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Supreme Court

Division Bench

Honourable Judge Tahir Ali Ansari

Honourable Judge Kamal Narayan Das

Order

068-WO-0188

Case: Including Mandamus

Advocate Sudarshan Subedi, permanent resident of ward No. 3 Mayur Basti of Kalika VDC of Bardiya district and presently living at ward No. 7 Chabahil Saraswatinagar of Kathmandu Metropolitan City of Kathmandu district representing self and Nepal Disable Human Rights Center-----1
Dipendra Shakya, resident of ward No.6 of Bhaktapur Municipality of Bhaktapur district -----1 **Petitioner**

Versus

Nepal Government, Office of the Prime Minister and Council of Ministers, Singhadurbar, Kathmandu ----- 1
Nepal Government, Ministry of Women, Children and Social Welfare Singhadurbar, Kathmandu-----1
Nepal Government, Ministry of Finance Singhadurbar, Kathmandu-----1
Nepal Government, Ministry of Health and Population Ramshahpath, Kathmandu-----1
Nepal Government, Ministry of Education, Kesharmahal, Kathmandu ----1
Nepal Government, Ministry of Local Development Pulchowk, Lalitpur,---1
National Planning Commission, Singhadurbar, Kathmandu-----1
Legislative Parliament Secretariat Singhadurbar, Kathmandu--1

Opponent

The fact in nutshell and decision over the writ petition fallen under the jurisdiction of this court as per article 32 and 107 (2) of the Interim Constitution of Nepal, 2007 have been as follows.

The writ petition mentions: Nepal Disable Human Rights Center registered before the District Administration Office, Kathmandu in 2056 B. S. has been a non-governmental organization led and operated by the persons with disability. The association has been actively engaged in the protection and promotion of the human rights of the disables along with the activities for the generation of the people's awareness, voice for justice, advocacy and promotion.

I, the petitioner Dipendra Shakya have also been a disable person. Despite the fact of carrying serious disability I have been raising voice for the justiciable rights of the self and the other person coinciding to me. Therefore, we deserve the *locus standi* to file petition on behalf of the individuals being seriously and mentally disable.

The daily life of the mentally retarded person (possessing mental disability) and seriously disable persons has been pitiable day by day in Nepal. There has been no doubt the situation as such has been caused due to lack of extension of service and facilities to be provided by the state organs and lack of medium to circulate voice and demand of the persons as such in the concerned bodies and lack of self-eligibility

Provision has been made in Rule 8 of the Disable Protection and Welfare Rules, 1994 for the establishment and operation of the disable house placing the disable and mentally retarded persons in center. The said legal provision providing for the establishment and operation of the disable house with the view of the secured residence to the persons with disability and helpless disables holds holy objective to relieve the writ petitioner Dipendra Shakya and the other disable persons such as the writ petitioner who may be victimized from the negligence of the family members and the society

for the entitlement to pass the livelihood as a human being and that the state is to discharge its duty to provide security of the life and property of the citizens. Similarly, there has been provision in the Local Self-governance Act for the collection of data of the persons with disability and erect the disable house. Although the Protection of Rights and Welfare Rules of the Persons with Disability, 1994 has been enforced the implementation thereof has been poor one.

As the Government of Nepal has signed the Convention on the Rights of the Persons with Disabilities and Optional Protocol to the Convention on the Rights of the Persons with Disabilities, 2006 there has been creation of the legal rights.

As per the Reasearch and Study of the different organization and association there has been six hundred thousnad persons in Nepal having been mentally retarded and the same number of the persons with the serious disabilities. The life of the mentally retarded and the person with serious disability has been pitiable and serious day by day.

Whereas the Kantipur daily dated 2066/05/16 (01st September, 2009) has also clearly spelled out that the mentally retarded and the persons with serious disability have not been entitled to obtain any specific relief apart from the general allowance and that some of them are passing pitiable daily life.

