

Supreme Court, Joint Bench
Hon. Chief Justice Kalyan Shrestha
Hon. Justice Sushila Karki

Decision
072-WH-0018

Subject: Habeas Corpus

Bishnu Lama, resident of Ward No. 7, Naubise VDC, Dhading District, currently in detention at Metropolitan Police Range Crime Division1

Subash Tamang, resident of Ward No. 4, Chandragiri Municipality. Kathmandu District, currently in detention at Metropolitan Police Range Crime Division1

Dipak Tamang, resident of Ward No., Panauti Municipality, Kavrepalanchowk District, currently in detention at Metropolitan Police Range Crime Division1

Advocate Khem Prasad Gautam, in favor of the 3 people, working for The International Legal Foundation-Nepal1

Versus

DAO, Kathmandu1

CDO of DAO1

Metropolitan Police Range, Teku, Kathmandu1

Here are the brief facts and decision of the writ petition filed in the court according to Article 46 and 133 (2) and (3) of Constitution of Nepal, 2015.

Details of writ petition:

The police arrested petitioners Bishnu Lama, Subash Tamang and Dipak Tamang from Solteemod on Sept 28, 2015 at 12 noon while they were waiting for the bus and kept them in detention. Then, opponent CDO, who has no jurisdiction, extended the remand duration by 6 days during the first remand hearing on Sept 29, 2015 which is against the Constitution of Nepal. Again, CDO extended the remand duration by 5 days on Oct 3, 2015 and hence, the three accused were kept in illegal detention. Article 17 (1) of Constitution of Nepal has ensured that

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"Except as provided for by law no person shall be deprived of her/his personal liberty". Curbing the petitioners' freedom by keeping them in detention has not been done in accordance with the law. According to Article 20 (3) of Constitution of Nepal and prohibitive phrase of Article 3 (2) of Some Public (Crime and Punishment) Act, 1970 every person who is arrested shall be produced before a judicial authority within a period of twenty-four hours after such arrest, excluding the time necessary for the journey from the time and place of arrest to such authority, and the arrested person shall not be detained in custody beyond the said period except on the order of such authority.

Although Article 5 (1) of Some Public (Crime and Punishment) Act, 1970 has given CDO the power of original jurisdiction to initiate the proceeding and adjudicate case under this act but Article 152 (2) of Constitution of Nepal states "Cases related to criminal offense leading to prison sentence of more than a year shall not fall under the jurisdiction of any other institution other than a court or specialized court or military court or judicial body". Similarly, Article 300 (7) states "The criminal cases, that demand more than a year of imprisonment, lying sub-judice at other bodies except the courts, shall be transferred to the District Courts of the respective districts after the commencement of this Constitution." Hence, the official jurisdiction to decide such cases belongs to District Courts according to the constitutional provision.

Article 6 (1) of Some Public (Crime and Punishment) Act, 1970 shows the provision of fine of up to NRs 2,000 and imprisonment up to 2 years in cases which fall under jurisdiction of this act. Article 300 (7) does not show any provision regarding jurisdiction about who will decide the imprisonment punishment and it rather indicates towards charges where there could be imprisonment for more than a year. As there can be up to 2 years imprisonment in cases under Some Public (Crime and Punishment) Act, 1970, it is clear that opponents like quasi-judicial bodies and officials do not have authority to decide such cases according to Article 152 (2) of Constitution of Nepal. It is also clear that the authority to deal with such cases as provided by Article 5 (1) of Some Public (Crime and Punishment) Act, 1970 automatically becomes nullified after Article 1 (1) of Constitution of Nepal comes into effect and hence, the official jurisdiction to decide such cases belongs to District Courts according to Article 300 (7) of Constitution of Nepal.

It is clear that the petitioners should have been kept in detention only by the decision of the concerned authority who is District Court Judge and not CDO as Constitution of Nepal 2015 had already come in to effect but this act of keeping them in detention by CDO who has already lost his/her jurisdiction over such cases is an illegal act. Thus, the petitioners have been kept in illegal detention by the opponents which has violated their rights according to Article 17 (1), 20 (3) and 20 (9) of Constitution of Nepal. Therefore, habeas corpus order be issued and the petitioners be freed from opponents' illegal detention.

Initial order given by this court on Oct 6, 2015:

What has happened in this? Why should the habeas corpus order as necessitated by the petition not be issued? If there is reason why the order should not be issued then it should be submitted

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with due process along with written specification through Office of the Attorney General within 15 days of receiving this order, excluding the time necessary for the journey from the place of arrest to concerned authority.

Details of the written answer:

The opponent writ petitioners were arrested on Sept 28, 2015 at Soalteemod situated near Kalimati, Kathmandu Metropolitan Ward No. 13 by the police, who were on duty to minimize rising incidents of theft, pickpocketing and looting as well as to search and arrest suspicious people, after iron rod and other items used for breaking into houses were found from the petitioners' bag. The petitioners had also engaged in verbal confrontation with the police causing obstruction in the police duty. Then they were tried at DAO Kathmandu for offense under Some Public (Crime and Punishment) Act and remanded in custody for investigation and after investigation was done they were presented at DAO Kathmandu on Oct 9, 2015 along with charge sheet from District Government Attorney Office Kathmandu where a bail of NRs 6,000 was set for each of them. After posting the bail, they were released on that same date. Opponent writ petitioners have filed this false habeas petition only to escape punishment for their crime and it is should be annulled.

It is mentioned in the petition that DAO, who does not have the official authority, remanded the petitioners in custody. According to Article 304 (1) of Constitution of Nepal "All the laws in the force at the time of commencement of this Constitution shall remain in operation until repealed or amended. Provided that laws inconsistent with this Constitution shall, to the extent of inconsistency, ipso facto, cease to operate, one year after first session of federal legislature, in accordance with this constitution". Hence, this petition which claims the petitioners were remanded in custody in violation of Article 152 and 300 (7) should be annulled. The petitioners were remanded in custody by Metropolitan Police Range for 6 days starting from Sept 29, 2015 and on the second time they were remanded in custody for 5 days starting from Oct 4, 2015 and investigation is going on. Thus, this petition which claims that the petitioners were illegally detained by DAO which has no authority should be annulled. Written answer submitted by DAO and its CDO.

