators so that they will be cooperative to the judicial proceedings; to

provide opportunities to the victims to share their concerns and voices; to maintain secrecy of their concerns and voices and to form separate commissions for those purposes. The said Ordinance is found to have been issued by the respondents in the circumstances where a directive order has been made in their names to form separate commissions having regard to the gravity of the matters involved.

If the basic norms and values of human rights enshrined in the Interim Constitution of Nepal, 2007 and the orders and judicial principles laid down by the Supreme Court are not being complied with by the state mechanism including the executive, not only the implementation of such values and principles will be delayed, rather activities may be carried out in contravention of such orders and principles, which has been symbolized by this Ordinance; and this is unacceptable, inexcusable and intolerable. Culture of compliance of law is expected not only from people but it is equally expected also from the state. If the state could not duly respect laws, it would be difficult for it to be respected by people and it would eventually lead to develop a culture of non-compliance of laws. Therefore, filing of the writ by the petitioners challenging the controversial sections of the Ordinance which has been issued ignoring the directives given in the past judgments could not be taken otherwise in this circumstance.

The act of enforced disappearance could never be portrayed as symbolic to any political face of the conflict; as such act must be taken as a grave offence concerning human rights and a crime against humanity. The acts of inflicting torture, disappearing of a person are purely criminal offences and they are continuously regarded to be crimes unless the perpetrators are brought to the final point of justice by separate investigations. To be associated with a conflict being convinced with the theoretical cause/s of the conflict or to be involved in the conflict is one thing; however, there is no room for tolerating the commission of such crimes or other untoward activity in the name of bringing change through the conflict or countering the conflict or solving the conflict. It is always unacceptable or objectionable to have the thought that anything can be committed in the name of bringing change or preventing or managing it. Legitimate or civilized measures must be taken while taking any initiative of moving the society forward or changing the direction or bringing stability or peace in society. No truth may be achieved through the nurturing of falsehood as in the same manner as justice may not be achieved through the way of crimes. Worth-considering are the thoughts that achieving or managing justice through criminal processes are not the roadmaps sketched by our Constitution and democracy. Otherwise, talking about war crimes at the time war becomes irrelevant.

Since the enforced disappearance is purely taken as a grave criminal offence, specialized institution or mechanism has to be created for various steps of prevention, investigation, prosecution, adjudication, re-rescue, rehabilitation, victims protection, compensation, penalty; however, ignoring them as secondary elements even without criminalizing the act of enforced disappearance and opening the alternate ways for justice, is to reject the severity of the crime and its consequence or to take it so lightly. The current Ordinance does not have thought of any specialized structure and undertaking for countering the act of enforced disappearance. Instead, bringing enforced disappearance within the range of reconciliation and addressing it through this mechanism is further more objectionable. The Ordinance seems to have the extreme paradox of bringing the grave crimes relating to human rights and other wrongful acts together in the same box. Truly speaking, the act of enforced disappearance is objectionable whosoever has committed it and it must be addressed through the mechanism of administration of justice. Thereafter, in addition to criminal justice process, victims must be protected through other components of the transitional justice such as reparation, rehabilitation and so on. The Ordinance does not provide anything on these aspects rather it seems to be motivated by diluting the consequences of the act or minimizing its affect. Such structure or thought could not be said to have complied with the international human rights law, Interim Constitution of Nepal, 2007 and the principles laid down by the Supreme Court. Therefore, structurally speaking, the Ordinance seems to be faulty.

The aforesaid Comprehensive Peace Accord was concluded for peaceful discourse ending up the decade-long armed conflict in the country and the said Accord has also clearly demarcated the politically motivated incidents and incidents caused by other reasons. However, having a look into the legal provisions in the Ordinance as to investigation of the disappeared persons, functions, duties and powers of the Truth and Reconciliation Commission, it seems that section 13 of the Ordinance mixes up the investigation of the disappeared persons and functions, duties and powers of the Truth and Reconciliation Commission together. Therefore, as analyzed above, the provision of formation of the single Commission for investigation of the disappeared persons and for Truth and Reconciliation Commission, instead of requirement of two separate commissions, is found to be in violation of the Comprehensive Peace Accord and the Interim Constitution of Nepal, 2007.

The second question now to be considered is whether or not section 23 of the Ordinance has conferred the Commission with uncontrolled discretionary powers and whether or not the provision allows the Commission to grant amnesty without the consent of the victim and whether or not it is inconsistent with the Constitution. The writ petitioners have contended that as Section 23(1) of the Ordinance provides that in case the Commission deems it appropriate to grant amnesty to the perpetrator while investigating under the Ordinance, it shall make recommendation to Government of Nepal showing adequate reasons and bases and this clause grants the Commission uncontrolled discretionary powers and sub-section (2) of section 23 provides that the Commission shall not make recommendation for amnesty of the perpetrators in cases of the serious nature of crimes including rape. Only the offence of rape has been spelt out in the category of serious crimes and the Ordinance is silent as to other offences and it does not define "serious offences." It again gives discretionary power to the Commission. The petitioner have claimed that the provisions of section 23 which allows the Commission to grant amnesty to the perpetrators even without consent of victims is against the core value of transitional justice and are inconsistent with the Constitution, thus, they must be invalidated.

