

The background of the cover features a close-up, artistic photograph of several books and stacks of papers. The books have various colored spines, including blue and black, and their pages are visible, showing a range of colors from cream to yellow. The papers are stacked in a way that creates a sense of depth and texture. The overall lighting is dramatic, with strong highlights and deep shadows, giving the scene a scholarly and professional feel.

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**“COMPARISON OF RAM SHAH’S CONCEPT OF ‘JASKO PAAP USKO
GARDAN’ AND THE PRINCIPLE OF NUREMBERG TRIAL;
INDIVIDUAL CRIMINAL LIABILITY REFLECTED IN THE ROME
STATUTE OF THE ICC”**

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Looking through the pages of history, the concept of collective punishment had a vital placement. Collective punishment had not only been observed in countries like Nepal, but it was observed in many countries around the world in one way or the other. In case of Nepal, Ram Shah (c. 1606 – 1671) introduced 26 sthitis to establish a vibrant legal and judicial environment in Nepal and the concept ‘Jasko paap usko gardan’ (The one who commits crime ought to have criminal liability) introduced in the 16th century is an exemplary move in the field of criminal justice system. This is the concept of individual criminal liability developed in Nepal already in the 17th century. Later on, the establishment of the war time criminal tribunals i.e. the Nuremberg Trial and principles developed by it for the same are considered to be the foundation of the Rome Statute of the ICC, 1998 which is now regarded as the impetus for the concept of Individual criminal liability. Therefore, the writer tries to compare the concept of individual criminal liability developed in the Nepali Legal system in the 17th century and in the 20th century in the international arena and further tries to draw how farsighted the legal system of Nepal was. Moreover, the research focuses on the idea of our inability to preserve and flourish our indigenous legal system.

INTRODUCTION

Ram Shah (c.1606–1641) was the king of the Gorkha Kingdom, Nepal. He was the son of King Purandhar Shah, brother of Chhatra Shah and father of Dambar Shah. He was well known for his social, economic, judicial and administrative reforms. Although, there was much principality within the Nepal’s territory in those days, there was a lack of rules and regulations in every principality resulting in anarchy. Thus, the feeling of responsibility had arisen in him so as to bring out the change in the legal system and make the society systematic in terms of each and every aspect. He

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was one of the learned kings and respected scholars known as a "just and fair ruler" across the mid-hill areas around Gorkha. And this led a maxim; *Nyaya napaye Gorkha jaanu*¹ to be known all over Nepal.

CONCEPT OF CRIMINAL LIABILITY

In a simple understanding, Criminal liability refers to the responsibility that one should bear if he/she commits crime. It is the responsibility for a crime and for the penalty society exacts for the crime.² Criminal liability³ is the legal responsibility for any crime against the state, making the perpetrator subject to the prosecution in a court of law and provides the punishment if convicted.⁴ The consequence to this principle is that persons or the groups may not be punished for acts committed by others, regardless of any connection to the offender (such as, for example, family, community or village) with the alleged offender.⁵

Nemo punitur pro alieno delicto is a legal maxim that says no one is punished for another's crime.

Criminal liability in the past

This concept was not used in practice in the past years or in the ancient period or in the history of Nepal and also in the different parts of the world at the time of the delivery of justice.⁶ Previously, Criminal liability was not only confined to that of the perpetrator. Rather, the system of facing the punishment by all of the family members or the community was put into practice. Thus, for the guilt

¹ If you feel unjust, you go to Gorkha to get the justice.

² England, C. Deborah, 'Criminal Liability' NOLO Official, <<https://www.criminaldefenselawyer.com/resources/criminal-liability.htm>> accessed 2 March 2021

³ Sherry, Holetzky, 'What Is Liability' Info Bloom (2021), <<https://www.infobloom.com/what-is-liability.htm>> accessed 2 March 2021

⁴ McMohan Mary, 'What is Criminal Liability?' Wise Geek (Oct. 02, 2019), <<https://www.wisegeek.com/what-is-criminal-liability.htm#didyouknowout>> accessed 2 March 2021

⁵ Diakonia, 'Guilty by Association: Israel's Collective Punishment Policies in the OPT' Diakonia International Humanitarian Law Resource Centre (Oct. 2016), <<https://www.diakonia.se/globalassets/blocks-ihl-site/ihl-file-list/ihl--briefs/guilty-by-association-israels-collective-punishment-policies-in-the-opt.pdf>> accessed 2 March 2021

of a member, all of the other members of the family or the members of the tribe or community had to suffer. The system of haphazard vicarious liability⁷ was practiced at that time and it seemed to be very unfit and intuitive in terms of analyzing and implementing it in a pragmatic approach.