Details of the order:

In this writ petition received with due process, the petitioners have been remanded in custody by opponent CDO under Some Public (Crime and Punishment) Act, 1970. Learned Advocates Ajay Shankar Jha and Bimala Yadav argued that there is provision of up to 3 years imprisonment under Some Public (Crime and Punishment) Act, 1970 so CDO cannot decide in such cases according to Article 152 (2) of Constitution of Nepal. They argued that even though Article 300 (7) of Constitution of Nepal states "The criminal cases, that demand more than a year of imprisonment, lying sub-judice at other bodies except the courts, shall be transferred to the District Courts of the respective districts after the commencement of this Constitution" the petitioners were illegally detained by CDO who has no authority over such cases and thus, the habeas petition should be granted and the petitioners should be released.

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Similarly, from the opponent's side, learned Advocate Geeta Timsina argued that Article 5 (1) and 6 (1) of Some Public (Crime and Punishment) Act, 1970 (as claimed in the petition) have not been amended or annulled according to Article 304 (1) of Constitution of Nepal. She further argued that according to Article 6 (1) of Some Public (Crime and Punishment) Act, 1970, CDO has referred the case before the Court of Appeal in order to impose the penalty of imprisonment and therefore, the petition is not in accordance with the constitution or law. She further argued that the petitioners had been remanded in custody in SPO case with due process and charge sheet was filed after investigation and they were released after posting bail and hence, this petition be annulled as there is no need for it.

After scrupulously pondering over both sides' arguments and studying constitutional and legal provisions it seems that following issues have to be considered while making the decision:

1. What will happen to the criminal cases, that demand more than a year of imprisonment, lying sub-judice at other bodies except the courts at the commencing period of Constitution of Nepal, 2015 after the constitution comes into effect?
2. What is the purpose of Some Public (Crime and Punishment) Act, 1970? What kind of law is it? Does the changed scenario caused by the constitution affect it or not?
3. Should the order (as claimed) be issued or not? If it should be issued then what kind of order should it be?

The writ petitioners were arrested on Sept 28, 2015 at Soalteemod by police. Then they were tried at DAO Kathmandu for offense under Some Public (Crime and Punishment) Act, 1970 and remanded in custody for investigation. There is provision of up to 2 years imprisonment in Some Public (Crime and Punishment) Act, 1970 and according to Article 152 (2) of Constitution of Nepal, 2015 CDO does not have the authority to decide such cases. In addition, according to Article 300 (7) of the constitution, there is provision to transfer such cases to District Courts but still the petitioners were kept in illegal detention by the CDO and hence habeas petition should be granted and they should be released. This is the main claim in the petition.

It was found in the written answer of opponent CDO that according to Article 304 (1) of Constitution of Nepal "All the laws in the force at the time of commencement of this Constitution shall remain in operation until repealed or amended. Provided that laws inconsistent with this Constitution shall, to the extent of inconsistency, ipso facto, cease to operate, one year after first session of federal legislature, in accordance with this constitution". Hence, CDO's action of remanding them in custody and letting the investigation continue cannot be termed illegal. It was found in the written answer of opponent Metropolitan Police Range that the petitioners were remanded in custody by CDO and investigation was carried out and later charge sheet was filed and they were released after posting bail. Hence, there is no need to issue the order.

Firstly, it seems necessary to ponder about the first question in order to get to a decision regarding the petition claim and written answer. Constitution of Nepal, 2015 has incorporated the concept of an independent, impartial and competent judiciary, and rule of law. Similarly, Part 11 of the constitution contains provisions regarding the judiciary. Similarly, Article 126 assures

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powers relating to justice in Nepal shall be exercised by courts and other judicial institutions in accordance with the provisions of the constitution, other laws and recognized principles of justice. Article 127 of the constitution has made three-category provision for courts: Supreme Court, High Court and District Court. According to Articles 152 (1) and 127 there is provision to establish and constitute other specialized courts, judicial institutions or tribunal, for the purpose of hearing cases of special types and nature. In addition, according to Article 152 (2) cases related to criminal offense leading to prison sentence of more than a year shall not fall under the jurisdiction of any other institution other than a court or specialized court or military court or judicial body.

The jurisdiction of the district court according to Article 151 is as follows:

151. Jurisdiction of the District Court: *(1) The District Court shall, unless provided otherwise in the law, have jurisdiction to hear original cases and execute all cases within its jurisdiction, hear petitions of habeas corpus, prohibitory order and other petitions according to the law, hear appeal over the decisions taken by the quasi-judicial bodies, hear appeal over the decision of the local level judicial institutions established according to the law of the province and initiate action and punish in contempt of court against those obstructing its or its subordinate courts acts of judicial execution or not abiding by the order or verdict.*

(2) The jurisdiction of the district court and other provisions relating to its working procedure shall be as provided for in the federal law.

Constitution of the Kingdom of Nepal, 1959 and Constitution of Nepal, 1962 had provisions only about formation of the Supreme Court and no provisions about the formation of District Courts. That is why it seems that formation of District Courts and their jurisdiction are handled by the law. However, it seems that Article 89 of Constitution of the Kingdom of Nepal, 1990 as well as Article 108 of Interim Constitution of Nepal, 2007 has provisions regarding formation and jurisdiction of District Courts. It is also found that the jurisdiction and work procedure of District Courts have been managed according to Administration of Justice Act, 1991 (according to directives of the constitution) and other relevant laws and regulations. It is known to all that Constitution of the Kingdom of Nepal, 1990 was the first to ensure judicial independence in Nepal. It appears that Interim Constitution of Nepal, 2007 is not as generous as the earlier constitution in terms of judicial independence. It is anticipated that the evaluation, analysis and description of judicial independence in the current constitution will be gradually done.

