

निन्दन्तु नीतिनिपुणा यदि वा स्तुवन्तु ! लक्ष्मीः समाविशतु गच्छतु वा यथेष्टम् !!

अद्यैव वा मरणमस्तु युगान्तरे वा !!! न्याय्यात्पथः प्रविचलन्ति पदं न धीराः !!!!

(निन्द्य होस् वा स्तुति होस्, धनोपार्जन होस् वा नहोस्, मृत्यु पछि वा तत्काल नै किन नहोस्- प्राज्ञहरुले न्यायको बाटो छाड्दैनन् ।)
-भर्तृहरि

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उपाध्यक्ष: नरेन्द्रप्रसाद पाठक
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सदस्य: बालकृष्ण न्यौपाने
सदस्य: रत्नकुमार खरेल

सल्लाहकार

कोमल प्रकाश धिमिरे
लोकभक्त राणा
अनिलकुमार सिन्हा
सुन्दरलाल चौधरी
सीताराम तिवारी
लवकुमार मैनाली
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सदस्य : नरेन्द्र पाठक

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सम्पादक : मदनकुमार डंगोल
सम्पादक : मेघराज पोखरेल
सम्पादक : पूर्ण राजवंशी
सम्पादक : प्रविणता वस्ती

आवरणको अर्थ

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मुद्रक

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Limits of the Court in Criminal Cases¹

Advocate Subash Acharya

1. Overview

It is the investigators job to collect all of the available evidence, the prosecutor's job to weigh the significance of the evidence, and the court's job to umpire the case whether the evidences amount to crime or not. If the evidence does not speak the crime beyond the reasonable doubt; the court cannot criminalize. Nor the court can criminalize beyond the law. Only the law can define a crime and prescribe a penalty. Courts have no power to create new offences and they have no power to abolish offences.

1.1 Judicial Activism v Judicial Self-restraint

On the other hand, 'judicial activism' & 'judicial construction' is other than 'judicial limitation'. There are several cases where the court has performed its activism for equity and larger public welfare; which is always appreciable.

In *Brown v Board of Education (1954)* US Supreme Court issued a ruling ordering the desegregation of public schools. *Roe v Wade (1973)* is notable for decriminalizing abortion. *Bush v Gore (2000)* is landmark United States Supreme Court case between the major-party candidates in the 2000 presidential election, George W. Bush and Al Gore. The judges voted along ideological lines, 5-4, to halt the recount of ballots in Florida and, in effect, elect Bush President. And, *Perry v Schwarzenegger (2010)* overturned California's constitutional amendment to ban same-sex marriage.

Cases are also notable which have been decided by the Supreme Court of Nepal such as *Radheshyam Adhikari v. Registrar Supreme Court (2036)*, *Radheshaym Adhikari v. Cabinet Secretariat (2048)*, *Advocate Balkrishna v. HMG (tanakour barrage case) (2049)*, *Surya P. Sharma Dhungel v. Godawari Marble Industries (2049)*, *Gopal Shivakoti v. Ministry of Finance (2051)*, *Mira Dhungana v. HMG (2052)*, *Yogi Narharinath v. Prime Minister Girija P. Koirala (2053)*, *Bharat Jungam v Constituent Assembly et. All (2068)* etc. Supreme Court of Nepal has performed her activism in wider area of public welfare and social service including consumer protection, personal liberty (privacy, violence, security), right to life, protection of environment and ecology, abuse of political power, corruption, public health, child welfare, religious freedom, students welfare and may more.²

However, there has not been a single case establishing offence beyond statutory construction in either name of judicial activism. There cannot be the activism of judiciary in criminalizing the innocent. Presumption of innocent is constitutional right. The court can express its discretionary power for the enforcement of the right of the defendants, but not for curtailing the rights guaranteed. Court is very much limited in criminalizing behaviours or conducts of the suspect within the ones which are explicitly 'prohibited and punished by laws'.

¹ This article is written under common legal system where the role of the court is primarily that of an impartial referee between the prosecution and the defense.

² Based on lecture note of Dr. Bhimarjun Acharya at Kathmandu School of Law in the year 2012.

b. Similarly, the Supreme Court in *Advocate Ratna Bdr Wagchand et al* (NKP 2062, Dec. No. 7491, p. 130) accepted the principle that the court cannot extend criminal liability. So, it established the *stare decisis* in the following two spectrums:

- o Court cannot create new offence, and cannot extend liability; &
- o Court cannot abolish offences which are already in law.

c. Limitation of court in criminal cases is almost invariably the same in all democratic countries. For instance, the House of Lords in *Goldstein v Rimmington (2005) UKHL 63* has ruled that Court has no power to create new offences, nor it has power to abolish offences. Statute law is the sole source of criminal offences. It is for those elected representatives of the country in Parliament or Legislative-parliament, not the executive and not the judges, to decide what conduct should be treated as criminal.

d. In *Jones et al. (2006) UKHL 16* the House of Lords made clear that-

- Statute law is the sole source of criminal offences, and
- It is for those elected representatives of the country in Parliament, not the executive and not the judges, to decide what conduct should be treated as criminal.

e. Assimilating the principle that 'court cannot extend the ambit of the statute to impose criminal liability' The Lord Chief Justice in *Thet v DPP (2006) EW HC 2701 (Admin)*, referred the case to the parliamentary debates to enlarge the scope of liability.¹³

