The Right to Have Rights

The Right to Have Rights:

The Theory of Anti-Deprivation Development Threshold

By

Yubaraj Sangroula

Cambridge Scholars Publishing

The Right to Have Rights:
The Theory of Anti-Deprivation Development Threshold

By Yubaraj Sangroula

This book first published 2026

Cambridge Scholars Publishing

Lady Stephenson Library, Newcastle upon Tyne, NE6 2PA, UK

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

ISBN: 978-1-0364-6329-8
ISBN (Ebook): 978-1-0364-6330-4

CONTENTS

FOREWORD

In this creative and impassioned book, Professor Yubaraj Sangroula critiques the failures of neoliberal and statist models of development and reimagines development as people-centred and human rights-focused. He argues that the technocratic discourse of 'poverty alleviation is inadequate to address three crucial 'deprivations' that persist in the modern developmental state and are facilitated by its elites. These are deprivation of entitlements, social exclusion, and lack of access to economic resources and life opportunities. The destructive prevalence of wealth, income and status inequalities underlie these deprivations.

The book is particularly good at exposing the many structural problems underpinning development failures. As a scholar of Nepalese legal history and jurisprudence, Professor Sangroula explores the limitations of Western legal transplants, including the Common Law system and its litigation model, in the Nepalese context, where the law must be rooted in local cultures and communities to flourish. He sees law as tied to South Asian values such as family, harmony, compromise, and morality and as a force for empowering human capabilities, not merely for punishment. At the level of governance, he dissects the elite networks of patronage and corruption that undermine development and human rights even in a democratized, post-conflict Nepal.

In proposing solutions, Professor Sangroula argues that the right to have rights is central to the development process. By this, he means that there is a duty on the state to protect 'first rights' that are essential to human dignity. These are physical integrity, personal autonomy, freedom of employment and lifestyle, basic needs (such as health and social security), and economic participation. The book also looks to other development models, such as China, to chart alternative possibilities in Nepal.

Professor Sangroula writes as someone who has experienced the pitfalls of development firsthand, as a leading Nepali legal scholar, practitioner, advocate, law reformer, and public official. He pioneered the teaching of socio-economic rights, law, and development in Nepal, including through innovative fieldwork with students in remote communities – driving all over

Nepal, trekking up and down mountains and valleys and along river banks, and talking with everyone from hill tribes to Prime Ministers to Maoist fighters. As a lifelong educator, Professor Sangroula pays special attention to the right to education as a means of empowerment.

This book is bursting with ideas and insights. It adds an important new voice to conversations about taming economic development in the service of human dignity and equality.

Professor Ben Saul,
Challis Chair of International Law,
University of Sydney, Australia

FOREWORD

Professor Sangroula's book speaks volumes about the kind of world he envisions- a just, equitable, and progressive society- a society where justice is to be administered impartially without chicanery and obfuscation. He delves into a critical analysis of key concepts in law, jurisprudence, human rights, and development throughout the book. He raises questions and attempts to open up a debate to engage scholars, learners, advocates, and policy-makers alike. And a debate is what we truly need at this point. It is a time to scrutinize what has gone wrong and what needs to be encouraged. The book takes a penetrating look at some of the harder questions- one of many: why has globalization failed many people worldwide?

Professor Sangroula very aptly outlines the reasons behind the struggling and staggering pace of development in South Asia, particularly in light of the colonial experience in some countries and some non-colonial countries of the impacts and importations of laws from colonial countries. Legal transplantation is problematic, to say the least, often because it impinges on the indigenous values of a society and the distinctive ways in which law and society interact. The author rightly observes that a transplanted legal system may create unequal societies and divide society in worse cases.

In addressing the questions of a divided society, he argues for the recognition of essential rights to take human persons to the threshold level of development. Interestingly, in the absence of conditions required to enjoy threshold rights, particularly socio-economic and development rights, a person cannot truly and meaningfully interact with the market, which often determines how economically sufficient they will become. The data is disturbing when it comes to poverty worldwide, especially in South Asia.

The gap between theory and practice can be credited to low public confidence in institutions like the judiciary, the executive, and the legislative body, or even institutions that purport to work on the development agenda. Those struggling in the lower rung of the 'vector of life' do not care how good the policies and plans look on paper or what jargon is used. They care about translating these into action- a creation of a society that hinges on equitable distribution of resources. I believe that it is

the responsibility of academics, advocates, and common persons to push the agenda of transformative change and hold governments and non-governmental institutions accountable for sustainable change.

A widened and human-centric definition of poverty deserves special mention. A statistical view of poverty as a mere shortage of economic resources does not reflect the fuller picture. A narrow understanding of poverty is perhaps why anti-poverty interventions have yielded such unsatisfactory results. The Millennium Development Goals have been criticized for falling short of making rights-based approaches to development and have, to a large extent, informed itself of a narrow understanding of poverty. The author has attempted to show that poverty is exclusion, deprivation, and subordination. He highlights that it is often misguided policies, plans, and inequitable processes of governments of underdeveloped nations to address inclusion needs. It is not surprising that these policies usually benefit a select few and ignore large masses of people, pushing them further into what the author calls a state of *regressive status quo*. Indeed, interventions are only likely to succeed if a holistic understanding informs them of poverty.