It is found from the review of Nepal's constitutional and justice administration laws that District Courts have always had the authority to decide cases from the initial stage. Administration of Justice Act, 1991 amended by Administration of Justice Related Some Nepal (Amendment) Act, 2010 on March 29, 2011 gave District Courts the authority to decide habeas corpus and injunction petitions in cases where any body or official violates legal rights of any person. It can be said that even though limited authority was given in this manner to District Courts to decide in habeas corpus and injunction petitions, this provision is a positive aspect from the perspective of decentralization of administration of justice.

Article 151 (1) of Constitution of Nepal, 2015 has officially defined District Courts' jurisdiction regarding hearing original cases, petitions and appeal through legislative law. Similarly, in Sub-Article (2) the provision of previous constitution has been continued which allows other jurisdiction to be decided according to the legislative law. Therefore, it seems that further management of jurisdiction can be done through legislative law. This constitutional provision has to be positively viewed from the perspective of preservation of judicial freedom and decentralization of judicial rights. It is known to all that as the nation is headed towards federal system the constitution makers have kept the judiciary in a united form and tried to spread judicial authority to local level. The jurisdiction of District Court as mentioned in Article 151 (1) of Constitution of Nepal, 2015 can be viewed in points as follows:

- a) hear original cases and execute all cases
- b) hear petitions of habeas corpus, prohibitory order and other petitions
- c) hear appeal over decisions taken by the quasi-judicial bodies and local level judicial institutions established according to the law of the province
- d) initiate action and punish in contempt of court against those obstructing its or its subordinate courts acts of judicial execution or not abiding by the order or verdict

From the beginning phrase of Article 151 (1) of the constitution (**The District Court shall, unless provided otherwise in the federal law**) it seems that it necessary to either amend current laws or pass new federal laws to allow District Court to exercise its new jurisdiction such as hearing appeal and others. Existing Administration of Justice Act, 1991 and other relevant acts have already granted the jurisdiction of District Court to hear original cases and petitions of habeas corpus and prohibitory order. Moreover, federal law has to make provisions regarding jurisdiction of appeal and jurisdiction to hear original cases in more issues. Therefore, formation of federal law seems indispensable to address this issue.

Similarly, following provisions regarding Specialized Court are mentioned in Article 152 of the constitution:

152. Specialized Court: (1) *In addition to the courts referred to in Article 127, the law may establish and constitute other specialized courts, judicial institutions or tribunal, for the purpose of hearing cases of special types and nature.*

Provided that no specialized court, judicial institution or tribunal shall be constituted for the purpose of hearing a particular case.

(2) *Cases related to criminal offense leading to prison sentence of more than a year shall not fall under the jurisdiction of any other institution other than a court or specialized court or military court or judicial body.*

Principally: Judicial jurisdiction is the right which remains integrated in court or judicial body. Constitutional law developed in favor of traditional and extreme separation of power does not find it appropriate to give judicial responsibility to other bodies except courts or judicial bodies. British constitutional expert Sir. A.V. Dicey had advocated that if people of different statuses go to separate courts and bodies for legal remedy then such system will not be able to support the

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principle of equality and rule of law. However, in France - the home country of philosopher Montesquieu who propounded the principle of separation of power there was practice of forming a separate administrative court or tribunal to deal with problems caused by the work of administrative officers. This is how the concept of administrative justice or tribunal was developed from continental legal system.

Due to the open and liberal economic policy, rapid industrialization and the business, profession that followed along with the complication caused by science and technology, and state's role for public welfare, development and classification in impact of government service, there came a stage where it became difficult to implement the British legal system in which complete judicial rights are used by courts or judicial bodies. The demand and practice for specialization in law due to multidimensionalism and diversity seen in the government's work area and nature had started in Great Britain a long time ago. Hence, due to the specialization seen in government's work nature several legal issues had to be handed over to those officials and bodies who did such specialized work. Administrative judicial work and judicial classification have crossed the boundary of legal system and thus, they have gradually become indispensable organs for all types of legal systems of current time as well as legal system of any country.

In context of Nepal, before the promulgation of Constitution of Kingdom of Nepal, 1990 various specialized courts and tribunals were formed under various laws. However, most related acts have given judicial jurisdiction to administrative officials or bodies in relevant matters. This trend is still present till date. Article 85 (2) of Constitution of Kingdom of Nepal, 1990 and Article 101 (2) of Interim Constitution of Nepal, 2007 have constitutionally paved way for formation of specialized court or tribunal. However, the current constitution seems one step ahead of previous constitutions in terms of formation of specialized court or tribunal and detailed provision of its jurisdiction.

Article 152 (1) of the current constitution has paved way for establishment and formation of specialized court, judicial body or tribunal (for special cases) apart from the regular courts (three categories: District Court, High Court and Supreme Court) according to Article 127. But according to the prohibitive phrase of the same Sub-Article no specialized court, judicial institution or tribunal shall be constituted for the purpose of hearing a particular case.

Moreover, according to Article 152 (2) cases related to criminal offense leading to prison sentence of more than a year shall not fall under the jurisdiction of any other institution other than a court or specialized court or military court or judicial body. It means that the jurisdiction provided to administrative officers or bodies through various special laws in criminal cases (leading to prison sentence of more than a year) has been revoked and transferred to courts, specialized courts and tribunals.

On one hand, if criminal cases, which require distinct expertise of specialized administrative officers, are kept under jurisdiction of only courts or judicial bodies then it causes scarcity of such specialists' distinct expertise in the judicial process. On the other hand, when only the administrative officers are given such responsibilities then it might affect the fulfillment of basic principles and values of the judicial process. Therefore, it is clear that in order to avoid such

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uncomfortable and paradoxical scenario a hybrid model (mixture of tribunal or specialized court) consisting of judicial and administrative official has to be followed.

