



BAR HUMAN RIGHTS  
COMMITTEE OF  
ENGLAND AND WALES

The Supreme Court of Nepal

Re. Role of the Attorney General  
In the matter of Agni Sapkota

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**AMICUS BRIEF ON BEHALF OF THE HUMAN RIGHTS COMMITTEE  
OF THE BAR OF ENGLAND AND WALES**

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February 2012

## INTRODUCTION

1. This brief is respectfully addressed to the Supreme Court of Nepal (hereinafter 'SC') by the Human Rights Committee of the Bar of England and Wales (hereinafter 'BHRC') in the case concerning Agni Sapkota. The aim of this *Amicus Curiae* is to respectfully assist the Court in determining the role of the Attorney General in cases where there is a conflict in interest. The brief seeks to provide the court with international and comparative examples of the role of the Attorney General where there is a conflict of interest comparable to the cases currently being considered by this Court.
2. The BHRC is the international human rights arm of the Bar of England and Wales. Established in 1991, it is an independent committee of the General Council of the Bar of England & Wales. The BHRC is primarily concerned with defending the rule of law and internationally recognised legal standards relating to the right to a fair trial. The remit of the BHRC extends to all countries of the world, apart from its own jurisdiction of England & Wales. This reflects the Committee's need to maintain its role as an independent but legally qualified observer, critic and advisor, with internationally accepted rule of law principles at the heart of its agenda.
3. The BHRC's objectives include upholding the rule of law and internationally recognised human rights norms and standards, and supporting practising lawyers, judges and human rights activists. To achieve its objectives, the BHRC conducts trial observations, capacity building training, fact-finding investigations, monitors human rights abuses, provides legal resources and conducts strategic litigation.
4. In carrying out this work, the BHRC has secured a reputation for legal expertise in the protection of human rights, and notably the right to a fair trial. The BHRC's reports and written submissions provide valuable tools to legal practitioners around the world and are read widely by policy makers within national and international bodies, thereby assisting in the development of the law.
5. The scope of the present *Amicus Curiae* is to seek to assist the Court in addressing questions regarding a possible conflict of interest faced by the Office of the Attorney General in Nepal as it emerged in the unfolding of the cases pertaining to the investigation on the part of the police under the direction of the Government

Attorney, the prosecution by the Government Attorneys and the role played by the Attorney General in a public interest litigation petitions challenging the appointment into public office of the alleged perpetrators in the murders of Arjun Lama and the promotion of a police officer suspected of involvement in the disappearance of five students in the district of Dhanusha. The brief provides a comparative background analysis of the role of the Attorney General in Sri Lanka, the UK and India in order to respectfully assist this Court as it address's the role of the Attorney General as presented before it in this case.

## **SUBMISSIONS**

### Legal Basis of the Office of the Attorney General

6. In common law and common law-derived jurisdictions, the office of the Attorney General forms part of the executive and acts as the chief legal advisor to the Government.

#### *Nepal*

7. In Nepal, the role, functions and powers of the Attorney General are regulated by the Interim Constitution of Nepal 2007 in Part 16, Articles 134-137, in a number of ordinary pieces of legislation enacted by Parliament.

#### *United Kingdom*

8. The UK does not have a written constitution and the role of the AG is not limited to a specific Act. The role has adapted and changed over time. The more recent Constitutional Reform Act effected important, far reaching and irreversible constitutional change. It has created an independent judicial appointments commission; strengthened the independence of the judges; broken the link between the judiciary and parliament, turning the House of Lords in its judicial capacity into a Supreme Court to operate from its own building from 2009.

#### *India*

9. In India, the role, functions and powers of the Attorney General are regulated by the Constitution of India 1950 in Part V The Union under Article 76, and in a number

of ordinary pieces of legislation enacted by Parliament and the Law Officer (Conditions of Service) Rules 1987 enacted by the President of India.

### *Sri Lanka*

10. The Office of the Attorney General in Sri Lanka has always been set out in the Constitution. However, Sri Lanka has had various constitutional reforms, many of which have affected the nature and role of the Attorney General.
  
