कानून

अङ्क ११५

नेपालको संविधान, २०७२ कार्यान्वयनमा कठिनाइ !

कानून व्यवसायी क्लब, काठमाडौं

निन्दन्तु नीतिनिपुणा यदि वा स्तुवन्तु ! लक्ष्मीः समाविशतु गच्छतु वा यथेष्टम् !!
अद्यैव वा मरणमस्तु युगान्तरे वा !!! न्याय्यात्पथः प्रविचलन्ति पदं न धीराः !!!!
(निन्दा होस् वा स्तुति होस्, धनोपार्जन होस् वा नहोस्, मृत्यु पछि वा तत्काल नै किन नहोस्- प्राज्ञहरुले न्यायको बाटो छाड्दैनन् ।)
-भर्तृहरि

जि.का.का.द.नं.३५/२०३८-४० १५ फागुन २०७२ कानून द्वैमासिक अङ्क ११५

यस अङ्कमा

लेख

- **अमीत प्याकुरेल/अनिल सुवेदी**, सैनिक न्याय प्रणालीः एक तुलनात्मक अध्ययन ३
- **अवतार न्यौपाने**, नियमनकारी निकायबाट हुने बैकिङ्ग सूरमा सरोकारवाला... ११
- **शरदप्रसाद कोइराला**, गैर नेपाली/विदेशी नागरिकः अचल सम्पत्तिको हक... १४
- **गोपाल प्रसाद दहाल**, संविधान कार्यान्वयन पक्षले पारेको असर १९
- **खिमलाल देवकोटा**, नयाँ संविधानको समीक्षा र कार्यान्वयनका चुनौतीहरू २२
- **चिरञ्जीवी नेपाल**, धर्म निरपेक्षताले उब्जाएको प्रश्न ३०
- **चन्द्र कान्त ज्ञवाली**, नेपालका संविधानहरूमा निर्वाचन प्रणालीसम्बन्धी... ३२
- **Subash Acharya**, Precincts in Criminal Cases ४३
- **Bhakti Ram Ghimire**, The Doctrine of separation of power... ५४
- **Bishal Khanal**, The Chief Justice and Judicial Reform... ६३

स्तम्भ (व्यक्ति व्यक्तित्व)

- **सुरेन्द्र के.सी.**, गणेशराज शर्मासँगको एकाध संस्मरण २६
- **प्रकाश वस्ती**, चिन्तनका धरोहर, विचारका मर्मज्ञ : गणेशराज शर्मा ६७

स्तम्भ (पुस्तक परिचय)

- **माधव प्याकुरेल**, गुलरको फूल/प्रस्तुतिः लक्ष्मीप्रसाद उप्रेती १८
- **सलाहुद्धीन अख्तर सिद्धीकी**, मनुस्मृतिको पारिवारिक व्यवस्था .../प्रस्तुतिः लक्ष्मीप्रसाद उप्रेती २९
- **एम.आर. उपाध्याय**, अधिवक्ता हाते पुस्तक/प्रस्तुतिः लक्ष्मीप्रसाद उप्रेती ३१

कानून पाइने स्थानहरू
- सर्वोच्च अदालत बार एशोसिएशन, रामशाहपथ
- दीपक पुस्तक भण्डार, पुतलीसडक
- पैरवी प्रकाशन, पुतलीसडक

- यस पत्रिकामा प्रकाशित लेखहरूमा व्यक्त विचार लेखकका नितान्त व्यक्तिगत हुन् ।
- यहाँ प्रकाशित लेखहरूले लेखकको पदीय हैसियतको प्रतिनिधित्व पनि गर्दैनन् ।
- लेखकका विचारसँग पत्रिकाका प्रकाशक तथा सम्पादकको सहमति आवश्यक छैन ।
- प्रकाशित सामग्रीको सर्वाधिकार सम्बन्धित लेखकका हकमा बाहेक प्रकाशकमा सुरक्षित छ ।

प्रकाशक
कानून व्यवसायी क्लब, काठमाडौँ
डिल्लीबजार, काठमाडौँ
फोनः ४२२२५८१
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लेख पठाउँदा
- इमेल, पेनड्राइभ, सिडीमा पठाउँदा प्रिती फण्टमा टाइप भए हामीलाई सुविधा हुने थियो ।
- लेखका साथ लेखकको फोन नम्बर पनि भए सम्पर्क राख्न सुविधा हुने थियो ।
- लेख बढीमा २५०० शब्द भए हाम्रो पत्रिकामा ४ पृष्ठमा अटाउने थियो ।
- हामीले पाद टिप्पणी शैली अपनाएका छौं ।