It cannot be denied that the provisions prevalent in current Nepali law which give jurisdiction (including unlimited imprisonment) to administrative officers who don't even have formal legal education, legal training or any legal experience has not been severely criticized before. It has been found that writ petition has been filed after promulgation of Constitution of Kingdom of Nepal, 1990 challenging that such provisions are not in accordance with the constitution and accepted legal principles.

Advocate Ambar Bahadur Raut from Advocacy Forum had filed writ petition challenging the jurisdiction provided by Some Public (Crime and Punishment) Act, 1970 and other laws to CDO. In that petition (writ no. 066-WS-0043) where Government of Nepal, Office of the Prime Minister and Council of Ministers were made opponents an order was issued by the special bench (which included me as well) on Sept 22, 2011 (NLJ 2011, Issue 7, Decision No. 8642, Pg 1083) after detailed explanation and analysis of justice fulfillment and concept of tribunal:

On the basis of analysis of constitutional provision and international provisions regarding human rights and accepted principles, it does not seem that the judicial jurisdiction given to CDO is in accordance with relevant legal provisions, constitution and norms and criteria of international human rights. Although question has been raised against a CDO in this case it seems that this is a symbolic case which represents various other cases as well. The scenario of other administrative officers having judicial jurisdiction in criminal case is also not principally different so it has become necessary to reflect on the scenario of administrative justice as a whole.

*It has become indispensable to amalgamate administrative judicial jurisdiction in accordance with contemporary international treaties related to human rights, Interim Constitution of Nepal and accepted legal norms. The petitioner has demanded immediate annulment of such jurisdiction stating it unconstitutional. However, if it is immediately annulled then the question arises - who will immediately exercise that jurisdiction and how? As there is no alternative provision for that so there will be legal vacuum/void if those legal provisions are declared unacceptable. Such vacuum cannot be fulfilled or managed by judicial decision or order and it will take some time for legislative body to improve and make necessary amendments in the relevant law. Similarly, the executive body will also take some time to make necessary arrangements so it will be inappropriate and unreasonable to immediately declare those laws as unacceptable, as it will further add confusion and difficulty in such complex scenario. **Therefore, order has been issued in the name of defendants to do the following in the below-mentioned issues:***

- 1) *Comparative study of Nepali legal system, social structure and practice of other countries should be done in order to review what can be improved or amended in the legal provision (for appropriate legal and legislative provision) regarding the sole jurisdiction (criminal) of CDO and other administrative officers. A study committee including experts of law, justice and administrative field should be formed for this,*

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which should provide suggestion within 6 months. Following directive order is issued in the name of GoN, Office of the Prime Minister and Council of Ministers and Legislature Parliament to immediately do necessary amendment in the relevant laws and make arrangements for its implementation on the basis of suggestions from the above-mentioned study committee and other concerned bodies:

- a. Study should be done to analyze what kind of judicial jurisdiction should be given to administrative officers in which types of cases, which type of cases should fall under the jurisdiction of specialized courts or tribunals. Possibilities should be studied. This should be done to make it in accordance with rule of law. Issues like formation of tribunals and administrative officers, jurisdiction, ceiling for punishment should be pondered upon and then issues like amending jurisdiction and transferring cases should be pondered upon.*
 - b. Objective criteria, in accordance with the constitution, should be made which will make the work of authorized tribunals or administrative officers independent, competent and unbiased.*
 - c. Such an environment should be created where people's faith in the work and judicial process of administrative officer should rise. There should be easy access to the work and judicial process of administrative officers too.*
 - d. There should be necessary arrangement for evaluation of administrative officer's work including his/her judicial work achievement and a procedure should be developed which links that evaluation to his/her skill enhancement.*
 - e. A separate law along with work procedure should be formed for implementation of appropriate legal process and fair trial while exercising judicial jurisdiction. Provision of effective legal review should also be included in that separate law.*
- 2) While making legal provisions in the law as mentioned in topic 1, qualification of the officer who looks in the case should be mentioned. Training of related law and judicial process is compulsory which ensures his/her competent performance regarding judicial work. Adequate provision of skill enhancement and security of service should also be included in it.*
- 3) It seems that it will take some time to have legal and legislative provisions as mentioned in topic 2. If responsibility is still given without knowledge of judicial process and related law then it will continue to be against the spirit of Article 24 (rights regarding justice), 100 and 101 of the Interim Constitution which has to be immediately stopped. Therefore, it is necessary to practically develop infrastructure for effective, fair and competent justice delivery system. So, deserving candidate has to be selected who has Bachelors Degree in Law, minimum Master's Degree in related field with applicable knowledge and 5 years experience in related field **or** candidates who have above-mentioned other qualification and experience but do not have Bachelors Degree in Law should have minimum 3-month training in related law and judicial process from National Judicial Council or other accepted training organization. Thus, mandamus is issued in the name of Office of the Prime Minister and Council of Ministers and Ministry of Home Affairs stating that necessary*

arrangements for this provision be made within a year and it has to compulsorily implemented.

According to this decision given by this court, the provision regarding 3-month training for administrative officers from National Judicial Council and Legal Service Training Centre has come into effect but the issue regarding relevant law amendment and other issues have not been fully addressed. The intention and sentiment of Article 152 (1) of Constitution of Nepal, 2015 which states that the law may establish and constitute other specialized courts, judicial institutions or tribunal, for the purpose of hearing cases of special types and nature and Article 152 (2) which states that **cases related to criminal offense leading to prison sentence of more than a year shall not fall under the jurisdiction of any other institution other than a court or specialized court or military court or judicial body** has to viewed in similar context as the intention and sentiment of the order given by this court.