Therefore, as the opponents have not fulfilled the constitutional and legal obligations which has resulted the infringement of the rights of the person with disability conferred by Article 12 of the Interim Constitution of Nepal, 2006 pertaining to right to live with dignity, right of equality, right of social security, and the matter also appears contrary to section 4 and 5 of the Disable Protection and Welfare Act, 1982 and Rule 8 of the Disable Protection and Welfare Rules, 1994. Therefore, we pray for the issuance of

the mandamus for the erection of the safe and community residential building to the helpless and orphan or the disable and the mentally retarded person neglected by the successors or patron, if any, as defined under Rule 8 of the Disable Protection and Welfare Rules, 1994 being the law having direct connection with the rights, interest and social security of the persons with disability, make and implement appropriate provisions to keep the men and women separately therein, make provision allowing the persons with serious disability and mentally retarded person being neglected by the successor and family to remain in the community house upon their desire, make arrangement of the entrance of the disable friendly wheel-chairs in the public infrastructure (government building and office) as well as the public transportation instruments, make compulsory arrangement of the unemployment allowance being sufficient to pass the daily life to the person with the serious disability and mentally retarded person and arrange the matching productive training and employment to the person being able for employment, formulate and implement the special policy defining the procedures to save the person with serious disability and mentally retarded person in the emergence of the natural disaster, arrange the formal, informal and practical education matching with the physical circumstance of the person with serious disability and mentally retarded person, make provision of the daily disability allowance and an assistant with the salary and allowance with the entitlement to pass the life until the erection of the community building and rehabilitation of the person with serious disability and mentally retarded person there in, make law at the par of the Interim Constitution of Nepal, 2007 and the Convention and Treaty for the protection and promotion of the interest of the person with serious disability and mentally retarded person and enforce and cause to

enforce the prevailing Disable Protection and Welfare Act, 1982 and Rules, 1994 rewriting as per the spirit of the Convention.

The order of the court comprising the single bench dated 2068/05/18 (04th Sept., 2011) states whereas what has been taken place in this matter? Why should not the order be issued as per the demand of the petitioner ? Let the notice be served to the opponent attaching a copy of the writ petition ordering for the submission of the written reply within 15 days except the time required for the way from the date of receipt of this order through the office of Attorney General along with the concerned file and the information copy thereof be served to the office of Attorney General and the case file be presented for hearing after the receipt of the written reply or the lapse of the period for the same as per the rules. Similarly, the case be presented with priority in consideration of the sensitivity of the case.

Whereas the written reply of the National Planning Commission before this court states: The recently held census has concluded the collection of the particulars of the persons with disability in each family from the Central Statistics Department and there has been processing and analysis of the statistics as such and that the number of the person with disability throughout Nepal shall be traced out upon the completion of the said work.

With regards to the persons with disability the three year plan (2067/068-2069/070 i.e. 2010/11-2011/12) has stated the strategy, working policy and the principal programs which have been mentioned in the three year plan book published by this commission from page Nos. 285 to 288. Following the work as mentioned in the three year plan with the act and activity from the concerned body there has been preparation of the plan to bring out the person with disability in the main stream the writ petition be quashed.

Whereas the written reply of the opponent Ministry of Education before this court states: The special treatment in favor of the person with disability has been pursued under the rule 60-66, Chapter-11 of the Education Rule, 2059 which is being administered by the Ministry of Education. The Ministry has been sensitive in regards to the persons with the incapacity. As per the claim made under No. 10 E of the petition of the petitioner there shall be essential provision in the days to come for the provision of the formal and informal pragmatic education in favor of the incapable and mentally retarded persons matching with the physical position. As equivalent to the other public services the percentage based reservation has been ensured under the Teachers Service Commission Regulation, 2067 in the recent time in the education service. The Ministry has been aware over the concerns of the opponent petitioner and thus it is hereby requested to relieve from the claim of the opponent.

Whereas the written reply of the Ministry of Local Development inter alia mentions: the Ministry has always been endeavoring for the protection and promotion of the rights and interest of the persons with disability. The District Development Committee Grant Operation Procedures, 2067, Municipality Grant Operation Procedures, 2067 and Village Development Committee Grant Operation Procedures, 2067 have provided for the allocation of minimum 15% budget by the District Development Committee, Municipality and Village Development Committee out of the total capital budget to invest in the program and projects for the direct benefit of the targeted group and area as prescribed by the Government of Nepal with the publication of notice and accordingly the program is implemented. Following the legal provision in the Local self –governance Act the local bodies are effecting registration of the personal events of the persons with disability, issuing the registration certificate thereof and

distributing the disability allowance and the social security allowance etc. Similarly, the local bodies are initiating works for the erection of the community building in favor of the persons with disability and performing works for their enhancement of the capacity via the skill-oriented training, awareness related workshop, seminar etc and many more other works. The matter under the domain of the executive can not be made part of the judicial settlement as per the principle of separation of power.