In justifying the true meaning of justice as seen through the eyes of those who most need it, Professor Sangroula reflects on oriental perspectives, their rich content, and the learnings they have put forth through thousands of years of unadulterated evolution. As a Professor of Law and Jurisprudence myself, I see value in training the next generation of lawyers and law students in these key concepts of Asian philosophy. They can juxtapose these with Western jurisprudence to get a fuller picture of understanding the law and justice.

This book is a must-read for passionate advocates of change and those who want to understand the best way to make it happen.

Professor Nomita Aggarwal
Former Head and Dean, Faculty of Law, University of Delhi, India

PREFACE

Rawls's foundational idea attempted to define justice in terms of the *fairness demands* of people. He encouraged us to ponder and speculate *in the veil* by abstracting the concept of justice. However, Amartya Sen declined to subscribe to his mystic ideas. He deemed it necessary to depart from the Rawlsian concept of the *Idea of Justice*. He viewed the notion of *Niti* as guiding the Rawlsian concept of justice and demanded that an idea of *Nyaya* should guide justice. As Sen has inspired, South Asian jurists need to take the word Nyaya, which holds a different concept and connotation from the term justice we use daily in our professional works. The *Sanskrit* word *Nyaya* possesses logical and empirical connotations —it applies, broadly speaking, both epistemological and metaphysical methods for enquiring and resolving issues that involve instances of injustice. Under the Vedic philosophical tradition, *Nyaya's* concept demands objectivity and rationality as key elements for the logical validity of any desired consequence. Logically, it emphasizes the perfection of the decision-making process and calls for equality in the matter of everyone's prosperity and progress, objectively—*sarva jana hitaya sarva jana sukhaya* and *sarve bhantu sukhina sarve santu niramaya, Buddhist and Hindu notions of objective justice, respectively*.

Metaphorically, corrective justice requires precision and perfection in the outcome, and for that, the process of justice must apply precise and perfect procedures that are apt to address injustice following the wisdom of 'separating milk from water.' It implies that no dereliction of any form is possible in the process of justice; it is not a formal game of merely. The process of justice must address the problem's cause and effect both. This notion of justice stood as a key theme in the administration of justice in South Asia before the British colonial rule maligned it. The concept of justice rejected the influence of the judge's subjective feelings or understanding. Justice is an outcome emanating from redeeming or correcting injustice faced by the victim. In this sense, the *Nyaya* philosophy stressed the process of justice as a tool for searching for or revealing the hidden truth. Unlike Western jurisprudence, justice in South Asian tradition, as a process, is a means to uncover the truth and address the problem of injustice—it is not a body of subjective and procedural dogmas.

In the context of equality as a tool for procuring a person's security and prosperity, the concept of justice under Nyaya philosophy differs from what is understood under Western jurisprudence. The idea of justice, connoting the sense provided by the concept of *Nyaya*, encounters problems. The concept of justice is narrow as it only confines itself to the bounds of fair and impartial procedures. It implies a sense of stressing the application of the law on equal footing for all, irrespective of their differences. This notion is grossly lacking in practice globally. The inequality gap is widening unstooped and becoming more and more unjust and excruciating.

In my own country—Nepal—economists are tirelessly telling stories of success in *poverty reduction.* They are busy narrowing the inequality gap deceitfully, providing statistics representing a paper game. For them, a person's security and economic prosperity are merely statistical games; they have little concern with an individual's capability to build to prosper and guarantee opportunities and means for prosperity. They never try to reflect on the development as an element of *Nyaya*. Most Nepali economists, influenced immensely by neo-liberalism or open market economy, have been tirelessly arguing that Nepal has been making big progress in lifting people from poverty, which is a sheer lie factually. They tell us stories that only 18 percent of the people of Nepal are now poor (Choudhary, 2018). But travelling near the Kathmandu valley shows how grotesque states of lives people are forced to live in. The state of Nepalese people's deprivation is truly inhuman and gross. Economists' statistics present a situation of calculus magic, not reality.

In this context, being overwhelmed by the contrast between the government's statistics and the naked facts of the people's deprivations, I tried to understand the dynamics of poverty in Nepal and other least-developed countries. My purpose was to reflect on approaches employed by different countries to tackle the crisis of extreme poverty in the lives of common problems jurisprudentially. My observations encountered shocking findings. World Bank's rich and expensive consultants and econometrists' briefings were rife. They teach us that *poverty is a state of lacking food, clothing, housing, etcetera.* Their stories reminded me of chickens and pigs on Nepal's rich men's farms. These chickens and pigs are fortunate to enjoy lavish foods, housing, electricity, and even medicines. Then, an innocent question haunted my mind. What about the state of life of these animals and birds? Are these pigs and chickens rich? Can we now argue that most animals in Nepal are rich because they have enough food and housing?

I realized that *poverty* is not a state of life merely lacking in food, housing, and clothing. Then, why has the lack of food and shelter become the key question seeking resolution? Is there something more than what World Bank's consultants and econometrists are telling us is hidden or unacknowledged? That encouraged me to disapprove of the stories of these people who suggested poverty is merely a sustenance want of people—or people who were in problems because they lacked food and other basic supplies. For me, the *so-called poverty* is just a metaphor or a shadow of a real object.