Precincts in Criminal Cases

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Advocate

1. Overview

"The criminal law does not accept the notion of what may be called *de facto* crime."[1] Therefore, vital thing in criminal law is the question of legality; and for court the principle of limitation: whether the particular conduct amounts to crime as per the existing law or not? If the law does not amount the particular act as crime in the time and place it committed, then, the court does not criminalize. For example, sexual intercourse between husband and wife was not contrary to the criminal law, but following the 2063 amendment of Muluki Ain, the sexual relation without the consent of his wife is an offence of marital rape. This might be due to the public's changing attitudes towards domestic violence. However, the court did not and could not criminalize for the same offence before the2063 amendment, i.e. before it was codified into law.

1.1. Demarcating Judicial Restrain from Judicial Activism

Judicial activism refers to philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions. It describes judicial rulings, an antonym of judicial restraint. The question of judicial activism is closely related to constitutional interpretation, statutory construction, and separation of powers.

However, the judicial activism cannot extend its sense of welfare into criminalizing a person beyond the law.[2] Court cannot establish an offence beyond legislation in either name of judicial activism. Presumption of innocence and right against retrospective use of law are fundamental to fair trail rights guaranteed by the UDHR, ICCPR and Constitution of Nepal. 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 as per codification, which are explicitly 'prohibited and punished by laws'.[3]

1.2. Conflict between Non-retroactivity Principle and the Common Law

In criminal law, if the evidence does not amount the crime; or,if the evidences are obtained in other ways than instructed by the law; or if the evidences are obtained legally but do not corroborate with the fact, court does not construct to criminalize. Court's decisions are supposed to rely on: Whether the conduct is prohibited by law or not?, Whether the accused has done that particular prohibited act or not?, Whether that conduct amounts to a crime or not?, Whether the evidences produced to proof prohibited conduct are legally obtained or not? And, whether the evidences weigh the crime in law or not?[4]

It raises some questions. For instance, what about the cases in which the evidence does not amount the crime, but the public knows it

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1 Glanville Williams (1983) , *Text Book of Criminal Law*, 2nd ed. New Delhi: Universal Law Publishing Co., p. 25.
2 Kermit Roosevelt, *The Myth of Judicial Activism: Making Sense of Supreme Court Decisions*,October 2006, Yale University Press Publishers, p. 272.
3 Rory Leishman, *Against Judicial Activism: The Decline of Freedom And Democracy in Canada*, May 2006, McGill-Queen's University Press Publishers, p. 310.
4 There is no de facto crime. For eg, marriage of Oedipus and Jokasta, despite the fact of being incestuous, was not a crime.

is that culprit who did it? Or, there is no law criminalizing the particular conduct which is in fact hatred, abhorrence and disgust to the mass? Can't the court move a step ahead in criminalizing them? How the common law have been developed if the court cannot construct? The courts have developed and extended criminal law over the years in the past, untrammelled by the non-retroactivity principle.

The conflict between non-retroactivity principle and the functioning of the criminal law as a means of social defence reached its modern apotheosis in a UK case of *Shaw v DPP* (1962).[5] The prosecution had indicted Shaw with conspiracy to corrupt public morals, in addition to two charges under the Sexual Offences Act 1956 and the Obscene Publications Act 1959. The House of Lords upheld "the validity of the indictment, despite the absence of any clear precedents, on the broad ground that conduct intended and calculated to corrupt public morals is indictable at common law. The decision led to an outcry from lawyers and others."[6]

a. Threats and Challenges

First, an objection to *Shaw* is that "it fails to respect citizen as rational, autonomous individuals: a citizen cannot be sure of avoiding the criminal sanction by refraining from prohibited conduct if it is open to the courts to invent new crimes without warning."[7] What happened in *Shaw* is was that a majority of the House of Lords felt a strong pull towards criminalization because they were convinced of the immoral and anti-social nature of the conduct- thus regarding their particular conceptions of social defence (relationship between law and morality) as more powerful than "the liberty of citizens to plan their lives under the rule of law."[8]Second, the court usurped the legislative function of the parliament. The proper procedure is for a democratically elected legislature to create new offences. Third, *Shaw* presupposes possibility that police and prosecution might press an unknown charge, and the courts may uphold its validity at common law. And forth, when an offence created operates retrospectively, it fails to respect the citizen's basic right that the law be knowable in advance.