Whereas the letter of reply of the opponent Ministry of the Women, Children and Social Welfare before this court states: the Ministry of the Women, Children and Social Welfare has been endeavoring its best for the rights and interest of the women and children subject to its resources and instruments from its establishment.

Whereas the letter of reply of the opponent Ministry of Finance before this court states: with regards to the claim of the opponent for the formulation and implementation of the laws in line with the treaty and agreement being Nepal a party the matter of making law, its amendment or repeal have been under the domain of the legislative parliament and the writ petition is subject to quash as it has made this Ministry opponent over the unrelated matter. The budget speech of the fiscal year 2068/069 (2011/2012) has exempted the vehicle tax, the road construction and maintenance charges for the scooters bearing 150CC made along with the system entitling the persons with disability. Further, the state will be active for ever to facilitate the rights and interests of the persons as such in future subject to its area and resources by making different programs the plea of the petitioner be quashed.

Whereas the letter of reply of the opponent Legislative Parliament Secretariat before this court states: Whereas the Secretariat has full consent over the claim and spirit of the petitioner that the Disability Protection and

Welfare Act, 1982, Disable Protection and Welfare Rules, 1994, Convention on the Rights of Persons with Disabilities and Optional Protocol to the Convention on the Rights of persons with Disabilities, 2006 to which Nepal has been a party, shall have been implemented as in the letters. With regards to the claim of the petitioner that the Disable Protection and Welfare Act, 1982 and Disable Protection and Welfare Rules, 1994 shall have been rewritten at the par of the Convention on the Rights of Persons with Disabilities and Optional Protocol to the Convention on the Rights of persons with Disabilities, 2006 there has been no obstruction to implement the afore stated Conventions following the provision of section 9 (1) of the Treaty Act, 2047 B.S. which stipulates: upon appearing any provision of the law of Nepal contrary with the international convention ratified by Nepal the provision of the Convention shall apply as equivalent to the law of Nepal to the extent of inconsistency and that the law of Nepal shall be ineffective. In addition, following the necessity to amend provision of any rules the formulating bodies may amend and revise the rules as such. The Government of Nepal or the Legislative Parliament shall table the related bill upon necessity to amend or revise any Nepal Act. The Interim Constitution of Nepal, 2007 has not provided authority to the Legislative Parliament and Secretariat to draft and present any bill before the House, therefore, filing of the case establishing this Secretariat Opponent arguing the lack of revision of the Disable Protection and Welfare Act, 1982 has been carrying no purpose and the petition be quashed in regards to this Secretariat.

Whereas the letter of reply of the Office of the Prime Minister and Council of Ministers in this court mentions: the Government of Nepal has been committed to or cause to ensure the fundamental rights granted under the Interim Constitution of Nepal, 2007 equally to the persons with

disability as well. For the sake of the same the Disable Protection and Welfare Act, 1982 and Rules, 1994 have been implemented. The Government of Nepal has been conferring reservation to the persons with disability for the utilization of the civil service, public service and facilities. With regards to the directive order and mandamus issued in the writ petitions from the esteemed court on the writ No. 3586 the Government of Nepal has arranged for the free admission waiving other charges to the blind, disable, deaf and mentally retarded person in the public school, college and training center. In order to make the hospitals disable friendly there has been construction of the ramp, free distribution of the medicine to the disable persons and the helpless along with the special exemption and free treatment and grant to the non-government organizations, establishment of the Help Desk for the information pertaining to the disability and empowerment in all five development regions and establishment and operation of the libraries for the hearing of the visually impaired persons. In the fiscal year 2068/69 (2011/2012) there has been community based rehabilitation program and sensitization program to the persons with disability in all seventy five districts, establishment and operation of the residential protection and rehabilitation center in three development regions, formulation of the partnership program for the production of the auxiliary materials to the persons with disability and operation of the program of the recording of the management of the distribution system of the identity card of the disability.

