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CONTEXTUALIZING NARIMAN'S *GOD SAVE THE HON'BLE SUPREME COURT*: THE PERIL OF JUDICIAL SUBJECTIVISM IN OVERCRIMINALIZATION

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ABSTRACT

The controversy of sitting Leaders of the Supreme Court of Nepal since Gopal Parajuli followed by Deepak Raj Joshi, Sushila Karki, Cholendra Shumsher, Hari Krishna Karki… compel us to ask: 'have the best times disappeared in the Supreme Court of Nepal or it is again to come! Of them, two of the leaders Sushila Karki and Cholendra Shumsher faced impeachment motion. Nepal Bar Association initiated a movement against Cholendra and a group of former justices summoned a press release for the dignity of the court asking his resignation. Now, Nepal Bar has announced the slogan of 'restructuring the judiciary' for its 16th National Conference to be held on Jestha, 2081. The scenario illustrated here does reflect that Supreme Court is not getting the proper leader capable of reforming the judiciary, reforming the appointment in judiciary and managing the dockets of cases pending. The qualification of being the leader of judiciary in Nepal is only the early appointment in SC. Is an early appointment only the quality that the Supreme Court needs in its leader? Is early birth enough to deliver justice? Is Supreme Court getting justice? With these observations, this article tries to

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contextualize Fali S. Nariman's God Save the Hon'ble Supreme Court in the setting of Nepal along with its effect conferring into judicial subjectivism and overcriminalization. With the theme: 'Let Supreme Court get justice, then only the Supreme Court will be able to give the justice!'

Key Words: Human Rights, Continent, Supreme court, Judgement, Law.

LIGHTING *THE HON'BLE SUPREME COURT*

God Save the Hon'ble Supreme Court[1] has become a talk of the town since its publication in 2018, it is once again in discourse since the death of the author Fali S. Nariman on 21st Feb, 2024. The book is one of the best-selling legal genre book in oriental continent.

In the first chapter of *God Save the Hon'ble Supreme Court*, Nariman atypically sets the interrogative title "GOD SAVE THE HON'BLE SUPREME COURT: Have the Best Times Disappeared?" and tries to justify why he raised the question 'have the best times disappeared?'

Nariman recites the words of Thurgood Marshall that the only real source of power that judges can tap is the respect of the people.[2] However, it is turning into the worst of times instantly with the following two events; he says:

> In *May 2017*, in a decision of a Bench of seven judges,[3] the Supreme Court of India, invoking its inherent jurisdiction under Article 129, felt compelled to punish a sitting judge- Justice C.S. Karnan of one of India's oldest superior courts, the High Court of Madras- holding him guilty of contempt of court! It had never happened before (and one can only express the hope that it never happens again!).[4]

On *12 January 2018*, four (of the then senior most) judges of the Supreme Court- Justice Jasti Chelameswar, along with Justices Ranjan

[1] Fali S. Nariman, God Save the Hon'ble Supreme Court (2018).
[2] *Ibid*, p. 21.
[3] 2017 (7) SCC 1.
[4] *Supra* Note no. 1, p. 31.

Gogoi, Madan B. Lokur, and Kurian Joseph- summoned a press conference with their grievances against the Chief Justice of India, Justice Dipak Misra.[5]

Along with this 'unfortunate precedent'[6] he recalls several other 'bad precedent'[7] in Supreme Court of India and advises ironically to settle the clash in judicial sophistication in the following words:

> I suggest that in desperate times like these when public confidence in the highest court of India is at an all-time low, it would not be inappropriate to amend the last sentence of the traditional chant in the US into a single impassioned *prayer* on the lips of all Indian citizens:
>
> God Save the Hon'ble Supreme Court.[8]

In the USA conflicts inside Supreme Court have been expressed in Philip J. Cooper's *Battles on the Bench: Conflicts Inside the Supreme Court* (1995).[9] Philip uses the metaphor 'Marble Temple' for the US Supreme Court where the combat supersedes collegiality. It is not mere 'judicial stress' or 'fights' that lead to bickering amongst judges. There are other causes as well, such as refusal of judges to see eye-to-eye with their colleagues, or with their chief justice on matters of policy or practice. Philip J. Cooper narrates the judges combat in the following words:[10]

> Filled with wonderful vignettes and telling anecdotes, battles illuminate the court's legendary and little-known clashes from John Marshall to Ruth Ginsberg and helps us understand why they fight, how they fight, and why their fights matter. In the process, it reveals a long tradition of strategic flattery, cajolery, name-calling, threats, subterfuge, and sermonizing-all in an effort to win over or run over fellow justices!!

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[5] *Ibid*, p 35.
[6] *Ibid*, p. 32.
[7] *Ibid*.
[8] *Ibid*, p 72.
[9] Philip J. Cooper, Battles on the Bench: Conflicts Inside the Supreme Court (1995).
[10] *Supra* Note no. 1, p. 63.

Nariman also recalls a distinguished Chief Justice of the United States Earl Warren, who said: "Life on the Court is like a marriage; one cannot tolerate it if it is one-battle-after-another."[11] This type of one-battle-after-another syndrome, occasional quarrels amongst the judges, ill feeling between members of the court are unreported hidden facts.

Public normally do not question on judges' activities, not because of faith but fear of contempt of court. Even the learned advocates remain silence because they have a docket of cases to plead before them. The learned advocates have a shadow of conflict of interests, which can be realized in every tiffin time at Bar's common hall. Thus, their loud and clear voice do not come behind the Bar. In this way, power dominates truth in the system of authority.

