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CORRESPONDENCE

NEPAL BAR COUNCIL

Kupondol, Lalitpur, Nepal.

Tel: 01-5260964, 5261884

E-mail: info@nepalbarcouncil.org.np

NEPAL BAR COUNCIL LAW JOURNAL 2020

Editor
Rom Bahadur Thapa

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MESSAGE

The Nepal Bar Council Law Journal (NBCLJ) has been the trusted voice of the legal profession for more than 25 years. In this avenue, it is my pleasure to introduce this new volume of peer reviewed NBCLJ bringing together the authors of wide breadth of expertise of different thematic legal issues and justice system of Nepal. I found the journal dedicated to express views on current legal issues, thereby generating a cross current of ideas on emerging matters. Eminent scholars have contributed research based articles for publications in the Journal.

Nepal Bar Council is a statutory body that regulates and sets professional standards in Nepal. Since its inception, it has performed regulatory function for legal practitioners by prescribing standards of professional conduct and etiquette. It has indeed played a very important role for enhancing the capacity of legal practitioners in Nepal. However, Nepal Bar Council has still long way to go in terms of developing the curriculum, establishing research and training centers, and expanding legal education, the major one. I believe that the publication of this journal may be a valuable resource for legal practitioner as well as others as well. As the chairperson of Nepal Bar Council, I want to assure that the NBC Law Journal will be developed on par with international standards and made accessible to all over the world in near future.

This Volume of journal is the result of a long process and has been made possible through the invaluable contributions of a number of people. I extend special thanks to the Coordinator Prof. Dr. Laxmi Prasad Mainali and members of the Publication Committee of this volume of journal who worked tirelessly to produce this publication despite the challenging Covid-19 pandemic situation. I also underline my appreciation to Editor Mr. Rom Thapa, authors of the articles, as well as peer

reviewers for their insightful efforts, academic work and remarks respectively. My warm thanks and appreciation to Ms. Mona Singh, Secretary of Nepal Bar Council, for her immense effort in coordinating all the persons involved in this publication process and all the staffs of the Nepal Bar Council equally deserve appreciation for their kind cooperation. I hope this volume of journal will have particular appeal to all interested readers such as students of law, judicial officials, judges, legal practitioners, legal researchers and academicians as well as contribute to prosperity of legal education in Nepal.



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Khamma Bahadur Khatri
Attorney General
Chairperson, Nepal Bar Council



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मिति: August 2, 2021

केन्द्रीय कार्यसमिति
(२०७६-२०७९)

अध्यक्ष
चण्डेश्वर श्रेष्ठ

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MESSAGE

It is my pleasure and privilege to announce the publication of the Nepal Bar Council Law Journal (NBCLJ), a well-established publication in the legal field of Nepal that offers law scholars a platform to engage in critical discussion on varied issues of domestic as well as public and private international law. This volume of the journal also presents timely information, analysis and opinions from authors including Law Professors, Lawyers, Investigating Officers, Judges and others. This volume of NBCLJ also holds a special distinction among academic journals for being peer-reviewed journals. I believe that this volume of NBCLJ provides a fascinating and insightful read that will stimulate critical academic thought and push the frontiers of academic literature in contemporary domains of Nepalese Law as well as international law.

The Nepal Bar Council Law Journal has attained prominence in the publication of scholarly articles on legal issues, with particular focus on Nepalese laws and practices to provide critical discourse on recent trends in case law and legislature. I am glad to share that Nepal Bar Council has recently approved a First Five Year's Strategic Plan (2021/22-2026/27) with the aim of enhancing rule of law, capacity and professionalism of legal practitioners, providing quality legal education in Nepal, and strengthening the institution of legal resources, etc. This is one of the milestone achievements for the institutional development of the Nepal Bar Council. For achieving the goal of the strategic plan, the quality publication of NBCLJ can be a special contribution as international standard legal resource material. I also assure continued mutual and collective efforts from the Nepal Bar Association and Nepal Bar Council to promote and regulate the activities of the law practitioners in a more professional manner in the future.