Hence, it seems that according to Article 152 (2) of the constitution, cases related to criminal offense leading to prison sentence of more than a year cannot fall under the jurisdiction of any other institution other than a court or specialized court or military court or judicial body. However, it seems that federal law has to manage issues such as how the running cases handled by quasi-judicial bodies or other administrative officials should be transferred to the jurisdiction of regular courts or specialized courts or judicial bodies or tribunals.

After constitutional change, there will be changes in various bodies of the state such as justice administration bodies, which is only natural. However, it should be kept in mind that such constitutional provisions cannot be implemented until required laws are made which are important for implementation of such constitutional change. Constitution has been promulgated but necessary laws as required by the constitution have not been made yet and this transitional scenario has also been addressed by the constitution. Such provision of the constitution is also called transitional provision.

Transitional provisions have also been mentioned in Part 33 of Constitution of Nepal, 2015. In the process of making transitional provisions it has been found that according to Article 300 (7) of Constitution of Nepal, *The criminal cases, that demand more than a year of imprisonment, lying sub-judice at other bodies except the courts, shall be transferred to the District Courts of the respective districts after the commencement of this Constitution.*

As the constitution has directly established the jurisdiction of District Courts, the provision to hear original cases and execute all cases within its (District Courts') jurisdiction has to be considered as constitutionally approved and hence provisions in the ordinary law will be ineffective and constitutional provision will be effective. Therefore, it should be recognized that **the criminal cases, that demand more than a year of imprisonment, lying sub-judice at other bodies except the courts, have been automatically transferred to the District Courts of the respective districts after the commencement of the constitution.** It is clear that after the promulgation of the constitution even the authority regarding hearing original cases, executing all cases within its jurisdiction and remand hearing have automatically fallen under the jurisdiction of District Courts. Therefore, it has been found that the pending criminal cases, that

demand more than a year of imprisonment, lying sub-judice at other bodies except the courts, have been automatically transferred to the District Courts immediately after the commencement of the constitution and such natured cases shall not fall under the jurisdiction of other bodies except the courts after the date of promulgation of the constitution.

Now the second question regarding whether this provision will also apply for Some Public (Crime and Punishment) Act, 1970 needs to be pondered upon. Some Public (Crime and Punishment) Act, 1970 has been officially stamped, published and implemented since Oct 4, 1970. It has been mentioned in its preamble that *whereas it is expedient to control some public crimes and to provide punishment thereof to maintain peace and order in different parts of Nepal and in order to maintain convenience, good conduct and morality of general public*. This preamble makes it clear that this act has been implemented for maintaining peace and order in the country and for controlling SPO (Some Public Offense) crimes and punishing the guilty in those cases.

However, while searching what types of activities fall under the definition of SPO, it has been found that the term **SPO** has not been defined in it. However, in Articles 2 (a) to 2 (k) twelve different activities have been prohibited so those activities have to be recognized as SPO. According to Article 2, the following activities have been found to be prohibited:

- (a) *To hinder or obstruct any public servant from discharging his/her official duty by committing battery or riot or by any other way;*
- (b) *To break public peace by committing battery or riot in any public place;*
- (c) *To break public peace or to make obscene show by using obscene speech, word or gesture in public place.*
 - (c1) *To print or publish any obscene materials by using obscene language or by any word or picture which denotes obscene meaning; or to exhibit or sell or distribute such obscene publication in public place other than the purpose of public health or health science;*
- (d) *To cause undue hindrance in the regular operation of postal service, communication, transportation, electricity supply or any other such essential social service;*
- (e) *To trespass on any governmental or non-governmental office or anyone's building or land by committing riot; or to stay or remain there in without any authority;*
- (f) *To damage any public or private property by committing riot or pelting stone or by any other way.*
- (g) *To insult women in public place by committing molestation (Hatapata);*

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(h) *To make undue behavior in public place.*

(i) *To hinder or obstruct anyone or to stop his/her pathway or passage in a condition when he/she is staying anywhere or walking on the road or traveling by any vehicle; or to commit riot, molestation, battery, nuisance or misconduct; or to capture or damage any property or vehicle of such person having with him/her in the said condition with keeping intention to harass or cause trouble him/her;*

(j) *To threaten or scold or tease or to commit any undue act or to express any undue thing to anyone through telephone, letter or any other means or medium with keeping intention to intimidate, terrorize or cause trouble or to insult or defame or harass to him/her;*

(k) *To commit any act or express anything, which causes intimidation or terror in general public and breaks public peace, by entering or not entering in any public gathering, assembly or demonstration; or to show weapon.*

Most of the provisions in Article 2 of Some Public (Crime and Punishment) Act, 1970 are about controlling activities which hinder public peace and order. Activities occurring in public places such as disrespectful, discourteous and ill-mannered behavior towards women, riot, battery, nuisance, misconduct, hindrance in public service or unauthorized entry have been considered as SPO crimes. According to Article 3, the police staff may arrest the person without a warrant if he/she finds him/her on the spot committing any of the SPO offense. According to Article 4, if an aggrieved person intends to file a case under this act, he/she shall lodge a complaint with the police against an offender within a period of seven days. Provided that, the adjudicating authority may, if he/she is satisfied with reasonable ground that the case cannot be filed within a period of seven days from the commission of the offence, extend the limitation in order to file the case up to thirty-five days from the date of commission of the offense.

According to Article 5 (1), the CDO (Chief District Officer) shall, while initiating the proceeding and adjudicating a case, follow the procedure pursuant to Special Court Act, 2002. Furthermore, an appeal against the decision made by the Chief District Officer pursuant to sub-section (1) shall lie before the Court of Appeal.

Similarly, Article 6 includes legal provision regarding penalty:

Penalty: *(1) In a case tried under this Act, the Chief District Officer may, upon depending on the gravity of the offence, impose a fine of up to Ten Thousand Rupees to the offender and order the offender to provide compensation to the victim as per the actual damage, loss, injury etc; and issue an order of detention to keep the offender in*

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a custody for a period not exceeding Thirty Five days if finds reasonable ground or cause in the course of investigation upon mentioning the cause thereof in the order. Such case shall be decided within a period of Three months.

