

**Advocate Sapana Pradhan Malla v. Prime-minister, Nepal Government and Office of the
Council of Ministers and Ors.**

Supreme Court of Nepal

25 December 2007

Citation: Writ No. 3561 of the year 2063 B. S (2006)

Judges: Hon'ble Justice Khil Raj Regmi., Hon'ble Kalyan Shrestha

Order

1. The present writ petition appears to have been filed as a Public Interest Litigation (PIL), pursuant to Article 88(2) of the Constitution of the Kingdom of Nepal, 1990, praying for the issuance of a directive order for the purpose of making and implementing the necessary law for the enforcement as well as protection of the right to privacy guaranteed by the aforesaid Constitution. The present writ petition has not been filed because the Petitioner herself or the organization (Forum for Women, Law and Development), which she represents, has become a victim due to the violation of the right to privacy mentioned in the petition. It has been filed because the Petitioner organization, is engaged in the advocacy of addressing through various means the legal rights and welfare of classes such as women, children etc. and the community affected by problems like HIV/AIDS. Therefore the Petitioner seems to have entered the court for seeking relief by displaying its meaningful concern for the present issue.
2. The Constitution of the Kingdom of Nepal, 1990, which has been shown as a basis for filing this petition, already stands repealed at present. The right to privacy mentioned by the Petitioner has been enshrined in Article 28 of the Interim Constitution of Nepal, 2007 and Art. 107 of this Constitution has retained the extraordinary jurisdiction of this court in respect of granting judicial remedy in matters of public interest or concern. Therefore it is feasible to deliver justice in regard to the issue prayed for by the Petitioner on the basis of the provisions of the 1990 Constitution which was in force at the time of the filing of this writ petition and those of the Interim Constitution of Nepal, 2007 which is currently in vogue. Hence, there is a need for considering the issues raised in the petition in the light of the aforesaid provisions.

3. The summary of the writ petition and the verdict delivered thereupon are as follows:

Freedom, equality and self dignity are the inherent rights of human beings. The rights of equality and self dignity provide guarantees for the individual liberty of human beings. These rights of equality and self dignity have been accorded protection at the international level through various legal provisions relating to human rights including the Universal Declaration of Human Rights. These rights of equality and self dignity are guaranteed by Articles 11 and 12 of the Constitution of the Kingdom of Nepal 1990. The main basis for protecting the right to self dignity of an individual is his/her right to privacy. In the life of every individual there are some matters of personal concern which need not be exposed to public knowledge. The State must display concern for the protection of their privacy. The Preamble of the Charter of the United Nations has reaffirmed the basic human rights and the right to self dignity of all men and women. Art. 12 of the Universal Declaration of Human Rights has guaranteed dignity and respect for individuals and the right to privacy of their residence, family and correspondence, Art. 17 of the International Covenant on Civil and Political Rights, 1966 and Art. 16 of the Covenant on the Child Rights and its Optional Protocol have also recognized the right to privacy as an inalienable right of the individual. Art. 22 of the Constitution of the Kingdom of Nepal, 1990 has enshrined the right to privacy as a fundamental right. Similarly, Section 49 of the Child Rights Act, 2048 (1991) has provided for, during the proceedings of any case relating to a child, the presence in the court room, of the legal practitioner, the father, mother, relative or guardian of the child. Further, if the official trying the case deems it appropriate, it allows the presence of any other person or social organization engaged in activities aimed at the protection of the rights and interests of children. Likewise, Rule 46(b) of the District Court Rules, 2052 (1997), Rule 60(a) of the Appellate Court Rules, 2048 (1991) and Rule 67(a) of the Supreme Court Rules, 2049 (1992) have provided for in-camera proceedings and the formulation of procedures for conducting the trial of cases relating to minors, rape, trafficking in human beings, establishing relations, divorce and also any other case which the court deems fit for trial in the camera court.

4. Even though all the Covenants and statutory Acts and laws mentioned above have recognized the right to privacy as an inalienable right of the individual, no clear legal provision has been made for protecting the privacy of the names and identity of the persons involved in cases

relating to women and children and the persons infected by contagious diseases like HIV/AIDS. Due to the ever increasing threat of spread of diseases like HIV/AIDS, there is infringement of the economic, social, cultural and property rights of such persons, and those victims have found it difficult to get access to justice. There has also cropped up a situation in which they also seem to be deprived of the right to hearing by a competent court, protected by international human rights law. Therefore the writ Petitioner seems to have prayed for the issuance of an order seeking the immediate enactment and enforcement of necessary law for guaranteeing the right to privacy granted by Art. 22 of the Constitution of the Kingdom of Nepal, 1990; for making appropriate provisions for maintaining privacy of the procedural formalities on the basis of gender sensitivity, while taking into consideration the sensitivity of women and also the discriminations and allegations suffered by them in respect of the proceedings ranging from filing of the case to pleadings, submissions and delivery and publication of the judgment; for making appropriate provisions for maintaining privacy in cases relating to children right from the initial procedure of the cases, in order to ensure juvenile justice to them, taking into consideration social stigma likely to be faced by the children in the future; for making necessary legal provisions for maintaining privacy in cases relating to the persons infected by HIV/AIDS right from the beginning of the process of registration of the case in view of the fact that the persons infected by HIV/AIDS are victims of social discrimination and stigma and they are also being deprived of reasonable opportunities; for making legal provisions for maintaining privacy in the event of a party to the case moving a petition at the time of registration of the case or while it is in progress, requesting the court to issue an order for maintaining such privacy by showing special reasons and facts which justify such a demand; for making breach of such privacy by any person concerned with maintaining privacy in such cases punishable and also for providing reparation to the persons affected by the breach.

5. This Court, issuing an order on July 16, 2006, directed the issuance of a notice to the Defendants asking them to explain within fifteen days why an order should not be issued as requested by the Petitioner. Taking into consideration the issue raised in the petition, the Court also granted priority status to the petition for the purpose of hearing. Replying to the notice, the Prime Minister and the Office of the Council of Ministers contended that the writ petition should be rejected as the Petitioner has framed that office as a Defendant without

specifically mentioning which rights of the Petitioner have been infringed.

6. In its written reply, the Ministry of Women, Children and Social Welfare maintained that the enactment of law or its amendment is a matter falling within the exclusive jurisdiction of the Legislature. As the Petitioner has failed to explain the reasons with justification as to which act of that Ministry has adversely affected the constitutional and legal rights of the Petitioner, the petition was baseless and based on subjective logic and, therefore, it deserved to be rejected.
7. Likewise, in its written reply, the Ministry of Law, Justice and Parliamentary Management, praying for the rejection of the petition, contended that the right to privacy guaranteed by Art. 22 of the Constitution of the Kingdom of Nepal, 1990 is in itself a law. According to that provision, because it is inviolable except in the circumstances specified by the law, an aggrieved person, in case of the infringement of such a right, can himself/herself move the court for the enforcement of that right. Therefore the Petitioner has failed to specifically mention who and how, has the fundamental right of any person been infringed. Furthermore, the writ petition appears to be related to cases pertaining to the privacy of a person in which connection a provision has been already made in the Court Rules. Also the Supreme Court is competent to make additional provisions in that regard pursuant to Section 31 of the Judicial Administration Act, 2048 (1991), and therefore the Petitioner's claim appears to be baseless and unreasonable.
8. Speaker of the House, Subhash Nemwang, in his written reply, contended that no one can disagree with the claim of the Petitioner that the State must implement the obligations prescribed by various International Covenants relating to human rights, by making relevant laws. The State must always be cautious in this direction, and the House of Representatives has always remained committed to and active in drawing the attention of the State in this regard. Expressing the commitment that the Government of Nepal must ratify the treaties and covenants relating to human rights including the one concerning International Criminal Court, Rome Statute etc, the House of Representatives also discharges functions such as issuing relevant directives to the Nepal Government. The Speaker further stated that if either the concerned Ministry of Nepal Government presented the relevant Bill or any other member of the House of Representatives presented a private Bill before the Parliament Secretariat for the enactment of law on any matter in accordance with the House of

Representatives Rules, 2006 in connection with making appropriate and effective law for the enforcement and guarantee of the rights to equality, privacy and self dignity equally ensured to women, children and HIV/AIDS infected persons, the House of Representatives stands committed to the enactment of that law by initiating the necessary legislative process. This court had directed the Petitioner on March 9, 2007 to produce before the court, the outlines showing which model and procedure shall be effective to ensure privacy in the context of the guarantee accorded to the right to privacy by the Constitution. The Petitioner has submitted a model of the guidelines as per that order.