This journal is the product of collective work and effort. I am greatly thankful to the team that undertook this work: Prof. Dr. Laxmi Prasad Mainali, Coordinator of the Publication Committee; Ms. Mona Singh, Secretary of Nepal Bar Council; Editor Mr. Rom Thapa; as well as generous and insightful guiding hands: Sr. Advocate Dr. Chandra Kanta Gyawali, Councilor of Nepal Bar Council and other Councilors as well. I hope that readers will find this volume of NBCLJ stimulating and insightful.

Sr. Advocate Chandeshwor Shrestha
President, Nepal Bar Association
Vice-President, Nepal Bar Council

FOREWORD

The COVID-19 pandemic has significantly disrupted every aspects of human life, including daily official works. This public health crisis has caused severe human suffering and loss of life worldwide. Despite these suffering and obstacles, we are presenting the 19th Volume of peer reviewed Nepal Bar Council Law Journal - 2020. This Volume includes total 34 scholarly articles that are relevant, critical, research based, contemporary as well as practically significant and covers different aspects of contemporary legal field. The articles are written by prominent professors, judges, government attorneys, investigation officers, judicial officers, legal practicers, etc. I believe that coverage on contemporary legal issues by these prominent authors from different justice sectors attributes a unique experiences to exchange knowledge on diverse legal issues.

Maintaining the quality of peer reviewed journal is not an easy task for the Publication Committee. We have followed the due process standards of peer review journal. The articles that are submitted to Nepal Bar Council are first assessed by the editor who decide whether or not the article is suitable for peer review, in relation to the scope of the journal and the quality of the article. If the article is found suitable for peer review, the article is forwarded to independent experts for a blind peer review. While sending to experts, the name of the author is removed from manuscript under review process and reviewers name is also remains anonymous for the author as well. Based on the comments of the reviewers, the editor corresponds with the author with comments to revise. Due attention has also been paid to plagiarism of article by using a special software. This year, the article that is found copied from internet website is also strongly rejected. The articles that are published elsewhere or submitted for publication elsewhere are also disqualified.

This year onward, the Publication Committee also takes an opportunity to suggest Nepal Bar Council to form a permanent functional publication department in Nepal Bar Council Office. This would encourage prospective writers to work on their articles without time constraint and submit to Nepal Bar Council. It is also worth to suggest that Nepal Bar Council may develop the roster of peer reviewers as per respective areas of law so that the Publication Committee can use the peer reviewers from that roster. I believe that this working pattern will help to advance the quality of the journal in coming year.

I, as the coordinator of the Publication Committee, would like to thank all the forces with us, for all their cooperation and enthusiastic involvement in this blooming endeavor. First and foremost, I am delighted that all the peer reviewers accepted our request to review the article and all have provided constructive feedback on respective articles which have significant contribution on shaping the quality of journal. At the same time, I would like to thank Advocate Mr. Rom Thapa (Ph.D. Scholar in Faculty of Law, Tribhuvan University), editor of the journal, for putting his fullest effort in editing this Vol. of journal. I express my gratitude to Ms. Mona Singh, Secretary of Nepal Bar Council, for her coordinating role and constant effort for the publication of this Journal. Similarly, Senior Administrative Officer Mr. Bidur Prasad Sapkota, Record-keeping Officer Mr. Suresh Maharjan and concerned staffs of the Council also deserve many thanks for their technical support. Lastly, as the Co-coordinator of Publication Committee of the Nepal Bar Council Law Journal - 2020, I would like to extend my sincere gratitude to the members of Publication Committee, Chairperson, Vice-Chairperson and Councilors of Nepal Bar Council.



Prof. Dr. Laxmi Prasad Mainali
Coordinator, Publication Committee, Nepal Bar Council
August 4, 2021

EDITORIAL NOTE

Despite the COVID-19 pandemic, Nepal Bar Council has come forth with another volume of *the Nepal Bar Council Law Journal (NBCLJ)*, one of the leading journals in the fields of law, that focuses on the discourse of various issues concerning contemporary legal developments in Nepal as well as global. I, as the editor of the Journal, feel privileged to be a part of it. This year, a total of 50 articles covering different domains of the law were received for publication. From the immense number of articles received, a proportion of manuscripts were screened for peer review – with a focus on originality, content coverage, the authenticity of source used, scientific writing, the rationale for publication, and methodological precision. After having prescreened the article submitted, the articles were forwarded to a peer reviewer. The comments received on the perspective article are then forwarded to the author. Revision of article based on comments provided by peer reviewer is also cross-verified by the editor as well. More importantly, the sources cited in articles have also been discussed with respective authors to make them more authentic. I believe, this rigorous editorial process has helped to standardize the articles published in the *NBCLJ*.

