



NEED FOR COMPENSATION LAW IN NEPAL

SEMINAR

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Rapporteur's Report

by

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Table of Contents

Executive Summary.....	2
Summary of the Remarks at the Opening Ceremony	2
Concept Paper Presentation on Compensation Law in Nepal	3
Summary of Comments and Remarks	5
Summary of Floor Discussion and Question & Answer Session	7

NEED FOR COMPENSATION LAW IN NEPAL

Executive Summary

1. The seminar held at the Hotel Shanker on 1st February, 2018 was aimed at driving forward the **Need for Compensation Law in Nepal** and allowing exchanges of views between the seminar presenter and the commentators on the approaches of Compensation. It highlighted the need of new law relating to compensation in Nepal to address the issues of damages and compensation in business including both private and public sectors in light of ever expanding global economy which will guide fair business practice and protect the investors, market and consumers. The Paper Presentation followed with comments from prominent personalities in legal sector and floor discussion addressed the major concerns of law and business regarding the legislative framework of existing intricacies in the fields.

Summary of the Remarks at the Opening Ceremony

2. The President of NUSACCI, Mr. Kiran P. Saakha in his welcome speech highlighted the importance of Compensation Law in determining security to investors who look for safety measures in Nepal. He further acknowledged that Compensation Law is not only important for investors but also to general public and individuals. He aptly identified that the availability of Compensation Law helps in promoting Foreign Direct Investment (FDI).

3. Honourable Supreme Court Justice Mr. Anil Kumar Sinha, one of the pioneers in Corporation law, in his keynote speech, aptly identified the lacunas of laws to identify the compensation issues in Nepal. He further quoted Section 8(4) of newly formed General (Civil) Code 2074 B.S. (2017 A.D.) where the provision “compensation shall be provided as per law” is found. According to him it is vague and the court at various instances is reluctant to provide sufficient compensation as no exact quantification of compensation is found in law. He reiterated that, as long as no quantification of compensation is found in law, no business can flourish. He said that business and investment disputes should be awarded with monetary compensation rather than imprisonment and criminalization.

NEED FOR COMPENSATION LAW IN NEPAL

4. Mr. Michael C. Gonzales, Charge D' affaires, US Embassy, Nepal, in his inaugural address pointed out US Embassy's top priority of bringing investment in Nepal to help Nepal be a Middle Income Country till 2030. He said that the private investors in absence of Compensation Law are in high risk, as disputes may lead the investors to bankruptcy. He pointed out longevity of dispute settlement procedure in Nepal which is common in all developing countries without actual amount of compensation. He urged all the distinguished law making authorities to make a Compensation Law and implement it in a good way which can be a new beginning and optimism for increment of Foreign Direct Investment and economy of Nepal. He recommended the authorities to enforce the law, guaranteeing less risk and legal accomplishment to the investors. He assured US Embassy's feedback in each stride of law making process where they would advice the authorities not only with success stories of tort and Compensation Law in US but also with the lessons learnt from failures of such law.

Concept Paper Presentation on Compensation Law in Nepal

5. Mr. Narendra Kumar Basnyat, Immediate Past President of the NUSACCI emphasized the need of Compensation Law in order to foster business environment in Nepal.

6. Mr. Raju Man Singh Malla, Senior Partner at Gandhi & Associates presented a concept paper entitled, "An Overview of Full Compensation System in Tort Law and its Importance in Development of Nepal". Mr. Malla provided basic background about the legal status of Nepal and importance of tort and Compensation Law in flourishing business and industries including foreign investment in Nepal. In addition, he gave a short introduction and fundamental backdrop of Tort and Principles of Tort where he explained tort as negligible act or intentional wrong-doing that causes physical, mental or economic loss or injury to another party i.e. the conduct excluding the criminal and contractual liability. He further explained the types of tort as Negligent tort, Intentional tort and Strict liability tort. However, he confirmed that all these forms of tort are ultimately based on Principle of Full compensation. Mr. Malla underscored the principle of non transferability of law as the law

NEED FOR COMPENSATION LAW IN NEPAL

of one country cannot be implemented in other countries and one should draft law in their own context. According to him the context and content of law should be developed by looking at their own legal system which is enforceable and implementable. However, he further clarified that laws and instruments of other countries can be used for referential purpose.