We know very well that no shadow forms without an object. A person's shadow reflects the physical being of that person. Regarding discourse and interventions of so-called poverty, this *something*—object—has been put into dark or obscurity advertently. Thus, how can one remove the shadow without removing the physical being itself? This simple question inspired me to learn about the reality of deprivation that cripples or crushes the lives of so many people across the world. From my inquiry, the lives of the deprived people of Nepal living in rural villages and city slums manifested three different sets of deprivations —they were deprivation of entitlements to livelihood commodities and advantages (e.g., rights and freedoms to put claims on those commodities), an acute state of social exclusion (e.g., want of liberties to enjoy equality in terms of the *worth* of human person), and the absence of access to resources and opportunities to development (e.g., absolute monopoly of rich persons and State agencies' ownership and possession on natural resources). These findings convinced me that these instances of deprivation were harvests produced by injustices imposed by the State's wrong policies and programs and elites enjoying the State's power.

The poor people are absolutely powerless. They are deprived of access to resources and opportunities for development. They are alienated, thus pushing into a trap of social exclusion. They are subordinated and pushed into marginality, hence depriving the possibility of prosperity and enjoying basic liberties. These three sets of deprivation resulted from the monopoly of a few elites enjoying the State's power over wealth, income, and employment. Meanwhile, a *status quo* is regressively employed to prevent the *powerless* from enjoying entitlements to commodities and equal status within the social structure.

It led me to conceptualize that the *state of deprivation* and the state of *regressive status quo* are meticulously imposed by a few people who unjustly grab the resources, take a share of others' income, and use the law

and justice machinery for their benefits exclusively. I unhesitantly concluded that the food and other supplies crises are merely symptomatic outcomes of the elite's monopoly of power over resources, income, and jobs. That is why I am encouraged to argue that *poverty* is just a metaphor connoting a shadow but not a real being or object. It suggests that no poverty, which is unreal or a shadow, can be removed or alleviated without eliminating the unwanted or causal being producing the shadow.

The real problem needing resolution is the gruesome *state of deprivation,* coupled with the *regressive status quo*. These real beings (objects and events) pose a vicious cycle squeezing the lives of common people. So, the State can lift the people from this vicious cycle only by removing *these three sets of deprivations* and the *regressive status quo*. A progressive State must understand that doing so is the precondition for the desired economic development and social transformation of deprived people.

Thus. I am encouraged to conclude that *there is nothing called poverty to eradicate or alleviate.* The problem needing eradication is called *deprivation* in what people are forced to live in. Understandably, the *so-called poverty* is a symptomatic adverse outcome generated by three sets of deprivation by the governing junta of the State and society; this junta, through all kinds of fraud and deceptions, such as votocracy and open market cliché, controls the State machinery in the pretension of democratic practice. The statistics regarding incidences of poverty, the poverty line, and so-called alleviation can be dubbed as *calculus magic or statistical puzzles* invented to deceive the common people—to throw dust on their eyes. The lives of millions of people worldwide are suffering from various *deprivations coupled with the regressive status quo* that persistently and forcefully blocks the process of change.

States can objectively resolve these deprivations only by applying a theory of pro-social justice equity-based distribution of wealth, income, and jobs. However, States are conceitedly skipping their obligations—rather, they are enlarging the inequality gap. The U.S.A. is a typical example. It's one percent population grabs all wealth and opportunities for income and jobs. Yet, we can assertively claim that this gruesome state of deprivation can be removed, thus freeing billions of people worldwide from the vicious cycle of deprivation and regressive status quo.

My inquiries about development modalities applied by different countries found the development models entertained by Chinese, certain East Asian, and Latin American nations as better options to resolve the vicious cycle.

These models provide a pragmatic theory for an *objectively functional system of justice*. This theory jurisprudentially combines equality, equal protection of the law, and equal opportunity (in the sphere of development) as a fundamental right of every individual with social justice that demands smooth economic growth, the restructuring of the social structure, and the enjoyment of civil and political liberty. This theory stresses the policies and programs giving priority access to people experiencing poverty the knowledge and skills capable of transforming their labor into productive labor. Besides, the theory emphasises the government's obligation to build transportation networks, generate markets and protect natural resources and the environment. Therefore, the state of three types of deprivation can progressively be destroyed, thus leading to the rise of a social structure and governance system that recognizes and protects every individual's *worth of human personality.*

In such a situation, the common people can enjoy the right to obtain an education, produce and transport commodities, and sell and buy commodities without hindrance. In this way, the common people can be progressively empowered to enjoy their human worth because they can enhance productivity as a fundamental right. They may build a system of entrenched interactions with and through the markets. They force the State to enact laws for pragmatic regulation of markets. In most countries mentioned above, the government succeeded in lifting millions of people by pursuing this development model. China lifted 800 million people's vector of life with a level of adequate living standard in a short period of thirty years. (*Xinhuanet,* 6 April 2021).