The outcome of this volume of the journal is the cumulative works of all individuals including Staffs of NBC, chairperson, and councilors of NBC, Coordinator, and members of Publication Committee, Secretary of NBC, etc. I would like to extend my gratitude to Prof. Dr. Laxmi Prasad Mainali, Coordinator, Publication Committee, and Ms. Mona Singh, Secretary, Nepal Bar Council, who always supported me in every step of the editorial journey. Without their coordination, the editorial journey of this volume of the journal wouldn't have been easy. Similarly, staff of Nepal Bar Council - Mr. Bidur Prasad Sapkota, Mr. Suresh Maharjan, and other staff of Nepal Bar Council, deserve many thanks for their invaluable support and assistance. Finally, I would like to thank Nepal Bar Council for believing in me and entrusting me with the editorial work of the esteemed journal for five consecutive years.

Thank you.

Editor,
Advocate Rom Bahadur Thapa
August 5, 2021

Contributors

Dr. Laxmi Prasad Mainali, Professor of Law, serves as a member of the teaching faculty of the Law, Tribhuvan University, Nepal since 1988. He also worked as a Head of Central Department of Law, Tribhuvan University in the year 2017-2019. He also has a Ph.D. degree on "A Critical Study on Juvenile Justice System in Nepal" from the Faculty of Law, Tribhuvan University. He is a Senior Advocate of the Supreme Court of Nepal. He is the author and editor of over 10 books, book chapters, journal articles and case commentaries. His first sole-authored book "Crime Related to Untouchability in Nepal" was published in 2010. His second sole-authored book "Juvenile Delinquency: Concept and Theory" was published in 2012. His third sole-authored book "Juvenile Justice System in Nepal" was published in 2016 and was awarded by Lawyer's Club, Kathmandu and Shankarlal Kedia Foundation as an Excellent Law Book Prize. Sr. Adv. Prof. Dr. Mainali has written more than five dozen research-oriented articles, are the most popular contribution in the field of Law and child justice. He is also an elected Senate Member of Tribhuvan University. Recently he is appointed in Nepal Law Commission as Vice-Chairperson by the decision of the Council of Ministers.

Prof. Dr. Kumar Ingam, a Senior Advocate, has completed his Doctor of Philosophy (Ph.D.) in Law for the thesis entitled "Role and Impact of WTO for the Economic Development of LDCs" and Master's Degree in Business Law from the Faculty of Law, Tribhuvan University, Nepal. He has been teaching International Trade and Arbitration, Fiscal Law, White Colour Crime in both B.A.LL.B and LL.M. as an active faculty since the inception (from 2000) of Kathmandu School of Law (KSL), Purbanchal University. He had served for six years as the Principle of KSL. Before joining KSL, he had served in Nepal Law Campus and Mahendra Ratna Multiple Campus, Ilam as a law faculty, Tribhuvan University, Nepal. He has published books on Trade Law, Roman Law as well as many research articles in law related journals. He has also conducted numerous research and presented at National and International Conferences. He has also participated as a member of the delegation in the visit of Federal Supreme Courts and Provincial Supreme Courts, Appeal Courts of the USA and Canada, China, and visited the Universities of Bangladesh, China and India, Supreme Court of Bangladesh, Denmark and High Courts of India.

Dr. Chandra Kanta Gyawali, a senior advocate, completed Ph.D. Degree in Constitutional Law in 2011. He teaches Anthropology for the Master's Degree Program at Tribhuvan University since 1997. He has carried out report writing and research work with UNDP, UNICEF, ROHLAR, ADB, UNESCO, OHCHR, and BISS