CONTEXTUALIZING 'BATTLE' IN *THE HON'BLE SUPREME COURT* OF NEPAL

In this article, the data of contradicting judicial decisions are not presented because it is rebuttable, and let's hope there will be uniformity a day. Here, some irrebuttable unfortunate events relating to leaders of the Supreme Court of Nepal are illustrated just to contextualize the relevancy of Nariman's *God Save the Hon'ble Supreme Court* ! Whether the best times have disappeared or it is again to come!

Gopal Parajuli

After a long service in judiciary, the date of birth as 2009/04/21 of the then Justice Gopal Prarajuli was fixed only on 13th Paush, 2073 by the Judicial Council Meeting led by the then Chief Justice Sushila Karki. On similar issue of age dispute relating to the then Chief Judge Surendra Bir Singh Basnet, the Supreme Court overturned that decision of Judicial Council from the bench of Hon'ble Justices Deepak Kumar Karki and Sarada Prasad Ghimire (Case No. 073-WO-0799) on 28th Jeshta 2074. Then, the Judicial Council reviewed the Parajuli's date of birth as 2010/01/16.

However, the Judicial Council Secretary Level Decision reaffirmed the then Chief Justice Parajuli's date of birth as 2009/04/21, and he was

[11] *Ibid.*

discontinued from his office by the letter of the then Secretary of Judicial Council Nirpa Dhwoj Niraula dated 30th Falgun 2074. In this way, he was retired seven months later than his retirement date or he was made to retire before two and half months!

For the least accountable government, the concern will be of the sum of money he received in the last seven months as salary, for public and stakeholders the concern is about the legality of decisions he made. It is a big question to the Judicial Council that how it allowed a person to be seated in the Bench if he was already retired, retired some seven months prior? Who will be responsible for it? Who will pay the bill against the damage of justice? Can it be payable? Or, it is as simple as a tea talk of a day at Bar's common hall?

Deepak Raj Joshi

Justice Deepak Raj Joshi, the then senior most justice of Supreme Court was rejected after 9 days hearing by the Parliamentary Hearing Special Committee with a two-thirds majority on 18th Shrawan 2075. Some of the reasons for rejection were: (i) Unable to present a concrete action plan and concept of how to discharge the responsibilities if the Chief Justice is appointed. (ii) Failure to answer clearly and satisfactorily to the questions asked about conduct, integrity and performance during the hearing. (iii) The educational certificate was doubtful and even the date of birth was different. (iv) Questions were raised about Joshi's public behavior and past actions and he had not been able satisfy the queries. (v) He could not assure that how he can contribute to the justice system of Nepal, and it was not certain that the judiciary can be independent, competent and free from corruption in his tenure.

How did he serve for years and years with these in-capabilities? Who is responsible for it? What about the potential injustice delivered during his tenure? Is it not the question to ask for the system of authority? All these questions are only the questions for questions because we know well that there is no responsible body to answer it. No idea whether the best times have disappeared or it is again to come!

Sushila Karki

Impeachment motion has been filed against Chief Justice Sushila Karki on 17th Baisakh 2074 in Legislative Parliament by the parliamentarians of Nepali Congress and Maoist. She was charged with an allegation to interference to the executive jurisdiction, lack of performance capacity, making judgments influenced by personal motives, treating judges differently, trying to create fractions among the judges in the court, incapable of writing judicial decisions etc. The immediate cause of blame of interference to the executive was related to the IGP case relating to Jay Bahadur Chand. Nonetheless, she remained in the position because of interim order issued by a single bench of the then Justice Cholendra Shumsher Rana in her favour in case no. 073-WO-1170 dated 2074/01/22. The issue of impeachment hurtling the independence of judiciary and the stay order expressed in 'better poetic verse' were both disputed at the time.

The big question raised about Sushila Karki was relating to competency. But nobody asked how she reached to that level if she was not competent? Whether the appointment was undue or the persons who appointed did it unduly? When series of judicial leaders are compounding under such interrogations, doesn't it mean something? Or, it's as simple as a tea talk of a day at Bar's common hall? Does it mean the best times have already disappeared? Or, without any effort to heal this tendency, the best time is again to come with the grace of Pashupatinath Temple!

Cholendra Shumsher Rana

For the first time in the history of Nepal, the Nepal Bar Association initiated a movement against the sitting Chief Justice with a slogan: 'Controversial Chief Justice cannot Maintain the Dignity of Judiciary: Resign the Position!' A group of former justices summoned a press release asking his resignation. Even, the sitting judges took the unprecedented step of boycotting their Benches, calling for the resignation of Cholendra Shumsher Rana, accusing him of making deals with political parties, especially with the then Prime Minister Sher Bahadur Deuba, and even securing a ministerial berth for one of his relatives.

He was tagged as the most untrustworthy Chief Justice of Nepal and questioned with various colours of corruption. Justice Harikrishna Karki's report of 14th Shrawan 2078 reemphasized the existing problem of mismanagement and corruption in judiciary, along with the measures to be taken to prevent them. Among them, it suggested to adopt 'gola process' in the short term and automatic cause- list system in the long term. Consequently, the Chief Justice power to set the cause-list was ceased and 'gola process' came into force from 15th Manshir 2078.

