

Research proposal on

Law, Common Law



Research Proposal on A COMPARATIVE PROPOSAL FOR TRIAL BY JURY IN NEPALI LEGAL SYSTEM Submitted to BA/LLB Programme Nepal Law Campus Faculty of Law Tribhuvan University Submitted by SauravNath Pant BA/LLB, 3rd Year Roll No. 13 Section: A March 3, 2013

1. 1 Introduction I have always been a firm believer in trial by jury. Somehow it is ingrained in me. As it is in most Englishmen. It is a lesson which has been handed down from one generation to another during the last 800 years. The trial by jury — a tradition held dear to the British — is a legal proceeding in which a jury either makes a decision or, makes findings of fact which are then applied by a judge. It usually comprises of 12 men. The jury system is a system developed in the Common Law, taken as its integral part which mandates that “ No free man shall be captured and or, imprisoned or, disseised of his freehold and or, exiled, or in any way destroyed, nor will we proceed against him by force or proceed against him by arms, but by the lawful judgement of his peers. ” The Jury System can be traced back upto the Greek and the Roman era. The Greeks were succeeded by the Romans while the Roman Empire collapsed. But it is largely the British System that has embodied the Jury System and established it as a tradition of the Common Law System. King William — the Conqueror established the Norman Dynasty in England by his conquest of England in 1066. The Jury System was introduced by a Norman King in England. One day the King was watching the justice delivery process, and noticed that a single judge could not always impart fair justice. Hence he observed that twelve laymen could give better justice than a judge. As a result he asked his advisors to compose a jury of 12 people along with a judge to settle the disputes filed at the court of law. The Magna Carta

of 1215 further secured trial by jury stating that, * For a trivial offence, a free man shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly, but not so heavily as to deprive him of his livelihood. In the same way, a merchant shall be spared his merchandise, and a husbandman the implements of his husbandry, if they fall upon the mercy of a royal court. None of these fines shall be imposed except by the assessment on oath of reputable men of the neighbourhood. * Earls and barons shall be fined only by their equals, and in proportion to the gravity of their offence. * To any man whom we have deprived or dispossessed of lands, castles, liberties, or rights, without the lawful judgement of his equals, we will at once restore these. * If we have deprived or dispossessed any Welshmen of lands, liberties, or anything else in England or in Wales, without the lawful judgement of their equals, these are at once to be returned to them. A dispute on this point shall be determined in the Marches by the judgement of equals. English law shall apply to holdings of land in England, Welsh law to those in Wales, and the law of the Marches to those in the Marches. The Welsh shall treat us and ours in the same way. It has already been stated that the history of Jury System covers over a period of 800 years. During that period the Jury System developed, and changed with time but never discarded. Some instances of its course of development is given below: 1. The Principle of Unanimous: This principle was established in 1367 and it lasted for 600 years until 1967. In 1967, the parliament altered it. The verdict was held valid if the majority was ten to two. 2. The jury were kept without food, heat or light once they retired to consider their verdict. The time —hallowed formula was, ‘ Without meat, drink, fire or candle’ 3. Once

only reasonable men (with some qualifications) were allowed to sit as juror. Now all people, men or , women, deaf or , blind, honest or, dishonest could sit as jurymen. All who are 18 years of age and are listed to the voter's list are qualified as jury men. Yes, in the past 800 years or, so the Jury System has changed a lot. So much so that Lord Denning himself considers 19th century to be the golden age of Trial by Jury. But it is not these changes that have led Lord Blackstone in his lectures in 1758 to say: ' Trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law.... It is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals' It is the cases decided by the Jury and the way in which one man may be convicted. A person may only be convicted if his equals (or, in the broad sense- the society) finds him to be guilty. Instances have been recorded where the Jury has upheld justice worked for the development of human rights, and even acted as an important check against the state power. The cases will be discussed later but a special mention to the case of ' the King's Brewer and the Seven Bishops' is to be made here. The verdict of the Jury defied the powers of the king and sent the whole of the country into partying. Also the system brings forth the sense of High Drama, into the courtroom. Nevertheless, the advantages offered such as giving ordinary folks their most useful lessons in citizenship, giving the people an active and decisive part in the administration of justice and in establishment of habit of obedience in law are the very reason (along with fact of being once ruled by England or, having accepted Common Law) that has led a number of

countries like America, Australia, Austria, Belgium, Canada, Greece and so on to accept the Jury System. Our good motherland, Nepal however has not accepted the Jury System ever though following a moreover mined form or, in its own way a unique form of legal system which is seen to be highly dominated by the Common Law System.