in Bangladesh. As a Constitutional and Anthropological Expert, he has written dozens of books and more than 2000 research articles. He has contributed immensely in the area of the Constitution, Federal System of Governance and Local Governance, Constitutionalism, Constituent Assembly, Federalism and Electoral Reform and Judiciary. He has presented more than 2100 papers to CA Members, politicians, Judges, Lawyers, Government Officials, Foreign and National Diplomats, Parliamentarians and Mayors and Deputy - Mayors. He has visited China upon invitation from the Foreign Ministry of China on 'One Belt One Road' 13th Plan of China, as Team Leader of South and East Asian Regions of young Diplomats in CISS, Beijing and SIFIS in Shanghai and Wenzhou Province and Hong Kong in 2016. He had participated and presented in workshop and talk programs on the constitution, governance, federalism, electoral system, inclusive democracy, human and fundamental rights in Austria, China, India, Germany, Slovakia, Hungary, Korea, and Bangladesh. He was awarded the Best Law Book award, 2018 for the new book on Federal Governance in Nepal by Rt. Hon. Cholendra Samsher Rana, Chief Justice of Supreme Court of Nepal. He is also a receiver of Bidhya Bhusan Padak for Ph.D. in Constitutional Law, awarded by the Rt. Hon. Ram Baran Yadav, first president of Nepal in 2011. In addition to this, his book 'Constitutional Law of Nepal' was awarded the 'Excellent Book Award' by Nepal Bar Council from Chief Justice Rt. Hon. Damodar Prasad Sharma.

Dr. Binod Bashyal, Associate Professor, has completed his Doctor of Philosophy (Ph.D.) in Law for the thesis entitled "A Study on Judicial Trends in maintaining the Rule of Law in Nepal" from the Faculty of Law, Tribhuvan University, Nepal in 2021 and Master's Degree in Constitutional Law and Political Science from Tribhuvan University. He has been teaching Constitutional Law, Administrative Law and International Law in law faculty for the past 29 years and now he is Assistant Dean of Faculty of Law, Tribhuvan University, Nepal. He has published books on Constitutional Law, Administrative law and International Law as well as many research articles in law journals.

Arjun Kumar Khadka has been in government service for more than three decades. He has been actively involved in Legislative Drafting in the areas of commerce and trade, intellectual property, public administration, public policy and election. Further, he had served in International Organization under the United Nations Mission in Liberia and Sudan as United Nations Volunteers, and as Training/Public Outreach Officer, he was especially engaged in civic education and public awareness program. Currently, he works at the Nepal Law Commission as Joint-Secretary. Before joining the commission, he had worked for more than four years at the Federal Parliament of Nepal where he was involved

in the law-making process in various areas and support parliamentarians for the materialization of the legislative procedure. He has completed a Master's Degree in Law (LL.M.), Master's Degree in Political Science (M.A.), and Master's Degree in Public Administration (M.P.A.) from the National University of Singapore. Additionally, he has also earned a Post Graduate Diploma on International Law and Sustainable Development from the Institute of Social Studies, the Hague and Post-Graduate Diploma on the Land Management and Informal Settlements Regularization Program from the Institute for Housing and Urban Development Studies, the Netherlands. Likewise, he has participated in law-related training, seminar and workshop in the national and international domain. He is a fellow of the UN/UNITAR fellowship program in International Law, UN Office of Legal Affairs, UNITAR.

Jivan Prakash Lamsal *is an Advocate of the Supreme Court of Nepal and a member of the Supreme Court Bar Association. He has written various articles published in Rising Nepal as well as some law journals. He is a practicing lawyer since 26 years as well as an authorized translator. He has obtained LL.M. Degree in Environment Law and has raised many PIL relating to the use of government, community, and public land.*

Tul Bahadur Shrestha, *an advocate, has been practicing law since 30 years. He is a member of the Supreme Court Bar Association, Kathmandu. He holds a Master's degree in Business Administration (MBA), Sociology and LL.M. Degree in Commercial Law from Tribhuvan University, Nepal. He has published more than 5 articles in different journals. He has contributed to the development and practice of commercial-related law. Additionally, he has also participated in different seminars and workshops organized by different organizations like Asian Regional seminars of "Yardsticks of Arbitration on Asian Regional basis." He also serves as a president of Morang Bar Association and lifetime member and Panel Member of NEPCA, Nepal.*

Bijaya Prasad Mishra, *Associate Professor of Law, serves as a member of the teaching faculty of the Law, Tribhuvan University, Nepal. He commenced his teaching career since 1998 and completed LL.M as the first batch student of Nepal Law Campus in 1999. He attended the 42nd Academy of American and International Law held in Texas USA in 2005 and participated in the International Bar Association Conference held in San Francisco USA in 2003. He jointly and solely presented the position paper of Nepal on Legal Aid respectively in the International seminar organized by Law Asia at Brisbane of Australia in 2010 and UNDP/Government of India at New Delhi in 2012. He was one of the delegates of the Nepalese Study Team of Federalism led by the Speaker of Constituent*