Provided that, if the Chief District Officer finds reasons to impose imprisonment to the offender as only the penalty of a fine is not adequate, he/she shall refer the case before the Court of Appeal in order to impose the penalty of imprisonment for a period not exceeding Two years. The Court of Appeal shall decide the matter in such case.

(2) Adjudicating Authority may, by considering the gravity of the offence, release the offender if it is proved that he/she has committed the offence for the first time, without imposing the penalty pursuant to Sub-section (1) upon causing him/her to sign on a document which reads that the offender pledge not to commit such offence again from the date onwards.

From the study of provisions regarding penalty in Article 6 it has been found that the CDO may, upon depending on the gravity of the offence, impose a fine of up to ten thousand rupees to the offender and order the offender to provide compensation to the victim as per the actual damage, loss, injury etc. Similarly, it has been found that CDO can issue an order of detention to keep the offender in a custody for a period not exceeding thirty-five days if the CDO finds reasonable ground or cause in the course of investigation upon mentioning the cause thereof in the order.

Regarding the issue of additional penalty of imprisonment along with fine, it has been found that according to Article 6 (1) in a case tried under the act, the CDO can issue an order of detention to keep the offender in a custody for a period not exceeding thirty-five days if the CDO finds reasonable ground or cause in the course of investigation upon mentioning the cause thereof in the order. Such case shall be decided within a period of three months. Provided that, if the CDO finds reasons to impose imprisonment to the offender as only the penalty of a fine is not adequate, he/she shall refer the case before the Court of Appeal in order to impose the penalty of imprisonment for a period not exceeding two years. The Court of Appeal shall decide the matter in such case.

According to Article 2, it has been found that adjudicating authority may, by considering the gravity of the offence, release the offender if it is proved that he/she has committed the offence for the first time, without imposing the penalty upon causing him/her to sign on a document which reads that the offender pledge not to commit such offence again from the date

onwards. Similarly, Article 7 and 8 have provisions regarding filing the case under other prevailing law and cases where GoN shall be the plaintiff.

Local Administration Act, 1971 and other acts have given the responsibility of respective districts' peace and security management to CDOs. There is no debate when we say that CDO is responsible for maintaining law and order in his/her assigned district for which he/she has to coordinate with various district offices. It does not seem contradictory that CDO, who has the responsibility for maintaining peace and order in the district, is given the jurisdiction to hear cases where similar natured offenses are included.

CDO's main responsibility is maintaining peace and order in the district and according to Article 6, it seems that whenever the CDO decides penalty in such trivial SPO cases, the penalty of fine is adequate in most scenarios. The prohibitive phrase in this act states that if the CDO finds reasons to impose imprisonment to the offender as only the penalty of a fine is not adequate, he/she shall refer the case before the Court of Appeal in order to impose the penalty of imprisonment for a period not exceeding three years and the Court of Appeal shall decide the matter in such case. Hence, it is found that the absolute jurisdiction to impose penalty of imprisonment does not solely lie in the domain of CDO but under judicial control.

There have been some generally accepted principles regarding jurisdiction of the court. The jurisdiction of the court is established and annulled according to the law. Even by acceptance of the parties related to the case, judicial jurisdiction formed according to the law cannot be altered. In similar manner, decision or order provided by the court can neither create jurisdiction nor transfer cases to bodies without necessary jurisdiction. Before the court enters into issue of any case, the court should first make sure if it has or does not have jurisdiction in that scenario. The decision taken in the lack of jurisdiction or by infringement of jurisdiction is considered non-existent or zero from legal perspective.

Substantive law offers legal remedy whereas work procedure law manages the issue of jurisdiction. Legal remedy without rights is meaningless. Therefore, where there is legal remedy, rights are also incorporated there. If there arises a conflict regarding whether there is court's jurisdiction in certain issue or not then, it has to be initially assumed that there is jurisdiction of the court.

Hence, whenever the court provides any legal definition it does not do so by limiting or curtailing its jurisdiction. It is natural to assume that the court has the necessary jurisdiction as it has been specifically formed for the purpose of conflict reconciliation. Whenever there is conflict or dilemma regarding jurisdiction of court and other bodies and when there is contradictory provisions regarding their jurisdiction in different laws then it has to be assumed that court has the necessary jurisdiction.

Regarding this petition, there is no debate that according to Article 5 of Some Public (Crime and Punishment) Act, 1970, CDO has the jurisdiction over cases related to this act. Moreover, it has already been analyzed above that there is provision of penalty of imprisonment up to three years according to this act.

On the other side, it has been found that according to Article 300 (7) of Constitution of Nepal, 2015, the criminal cases, that demand more than a year of imprisonment, lying sub-judice at other bodies except the courts, shall be transferred to the District Courts after the commencement

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of the constitution. It has been found that the court has annulled the jurisdiction of other bodies except the courts over criminal cases that demand more than a year of imprisonment. Moreover, the criminal cases lying sub-judice at other bodies except the courts at the time of promulgation of the constitution have also been mandatorily transferred to District Courts according to the mandatory provision right after the promulgation of the constitution. The provision of Article 5 (1) of Some Public (Crime and Punishment) Act, 1970 which defines CDOs' jurisdiction over cases related to this act has been challenged in this petition. There is no reason for any suspicion or dilemma over the constitutional provision which has mitigated such jurisdiction of the CDOs.

Regarding Article 304 of the constitution (which states that laws inconsistent with the constitution shall, to the extent of inconsistency, ipso facto, cease to operate, one year after first session of federal legislature, in accordance with the constitution) and the written answer of opponent DAO as well as argument of learned public prosecutor which state that the provision of Article 300 (7) is applicable only after formation of federal laws, it is necessary to clearly identify the difference between major provisions and transitional provisions present in the constitution.