- 9.** Learned Advocate Rup Narayan Shrestha appeared on behalf of the Petitioner in the course of hearing of the writ petition which has been presented before the Bench as per the Rules. He pleaded that the Constitution has protected the freedom and equality of a person, besides also protecting the right to privacy, which can be viewed as the main basis for the protection of an individual's self-dignity. The international human rights law has also laid emphasis on protection of the right to privacy of an individual. Although the Constitution has protected the right to privacy, no exhaustive law has been enacted and implemented in this regard. Various international human rights laws have provided for making special provisions for the protection of the privacy of victim women, children and HIV/AIDS infected persons. In our legal system, in the absence of any clear legal provision ensuring the privacy of the name and identity of women, children and HIV/AIDS infected persons involved in the legal proceedings, there is a scenario depicting the infringement of their economic, social and property rights and lack of access to justice. Thus the learned Advocate pleaded for the issuance of the order as requested by the Petitioner.
- 10.** The written submission produced by the Petitioner states that the rights to equality and self dignity are essential for dignified living of a human being. Equality and self dignity guarantee freedom. It is the right to privacy which serves as the basis for the protection of self dignity. This is also linked with the privacy of information in a social, physical and mental manner. If public exposure of some matters presented in the course of a legal proceeding is not discouraged, there is always the danger of deprivation of justice for the victims. In case of failure to protect the privacy of some matter, the victim may be faced with a situation in which the rest of his/her life may be exposed to danger and s/he may also suffer from a social stigma. Particularly, if the privacy of the classes of the people exposed to risk is not protected,

they cannot exercise their right to receive justice. Management of this right must be undertaken in order to protect against discrimination and stigma. If that is not done, it may result in restrictions also on the exercise of the right against exploitation, the right against violence, the right to property and the right regarding criminal justice. Besides, light has been thrown on the various provisions made in the international human rights laws. On the basis of that, it has been contended in the written submission that the order prayed for by the Petitioner must be issued and, pending the enactment of relevant law as per that order, guidelines for the protection of privacy should be issued.

11. Appearing on behalf of the Defendant, Ministry of Law, Justice and Parliamentary Management, learned Advocate Narendra Prasad Pathak argued that the claim made by the Petitioner in this petition is not clear. The Constitution has protected the right to privacy and provided for seeking judicial remedy from the apex court in the event of infringement of that right. Provisions have been made for in-camera trial of specific cases relating to women and the cases in which children are a party. Therefore there is no basis for the issuance of the writ and it must be rejected.

12. The present writ petition has been scheduled for today, for the delivery of judgment. In view of the submissions made by the learned counsels and the written submission presented by the learned counsels appearing on behalf of the Petitioner, the following issues need to be addressed in this writ petition:

Whether or not one has got the right to maintain privacy about the identity or other related information concerning the victim women, children or HIV/AIDS infected or affected persons involved in the legal proceedings? Whether or not it has any legal ground or justification?

What is the status of the existing legal provisions regarding the protection of privacy? Are they adequate or inadequate?

Does the claim for the right to privacy affect the other party's right to fair judicial hearing?

Whether or not maintaining privacy of information in the judicial process casts any impact on the right to information?

Whether or not the court possesses the power to issue an order to maintain privacy in the judicial process about the details of the party or the victim or the witnesses mentioned in the petition? And whether or not it is proper to issue a directive order, as requested by the

Petitioner, to make laws for protecting the information regarding their identity?

Whether or not it is desirable to make some immediate provisions pending the formulation of adequate legal provisions? If the interim provisions are to be made, what type of provisions can be included in those interim provisions?

It looks essential to first consider the special nature of those sections of the victim women, children or HIV/AIDS infected or affected persons involved in litigation, who have got their own personal special nature and needs, and for whom the Petitioner has sought for maintaining the privacy of their introductory and related information. There are some specific circumstances for the protection of the privacy of the victim women. Likewise, the factors and circumstances necessary for the protection of the privacy of HIV/AIDS infected persons or children are of different nature.

- 13.** Let us first consider the case of women. Women like men may also get involved in conflict with the laws. And in the event of violation of law by women generally there is no need for protecting the privacy of the identity and other related description of the concerned women. The legal liabilities of a woman are similar to those of others in a situation where she is involved in some crime. Art. 13 of the Interim Constitution has provided for equality before the law and equal protection of the laws under the right to equality. However, in view of the present social context of the country on account of various religious, social, economic and cultural reasons, women do not appear to be in a position to enjoy equal opportunities in political, social, economic and educational fields nor can they acquire a status similar to that of their male counterparts. There are several things to be done by the State to change that situation and to create an equitable condition. The female community particularly, seems to be the victim of discrimination due to existing discriminatory social, cultural and psychological factors. Besides other things, they also seem to be experiencing obstacles in the enjoyment of public rights or opportunities or facilities which are available according to the law. Consequently, not to talk of enforcing their rights, the women feel hesitant even to seek judicial remedy for violence or injustice committed against them. Without enjoying their right relating to justice, they appear to be bound to surrender or tolerate the injustice. Such a situation is visible in the incidents of violence committed especially against women. Given the nature of violence committed against women, they face hindrances in getting access to justice while lodging complaints and appearing as

witnesses for substantiation of their complaints. This is due to threats made by criminals or criminal groups or due to the fear of society which might put allegations on the character or purity of the victim women.

- 14.** Children are another class for whom the Petitioner has asked for maintaining privacy regarding their identity and related information. The concept of juvenile justice seems to have developed from the need for giving judicial treatment to children in conflict with the laws, different from the one meted out to adults charged with a similar offence. This is in view of some factors like young children in the evolving stage of their learning and understanding, positive social contributions expected from them in the future and the long-term impact on society, in case of increase in criminality or perversion in the children. Under this, in the course of taking action against a child for violating any law, steps are taken to prevent him/her from repeating the violation of law in the future instead of sending him/her to detention or prison to arouse the feeling of repentance in him/ her for the act s/he has committed. This is done by adopting alternatives to punishment instead of imprisonment to provide the victim with relief and reparation also with the involvement and under the responsibility of the parents of the child and to explore the possibility of reform in the child and attempting rehabilitation of the child in society, through restorative justice measures. It is for this reason that the claim has been made seeking imposition of restrictions on the publication, for public purpose, of the introductory and other related description of a child, recorded in judicial proceedings involving children, where s/he has acted either as a Defendant or suffered as a victim.
- 15.** If the violation of law committed by a child is recorded and made public in stead of keeping it confidential, society, after having knowledge of that, may treat the child as an anti-social element. There may develop some distance between the child and the society or a situation of conflict may arise between them. Even though the child repeats the violation of law, taking into consideration the principle of the best interests of the child, there are legal provisions not to punish the child as a habitual offender and to protect the privacy of the introductory details of the child during the progress of the legal proceedings or even after the decision of the case in both the circumstances, whether the child is a Defendant or a victim. If the fact of prosecuting the child for getting in conflict with the laws or punishing him/her is kept in the written form or published, it may cause obstacles to the career

development and character building of the child in the future. Therefore, a system has been developed in some countries to destroy the records after the decision of such case. Moreover, if the child happens to be the victim and his/her sensitive and vulnerable condition is published, other people may get thrilled or attracted by such condition of the child and may also feel tempted to make additional exploitation or derive illegal benefits from the child. The violence committed against the child may haunt him/her all their life and its publication may further increase the pain. If the privacy of the child is not protected there may arise a situation in which the child may not come forward to claim judicial remedy against the violence or injustice committed against him/her or may not even participate in that process. Thus, the issue of the privacy of children involved in the juvenile justice process appears to be of a different nature.

- 16.** As far as the question of protection of the privacy of the introductory information of HIV/AIDS affected or infected persons or the condition of their infection is concerned, this seems to be a problem of a different nature. It is relatively a new health related problem for which no curative remedy has been discovered so far. As its infection is silently spreading in the society, this problem needs to be addressed in a strategic manner. The reasons behind this infection and the problems experienced by the infected persons are of multi-dimensional nature. Some factors like poverty, illiteracy, lack of awareness, lack of medical treatment and facilities, the problem relating to discharge of duty by the persons responsible for providing public service etc. spread the infection of this disease. On the other hand after becoming a victim of infection, the infected person is found to be suffering from violation of some human rights including discrimination, boycott, deprivation etc. in utilities of a family, community and public nature. As a result, the infected person experiences a gradual decrease in his/her access to education, employment, health facilities, recreation, family assistance and property etc., and s/he becomes compelled to seek judicial remedy for acquiring those things. At a time when judicial remedy is required against all kinds of injustice, due to the fear of being a victim of additional neglect and boycott in the event of disclosure of one's infected physical condition and identity coupled with systemic delay, one may opt for discarding the process of judicial remedy. If such a situation is created, the infected person not only faces a threat to his/her life but also, if such an infected person, who is incurable and dejected, behaves in a way as if s/he was not infected, a vicious circle of infection is created.

This finally compels the society to bear an unexpected and unbearable burden. The above description makes it clear that according to their respective condition and nature, there are specific needs of the classes for whom the Petitioner has asked for protection of their privacy. Consequently, the demand for maintaining such privacy needs to be considered exhaustively.