On 1st Chaitra 2078, parliamentarians of ruling coalition party charged Cholendra as unable to lead the court due to the lack of efficiency, filed an impeachment motion against him, and he was suspended. The Parliamentary Impeachment Recommendation Committee meeting held on 9th Bhadra 2079 called Cholendra Shumsher Rana for statement. During the statement, the suspended Chief Justice Ja.Ba.Ra. conversely accused former Chief Justices, fellow Justices of the Supreme Court, top leaders of political parties and bar officials.

The Federal Parliament Secretariat declared the impeachment motion against Chief Justice Cholendra Shumsher Rana ineffective on 21st Manshir 2079 after the election of new members of parliamentarians. However, he could not enter into the court and got retired.

Cholendra was called only after six months for the statement recording before the Parliamentary Impeachment Recommendation Committee. There, he accused so many 'also known as towering personalities'. His major argument was that he became victim of conspiracy. Whether he became victim of conspiracy or it was the fate is not an issue of much interest today. Why he was not heard by the Parliamentary Impeachment Recommendation Committee on time is also not the issue of interest today. He was suspended and retired- the objective fulfilled. Was that only the issue? Of course not. Then, where are the issues today? What about the accusations he was charged at Parliamentary Impeachment Recommendation Committee? Has there been any investigation or committee formed objectives fulfilled? Conversely, the issue of impeachment against Sushila was protected by creating the

discourse of independence of judiciary; whereas, the issue of impeachment against Cholendra was petrolled by creating the discourse for the independence of judiciary. The true fact finding has not come yet, and I guess will not come.

Deepak Kumar Karki

While Ja.Ba.Ra was suspended, the senior most Justice Deepak Kumar Karki took over the position as the Acting Chief Justice. But, neither Ja.Ba.Ra's could resume his position nor Deepak Kumar Karki became Chief Justice. Karki then retired handing over the responsibility to Hari Krishna Karki. Since the impeachment position filed against Former Chief Justice Cholendra Shumsher Rana, the Supreme Court of Nepal was headless.

Acting Chief Justice Deepka Kumar Karki was also questioned for being in close connection with the executives due to the controversy of begging benefits to the former acting chief justice equal to chief justice, which was sought in his favour after his retirement.

Hari Krishna Karki

Justice Hari Krishna Karki was appointed as Acting Chief Justice on 11th Ashoj 2079, he served his almost tenure of chief as acting chief. Only on 25th Baisakh 2080, the Constitutional Council has recommended him for the Chief Justice. The parliamentary hearing committee called for complaints against him before endorsing his name for the appointment. After the procedural fulfilments, he became Chief Justice only on 1st Ashad, 2080 just 50 days before his retirement. He got retired from 20th Shrawan 2080. The main reason of hurdle in his way to becoming Chief Justice is said to be his avoidance of sitting in the Constitutional Bench during the hearing of parliament dissolution case 077-WC-0071, even though the legal cause of delay was *in*tentional non-formation of parliamentary hearing committee.

During his tenure, CJ Hari Krishna Karki was unable to enact his own report of the 14th of Shrawan, 2078. He attributed this failure to the structural composition of the Judicial Council, stating that it is the root

cause of all issues within the Nepalese judiciary. This statement was made during an interview on Kantipur TV, dated the 24th of Ashad, 2080.

Now, Bishowambhar Pd. Shrestha is the Chief Justice since 4th Bhadra, 2080. He also performed as Acting Chief Justice for a few weeks from 21st Shrawan till his appointment as Chief Justice.

In this race of being *'appointment.seniority.chief justice'*, the foreground is of the theme is 'being senior' in the serial number. In the race for the position of Chief Justice, the primary focus appears to be on seniority based on serial number. However, where is the measure of merit in this process? Where is the assessment of an individual's contributions? Is an early appointment the only quality the Supreme Court seeks in its Chief Justice? Is being born earlier sufficient to ensure the delivery of justice? Is the Supreme Court truly achieving justice through this approach? These questions raise concerns about the fairness and effectiveness of the selection process and its implications for the administration of justice. With this process is Supreme Court getting justice? May be because of this, the Nepal Bar Council is going to organize its 16th National Conference on 4, 5 and 6 of Jestha, 2081 in Kathmandu with a slogan of 'restructuring judiciary'.

Let Supreme Court get justice, then only the Supreme Court will be able to give the justice!

WHERE DOES THIS BATTLE GET REFLECTED?

The outcomes stemming from such judicial battles create a subjective constraint on judges. This influence seeps into their evaluations of evidence within cases. Regardless of how objective a person aims to be, their personal experiences and wisdom inevitably influence their writings. While complete avoidance of subjectivism may be unattainable in normative science, one should always strive to maintain a distance from it. The larger issue arises from overcriminalization due to the expansive interpretation of criminal statutes, diverging from the limitations set by the rule.