The respondents have asserted in their written replies that the clause used in Section 23(1) of the Ordinance that in case....deems appropriate to grant amnesty showing adequate reasons and bases does entail that the Commission may decide to grant amnesty for persons engaged in whatsoever type of crimes. They have further asserted that no section of the Ordinance provides the Commission with powers to make recommendation in case of serious violations of human rights and that neutrality of the Commission may be inferred from its very formation method. Since the neutral Commission has to make recommendations based on the bases and criteria to be prepared by the Commission the writ is filed having unfounded doubts as to the functioning of the Commission. Thus section 23 has not to be invalidated. Section 23 of the Ordinance on Investigation of Disappeared Persons, Truth and Reconciliation Commission, 2013 has the following legal provision:-

*23. Provision regarding amnesty: 1) While carrying out investigation pursuant to the Ordinance, the Commission may, if deemed reasonable for amnesty to perpetrator, make recommendation to the Government of Nepal explaining sufficient grounds and reasons thereof.*

- (2) Notwithstanding anything contained in Sub Section (1), serious crimes which lack sufficient reasons and grounds for granting amnesty following the investigation of the Commission, including rape, shall not be recommended for amnesty by the Commission.*
- (3) Prior to making recommendation by the Commission pursuant to Sub-section (1), such person shall be required to submit an application in writing for amnesty to the Commission by repenting for the misdeeds carried out by himself/herself during the armed conflict to the satisfaction of the victim within a time period as prescribed by the Commission.*
- (4) In case of application for amnesty pursuant to Sub-section (2), the Commission may, prior to decide in relation to make recommendation or not for amnesty to such person, consult the victim as per need in such matter.*
- (5) Prior to submit an application for amnesty pursuant to Sub-section (2), the applicant shall have to express the details of the truth and facts to the full extent of his/her knowledge in relation to activities conducted by him/her during the course of armed conflict and also the Commission shall have to document such details.*
- (6) The bases and criteria to be adopted while making recommendation pursuant to Subsection (1) shall be as prescribed.*
- (7) The name of such person, who is granted amnesty by the Government of Nepal upon the recommendation of the Commission pursuant to Sub-section (1), shall be published in the Nepal Gazette.*

The aforesaid legal provision has to be looked into whether or not it is as per the norms and values enshrined in the Comprehensive Peace Accord concluded between Government of Nepal and the then Communist Party of Nepal (Maoists) on November 21, 2006; the Interim Constitution of Nepal, 2006; basic principles of international humanitarian law and human rights and the norms and values of roles of victims in the transitional justice. Section 7 of the Comprehensive Peace Accord has expressed commitment to the Universal Declaration of Human Rights, 1948 and basic principles and values of international humanitarian law and human rights laws. Similarly, sections 5.2.5 and 5.2.3 of the said Accord provides for investigation of the persons killed and

disappeared in the course of armed conflict and finding of truth and reconciliation as to those found involved in serious violation of human rights and in crimes against humanity. Article 12(1) of the Interim Constitution of Nepal, 2007 ensures the right to live a descent life, and Article 13 guarantees the right to equality. Similarly, Article 24(9) secures the right to fair hearing by a Court of law or tribunal and Article 32 provides the right to constitutional remedies for enforcement of the rights guaranteed by the Constitution.

Nepal has become a party to a series of human rights instruments including the Convention on the Prevention and Punishment of the Crime of Genocide, 1948; the International Covenant on Cultural, Economic and Social Rights, 1966; International Covenant on Civil and Political Rights, 1966, Convention on Elimination of All Forms of Discrimination against Women, 1979; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984; Convention on Rights of the Child, 1989; the Charter of the United Nations; the Universal Declaration of Human Rights. Since section 9(1) of the Nepal Treaty Act, 1991, provides that provisions of international treaties are applicable as a Nepal law, the obligation to find out truth having investigated the crimes under such International Law, bringing the perpetrators to prosecution and providing victims with reparation rests with the state. Article 2 (1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, to which Nepal is also a party, provides that each state party shall take effective legislative, administrative, judicial or other measure to prevent acts of torture in any territory under its jurisdiction. Article 13 of the said convention secures the right to seek justice by filing a complaint at a competent body and Article 14 secures the right to compensation by the victims and dependent persons. Article 8 of the Universal Declaration of Human Rights provides that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him/her by the Constitution or by law. Article 2(1) of the International Covenant on Civil and Political Rights, 1966 provides, "each state party to the present covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, racial or social origin, property, birth of other status. Having gone through the judgments of foreign human rights courts, the Inter-American Court of Human Rights in the case of *Velásquez Rodríguez v. Honduras* dated 29<sup>th</sup> of July, 1988 had held that in the cases of human rights violations including enforced disappearance, the state has an obligation to investigate and penalize the perpetrators. Similarly, in the case of *Barrios Altos v. Peru*, decided on March 14, 2001, the two amnesty laws of Peru were found to be inconsistent with the Inter-American Convention on Human Rights and the Court has laid down that the measures aimed at eliminating criminal prosecution and establishing impunity are unacceptable.