Assembly that visited Canada in 2010. He led the team of the National Judicial Academy to visit the Judicial Academy of New Delhi and was a member of the National Judicial Academy Team assigned to study Judicial Education in Berlin, Germany led by the Justice of Supreme Court respectively in 2011 and 2012. He took part in the Constitution Building Course organized by International IDEA at Barcelona of Spain in 2011. He was the Executive Editor of *Nyayadoot*, the sole mouthpiece of Nepal Bar Association from 1997 to 2000, Central Member and Secretary-General of Nepal Bar Association respectively for the tenure of 2001-2004 and 2010-2013. He has also been in active legal practice since 1990.

Dr. D.N. Parajuli is an Associate Professor at the Tribhuvan University, Faculty of Law, Nepal Law Campus. He specializes in Commercial Law, International law and Human Rights. He completed LL.M. Degree from both Tribhuvan University, Nepal; and UN Mandated University for Peace, San Jose. He also has a Ph.D. Degree from the Tribhuvan University, Nepal. He is an Advocate of the Supreme Court of Nepal. Currently, he is serving as the Campus Chief of Nepal Law Campus, Kathmandu. He is acknowledged as a writer of various books concerning Mercantile Law, Business Law, International Institution and Human Rights, Company Law and Corporation Law, Contract Law, Property Law, and has published various research articles in the area of law, justice, and human rights. He is also the Chief Editor of "Nepal Law Review", a historic law journal of Nepal, and KANUN PARICHARCHA published by Nepal Law Campus.

Dr. Diwakar Bhatta is a District Judge and presently on deputation from the Supreme Court of Nepal to the National Judicial Academy, Nepal as a Faculty. He has done his Doctoral Degree (Ph.D.) in Criminal Law from Tribhuvan University. He holds LL.M. degree as the Gold Medalist, from Tribhuvan University and another LL.M. degree in International Law and Human Rights from the University of Hong Kong. He has done some significant researches in the area of International Law, Human Rights, Constitutional Law etc. as part of his academic interest and excellence and also contributed dozens of research articles in law and justice that have been published in some renowned publications of the country. Besides these, he has also presented papers in international and national seminars in International Trade Law, Criminal Law and Commercial Law and Access to Justice, etc.

Dinesh Prasad Ghimire is a Joint - Government Attorney (Gazetted 1st Class Officer) under the Office of the Attorney General. He has been involved in Nepal's judiciary service since 2067 (B.S.). He has also obtained a Master's Degree in Law and Rural Development.

Dr. Awatar Neupane is an Advocate of the Supreme Court of Nepal and a member of the Supreme Court Bar Association. He is also a Lecturer at the National Law College, Faculty of Law, where he specializes in Commercial Law. He graduated with a B.L. Degree and obtained LL.M. from Tribhuvan University. He also has a Ph.D. degree from the Faculty of Law, Tribhuvan University. He is the author and editor of over 7 books, 50 journal articles, and/or case commentaries. His sole-authored monograph "Role of Supreme Court on Banking Law", "Company Law" "Text Book on Company Law" and "Banking Law" are published. He is the Chief Editor of Business Law Journal, published by Commercial Law Society Nepal.

Laxmi Sharma is an Assistant Professor at the Faculty of Law, Nepal Law Campus, Tribhuvan University. She is also the director of B.A.LL.B Program at Nepal Law Campus. She has done a Master's Degree in Public International Law from the University of Oslo, Norway in 2012 and in International Law and International Human Rights Law from Tribhuvan University, Nepal in 2008 as well as a Master's Degree in Rural Development from Tribhuvan University, Nepal in 2005. She has published many articles relating to International Law, Human Rights Law, Commercial Law, Refugee Law, and so on in various journals of academic and research institutes. Besides these, she has also presented papers in the international and national seminars in International Law, Humanitarian Law, Human Rights Law, and so on.