1. 2 Statement of Problem It is a matter of fact that we find in Nepal the large dominance of the Common Law System. Moreover we can say that Nepal has accepted the Common Law System at large. The characteristic feature of the Common Law System such as precedent, the role of the judge, the role of the lawyers, the power in the judges to make the law and also the power in the judge to interpret and enlarge the scope of the law and so on are found in the Nepalese law. They do show the high influence of the Common Law system into the Nepali Legal System. But one major characteristic trait still remains to be embodied into the Nepali Legal Systems, i. e, the Jury System. The notion to forward the need of Jury system in Nepal can also be done through a little change in the consideration. In many countries of continental Europe and Japan the belief that ‘ a single judge is not a judge’ has played significant role in strengthening the quality of justice, therefore they normally compose the bench of three judges even at the trial level. At the appellate level hearing by more than half a dozen judges is a common legal practice. This concept of plural adjudication has not been yet accepted in Nepal, exception to the Supreme Court and Appellate Court where normally two judges decide the case. At the trial level, till today, the case is being decided by one judge, which leads to cause imperfect justice and therefore some sort of dissatisfaction in the people as seen in Nepal. However, here we necessarily do

not need to imply that the Jury system as seen in England is necessary but we may say more definitely and positively, for example: Japanese did not follow the Jury System but accepted the idea of securing assistance from the assistant judges and study groups. Instead of Jury, the Chinese accepted the concept of People Assessors and Judicial Committees making them responsible to find the truth in the case. Even the Indian courts, on some occasions, have begun to compose such study groups and accept the rule of public participation particularly in the LokAdalat. Public participation is an important aspect for the growth in the Judicial culture. Here the Jury will play a great role to develop public confidence toward justice system. Our system in delivery in justice is incomplete and the incomplete thing could not give complete achievement. Hence, is it not reasonable for Nepal to accept the Jury System? Similarly, the research paper also looks to find the answer to whether creation public participation can cause to solve the dissatisfaction seen towards the Judicial system. In Nepal, we also have the problem of taking any concept as an end and not as a means towards an end. The research paper will also look to give solution towards how we can establish the Jury System as a means towards an end and thus find solution towards some of the existing problems in the Judiciary. It looks to give suggestion towards the form in which we can apply the Jury System in Nepal.

1. 3 Hypothesis History is the past wisdom and a storehouse of knowledge. It helps to understand the past, the coming up to the present time and also predict for the future. Nepal is a lucky country as historically she is very rich. The history of Nepal seems to date back way before the time of Lord Krishna and Mahabharata. We also find the mentioning of Nepal in the Vedas. Nepal

may not have the concept as known to the world by the name of Jury System. But Nepal certainly has the fundamental notion of the Jury System known to her and to the history as the Panchayat. The adjudication of dispute by the people themselves was done in the Kirat and Lichhavi period through Panchalika and Grampanchayat. This concept fundamental to our land had been lost and resurrected by King Mahendra in the 2019 B. S. constitution. So, it is not necessary as a whole to name the concept next to be introduced in the Judicial System as the Jury System but we can always give the name retaining the portion of history and culture and giving it to some extent the Nepali touch. The concept can be ours and we can always borrow the wisdom of Great Britain for practical usage. Hence, basically the merging up of the system into the Judiciary will give rise to our own set of the Jury System. The 2019 B. S. Constitution had established the various level of Panchayat formally. It was taken moreover as an Administrative body than a judicial one. It had some judicial function. It will only be doing justice to the history if we are to summon once again the local people as Panchayat to participate in the justice administration as a variation of the Jury System. Similarly, while looking towards the notion through the economic standpoint, we are to look at the history of the system in Britain. Its development will certainly give solution to the problem. If we are not to accept the whole developed form and research upon the form in which we can accept, then and only then can we establish the Jury System to serve as a means towards an end. The system should suit the country and be accepted by taking into consideration the conditions prevalent in Nepal. The functioning of the system should also be somewhat which will suit our country. For example:

we should be able to decide what to what ratio verdict will convict the accused. Similarly, the qualification should also be made taking into consideration of the people. For example: at first instance, all should be qualified but only for the small types of crime. For complex cases of fraud, expert panel should be created or, at least people who can understand should be selected. The internal functioning should be designed to meet the need. The key issue in the research will be amalgamating tradition into the jury, establishing a more need suited Jury System taking into consideration the country as a whole and also to find solution to the economic problem that may arise from accepting the Jury System. However, initially the research paper will establish the Jury System as a positive way forward.

1. 4
General and Specific Objective The objective in general of this study is to establish the need of jury system in the judicial organ of the State and establish it as a positive way forward for the country. The research paper will look to show how this time tested formula will help the people and the State as a whole. At first instance the Jury System looks to work as a check against the State power. But side-by-side it also will be educating the people. The study has the following three specific objectives: 1. To study and recommend ways by which the jury can be made economically viable. 2. To suggest the way in which the Panchayat concept and the jury system be amalgamated in order to form an Anglo-Nepal hybrid Jury System. 3. The research paper will also look to furnish the plan of action: such as the majority needed for conviction, the expertise needed to sit as a juror in complex cases and/or, political cases, the way in which prejudices can be removed and so on.

1. 5
Rationale of Study The main rationale of the study is the need to analyse the

Jury system — its pros and cons, its obstacle for acceptance in Nepal and possible solutions and the format in which it is to be applied. Similarly, the research paper also looks to analyse how the acceptance will affect the Judiciary, common people and the nation as a whole.

1. 6 Limitations of Study

This study is limited to comparative analysis of the pros and cons of the jury system. This study is also limited in the historical analysis of our own variation of the jury system along with economic problem and the form in which the clay is to be moulded i. e., the working analysis of the system.

1. 7 Research Methodology

This study is based on doctrinal method of scientific research. Hence the research methods of field survey and primary empirical data gathering are not applied. Rather it is textually driven.

1. 8 Organisation of Study

For the purpose of conducting the study on the topic, the Seminar Paper will be divided into five chapters:

- * Chapter 1 deals with the introduction of the jury system and the views pertaining to the system.
- * Chapter 2 deals with explaining the necessity of jury system in Nepal
- * Chapter 3 deals with Nepal's own experience in history with a Nepali variation of the system
- * Chapter 4 deals with problems that may arise if we are to accept the system
- * Finally, the last Chapter 5 is the concluding chapter which looks to furnish suggestions for the way in which the jury system can be adopted and the problems be countered.

1. 9 Literature Review

For the purpose of the research, I have gone through the following research works, books, constitutions and websites.

1. A research paper by Krishna Prasad Sharma Nepal on ' Restructuring of the Judiciary in Nepal with special reference to Access to Justice'. Here the author has suggested for restructuring of the judiciary in Nepal, which my work also looks to do. He

had not touched upon the issue of jury and my paper looks to do so. 2. Lord Denning, *What Next in the Law*, London: Butterworth and Co. (Publishers) Ltd, 1982: In this book the author had highlighted upon the jury system and its tradition. He has also mentioned some of the cases decided by jury having high national significance. He also has given the development and certain rules pertaining to the jury system. Similarly, he has given suggestions for improvement. This book is the major source from where the inspiration to write the research paper has been drawn. 3. BishalKhanal, *Regeneration of Nepalese Law*, Kathmandu: Bhrikuti Academic Publications, 2000: In this book the author has analysed the development of Nepali law and also has pointed out some problems which have created dissatisfaction among the people in the judiciary. 4. Revatiramankhanal, *NepalkoKanooniltihaskoRooprekha*, Kathmandu: Appollo Offset Press Pvt. Ltd., 2059 B. S.: In this book the complete history of Nepal's legal system has been sketched. From this book, I have taken the fact about the historical concept of the Panchayat and come up with the idea of amalgamation into jury system. 5. Rene David, *Major Legal System in the World Today*, London: Stevens and Sons Ltd, 1985: In this book the various major legal systems have been analysed. This book helped me understand some of the major characters of the Common Law System. 6. *Constitution of Nepal*, 2019 B. S., has also helped in the research for this is the constitution which has formally accepted the Panchayat notion though in a completely different notion in which I purpose to use it. 7. Some websites have really been helpful, most prominently the Wikipedia and also ones linking the Wikipedia with original materials used in the article. Bibliography 1. Lord Denning, *What Next in the*