The petitioners have argued that by the provision of amnesty made in section 23(1) of the Ordinance that the Commission may, if deemed reasonable for amnesty to perpetrator, make recommendation to the Government of Nepal explaining sufficient grounds and reasons, the roles of victims have been made zero as against the spirit of transitional justice and has delegated uncontrolled discretionary powers to the Commission. The sub-section (3) has provided that the perpetrator has to repent with the victim as to the serious violations of human rights he/she had had in a satisfactory manner but it does not clarify as to how to repent and where. The victim's acceptance to such repentance is not ensured. Under section 2 (k), definitions of serious violations of human rights has been made that contains a list of serious crimes such as murder, abduction and kidnapping, enforced disappearance. Section 23(3) of the Ordinance provides that a perpetrator may get an amnesty from heinous crimes under International Law only on the basis of submission by the perpetrator an application to the Commission that he/she had had repentance with the victim if the Commission recommends the same. Similarly, section 23 (2) provides that the Commission will not make recommendation for amnesty in cases of serious crimes including rape where the Commission does not see adequate reasons and bases. The Ordinance does not define what "serious crimes" mean and only state the word rape and remains silent as to other crimes.

If the word has been used in the course of defining the crimes in clause (k), it would have been better for citation, but it is not here. Though the written replies of the Ministry of Peace and Reconstruction state that the word is targeted to section 2(k), it is necessary to be made simpler by the words of the Act. If section 23(2) is not intended to grant amnesty on the basis of involvement in serious nature of crimes, it would be meaningless to make legal provision of repentance in section 23(3) as to committing serious violation of human rights. The provision of section 23(2) provides that recommendation for amnesty will not be made in cases of the offences defined in section 2(k) only if there are no adequate reasons and bases. This means that normally, the Commission paves the way for amnesty and principle of non-recommendation for amnesty is adopted only if adequate reasons are not there. In other words, the Ordinance has made the grant of amnesty as rule for any

type of crimes and non-grant of amnesty as an exception. It would have been natural and reasonable to have the provision of reduced punishment, amnesty or other measures of transitional justice only if amnesty or other leniency is appropriate having regard to the specialized circumstances such as the circumstances at the moment of commission of the crime, findings of the investigation and status, view of the victim towards amnesty and perpetrator, confession of commission of the offence by the perpetrator along with repentance from the victim and effects and impact of the amnesty in society. It would have been a normal rule to bring the perpetrators of the heinous crimes against human rights and humanitarian law to justice and to adopt alternative ways as an exception, but the reverse is the approach here. Moreover, section 23 is not clear about what consequences follow if no recommendation for amnesty is made. It is not clear that the consequence of non-grant of amnesty is to bring those involved to judicial proceedings. It is provided that the Attorney General would consider about bringing prosecution only if the Commission corresponds to the Attorney General for doing so.

Section 23(4) of the Ordinance provides that the Commission may have consultation with the victim before making recommendation for amnesty if the perpetrator makes an application for amnesty. Section 23(3) provides that the perpetrator has to have repentance with the victim satisfactorily. It would be reasonable to ensure the consultation with, and consent of, the victim for amnesty. However, the said legal provision has not made such elements mandatory. The word "consultation" appearing in sub-section (4) does not denote consent, it only denotes general consultation and it does not mean to have a legal compulsion to respect the view of the victim. Similarly, as per sub-section (6), the bases and criteria for making recommendation for amnesty will be as prescribed and since section 40 has delegated the power to frame rules to the Commission itself, which again shows that the bases and criteria will be prepared as per the uncontrolled discretion and the ways for amnesty will be paved accordingly.

The overall legislative scheme of section 23 does not classify the offences committed during the conflict as the ones in which amnesty may be granted and the heinous ones to have had judicial hearing as per national and international laws. The provision of section 23 (3) that if the perpetrator repents with the victim with regard to the incidents of serious violation of human rights, the Commission may recommend for grant of amnesty even in the cases of serious violation of human rights as defined in section 2 (k) seems to be inconsistent with national and international law. Truly speaking, even the consent of the victim would not be sufficient to immune the persons involved in such heinous crimes. It is the state obligation to investigate the perpetrators involved in such heinous crimes and to prosecute them.

If amnesty is granted for the perpetrators involved in crimes of serious nature and grave violations of human rights having them forcibly linked with political conflicts, not only will impunity be promoted but the rule of law will also not be maintained. The Commission may not be conferred with uncontrolled powers of granting amnesty in all type of crimes depriving of the right of victims of serious crimes to get effective justice from independent and competent authority. This Court in the case of *habeas corpus* involving *Rabindra Dhakal on behalf of Rajendra Dhakal v. Ministry of Home Affairs* has clearly laid down that the state cannot ignore its obligation of finding out the actual position of the disappeared persons and making their condition public; of taking actions against those officials found to be guilty and providing for appropriate relief to the victims and that no amnesty can be granted in cases of serious cases.

In transitional justice system, overall evaluation of the incidents happened in the course of conflicts is made and an approach of strategic remedies is taken in which we have to consider different phases of transitional justice such as investigation of crimes and prosecution, reparation, institutional reform, vetting and other steps. There must be the laws, skills and institutional capacity to ensure clarity and effectiveness in all of these activities. The main purposes of transitional justice are to prevent the serious cases of violations of human rights and humanitarian law in the course of conflict, not to repeat commission of such offences, to regenerate a sense of self-respect and security, to maintain record of happening of incidents, creating an atmosphere of national harmony and restoring the rule of law and ultimately contributing in the course of peace-building. An order of *mandamus* has already been issued in the name of Government of Nepal in the case of *Liladhar Bhandari v. Government of Nepal, Office of the Prime Minister and Council of Ministers* (Writ No. 0863 of the year 2064) that there is a need of addressing the issues of transitional justice through particular mechanisms and programs.