Richard A. Posner, a retired judge and a senior lecturer at the University of Chicago Law School examines it in his *How Judges Think* (2019).[12] He presents two practical concepts of law as below:

> In one, which can actually span the considerable distance between the philosophies of adjudication of Antonin Scalia and Ronald Dworkin, law is distinct from politics and policy; it is the realm of rules, rights, and principles. In the other, law, at least insofar as the study of judges is concerned, is whatever judges do in their official capacity unless they go wild and court impeachment for being usurpative. I shall continue to call the first concept of law legalism and the second pragmatism, though it is a stretch to call Dworkin a legalist, for really what he has done is relabel his preferred policies 'principles' and urged judges to decide cases in accordance with those 'principles' and ignore (other) 'policies', which are consigned to the legislature. We shall see Scalia's commitment to legalism is also in doubt.
>
> Legalism consists of techniques for evaluating evidence; interpreting legally operative texts such as statutory and contractual provisions; applying rules to the facts of a case (which may mean applying a rule in a new, unforeseen situation); choosing between governing an area of law by a broad rule, which lawyers call 'standard', or by a narrow or specific rule (a 'rule' in contrast to a standard); and drawing analogies and distinctions between precedents and the case at hand (following or distinguishing precedents).[13]

Posner's point is that in the whole process of the technique of evaluating the evidence, there are internal constrains in a judge. Such subjective restrain in judges are subject to persons, but with all persons.

[12] Richard A. Posner, How Judges Think (2019).
[13] *Ibid,* p. 175.

Douglas N. Husak, a distinguished Professor of Philosophy and co-director of the Institute for Law and Philosophy at Rutgers University, presented this problem in his book *Overcriminalization* (2008).[14] In this book, he writes how the United States suffers from overcriminalization, and describes the phenomena in producing massive injustice.[15] He cites Ronald Gainer, once Associate Deputy Attorney General in the Department of Justice, who describes the current state of federal criminal law as follows:[16]

> Federal statutory law today is set forth in the 50 titles of the United States Code. Those 50 titles encompass roughly 27,000 pages of printed text. Within those 27,000 pages, there appear approximately 3,300 separate provisions that carry criminal sanctions for their violation. Over 1,200 of those provisions are found jumbled together in Title 18, euphemistically referred to as the 'Federal Criminal Code'.
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> — Ronald Gainer: 'Federal Criminal Code Reform: Past and Future,' 2 *Buffalo Criminal Law Review* 45, 53 (1998)

Husak breaks the conceptual apparatus of crime as *mala in se* from *mala prohibita*; and improvises it into three categories: overlapping offenses, crimes of risk prevention, and ancillary offenses:

> The first category overlapping crimes. We overcriminalize partly by re-criminalizing—by criminalizing the same conduct over and over again. As Stuntz observes, 'federal and state codes alike are filled with overlapping crimes, such that a single criminal incident typically violates a half dozen or more prohibitions.'[17]

Offenses of risk prevention (or risk creation) are a second category of statute that has contributed to the phenomenal growth of the criminal

[14] Douglas Husak, Overcriminalization: the Limits of the Criminal Law (2008).
[15] *Ibid*, p. 5.
[16] *Ibid*, p. 9.
[17] *Ibid*, p. 36.

law. After all, the state has long proscribed just about every possible means of directly causing harm—even if it resorts to recriminalization—but there is virtually no limit to how far the state might go in protecting persons from novel ways that harm might be risked. Crimes of risk prevention are examples of inchoate offenses. Roughly, an offense is inchoate when not all of its instances cause harm. These offenses do not prohibit harm itself but, rather, the possibility of harm—a possibility that need not (and typically does not) materialize when the offense is committed. New crimes of risk prevention can easily be generated by proscribing conduct more and more remote from the ultimate harm to be prevented.[18]

My third and final category of relatively new kinds of crime might be called ancillary offenses. Roughly, ancillary offenses function as surrogates for the prosecution of primary or core crimes and bear an indirect relation to them. They are created mostly for situations in which a defendant is believed to have committed a primary or core offense, but prosecution is unlikely to be successful or is otherwise thought to be undesirable. On some occasions, the state cannot prove the commission of the core offense, or its evidence of this offense is inadmissible because it has been obtained illegally. These occasions have led to the enactment of growing numbers of ancillary offenses that surround core crimes. Because most of these statutes have neither common-law analogues nor well-established public meanings, legislators have broad authority to define them as expansively as they wish. As a result, many of these laws venture into the 'gray zone of socially acceptable and economically justifiable business conduct.' The features of many of these offenses—the absence of culpability requirements, the shifting of burdens of proof, the imposition of liability for omissions, and the implicit trust in prosecutorial discretion to prevent abuse—compromise fundamental principles long held sacrosanct by criminal theorists. These crimes lie far outside the core of criminal law and seem unlikely to satisfy the criteria in a theory of criminalization.[19]

[18] *Ibid,* p. 38.
[19] *Ibid,* pp. 40-41.

Some recent phenomenon in Supreme Court of Nepal reflects- to term in better word- 'intellectual competitiveness' in some cases. For example, the judgment of the Constitutional Bench on the case no. 074-WC-0020 and Division Bench on the case no. 075-CR-0051 do not only seek for theoretical clarification that which decision is correct; rather, it also raises the question on the trend of judicial practice and its settlement for the precedent. Why the judges do not abide the earlier precedent? In another issue, this variability was reflected in case no. 079-WH-0187 versus case no. 079-WH-0210 even though the prior file was attached with in the latter case. There are numerous list of such decisions where the judges of Supreme Court have not abided earlier decisions, nor have they sent to resolve the issue to larger bench. But just delivered their decisions though varying with earlier one; in most of the cases, without mentioning the reason and rational of variance.