Whereas the letter of reply of the Office of the Ministry of Health and Population before this court mentions: this ministry has been undertaking construction of ramp in the hospital so as to make it disable friendly with the free distribution of the urgently needed medicines to the disables, provision of the special waiver and free treatment in the hospitals to the

disables and helpless and grant to the non-governmental organizations for to the disables and helpless subject to the available resources of the state from the preceding years. There has been no infringement of any right of life with dignity and the other coinciding fundamental and constitutional remedy related rights conferred to the oponent petitioners. Therefore, the writ petition be quashed.

Whereas the file of the writ petition presented in the daily cause list by following the rules has been studied. The arguments of the learned Advocates Sudarshan Subedi and Major Thapa representing the petitioner have been: the International Convention relating to the Disability, Disability Protection Act and Rules have ensured the various rights to the persons with disability. The said provisions have not taken the practical shape. Though there has been some provision for the ordinary disables, there has not been any provision to the seriously incapable persons from the government. The Rule-8 of the Disable Protection and Welfare Rules, 1994 has provided for the house to the person with serious disability but there has been no erection of the house as such as of the present. There has also not been provision for the disable friendly road and the government building. There exists obligation to the government, local body and municipality for the purpose. It has not been fulfilled. The works mentioned in the letter of reply of the Office of the Council of Ministers as performed have not been adequate. No provision is made addressing the protection of the person with serious disability in the aftermath of the demise of the guardian taking care to him/her. As there appears necessity to provide for the social security, eating provisions, education and care taking to the person with disability let the order be issued as per the demand of the petitioner.

Whereas the learned joint-attorney Dharma Raj Paudel, representing the Government of Nepal has presented arguments mentioning: the stipulation of many more welfare acts in favor of the disable persons from the government have been mentioned in the letter of reply of the Office of the Prime Minister. The Ministry of the Social Welfare has defined and prescribed the disability. The Interim Constitution of Nepal has provided for the relief of the persons having been disable in the conflict period. In the operational three year plan as well the disable welfare plans are being implemented. The provisions to make the hospital and government offices disable-friendly has been commenced. The speaking software *daje* has also been introduced. As there has been no legislative parliament at present the rewriting of the Disable Welfare Act in tune of the Convention has not been possible. The state is to perform the works relating to the construction of the disable house subject to its capacity the writ petition be quashed.

Whereas following the demand of the petitioner Nepal Disable Human Rights Center and Dipendra Shakya, a person with serious disability, is seemed with the contention that the rights and interest of the disable person and that each person living in the state shall have unhindered right to possess the conferred rights by the state. Since the state has ratified and enforced the Convention on the Rights of Persons with Disabilities and Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2006 the Disable Protection and Welfare Act, 1982 and Disable Protection and Welfare Rules, 1994 appear to be incomplete and passive in implementation. Despite the Rule 8 of the Disable Protection and Welfare Rules, 1994 has made provision for the establishment and operation of the disable house it has not been operated. By this, the disable persons are deprived from the exercise of the right to

life conferred under Article 12 (1) and the right of equality and protection *et al* provided under Article 13. Therefore, the order be issued for the erection of the community house in favor of the seriously disable and mentally retarded person, make arrangement of the wheel-chairs for the entrance in the public infrastructure as well as the public transportation vehicles, unemployment allowance and prepare the policy to save the disable persons by the state upon arising the natural disaster, implement the practical education and rewrite the Disable Protection and Welfare Act, 1982 and Disable Protection and Welfare Rules, 1994 in line with the International Convention Relating to the Disabilities.

Whereas the letter of reply of the opponent Office of the Prime Minister and Council of Ministers shows in the context of the directive orders issued by this court there has been construction of the ramp in order to make the hospitals disable friendly from the past, free distribution of the medicine to the disable and helpless persons along with the special exemption and free distribution of the medicine and free medication and grant to the non-governemt organizations for the service of the disable persons and the helpless persons.

Following the afore stated demand under the writ petition, letter of reply of the opponent and hearing the arguments of the lerned legal practitioners the pont-wise demand of the petitioners stands as follows.

1. That the state shall arrange for the daily allowance and special facility to the person with disability and the mentally retarded persons as well.

2. The erection and operation of the residential houses to the persons with serious disability.

3. The implementation of the prevalent Act and Rules and

4. The Acts and rules of Nepal be updated, amended, rewritten in line with the International conventions and agreements pertaining to disability and implement accordingly.