From this inquiry, I can see a possibility of resolving the problem of deprivations by dividing interventions broadly into two levels—the level of development threshold and economic and social prosperity or happiness. The role of the State to establish the level of development threshold through enacting and enforcing the pro-poor development law and justice machinery is vital and indispensable. The level of development threshold is established categorically by the recognition and protection of the *five first rights*. These rights are key for building the capability of individuals to enjoy all other rights, including civil and political rights. The capability is key as an instrument of enhancing entitlements to essential commodities, as argued by Amartya Sen, for both economic and social transformation. However, the capability presupposes some initial or key rights for its enhancement. As a matter of fact, these rights are portrayed as the *first rights.* They address both the *acute state of income and human worth deprivations.* The *first right*s that the State has to guarantee and enforce unfailingly are (a) the right

to the inviolability of physical integrity (the society must protect each individual from all kinds of violence—*ahimsa*); (b) the right to the inviolability of personal autonomy or personhood (the society must protect each individual from all kinds of inhuman and degrading treatment—must ensure *ahimsa and maryada*); (c) the right to the freedom of choosing professions and style of life (*swotantrata abd swadhinata*); (d) the right to basic supplies such as education, health service, and social security—the education being the most fundamental one— *gyan and arogyata;* and (e) the right to participate or involve in some economic enterprise without failure—the State must either offer resources or skills or jobs—*Karma and seepa*. Success in reaching the level of enjoying these rights establishes the demarcation between life below and above deprivations, which is defined by conventional economics as the *poverty line*.

This approach of infusing fundamental rights and development endeavors suggests that interventions for lifting people from deprivations are not the charities of the Government—they are rights of the people that are being unjustly deprived by some people enjoying the State power or the hierarchy in society's structure. The issue of deprivations is an issue of social and social inclusivity, collectively defined as social justice. Therefore, no freedom deprivation of millions of people is possible by eradicating the so-called poverty until and unless the yokes of an unregulated market, which grants a monopoly to a few elite people in the society, thus besieging the State.

This book is the outcome of my experience of traveling to Nepal and observing people's lives. It includes my impression and reflections on the failure of the Nepali politicians, the State's bureaucracy, and the State's institutions, including the judicial system. State's so-called development initiatives have grossly failed to address the gruesome problems of economic deprivation, social exclusions, and corruption in bureaucracy, politics, and policies. This failure of the State can be dubbed as *akarmanyata* (inactions caused by omission) of politicians and the people's *obsession to* live in *a state of regressive status quo.* The book attempts to critically analyze the obsolete theories of justice, the problems of a small developing country like Nepal, and the impacts of transplanted legal and justice systems. There are frequent repetitions contextually, and they are intentional.

In the recent addition, I have added more ideas and analyses. Some ideas have been erased because my further observations dictated something different. Many examples and illustrations have been added to clarify

assertions, claims, and arguments. After the first edition's publication, I had the opportunity to visit China's Tibet, Sichuan, and Yunnan provinces, where the economic rise is unprecedented. The change or transformation in people's lives in those provinces is amazingly progressive. During those visits, I had an opportunity to observe the Chinese model of development that connects human rights as an essential component of the development goals. I have added those experiences in the present edition. These experiences have led me to argue that 'the South Asian development modality' requires decolonizing the legal and judicial systems. Social justice should be the driving force behind development initiatives and the system of justice.

We all know that South Asia is one of the world's most beautiful and rich landscapes. Particularly speaking, Nepal represents 0.01 percent of the world's population but 3 percent of the world's natural resources. Despite that glaring fact, the people of Nepal are poor like other South Asians. It means that South Asia has problems. Here, people argue more and work less. The liberal democracy in South Asia has become an instrument of dividing people and enjoying the State's power for private purposes. People are divided minutely in South Asia vividly. Theism has turned into *superstition,* and religion is a mantra for deceptive politics. South Asians look to the Gods to solve their problems, including private gains. Satirically speaking, their power of arguments is so strong that they can transform geniuses like Krishna, Buddha, Jain, and others into *Gods*. They donate more to the construction of temples but none or very little to schools. They don't want to pay the tax but want degrees from the university so they can come home without studying. They think that everything Western is possible to copy. The colonial system in geography is abolished, but it is nestling in mind. South Asians are ready to work as *street cleaners* in the migrated countries but not on cultivating farms in their own country. Nepal suffers more from these problems. Many leave schools because of the charm of becoming a *chowkidar* (a home security guard) in India.

The impact of these Nepalese practices on national economic development is worrying. No development initiative can succeed without changing the rudimentary, pseudo, and conservative mindset of people who disregard labor and its enhancement as a departure for economic and social transformation. The politicians in South Asia ruthlessly exploit the general population's these non-productive and menacing characters. The political leaders and bureaucrats use the nation's scarce revenue for their private luxury and benefit. The political leaders and government employees shamelessly commit corruption but are not tired of making a pilgrimage to

worship gods and goddesses a great deal of time every day, month, and year.

Many of these habits are products of the colonial era when South Asia was plundered, leaving today's gruesome deprivations. Understandably, the gruesome situation of deprivations has roots in colonial history. But South Asians are happy to stride in the footsteps of the colonial legacy. Adopting an *objectively functional theory of* justice seems difficult without coming out of the shell of the *Bhagyabad against Karmabad,* a theory that advocates *luck is only obtainable* but not what one expects to achieve (*lekheko matra painchha dekheko paidaina*—your destiny determines your fate). This interpretation of life and reality by mischievous elite Hindu pundits is destructive, which goes against the original thought advocated by *sastras* (early philosophical scriptures).

This nihilist worldview about life is too deeply ingrained in people's thoughts in South Asia. As a matter of fact, the people's wishes to acquire good life by praying and worshipping are bigger than undisturbed belief in efforts and labor changing life. A significant number of my students prefer to go to the temple rather than the library before the examination begins. In Nepal, libraries are the venues that are visited less by people. My brief observation shows the ratio of people going to the temple and library is 98 and 2 percent, respectively. Only a very negligible number of lawyers I have seen in Nepal prefer to spend a vacation in the library than visiting Rameshor (a pilgrimage site in north India), Muktinath (a pilgrimage in northern Nepal), and so on. Learning and work are two less preferred activities by most educated people in Nepal.