Though the impugned Ordinance uses the words "in the course of armed conflict" however, those words could not cover all incidents happened in the course of the armed conflict. The words could cover only the incidents happened in the course of conflicts. In such situation, the prevailing laws have to be invoked in case of other matters. Conflict means the cause because of which the conflict ensued. Commission of crimes of non-political

nature of whatsoever type could not be insulated in the name of the conflict. Failure to conduct investigation at the very moment in the crimes committed because of the immediate circumstances could not be regarded as immunity or waiver granted by the criminal law. Since politicization of crimes is at massive scale, addressing and managing it seems to be challenging. Time of conflict is the period during which the conflict was continuing. Not each and every incident happened during the time of conflict may be regarded as the incident happened in the course of conflict. In the conflict period, the incident associated politics and the incidents of commission of crimes could not be viewed having mixed them together. An act that is purely criminal in nature could not be said to be an incident happened in the course of conflict and such act has to be addressed by the prevailing criminal law. Commission of an offence may be addressed by transitional justice measures or other measures only if commission of such an act is found to be associated with conflict. There is no possibility that the Truth and Reconciliation Commission would address the purely criminal incidents. It is necessary to know here that the Truth and Reconciliation Commission Ordinance is not a law to substitute the criminal justice system of the country; rather it is only an auxiliary law.

In case of general administration of criminal law, one is prosecuted as per law and punishment is imposed upon conviction by a decision of a Court and the judgment is executed and pardon is granted only in exceptional cases by the state in specific situation following specific procedures. While granting a pardon, the fact of commission of the offence is established beforehand. Since no such processes are established in case of granting amnesty in the course of managing transitional justice, it has to be seen very cautiously. Granting amnesty to those perpetrators involved in serious violation of human rights before determination of the guilt is something not imagined by the Constitution. Whether or not to grant pardon or amnesty is the matter to be decided based on the Constitution and the recognized principles of justice.

While including the provision of pardon as per the Constitution, no recommendation for pardon could be made in case of the perpetrator engaged in serious violation of human rights as in ordinary criminal cases. The present Ordinance has been framed with the element of amnesty as the main purpose and the element of not granting amnesty as an exception. The provision that the Commission may have consultation with the victim before granting amnesty could not be objective. It would be logical if mandatory consultation and consent of the victim could be made as a rule before granting amnesty by the Commission. The bases and criteria for amnesty are the substantive matter of a legal system and to provide that they will be as prescribed [in the Rules] is to set justice aside. Article 151 of the Interim Constitution of Nepal, 2007 provides that the President may, on the recommendation of the Council of Ministers, grant pardons to persons convicted, and suspend, commute or reduce any sentence imposed by any Court, special Court, military Court or by any other judicial or quasi-judicial, or administrative authority or institution. However, the Ordinance has challenged this constitutional provision by granting the power to grant amnesty to Government of Nepal. More clarity is needed in this respect.

No amnesty or pardon may be granted against any fundamental right including the right to life, right to equality, right against torture of the victim of the serious type of crimes and grave violation of human rights. The Commission seems to have uncontrolled discretionary power by virtue of section 23 of the Ordinance by providing that it may grant amnesty even to the persons involved in serious crimes. Since the Commission seems to grant amnesty to perpetrator in case of the crimes defined in section 2(k) even without consent of the victim, the powers granted by the Ordinance to the Commission as to the grant of amnesty does not seem to be rational and lawful even in the context of the rights of the victims and the fundamental rights guaranteed in the Constitution. Moreover, such provision is not consistent with international humanitarian law and norms and principles of transitional justice.

While considering into the third question that whether or not the provision made in section 25 of the Ordinance creates a situation of immunity for those involved in serious crimes and whether or not the said section 25 is inconsistent with Interim Constitution of Nepal, 2007, the petitioners have contended that the provision of section 25 (1) that the Commission may make recommendation to take actions as per the prevailing laws against those not included in the recommendation of amnesty and this provision has rendered the recommendation for taking actions not compulsory but subject to discretion of the Commission and thus, it gives a room for immunity to the perpetrators. Moreover, the use of the terms *as per prevailing law* which means that the actions will be taken as per the laws prevailing at the time of commencement of the Ordinance. Normally, proceedings of a criminal case is initiated as per the prevailing law, but in the special cases of serious violations of human rights, if the ambit of the prevailing law are narrow compared to the nature of the crime and propensity of the harm caused, and thereby the very purpose of justice is defeated, *ex post facto* law has to be enacted considering the acts already

committed for the greater interests of justice and social order. The Ordinance does not take into consideration to these factors. The respondents have responded that the prevailing law means the laws to be framed subsequently as laws may be made in case of serious violation of human rights, thus the petitioners claim is baseless. However, the provisions of the Ordinance do not seem to have confirmed this position.