Upon the consideration of the afore stated argument of the petitioner the following issues appears in necessity of the decision.

1. Whether or not mandamus be issued requiring the provision of the allowance and special facility to the person with disability and erection as well as operation of the residential building to the persons with serious disability.

2. Whether or not the prevalent legal provision and its implementation has been effective.

3. What kind of order be issued in consideration of the claim of the petitioners.

First of all upon the consideration of the first question Article 12 (1) of the Interim Constitution of Nepal, 2007 has ensured for the right to life with dignity to each person. To exercise this right there shall have been fulfillment of the basic human necessity and to live with dignity there shall have been additional physical facilities. No doubt the state shall ensure for the same. Article 13 of the Constitution has provided for the equality to all the citizens. By this the perception that all the citizens irrespective of the physical or social status or condition are standing equal and that there shall not have been discrimination among the people. On the proviso clause of the same article 13(3) the constitutional provision exists: Provided that, nothing shall be deemed to prevent the making of special provisions by law for the protection empowerment or advancement of Women, Dalits, Indigenous People (Adibashi Janajati), Madheshi (People living in Terai Region) or farmers, workers, economically, socially or culturally backward classes or children, the elderly or the person with disability or those who

are physically or mentally incapacitated. Article 18 of the constitution has provided right to each citizen for employment and social security and Article 18 (2) has provided for the the special constitutional right of social security to the women, worker, elderly, disable, incapacitated or helpless citizens as provided in law.

Under the state obligations provided by the Interim Constitution on Article 33 (Part D 1) the state has accepted its obligation to have participation of Madheshi, Dalit, Indigenous people, Women, Labors, Farmers, Backward class and persons with disability in the state structure and all the organs of the state. Similarly, Article 35 (9) of the constitution has provided *inter alia*, the policy of the state: making special provision of social security for the protection and upgradation of the single woman, orphans, children, the helpless, the elderly person, the person with disability, the incapacitated person and the tribes on the verge of extinction. Article 35 (17) has provided that the state shall pursue a policy of providing allowances to the elderly citizen, incapacitated, women and unemployed person by making laws. These constitutional provisions have directed the state to fulfill the basic necessity of the person with disability and additionally make special provisions to ensure for their dignified life.

Upon the consideration of the prevalent legal provisions designed to confer the said constitutional provision practical shape section 10 (1) of the Disable Protection and Welfare Act, 1982, made many year's back provides privileges to the person with disability through the provision: the Government of Nepal may make available the land to be distributed under the prevalent law or the land to be made available for cultivation subject to the prescribed conditions for the construction of the house to the person with disability without house or any other person with disability to involve in agricultural works following the necessity. Section 11 of the same Act has

prescribed for the special duty to the family member and relatives requiring the family member, guardian or successor to make special care providing the nurturing facility to the person with disability. In addition to the other matters Rule 8 of the Disable Protection and Welfare Rules, 1994 has made provision for the Establishment and operation of the disable house.

In addition, Section 28 (1) part (K) sub-part (6) has made provision to maintain record of helpless, orphan and disable children in the area of the village development committee and place them in the appropriate places and section 96 (1) part (J) sub-part (10) has made provision to keep them in the Municipality area and Section 189 (1) part (F) sub-section (2) has prescribed the work to the District Development Committee to work as per the national policy for the protection of the helpless, women, elderly, disable and incapacitated person.

As Article 28 of the Convention on the Rights of Persons with Disabilities, to which Nepal is a party, has provided Right of Adequate Standard of living and Social Protection with the focus to ensure persons with disabilities to public housing programmes and that the state is required to undertake the public residential programmes ensuring the residential right of the person with disability as a matter of obligation. Whereas Nepal has been a party by accepting it the practical conversion under the Domestic Legal Domain with the actual and effective implementation has been the unignorable obligation of Nepal and the Government of Nepal.