The role of education is vital to changing the face of South Asia, but it is too weak in terms of quality in raising productivity—this education system is a gift of British colonial rule. After 1990, the neoliberal economic drive further weakened the quality of education in South Asia; it pushed South Asian education toward the race of commoditization and commercialization. The commercialization of education proved extremely destructive to the South Asian socio-cultural value systems and instigated the mass brain drain. The commercialization of the education system turned teaching and learning activities into a commodity—students joined institutions for degrees, and many of them took it as a license to emigrate to Western countries.

In the wake of the commercialization drive, education institutions in Nepal turned into 'factories' to produce free-of-cost human resources for the developed countries. Currently, over sixty thousand students emigrate

abroad, thus causing billions of rupees to fly out of Nepal annually. This magnitude of migration is manifestly harmful to the national resources, both financially and humanly. Such migrants take a large amount of time to pursue their education abroad, and the larger part never return home.

According to some reports, the mass exodus for education abroad caused the flight of over 500 million USD out in 2066-67 BS (2010-11AD). This amount has now ballooned to 1.5 billion USD. If we compare it with the total Nepalese education budget for the same fiscal year, it is more than 40 % of the total national budget for education. This migration trend is causing irrecoverable adverse impacts on the Nepalese economy, resulting in an alarming situation. (Dhungel-Upadhya, et al. 2013). The trend has been ever-increasing since then. It may turn the country away from the required human resources for development endeavors in the long run. In Nepal, parents send students to native institutions only to prepare for their migration abroad. As a result, most students consider their studies to be formal.

Many parents enthusiastically encourage their children to go abroad as a matter of family pride. Since their children are not going to stay in the country, they even make a plea that I accept an additional fee and allow their children to stay home and do less homework. Very few parents encourage institutions to involve students in research activities; involving students in research activities is considered troublesome. Many of them request that we exempt their children from research assignments in far districts mainly because they have no habit of eating local foods. Most young people cannot speak their native language. They avoid eating fresh vegetables and fruits; they love products from multinational corporations. A misconception has become a religion—they think an institution charging a higher fee is better. Neo-liberalism has spread neo-colonialism in a country like Nepal. At least, this trend can be defined as a cultural hegemony of the developed Western countries.

In the first three chapters, this book specifically focuses on these issues, particularly the several forms of deprivation. The development threshold theory has been stressed as a tool to improve the economic condition of deprived people. These issues have roots in the failure of the conventional development model that suggests that the main cause of poverty lies in low income, less than 1.25 US dollars. Economists tend to play with statistics and ignore reality. Hence, the development threshold theory, taking human rights as a foundation of development, promotes development economics, where the State has to play a pivotal role in ensuring development in the

vector of life as a fundamental right.

South Asia inherited legal theories from the common law system. The colonial regime in India introduced the common law system as a part of the design to break the backbone of Indian society and ensure the sustainability of colonial rule. Britain's education system was brought to India to break the cultural backbone of Indian culture. In Lord Macaulay's words, this design was necessary 'to form a class of persons who would have Indian in blood and color and English in taste, opinions in morals and intellect.' The legal and judicial systems meticulously replicated the British system, including the jury system. The British legal system stressed the legalist-centralist theory. This theory was conspicuous. It ignored to pay respect to the Indian episteme. The colonial regime intended to destroy the system of law and justice that evolved epistemologically over the centuries. The investigation of the Licchavi and Sakya histories uncovers a comprehensive functional system of law and justice. The *Vizzi Sangh* (a confederation of eight *Janapad* with a system of elected kings) during 500 BC had an eight-tier-judicial organization to ensure that an innocent is not wronged or an inappropriate sentence punishes a convict. With the advent of the Licchavi rule, Nepal also inherited the early Licchavi judicial system, which contributed to enhancing the one established by Kirat rulers.

Nepal imported the colonial common law system after 1951. Most of the legal institutions and principles practised by the common law system in colonized India were imported grossly, thus destroying Nepal’s indigenous system by transplanting the common law values and principles. As Sylvian Levi and Hudgson have described, Nepal’s judicial system was fairly speedy and fair, though they described many other aspects prejudicially. However, the transplantation failed grossly; it saw catastrophic consequences. The latest incidents of the Supreme Court of Nepal are glaring examples. Nepal’s judiciary is crippled by corruption, delay in the process, and discrimination against the poor masses. People's confidence in the system of justice has dropped to the lowest minimum level.

Two fundamental reasons caused the transplantation to fail. The legal system of every society reflects the mood of the people living in it, and every legal system has its core concepts from which a specific legal culture evolves and emerges. As argued by Karl von Savigny, the legal system is organic and grows out of the common impulse of people (he termed it *‘volkgeist*.’) The mood of society is reflected in its culture, and the culture is reflected in legal and judicial systems. It implies that no legal system can stand against society's general culture; it cannot receive values and

principles from other systems without breaking its milestones.

For example, Nepali society did not traditionally accept litigation as a regular dispute resolution system prescribed by the common law procedures. Nepal practised a system of *Panchali (Panchyat),* a body of five villagers' mediation or arbitration. In this system, legally and morally adept persons besides two persons knowing facts would be included. Over time, many judicial institutions emerged that practised an inquisitorial justice model. It was the duty of judges to investigate facts and evidence. The indigenous system was distinct from what was introduced by colonial rule in India.