CONCEPT OF 'COLLECTIVE PUNISHMENT'

In previous times, the justice system was based on collective punishment whereby the family or tribal members of the perpetrator also had to suffer from the offence committed by him. It is a form of retaliation whereby a suspected perpetrator's family members, friends, acquaintances, neighbors or entire ethnic group is targeted.

The collective punishments that were practiced are shown as:

a. In China

During the Ming dynasty of China, around the 16th century, 16 women of the palace attempted to assassinate the Jiajing Emperor. All of them were sentenced to death by slow slicing.⁸ Ten members of their families were beheaded, while 20 of them were enslaved and gifted to ministers.

b. In Rome

In the Roman legal system, if the male members were not present in the family, the family members had to turn out to be slaves, and the further descendants had to be the slaves by default. Yet, it is not related to a crime, but still, the accountability of being a slave existed.

c. The German Punishment

During World War II, collective punishment was very much the norm as German and Japanese troops engaged in targeted reprisals against persons and communities as revenge for the acts of the few or for purposes of population control.⁹

⁷ Vicarious Liability means in some cases, person is made liable for the act of the other person, because he/she was in particular relationship with that person committing the crime. Laxmi Sapkota, *General Concepts of Law*, (1st edn, Lex & Juris Publication) 141

⁸ Yao Lao, 'Families That Hang Together' China Daily (May 17, 2004) <https://www.chinadaily.com.cn/english/doc/2004-05/17/content_331252.htm> accessed 3 March 2021

d. In Nepal

The general principles of the criminal law say that criminal liability cannot be transferred to anyone unlike the civil wrong. The Nepali Society and the legal and judicial system were also not free from the concept of collective punishment.

According to an inscription engraved by King *Narendra Dev*, “the ones who are proven guilty of committing the heinous crime will be punished by the royal palace and his land, family and property shall be taken by the *Aryasangh* as per the inscription of *Bajraghar*.” Based on this inscription, the then society considered family members merely as an object (property) and used them as a source of penalty.”¹⁰

It is said that the Chief Minister, *Chikuti* after the death of King Pratap Malla, had poisoned King Parthivendra Malla and thus had all his family members be given the death penalty.¹¹ It is said that Chikuti at that time was at *Deopatan* where he was severely beaten by the passersby. The human excreta were pushed in his mouth; later on all the members of Chikuti’s family including the infants were killed.¹² Moreover, *Mahadev Ojha*, the one who was accused of treason in the Malla Period was exiled from the country along with his family members.¹³ Thus, if a criminal was exiled from a country, the family members had also got to be exiled because of which they had to suffer a lot.

SIXTEENTH STHITI OF RAM SHAH: “JASKO PAAP USKO GARDAN”

King Ram Shah developed his 26 edicts, which dealt with the existing situation of the country at that time and was based on the Hindu religious texts but were more reformed.

In his 16th edict he mentions;

⁹Stanley L. Cohen, ‘A Short History of Collective Punishment: From the British Empire to Gaza’ Counter Punch (Aug. 24, 2018), <<https://www.counterpunch.org/2018/08/24/a-short-history-of-collective-punishment-from-the-british-empire-to-gaza/>> accessed 3 March 2021.