Kamal Raj Thapa is a Lecturer at Nepal Law Campus, Law Faculty; Tribhuvan University, teaching Jurisprudence for LL.M. He is the author of 'Jurisprudence as Cabbage' and the principal author and editor of 'Governance, Constitution and Contemporary Issues.' His numerous articles are published in Kanoon, Nyayadoot, Nepal Law Review, Kathmandu School of Law Review, Business Law Journal, ADR Commercial Law Journal including NBC bulletin. He has edited some of the volumes of Nepal Law Review, ADR Commercial Law Review as well.

Nabin Kumar Subba is an Advocate and Assistant Professor at Faculty of Law, Tribhuvan University. Currently, he is working as an Assistant Campus Chief at Nepal Law Campus, Kathmandu. He has completed LL.M. Degree in International Law and Human Rights Law from Nepal Law Campus, Tribhuvan University in 2005. He has also completed a Master's Degree in Political Science from University Campus, Kirtipur in 2007.

Bishnu Prasad Soti, Deputy Superintendent of Nepal Police, is currently serving as a Strategic Police Adviser in United Nations Assistance Mission in Somalia (UNSOM), Rule of Law and Security Institutions Group (ROLSIG). He

has served as an NCB Officer of INTERPOL Nepal in the year 2015-2017, as a Contingent Liaison Officer in United Nations- African Union Hybrid Mission in Darfur (UNAMID) in 2013-2014, as a Police Adviser in United Nations Mission in Sudan (UNMIS) in 2007-2008. He also has a Post Graduate Diploma in Police Science, Master's Degree in Education, Political Science and LL.M. Degree in Criminal Law and International Law from Tribhuvan University Nepal. He has also graduated in several specialized Police courses in Nepal and abroad, which includes NCB Officers' Course (Singapore, 2016), Forensic Criminology Course (India, 2013), and more than a dozen United Nations Training Programs Courses. Additionally, he also participated in different seminars like traditional security issues (China, 2017), INTERPOL Asian Regional Conference (Kathmandu, 2017), Head of NCB Conference (France, 2017). He is also the recipient of three UN Medals and the Kathmandu Police Award 2018. He has published more than a dozen articles in different journals, CID Magazines, and other publications.

Kedar Ghimire is Deputy Director at National Judicial Academy, Nepal since 2008. He has done Master's Degree (LL.M.) in Cyber Law and Cyber Security from Jagran Lakecity University, Bhopal, Madhya Pradesh, India. He is the Gold Medalist (Top ranking position on overall LL.M. stream) of the Batch 2017/18. He has published different articles on this particular subject in different National and International Journals. He has also participated in different trainings at the national and international level on this particular subject. Among them, he has participated in one of the important events "End to End Court Technology" program at Singapore in 2017 which was very much related to the use of ICT in the Judiciary and how to maintain cyber security on it. Additionally, he has also done a Master's Degree in Library and Information Science (M. Lib. Sc.) from Tribhuvan University.

Amar Bahadur Shah is an Advocate. He completed LL.B. in Criminal Law and Justice from Kathmandu School of Law (Purbanchal University) & LL.M. in Criminal Law and Commercial law from National Law College (Tribhuvan University), Nepal. He is associated with Nawalparasi District Court Bar Association. He has written numerous research-oriented articles on Nepalese jurisprudence, juvenile justice system, victim justice system, human rights, and constitutional rights in different law journals and newspapers of Nepal. He is serving as a trainer on issues of human rights in the nation.

Sarita Khanal, a practicing lawyer, has been teaching in different colleges of Law and Management since ten years. At present, she is a faculty at Chakrawarti Habi College of Law and Nepal Open University. She has pursued MBS (Masters in Business Studies) from T.U. and LL.M. (Masters in Law) from

Nepal Law Campus, T.U. She is a Gold Medalist in LL.M. from T.U. and she has been decorated by Nepal Bidhya Bhusan "Kha" by the President of Nepal. She has co-authored a book entitled 'Business Law' and published many research articles in different law journals. Currently, she is a Ph.D. research scholar under the Faculty of Law, TU. Her area of Ph.D. research is Intellectual Property. She has participated in a seminar on Rule of Law organized by Thailand Institute of Justice, Bangkok in the year 2017.