It has been found that Article 304 contains provisions, which mention that current laws will remain in operation. The provision in this article is as follows:

304. Existing laws to remain in operation: (1) *All the laws in the force at the time of commencement of this Constitution shall remain in operation until repealed or amended.*

Provided that laws inconsistent with this Constitution shall, to the extent of inconsistency, ipso facto, cease to operate, one year after first session of federal legislature, in accordance with this constitution.

The constitutional provision regarding applicability of current laws seems very clear. All the laws in the force at the time of commencement of the constitution shall remain in operation but laws inconsistent with the constitution shall, to the extent of inconsistency, ipso facto, cease to operate, one year after first session of federal legislature, in accordance with the constitution.

According to the transitional provisions of the constitution it has been found that the laws inconsistent with the constitution shall, to the extent of inconsistency, ipso facto, cease to operate, one year after first session of federal legislature, in accordance with the constitution. It means that until that time, there is no restriction on regular exercise and implementation of such laws. However, it does not mean that the laws inconsistent with the constitution are not the same as other laws which are not inconsistent with the constitution. Such laws remain continuously inconsistent and contradictory with the constitution. It is necessary to draw attention of the state and concerned bodies towards immediate amendment and improvement of such laws if we are to seriously practice such provision provided by the constitution.

Constitution drafting is not a phenomenon, which occurs on daily basis on anyone's whim. Ordinary and contemporary changes can be addressed through constitution amendment and constitution drafting is not required for such purpose. Constitution is drafted and promulgated only in the critical scenario when incumbent constitution and its amendment cannot run the

country's governing system. Therefore, it can be assumed that each constitution will bring fundamental changes in the governing system and other provisions as compared to the earlier constitution. The long-awaited Constitution of Nepal, 2015 has definitely brought substantial transformation as it has been prepared by representatives of sovereign citizens.

It is only natural that the new constitution will make different provisions than the former one. However, it is not practical as well as possible to reestablish systems/mechanisms prevalent before the promulgation of the new constitution at once and implement new constitutional provisions. As constitution is the main law it facilitates the relationship and governing mechanism between citizens and the state. The act of further strengthening the mechanism provided by the constitution is only possible through various acts, which are formed according to it. The formation and establishment of prime bodies of the state are indispensable for this. Then only it is possible to exercise the new legal system according to the constitution.

The current constitution has brought drastic transformation in the governing system as the state is entering into centralized federal system. The current transitional phase is not likely to end soon because issues such as formation of federal states and demarcation of their boundaries are still controversial. From the initial estimation, it is clear that more than 100 new laws have to be passed and more than 300 new laws need to be amended. Thus, it is clear that implementation of the constitution is more challenging than constitution drafting.

Actually, no constitution is good or bad in itself. This depends on its implementation. The success or failure of a constitution depends on the people/bodies implementing it as the constitution is brought to life from the activities of various post-bearers and bodies formed according to the constitution. We do need to go far to see examples of how people uplifted a country through successful implementation of even a bad constitution and how people destroyed a good constitution and pushed the country towards disaster.

That is why every new constitution has transitional provisions along with the prime constitutional provisions. The Constitution of Nepal, 2015 is no exception. Part 33 of the constitution is the short-term provision for the purpose of constitutional transformation and all remaining provisions are prime or regular constitutional provisions.

It is only natural that the prime constitutional provisions are permanent and long-term. On the other side, transitional provisions are only transitional constitutional tools for the purpose of transformation from previous constitution to the new one and for safe landing of the state mechanism. The significance of these transitional provisions will automatically diminish after complete implementation of the new constitution.

According to this analysis, Article 5 (1) and 6 (1) of Some Public (Crime and Punishment) Act, 1970 has to be viewed in the light of Article 151 (1) (*jurisdiction of District Courts to hear original cases*), Article 152 (2) (*cases related to criminal offense leading to prison sentence of more than a year shall not fall under the jurisdiction of any other institution other than a court or specialized court or military court or judicial body*), Article 300 (7) (*transitional provision*) and Article 304 of the constitution.

According to the prohibitive phrase of Article 6 (1) of the act, the authority to impose penalty of imprisonment has been kept under the court's jurisdiction. Moreover, if the District Court finds reasons to impose imprisonment to the offender, the District Court shall refer the case before the Court of Appeal in order to impose the penalty of imprisonment. The Court of Appeal shall decide the matter in such case and not the District Court. It seems that it will not go against the constitutional spirit if such jurisdiction (which suits CDO according to his/her work nature) is not immediately transferred to the courts. It seems that such jurisdiction does not suit the District Judges. Nevertheless, when the constitution has clearly defined that the criminal cases, that demand more than a year of imprisonment, lying sub-judice at other bodies except the courts, shall be transferred to the District Courts then there is no space for its further clarification/explanation.

Overall, according to Article 5 (1) of Some Public (Crime and Punishment) Act, 1970, the CDO has been given the power of original jurisdiction to initiate the proceeding and adjudicate case under the act. According to Article 6, the CDO can impose the penalty of imprisonment for a period not exceeding three years in cases lying sub-judice under that act.

According to Article 151 of the constitution, the District Court shall have jurisdiction to hear original cases according to the federal law. However, this question has not been addressed by the constitution - Which types of cases fall under the jurisdiction of the District Court in which it can hear original cases and execute them? Federal laws in accordance with the constitution have also not been passed.

According to Article 152 (2) of the constitution, there is the provision that cases related to criminal offense leading to prison sentence of more than a year shall not fall under the jurisdiction of any other institution other than a court or specialized court or military court or judicial body. However, according to Article 152 (1), the law may establish and constitute other specialized courts, judicial institutions or tribunal according to federal law, for the purpose of hearing cases of special types and nature but the body to hear original SPO cases and execute them has not been formed yet. On the other side, Article 300 (7) of the constitution has made mandatory provision where the criminal cases, that demand more than a year of imprisonment, lying sub-judice at other bodies except the courts, shall be transferred to the District Courts of the respective districts after the commencement of the constitution.