¹⁰ Bishal Khanal, *Nepal ko Nyaya Prasasan- Ek Etihāsik Singhavolokan*, (Aathrai Publications, Kathmandu) 53

¹¹ Ibid. 12

¹² Tulasi Ram Vaidya & Tri Ratna Manandhar, *Crime and Punishment in Nepal; A historical Perspective*, (Jore Ganesh Press Pvt. Ltd., 1985) 70

¹³ Ibid. 12

In case a *Khas*, a *Magar*, a *newar* and others commit a crime which is punishable by death penalty, execute only the person who commits the crime. Do not torture the family members of the culprit. His Majesty has made a Rule of -"Punish only them who commit the crime;"¹⁴ abide by the Rule accordingly.¹⁵

INDIVIDUAL CRIMINAL LIABILITY AS PER PRINCIPLES ESTABLISHED BY NUREMBERG TRIALS

The rise of individual criminal responsibility or liability directly comes under international law, marks the coming together of elements of traditional international law with more modern approaches to human rights law and humanitarian law, and involves consideration of domestic as well as international enforcement mechanisms.¹⁶

As per this concept, any individual would regardless of their rank or governmental status, would be personally liable for any war crimes or grave breaches committed, while the principle of command responsibility means that any person in a position of authority ordering the commission of a war crime or grave breach would be as accountable as the subordinate committing it and the subordinate shall not be given right to defend oneself stating that any crime committed by them is as done per the superior order.

After the end of First World War, the winner nations i.e. the Allied Powers developed a rule to punish the defeated powers for the violations of the laws of war. The First World War ended when the winner and defeated nations signed the **Treaty of Versailles 28 June, 1919**.

Article 228 and **229** of the treaty establishes the right of the Allied Powers to try and punish individuals responsible for "*the violations of the laws and customs of war*". **Article 228** of the treaty declared the fact that the German Government had recognized the right of Allied and Associated Powers to bring before military tribunals the persons accused of having committed acts in the violation of the laws and customs of war. Thus, the Government of the Germany was

¹⁴ This is the principle *Jasko Paap usko garden*, established by Late King Ram Shah. This principle is based on the criminal liability to a person who has committed the crime not the members of the family.

¹⁵ Nepal Law Commission, 2007, <www.lawcommission.gov.np> accessed 3 March 2021

¹⁶ Malcolm N. Shaw, *International Law*, (8th edn, Cambridge University Press) 288

imposed to hand over "all persons accused", so as to bring the individuals responsible for the war time crimes before an allied military tribunal.

Individual responsibility has also been confirmed with regard to grave breaches of the **four 1949 Geneva Red Cross Conventions** and 1977 **Additional Protocols I and II** dealing with armed conflicts. Specifically, a provision that the High Contracting Parties will undertake to enact legislations necessary to provide effective penal sanctions for the persons committing or ordering to commit any of a series of grave breaches.¹⁷ Such grave breaches include the willful killings, torture or inhuman treatment, extensive destruction and appropriation of property which is or has not been justified by the military necessity and carried out unlawfully and wantonly, unlawful deportation or transfer of protected persons and the taking of hostages.¹⁸

Moreover, after the Second World War was over, like the concept established by the Treaty of Versailles, a movement started up within the international community that shaped a profound consciousness of the need to prosecute the serious violations of laws of war with regard to traditional responsibility of state and the personal responsibilities of individuals.

Thus, Nuremberg International Military Tribunals were established in order to try the war time criminals whose offences have no particular geographical location whether being an individual accused individually or in the capacity as member of groups or organization or in both capacities.¹⁹

Article 4 of the **Charter of Nuremberg International Military Tribunal** established the legal basis for the superior order not to be regarded as a basis for a defense in case of the Crimes committed during wars and the individual or a group involved is punished.

Article 6 of the **Charter of Nuremberg International Military Tribunal** established the legal basis for trying or prosecuting individuals accused of crimes against peace, war crimes and crimes against humanity.

¹⁷ Ibid. 291

¹⁸ Ibid. 19, 291

¹⁹ Edoardo Greppi, 'The Evolution of Individual Criminal Responsibility under International Law' 81 IRRC (September, 1999) 536-537

Crimes against peace as mentioned in the charter include planning, preparation, beginning or waging of a war or aggression, or a war in violation of international treaties, agreements or assurances, or any kind of participation in a common plan or conspiracy for the accomplishment of any of the foregoing. Moreover, the **war crimes** include the violations of the laws and customs of war. Murder, ill-treatment or deportation into slave or labor or in occupied territory, murder or ill treatment of the prisoners of the war or persons on the seas, the killing of hostages, plunder of the public and private property are *inter alia* followed in the war crimes. Adding more to this, the **crimes against humanity** include assassination, extermination, enslavement, expulsion or deportation, and other kind of inhuman activities that is seen to have been committed against any civilian population before or during war time on political, racial or religious grounds in execution of or not in violation of the domestic law of the country where perpetrated.