This is not the hidden problem, it is also reported. The Supreme Court Bar Association of Nepal had formed a ten member's Decision Review Committee under coordination of Sr. Adv. Mahadev Prasad Yadav in 2077. The Committee reviewed Corruption Cases decided by Supreme Court, and presented the differences in ratio and violation of the doctrine of precedent in its report *Decision Review Committee's Report, 2077*.[20]

The report analyses the differences of ratio in the decisions, particularly in Corruption Cases under various themes of corruption including bribery, illegal property, forged report, duplicate certificate etc., as decided by Supreme Court of Nepal from 2065 to 2075. The report concludes with very alarming remarks:

> Supreme Court's decisions have unnatural variability. Supreme Court is the source of judicial guidelines. It is the creator of judicial culture. However, the fact that the decisions are not in uniformity indicates that the Supreme Court is derailing from judicial values and principles. The unnatural variability in its decisions indicates the arbitraries

[20] Supreme Court Bar Association, Supreme Court Bar Association's Decision Review Committee's Report, (2020A.D.).

> and loses faith of the people. And, it is very serious problem.[21]

The report repeatedly questions on the judicial discipline and accountability, basically resulting out of violation of the principle of precedent.

IT'S SIDE EFFECT ON OVERCRIMINALIZATION

It is axiomatic truth in criminal law that what criminalizes is only the law.[22] Not the judges nor their interpretations. However, when there is scarcity of judicial discipline, when there is dearth in judges accountability, when there is drought in principles- subjectivism dominates over objectivism, personal experience and emotion cover up the wisdom and logic results in overcriminalization from the root of so-called self-esteem. This is a big problem with the judges elsewhere in the world.

In 1968, Sanford H. Kadish[23] presented *The Crisis of Overcriminalization*[24] connecting to private morality:

> In this piece I want to comment on the problems of overcriminalization in just three kinds of situations, in each of which costs paid primarily affect the day-to-day business of law is used: (1) to declare or enforce public standards of private morality, (2) as a means of providing social services in default of other public agencies, and (3) as a disingenuous means of permitting police to do indirectly what the law forbids them to do directly.[25]

In 2011, Dennis F. Baker[26] wrote *The Right Not to be Criminalized*[27] which tries to explain the legitimacy of 'just criminalization'

[21] *Ibid*, pp. 283 and 284.
[22] Criminal law applies strict construction opposing liberal construction applied in constitutional law. This article refers the references relating to criminal law and interpretation of criminal law.
[23] Professor of Law at University of California, and visiting Professor of Law at Harvard Law School. He also served as general consultant for the President's Commission on Law Enforcement and Administration of Justice.
[24] Sanford H. Kadish, *The Crisis of Overcriminalization*, 17 AMER. CRIM. LAW 70 (1968).
[25] *Ibid*.
[26] Professor at King's College, University of London.
[27] Dennis F. Baker, the Right tot to be Criminalized: Demarcating Criminal Law's Authority (2011).

over 'crisis of unjust criminalization', and argues that the right not to be criminalized is not merely a cardinal human right found in morality, but is also a constitutional right.[28]

Baker opposes unfair criminalization and construing unjust criminalization.[29] He states various such unfair and unjust criminalization in practices; as below:

> Unfair and unjust criminalization flows from a number of practices including the mislabelling of innocuous conduct as criminal; eliminating the *ex post* culpability requirement without moral justification (strict and vicarious liability for crimes that result in conviction and/or imprisonment); eliminating the *ex ante* 'imputability of blame for remote harm' requirement without justification (i.e., criminalizing people for being a mere 'but for' cause of harm caused by the intervening choices of others: remote harms); imposing disproportional punishments; and through the circumvention of human rights and due process protections by, for example blurring the civil and criminal law. From the *ex ante* criminalization perspective the lawmaker has to consider a number of factors including what can be fairly labelled as criminal; the sentences that should be set for various offenses; and the structure that the criminal law will take to ensure that criminal liability will only be visited on those who are deserving of criminal censure.[30]

All these types of practices that allows unfair and unjust criminalization is the violation of right- 'right not to be criminalized' that he deals under the title "Unprincipled Criminalization."[31] He says:

> The right to not to be criminalized is a basic human right that aims to protect individuals from unwarranted state

[28] *Ibid*, pp. x, xi.
[29] *Ibid*, p. 3.
[30] *Ibid*, p. 9.
[31] *Ibid*, Chapter One.

> interference of a penal nature. In particular, the right is geared towards protecting individuals from being unjustly criminalized. The right is a basic moral right, but it is also a fundamental legal right. It is formed by a number of specific protections as well as the more general protections found in the Fifth and Eighth Amendments of the U.S. Constitution, and the corresponding rights concerning deprivation of liberty and fair punishment as set out in Articles 3, 5 and 8 of the European Convention and Articles 7, 9, and 12 of the Canadian Charter of Rights and Freedoms.[32]

Baker argues that the various courts around the world use different standards of interpretation, but the differences are more formal than substantive. A careful analysis of the personal autonomy and fair punishment type provisions found in the various constitutions demonstrates that these types of rights, however differently worded and however differently interpreted in the past, contain a general right not to be criminalized.[33] He states:

> The 'the margin of appreciation' doctrine allows courts take into account that the ECHR will be interpreted differently in different countries, but it should not permit the Strasbourg Court to endorse interpretations that would result in human rights abuses, such as allowing a person to be criminalized and jailed for engaging in innocuous activities or allowing a person to be sent to prison for 40 years for shoplifting and so forth. Allowing someone to be jailed for 40 years for shoplifting contravenes our deeply held conventional (Western) standards of justice- the very same standards that we ask non-Western states to comply with.[34]

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[32] *Ibid*, p. 9-10.
[33] *Ibid*, p. 10.
[34] *Ibid*.