According to the transitional provision of Article 304 (1) of the constitution, all the laws in the force at the time of commencement of the constitution shall remain in operation until repealed or amended, provided that laws inconsistent with the constitution shall, to the extent of inconsistency, ipso facto, cease to operate, one year after first session of federal legislature, in accordance with the constitution. Article 152 (2) of the constitution, which states that cases related to criminal offense leading to prison sentence of more than a year shall not fall under the jurisdiction of any other institution other than a court or specialized court or military court or judicial body, seems to be inconsistent with Article 5 (1) and 6 (1) of Some Public (Crime and Punishment) Act, 1970.

According to transitional provision of Article 300 (7) of the constitution, the criminal cases, that demand more than a year of imprisonment, lying sub-judice at other bodies except the courts,

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shall be transferred to the District Courts of the respective districts after the commencement of the constitution and there is no alternative except to immediately implement this provision. Thus, it seems that the cases under Some Public (Crime and Punishment) Act, 1970 shall be immediately transferred to District Courts after the promulgation of the constitution until specialized judicial bodies with assigned jurisdiction are formed according to Article 152 (2) of the constitution.

Now the final question (**Should the order as claimed by petition be issued or not and if it does need to be issued then what kind of order needs to be issued?**) needs to be pondered upon. According to the petition, the main claim is that the petitioners including Bishnu Lama who were arrested on Sept 28, 2015 and remanded in custody by CDO of Kathmandu under Some Public (Crime and Punishment) Act, 1970 goes against the spirit of Article 152 (2) and 300 (7) of the constitution; thus, their habeas petitions be granted. However, according to the written answer of opponent Metropolitan Police Range and order of CDO dated Oct 9, 2015 the petitioners were released after posting bail of NRs 6,000 each. Moreover, this fact has also been accepted during the argument of learned advocates so there is no need to grant this habeas petition.

However, according to the petition, there seems to be confusion regarding who has the jurisdiction to hear original SPO cases and execute them - CDO or District Court? Hence, there is dilemma regarding its exercise and implementation according to the constitutional and legal provisions as some clients are being remanded in custody by CDO and some are being remanded in custody by District Court.

According to Article 300 (7), there is a mandatory constitutional provision where the criminal cases, that demand more than a year of imprisonment, lying sub-judice at other bodies except the courts, shall be transferred to the District Courts of the respective districts after the commencement of the constitution and there is no alternative except to immediately implement this provision through which District Courts will hear original SPO cases and execute them. However, regarding the analysis addressing the second question, it seems that SPO cases should be decided in the presence of administrative officers (apart from judicial personnel) as SPO cases are related to administrative work of maintaining public peace and order.

Although it seems that such cases under the constitutional jurisdiction currently fall under the jurisdiction of District Courts but according to Article 152 (1) of the constitution, the law may establish and constitute specialized courts, judicial institutions or tribunal, for the purpose of hearing cases of such special type and nature as these issues are often interrelated with main work of administrative official. The power to provide jurisdiction to bodies formed in accordance with federal law to hear such original cases and execute them falls under the jurisdiction of federal legislature. Similarly, the issue of reviewing prevalent provision of penalty and making it in accordance with the constitution also falls under the jurisdiction of federal legislature. Therefore, this court cannot interfere in that issue by strictly imposing anything.

Finally, this order is issued in the name of Office of the Prime Minister and Council of Ministers, Ministry of Home Affairs and Ministry of Law and Justice - After analysis of all sections

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mentioned above, as the jurisdiction according to Article 5 (1) of Some Public (Crime and Punishment) Act, 1970 will be transferred to District Court according to Article 300 (7) of Constitution of Nepal, 2015, the cases lying sub-judice at DAO should be immediately transferred to related District Courts and from now on activities such as hearing and executing SPO cases and remand hearing should be conducted by District Court.

Furthermore, directive order is issued in the name of Office of Council of Ministers to review this situation and to provide clear directions, as there has been complication and difficulty regarding jurisdiction of SPO cases and there is urgent need to review this situation which has arisen due to the constitutional provisions regarding nature and degree of penalty regarding SPO cases.

It has been found that when Article 300 (7) of Constitution of Nepal, 2015 (regarding provision to hear cases) is implemented, the cases lying sub-judice not only under Some Public (Crime and Punishment) Act, 1970 but also under various other acts at other bodies except courts that demand penalty of imprisonment of more than one year need to be immediately transferred to District Courts in large numbers. Moreover, it has been found that activities such as hearing and executing SPO cases and remand hearing in such cases should be conducted by District Courts. It has also been found that in near future, appeal against decisions given by quasi-judicial bodies will be tried at District Courts.

As a result of this, District Court has to fulfill additional responsibility as assigned by the constitution apart from its regular workload. It does not seem possible that District Courts will be able to fulfill the additional responsibility as assigned by the constitution in light of available physical infrastructure, manpower and allocated resources. Order is issued in the name of Office of the Prime Minister and Council of Ministers to allocate necessary/additional manpower, land and resources as required in the current scenario with the involvement of Secretaries of Ministry of Finance, Ministry of Home Affairs, Ministry of Law, Ministry of General Administration and Ministry of Forest, under the leadership of Chief Secretary in order to make necessary arrangements for case transfers and management by creating and developing organizational capacity through required manpower to ensure jurisprudential development of sensitive and different types of cases where specialization of such subjects is demanded as this is important for proper legal action based on the subject and nature of cases which is necessary for maintaining an environment of security and justice. Moreover, order is also issued in the name of the Registrar of this court to coordinate about implementation of this order and prepare report including its progress details.

The concerned body and official should be immediately contacted in writing through Office of the Attorney General for implementation of this order and the case file should be submitted with due process.

Signature
Chief Justice

I agree with the given decision.

Signature

Justice

Date: Nov 3, 2015