b. Resolution

The criminal law "embodies the height of social censure, and its extent should be determined in advance by accountable democratic processes rather than *ex post facto* by judicial pronouncement."[9] The House of Lords realized it in *Knuller v DPP* (1973)[10], and expressed it categorically in *Rimmington and Goldstein* (2006).[11] Since then "the English courts no longer claim the power to create new criminal offences."[12]

The law should be made prospectively by the legislature, not by judicial decision which operates retrospectively. Courts should not 'strike down' statutes, should not interpret the law beyond legislative will, and should not establish offences in the manner which are not statutorily supposed. Professor Ashworth has illustrated that "It is not an argument about evidence and procedure at all but an argument about the proper preconditions of criminal liability."[13]

Lord Bingham put it in *Jones* (2007), "it is for those representing the people of the country in

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5 *Shaw v DPP* (1962) AC 220.
6 Andrew Ashworth (2009), *Principles of Criminal Law*, 6th ed., Oxford: Oxford University Press, p. 58.
7 Ibid.
8 Ibid.
9 A.T.H. Smith, *Judicial Law Making in the Criminal* Law, July 1984, 100 LQR 46.
10 *Knuller v DPP* (1973) AC 435.
11 *Rimmington and Goldstein* (2006). 1 AC 459.
12 Ibid (n 6), 59.
13 Professor Ashworth, "Four Threats to the Presumption of Innocence" (2006) E & P 241, cited from Smith and Hogan, *Criminal Law*, 12th edition, Oxford: Oxford University Press 2008, p. 155.

Parliament, and not the executive and not the judges, to decide what conduct should be treated as lying so far outside the bounds of what is acceptable in our society as to attract criminal penalties."[14] It was put some years ago than that of *Jones* by the Special Bench of Supreme Court of Nepal in *Advocate Ratna Bdr Wagchand et al.*[15]

1.3. Foundation behind

Various philosophical aspects exist in support of this rationale. Among these, four broad currents are discernible:

a. Guarantee of Individual Liberties against State Arbitrariness

The *nullum crimen* principle is considered an indispensable tool for safeguarding individual liberties. The enjoyment of individual liberties requires that citizens know in advance their limits and the consequences for transgressing them. Here, the principle is destined to protect against State arbitrariness and provides individuals with foreseeability and calculability in the exercise of their rights.

b. The Need for Fairness in Criminal Law

Given the function of criminal law in society, it is also an essential requirement of substantial fairness that the individual must be able to know beforehand whether his acts are liable to punishment. The legality principle is thus an important legitimacy factor of any system of criminal law.

c. Democracy and Separation of Powers

Concerned foremost about the separation of powers, philosophers of the Enlightenment[16] derived the principle of legality from the social contract doctrine. In a state of nature, citizens agree to accept limitations to their liberties only in so far as this is necessary to ensure peaceful coexistence with other members of society. The legislator is the direct representative of the parties to the social contract and therefore the legitimate institution to limit liberties and determine which conduct is punishable.

d. Purposes of Criminal Law

The prerequisite for punishment is a wrongful act. This presupposes, however, that the concept of wrongfulness is understood in a legal manner. Conversely, in cases where the concept of wrongfulness is understood in moral rather than legal terms, the idea of retribution for moral wrongdoing through criminal law may give rise to abstractness and judicial arbitrariness.

2. Accepted Principles

2.1. Principle of Legality

The principle of legality is rooted on Latin Maxim: *nullum crimen sine lege, nulla poena sine lege.* Itcovers both prohibited criminal conduct (*nullum crimen sine lege*) and sanctions for it (*nulla poena sine lege*). In its broadest sense, the principle of legality encompasses the principle of non-retroactivity, the prohibition against analogy, the principle of certainty, and the prohibition against un-codified, i.e. unwritten, or judge-made criminal provisions.

This means that an act can be punished onlyif, at the time of its commission, the act was the object of a valid, sufficiently precise, written criminal law to which asufficiently certain sanction was attached.The principle of legality in criminal law is closely related to legal formalism and the rule of law and has originated from the writings of Cicero, Feuerbach, Dicey and Montesquieu. Its historical development and advancement till the date could be reviewed as below:

[14] *Jones* (2007) 1 AC 136.
[15] NKP 2062, Dec. No. 7491, p. 130.
[16] Originating in the 17th century, it was sparked by philosophers Francis Bacon (1562-1626), Baruch Spinoza (1632–1677), John Locke (1632–1704), Pierre Bayle (1647–1706), Voltaire (1694–1778), Francis Hutcheson (1694–1746), Voltaire (1694–1778), Montesquieu (1689–1755), David Hume (1711–1776), and Rousseau (1712–1778).