Section 25 of the Ordinance contains the following legal provisions:-

25. *Recommendation for Action may be made: 1) While carrying out investigation pursuant to this Ordinance, the Commission may recommend for action, as per the existing laws, to perpetrators not recommended for amnesty pursuant to Section 23.*

*2) While recommending for action pursuant to Sub-section (1), the Commission shall do so through the report to be submitted pursuant to Section 27.*

*3) Notwithstanding anything contained in Sub-section (2), the Commission may correspond to the Office of the Attorney General to prosecute perpetrators not recommended for amnesty prior to submission of the report pursuant to Section 27(1).*

A principle has already been developed in the International Law relating to human rights that the universal jurisdiction will apply in cases of serious violations of human rights and offences against humanity and the perpetrators involved in such cases may be brought to justice even by enacting *ex post facto* law. Since the crimes involving serious violations of human rights and offences against humanity are grave crimes, if the existing laws are not enough to bring the persons involved in such offences, impunity has to be eliminated even by enacting new laws. This Court has issued a directive order in the name of Government of Nepal in the case of *Rajendra Dhakal* to criminalize and penalize the act of enforced disappearance committed during the conflict period and to enact new law for that purpose. In case the Ordinance comes into force as such, since the words *as per the prevailing laws* in section 25(1) do not include the new laws to be enacted, it may immune perpetrators committing grave offences under International Law but not having the force of law in absence of national law.

Though it is universally recognized practice to enact *ex post facto* laws to effectively counter cases of serious violations of human rights or crimes against humanity and to secure complete justice by ending up impunity in special circumstances for the continuity of law and justice, and the directive of this Court given in the case of *Rajendra Dhakal* has been accepted in the written replies of the Ministry of Peace and Reconstruction and for that purpose, the same ministry has been assigned the responsibility to make law for that purpose by this Ordinance, however, these matters could be accessed only in the course of implementation and it could not be settled at present. If no law is to be framed to criminalize enforced disappearance and to execute the prevailing law through the structure of the present Ordinance, a severe condition of non-settlement of crimes of enforced disappearance would emerged. If true and honest implementation of transitional justice is to be ensured, integrated arrangements of relevant laws have to be framed and institutional, procedural, remedial and relief-oriented measures have to be taken and brought into enforcement. It would be unfortunate to formulate any policy or law or to block the making of such laws or policies or their implementation with the mentality of revenge or by guilty feeling for the crimes committed. If legal system and justice system could not be operated by a perpetual sense of justice and conscience and with a long term view and an approach of promoting friendship and good faith in society, the society would continue to be engulfed in conflicts, and it would be impossible to move forward to the path of development and civilization.

While going through the provision of making correspondence for taking actions against those found to be involved in serious violations of human rights but not included in the recommendation of amnesty, such action must be mandatory and not voluntary. The provision that recommendation may be made for taking actions against those not included in amnesty does suggest that granting amnesty is the major purpose and if the taking of actions against the perpetrators not included in the recommendation has to be left at the discretion of the Commission, the perpetrators would not be subjected to justice and the victims would be further victimized. Section 25(1) of the Ordinance states that ...may recommend for taking actions... and section 25(3) states that ...may correspond to the Attorney General for filing case and by this, taking actions even against those not included in the recommendation for amnesty is not made mandatory but discretionary to the Commission. Therefore, the said provisions could not be said to be consistent with the Constitution and it seems the Ordinance has to be reviewed and reformulated for making it consistent with the Constitution, law and justice.

Now considering the fourth question, whether or not the power of the Attorney General to decide as to bringing or not bringing prosecution is narrowed by virtue of the provision made in section 29 and whether or not the

limitation of filing of the cases within thirty five days from the date of decision of filing the cases is against the universal principle that there is no statute of limitations in cases of criminal offences of serious nature; the petitioners have contended that the provisions made in 29(1) of the Ordinance on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation, 2013 that the Attorney General or a Government Attorney designated by him may decide whether or not to prosecute on the cases of serious violation of human rights if the Ministry makes correspondence for the same on the recommendation of the Commission. Since this provision provides that the Attorney General could not file cases without recommendation of the Ministry of Peace and Reconstruction thereby, the constitutional power of the Attorney General to decide whether or not to file a case has been narrowed down. Thus, said section must be invalidated. The respondents have responded that since sub-section (3) of section 25 provides that the Commission may correspond to the Attorney General to bring prosecution against those not recommended for amnesty, thus, the provision of Section 29 (1) of the Ordinance must be read together with section 25(3). Therefore, the provision of section 29(1) does not narrow down the constitutional roles of the Attorney General as claimed by the petitioners and the writ must not be issued.

Section 29 of the Ordinance on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation, 2013 is as follows:-

29. Provisions relating to filing cases: (1) *The Attorney General or a Government Attorney designated by him shall, after necessary investigation, decide on the matter whether a case can be prosecuted or not against any person, if the Commission itself or the Ministry writes to it based on the report of the Commission to initiate a case against any persons who were found guilty on allegation of serious human rights violations.*

(2) *The Attorney General or a Government Attorney, while deciding on the matter whether a case can be prosecuted or not pursuant to Sub-clause (1), should state the ground and reason thereof.*

(3) *The Government Attorney shall have to initiate a case against such person in such Court wherein the Government of Nepal, upon publishing a notice on Nepal Gazette, notifies it; if a decision, after the necessary investigation pursuant to Sub-Clause (1), is reached to initiate a case against such person.*

(4) *If the Attorney General of a Government Attorney designated by him decides to prosecute pursuant to Sub-section (1), Case can be filed within thirty five days of such decision notwithstanding anything contained in any other existing law.*

Sub-section (3) of Section 25 of the Ordinance:

(3) *Notwithstanding anything contained in Sub-section (2), the Commission may correspond to the Office of the Attorney General to prosecute perpetrators not recommended for amnesty prior to submission of the report pursuant to Section 27(1).*

Article 135(2) of the Interim Constitution of Nepal, 2007 provides, "The Attorney General or officers subordinate to him/her shall represent the Government of Nepal in suits in which the rights, interests or concerns of the Government of Nepal are involved. Unless this Constitution otherwise requires, the Attorney General shall have the right to make the final decision to initiate proceedings in any case on behalf of the Government of Nepal in any Court or judicial authority."