As written in the very first paragraph: "In this book my goal is not merely to discuss the moral limits of the criminal law. Instead, the focus is on the legal limits of the criminal law,"[35] this book reminds judges not to forget the legal limits even in course of *battle*.

In 2012, Stephen F. Smith[36] came with *Overcoming Overcriminalization*[37] which stated overcriminalization as a quantitative problem. Under the sub-title 'judicial crime creation' he writes:

> Another major problem with federal criminal law is that it allows courts essentially to create new crimes. The root of the problem here is that the courts are notoriously inconsistent in their adherence to the venerable rule of lenity. The rule of lenity—one of the few Marshall Court doctrines that has not achieved canonical status—requires courts to construe ambiguous criminal laws narrowly, in favour of the defendant. It does so not to show lenience to lawbreakers, but to protect important societal interests against the many adverse consequences that judicial expansion of crimes can produce—consequences such as the usurpation of the legislative crime-definition function, not to mention potential frustration of legislative purpose and unfair surprise to persons convicted under unclear statutes. The rule of lenity therefore reflects, as Judge Henry Friendly once put it, a democratic society's instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.
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> More to the point here, faithful adherence to the rule of lenity would require courts to counteract overcriminalization. The rule of lenity requires courts to narrow, rather than broaden, the scope of ambiguous criminal laws. This would prevent prosecutors from exploiting the ambiguities of poorly defined federal crimes

[35] *Ibid*, p 1.
[36] Professor of Law, University of Notre Dame.
[37] Stephen F. Smith, *Overcoming Overcriminalization*, 102 J OF CRIM. LAW & CR. 85, 100 (2012).

> to criminalize conduct Congress has not specifically declared a crime. The rule of lenity would thus make poor crime definition an obstacle to—not an occasion or excuse for—more expansive applications of federal criminal law.
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> Unfortunately, the federal courts treat the rule of lenity with suspicion and, at times, outright hostility. Although it sometimes faithfully applies the rule of lenity, the Court has on many other occasions either ignored lenity or dismissed it as a principle that applies only when legislative history and other interpretive principles cannot give meaning to an ambiguous statute.
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> The result of the judiciary's haphazard adherence to the rule of lenity is as predictable as its results have been misguided. As previously explained, federal judges have repeatedly used ambiguous statutes as a basis for creating new federal crimes and have expanded the reach of overlapping federal crimes to drive up the punishment Congress prescribed for less serious federal crimes.114 The end result of such assaults on the rule of lenity is necessarily a broader and more punitive federal criminal law.[38]

He concludes this scenario simply as an 'assault on rule of lenity.'[39]

In 2013, Paul J. Larkin[40] wrote *Public Choice Theory and Overcriminalization*[41] alarming how public choice theory is influencing legislature to legislate new offences every day without any fair labelling, which is hitting in the problem of overcriminalization in Unites States of America.

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[38] *Ibid*, p. 567 and 568.
[39] *Ibid*, p 568.
[40] Senior Legal Fellow & Manager, Over-criminalization Project, the Heritage Foundation; M.P.P., George Washington University.
[41] Paul J. Larkin, *Public Choice Theory and Over-criminalization*, 36 (1) HARV. J OF LAW & PUB. POLICY. 13 (2013).

Larkin states that "Overcriminalization is becoming an increasingly important issue in modern-day criminal law."[42] He says it has been realized by various stakeholders including American Bar Association, Justice Department officials, the House Judiciary Committee, and even the Media have picked up on it.[43] According to Larkin, it is happening because of "the public's demand for more and more criminal laws, along with harsher and harsher treatment of criminals."[44]

To him, "overcriminalization is less a problem with the substantive criminal law than it is with the law making process."[45] He accuses, as far as overcriminalization goes, "legislatures are the biggest offenders. Over the last fifty years, legislatures have become 'offense factories' that churn out new statutes each week."[46] His point is that such passing numerous legislation week by week lack fair labelling and fair warning that turns into the overcriminalization of an individual.

To avoid such problem of overcriminalization, he expects form judges to dust off the principles of criminal law:

> If judges are persuaded that overcriminalization is a problem, they are in a position to change this situation without becoming 'activist'. Several criminal law doctrines can be dusted off and used by courts that would protect morally blameless parties from winding up in prison due to the rent-seeking conduct of private parties and the vote-seeking behaviour of political actors. At a minimum, judges can use their prestige to tell the public the true effect of the overexpansion of criminal laws and why it is harmful.[47]

In 2017, Kahryn Riley came with loud and clear over-cry with *The Problem of Overcriminalization.*[48] It was a legislative testimony presented to the Michigan Law Revision Commission by the Mackinac

[42] *Ibid*, p. 720.
[43] *Ibid*, p. 721.
[44] *Ibid*.
[45] *Ibid*, p. 722.
[46] *Ibid*, pp. 724-725.
[47] *Ibid*, p. 793.
[48] Kathryn Riley, *The Problem of Over-criminalization,* Michigan Law Revision Commission: Mackinac Center for Public Policy (May 18, 2017).