The *leaders, organizers, instigators and accomplices* who had taken part in the formulation or execution of a common plan or conspiracy to commit any crime in the execution of such plan comes under the concept of *ratione personae* jurisdiction.²⁰

OTHER SUBSEQUENT WAR TIME TRIALS AND TRIBUNALS

The same practice was done in the Tokyo Trials so as to try the individuals with the crimes done during war time as like of the Nuremberg Trial. All the principles with which Nuremberg trial was guided by were also made applicable in the Tokyo Trials.

Even after the world wars were over, the serious violations of human rights in form like civil wars sustained for a long time resulting in the mass violence. The civil wars in the Yugoslavia, Rwanda, Sierra Leone, East Timor, etc. caused millions of death cases in form of ethnic cleansing, genocide, etc.

Addressing the huge murders and killings, destruction of property, etc., a new international criminal tribunal was set up quickly in an ad hoc basis by the UN Security Council. With the great public demand, the UN Secretariat was dragged to draft the statutes for the International Criminal Tribunal for Yugoslavia which began its functioning in 1994 followed by the establishment of International Criminal Tribunal for Rwanda. These moves brought out great momentum in establishing war time

²⁰ Malcolm N. Shaw, n(16)

criminal tribunals (known as ad-hoc tribunals and also hybrid courts were practiced in some) in many countries like Sierra Leone, East Timor, Kosovo, etc. to try the individuals and groups involved in the war crimes.

ROME STATUTE AND THE ESTABLISHMENT OF ICC

The wars in various forms or confrontations resulting in the destruction of people and property were rampant since the very early period in one way or the other, so the need of establishing a permanent international criminal court was most needed. Moreover, its need led various attempts in the direction of establishing it just after the World War I, but a firm agreement in its establishment was never achieved. The Principles set out mainly by the Nuremberg Trials and Tokyo Trials were the predecessors of the ICC.

A permanent legal and judicial body established by the Rome Statute of the International Criminal Court (1998) *Vis a Vis* the International Criminal Court (ICC) has been established so as to prosecute and adjudicate the individuals accused of genocide, war crimes and crimes against humanity. It was established through a treaty negotiated in 1998 by 160 states by meeting in Rome and is called the Rome Statute.²¹ The headquarters of the ICC is at The Hague, Netherlands.

It is mentioned that it is a permanent institution and has the power to exercise its jurisdiction over the persons for the most serious crimes of international concern as referred to in this statute, and be complementary to the national criminal jurisdictions.²² Moreover, the court may exercise its functions and powers provided in the Statute being on the territory of any state party and by special agreement or on the territory of any State.²³

Article 5 of the statute mentions the crimes within the jurisdiction of the Court.²⁴ **Article 25** mentions the provisions regarding the Individual Criminal liability.²⁵

²¹ Judge Philippe Kirsch, 'Applying the Principles of Nuremberg in the ICC' 6 Washington University Global Studies Law Review, 4 (2007), <https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1146&context=law_globalstudies> accessed 4 March 2021

²² Rome Statute of the International Criminal Court, July 17, 1998, art. 1.

²³ Ibid. 24, art. 4(2).

²⁴ The crimes of genocide; Crimes against humanity; War crimes; the crimes of aggression.

²⁵ Rome Statute of the International Criminal Court, July 17, 1998, art. 25:-

Moreover, the Statute mentions that the statute shall be equally applicable to all persons without any distinction based on official capacity²⁶ as per **Article 27**.

Furthermore, **Article 33** of the Statute does not regard superior order to be the matter of defense to be taken.²⁷

Article 25(2) - a person who commits a crime within the jurisdiction of the court shall be individual responsible and liable for the punishment in accordance with this statute.

Article 25(3) - In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

- (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
- (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
- (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - (ii) Be made in the knowledge of the intention of the group to commit the crime;
- (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
- (f) Attempts to commit such a crime by taking action which commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

3. In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of states under international law.

²⁶ In particular, official capacity means the Head of State or Government, a member of a government or parliament, an elected representative or a government official in no case exempt a person from criminal responsibility under the statute. Moreover, the immunities or special procedural rules that may be attached to the official capacity of a person whether national or international law, they shall not bar the Court from exercising its jurisdictions over such person.