3.3 Principles 'that limit the court to criminalize'

a. Strict rule of construction

Criminal law applies strict rule of construction. Article 100 of the Interim Constitution has

ensured its applicability. The court, without reservation, must limit itself to the law proceeding and deciding the criminal case. Even if the usual interpretation results in consequences so different that legislators could not possibly have intended them, a secondary 'unfavorable to the accused' construction not be taken. Lord Esher in a case¹⁴ has stated long ago that 'the court has nothing to do with the question whether the legislature has committed an absurdity'.

b. Casus omissus

This principle refers to the condition that the particular conduct should have been legislated but has not been. In such condition, the rule signifies that omissions in a statute cannot as a general rule be supplied by construction. The Courts have the liberty "only to remedy the logical defects in words and phrases used in the statute and the intention of the legislature. If, however, the intention of the legislature is defective, either being too wide, or too narrow, the Courts will have to accept them as they are, the Courts cannot either add or alter or amend or detract from it, because such a step on the part of the Court would amount to legislation rather than construction."¹⁵

c. Court cannot criminalize

There is a Latin maxim: *Nullum crimen sine lege* i.e. no crime without law, and *Nulla poena sine lege* i.e. no punishment without law. If the law does not amount the conduct as crime, court cannot criminalize. It is not under the duty of the Court to stretch the words used by the Legislature to fill in gaps or omissions in the provisions of an Act. Indian Supreme Court in *Hiradevi case (1952)* postulated that "the intention of the legislature has to be ascertained from the very words of the law itself."¹⁶ However, "it is worth emphasizing one particular principle of statutory construction in criminal law: that if a provision is ambiguous it ought to be interpreted in the manner favorable to the accused."¹⁷

¹³ Obviously as guidelines for future cases.

¹⁴ *R v City of London Court Judge (1892)*

¹⁵ H.N. Tiwari, PhD (2010), *Legal Research Methodology*. India: Allahabad Law Agency, p. 96.

¹⁶ *Hiradevi v District Board, A.I.R. 1952, S.C. 362*; Cited from H.N. Tiwari, PhD (2010), *Legal Research Methodology*. India: Allahabad Law Agency, p. 96.

¹⁷ *Tuck v Priester (1887) 19 QBD 627*; cited from Smith and Hogan (2008), *Criminal Law*, 12th edition, Oxford: Oxford University Press, p. 20.

d. Presumption of innocence

It is an unavoidable fact that the principle of presumption of innocence is human rights. It is guaranteed under Article 24 (5) of the Interim Constitution of Nepal as well; and is widely accepted principle through International Declaration of Human Rights, 1948, the Human Rights Act, 1998¹⁸, Art 6(2) of the European Convention etc.

Defining the right of presumption of innocence, Lord Bingham In a land mark decision of *Sheldrake*¹⁹ has postulated:

"The overriding concern is that a trial should be fair, and the presumption of innocence is a fundamental right directed to that end. It is open to states to define the constituent elements of a criminal offence, excluding the requirement of *mens rea*. But the substance and effect of any presumption adverse to a defendant must be examined, and must be reasonable. Relevant to any judgment on reasonableness or proportionality will be the opportunity given to the defendant to rebut the presumption, maintenance of the rights of the defence flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption."

Hence, courts cannot 'strike down' statutes, cannot interpret the law beyond legislative will, and cannot establish offences in the manner which are not statutorily supposed.

e. Principle of individual autonomy

Court also concern at the principle of individual autonomy that "an individual should not be held criminally liable unless he had the capacity and fair opportunity to do otherwise"²⁰

f. Principle of fair-trial

Fair trial means the trial must be fair. It means rules of law to be followed in both civil and criminal proceedings. The aim is to ensure the proper administration of justice; i.e not more than what is prescribed by law.

3. Conclusion

- Criminal liability cannot be extended. Court cannot criminalize. The duty of the court in criminal cases is to apply the law into the conduct. If it does not amount the crime, court cannot establish it. Court is a legal entity.
- The limitation of the court envisions prosecutors and investigators job even greater. It demands greater personal scrutiny: training, education and experiences with them.
- As the court with its eyes closed weighs the admissible evidences & law; the investigators must focus on physical evidences rather than in oral evidences. And, the forensic examination of evidences is the most to bind her so.
- Closely tied to the issue of inadmissible evidence is the question of the competence and credibility of the police. The investigators need to be trained to endow with the following minimum skill and competencies:

• Deductive and inductive reasoning	➤ Ability to relate a large number of seemingly unrelated facts.
• Critical/analytical thinking	➤ The investigator must be able to 'see' and not just look.
• Ethics and integrity	➤ Possess a personal philosophy based on honour, integrity and duty in order to avoid confusion, ambiguity, and corruption.
• Human anatomy	➤ Be able to recognize human anatomy.
• Language	➤ 90 % of what an investigator does involves language-based communication, from interviews to court testimony.
• Law of evidence	➤ Admissible evidences & forensic science.

□□

¹⁸ Of United Kingdom

¹⁹ *Sheldrake* (2005), 1 AC 246 at (21); cited from, Smith and Hogan, *Criminal Law*, 12th edition (Oxford: Oxford University Press 2008), 155.

²⁰ H.L.A. Hart (2008), *Punishment and Responsibility*. 2nd edition; cited from Andrew Ashworth (2009), *Principles of Criminal Law*, 6th ed. Oxford: Oxford University Press, p. 25.