It is uncontroversial that the persons with disability have been a group of the persons different than that of the able persons. Keeping the same matter in view the state is obliged to make special infrastructures to increase the contact and access in the public places and guarantee the employment as per the special physical and mental conditions. The disability has been special physical, mental or intellectual condition which

may arise by birth or due to different circumstances appearing after birth due to different reasons. As the disability is to decrease the physical, mental or intellectual capacity of an individual it is difficult to a person with disability to pass life as equivalent to the other able, perfect or normal person. So, the person with disability requires more and special facility and care in comparison of the ordinary person. Therefore, the state is to treat them with the identification of the physical capacity, mental and intellectual position differently than the ordinary persons. The state is obliged to undertake the special programs full with the essential physical infrastructures entitling them for the livelihood. It needs the identification of the person with disability, incapacitated and seriously incapable person and thereby provide the living allowance for livelihood or the special facility thereof and whereas the demand of the petitioner for the same has not been inappropriate one.

The state is required to make special provision for the protection and welfare of the persons under such category so as to implement the prevalent constitutional provision. Out of the persons with disability some may have been the person with ordinary disability and some may be carrying more or serious disability resulting in the reliance with the others for the support, service or care for the food taking to operate the daily works due to personal incapacity. With regards to the persons carrying the serious disability as such the state is to be more serious for the works to ensure for their right to life. The Disable Protection and Welfare Act, 1982 has made provision for the Disable house and section 2 (C) of the Act has defined "Disable House" as the house provided for the nurturing of the helpless and person with disability. Section 10 (8) of the Act has made provision for the disable house so as to make provision of residence to the elderly person with disability and helpless person with disability along with

the entertainment and other instruments to pass time with convenience in the said house. The rule 8 of the Disable Protection and Welfare Rules, 1994 which was made after 12 years for the implementation of the said Act has also made provision for the construction and operation of the Disable House. As per Rule 8 (1) the Government of Nepal may establish disable house in the different regions as per necessity and recognize the other houses as the disable house until its construction. The Rule 9, 10, 11 and 12 have made other provisions for the operation of the disable house. Section 10 of the Act has made provision for the rehabilitation of the persons with disability in the society, their participation in the social and cultural activities and provision of the employment and the provision of the unemployment allowance until the provision of the employment, livelihood allowance and the special allowance for the elderly person and the person with disability being unable to earn for livelihood.

Hence, realizing the necessity of the residential house for the person with disability the said Act and Rules have made provision for its establishment and operation. Relating to the person being incapacitated or the person with physical or mental disability upon finding no family to nurture or protect them or there has been no proper nurturing facility despite the fact of prevalence of the family or inability to do so or upon consideration of the fact that there has been lack of interest for nurture or no nurturing has been performed there has been necessity to build the residential house to the persons with the serious disability as per necessity and its operation with the proper method and provision of allowance to the unemployed or the person with disability being unable to pass life by self. In this context, the demand for the construction of the house to the person with disability and its operation as well as the special facility or allowance has been lawful and justiciable one.

With regards to the second question the provision of the Interim Constitution of Nepal, 2007 has directed for the person with disability and incapacity whereas the Government of Nepal has ratified and been a party of the Convention on the Rights of Persons with Disabilities and Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2006 there has been no clear basis to present the provisions of the Disable Protection and Welfare Act, 1982 and the Disable Protection and Welfare Rules, 1994 have been fully capable and effective one. The Act and Rules have not catered the whole matters relating to persons with disability. On the other hand, the incorporated part of the matters relating to the persons with disability has also not been rightly, properly and effectively implemented. Despite the prescription of the disability it is not based on comprehensive and actual basis. There has not been full protection of the interest of the persons with disability as mentioned by section 4 of the Disable Protection and Welfare Act, 1982. The letter of reply presented by the office of Prime Minister and Ministry of Social Welfare has merely shown the commencement of some preliminary works. However, many more crucial works have not been performed. The disable house as mandated by the Act and Rules has not been established. Besides, the grants conferred to some of the non-government organizations for the said purpose neither there has been construction of the disable house from the government level nor its operation. Over the education of the persons with disability only a few preliminary works have been performed which have not been adequate. Similarly, the training and employment and the other facilities and privileges as instructed by Section 10 of the Act have not been reasonably and adequately provided.

In addition to the prevalent Act and Rules this court has issued directive orders over the different writ petitions for the protection and welfare of the persons with disability in the previous time as well. In order to implement the provision of Article 13 (3) of the Constitution for the formulation of the policy and program making the simpler and easier access of the persons with disability in

the public places (Bimala Khadka et al vs. the Office of Prime Minister and Council of Ministers, writ No. 0748 of the year 2065), to confer the free education to the blind and persons with disability (Sudarshan Subedi et al vs. His Majesty's Government, Council of Ministers et al writ No. 3586), to confer the facilities under the Disable Protection and Welfare Act, 1982 (Petitioner Babu Krishna Maharjan vs. the Office of Prime Minister and Council of Ministers, writ No. 3666 writ petition of the year 2061 B.S.), the directive orders have been issued by this court.