Based on the accusatorial model, the litigation system is considered unfavorable by the general people, even today. The general psychology is that litigation does not contribute to fostering or preserving harmony or cohesion in society. It rather divides society. This psychology has been encouraged by the Nepali society's practice that traditionally denied the significance of the legalist-centralist approach to the legal system. The Nepali psychology of law and justice relied on epistemological notions. The Nepali legal culture developed quite differently, therefore. It is quite different from the British common law legal culture that stresses the importance of litigation as the main means of dispute resolution.

Therefore, Nepal transplanted the British common laws but could not import British legal culture, which was rooted in the culture of the British people. Understandably, the failure to import culture rendered the British legal system a failure in Nepal. This failure is costly; this failure yielded the causes leading to the lack of confidence of the general people in the current judicial practices in Nepal. The untransferability of British legal culture is a fundamental reason for the failure of the British common law system in Nepal. The failure situation is more acute in India; millions of cases have been pending for several years.

Consequently, South Asian societies face a serious trap of the transplanted legal system. Its failure has yielded several seen and unseen impacts in South Asian cultures. The loss of people's confidence in the current system of justice is one of them, and it affects the entire system of governance. For instance, an unbelievably big volume of pending cases in the South Asian courts manifests a poor condition of protecting people's rights. The failure in the delivery of justice is a major reason behind the failure of the governance system, either. The book has attempted to reflect on this issue in the last chapter.

The book accumulates information largely from experiences and observations in the past, particularly the experiences of my fieldwork with students in several districts. As a part of ongoing academic activities, I had an opportunity to observe the function and standard of the Nepali legal system and the rule of law work in society. I had several opportunities to visit local communities in Nepal, Bangladesh, and Denmark. I spent months with students in Nepal's remote places. I engaged in mediation training and research on the impacts in more than three dozen districts in Nepal. I had occasions to observe local mediation processes directly. I found such processes working effectively under the care of local community leaders. I also had an opportunity as the legal advisor to the Kathmandu Metro-City, where my main job was to facilitate cases lodged before the Mayor; the mayor entertained jurisdiction in many matters.

I deeply observed the system of *Salish* (mediation practice) practiced by villages in Bangladesh. I worked as a residential trainer in a three-week mediation training organized by the South Asian Law and Human Forum in Bangladesh. During this training program, I visited remote local communities in Bangladesh with a South Asian mediation trainees' group as a part of the training. I benefited from observing the local Salish functions and popularity in that course. Also, I entertained opportunities to mediate dozens of disputes. I observed the culture of mediating disputes in Sri Lanka. And I saw that it worked tremendously successfully. The social sanction or the force was a major element in securing sustainability of the mediation awards in Bangladesh and Sri Lanka, as in Nepal.

These field studies and works gave me an immense chance to explore the legal culture or mood of people in these societies, which always stood un-detached from the general psychology of people to maintain peace and harmony among them. I noticed those common people possessed a great sense of compromise in settling disputes and preserving social harmony and cohesion—the sense of compromise yielded from religious faith, moral values practiced, and the necessity of living in peace and harmony. The feeling of mechanical solidarity among people played a great role in determining the appropriate 'means and model' of dispute settlement. The settlement model or habitat, the situation and types of available resources, and the level of socio-economic development of the given place, among many others, also played a key role in selecting the means and modes of dispute settlement. The composition of the people's masses (the community) also played a crucial role. The element of language is not less important; it is vital sometimes.

All these elements or factors, which are active in society as a social function and change dynamics, collectively constitute a unique episteme of the given society. This theory emerged as a core understanding from my enduring research activities in the grassroots communities' mediation practices as a fundamental form of legal culture. I spent hours debating with my students and villagers before concluding that the episteme is fundamentally relative to society. The social episteme on which the legal culture of the society is founded differs in societies because of their peculiarities. If we try to discern the dynamics of the society's legal culture, we may see distinctly how the cultural system of the society generates its unique legal culture.

The different population groups may share certain cultural behaviors as an umbrella culture in a society. However, each particular ethnic, linguistic, or caste group may possess a peculiar cultural typology that may somehow differ from others. For instance, in Tanahu, Palpa, and Aarghakhachi (Nepal district), a Muslim community has lived with the non-Muslim majority population for generations. They are called *hill Muslims* and follow the Islamic faith. However, this Muslim community manifests a categorically different cultural mood than other Muslim communities living in Nepal's south plain lands. While they hold the same Islamic faith, they embody different cultural traits or behaviors. Due to cultural mood and language similarity, no Muslim community living in these districts has conflicts with the majority population groups with distinct religious faiths.

Let us connect two issues in discourse—litigation and episteme. Episteme, in my opinion, is the cultural web of people. Episteme is inevitably a determinant of the legal culture of the society or community—the legal culture of the society has the imprint of the social episteme. Therefore, no law can function objectively, disregarding society's episteme. According to Marx's method of interpretation of social structure, the legal system is a superstructure based on the epistemic peculiarities of society. We have no reason to contradict his idea. However, it does mean that the legal culture is stereotypical and a static phenomenon like some cultural taboos of the society. Legal culture, like the legal system, changes slowly and evolves organically. This assertion helps us conclude that legal culture and legal system are dependent variables—they are not independent variables. The legal culture and legal system cannot resist the influence of the change in the broader framework of the social episteme. It means that changes in social episteme and legal culture are mutually reinforcing forces.