Law, London: Butterworth and Co. (Publishers) Ltd, 1982 2. Bishal Khanal, Regeneration of Nepalese Law, Kathmandu: Bhrikuti Academic Publications, 2000 3. Revatiraman Khanal, NepalkoKanooniltihaskoRooprekha, Kathmandu: Appollo Offset Press Pvt. Ltd., 2059 B. S. 4. Rene David, Major Legal System in the World Today, London: Stevens and Sons Ltd, 1985 5. Blackstone Commentries Vol. III ----- [2]. Lord Denning, What Next in the Law, 1982, London: Butterworth and Co (Publishers) Ltd, p. 33. [3]. Lysander Spooner in his essay on " The Trial by Jury" [4]. Samons, Loren J. (2007). The Cambridge companion to the Age of Pericles. Cambridge University Press. pp. 244, 246. ISBN 978-0-521-80793-7. http://books.google.com/books?id=QAePyZ_Z1WkC&pg=PA244&lpg=PA244&dq=dikastai+501+citizens#v=onepage&q=dikastai%20501%20citizens&f=false. [5]. Acilian Law on the Right to Recovery of Property Officially Extorted, 122 B. C. http://avalon.law.yale.edu/ancient/acilian_law.asp [6]. Rene David, Major Legal Systems in the World Today, 1985, London: Stevens and Sons Ltd, p. 311. [7]. BishalKhanal, Regeneration of Nepalese Law, 2000, Kathmandu: Bhrikuti Academic Publications, p. 35. [8]. Magna Carta of 1215 - <http://www.fordham.edu/halsall/source/magnacarta.html> [9]. Lord Denning, What Next in the Law, 1982, London: Butterworth and Co (Publishers) Ltd, p. 37. [10]. Ibid, p. 37. [11]. Ibid, p. 62. [12]. Commentries III, p. 379. [13]. Lord Denning, What Next in the Law, 1982, London: Butterworth and Co (Publishers) Ltd, pp. 36-52. [14]. Ibid, p. 33. [15]. America has embodied the jury system in its constitution. Their Constitution in 1971 Article VI and VII enshrined the provision as being handed down to them by the UK. [16].

BishalKhanal, *Regeneration of Nepalese Law*, 2000, Kathmandu: Bhrikuti Academic Publications, p. 38. [17]. Ibid, p. 38. [18]. Ibid, p. 40. [19]. For example: We can see the Parliamentary System adopted in Nepal. The exact copy that of the UK. But what we don't wish to understand is that the concept of the system was rooted in 1215 with the signing of Magna Carta where we find it was accepted that ' All men are born free and equal' and ' No taxation without representation'. But in Britain the concept gradually developed and from the Glorious Revolution the form came into as a living organism giving the Parliament the sole power. It took a span of more than 400 years. Similarly, also is the case with Political Parties. The wigs and Tories when they were formed, the King himself used to address the General Meeting and Mass Meeting during the election and ask for the people to vote for Tories who were the supporter of the King. Again one noted example will have to be Cromwell's dissolution of the Upper House to kill King Charles I. Theoretically, the Upper House is a permanent body. They all show any concept is not an end but a means towards achieving an end. [20]. It is known that Nepal at some point of time was ruled by the Gopal Dynasty who came here along with Lord Krishna. [21]. Revati Raman