Laxmi Sapkota is an Assistant Professor at Kathmandu School of Law and she has been teaching there since 2069 (B.S.) She completed her Master's Degree from the same institution in Business and International Trade Law. Furthermore, she is currently pursuing her Ph.D. from the Faculty of Law, Tribhuvan University. She is an Advocate and also a mediator. As well, she is the legal advisor to some of the companies. She has authored two books - 'General Concept of Law' and 'Contract Law.' Additionally, she has written dozens of articles in national and international journals. Moreover, she frequently writes an article in national daily newspapers.

Mukunda Adhikari, the advocate, is a Ph.D. Candidate at Xian Jiaotong University, Shaanxi, Xian China, He is International Student Ambassador of International School in Xian Jiaotong University. He has LL.M. Degree majoring "Constitutional Law and Criminal Law" from the Faculty of Law, Tribhuvan University. He also has M.Ed. Degree majoring in "Education Planning and Management" from the Faculty of Education, Tribhuvan University. He worked as a B.A.LL.B. Coordinator and taught Legal Research in National Law College in the year 2072-2073 (B.S.). His articles have been published in various international journals. He has presented more than 10 papers at International Belt and Road Conference. He is serving as a legal adviser of the Nepal Veterinary Council and other private organizations.

Prem Prasad Dhital is an advocate with extensive knowledge and experience in the areas of Commercial law and Constitutional law. He has nearly a decade long experience in litigation and legal consultancy services. He is a lecturer, presenter, and researcher in the field of law. He is also working in the areas of self-governance and lawmaking at the local levels since a long time. Prior to joining the legal profession, he was a lecturer of English literature. He holds a Master's Degree in Major English from Tribhuvan University and LL.M. in Business and International Trade Law from Purbanchal University, Nepal. He has also published many articles in different papers.

Rupes Lama is an Advocate, holds LL.M. Degree (Commercial and International Law from Tribhuvan University, Nepal Law Campus) and a Master's Degree in Political Science.

Surya Mani Rai (Jimi) is a practitioner lawyer of Nepal. He has obtained an LL.B. in Law and a Master's Degree in Economics from Tribhuvan University, Nepal. He is pursuing LL.M. Degree from Tribhuvan University, Nepal. He is also a legal adviser of business corporations and has worked in many research projects relating to human rights and rule of law. He is interested in tax law and tax relating matters.

Yam Kumar Yonjan is a practicing Lawyer of the Supreme Court of Nepal. He is also a teaching faculty member of Nepal Law Campus, Tribhuvan University. He has completed LL.M. degree from Nepal Law Campus, Tribhuvan University with a specialization in International Law and Commercial law. He has experience as visiting resource person in different law colleges, governmental and non-governmental academic and training institutions. Presently, he is doing legal practice in the field of commercial law and he is also pursuing a Ph.D. degree from the faculty of law, Tribhuvan University.

Roshan Kumar Jha formerly a teaching faculty member at Tribhuvan University, Nepal Law Campus, is currently a Bench Officer at the Supreme Court of Nepal. He holds an LL.M. Degree in Criminal and Commercial Law from Tribhuvan University. He has written the book entitled "Legal Philosophy" and many research articles in national as well as international journals.

Manish Nepal is an Advocate. He is also a Ph.D. Scholar at Faculty of Law, T.U. His research area in Ph.D. is "Cyber Crime Jurisprudence." He has obtained LL.M. Degree from Nepal Law Campus securing 1st Division 1st marks in the year 2019. Currently, he is a faculty member of the National Law Collage, where he teaches Jurisprudence and International Law at LL.M. since 2019. He also serves as the faculty at Nepal Open University, where he is the lecturer of Intellectual Property Law and Cyber Law in LL.B. since 2020. He has written half dozen of research articles that have been published in major law journals of Nepal. He also has an upcoming book entitled "Intellectual Property Law."

Bimal Prasad Lamichhane is a practicing Advocate, independent scholar and academician thinker. He completed B.A.LL.B. from Tribhuvan University in the first division. He has obtained M.A. Degree in Political Science from Tribhuvan University in the first division and also completed LL.M. Degree from Tribhuvan University, Central Department of Law, Nepal Law Campus in the first division

specializing in Commercial Law and Criminal Law. He has authored and co-authored several books and research articles on different issues related to law and justice in reputed journals of Nepal. Presently, he is a part-time lecturer in the Faculty of Law, Prithvi Narayan Campus (Pokhara), Tribhuvan University.