²⁷ Rome Statute of the International Criminal Court, July 17, 1998, art. 33:-

ANALYSIS

Kenny: “Wrongs whose sanction is punitive and is in no way remissible by any private person but is remissible by the crown alone is remissible.”²⁸ This definition says that the one who does the wrong is liable not the others. Even in today’s concept, the concept of vicarious liability exists for certain cases but it does not mean that there is the concept of vicarious liability so the others would have to suffer from the other’s misdeeds as this is an exception.

The concept "*Jasko paap usko gardan*" developed in the 17th century in Nepal rejected the concept of collective punishment and focused in the premise of the individual liability for the commission of any crime by an individual which has from the 20th century been embraced by the world at large as the Individual criminal liability. Moreover, the devastating wars occurred at different era in the world were the representative of the collective punishment to the people creating a dismantled world. So, in order to reform the world and ensure peace, security and friendly relations all over the world, the international treaties and conventions were drafted criminalizing the war crimes in the form of collective punishments. From all of the ideas discussed above, we can say that the concept of collective punishment has been internationally rejected through various treaties, convention and manuals after the 20th century.

Whitney Harris said, "Seven hundred years may pass before humankind is able to eliminate war in the world and establish a system of universal justice. Rome was the beginning. The end may never come. For like Rome itself, the struggle for peace, law and justice in the world is eternal."²⁹

Article 33 (1) - The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

- (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
- (b) The person did not know that the order was unlawful; and
- (c) The order was not manifestly unlawful.

Article 33(2) - For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

²⁸ Rajit Bhakta Pradhanaga, *A General Introduction to Criminal Law*, (Kantipur Printing Press, Lainchaur, 2041) 28

²⁹ Judge Philippe Kirsch n(21) 508

Similar to the idea of Whitney Harris, we are believing that Nuremberg trial has been the basis for the conceptual development of the principle of individual criminal liability which has been regarded as the internationally accepted through the Rome Statute but when we go back to the history of Nepal, in the 17th century, the concept of Individual Criminal Liability had been established. Ram Shah seems to have been farsighted and when relating it with the international arena at present, the international law on the war crimes and the principles relating to the criminalization of collective punishment seems to have been highly similar to that of his principle which had been established during the 17th century. The only difference among the concepts developed in Nepal in 17th century and that of the same in the international arena developed aftermath 20th century was the application of the principle itself. But, the crux or the philosophy behind the principle of Individual criminal liability was same. But, the tendency of ours to like the ideas of others, rejecting and disrespecting that of own's ideas, philosophies and our inability to flourish our indigenous legal system, has always made us many steps backwards than that of the west.

Have we had the capability to flourish our philosophy, our ideas, our thinking and cognitive analysis in the world in the past, we can say that we would have less chances to bear the terrible myseries created by the destructive wars and we would have a very great position in the world to establish ourselves as the think tanks and powerful and intellectual nation. Again, if we still and further undermine and underestimate ourselves, we would definitely always have to be under others and others will definitely hegemonize us and this is the greatest irony to be experienced.

CONCLUSION

Ram shah was a greatest reformist and made such a huge and exemplary effort in terms of bringing out various reforms in the civil and criminal justice system in the then times. Moreover, the concept of *Jasko Paap Usko Gardan* has been the most influential concept for bringing out the paradigm shift in the criminal legal system of Nepal. Since this concept/principle says that the one who commits crime is only liable for the crime committed, it protects the rights of other people as the innocent would not have to fall in trap of the laws and the punishment imposed by it. Thus, this concept reduces the chances of people being negative towards the law and the justice system as the innocent people won't have to bear the liability for someone else's crime. This principle which was established during the 17th century is, therefore, seemed to be a very farsighted and a far reaching concept which

has now been used to develop different kinds of principles in the criminal justice system, Human Rights and the International Humanitarian Law. As like the concept of Individual criminal liability namely, *Jaske paap usko gardan* is an example to show how Nepali legal and judicial system was rich enough. There are thousands of such principles that we used to follow in the past which have now been regarded as the internationally accepted principles that arose from the west, which is half the truth. Thus, greater research on our indigenous legal system must be done so as to glorify our history