In a district in Nepal, I encountered an event that manifests a typical cultural mood of people disapproving of litigation as the main instrument of dispute

resolution in Nepal. Two families had happily decided to get their son and daughter married. Most preliminary rituals of marriage had been consummated. However, the boy's father decided to withdraw from his commitment because he later learned that the girl's father was engaged in court litigation of fraud. Being involved in court litigation was considered a stigmatizing factor. Thus, he rescinded to continue the marriage process.

As a means of dispute settlement, litigation is not an indigenous practice in Nepal. The prevailing mentality of people towards litigation shows this. Many other instances corroborate this assertion. In a district, I found a practice in a community belonging to a specific ethnicity of ending marriage by employing a decision of village elders. The process followed a series of counselling and consultations. Before they passed a verdict, the village elders ensured a package of compensation to the wife for the dissolution of the marriage. Couples witnessed by the verdict givers then signed a written paper declaring the dissolution of marriage. Legally, these documents were not valid, and the man who married another wife had a risk of being prosecuted for polygamy. However, our suggestion to go to the court for a divorce proceeding was rejected by the community members outright. They questioned the authority of the State in private matters of the family. They argued that the divorce from the court would bring stigma or a negative image to the family and the values of the community.

Litigation in Nepal is not confined to two litigants. It becomes a public affair between families and clans, and it grows to encompass a larger mass of relatives and the community itself, thus creating a big void. This might be why Nepal has an incomparably smaller volume of cases in courts than India and Bangladesh. Most importantly, Nepalese courts have recently adopted a practice of following mediation counselling before the litigation begins. This practice has been adopted as a mandatory rule in Nepal's courts.

What follows from the discussion is that the enforceability and legitimacy of a legal system are determined conceptually by the socio-cultural factors of the society called episteme. The transplant project fails mainly because of this factor. Nepal's mission of legal reforms has yielded no desired results for a long time. The reasons are not explored or examined, however. The people of Nepal have very little faith or trust in the existing legal and judicial system. The image of the legal profession is at a low ebb, either. The judicial system is facing a critical observation of people. It faces allegations of corruption and is seeing a sharp decline in public confidence in the justice system. It is commonly viewed that judges of Nepal only judge but do not deliver justice—justice is measured by its ability to address injustice. The

system itself victimizes poor people. Asian concept of justice does not stress the principles of justice; it stresses the facts of injustice. Injustice epitomizes an objective reality, whereas justice is a perception. The commoners look for the 'removal of injustice' as what is called justice. Why has the mission of reforms gone to the adverse extreme instead of alleviating the situation?

In my opinion, the answer is obvious; it is a manifested truth that no legal or judicial system can be improved or changed in disregard to understanding the legal culture of the society, that is to say, that no system of law and justice can work against epistemic realities of the society. Neither the reform of the legal and judicial system can work in disregard or oblivion of Nepal's societal episteme.

Let us exemplify this assertion. Like other societies, Nepalese society is dynamic. It is rapidly changing and transforming, breaking the state of the *regressive status quo*. The diverse ethnic-cultural typologies have been mixing unprecedentedly in the wake of the phenomenal migratory events across the country. The changes taking place in society unleash conflicts, disagreements, and tensions. As a result, society is divided. The breakdown of the traditional mosaic becomes a regular feature. Nepal's present is a glaring example.

Not unusually, thousands of disagreements and disputes happen every day. However, society resolves an enormous volume of such disputes. The legal culture consists of precisely defined legal concepts, which are not always properly conceived and articulated. The law may keep changing to address the contemporary demands of society. However, the legal concepts function enduringly. We can take the marriage law as an example. It has been changing consistently over the last fifty years, but the marriage concept is the same—the Nepalese marriage law concept has not yet recognized marriage as a contract. The Nepalese legal culture or marriage law concept still considers marriage an important moral institution besides its legal significance.

As indicated above, many disputes are settled in Nepal without moving to court. Overwhelmingly, the disputants or the parties of the disputes themselves settle a larger volume of disputes. We are aware that there are countless disputes in trade affairs, financial transactions, real estate business, share market, family relations, neighbourhood management, transportation, and so on. Over 90 percent of these disputes are settled by the negotiations of the parties or disputants themselves without notice of the State. Our legal culture advises us that pulling the issue too far is unworthy

and unproductive. According to our legal culture, each party is prepared or volunteers to sit for the dialogue with a mindset to bear some loss or disadvantage. The guiding principle for settling dispute suggests that one should not be adamant: a maxim '*afano goruko baarai takka'* (not only can your bull be sold at better prices, but another's bull can have a good price also) follows morally suggesting the parties that they must accommodate each other's genuine interests. It implies that one has to be prepared to compromise. Therefore, every dispute is not pulled to the court or formal body. It is a prevalent notion that litigation harms both parties; it is a guiding principle in Nepal, rooted in our vast jurisprudence that evolved over 5000 years.