- 17.** Now let us consider issue no. 1. It is to be considered whether or not the victim women, children or HIV/AIDS infected persons have got a right to the protection of their introductory information and if it is so granted, what are its legal grounds and justification. Besides the national, constitutional and legal provisions made in this regard, the provisions contained in the international human rights conventions also need to be considered.
- 18.** Under the fundamental rights provisions of the Interim Constitution of Nepal, 2007, several rights including the right to freedom (Art. 12), the right to equality (Art. 13), the right to privacy (Art. 28) and the right to constitutional remedy (Art. 32) have been included. Human rights or fundamental rights are the matters which need to be considered in the context of the relation of the individual with the State. It is the principle that the people accept the right of the State on the condition that the State shall also respect and safeguard the specific rights of the people or community such as freedom, equality etc. and shall not infringe those rights. As on the basis of this principle the State has legally recognized and guaranteed some natural necessities, these rights are treated as inviolable. The rights such as the right to life, the right to equality, the right to personal freedom, the right to property, the freedom of thought and expression, the freedom of publication, the right regarding justice etc. are treated as basic human rights. The right to privacy is directly or indirectly linked to all those rights in an indivisible manner, thereby prohibiting outside interference in the personal matters of an individual. For example, the right to life not only signifies an individual's right to live a simple existence rather it also signifies one's right to live with dignity. If some highly personal information of an individual or citizen is subjected to disclosure except when its disclosure is essential for some specific legal purpose, the individual or the citizen is unnecessarily made to stand in the defense line and also falls in a position where s/he may not confidently do the work which s/he likes to do.
- 19.** A demand for uncalled for openness regarding someone's personal information may lead to a situation where it shall be impossible to enjoy one's rights or to demand even for the

fulfillment of one's legal obligations. For instance, in the event of taking any health service, even though the status of anybody is not directly related with that matter, if s/he is made to disclose whether or not s/he is married or whether or not s/he is infected with HIV/AIDS and, if s/he is a child, whether or not s/he has been charged with theft or whether or not s/he is involved in any litigation, simply that very reason may lead to a situation where it shall be difficult for him/her to enjoy the facilities provided by the law. If any pregnant woman wants to abort her unwanted pregnancy and the institution providing that service forces her to disclose the identity of the person who has made her pregnant or whether or not she is married, the pregnant woman may feel compelled to discard the abortion service as she may not want to disclose that information or such an act may make her feel uncomfortable. Such problems may be multiple and it is not possible to mention all the dimensions.

- 20.** As a result of complexity of the problems like HIV/AIDS, the status, guardianship, health etc. of the parents of the children may also be dragged into controversy. For instance, while talking about protection of the privacy of the introductory information about a child affected by HIV/AIDS or also in a dispute about the guardianship of a child it may be essential to provide protection of privacy of the status of the parents of that child. Even if the introductory information about the child is protected, the disclosure of the identity of his/her parents may destroy the meaning and purpose of maintaining the privacy of the identity of the child. If a child has been brought up in a prison due to the imprisonment of his/her mother the information about such a rearing may also need to be protected. Such instances may be multiple.
- 21.** In the process of enjoyment of judicial remedy the Petitioner seems to have requested for making provisions for protecting the privacy of the introductory information of women who have been victims of violence against women, of children who are parties to a case and of persons who are infected with HIV/AIDS. Article 28 of the Interim Constitution has provided that the person, residence, property, documents, data, correspondence, character etc. shall be inviolable except in the circumstances specified by the law. This provision has made the privacy of the above mentioned matters generally inviolable and has provided for specification of the conditions by the law for disclosure of their identity. Thus it appears that the law has made privacy a general matter whereas disclosure is an exception.
- 22.** There is some special significance of various rights mentioned in the Constitution and their

hierarchical order has not been fixed nor can it be possible to do so. No right is complete and absolute in itself, and for the enjoyment of any one right other rights may be related and subsidiary. The infringement of one right may cause obstruction to the enjoyment of another right. Therefore, it is essential to consider any question relating to any right in the totality of the provisions regarding fundamental rights and also on the basis of their complementarities. For instance, even though only the right to privacy of the HIV/AIDS infected persons is to be considered, it may also become essential for the protection of their right to health. In order to prevent any adverse impact on his/her personal or his/her family's right to education or employment or to prevent discrimination, it becomes equally essential to protect the right to education, the right to labour, the right to property and the right to equality.

23. The right to privacy has got its own significance in the context of women or children. It has been mentioned in Art. 20(3) of the Interim Constitution that no physical, mental or any other type of act of violence shall be committed against women and that such an act shall be punishable by law. It has been mentioned in the Constitution that no discrimination shall be made against any person only because the person is a woman. Therefore if any woman involved in any specific litigation or placed in a particular situation does not feel the presence of a friendly environment for easy access to justice at par with men, the act aimed at bringing change in such a situation shall have to be treated as a part of the greater process of removing discrimination against women. The exercise of the right against torture guaranteed by Article 26 of the Interim Constitution is also relevant for safeguarding privacy in order to remove discrimination against HIV/AIDS infected or affected persons and to control torture or inhuman behaviour against them. If the treatment meted out to any party or victim creates a feeling of fear, threat or inferiority complex in the mind of such a party and makes him/her feel insulted, such treatment is considered to be insulting. Thus in the present case, in order to make the right of privacy mentioned by the Petitioner effective and meaningful there is a need for considering this right in the relativity of other relevant rights. Especially, in the present context it needs to be considered in the light of the right to life, the right to freedom, the right to health, the rights of women, the rights of children, the right to property, the right to information and, most importantly, the right to justice and judicial remedy.

24. In the context of the analysis made above, it becomes relevant to look at the provisions

made by international law, especially international human rights law, and our Constitution and the laws. Article 22 of the Constitution of the Kingdom of Nepal, 1990 had afforded protection to the right to privacy by providing that the privacy of a person, home, property, document, correspondence or information of anybody shall be inviolable except in the circumstances specified by the law. Article 28 of the Interim Constitution has expanded its sphere by also embracing other facets of the privacy of a person. It has guaranteed that “the privacy of the matters relating to the person, home, property, document, data correspondence and character of anybody shall be inviolable except in the circumstances specified by the law.” Under the provision of the right to privacy, privacy of the person as well as his/her confidential information seem to be protected. If the privacy of the data and the personal introductory description of an individual relating to his/her character and other related information are not protected, the right to privacy becomes extremely contracted and may not attain its objective. The use of the word ‘person’ in Art. 28 of our Interim Constitution, 2007 signifies not only the inviolability of the body but also the physical health and the personal introductory matters. The data of a person, irrespective of whether it is concerned with any case or health, is treated as inviolable except in the circumstances specified by the law. In other words, for open dissemination of such information, permission should have been granted by the law itself. Otherwise, it shall be inviolable. So far as the question of whether or not the data received in the judicial process falls under this category, if it is argued that only because it is a judicial process all matters should be open and easily accessible, in that case the above mentioned constitutional provision shall become meaningless.

25. The right to privacy is found to have acquired recognition as one of the significant human rights at the international level. Article 12 of the Universal Declaration of Human Rights, 1948 has provided, “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has got the right to the protection of the laws against such interference or attacks”. That Article seems to have ensured the right to privacy regarding an individual’s honour, reputation and his/her residence, family and correspondence. Likewise Art. 17 of the International Covenant on Civil and Political Rights, 1966 has also provided, “(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. (2) Everyone has the

right to the protection of the law against such interference or attacks.” Thus this provision has also laid emphasis on the protection of the privacy of the honour, reputation, residence, family and correspondence of an individual. Likewise, Article 16 of the Convention of Rights of Child, 1989 has also provided, “No child shall be subjected to arbitrary or unlawful interference with his/her privacy, family, home or correspondence, nor to unlawful attack on his/her honour and reputation,” And, by further providing that “the child has the right to the protection of the law against such interference or attacks” it seems to have recognized the children’s right to privacy. Article 8(4) of the Optional Protocol to the Convention of Rights of Child on the Sale of the Children, Child Prostitution and Child Pornography, 2000 seems to have included the matter of taking appropriate steps in accordance with the national law to remove undue flow of information regarding introductory matters relating to a child in order to protect his/ her identity and privacy- “Protection as appropriate to the privacy and identity of child victim and taking measures in accordance with the national law to avoid the inappropriate dissemination of information that lead to the identification of child victim.” Art. 8(6). UN General Assembly, Special Session (UNGASS) on HIV/AIDS has also stated that the governments need to make laws and Rules and undertake other measures to ensure the rights of the persons infected with HIV/AIDS, and under this, their confidentiality and privacy should also be protected.

26. Article 9 of UNESCO Universal Declaration on Bioethics and Human Rights has also made special provision regarding privacy and confidentiality and observed in this regard as follows: “The privacy of the persons concerned and the confidentiality of their personal information should be respected. To the greatest extent possible, such information should not be used or disclosed for purposes other than those for which it was collected or consented to, consistent with international law, in particular international human rights law.” The human rights conventions adopted and enforced by various regional groups, in accordance with the above mentioned Conventions, have also accorded a respectable place to the right of privacy of a person and have thus guaranteed its protection. For example, the provisions made by Article 8 of the European Convention on the Protection of Human Rights and Basic Freedoms (1950) and Article 11 of the American Convention on Human Rights (1969). It becomes clear that the above mentioned Conventions and Declarations have created obligations for the States to protect effectively the right to privacy of the

individual by making laws. Even though the human rights declarations do not carry mandatory force as exercised by treaties, the States should implement their spirit by relating them to the main treaties.