a. Roman and Medieval Law as well as the Jus Commune in Continental Europe

Only rudimentary features of the legality principle can be found in Roman and Medieval Law. Criminal law was not confined to statutory regulation. To the extent that criminal offences were laid down in written form, a distinction that can be traced back to Cicero, was often made between statutes that constituted crimes and statutes that were merely declaratory of inherently criminal behaviour (*mala per se*). Non-retroactivity did not apply to the latter category. In the same vein, the Constitutio Criminalis Carolina (1532)[17], the most important codification of criminal law in Germany at the time of the *jus commune*, contained a few elements pointing towards a growing adherence to the legality principle but clearly fell short of a full acceptance of this principle.

b. Enlightenment

Acceptance of the legality principle in its comprehensive sense is rooted in the period of Enlightenment and the social contract doctrine. It was the goal of limiting judicial power—as per the separation of powers doctrine—that paved the way for the first codifications of the legality principle. Montesquieu and, with specific regard to criminal law, Beccaria were key figures in this movement. It was Feuerbach, however, who first coined the Latin adagium *nullum crimen, nulla poena sine lege*.

c. The Development of the Common Law

The idea of law limiting the arbitrary exercise of the executive power first gained prominence in the Charter of Liberties (1100)[18], at a time when the baronial and knightly class opposed the arbitrary power of the monarchs. This Charter laid the foundation for Art. 39 of the Magna Carta Libertatum (1215), which guaranteed that no free man shall be deprived of his rights without the law of land. In spite of this guarantee, the Star Chamberoperated for 200 years until 1641, punished certain behaviours considered morally reprehensible irrespective of positive or common law. In fact, the major common law felonies, such as murder, rape, and burglary came into existence through case law. Over time, however, the theory of precedent and concern for legal certainty produced a fairly stable, predictable, and known set of crimes, much in line with the ideas underlying the *nullum crimen* principle. Because all felonies were punishable by death, this system did also not conflict with the main idea underlying *nulla poena*.

This careful development of the law was accompanied by powerful statements of authoritative writers such as Locke and Blackstone against retroactive law-making. Blackstone, in particular, considered it cruel and unjust to convert an action, innocent when it was done, into criminal conduct through a subsequent law. He also emphasized the need for the law's foreseeability through notification. Still, the British Parliament occasionally enacted ex post facto criminal laws well into the 19th century. Only in 1973 did the House of Lords abolish the doctrine of residual judicial discretion to create common law crimes.[19] Today, most common law countries have statutory definitions of crimes including USA, India, Canada and Nepal.

d. First Codifications in the World

At the underlying level, the first allusions to the legality principle can be found in the Manab Nyaya Shastra, written during the Malla Dynasty by King Jayasthiti Malla in the 14th century. It was carried forward in the *general code* of Nepal. The Muluki Ain, 1910 (1853),

[17] The Constitutio Criminalis Carolina (1532) is recognised as the first body of German criminal law (*Strafgesetzbuch*).
[18] The Charter of Liberties was a written proclamation by Henry I of England, issued upon his accession to the throne in 1100. It sought to bind the King to certain laws regarding the treatment of nobles, church officials, and individuals.
[19] *Knuller v DPP* (1973), AC 435.

Chapter 2 On Punishment, Number 1 states that a person who commits any act, considered by law as an offense, is only liable to punishment.

In the Western world, first allusions to the legality principle can be found in Arts 7 and 8 of Virginia Declaration of Rights (1776). Constitution of Maryland (1776),Article 15 contained the first explicit prohibition against ex post facto laws, which later found its way into Art. I(9)(3) of Constitution of the United States of America. The breakthrough of the legality principle in Europe was initiated by Part I Art. 1 of Austrian Criminal Code (1787) and by Art. 4 of French Penal Code (1810), which was inspired by Arts 7 and 8 of French Declaration of the Rights of Man and of the Citizen adopted in 1789. The Bavarian Penal Code (1813), which was heavily influenced by Feuerbach, laid down the legality principle in its Art 1. It was also codified in Art. 2 of Penal Code of the German Empire (1871), which employed a wording very similar to that of the French Penal Code of 1810.