Upon studying the previous orders issued by this court and the letter of reply submitted by the opponents it is difficult to conclude that the prevalent legal provisions are adequate for the welfare and protection of the persons with disability. In addition, the existing provisions are also not found out to have been effectively implemented. The effective and reality based policy and programs relating to the person with disability has not been formulated under section 20 of the Act. By this, the obligation of the state towards this weaker class of the society can not be understood to have been fulfilled. In this context, it is essential to reform, change and revise our legal provisions for improvement and protection of the actual interest of the person with disability and incapacitated person. It is a crucial matter. The reasonable and timely updated legal provision shall not only make the government and governmental bodies sensitive in this direction but also shall compell for the fulfillment of the obligation. Therefore, appropriate revision of the prevalent laws seems essential in the given circumstance of this day to work for the protection and welfare of the person with disability to the government and the other bodies of the government. Until the completion of the said work it is essential to make the implementation process of the Act and rules more effective and result-oriented.

Over the observation of the claim of the petitioners considering the kind of order essential to issue which is the third question, there appears no controversy that the provisions under the Constitution, Act and Rules shall have been pragmatic and the said provisions have been for the sake of implementation. It is

the obligation of the state and the government driving the state and its mechanism to make the concrete solution and provision for their effective implementation. The state obligations, directive principles and state policies mentioned under Chapter 4 of the Constitution are not merely cosmetic rhetorics of the words. The makers of the constitution have realised the necessity and held objectives to convert in real practice. Subsequently in the present context and inserted in the constitution accordingly. To put the constitutional provision under chapter-4 passive shall not be in line with the overall provision of the constitution and Constitutional spirit. However, the conversion of the Constitution, law and commitment expressed through the convention and treaties in the actual practice the matching commitment, conduct, physical resources and vehicles are essential. It is a matter of national pride that a person with disability is not deprived from the facilities under the constitution and that they are to get service, facility and care as per the international system and criteria. This is a very sensitive issue. The state or the government shall not express the commitment which can not be fulfilled immediately and the court shall also not issue any order as such.

The court has been committed and sensitive for the full implementation of the Constitution and Act. In addition to the matters clearly spelled out by the law this court is always active, moving ahead and attempting for the conversion of the objectives of law, spirit and contention of the constitution in actual sense. However, being an organ of the state, rather than moving alone there may be justice to the people upon the performance of the activities of the court with the co-ordination of the other branches of the state and accordingly the state may be run in line with law. Therefore, the court shall always be aware toward this and that the principle of appropriate judicial restraint shall also not be neglected. It does not however give sense to accept the prevalent situation in as it is form or remain indifference toward the rights and interest of the person with disability or pursue passive judicial approach in place of judicial activism. However, it is sure that it will be useful that the judicial activism and judicial restraint both shall have been reasonably viewed together maintaining balance with each other. The

decision maker shall always be aware and cautious toward the risk that the pursual of the extreme judicial activism and the unnecessary Judicial self restraint to the extent of judicial passivism both may pose obstruction in the way of the people to acquire justice.

Whereas the writ petitioners have put forward the demand for the provision of the adequate disable house with physical infrastructure and its operation and provision of a separate track to enter each government office and public offices and the vehicles of public transporation with wheel-chair. The regular allowance to the person with serious disability and livelihood allowance to the caring person to them have also been demanded. The access of the person with disability over the Education, Health, Employment has also been demanded. Upon the consideration over these demands the state shall subsequently address these demands for the development of the adequate infrastructures subject to its resources and vehicles and formulate as well as implement the the policy and programs accordingly. As it needs larger physical instruments and resources the issuance of time bound absolute order from this court may not be possible for implementation. The unavailability of the physical instruments and resources may be blockade for the same. Therefore, the issuance of order at the par of the demand of the petitioner in the writ petition requiring the wider works for the immediate performance may not be wise and useful.