- 27.** As Nepal has become a party to the international human rights Conventions and accepted the obligations imposed by them, there is no dispute that the State must implement those obligations by incorporating them in the Constitution, statutes, laws and Rules and also various programmes. Several judgments delivered by this Court in the past have already made adequate interpretations regarding the national recognition of international treaties in the context of Section 9(1) of the Treaty Act, 1990. What is remarkable is that it is essential to consider the right to privacy and the right to access to justice from the view point of basic human rights. Besides the right to justice, the right to constitutional remedy has also been guaranteed in the Interim Constitution of Nepal, 2007. In addition to Articles 24 and 32, certain rights regarding judicial remedy also get mobilized in course of dispensation of justice by the general Courts under their ordinary jurisdiction.
- 28.** Out of the general and extra-ordinary jurisdictions available for the protection of fundamental and legal rights of a person, the proper jurisdiction is invoked as required by the situation. It is the regular remedies which are sought especially for the resolution of the question regarding juvenile justice, violence against women and also remedy for right to property or other rights of HIV/AIDS infected persons. So the right to privacy is limited not only to the application of the Criminal Law but also extends to the implementation of the Civil Law. If any person has filed a lawsuit asking for expenses or his/her share of property or compensation for medical treatment for having been infected with HIV/AIDS, information regarding such a situation, too, cannot be allowed for unrestricted dissemination. At least the relevant portion needs to be given protection up to a desirable limit. So there is a need for looking at the right to privacy in the light of the judicial process, whether it can be made basically fair, free from discrimination and friendly for the court users in the course of judicial treatment.
- 29.** The Petitioner has, in her written submission, drawn attention to the Declaration of Basic Principles for Victims of Crime and Abuse of Power (29 Nov. 1985) which seems to be relevant also in the context of the present case. It has been mentioned in that Declaration that the victims should be given respectable and sympathetic treatment and their access to

judicial mechanism should be ensured and speedy remedy should be provided to them in accordance with the law for the losses suffered by them. The same has also been stated in that Declaration. Irrespective of the way in which the victim has been made to suffer from injustice, our social outlook upon them may have turned negative for some fallacious belief, instead of making efforts to heal his/her wounds. If it so happens, in addition to the violence suffered by the victim earlier, a situation may arise forcing such a person to further suffer continuously from the second stage of violence or pain as a result of publication or recording of the physical condition of that person. The psychological tension or damage caused to a person on account of violence is treated as an additional recurring violence falling under the second category. In the absence of legal and other protection aimed at tackling such a problem, if obstacles are created in the way of enjoyment of other rights or facilities, the search for justice turns into a curse instead of a boon for the victim.

- 30.** Adverse social psychology still exists in our society in a religious or cultural form. An extensive movement needs to be launched for bringing about broad changes in such a type of thinking, but it has not taken place so far. By a mere declaration of rights in the law negative social psychology or obstacles existing in the way of enjoyment of the rights may not disappear automatically. If such a reality is ignored, there may be a danger of our findings becoming more technical than substantive. As a result, our services may not be automatically available to the people for whom they have been created or to whom they have been dedicated. If favourable conditions are not created, the parties, despite their willingness, may not have the capacity to accept our services. In that event a situation may arise where our services may not be available to those who need them most, whereas, those who do not need them may be more benefited by them. Therefore, taking into consideration such a stark reality, it is necessary to, by ensuring an individual's right to judicial remedy, grant him/her effective and easy access to justice and to guarantee privacy of the personal identity of the parties involved in the judicial process through the protection of the right to privacy. Its main objectives are that the concerned party may not lose his/her courage to seek remedy against injustice and s/he may not be made to experience any additional disqualification or disadvantage in practice, for the reason of having raised one's voice against injustice. It is the belief of this Bench that if in the eyes of the incapacitated sections of the society our services lose attraction or do not carry conviction, it shall have to

be treated as an indication of the gradual end of the social utility of our services.

31. In fact, the right to access to justice is a right covering an expansive area which has got various complementary dimensions. Out of them, in addition to other matters, it is clear that the protection of the right to privacy of the victim is an important part. It is essential for the judicial system to always maintain a balance between the obligation to give fair treatment to the parties present in the judicial process and the right of the parties to have access to justice. In this context, without guaranteeing the personal privacy of the victims and their personal security and without taking into consideration the disadvantages confronted by the victims, justice cannot take a firm and expressive form in the midst of revenge and fear. For arousing this feeling of self-confidence and security among the persons who have come forward to seek justice, it is essential to give them a guarantee of the privacy of their personal identity or other related information. If viewed in this way, the need and relevance of the protection of the privacy of the personal identity and other related information of women, children or HIV/AIDS infected persons who have come to be present in the judicial process appears to be clearly important from the viewpoint of the enjoyment of the right to judicial remedy.

32. Let us now consider the second question - What is the existing legal provision regarding the protection of the personal introductory information of the persons mentioned in the petition? Is it adequate or not?

Although the right to privacy has been declared in Art. 28 of the Interim Constitution, it has been placed under the clause “except in the circumstances specified by the law,” and no extensive provision of the law has been made so far. Till today extensive legal provisions regarding the right to privacy of the women, children or HIV/AIDS infected persons have not been made. As a result, the rights and interests of both the person seeking privacy and the person demanding information are virtually uncertain in practice and dependant on the administrative discretion. As the right to privacy needs to be managed according to the nature and needs of the class seeking that right, it is not possible to make similar provisions for all classes or in all circumstances. Therefore, there is a need of regulating the right to privacy by first deciding the nature and extent of privacy on the basis of specific sections, classes or circumstances, and the Legislature and the Executive are needed to take special steps in this regard. As regards the question of the right to privacy of the victim women, children and

HIV/AIDS infected persons who have entered the judicial process, in the recent days a provision has been made for in-camera trial of the cases relating to rape, trafficking in human beings, children, ascertainment of relation and divorce. Besides, it has been also provided that if the Court deems any other case fit for in-camera trial, it may issue an order accordingly. Such a provision has been made by Rule 46(b) of the District Court Rules, 2052 (1995), Rule 60(a) of the Appellate Court Rules, 2048 (1991) and Rule 67(a) of the Supreme Court Rules, 2049 (1992). In those Rules, as no mention has been made about the civil or criminal cases in which HIV/AIDS infected persons are involved as plaintiffs or defendants, those Rules do not seem to include such cases under this category. It has been provided that while taking the statement of a victim woman in the course of conducting investigation of any offence under the chapter on Rape in Muluki Ain (the National Code) a female police personnel must take that statement. Likewise, it has been further provided that during the trial of a case under that chapter only the concerned legal practitioner, the accused, the victim woman and her guardian, the police personnel granted permission by the official entrusted with the trial of the case and the Court employees may remain present in the court room.

- 33.** The Children Act, 2048 (1991) has provided that during the trial of any case involving any child, the legal practitioner, parents, relation or guardian of the child and, if the official trying the case deems it proper and grants permission, any person or representative of any social organization involved in the activities concerning the protection of the rights and interests of children, may remain present in the court room. Besides, the Children Act has also imposed restriction on the publication, in any daily or magazine, of the description of any incident relating to such a case without the permission of the investigating officer or the official conducting the hearing of the case. The same Act has further provided that the police office must maintain, in a confidential manner, the record of the name of the child arrested in connection with the charge of any offence, his/her address, age, sex, family background, financial position, the offence committed by the child and the description of any action if taken in that connection, If such data are published for the sake of any study or research it can be published only on the basis of age or sex, and that, too, without mentioning the name, family title or address of the child. The above mentioned provisions have provided for in-camera proceedings and the protection of privacy in regard to

publication in dailies and magazines. But no thought has been given so far to the inclusion of a provision regarding maintaining privacy about the introductory information of the child also in the case file and the documents included therein. Moreover, there is no effective implementation of the existing law.

- 34.** Even after making the provision for camera Court no exhaustive Guidelines have been prepared and issued for the purpose of conducting the proceedings in a camera Court. The physical environment and management aspects of camera Court have been almost forgotten. Not even initial work has been done in the direction of ensuring necessary sensitivity, awareness and skill in the mind of judges, employees and also the legal practitioners in regard to conducting the in-camera trial. Information has not been disseminated in an extensive manner about the provisions of the in-camera proceedings and its advantages. Camera court does not simply signify a process restricting the unnecessary entry into the place where the Bench is physically operating. No formal provisions having theoretical and practical clarity have been formulated regarding the responsibility to be shouldered by those participating in the in-camera proceedings in accordance with the spirit of this trial, irrespective of whether they are inside or outside the camera Court or whether the in camera proceedings are in progress or they are over.
- 35.** One of the objectives of the camera Court is to protect the victim party to the case from a discouraging environment which dissuades him/her from bringing to light even the matter which she is willing to disclose only because the Bench is open. Thus it empowers him/ her to participate and be present in the judicial process in an effective and actual manner. But if the victim is made to face the accused even inside the camera Court or if there arises a situation in which the victim is not in a position to bear the fear or terror caused by his presence and if the victim could not be protected against all this, there shall be no possibility of the camera Court serving its purpose. Rather due to the presence of the limited number of persons inside the Court room the victim may feel additional insecurity from the defendants. If it so happens, the advantages of the open Bench shall be lost whereas only the risk of the camera Court shall become obvious. Hence, in order to ensure the immediate and long term benefits of the camera Court necessary study, management, monitoring and evaluation are still to be undertaken. For this it is necessary that the concerned Courts themselves should first display special management and readiness as

their own responsibility.