Center's Policy Analyst Kahryn Riley on 18th May, 2017.[49] Kahryn Riley is an attorney, and an alumna of Hillsdale College and Regent University School of Law.[50]

In this paper, she addresses the problem of overcriminalization in Michigan, based on a testimony:

> We discovered this problem after learning about a number of stories of people put into legal jeopardy by Michigan's criminal law. One such individual was Lisa Snyder, whom the state charged with running an illegal daycare after she volunteered to help her neighbor's children board the school bus each morning, free of charge. She was able to obtain counsel and eventually the law was changed, but many defendants might not have the resources to obtain this outcome.[51]

The paper finds that "Michigan repeal outmoded or duplicative laws, and that the state enact a default criminal intent standard to protect citizens who unknowingly violate criminally enforceable statutes or regulations that govern conduct that is not intuitively wrong."[52] And, it presents the reforms for two reasons.

> First, a state's criminal code should protect individual liberty and private property — not be a tool to regulate every aspect of human conduct.
>
> Second, a very broad criminal code creates a risk that prosecutions will vary markedly from jurisdiction to jurisdiction and that scarce resources will be diverted from the enforcement of serious violent and property crimes.[53]

CONCLUDING OBSERVATIONS

In giving the leading judgment in a case of corruption Justice Ishwor Prasad Khatiwada postulated *"andher nagari chaupat raja, takke*

[49] *Ibid*, at Front Cover of the Paper.
[50] *Ibid*, p. 4.
[51] *Ibid*, p. 1.
[52] *Ibid*, p. 2.
[53] *Ibid*.

ser bhaji takke ser khaja" that satires not only the criminal investigation standard of the country but overall criminal justice system, of which a part is obviously the judges too.[54] I do hesitate to translate it here, rather present some findings of three reports that will illustrate the scenario:

Supreme Court Bar Association's *The Study Committee's Report, 2064*:[55]

> Supreme Court Bar Association of Nepal formed a four member's study committee under coordination of Shreehari Aryal to study the problems, complains of stakeholders on the activities of judiciary in Nepal, and to suggest the findings in order to enhance the faith of people on judiciary. The Committee submitted a comprehensive report, which was published by the publication committee of Supreme Court Bar.[56]

Chapter 3 of the Report, entitled "Pitfalls in the Laws", explains the weaknesses practiced in judicial practices along with pitfalls in laws itself. Among them, the problem of derailing from the principles in hearing system is also enlisted as one of the major problem in judicial practices.[57] According to this report, there are five basis reasons- based on the opinions of the stakeholders- of declining public faith on judiciary, enlisted as below:[58]

a	Reason of excessive discretionary power in law	28.89 %
b	Reason of interpreting the law to invoke the self-bias	24.87 %
c	Reason of ambiguous and plural meaning generating legislation	21.60 %
d	Reason of not applying the scientific drafting system	12.81 %
e	Reason of not implementing the whatsoever existing law	11.80 %

Of these, the use of 'excessive discretion' and problem in 'interpretation of laws' promoting self-bias reflect the need of following the restrictive construction of the court including in criminal cases.

[54] *Namaraj Bhandari vs. Government of Nepal, NKP 2078,* Vol. 1, D. No. 10635.
[55] Supreme Court Bar Association, the Study Committee's Report (2008 A.D.).
[56] *Ibid,* pp. 2-9.
[57] *Ibid,* pp. 47and 48 (under sub title 3.2.1).
[58] *Ibid,* p. 50 (under sub title 3.3.1.1, Table 9).

Office of Attorney General & Center for Legal Research and Resource Development (CeLRRd)'s *Baseline Survey on Criminal Justice System of Nepal, 2069* (2013):[59]

It was a baseline survey conducted jointly by the Associate Professors Mr. Ganesh Bdr. Bhattarai, Mr. Suraj Basnet and Ms. Sushila Karki of Kathmandu School of Law (KSL), and published by Office of Attorney General & Center for Legal Research and Resource Development (CeLRRd).

The baseline survey was conducted in 15 sample Districts, and was generalized to overall criminal justice system of Nepal. The Districts were selected based on geographical representation including Terai Region, Hilly Region, and Terai-Hilly Region:[60]

Terai:	Kanchanpur, Rupandehi, Chitwan, Parsa, Siraha, Morang and Banke.
Hilly:	Taplejung, Kathmandu, Lalitpur, Mustang, Rasuwa, Baglung, Jumla and Doti.
Terai-Hilly:	Chitwan, Rupandehi, Banke and Kanchanpur.

The baseline survey collected the registered criminal cases of two fiscal years from 2067/068 to 2068/069 in District Prosecutor Office, District Police Office, District Court, and had studied the overall scenario of functioning of the system components of criminal justice system and their weaknesses.

In its subtitle under 7.5.2 'Average Time Used for Judicial Duty', the report has presented the average time used for judicial service, which is surprisingly only 4.5 hours per working day.[61] Then, the report draws some conclusions relating to the principles of criminal justice system, as below:

- The personnel working in various agencies of criminal law did not have proper sensibility towards the values of the principles of fair and impartial justice system.

[59] Office of Attorney GENERAL & Center for Legal Research and Resource Development (CeLRRd), Baseline Survey on Criminal Justice System of Nepal (2013A.D.).
[60] *Ibid,* pp. 10.
[61] *Ibid,* p. 156.