First of all, an analysis has already been made while dealing with the third question that section 25(3) of the Ordinance has provided that the Commission may correspond to the Attorney General for taking of actions against the perpetrators not included in the recommendation and thereby the Ordinance has left the making of correspondence for filing cases at the discretion of the Commission. While going through the legal provision made in section 25(1), it seems that the Commission does not directly correspond to the Attorney General to file cases rather it makes recommendation to the Ministry of Peace and Reconstruction and the Attorney General is able to decide whether or not to file the case only after the Ministry makes recommendation to it at its discretion. Instead of ensuring prosecution against the perpetrator engaged in crimes of grave violation of human rights, provision has been made that the Commission has to make recommendation to the Ministry first and the Ministry may correspond to the Attorney General at its discretion for filing of cases.

It seems that the Attorney General will be able to decide as to whether or not to file prosecutions under the provision of section 29 only if the Commission may correspond to the Attorney General to file prosecution in the cases not recommended for amnesty under section 25(3) or under the situation in which the Commission makes

recommendation to file cases against the perpetrators engaged in serious violations of human rights and the Ministry's correspondence to the Attorney General or the Government Attorney he/she has designated.

Section 25(3) of the Ordinance provides that the Commission may correspond to the Attorney General to file cases but it does not clarify as to what the Attorney General has to do thereafter, while under section 29, the Commission may correspond to the Ministry to file cases but the Ordinance does not make it mandatory for the Ministry to correspond to the Attorney General to file cases and even if the Ministry corresponds to file cases, it still does not ensure whether or not the Attorney General will file the cases. In such a manner, there is always uncertainty in the Ordinance as to bringing prosecutions in whatsoever type of grave violations of human rights. If bringing prosecutions is subjected to such widest discretionary powers and reliance on the Ministry or Attorney General, which is expected to be close to the contemporary political interests is expected, then eliminating impunity and well management of transitional justice would be only a day-dreaming. In reality, there is no discretionary privilege of the state in investigation or prosecution of a criminal offence. Situations where an offence is committed but there is no investigation or investigation is carried out in such poor manner that it results in failure or the investigation is not reflected in the result are the stark examples of failure of the rule of law. To file lawful prosecutions upon successful investigation and to pursue them to the last point of justice are the basic responsibilities of law enforcement agencies. If investigation or prosecutions are not made or impunity is promoted by denying to carry out investigation or prosecutions directly or indirectly, each of such incidents does have consequences in public law and, based on the Constitution and recognized principles of justice, the Court also does have powers necessary to compel to reactivate the investigation or prosecutions, and it is also the duty of the Court to do so. If the designated investigation officer or prosecutor does not fulfill his/her duties, and justice is defeated or the victim feels that he/she has not got remedy as a consequence thereof, in such cases, situation may arise to open the alternate course of action of private investigation or prosecution at the responsibility of victims. The path of justice should not be obstructed due to the failure of particular official or institution and victims may not be stranded in helplessness. It is necessary to reform the criminal law taking into account of these aspects as well.

Based on the above analysis, the present Ordinance does not ensure to the required level the prosecutions even against the perpetrators of grave offences which has affected the right of the victimized person/s or society to seek justice for protection of his/her/its rights and interests. Though it is not proper to have a biased view in advance as to the intention of the Attorney General or the Ministry, which are the public authorities, nevertheless, it is necessary to have clear provisions in the Ordinance to ensure the degree of certainty in achieving justice.

The Interim Constitution of Nepal, 2007 has created the institution of the Attorney General with wide powers of prosecutions. Question may be raised whether or not any provision of this Ordinance narrows down its power. Effective implementation of criminal law is its inherent obligation and success or failure of this institution is linked to its performance. However, if, being influenced by the departmental interests of the executive, which is again associated with political interests, decisions could not be taken based on the Constitution and rationality, the very foundation of the state may be at stake. Sound administration of the criminal justice is a *sine qua non* for well implementation of the Constitution and since ensuring the same is one of the mainstream obligations of the state, therefore, the basic structure of the criminal law and justice could not be subordinated to the mechanism of transitional justice. Based on the subject-matter and context, the criminal judicial process and process of reconciliation must be carried as complementary to each other and to be treated separately and specially as may be necessary.

The power relating to prosecutions entrusted by Article 135 of the Interim Constitution of Nepal, 2007 is a specialized and autonomous type of power. The reasons behind entrusting this power to the Attorney General directly by the Constitution is the supposition that the institution of the Attorney General is a professional and judicious institution and such institution does not bring malicious prosecutions against anyone being motivated by particular political reasons or not to bring prosecution against anyone for fear or favor or for political interests and that prosecutions in serious offences be made as per specialized legal and judicial necessity in fair manner. For these reasons, such institution is created and entire power of prosecution is entrusted to it. Therefore, powers of prosecution of the Attorney General could not be narrowed down.