- 36.** The objective of the provision for setting up camera Court in some specific cases is to address the specific needs of the victims in the concerned cases and to prevent unnecessary disclosure. Yet the victim women, children and HIV/AIDS infected persons have felt the lack of guarantee of the privacy of their introductory and other related information. Besides, no thought has been given in regard to the protection of the privacy of their introductory information following the disposal of the case. The provision of camera court is a provision which can be activated only after the filing of the case. However, in a few sensitive cases there may arise a need for protecting the privacy of the introductory information of the complainant or the victim right from the time of lodging of the first information report (FIR). The victim may not feel like filing the FIR for the fear of general people forming negative opinions about him/her. This occurs when people become aware of his/her condition because of the filing of the complaint and the unnecessary dissemination or publication of unwanted information through that means. The victim, therefore, thinks that the general people would not have learnt about his/her condition had s/he not filed the complaint leading to the initiation of the case. This is because after the start of the process of the case following filing of the FIR, the victim is presented before the Court, his/her proofs and evidences are subjected to examination and they are also kept in the written form and brought to light.
- 37.** All criminal events taking place in society are not found to be recorded as complaints, only because of the failure to maintain and guarantee the privacy of the information relating to the victims. Such a trend is treated as an additional opportunity for the criminals to commit crimes and on the other hand it also aggravates the vulnerability of the victims. Therefore, it is essential to guarantee the identity and other information related to a sensitive class like victims and children, right from the time of investigation of the offence. At present the prevailing scenario in our country shows a trend of disclosing all the information about the victim right from the time of filing of the FIR, disclosing the case file and the documents contained therein, the concerned party enjoying the freedom of demanding their copies and inspecting them and also the media having unlimited access to them. That is to say, the prevailing scenario shows that the needs and interests of the victims have been left unregulated. If all the problems relating to access to justice ranging from investigation to judicial adjudication, and, thereafter, publication and implementation of the decision are not

addressed, the self confidence of the victims cannot be enhanced only by conducting proceedings in a camera Court, which start in the middle and also end in the middle of the judicial process. In order to make the existing camera Court meaningful and to ensure the judicial guarantee of a high order for the victim and the sensitive party it is, therefore, essential to make additional provisions for protecting the privacy of their introductory personal information and other related information.

- 38.** Let us now consider the issue No. 3. It is necessary to consider in the present context what type of relation exists between the right to privacy and the right regarding fair hearing from a competent Court. The right to privacy compels the protection of the privacy of certain specific information. Everybody under the right to justice, which remains as an integral part of judicial remedy, possesses a right to information about any action taken against them and also to have fair hearing from a competent Court. Judicial impartiality and unbiasedness are the main prerequisites of the right to justice. The right to information, the right regarding justice and the right to judicial remedy can be viewed both as mutually independent and as complementary to each other.
- 39.** Public information can be sought for under the freedom of speech and expression and the right to information, and judicial information is also included under this. Our Constitution has guaranteed several rights under the right to justice enshrined in Art. 24. But under that provision it has not been specified that every trial must be made public nor has it been made mandatory that all the subject matters of judicial hearing should be also made accessible for the common people. Since it is the right of a defendant to seek, under the freedom of speech and expression, necessary information in order to examine the evidence and information presented against him/her, s/he is entitled to have the natural right to seek, receive and present his/her version in that connection. In addition to that, matters regarding the enjoyment of one's rights guaranteed by Art. 24 are also there. The rights of the victim too, are another aspect which needs to be considered along with the rights of the Defendant. His/her right to express himself/herself without any hindrance needs to be recognized in order to reach the goal of judicial remedy. Only in a proper environment and with proper opportunities the victim may express him/herself in a proper manner and present all the available proofs. Hence, it is the duty of the state to manage the judicial trial ensuring guarantee for all this.
- 40.** Although Art. 24 of the Interim Constitution has not provided for judicial dispensation only

through an open Court as a necessary prerequisite for the enjoyment of the right regarding justice, our judicial procedures seem to be automatically oriented towards the system of open trial. In fact, it can be said that making judicial trial generally open seems to remain a characteristic of our judicial system. Our judicial system seems to be conducted in accordance with the spirit pervading in Art. 11 of the Universal Declaration of Human Rights and Art. 14 of the International Covenant on Civil and Political Rights, which have been ratified by Nepal. According to the above mentioned Article 14 of ICCPR all persons are equal before the Courts and tribunals. It has also provided that in the determination of any criminal charge against any person or his/her rights and obligations in a suit of law, s/he shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. It has further provided that the press and the public may be excluded from all or part of a trial for reasons of morality, public order or national security or if the interest of the private life of the parties so requires or where the Court is of the opinion that in special circumstances publicity would prejudice the interests of justice. Besides, it has also provided that any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juveniles requires otherwise or the proceedings are concerned with matrimonial disputes or the guardianship of children. The above mentioned Article 14 has provided for imposing restrictions on the presence of the press and the public during a trial in order to maintain public interests, national security, morals etc. Moreover, it has also been clearly mentioned that restrictions can be imposed on public hearing if, in the opinion of the Court, the purpose of justice may be defeated if open trial was allowed or the Court proceedings were published. Also, even while making any decision public it has provided that exceptions can be made in the interests of children or in the issues relating to matrimonial disputes or guardianship of children.

- 41.** Although the concept of public hearing has been included in the International Covenant on Civil and Political Rights, it is not proper to say that the very use of the term “public hearing” must necessarily be viewed as an open hearing. The hearing conducted in accordance with the law does not lose its public element only for the reasons of restrictions imposed on the entry of some particular person with a view to regulating hearing in certain specified circumstances or due to a hearing conducted in a camera court or due to not

disclosing the identity of a particular party or witness. Even where the hearing is conducted after making such an arrangement, in actuality, it is public law which is being applied, and the judicial process is regularized. The main thing which needs to be considered in the judicial process is whether or not the concerned party was dealt with fairly and whether or not that party received adequate opportunity for his/her defence.

- 42.** Our Muluki Ain (the National Code) and the laws and Rules relating to judicial administration have also granted it recognition to a desirable limit. The provision of camera Court in some particular cases has been already discussed above. It is not that there shall be judicial fairness only when the Bench is open and that judicial fairness would be a casualty the moment hearing is conducted in a camera Court. For a fair hearing it seems essential to make a provision for some major prerequisites like opportunity provided to the party for presenting his/her claim or defence without any hindrance, procedural simplicity, opportunity for legal aid or representation, congenial environment, judicial impartiality etc. In fact, in our judicial system, the judicial process has been generally kept open and the in-camera proceedings are conducted as an exception only in some cases in which the parties of some specific conditions are involved. While doing so, the approach remains that even in those sensitive circumstances the judicial flow must continue uninterrupted. It is necessary to view this, in fact, as an attempt at striking a balance between judicial fairness and judicial effectiveness.
- 43.** Only because special type of protection has been afforded to the parties or witnesses there is no reason to believe that the dignity of open hearing shall be eroded only for that reason. If there is possibility of fear or influence in the open Court, justice may get obstructed even there. It is for this reason that there is generally no place for questioning the justification of public or open Court. Nonetheless there seems to be no reason to believe that fair judicial hearing may not be possible just because in special type of cases or in cases involving special type of people, hearing has been made public only after maintaining the confidentiality of some specific information or that hearing has been conducted in camera. If the necessary prerequisites or qualities required for fair judicial hearing are present, it should be presumed that there is fair judicial hearing irrespective of the fact whether there is an open Court or a camera Court. In fact, the right to public hearing and the victim's or the party's right to privacy are a matter to be viewed in a balanced way. It is not correct to say that an accused

person's right to defence and fair hearing has always got precedence over the victim's right to judicial remedy. For the guarantee of fair administration of justice, it is essential that the victims must present their evidence without any fear or obstacle and the decision maker must also issue the necessary orders for the same. In *Scott v. Scott*, 1913, AC 417 it was said that "the state has an interest in fair administration of justice. It requires that the victims and witnesses depose without fear and intimidation and that the judge is given sufficient power to achieve that object". In fact, under the right to judicial fairness, it is necessary to view in a coordinated manner the party's right to defence of his/her innocence along with the victim's right to seek judicial remedy for the injustice committed against him/her. When sometimes it becomes necessary, in view of the nature of the case, to provide protection to the privacy of the introductory information of also a party to the case (for example, children) as it appears compulsory in the interest of justice, it becomes all the more important in the case of the victim. It is not possible to say where this balance shall be struck. There is a need for continuous review of the circumstances for striking such a balance. In the present context a defendant's right to defence does not mean that he can subject the victim's evidence or the victim to cross examination in any manner or to any extent. Rather it simply signifies that s/he must be provided with a guarantee of the basic opportunities required for defence.