- Lack of realization towards weakness and mistakes in their duty performance
- The tendency of perceiving criminal justice as administrative departmental phenomenon is found massive.[62]

Ministry of Law, Justice and Parliamentary Affairs' *Baseline Survey on Crime Report, 2072* (2015)[63]

It was the first ever baseline survey on crime done by Government of Nepal.[64] The High Level Task Force formed under the Chairmanship of the then Justice Kalyan Shrestha recommended the Government of Nepal to conduct a baseline survey on crime. The Council of Ministers endorsed it, and order the Ministry of Law, Justice and Parliamentary Affairs to pursue the survey. The Ministry did survey in ten districts for the fact findings on numbers of crime, their types, causes, and the modus consulting the stakeholders and the parties of the crime.[65] However, the study did not consult Nepal Bar Association in its thorough process.

The Report, in its first page itself, cites the fact that altogether "84 Acts grant the power to Extra-judicial Authorities to adjudicate criminal cases, and sentence to imprisonment and impose fine."[66] This illustration is an eye opening to see the situation of criminal justice system in Nepal. On the other hand, Nepal does not have specialized criminal courts at any tier of judiciary, with an exception to the Special Court. The judges who interpret the general laws, do interpret constitutional, and penal laws as well. This fact also indicates the chance of inconsistencies in interpretation of penal statutes.

In Chapter 5, entitled "Effectiveness of Criminal Justice System", the Report presents the data on 'effectiveness of court's functioning' as below:[67]

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[62] *Ibid*, p. 167.
[63] Ministry of Law, Justice and Parliamentary Affairs, Baseline Survey on Crime Report (2015 A.D.).
[64] *Ibid*, at *Statement*, Agni Prasad Kharel, Minister, Ministry of Law, Justice and Parliamentary Affairs.
[65] *Ibid*, at *Statement*, Tek Prasad Dhungana, Secretary, Ministry of Law, Justice and Parliamentary Affairs.
[66] National Judicial Council, A Study Report on Adjudication of Extra-Judicial Authorities (2008A.D.).
[67] *Ibid*, p. 130.

District	Effective	Moderate	Not effective	Don't Know	No Answer	Total
Taplejung	11.5	36.4	22.9	28.5	0.7	100
Morang	10.2	47.7	5.6	36.3	0.2	100
Saptari	16.2	40.3	24.1	18.5	0.9	100
Sindhupalchock	2.9	33.4	5.1	58.1	0.4	100
Kathmandu	11.1	32.7	11.1	44.5	0.4	100
Parsa	25.6	35.8	27.1	11.1	0.4	100
Kaski	4.2	40.4	5.8	48.9	0.7	100
Banke	6.9	41.8	20.2	30.7	0.4	100
Jumla	12.2	49.7	4.5	33.4	0.2	100
Bajhang	7.6	45.8	4.3	42.0	0.2	100
Total	**10.8**	**40.4**	**13.1**	**35.2**	**0.5**	**100**

It shows that only 10.8 per cent of the participants in the survey accepted the effectiveness of the court's functioning; whereas 40.4 per cent said that it is moderate, and 13.1 per cent said that it is not effective. Comparing the same with Extra-judicial Authorities' decision, it's 8.5 per cent accepting the effectiveness, and 16.5 per cent denied the effectiveness; whereas, 37.6 per cent said it's moderate.[68]

In another question on 'court's effectiveness in imposing the sentence', 11.9 per cent affirmed its effectiveness which is three times less than who said it is just moderate (38.0 per cent), and 14.9 per cent participants denied court's effectiveness. This empirical data certainly indicates that there is a problem, as presented below:[69]

District	Effective	Moderate	Not effective	Don't Know	No Answer	Total
Taplejung	10.6	34.6	24.4	29.9	0.5	100
Morang	11.8	47.9	5.8	34.1	0.4	100
Saptari	18.2	36.9	27.5	16.4	0.9	100
Sindhupalchock	2.4	32.7	6.7	57.5	0.7	100
Kathmandu	11.1	31.0	12.2	45.0	0.7	100
Parsa	23.1	37.6	28.7	10.4	0.2	100
Kaski	7.4	36.4	7.8	47.8	0.7	100
Banke	9.3	35.3	23.8	31.3	0.2	100
Jumla	15.8	43.4	7.1	33.4	0.2	100
Bajhang	9.1	44.4	5.6	40.0	0.9	100
Total	**11.9**	**38.0**	**14.9**	**34.6**	**0.5**	**100**

[68] *Ibid,* p. 132 (under Table 5.9).
[69] *Ibid,* p. 130, 131.

It shows that only 11.9 per cent of the participants in the survey accepted the court's effectiveness in imposing the sentence; whereas 38.0 per cent said that it is moderate, and 14.9 per cent said that it is not effective.

And, the Report also presents data on the overall effectiveness and impartiality of criminal justice system; of which, only 6.7 per cent participants were 'fully confident' with the effectiveness and impartiality, and 20.2 per cent participants stated that they don't believe on effectiveness and impartiality of criminal justice system in Nepal.[70] Such questioning on the effectiveness of judiciary alarms the questions into the decision of courts, and the decisions of courts attracts the issue of judges discretionary and limitations.

In conclusion, the juxtaposition of the Court's effectiveness alongside the ongoing judicial battles, emphasized intermittently, underscores the pressing need for restructuring within the judiciary. As the Nepal Bar Council prepares for its forthcoming National Conference in Jestha, 2081, the sentiments echoed by Nariman's plea in "God Save the Hon'ble Supreme Court!" resonate deeply. May the divine blessings of Pashupatinath Temple guide us toward a brighter future for the judiciary in Nepal, and the peril of judicial subjectivism: a critique of overcriminalization find resolution.

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[70] *Ibid*, p. 134 (under Table 5.11).