2.2. Non-retroactivity principle

The legality principle finds its expression through the prohibition of retroactive criminal laws. A criminal sanction may only be imposed if the conduct in question existed under the relevant law at the time when the impugned conduct occurred. Thus, legislators do not enact *ex post facto* criminal laws and judges do only apply criminal provisions that were in force at the time when the conduct occurred. The principle does not, however, prohibit a judicial modification of the interpretation of an existing statute as long as it respects statutory wording and the nature of the offence, the outcome being reasonably foreseeable.[20]

The principle of non-retroactivity also applies with regard to common law. The legality principle prohibits the retroactive creation of new crimes through the judiciary. At the same time, the prohibition of retroactivity does not exclude the progressive development of criminal law through judicial law-making in the sense of gradually clarifying the rules of criminal liability through judicial interpretation from case to case. This is considered an entrenched and necessary part of the legal tradition of common law countries. The result of such progressive development must, however, be consistent with the essence of the offence and must be reasonably foreseeable.[21] However, this is limited to interpretation of law prospectively, not to criminalize retrospectively.

While the legality problems raised in the common and civil law systems are arguably not fundamentally different, the common law system is perhaps more vulnerable to the danger of overstretching the concept of a reasonably foreseeable legal evolution. Two cases that have sparked considerable discussion in this regard are the cases of *SW v The United Kingdom*(1995)[22]and *CR v The United Kingdom* (1995)[23]in which the *European Court of Human Rights (ECHR)* held that the abolishment of the common law marital defence to rape did not violate the legality principle. The Supreme Court of Nepal in *Meera Dhungana case*[24] has issued a directive order to the Ministry of Law, Justice and Parliamentary Affairs to prepare a bill for addressing the issue of marital rape.

On the level of international criminal law, even greater difficulties with the principle of non-retroactivity arise where a court determines on the basis of a relatively sparse international

[20] Pessino v France (ECtHR) App 40403/02, para 36.
[21] SW v The United Kingdom (ECtHR) Series A No 335 B para. 36.
[22] SW v The United Kingdom(1995), ECHR 22.
[23] CR v The United Kingdom (1995) ECHR 52.
[24] Meera Dhungana for Forum for Women, Law and Development v HMG, Ministry of Law, Justice and Parliamentary Affairs(2058), Writ no 55, 2058 BS.

practice, and by references to fundamental principles, whether a crime under customary international law has come into existence. The 'creative precedent' set by the ICTY in the *Tadic Case*[25]constitutes the most prominent recent example of such 'evolutive adaptation'[26]of international criminal law.In any such event, retroactive re-characterization of a national crime as a crime under international law would usually pose serious jurisdictional questions.

So, the essence of the non-retroactivity principle is that a person should never be convicted or punished except in accordance with a previously declared offence governing the conduct in question. It is the principle that explains no one guilty of any penal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. It forbids a legislature to create a criminal offence which applies to behaviour prior to its enactment.

2.3. Strict rule of construction

Criminal law applies strict rule of construction. This means that a criminal law may not be enlarged by implication or intent beyond the fair meaning of the language used or the meaning that is reasonably justified by its terms. Criminal statutes, therefore, will not be held to encompass offenses and individuals other than those clearly described and provided for in their languages. The strict construction of criminal statutes complements the rule of lenity, which holds that ambiguity in a criminal statute should be resolved in favour of the defendant.

Strict construction is the opposite of liberal construction, which permits a term to be reasonably and fairly evaluated so as to implement the object and purpose of the document. It is the principle in criminal law that limits or restricts judicial interpretation in order to criminalize or extend the criminal liability other than as prescribed by law.

Article 126 of the Constitution of Nepal has ensured its applicability. The court, without any reservation, must limit itself to the law in proceedings and deciding the criminal cases. Even if the usual interpretation results in consequences so different that legislators could not possibly have intended them, any secondary 'unfavourable to the accused' could not be taken. Lord Esher in *R v City of London*[27] has stated long ago in 1892 that 'the court has nothing to do with the question whether the legislature has committed an absurdity'.

2.4. 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."[28]

2.5. Presumption of innocence

It is an unavoidable fact that the principle of presumption of innocence is a fundamental human rights. It is guaranteed under Article 20 (5) of the Constitution of Nepal; and is widely accepted principle through Universal Declaration of Human Rights 1948,and Art 6(2) of the European Convention.

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[25] *Prosecutor v Duško Tadic* (1997) ICTY Case No.: IT-94-1-A.
[26] Cassese A. (2008), *International Criminal Law*, 2nded., OUP Oxford, p. 45.
[27] *R v City of London Court Judge (1892)*1 QB 273.
[28] H.N. Tiwari, PhD (2010), *Legal Research Methodology*. India: Allahabad Law Agency, p. 96.

