



**Nepal Bar Association (NBA) Interaction on
Independence of Judiciary for Human Rights**
Speech delivered by Ms. Jyoti Sanghera, Head, OHCHR-Nepal
Thursday, 26 May 2011

- Mr. Chairperson, Honourable Minister for Law and Justice Mr. Prabhu Shah, Attorney General Dr. Yuba Raj Sangraula, NHRC Commissioners, Honourable Constituent Assembly Members, Chairperson of Nepal Bar Association, Chairperson of Nepal Judicial Academy, Justices, Representatives from various Commissions, Members of Nepal Bar Associations and Friends and Colleagues from media and civil society.
- It is a great privilege and honour to have this opportunity to speak with you, the members of Nepali legal community. I especially would like to thank the Nepal Bar Association for offering me an opportunity to be here with you all today. I would also like to applaud the Nepal Bar Association for choosing this very important theme “Independence of Judiciary for Human Rights”.
- It is crystal clear that judicial Independence is a matter of human rights. Independent judiciary is a must for rule of law and effective protection of fundamental human rights and freedoms of the people. If we take a look at universal bills of human rights, we can see a number of references to independent judiciary. For instance, Article 8 of UDHR provides, “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”
- This has also been incorporated in ICCPR. Article 2(3) of the ICCPR obliges the State to ensure that the right to a remedy is determined by competent judicial, legal or administrative authorities while the Article 14 (1) of the ICCPR guarantees the right to equality before the courts and tribunals and right to a fair and public hearing by a competent, independent and impartial tribunal. In response to *Gonzalez del Rio v. Peru (1992) case*, the UN Human Rights Committee labeled this right as “an absolute



right that may suffer no exception". UN HRC further recognizes that the independence of judiciary consist of a number of things including "actual independence of the Judiciary from the executive branch and the legislative'.

- Independence of judiciary has been recognized as an unchallengeable principle globally. This principle received considerable elaboration in the *UN Basic Principles on the Independence of the Judiciary* (1985), which urges the States to ensure institutional as well as functional independence of judiciary. In this regard, allow me to remind you what these principles mainly require: constitutional guarantee that the judiciary is independent of the other branches of government; non-interference in internal matters of judicial administration; independence in financial matters and a provision of sufficient funds to perform their functions efficiently; the duty of others to respect judicial independence and observe the judicial decisions; jurisdictional exclusivity over all issues of a judicial nature (ban on exceptional or military courts); finality of decisions, meaning that the decisions of the courts are not subject to any revision outside the judiciary; and right and duty of the Judiciary to ensure fair court proceedings and reasoned decisions.
- In terms of functional independence, UN Principles on Independence of Judiciary stand for a transparent and representative system of appointments by an independent body based on professional qualifications and personal integrity; security of tenure and adequate remuneration; effective and independent disciplinary mechanisms; right of judges to join professional associations; independence of judges in the performance of professional duties; a right and a duty to decide cases according to law; promotion of judges on basis of objective factors; and removal only for reasons of 'incapacity or behaviour that renders them unfit to discharge their duties'.
- I am pleased to note that Nepal has a strong constitutional tradition of guaranteeing fundamental rights together with an independent judiciary as an immutable safeguard for such rights. Since the ongoing Constitution-making process offers an historic opportunity to strengthen the foundation for the Nepalese State firmly grounded on respect for human rights and justice, it is crucial that the Constituent Assembly further strengthen the independence of the judiciary at the highest level in order to enable



Nepali people to receive an appropriate remedy determined by competent and independent judicial institutions. In this regard, it is highly important to ensure an independent check and balance through judiciary against legislative and executive excesses encroaching upon fundamental rights and freedoms.

- Experience from around the world tells us that even the most perfectly drafted Constitution does not, in itself, guarantee the enjoyment of human rights. The rights recognized in the Constitution must be given effect by independent bodies. In this regard, strong independent judiciary with sufficient power to hold the Government to account, and national human rights institutions that can adjudicate complaints of human rights violations are vital for effective accountability mechanisms.
- You might have noticed that the High Commissioner had also expressed concerns over the CA Judicial Committee proposal to shift the authority for determining the constitutionality of laws from the Supreme Court to a parliamentary committee which would remove independent scrutiny over parliamentary decisions. I am glad to notice a growing consensus among political parties on principles of independence of judiciary. Whatever mechanism is envisioned for this purpose, it should unquestionably be within the framework of the rule of law and independence of judiciary.
- Since we are discussing independence of judiciary in the context of constitution writing and the peace process, I feel that it is also important to briefly touch upon transitional justice aspects. We all are aware that the victims of armed conflict have been asking questions seeking truth, justice and reparations for long time. It is worrying that there has been so little action taken to redress the grievances of the victims. No-one has been made properly accountable. Some perpetrators have been promoted. Criminal investigations have not moved forward. Many of the Supreme Court decisions requiring criminal investigation and prosecutions of human rights violations and abuses have not been complied with. We have also witnessed a practice of withdrawing criminal cases in order to protect politically connected individuals from criminal accountability. In order to ensure effective and independent functioning of the Judiciary to protect victims' rights, such practices should be stopped



and the Judiciary should be fully cooperated with. Its authority must be honored by all, state as well as non-state actors.

- In addition to constitutionally guaranteeing structural and functional independence of the judiciary in line with international standards and principles, it is also important to address some associated issues. The future constitution should, in particular, address the impermissibility of any measure which provides for *de facto* or *de jure* amnesties for serious crimes under national and international law, including pardons and the withdrawal of criminal charges in order to protect the rights of victims to an effective remedy and reparations, and to confirm the supremacy of civilian courts over all offences except those of a purely military nature.
- OHCHR is hopeful that the constitutional proposals regarding independence of judiciary will be further strengthened during future discussions. The international human rights instruments to which Nepal is a party may serve as a foundation for constitutional deliberations pertaining to human rights and judiciary.
- I finally wish that the discussion this afternoon will be very fruitful. OHCHR is eager to see suggestions generated from today's deliberations. OHCHR would also like to express its readiness to extend its support to and collaboration with the Nepal Bar Association in future.

Thank you