The petitioners have also challenged the provision of limitations for filing of cases made in section 29 of the Ordinance. Sub-section (4) of section 29 provides that if the Attorney General or a Government Attorney designated by him decides to prosecute pursuant to Sub-section (1), a case may be filed within thirty five days of such decision, notwithstanding anything contained in any other existing law. This provision does not prescribe

limitations for decision as to file or not to file case but prescribes that if decided to file the case, it must be filed within thirty five days. Though it is normally not imagined that case will not be filed after taking decision to file cases, however, a complicated situation may emerge as to what happens if the limitation of thirty five days is expired despite the fact that decision of filing the case has already been made. The present provision may be made to bring prosecutions soon, if they have to be filed. But if a situation emerges that the limitation was expired by misusing the same provision, serious questions arise as to administration of justice. It is necessary to examine it from practical point of view as well. If limited period is prescribed as limitation in serious offences, it is regarded to be a conspiracy in favor of the perpetrator. In order to pave the way of justice, the state is expected to have flexible limitations for bringing prosecutions in an equitable manner. The concept, values and norms of human rights may not be ignored by providing a limited period of time as limitation against the persons engaged in serious violation of human rights like in normal criminal law and depriving the victims of violation of human rights the basic right to secure justice. If the established principles of carrying out investigations, bringing prosecutions, and conducting judicial proceedings against the perpetrators engaged in serious violations of human rights subject to the recognized principles of criminal justice are challenged, and the judicial process is targeted to be made dysfunctional by delimiting the limitations, a situation of defragmentation of the developed jurisprudence would emerge. There is possibility that such provisions might have direct or indirect impact even on the developed criminal system and its course of development. Resolution No. 60/147 adopted by the United Nations (Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law) provides in its Principle No. 4, "where so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law." Thus, the Resolution provides that statute of limitations may not be made with regard to the offences of grave violations of international human rights and of International humanitarian law. Therefore, the provisions of section 29 narrowing down the power of the Attorney General to bring prosecutions and of section 29(4) providing for a limitation of thirty five days for filing of cases are against the universal principle of non-applicability of statute of limitations in serious types of criminal cases.

Now, while considering about the final question as to whether or not an order as requested by the petitioners is to be issued, it is evident that the petitioners have requested that as Sections 13, 23, 25 and 29 of the Ordinance on Investigation of Disappeared Persons, Truth and Reconciliation Commission, 2013, are against Articles 12 (1), 13 (1) and 24 (9) of the Interim Constitution of Nepal, 2007; they are to be invalidated as per the Article 107 (1) and be amended to as per the Article 107 (2) of the Constitution.

The conflict of Nepal has a unique feature and the Nepali society is now undergoing a historical challenge of taking this conflict to a logical conclusion by institutionalizing peace in sustainable manner. The concerned sectors will make specialized analysis and conclusions as to the causes and consequences of the conflict and its outcomes as well. Now the main question before this Court relates to whether or not the procedures and legal provisions as adopted by the impugned Ordinance on Investigation of Disappeared Persons, Truth and Reconciliation Commission, for the purpose of addressing incidents of serious crimes related to human rights that happened during the conflict, have violated Constitution, international human rights law, accepted principles of justice, and if implemented in its present form, whether or not the Ordinance may achieve the goals of transitional justice.

The Interim Constitution of Nepal, 2007 appears to have come into existence as a roadmap for conflict resolution. It is urgent to institutionalize and manage transitional justice in Nepal as it continues to remain an important challenge for the establishment of peaceful Nepali society by making it free from the effects of conflict and addressing the causes of conflict. In connection to this, two separate bills on Truth and Reconciliation Commission and Commission on Investigation of Disappearance were tabled in the previous Legislature-Parliament (Constituent Assembly) in relation to implementing the Interim Constitution and Comprehensive Peace Accord; however those Bills could not be passed before the dissolution of the Constituent Assembly, and consequently, it appears that they have not got the shape of legislation until now. Hence, it appears that an important matter that could not be settled through a regular legislative process was given a form of law through the process of Ordinance. And the Ordinance was suspended from implementation with an interim order of this Court on 1 April 2013.

As peace, justice and development in Nepal have been hampered in numerous ways due to the prolonged transition in the context of management of the conflict in Nepal; it is imperative that the issue be addressed as expeditiously as possible through multi-dimensional approaches. The promulgation, though delayed, of this Ordinance for managing the transitional justice, is positive in itself; however, concerns have been expressed as to what extent this Ordinance will be of help in managing the conflict and institutionalizing justice. It has been observed as discussed above that the infirmities mentioned in the impugned Ordinance have to be reformed as deemed necessary through judicial settlement and to be implemented in a new manner. The process of the search for the disappeared and truth and reconciliation has to be viewed in the context of design and implementation of the project along with policy and capacity that includes various elements of the management of justice including documentation of various incidents that happened during conflict period, truth seeking and truth telling, reparation, delivery of justice, relief and rehabilitation.