Defining the right of presumption of innocence, Lord Bingham in a land mark decisionof *Sheldrake*[29]has written:

'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. And, "if a provision is ambiguous it ought to be interpreted in the manner favourable to the accused."[30]

2.6. The Principle of Certainty (*nullum crimen sine lege certa*)

Maximum certainty in defining offences embodies what are termed the 'fair warning' and 'void for vagueness' principles. There is close relationship between the principle of maximum certainty and the non-retroactivity principle. A vague law may in practice operate retroactively; since no one is quite sure whether given conduct is within or outside the rule. The caseof *Sunday Times v UK (1997)* has stated the quality of law standard as below:[31]

'Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able- if need be with appropriate advice- to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.'

However, it is true that the certainty principle embodies maximum certainty, not absolute certainty. US Supreme Court put it in *Conally v General Construction Co* (1926): "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."[32]

Although the need for criminal provisions to be certain is not expressed in international conventions containing a legality provision, certainty is generally considered to be a natural component of the legality principle.The principle of certainty is also considered to guide statutory interpretation through a rule of lenity or strict construction.[33] This rule should not be misunderstood to mean that, wherever there is room for interpretation, the solution most favourable to the accused must be adopted. The effect of strict construction of the provisions of a criminal statute is rather that, where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of construction fail to solve, the benefit of the doubt should be given to the accused and against the legislature which has failed to explain itself.[34]

2.7. The Interdiction of Analogy

The Interdiction of Analogy is known as *nullum crimen sine lege stricta*. The prohibition against

[29] *Sheldrake* (2005), 1 AC 246; cited from, Smith and Hogan, *Criminal Law*, 12th edition (Oxford: Oxford University Press 2008), p.155.
[30] *Tuck v Priester* (1887) 19 QBD 627.
[31] *Sunday Times v UK* (1997) 2 EHRR 245, para 49.
[32] *Conally v General Construction Co* (1926) 269 US 385.
[33] Art. 22(2) of Rome Statute.
[34] *Prosecutor v Delaliæ et al.*(1998)IT-96-21, para 413.

analogy in criminal law is directly linked to the prohibition against retroactivity and hence a generally accepted component of the *nullum crimen* principle.[35] This means that a judge must not fill a gap in the criminal law by applying a statute beyond its wording or by extending a precedent through the creation of a new unwritten crime.

2.8. 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."[36] This is a concept under fair trial, whichrequires the trial be fair. The aim is to ensure the proper administration of justice.

3. Provisions in International Laws

a. Applicable International Law

Principle of legality is assimilated in all major international laws including the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights and the European Convention on Human Rights. However the imposition of penalties for offences illegal under international law or criminal according to the general principles of law recognized by civilized nations are normally excluded from its ambit. As such the trial and punishment for genocide, war crimes and crimes against humanity does not breach international law.

There is some debate about whether this is really a true exception or not. Some people would argue that it is derogation or - perhaps somewhat more harshly - an infringement of the principle of legality. While others would argue that crimes such as genocide are contrary to natural law and as such are always illegal and always have been. Thus imposing punishment for them is always legitimate. The exception and the natural law justification for it can be seen as an attempt to justify the Nuremberg trials and the trial of Adolf Eichmann, both of which were criticized for applying retrospective criminal sanctions. Arguably, the Nuremberg Tribunal was correct to question the view that the legality principle formed part of international law in 1945. Meanwhile, however, the legality principle has grown into an internationally recognized human right which also governs international criminal law.

b.Setbacks during Totalitarianism

Totalitarian regimes of the 20th century hindered the development of the legality principle, and enjoyed judicial activism in criminal law as well. In 1935 the German National Socialists amended Art. 2 Penal Code of the German Empire and henceforth admitted punishment not only for conduct explicitly defined therein, but also for acts 'deserving of penalty according to the fundamental conceptions of a penal law and sound popular feeling' subject to judges wisdom. This disposition was declared inapplicable by the Allies in 1945 and abolished in 1946. The broad application of the *nullum crimen* principle in Germany today may be a result of lessons learned from Nazi abuses.