The concept of litigation is indeed a western concept transplanted in Nepal. However, our education system is solely concerned with the mission of preparing lawyers for litigation. Our legal education prepares judges solely for litigation. It is a tragedy that Nepal has not yet developed legal education. Kathmandu School in Purbanchal University introduced a new legal education system in 2000, intending to prepare a new breed of legal intelligentsia, taking the alternative approach to the justice system. It has been successful in influencing the nation, somehow. However, I am suffering tremendously personally from the envy of the legal fraternity for my relentless efforts to challenge the dogmatism of the system of justice. Many people attempted to prevent my access to other universities and government institutions. Yet, I continue to struggle without concern for consequences.

At some points, I had to challenge such behaviors vocally, thus being dubbed by someone as arrogant and pushy. At that point, I realized that criticism does not suffice to break the nut; many rational new principles should be unearthed to convince society about the need for a change in the justice system. This book is a part of that mission. Two books, as a result of for many years, *Decolonization of Jurisprudence* and *Decolonization of Constitutionalism,* have recently been published as a part of this mission.

Our justice reform mission has not seen the actual reform sectors. It is only engaged in the restructuring of the structural mechanisms of the system and is trying to strengthen the concept of law or legal culture, which is not peculiar to Nepal. According to Savigny, alien law can lead society to dissolution as injecting unmatched blood kills the receiver. The Asain legal system is fundamentally based on the legal concepts of promoting harmony or cohesion against the state's coercive force. There are some innately evolved philosophical principles on which the legal cultures of Asian

societies are founded. These principles include:

Family is the unit of society; hence, individuals' affairs are not supposed to engender adverse impacts against the integrated family system.

Binary harmony or unison, as opposed to the binary opposite, is the guiding philosophical principle in Asian societies. The principle of binary opposite classifies an object or phenomenon into two aspects: *logo* (important or central) and *non-logo or* peripheral. It means that each object or event has two aspects. The binary opposite notion holds that human beings have two aspects: male and female. The male is the logo, and the female is the peripheral. The day is logo, and the night is peripheral. The majority is the logo, and the minority is peripheral. In the justice system, this concept is the underlying principle by which litigation receives prominence in Western jurisprudence's legal culture or legal concept. Asian societies, on the other hand, recognize the principle of complementarity of two aspects. For instance, males and females are not opposite, as logos and peripherals are. *Bhagwat Gita,* a seminal scripture under *Vedic tradition*, has described these two aspects as *purusa and prakriti,* combining a new substance or object. It means that the Asian justice system stresses the element of unison or harmony. It is considered that litigation divides relationships. The litigation for its character of bifurcating is not culturally acceptable to the Nepalese and other Asian societies. This principle governs the legal cultures of Asian societies.

Historically, in Western jurisprudence, the penalty or punishment provided the force to the law for its enforceability. Justice was considered a prerogative of the sovereign, the King. The king was considered a representative of the divine force, so he was not accountable to the people. In litigation, the objective of the process was to identify a lesser bad among two bad guys. It emerged out of the system of *duel or a war of wager.* The victorious was excused, and the loser should have paid the consequences. The collection of revenue was one of the motives behind the litigation.

Since the sovereign (king) was supreme, he could judge by conscience. He possessed no duty to deliver or dispense justice as truth. Confession was used as a tool for concluding evidence. In the Asian justice system, the truth in the name of justice was to be revealed without contest. Hence, the parties to the dispute had the right to bring their evidence to light to prove their causes or innocence. Here, it is not the judge who decides the case but one of the parties who brings evidence or truth into the light.

In the legal culture of Nepal, the key responsibility of judges is to safeguard the purity of the procedures of justice. For instance, King Prithiwi Narayan Shah ordered to refrain strictly from depositing penalties into the State's treasury because the chance of injustice concealed in an unknown form is always possible. In such a case, the penalty acquired would taint the State's morals and corrupt the State treasury. Conceivably, ethics and morality have always worked as a backwater of the justice system. For a large part, the milestone of Western jurisprudence disregards the essential role of morality in the dispensation of justice; it considers the law as an adequate tool to dispense fair justice. Western jurisprudence regards without hesitation that a law may be immoral but still legal. Conversely, the Asian traditions of justice refuse the legality of the law, which contradicts morality.

Therefore, Nepal needs to consider that reformation or improvement of the legal and judicial system is impossible if the native legal concepts and legal culture that significantly influence society are ignored or unheeded. The Nepali judiciary and jurists have yet to be adequately informed of this reality. The domination of the principles and values of the common law system has overshadowed our society's understanding of the legal intelligentsia. The problem in India is too chronic. The Malimath Committee, 2002, has vividly reflected on the issues the Indian legal and justice system has been forced to encounter. The report reveals over 30 million pending cases nationwide; therefore, the efficacy of the current legal and justice system is doubtful. This situation in Bangladesh and Pakistan is no less severe. In Nepal, the common people's distrust of the system of law and justice is acute. Indeed, the legal system has been a boon for the corrupt bureaucrats and politicians to plunder the nation.

Through this discourse, I intend to justify an argument that no law can have an efficient and meaningful development interface if it does not carry on the indigenous legal concept or is irrelevant to the legal culture of the society. Legal culture functions in society as an expression of people's common impulses. Thus, understanding the failure of development and the legal system requires a closer epistemic inquiry. No study of law and justice can offer solutions to the problem or its true understanding by segregating it from social reality.

The legal system is not a body of formal rules to discipline the population, as Hobbes, Austin, and many others argued. Pragmatically, the body of laws constructs individuals' capabilities to expand their access to added socio-economic advantages rather than suppressing their choices and freedoms. Undeniably, the purpose of the law is to build and enhance people's