7. Mr. Malla briefly explained about the law of Tort and Compensation in other jurisdictions and their judicial approaches. He succinctly clarified the legislations of United States of America, the United Kingdom and India with some the landmark cases of tort and compensation i.e. *USA v. Yellow Cab Company*, *Chellamma v. Kerala State Electricity Board (K.S.E.B)*, *Bhim Singh v. State of Jammu Kashmir*. He pointed out that the compensation in Nepal is not specified and condensed in a single legislation rather found in parts of various Acts like Compensation Act 2019 B.S. (1963 A.D.), Consumer Protection Act 2054 B.S. (1998 A.D.), General Code 2020 B.S. (1964 A.D.), Motor Vehicles and Transport Management Act, 2049 B.S. (1993 A.D.), Libel and Slander Act, 2016 B.S., Muluki Civil (Code) Act, 2074 B.S. (2017 A.D.), Compensation for Torture Act, 2053 B.S.(1996 A.D.) etc. He illustrated the provisions regarding liability of government employees under the offence of tort, torts claimed by non-Nepalese, procedural matter for claiming compensation etc.

8. Mr. Malla in his remarkable presentation further detailed out the procedure for claiming compensation, forming a separate body (Compensation Allocation Committee or a tribunal) for determining the amount of compensation, official investigation body, matters relating to appeal, establishment of compensation fund, matters regarding punishment for fraudulent claims etc. He further suggested drafting the Compensation Law including the compensation for Medical malpractices and the claims by workers or employees of company, organizations or such other entities.

NEED FOR COMPENSATION LAW IN NEPAL

9. Mr. Malla concluded his presentation by emphasizing the need of making Compensation Law in order to formulate just system of law and justice dispensing mechanism based on rule of law, the principle of Natural Justice as well as the principle of full compensation including medical fees, mental sufferings, administrative costs etc.

Summary of Comments and Remarks

10. Prominent lawyers, businesspersons and experts invited in the Seminar presented their comments and remarks on the Paper.

11. Mr. Kevin Burke, Department of Justice, US Embassy, Kathmandu in his succinct comments clearly identified the lacunas of the Nepalese government in making and executing laws. According to Mr. Burke the government should reduce uncertainty of business transactions. Mr. Burke further added that investors have to invest huge capital without clear legal provisions of compensation which is in high risk refraining them from investing in Nepal. He urged all the distinguished attorneys and businessman to form and implement laws which would be business friendly and helpful for the rapid economic growth of the country.

12. Mr. Dilli Raj Regmi, Joint Secretary, Ministry of Law Justice and Parliamentary Affairs (MOLJPA) in his elegant comments put forward the view that the Seminar on Compensation Law in the present context of recent enactment of Muluki (Civil) Code Act, 2074 B.S.(2017 A.D.) is very relevant as it would follow enactment of several other legislations with its enforcement from Bhadra 01, 2074 B.S. (August 17, 2018 A.D.). He further clarified that Muluki (Penal) Code Act, 2074 B.S. (2017 A.D.), has accepted compensation as an aspect of punishment based on reasonable compensation principle. In his keynote comment Mr. Regmi raised an issue of debate in the concept of Full Compensation and Fair Compensation. He pertinently identified the aspect of Fair compensation and further added whether concept of fair or full compensation is to be taken while drafting the Compensation Law in Nepal. He criticized the provision of Bilateral Investment Promotion and Protection Agreement (BIPPA) in relation to discriminatory

NEED FOR COMPENSATION LAW IN NEPAL

provisions of compensation to Nepalese and foreigner investors. He significantly put forward the view that “foreign laws should not be adopted but be adapted.” As a government official, he urged all the attendants to find and inform the lapses of existing laws and help MOLJPA to fill such gaps either by amendment or by making new laws.

13. Mr. Sailendra Kumar Dahal, President of Supreme Court Bar Association highlighted the Full Compensation with an approach of fair compensation which is hard to achieve. He aptly identified two perspectives in regard to compensation for tortuous act: firstly, one who gets injured receives payment in lieu of damages occurred and secondly, the need of Consumer Court and Small Claims Court in order to facilitate the summary settlement of disputes. In focusing the procedural aspects, Mr. Dahal referred the development of mechanism under present Federal Structure as to include the participation of local bodies.

14. Mr. Gyanendra Prasad Dhungana, President of Nepal Bankers’ Association placed his comments in light of the significance of Compensation Law in promoting business environment in the country. He was concerned about the Compensation Law that should be framed considering the appropriate environment for Foreign Direct Investment in the Country to avoid unfair business practices. He raised the issue of Compensation in cases of dishonour of Cheque and blacklisting of firms, companies and individuals in the absence of default. According to him the Compensation Law, should address the lacunas of the existing laws.

15. Mr. B.K. Mahajan, Vice President of Nepal Insurers Association, in his comments raised the issues of compensation in relation to insurance such as coverage of liability by the employer with respect to the employee, transfer of risk to the insurance company, third party liability and so forth. He raised further concern over the situations of “act of god” like natural calamities and liability on part of the government.