In Russia the principle was abolished during the Russian Revolution. According to the earliest Communist decrees, criminal courts were to render judgment on the basis of 'revolutionary legal spirit' (*Revolutionares Rechtsbewusstsein*). The Soviet Penal Codes of 1922 and 1926 permitted the criminalization of 'socially dangerous acts' through far-fetched reasoning by analogy. The *nullum crimen* principle was formally reintroduced in 1958[37] but still remained inapplicable in practice for

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[35] *Kokkinakis v Greece* (1983ECHR, Application No. 14307/88, para 52.
[36] 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.
[37] Art. 6, Fundamental Principles of Criminal Legislation of the USSR.

minor offences treated by non-professional Comrades' Courts. Today, the principle of legality is guaranteed in Art. 54 Constitution of the Russian Federation of 1993.

c. International Influences towards Universal Acceptance after 1945

A key contributor to the-eventual-universal acceptance of the *nullum crimen* principle is the international human rights movement after 1945. By 1948, the General Assembly of the United Nations recognized the principle in Art. 11 (2) of Universal Declaration of Human Rights, 1948. Article 11(2) of UDHR 1948 and Article 15(1) of ICCPR 1966 facilitated to setout Article 22 of Rome Statute: "A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court". Subsequent legally binding international and regional conventions followed the same.

4. Context of Nepal

The principle of limitation is relevant in both procedural and substantive aspects under national legal provisions as well. But here the emphasis lies in the way substantive law corresponds to the principle of limitation. It is stipulated consistently from Constitution to General Code of Nepal.

4.1. Provisions

Principle of limitation is constitutionally guaranteed in Article 20 (4) of Constitution of Nepal, 2072:"*No person shall be punished for an act which was not punishable by law when the act was committed, nor shall any person be subjected to a punishment greater than that prescribed by the law in force at the time of the commission of the offence*".The recognized principles of justice is further assimilated in Article 126 (1) of Constitution.

Muluki Ain (General Code), Chapter 2 On Punishment, Number 1 states: *"a person who commits any act that is considered by law as an offense"* is only liable to punishment,- is in line to Article 11(2) of UDHR, Article 15(1) of ICCPR, Article 7 of ECHR and Article 22 of Rome Statutes. Number 189 of On Court Proceedings, General Code has set down the format of judgment as *"now, therefore, such-and-such is held as such in view of such-and-such circumstance, proofs and evidence and pursuant to such-and-such law. I have made this judgment by holding such-and-such by virtue of such and- such law,"* rationalizing judicial exercise only pursuant to law. There is provision of correction from the appellate court in case the district court violates limitation principle of law as per the same Number 189 through Appeal. Draft Criminal Code, 2067 followed this boundary in Section 7, On General Principles of Criminal Justice.

4.2. Supreme Court's Decisions

The remarkable cases that have interpreted the issue of limitation of court in criminal cases by Supreme Court of Nepal includes *Ramprasad Rai v. Milprasad Rai (NKP 2052, Decision No. 5077, P. 270), HMG v. Lalbahadur Tamang (NKP 2058, Decision No. 6971, P. 34), Nepal Government v. Kirti Bdr Chand et al. (NKP 2059, Decision No. 7070, P. 132), Adv Ratna Bdr Wagchand v. HMG Prime Minister & Council of Ministers (NKP 2062, D.N 7491, P.130), HMG v. Jugat Sada et.al. (NKP 2063, Decision No. 7752, P. 1075), Nepal Government v. Tara Prasad Devkota et.al. (NKP 2066, Decision No. 8254, P. 1751), Nepal Government v. Sidhartha International Trade Concern(NKP 2067, Decision No. 8465, P. 1580), Molhuysen Hendrik Otto v Nepal Government (NKP 2069, Decision No.. 8860, P. 1096), & Sanjay Kumar Shah v Chairman Subash Chandra Nembang et al. (NKP 2070, D.N. 9040, P. 977).*

Supreme Court of Nepal, for example, in the case of *Adv Ratna Bdr Wagchand v. HMG Prime Minister & Council of Ministers* (NKP 2062, D.N 7491, P.130) has delivered the verdict that "Court cannot create new offence

through its interpretation nor it can decide whether the quantum of punishment provided in law is less or more. Such interpretation would be against the jurisprudence, principle of separation of power and harmony. Court can only criminalize and impose penalty upon the defendant only as per the existing criminal law".

5. Conclusion

In criminal law on national level, the principles of legality hold somewhat different credence in common law and civil law systems. In civil law systems law is generally fully codified leaving only very little leeway for the discretion of the judge, whereas in common law systems, at least traditionally, the judge does not always have a written text to adhere to and therefore may have to resort to unwritten law. Strict compliance of limitation principle, therefore, produces question of the validity of common law tradition. For instance, how the common law have been developed if the court cannot construct? The courts have developed and extended criminal law over the years, untrammelled by the non-retroactivity principle. It generates a conflict between limitation principle and the functioning of the criminal law as a means of social defence.