Chitra Bahadur Sunar as a law practitioner in the area of Criminal and Commercial Law has been practicing the legal profession actively since 2073 (B.S.). He is a Part-time Lecturer of Private International Law, Nepalese Legal System, and Criminal Law at Prithvi Narayan Campus, Pokhara. He is also a Faculty Member teaching Hospitality Law (Hotel Law) at Lincoln University College, Pokhara. He holds a Master in Laws (LL.M.) with a specialization in Criminal and Commercial Law from Nepal Law Campus, Tribhuvan University. He also served as In-House Legal Counsel in S.C.I.G. International Nepal Hydropower Company Private Limited for two years.

Rajesh Bastola is a B.A.LL.B. graduate from Nepal Law Campus, Tribhuvan University in the year 2017. He has recently completed LL.M. from South Asian University, New Delhi, India in the year 2020 with a specialization in International Law and International Investment Law. He is enrolled as an Advocate in Nepal Bar Council. He was ranked one candidate from Nepal in the LL.M. entrance examination of South Asian University. Similarly, He was ranked one student amongst the non-Indian category in South Asian University. The academics rewards during his LL.M. were SAARC Silver Jubilee Scholarship for the academic session 2018/19 and President's Scholarship for the academic session 2019/20. His recent article was published in NJA Law Journal 2020 titled "Foreign Direct Investment in Nepal: An Appraisal with Special Reference to the Foreign Investment and Technology Transfer Act, 2019." His keen area of interest is International Law, International Investment Law and Arbitration.

Makan Tamang, advocate at Nepal Bar Council, completed B.A.LL.B. from Nepal Law Campus and is Pursuing LL.M. (International Law) at South Asian University, New Delhi, India. He also worked as Programme Coordinator of a Project under LANCAU, Nepal, Kathmandu. He served as a Board Member of the Nepalese Law Students' Association (NeLSA, Nepal), and interned in the Nepal Legal Service Center as Legal Associates. He had participated in many extracurricular activities such as Moot Court and Law Debate Competitions.

Prakriti Malla is an Advocate and a legal scholar. She is pursuing her Master's Degree (LL.M.) in International Law at South Asian University, New Delhi, India as a President Scholarship holder since July 2019. She has served as a Local Expert in the World Bank's 'Women, Business and the Law unit for the 2020 and

2021 report entitled 'Women, Business and the Law'. Also, she has experience working as a Program Coordinator at Light House Foundation Nepal in 2019 (January 2019-July 2019), Youth Campaigner in the project "Good Governance and Democracy" launched by AYON, IFES and USAid in 2018 (May 2018 - December 2018).

Bhim Bahadur Phadera, an Advocate, holds B.A.LL.B. from National Law College, and currently pursuing LL.M. in Constitutional Law and Criminal Law from Nepal Law Campus, Tribhuvan University. He has published some articles – 'Socialist Constitutionalism', Nepal Bar Council Law Journal (2019) Victimological Jurisprudence and New Criminal Code, 2074, NaLC E-Journal (2019), 'Doctrine of Alter-Ego', Business Law Journal (2018), Construction-Interpretation Debate, NaLC E-Journal (2018), and has published some other articles in online news portal regarding political-legal affairs of nation.

Ashriti Pokharel, a B.A.LL.B graduate from Kathmandu School of Law with specialization in commercial law is an advocate certified by Nepal Bar Council. She is currently engaged in corporate law practice. She has been pursuing LL.M. Degree from Tribhuvan University, with a specialization in Commercial Law and International Law. Her areas of interest are commercial and human rights issues including but not limited to intellectual property, tax, foreign direct investment, among others.

Srijan Khanal is a practicing advocate and a young professional. He has completed his B.A.LL.B. from National Law College (NaLC) in 2019. His keen areas of interest are human rights, international law, intellectual property, corporate law and policy research. He has represented Nepal in various platforms like the Panjnad Moot Court Competition, Pakistan where his team stood as runner up amongst various international teams; chaired the SAIMUN conference in UNEP headquarters in Kenya. He is actively involved in Civil Law and Human Rights Center, NaLC in disseminating awareness in human rights. He also intermittently pens articles in NaLC E-journal.

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