16. Senior Advocate & Partner at International Lawyers and Consultants (ILC) Mr. Pravakar Adhikari discussed the Seminar topic in light of existing commercial practices and

NEED FOR COMPENSATION LAW IN NEPAL

complexities. He distinguished between tort and contract, the former denoting a legal wrong committed upon the person or property independent of contract. Herein, he emphasised that the relation between tort and contract is universally debatable concept. He added that tort covers legal rights and obligations where the loss may be actual or hypothetical, however contract provides contractual rights and obligations with actual loss. He linked these concepts to highlight the compensation regime in commercial sectors.

17. Mr. Adhikari provided series of examples relating to Air Carrier Liability, import of defective products, medical malpractices, blockade compensation, etc where reasonable compensation could be provided to the aggrieved parties if the issues were adequately addressed by law. He shared the decision of the Court of the United States and Thailand in the event of crash of Thai Airways International Flight 311 (TG-311) in 1992 A.D. to provide compensation worth approximately one million dollars to Mr. Nirajan Koirala and also handsome compensation to Ms. Meena Kumari Thapa. In addition, he suggested that single compensation regime should be drafted in order to cover national and international transactions. In this regard, he called for the need to draft Compensation Law so as to address jurisdictional intricacies that exist in commercial practices.

Summary of Floor Discussion and Question & Answer Session

18. After the commenting session, the audience raised some important questions on the floor.

19. Mr. Shyam Mohan Shrestha expressed that the Compensation Law should envision the kind of compensation aggrieved party should be provided with. He shared the irony how Nepalese businesspersons are compelled to bear financial liability in both the situations of export and import of goods. He added the need to draft law in clear, simple manner with special focus on its implementation.

20. Nepal's Former Ambassador to France Mr. Mohan Krishna Shrestha explained economic diplomacy as the buzzword of today. He opined that the declining foreign

NEED FOR COMPENSATION LAW IN NEPAL

investment in Nepal is the result of inappropriate business law and inadequate compensation law. He said that the issues of foreign investment and participation of private and public sectors in the investment reflect the reputation of the nation at large. Therefore, lawmaking is relevant with national development.

21. Similarly Mr. Swayambhu Ratna Tuladhar, Nepali handicrafts exporter in his question to the Paper Presenter and the Panel of Commentators asked the authority responsible and the way forward to address the challenges in adoption of appropriate Compensation Law.

22. Mr. Bikash Acharya from Belgium Panchakanya Group suggested that the Compensation Law should be drafted in simple manner so that not only the individuals in legal sector but the common people would also be able to understand the provisions.

23. Mr. Birendra Raj Adhikari was conscious about the compensation of expenses involved in litigation in false cases.

24. Mr. Gandhi Pandit, Founding Partner at Gandhi & Associates identified tort as wrongful act which is not of criminal nature but civil. He further emphasized that the concept of tort is applicable not only in case of commission of wrong but also in omission of duties. Moreover, he mentioned the significance of judiciary in implementation of Compensation Laws.

25. Mr. Bibek Dhital mentioned the business loss Nepalese investors have faced due to the failure in timely renewal of US-Nepal Trade Treaty. As a carrier, he was also concerned about the higher compensation a shipper was entitled to in shipping goods pursuant to the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October, 1929.

NEED FOR COMPENSATION LAW IN NEPAL

26. In response to the questions, suggestions and comments from the floor, the Paper Presenter Mr. Raju Man Singh Malla elaborated that tort doesn't include compensation under breach of contractual obligations. He agreed with majority of concerns regarding the need for developing investment friendly Compensation Law as well as stable government policy to shape way forward for initiating full, fair and reasonable compensation.

27. Mr. Gyanendra Prasad Dhungana, President of Nepal Banker's Association added to this in connection with the Banking Laws in Nepal. He opined that the Banking laws which provide authority to the bank to black list individuals, auction property and seize passport of the customers are not in line with international standards and most often discourage foreign investment in Nepal.

28. Mr. Dilli Raj Regmi, Joint Secretary, MOLJPA reiterated the differences of the concept between tort and compensation in light of contractual obligations. He referred that the issues of contributory negligence, actual loss and additional loss/damage are more based on the interpretation of court. He further mentioned that Nepal would be party to Convention for the Unification of Certain Rules for International Carriage by Air, 1999 A.D. in near future. He further assured to incorporate the invaluable comments and suggestions of the Seminar in the revision of Muluki Civil (Code) Act, 2074 B.S. (2017 A.D.)

29. With the above floor discussions, Mr. Narendra Kumar Basnyat, Immediate Past President of NUSACCI summed up the Seminar highlighting its key theme to protect and promote Business Investment in Nepal and adequately address the compensation regime in enacting new legislation.