For management of transitional justice, general viewpoint is mainly to undertake judicial processes relating to serious violations of human rights and to continue peace dialogues between the conflicting parties, create an environment of reconciliation by encouraging friendliness and harmony as regards other matters with a view to maintaining peace. Viewed from this perspective, despite good objectives as mentioned in the preamble to the present Ordinance, fundamental problems are still observed to be inherent in it.

To conclude, as discussed in different issues above, the present Ordinance is in contravention to the approach of the international human rights law which regards incidents of enforced disappearances as serious crimes related to human rights. It is also against the decision and order issued by this Court on the case of *Rajendra Dhakal*, and against the spirit of the Interim Constitution of Nepal, 2007, and the right to life and liberty of individuals as recognized by the previous Constitutions. A separate Commission had to be formed to implement the decision of the case of *Rajendra Dhakal*, which has not been complied with. Besides, while the Disappearance Commission was deemed to be purely related to criminal acts of enforced disappearances, it has not been provided for accordingly in the Ordinance. And acts of enforced disappearances should not be made matters of reconciliation, whereas, in the present Ordinance, acts of enforced disappearances have been made matters of reconciliation and made part of the Truth and Reconciliation Commission. Therefore, as this is against law, and as the provisions related to the act of enforced disappearances in the present Ordinance are in contravention to the Constitution, law and the principles of judicial precedents as set by this Court, therefore, an order of *certiorari* is hereby issued in the name of the respondents; and because the said provisions are unacceptable, they should be removed from the Ordinance and that the Ordinance should not be implemented or cause to be implemented in its present form.

As stated above, an order of *mandamus* is hereby issued in the name of respondent Government of Nepal to issue, without delay, another Ordinance with necessary legal provisions to establish a separate Inquiry Commission, or to make necessary arrangement for the same, for the investigation of enforced disappearances, in line with Constitution, laws and the decision of this Court in the case of *Rajendra Dhakal* and other legal precedents set by this Court.

Among other provisions of the Ordinance, the main constitutional and judicial issues are found as stated as follows; and as the provisions of the Ordinance in the present form are not found to be in line with the principles of constitution and justice, and as it requires to be done as mentioned hereunder, the order of *mandamus* is hereby issued in the name of the respondent Government of Nepal, to do as mentioned hereunder and issue the Ordinance only after its amendment or reform or to make any other necessary legal arrangement for its implementation:-

- a) Since the provision of Section 23 of the Ordinance concerning amnesty does not assure non-recommendation for amnesty even in case of the offences referred to in Section 2 (k) and it has made them a matter of amnesty procedures and since this has made the involvement and consent of victim in the amnesty proceedings not mandatory but only secondary requirement and this seems to be against the victims' fundamental right to justice including right to life and liberty, right to information, right against torture, and this provision is found to be against the recognized principles of justice. Therefore, this provision has to be reviewed, reformed and amended accordingly;
- b) Since the provisions of Sections 25 and 29 of the Ordinance do not make the criminal prosecution of the persons accused of serious violation of human rights certain, easy and uninterrupted, rather it has been subjected to the discretion of the executive and uncertain and thereby obstructing the process of justice, the said provisions have to be made consistent with the Constitution and laws;

- c) Though the limitation of thirty five days has been prescribed to file cases after the recommendation of the Commission or after the Attorney General decides to file cases after the recommendation of the Ministry, but it does not specify the responsibility as to what happens if a case is not filed within the said limitation, and since such a short period of limitation in serious violation of human rights may lead to impunity, therefore, the said provisions are also inconsistent with the Constitution and against the accepted principles of justice recognized by the Constitution, therefore, they have to be reviewed and amended accordingly;
- d) In addition to amending the above mentioned provisions, an order is hereby issued to make legal reforms and adopt practical measures in implementation phases to make legal provisions for the criminalization of the acts of serious human rights violations so as to have a comprehensive management of truth finding and reconciliation; to initiate extensive campaigns to promote the spirit of reconciliation; to provide for reparation to the victims and their families with enough economic, legal and institutional arrangement; and to ensure the autonomy and impartiality of the Truth and Reconciliation Commission by forming such a Commission constituting only of individuals who, during conflict, were not parties to that conflict or were not involved, in any way, either to repress that conflict or were part of the administration thus being party to the conflict, or who do not have any negative records of human rights violations, and also in line with the internationally accepted standards; to make and implement victim and witness protection program for them to be able to tell their truth, to be able to effectively defend it, and to protect their individual identity related details; to arrange for, if needed, in-camera hearing or distance hearing by arranging various means including of audio-visual technique.
- e) In order to prescribe in law itself the fundamental provisions to be adopted by the Commission on issues including amnesty, amend to the Ordinance by taking assistance from an expert team constituting conflict experts, organizations representing victims or victims' interest, human rights law experts, and other stakeholders on these matters.

Do communicate this order in writing to the respondents Government of Nepal and the Office of the Attorney General to effectively implement and manage as stated above. Inform about this Order to the respondents Government of Nepal and the Office of the President through the Office of the Attorney General. Do cross off the diary record of this case from the list of cases and handover the case file to the Archive Section as per law.

Sd.  
Justice

We concur with the above.

Sd.

Justice

Sd.

Justice

Done on this Thursday, the 2<sup>nd</sup> of January of the year 2014.

Bench officer: Shiba Prasad Khanal and Bishnu Prasad Gautam, Under Secretaries  
Computer setting: Ranu Paudel, Bikes Guragain