Thus, the serious study and analysis of the overall circumstance shows the necessity to perform some of the activities on immediate basis and some activities to be performed subsequently. It is encouraging matter that the Government of Nepal and its organs have commenced some of the activities for the rights, interest, education and social security of the persons with disability. Therefore, for the performance of the following works by being more serious and responsive toward this issue the Manadamus is issued to the opponent Government of Nepal, Office of the Prime Minister and Council of Ministers, Ministry of Women, Children and Social Welfare and Ministry of Finance.

The works to be performed:

1. Make provision of payment of minimum monthly Rs. 500/- (Rupees Five Hundred) to Rs. 3,000/- (Three Thousand) as livelihood allowance to the person with disability identified and calculated as of the present in consideration of the circumstance of the disability.
2. To make monthly special allowance Rs. 3,000/- (Rupees Three Thousand) to Rs. 5,000/- (Rupees Five Thousand) considering the condition of the person with serious disability from the fully incapacitated or the person with full mental unsoundness identified and calculated and being incapable physically for walking upon finding no family for the reasonable care or to the caring person who has no competent family to do so.
3. To identify, classify and overview the rights and interest of the person with disability appoint at least one Social Welfare Officer in each district or assign any officer of the Government of Nepal to do the said work.
4. Make available the allowance and special allowance pursuant to above section 1 and 2 within three months from the date of receipt of this order applying from the date of receipt of this order.
5. The social welfare officer shall have been appointed within 6 months from the date of receipt of this order.
6. With the completion of the afore stated works serve information on the performance of order to this court within 7th month from the date of receipt of this order.

In addition to the works as such the other welfare activities to be performed in favor of the persons with disability shall not be confined into the policy, rather be brought into execution process. The matters as such shall have been brought in details by the Act. Further, there is necessity to address the latest challenges appearing in the rights and interest of the persons with disability. There has been condition prevalent to revise the Act or Rules or promulgate the intergrated Act with the induction of the subject matters relating to Health and Social Security on the Acts and Rules to the person with disability following the detail study. The Act made some three decades back and the Rules made some two decades back

have not catered all the essential matters of the area and secondly the Act and Rules as such are not effectively implemented.

Therefore, following the analysis over the Constitution, Act, Rules and Conventions as above this directive order has been issued to subsequently perform the following works within a reasonable time period to the opponents Government of Nepal, Office of the Prime Minister and Council of Ministers and the Ministry of Women, Children and Social Welfare.

The matters of Directive Order:

1. To or cause to calculate the persons with the physical, mental and intellectual disability as per the accepted principles of medical science and international standards for the purpose of section 3 of the Disable Protection and Welfare Act, 1982 and set their standard and classification.
2. To construct and operate the Disable House. To this end, at least a disable House be constructed and undertaken each year from the next fiscal year adopting the planned way in the district or area having many more persons with disability.
3. To make effective implementation of the provisions relating to the residence, education, health training employment and other facilities provided by the Act and Rules.
4. With the view to or cause to monitor the activities initiated by the government or non-governmental level for the welfare and security of the persons with disability appoint a monitoring official being officer level on each the Secretariat of Council of Ministers and Ministry of Women, Children and Social Welfare and prescribe their power, function and duties in the revised Disable Protection and Welfare Act.
5. As per proviso clause of Article 13(3) of the Interim Constitution of Nepal, 2007 and State's Policy and obligations mentioned under Chapter-4 of the Constitution the special provision and programs for the persons with disability be implemented.

6. To make co-ordination and co-operation over the action and activities of the governmental and non-governmental bodies working in the area of the rights and welfare of the persons with disability.

7. With the view of ratification of the Convention relating to the Convention relating to the Disability, 2006 having essential consultancy and recommendation with the experts and stakeholders either the Disable Protection and Welfare Act, 1982 and rules, 1994 be timely amended and revised or new integrated Act and the rules in tune of the same be formulated.

The information of the order be served to the opponents via the Office of Attorney General and the information with the copy of the decision be served to the Monitoring and Inspection Division of this court and let the record in diary be struck off and the file be duly handed over as per the rules.

s/d

Judge

I concur the said opinion.

s/d

Judge

Bench Officer: Churaman Khadka

Computer Typist: Saraswati Paudel

Handed down on Tuesday, 30 Shrawan of the year 2069 (14 August, 2012)