44. Nowadays due to the expanding nature of terrorism and in order to ensure, for the sake of fair justice, the desirable participation of all the concerned by protecting them from the emerging new trends seen in the world of crime, procedures have already been adopted to conduct the trial in a camera Court after shifting the case from open Court. Also, to record the evidence and statement of the witnesses, protecting the victim or the witness from confronting the defendant, through audio visual medium or close circuit television or by using a bar erected between the defendant and the victim. The Indian Supreme Court has ruled, in *Sakshi vs. Union of India*, [AIR 2004 SC 3566, 2004 (2) ALD Cri 504] that if any testimonial statement has been recorded by using video screen and the defence has watched it, the requirement of a Defendant's right to have the proofs examined in his presence should be treated as fulfilled. In order to deal with the menace of terrorism various legal provisions including Section 13 of the Indian Terrorist and Disruptive Activities (Prevention) Act, 1985 (TADA) and Section 30 of the Prevention of Terrorist Act, 2002

(POTA) have been made. Some new methods of examining a child witness, allowing a few exceptions to some general rules followed in course of examination of an adult witness, have started finding place in our system. For example, cross examination made by the defendant is indirectly conducted through the judge; informality is adopted while examining a child witness and the examination of the witness takes place in a suitable manner, after considering his/her mental level and after providing him/her with a friendly person or environment; the version of the child witness is recorded through an audio-visual means for presenting it in the Court. It is necessary to protect the privacy of the introductory information about the concerned party in certain conditions in the judicial process in order to ensure the act of seeking and receiving justice in view of sensitive cases or the sensitivity of the concerned party and the needs of justice. But it is equally necessary to take precaution against making such a situation adverse thereby allowing it to become prejudiced and disabling the Defendant to get justice. The need for a fixed procedure or Guidelines can be realized in order to ensure such a situation.

45. Let us now consider question No. 4.

As the right to information has also been accorded protection in the present Constitution, while considering the question of whether the act of keeping the personal details of a party to the case or the victim secret, contradicts the Defendant's or the public community's right to information, it cannot be said that the need for creating a demarcation line between the right to privacy and the right to information may not arise. The right to information is also treated as an integral part of a person's freedom of expression. For a meaningful enjoyment of one's freedom of thought and expression, the act of seeking and receiving some information of public importance, which is felt necessary for a person, constitutes the inner contents of the right to information. It has been already mentioned in the law relating to information that the procedure of getting information of public importance should be provided in the law itself. A provision regarding giving other persons compulsory access to private information is neither in the law nor is it proper to do so. In fact giving access to personal information is inviolable except where the law compels it. Imbibing this very spirit, the Right to Information Act, 2064 (2007) has provided for giving protection against unauthorized publication and dissemination of any information of a personal nature.

46. The Right to Information Act, 2064 has also provided for the use of personal information

only after obtaining written consent except where it is necessary for the sake of preventing any serious danger to the health or security of the public or controlling corruption and where the law permits for such publication. Therefore, it does not seem that the utility of the provision regarding privacy guaranteed by the right to information can be obstructed. In fact, it is worth remembering that under the right to expression, is also included the right of a person who is not in a position to express him/herself. Particularly, as victim women and children exposed to risk and HIV/AIDS infected persons can express themselves or explore judicial remedies for their judicial needs only if the privacy of their personal introductory information or other information is guaranteed, it is also the duty of the State and society to provide a guarantee for this.

47. It is not proper to say that the right to privacy always obstructs the flow of information. The information for which legal protection is not considered essential does not fall under the confines of privacy, and even within the law relating to privacy, relaxation can be given for allowing access to information. Also, under the right to information the provisions regarding refusal of access to a person's information declared inviolable may also be included. What is most important in the judicial process is to provide protection to the information regarding privacy of the introductory and personal information of the classes exposed to danger, within a necessary and desirable limit in order to create a situation for the enjoyment of their rights. Another right related to the right to information is the right regarding publication, transmission and press. The right regarding publication, transmission and press is considered as an enlarged form of the freedom of expression and publication. That right and the right to information both help in giving expression to a person's freedom of expression and publication. The above mentioned rights also help in the promotion of greater public interest. Nevertheless, in the hierarchical priority of rights, these rights are not considered as enjoying superiority over other rights. Under the right to publication, transmission and press embodied in Article 15 of the Constitution, a provision has been included which says that laws can be made with a view to imposing restrictions on the activities aimed at disturbing the good relation between various castes, races or communities, causing slander or contempt of Court or adversely affecting public etiquette or morality. Thus, it is clear that even while enjoying the right to information it must be enjoyed confining oneself within the area defined by that right. If, through those rights, positive contributions are made to the

enjoyment of a person's right to justice and the right to judicial remedy in an unhindered way, the meaningful protection of every right can become possible.

48. Now let us consider question No. 5.

The status of the existing rights and the relevant laws relating to the protection of the privacy of the personal introductory information of the women, children or HIV/AIDS affected or infected persons mentioned in the petition has been analysed. This has made it clear that making legal provisions, addressing the necessities of all the sectors, regarding the enjoyment of privacy, which has been recognized as a fundamental right, has become necessary. Now a question arises whether or not an order can be issued for protecting the privacy of the introductory information of the persons who have come to join the judicial process in the capacity of a party or a victim. Actually, this question is very significant. It is necessary to consider whether or not such an order can be issued and, if yes, in which capacity such an order can be issued.

49. Article 100 of the Interim Constitution of Nepal, 2007 has provided that the powers relating to justice shall be exercised in accordance with this Constitution, other laws and the recognized principles of justice. Besides, in Article 107(2), extra-ordinary jurisdiction has been granted to settle any dispute relating to a constitutional or legal question by issuing a necessary and appropriate order. For this purpose, this Court also possesses the power to issue appropriate orders with a view to imparting full justice and providing appropriate remedy. It is the duty of the Court to defend the people's right to justice by exercising, in a meaningful way, the jurisdiction created by the law relating to judicial administration in addition to the right to constitutional remedy granted by Article 32 and the extra –ordinary jurisdiction enshrined in Article 107 of the Constitution. Exercising such a right is not a mechanical work. The above mentioned jurisdiction needs to be adopted in the totality of the right of the party, the need or problem experienced in course of its enjoyment, the creation of infrastructure required for addressing it properly and also reasonable thinking and conduct.

50. No existing law seems to hamper the act of conducting any programme for the protection of the victim witnesses initiated in view of the special needs of the specific classes placed in a disadvantaged situation or the party exposed to risk. This is provided that justice can be delivered by protecting the secrecy of specific identity or details or by adopting an anonymous

procedure in that course. Nowhere it has been accepted that under an accused person's right to have information about the charge against him is also included his right to compel the victim witness to be present before him and the right to public defence after obtaining all the information from the victim. Such a right is treated as a relative right which can be regulated to a desirable extent. In totality it has been accepted by several countries that the right of the accused and the right of the victim ought to be viewed from the viewpoint of the balance of interests. Hence, in order to meet the needs of justice it has been recognized as an integral part of the Court's inherent jurisdiction regarding dispensation of justice, to make necessary arrangements as an exception to the open Court and to issue an order under that provision protecting the privacy of any specific party or victim. And it is a general belief that the absence of any specific law does not create any obstacle to do so.

51. In the United Kingdom, the House of Lords, in *Attorney General Vs. Leveller Magazine*, [1979, AC 440] has explained such a provision and declared that the Court, under its inherent right, retains the power to maintain secrecy about the name of the witness. Also in *Taylor Vs. Attorney General*, [1975(2), NZLR, 675], the Court of Appeals of New Zealand has ruled that the Court reserves the right to issue a directive as to which extent publication about any case should or should not be allowed outside the Court. The Supreme Court of Canada has also, in *R. Vs. Dunnett*, [1994 (1), SCR, 469] held that the right to fair hearing in a case is not absolute, and that anonymity can be permitted if disclosure of the identity of the complainant or an innocent person is detrimental to his/her interests, and that seems more essential than the interest of the defendant. In several countries separate laws are found to have been made regarding protection of the personal information of the victims or witnesses as a part of the Victim/witness Protection Scheme. For example, mention may be made of the *Witness Protection Act, 1991 of Victoria* and the *Evidence (Witness anonymity) Amendment Act, 2000 of Queensland of Australia*, the *Witness Protection Ordinance (67 of 2000) of Hong Kong*, the *Witness Programme Act, 1996 of Canada*, the *Portugese Legislation Act (Act No.93/99 of 14 July, 1999) of Portugal* and the *Witness Protection, Security and Benefits Act (Republic Act No. 6981) of the Philippines*. Besides, different provisions are found to have been made in several states of the United States of America in regard to the victim or witness protection. Article 706-57 and 706-63 of the *French Penal Procedure Code* has made the following provision:

“If it is found that there is danger to the life or the physical integrity of the witness or any member of his family or of a close relative then the examining magistrate - public prosecutor will be justified in authorizing declaration of such witness as protected without his identity appearing in the file of the procedure. In no circumstances can the identity or the address of such a witness be disclosed.”(With acknowledgement to Law Commission of India, 198th Report, August 2006, P. 493) In some countries like Japan, Netherlands, Germany, Italy, etc. also such legal provisions regarding protection can be found. This is an indication of the emergence of a new trend of the protection of privacy by law.