However, the dispute is no more a yardstick today! In course of development of the judicial practices, limitation principle is has been firmly established in at least all democratic countries. In Nepal, it's fundamental right pursuant to Article 20 (4) of the Constitution. And, "the fundamental rights are" Dr. Acharya writes,"correlated with the freedoms and rights which a man is entitled to by virtue of one's association with the state as its citizens"[38].It has a come up with long history to reach at this conclusion of limitation principle. Summed up in the following three developmental stages:

a. Stage one

Despite the principle of *nullum crimen sine lege;nulla poena sine lege,* there are offences of common law origin across the globe. For example, in UK, murder is a common law offence and lacks a statutory definition in Homicide Act 1957. It's the first stage. The issue was resolved by the House of Lords in *Knuller v DPP* (1973)[39] that the criminal law embodies the height of social censure, and its extent should be determined in advance by accountable democratic processes rather than *ex post facto* by judicial pronouncement.

b. Stage two

Since 1973, the English courts no longer claim the power to create new criminal offences. The House of Lords has expressed it much clearly in *Hyam v. Director of Public Prosecutions [1975] A.C. 55*; *Regina v. Cunningham [1982] A.C. 566*; *Regina v. Moloney [1985] A.C. 905*; *Regina v. Hancock [1986] A.C. 455*; *Regina v. Woollin [1998] 4 A11 E.R. 103* and categorically in *Rimmington and Goldstein (2006).*[40]

Judges agreed that courts should not 'strike down' statutes, should not interpret the law beyond legislative will, and should not establish offences in the manner which are not statutorily supposed. The law should be made prospectively by the legislature, not by judicial decision which operates retrospectively. Professor Ashworth wrote: "It is not an argument about evidence and procedure at all but an argument about the proper preconditions of criminal liability."[41]Lord Bingham proclaimed in *Jones et. al.(2007)* "It is for those representing the people of the country in Parliament, and not the executive and not the judges, to decide what conduct should be treated as lying so far outside the bounds of what is acceptable in our society as to attract criminal penalties"[42] as Supreme Court of Nepal has done the same in *Ratna Bdr Wagchand et al.(2005)*[43].

[38] Dr Bhimarjun Acharya (2008), *Fundamental Rights in World Constitution,* Kathmandu: Pairavi Book House, p. iii.
[39] *Knuller v DPP* (1973) AC 435.
[40] *Rimmington and Goldstein* (2006) 1 AC 459.
[41] Ibid (n 13), 155.
[42] *Jones* (2007) 1 AC 136
[43] NKP 2062, Dec. No. 7491, p. 130.

c. Stage three

One step ahead, there has been a new discourse since 2010 especially in America that even the state cannot criminalize to the behaviours that affects fundamental human rights. The issue came up with when the Alabama appeals court ruled[44] that the State of Alabama'sban on consensual gay sex is unconstitutional. The measure banned oral and anal sex, adding that "consent is no defense to gay sex"[45]. In a unanimous ruling, judges said "A person's sexual orientation shouldn't matter. The law was aimed at banning gay sex, and aiming to ban consensual sex is flat out wrong."[46]

Similarly, US Supreme Court in *Susan B. Anthony List v. Driehau*[47] has challenged to law criminalizing false political statements. In 2010, the then US Representative Steve Driehaus had filed a complaint with the Ohio Elections Commission over billboards put up by the Susan B. Anthony List (SBA) in his congressional district. After Driehaus lost his re-election bid, his complaint was dismissed. However, the SBA had already filed a suit in federal district court challenging the constitutionality of the Ohio law that criminalized spreading false statements during the course of a political campaign. The district court held that the suit was non-justiciable, and the US Court of Appeals for the Sixth Circuit agreed. However, US Supreme Court questioned the constitutionality of the Ohio law and issued the order of certiorari.

To sum up, as per the stages described above, Nepal remains in stage two of the development of limitation principle. Courts of Nepal are obliged to limitation principle pursuant to General Code, Constitution, Treaty Obligations and Precedents. Therefore, courts can decide to criminalize and penalize only for the 'acts prohibited and punished by laws' and only as far as the 'laws prohibit and punish for thatparticular act in question'.

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[44] Alabama appeals court ruledit in *Dewayne Williams case.* The case involved an Alabama man convicted of sexual misconduct in 2010. However, Dewayne Williams said he'd had consensual anal sex.
[45] Antonin Scalia(1989), *The Rule of Law as a Law of Rules,* 56 U.Chi.L., Berlin, p 34.
[46] Ibid.
[47] *Susan B. Anthony List v. Driehau (2013)* USC, 187.