- 52.** The above analysis shows that the Courts have, in exercising their inherent judicial jurisdiction, issued orders for the protection of the personal privacy of the party to a case or the victim on the basis of necessity and appropriateness for the sake of fair dispensation of justice. However, it does not mean that a demand has been made for not allowing the Defendant to know, even for the purpose of his defence, who the witnesses against him in that case are, or to close all the ways of cross examining them. Rather the demand has been made only for the protection of the secrecy of the personal introductory information in the proceedings of a case right from the beginning. In such a situation where the privacy has been protected, there is a need for conducting or regulating the presentation of evidence, the procedure of the examination of witness and some other related matters in a special manner in order to make such protection more effective. Not that comprehensive provisions regarding the privacy of a party to the case or the victim cannot be the subject matter of legislation. In fact, making a separate legal provision in this regard is not only desirable but also essential because such a need can be better addressed only through the means of effective law.
- 53.** For this, it appears essential that the Executive and the Legislature must take initiatives to make laws for the protection of privacy of the victim women, children and HIV/AIDS infected persons. It is necessary to include adequate provisions in the law and to implement such provisions including, protection of the privacy of the personal information of the persons whose privacy needs to be protected; the information about their physical and medical conditions and the information which has come to light in the judicial process; providing necessary counseling, disclosing some information after obtaining informed consent; specifying the conditions when the information may be disclosed; protecting the privacy of information or prescribing the procedure and authority for disclosing such information; making

provisions for necessary punishment; reparation and treatment for its effective implementation; providing a record system equipped with necessary techniques and methods of monitoring and evaluation for controlling the misuse of that provision and also making provisions in the law, if so needed, for essential conduct.

- 54.** The written replies submitted by the opponents do not show any ideological objection to the act of protecting privacy by making a law relating to privacy as requested by the Petitioner. The Speaker of the Legislature Parliament has not only expressed his acceptance to making law for the protection of privacy of the classes of people mentioned in his written reply but has also expressed his consent for the need for such a law and displayed his willingness to facilitate the process if the necessary Bill is presented by the government or the concerned party. The positive expression given by the Speaker of the House of Representatives in his written reply in respect of the request made in the petition appears to be a praiseworthy beginning, notwithstanding the fact that no initiative seems to have been taken so far for making laws in this regard.
- 55.** Therefore, this directive order is hereby issued to the Respondents Prime Minister, the Office of the Council of Ministers and also the Ministry of Law, Justice and Parliamentary Management to present, at the earliest, a Bill before the Legislature Parliament. Also taking into consideration the aforesaid legal questions, for making laws containing comprehensive legal provisions, after having consultations with a committee set up for this purpose and comprising as its members, the concerned Court, Bar Association, women, children and the people representing the marginalized sections of the society including HIV/AIDS infected persons or the organizations working in their interest, the representatives of the civil society and also the Petitioner Forum for Women, Law and Development.
- 56.** Even though an order has been issued as mentioned above, since it would take some time for the law making process, let us now consider the last question whether or not some interim provisions should be made for immediate arrangements. Women become involved in various cases, such as, rape, incest, abortion, claim for establishing relations, divorce etc., all of which are related to violence against women and which also cause birth to several other legal problems. Similarly, even today throughout the Kingdom of Nepal there are several cases involving children as Petitioners or opponents. There are also cases involving the persons infected by HIV/AIDS which may have been registered in various Police Offices,

Government Advocate Offices, District Administration Offices and other Judicial/quasi-judicial bodies, which may be currently passing through various stages ranging from investigation to prosecution and filing of the charge sheet or the trial being in progress. It is worthwhile to consider whether or not it would be proper to let the persons involved in the cases mentioned above, continue to remain in the system followed earlier, prior to the delivery of this decision and pending the formulation and implementation of a legal provision as mentioned above.

- 57.** If, even after this decision, this Bench allows the continuing infringement of the right to privacy in the cases involving the persons, such as, victim women, children and HIV/AIDS infected people who have been recognised by this Bench as belonging to a sensitive category, even though the law to be made after the issuance of this order shall provide protection to the right to privacy, the damage caused to such persons due to the violation of privacy already suffered by them cannot be compensated. Hence, not only is the continuation of such a state of affairs undesirable, it is also urgently necessary to stop such a process at the earliest. Pending the enactment and implementation of a comprehensive law for this purpose in accordance with the directive order issued in this case, it must be considered as to what type of interim provisions, and having which kind of structure, should be appropriate for formulation and implementation.
- 58.** In the context of the totality of the requests made by the Petitioner, a Division Bench of this Court had sought the advice from the Petitioner organization on March 9, 2007 to suggest which model or procedure shall be appropriate to protect the privacy guaranteed by the Constitution. The Petitioner, on the basis of its study, seems to have given some valuable assistance by presenting a model of the procedure relating to the protection of the right to privacy. Because it is essential to make different types of provisions for the protection of privacy according to the nature of the specific needs of various concerned classes, it does not seem to be an easy task. Notwithstanding the fact that, as mentioned above, the privacy of any personal information even in regard to the cases involving victim women and children has not been protected so far by any concerned body including the Courts, now it does not seem proper to allow such a situation to continue any more. It is so because the people belonging to this class have got a fundamental and human right including the right to judicial remedy, and it is also the duty of the Court to safeguard such a right. Although the

Court does not make laws for this, it cannot be said that the Court cannot issue Guidelines or orders, without contravening the prevailing laws. In special circumstances the Court can do so, for the purpose of the protection of the present legal liabilities, after identifying them, on the basis of the existing Constitution and laws, the recognized principles of law and various international human rights laws to which Nepal is also a party. It has been provided by Art. 88 of the Constitution of the Kingdom of Nepal, 1990 and Art. 107 (2) the Interim Constitution, 2007 that the Supreme Court is equipped with extra-ordinary jurisdiction to issue appropriate orders with a view to imparting full justice. It has been clarified above that it is also an inherent right of the Court to issue necessary Guidelines or orders for enabling the party, which has come to it for seeking justice, to have effective access to justice. This court is found to have issued eight-point guidelines regarding implementation of the right to information also in the case of *Gopal Shivakoti and others v. the Finance Ministry and others* [Nepal Kanoon Patrika, 2051, No. 4, Decision No. 4895, p. 255]. The Indian Supreme Court has also, in *Vishaka v. State of Rajasthan* [AIR, 1997, SC, 3011] ruled that if the other political organs fail to discharge their duty of making laws it becomes the duty of the Court to fill up such a lacuna. It is also the duty of the Court to formulate and issue some Guidelines containing various provisions relating to definition of sexual harassment in order to control its occurrence at a public place, means of deterrence for its prevention, prosecution, disciplinary action, designating the authority for hearing such complaints, causing awareness about the rights of the women employees, protection of the rights of the third party etc. These are only a few of the examples. Such Guidelines are issued not for the purpose of imposing restrictions on the rights granted to the parties by the Constitution, the Statutes and the laws, but for facilitating the implementation of the existing law. Thus, the uncertainty at the stage of implementation of such rights should be removed or the lacunae should be filled. Thereby, at least to some extent, the law relating to rights will be more effective. It seems proper and permissible to issue some Guidelines of interim nature which shall remain effective till comprehensive legal provisions are made.

59. While thinking about what type of guidelines should be issued for the protection of the privacy of the women, children and HIV/AIDS infected persons who are victims or a party in the context of a case, some issues need to be addressed. These are chiefly, the classes to be

covered by it, the duty of the concerned officials, the type of information that needs to be protected, the method of its protection, the condition in which the concerned party should be given information, the manner and the amount of information which should be given, the duty of the person receiving the information, the action to be taken against the persons including the officials or employees who violate the privacy of information, the procedure to be adopted while seeking the privacy of information and the right to disclosure of information in cases where the privacy of information is not required. This provision must be implemented by all the related bodies including all the law Courts, police offices, the government attorney offices working under the Attorney General, the District Administration Offices etc. Recognition must be granted to the provisions like imposing restrictions on demand for copies of the introductory or other private information made available in the process of the lawsuits relating to the persons or the classes included in the Guidelines. Also provisions like not mentioning anything even in the rulings leading to the disclosure of such information, restricting publication of such information by the media, including newspapers and magazines which might result in the violation of the privacy of such information, and permission granted to researchers to get access only to the information about the details other than personal information.

- 60.** There is a need for making a provision which allows the concerned Court to treat the violation of the Guidelines as its own contempt and initiate action, and punishment for the same. Even though the Constitution has provided for the right to privacy, no legal provisions have been made so far which specify the circumstances in which protection should be granted to the privacy of the people belonging to some specific classes including victim women, children or HIV/AIDS infected persons. Further, no provisions describe the circumstances where their personal information may be disclosed. Comprehensive provisions are yet to be made to address all this. Taking into consideration the above mentioned matter, a directive order has been issued to the Respondent Prime Minister and the Office of the Council of Ministers as well as the Ministry of Law, Justice and Parliamentary Management to make a law including the above mentioned provisions which describe the rights and duties of the concerned parties. Also to maintain the level of privacy as prescribed (by the law) in some special type of lawsuits in which victim women or children or HIV/ AIDS infected persons are involved as

a party to the case, right from the time of registration of the case in the police office or its direct registration in a law Court or in other bodies, till disposal of the case or even in a situation following the disposal of that case. Therefore, this order is hereby issued to the aforesaid Respondents to comply with and cause compliance with the Guidelines attached herewith pending the enactment of such a provision. The office of the Registrar of this Court is directed through this order to write to the concerned Courts, bodies and offices for its implementation and also to discharge the function of necessary monitoring and coordination.

61. Finally, this Bench wants to extend its thanks to Under Secretary Tika Ram Acharya, Secretary to the Judicial Council, Prakash Kumar Dhungana and Deputy Registrar of this Court Bipul Neupane for providing research oriented assistance in connection with the work related to this order. A copy of The Procedural Guidelines for Protecting the Privacy of the Parties in the Proceedings of Special Types of Cases, 2064 (2007), having six pages and issued today by this Bench, is attached herewith.

s/d

Justice Kalyan Shrestha

I concur with the aforesaid verdict.

s/d

Justice Khir Regmi

Done on day 10th of the month of Poush, 2064 (Dec. 25, 2007).

Attachment

Preamble:

Even though the Interim Constitution of Nepal, 2007 has, by including the right to privacy under the Fundamental Rights, also guaranteed the right to judicial remedy, since, for the want of a definite legal provision for its protection, it has been realized that the persons infected with HIV/AIDS in the event of such infection, the women in the event of violence committed against them and the children in the event of getting involved in conflict with the law are experiencing obstacles in seeking remedy against injustice or getting access to justice. Since they are also encountering additional crisis and inconvenience in living a life of self dignity due to the failure in providing protection to their personal introductory information in Course of the proceedings of law suits ranging from their investigation to the implementation of the decisions and also during the period ensuing thereafter; and as it has been decided by this Court to issue, by exercising the inherent power of this Court under the power granted by Article 107(2) of the Interim Constitution of Nepal, 2007, an order to the Government of Nepal to make legal provisions including also the procedure for protecting the privacy of the people belonging to such classes, these Guidelines for protecting the right to privacy, which shall be applicable to every stage of the proceedings of the above mentioned cases of special types, are hereby issued, pending the enactment of such a law, with a view to imparting full justice and providing a suitable remedy for the protection of the right to privacy.

1. Short Title and Commencement: -

- (1) The title of these Guidelines shall be “ The Procedural Guidelines for Protecting the Privacy of the Parties in the Proceedings of Special Types of Cases, 2064 (2007).
- (2) These Guidelines shall come into effect after thirty days from the date of today.

2. Definition:

Unless the subject matter or context requires otherwise, in these Guidelines :

(a) ‘Lawsuit’ means, for the purpose of these Guidelines, the following types of cases specified by the concerned official after making a decision on protecting the privacy of the personal introductory information:-

- (1) the criminal cases, requiring protection of privacy on the basis of the nature of the

case and the impact that they can leave on the victims, having women as victims and including rape, abortion, sexual abuse, transactions in human beings, trafficking in human beings, incest and violence against women;

(2) the criminal cases having children as a party and tried by a juvenile Court or Juvenile Bench;

(3) the cases related to HIV/AIDS affected or infected persons where such information has been disclosed;

(b) 'Personal introductory information' shall signify,

(1) all the related description regarding disclosure of the identity including name, family title, address, etc. of the victim women in the context of the cases mentioned in sub clause (1) of clause (A);

(2) all the related description regarding disclosure of the identity including name, family title, address etc. of the children who are involved as a party in the context of the cases mentioned in sub clause (2) of clause (A);

(3) all the related information regarding disclosure of the identity of the persons affected or infected with HIV/AIDS in the context of the cases mentioned in sub clause (3) of clause (A).

(c) 'The Concerned Official' shall signify the District Judge in the context of the District Courts, the Registrar of the concerned Court in the context of the Appellate Courts and the Supreme Court and the Officer-in-charge of the concerned office in the context of other bodies or offices.

3. Personal Introductory Information not to be Disclosed:

(1) All the bodies including the investigating body, the body trying the case and the verdict implementing body shall have to protect the privacy of the persons appearing as a party to the cases mentioned in Section 2 in course of all the activities conducted right from the filing of the complaint to investigation, prosecution, trial, delivery of verdict, implementation of verdict and even during the period following the implementation of the verdict.

(2) The privacy of the personal introductory information, not disclosed as mentioned in Clause (1), shall have to be protected in all conditions including the lawsuit, rejoinder, complaint, petition, report, appeal, decision or any public publication to be made by the Court or any other body.

(3) The concerned person cannot be compelled to disclose the introductory information kept secret in accordance with clause (1).

(4) Nobody, including any party or his/her counsel, expert, witness, judge or employee, who appears at any stage of the legal proceedings and comes to know about the personal introductory information kept secret, shall disclose to anybody the information thus kept secret.

(5) The information kept secret according to these Guidelines shall not be disclosed even after the disposal of the case.

4. Disclosure of Private Personal Information:-

Permission may be granted for the disclosure of the personal introductory information, kept secret, to the extent considered necessary in the following circumstances:

(1) if the official responsible for maintaining secrecy deems it legally fit for disclosure and grants permission accordingly;

(2) if it looks necessary for the protection of fair judicial hearing; and

(3) if the person, whose personal introductory information has to be kept secret, presents a written application stating that maintaining privacy of such information is no more essential.

5. Procedure for Maintaining Privacy:-

(1) The personal introductory information kept secret in accordance with Section 3 must be recorded on a separate page and sealed in an envelope, and a separate introductory name or number or indication mark must be given to indicate the information kept private and that must be certified by the concerned authority.

(2) If the privacy of any document or evidence needs to be protected for the sake of maintaining secrecy of the personal introductory information it must be sealed and its details mentioned on a separate sheet of paper and attached to the case file.

(3) For the sake of protecting the privacy of the information kept secret, the concerned court or office must make arrangements for creating a separate roster of such case files, giving indication marks and preserving the records.

(4) If any person requests for protecting the privacy of his/her personal introductory information, it shall be as decided by the concerned official whether or not to protect

the privacy as requested. In case the personal information is to be kept secret as requested in any case, the reasons justifying such a decision must be mentioned in a written form.

6. Introduction: -

(1) Notwithstanding the presence of a person, whose introductory information has been kept secret in course of investigation or proceedings of the case, the introductory matters relating to him/her shall be mentioned only by the name, number or indication mark assigned to him/her. His/her signature, too, shall have to be made by that very symbol, name, number or indication mark.

(2) The person whose personal introductory information has been kept secret in accordance with these Guidelines must be given an identity card mentioning his symbol, name, number or indication mark.

7. Summons, Notice and Correspondence:-

While issuing any summons, subpoena or notice to or corresponding with the persons, whose introductory information has been kept secret, it must be executed by using his/her symbol, name, number or indication mark. If the other part asks for official introduction regarding such information, the information shall have to be given by opening the sealed particulars after making arrangements for preventing unnecessary disclosure of the personal introductory information thus kept secret, and after the completion of the work it must be resealed.

8. Restriction on Publication of Information:-

The information relating to the identity of a person kept secret in accordance with these Guidelines must not be brought to light or disseminated by any means.

9. Violation of Privacy to be Punishable:-

(1) If, in contravention of these Guidelines, anyone discloses the name and information regarding someone, whose introductory information has been kept secret, resulting in the revelation of his/her real identity, such a person shall be considered to have violated an order of the Court and shall be subjected to the contempt of the Court proceedings.

(2) No personal introductory information or information kept secret, which comes to the knowledge of any employee during the proceedings of the camera Court, shall be disclosed to any third party outside the camera Court. If any act is done in contravention of this provision, departmental disciplinary action also may be taken in addition to the action to be taken pursuant to clause (1).

10. Authority Designated for Entertaining Complaints:-

If a complaint is to be filed seeking action against any employee for the violation of these Guidelines, the complaint must be filed before the concerned officer-in-charge in case of an employee and before the concerned authority of a superior level in case of an officer-in-charge. Any complaint filed in this manner must be disposed within seven days.

11. Compliance with the Guidelines:

It is the duty of the concerned office, Court and all concerned to comply with these Guidelines.

12. Provisions Regarding Implementation of the Guidelines:-

(1) These Guidelines must be disseminated by means of public media for the knowledge of the common people.

(2) These Guidelines must be displayed on the notice board of the Courts of all levels, police offices and the government attorney offices.

(3) If any impediment arises in the implementation of these Guidelines, the concerned official shall remove the impediment by adopting an appropriate method. But if the concerned official cannot remove that impediment, the Supreme Court shall settle the issue by removing the impediment on a report submitted before it.

(4) The provisions contained in these Guidelines must be followed in the proceedings to be undertaken henceforth including in those cases which are currently in progress.

13. Existing Law to Prevail:

The matters other than those provided in these Guidelines shall be dealt with in accordance with the existing law.