11. The Attorney General is said to be the lineal successor of the office of “Advocate Fiscal”, the existence of which can be traced back to the early stages of Dutch rule in the Island. In 1834, the British renamed the office of the “Advocate Fiscal” as “King’s Advocate”. During the reign of Queen Victoria the office was called “Queen’s Advocate”. By the earliest constitutional reforms effected in 1833 the King’s Advocate was made a member of the Executive Council. In 1877 he was also made a member of the Legislative Council. By Ordinance No. 1 of 1883, the designations known as King’s Advocate and Deputy King’s Advocate were amended to Attorney General and Solicitor General respectively. This change took effect from 1 January 1884. That same year, following a Supreme Court decision, the Office of the Attorney General was established by law. In 1931 under the Donoughmore Constitution an office of the State, called the Legal Secretary, was created. This office took over the AG’s role within the Legislative Council. The office of the Attorney General has since been constitutionally entrenched as a public servant. The Legal Secretary as well as the Attorney General now advised the Governor. The Attorney General together with the Solicitor General and nine Crown Counsels handled criminal prosecutions and all civil matters pertaining to the Crown. In 1946 the Soulbury Constitution created a Minister of Justice, but the Attorney General and Solicitor General remained public servants and the duty of providing legal advice to the Governor General was placed on the Attorney General alone.<sup>1</sup>

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<sup>1</sup> Department of Attorney Generals, Sri Lanka. Evolution of the Office of the Attorney General. Available at <http://www.ewisl.net/attorney1/testing/History.htm> [Accessed 15 September 2011].

12. On 4 February 1948 Sri Lanka attained independence. In 1972 she became a Republic and the Governor General on the advice of the Prime Minister appointed the Attorney General. In 1978 a new Constitution was enacted whereby provision was made for an Executive President to replace the Governor General. Consequently the President now appoints the Attorney General.<sup>2</sup>

### *Comparison*

13. In comparison, the office of the Attorney General is regulated by a mixture of constitutional provisions and ordinary legislation in Nepal, India and Sri Lanka – all countries with an entrenched constitution. In the UK, the position and powers of the AG are regulated by a mixture of statutory and customary provisions due to the lack of a written constitution.

### Appointment Procedure of Attorney General

#### *Nepal*

14. In Nepal, the Attorney General is appointed by the President on the recommendation of the Prime Minister under Article 134(1) of the Interim Constitution, amongst those who qualify to be appointed as judges of the SC under Article 134(2). The Attorney General may be relieved from office by the President on the recommendation of the Prime Minister under Article 134(3). The Attorney General is also the head of the Government Attorneys (Public Prosecutors) employed throughout Nepal. There are four tiers of Government Attorneys: first, Assistant District Government Attorneys (Gazetted Third-Class civil servants), who are appointed by the Government on the recommendation of the Public Service Commission after successfully sitting a competitive examination; second, Deputy Government Attorneys/District Government Attorneys (Gazetted Second-Class civil servants); third, Joint Government Attorneys (Gazetted First-Class civil servants); and, fourth, the Deputy Attorney General (Secretary Level, Special Class civil servant). Significantly, after obtaining the level of Third-Class civil servant by public examination, the promotion of these cadre-based civil servants is regulated by the Judicial Service Commission (hereinafter 'JSC'), a constitutional body

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<sup>2</sup> Ibid.

regulated by Article 114 of the Interim Constitution. The JSC comprises five members: the Chief Justice, the Minister of Justice, the Senior-most Judge of the SC, the Chairperson of the Public Service Commission, and the Attorney General. The Chairperson of the Public Service Commission is appointed by the Constitutional Council as provided by Article 125(2) of the Interim Constitution. The Constitutional Council is a seven-member body in which four members are part of the Cabinet, including the Prime Minister, as provided by Article 149(1) of the Interim Constitution. As a result, the composition of the JSC suggests the possibility of a certain degree of executive influence over the decisions of the Commission with regard to the career advancement of individual Government Attorneys.

### *United Kingdom*

15. In the UK the Attorney General is a political appointment. This process and the various roles of the AG have caused increasing criticism in recent years. The House of Commons' Constitutional Affairs Committee has made a number of recommendations about the appointment of the Attorney General seeking to promote the rule of law.<sup>3</sup>
16. Traditionally, the Attorney General and the Solicitor General have been senior barristers and Members of Parliament, with considerable experience in the fields of both law and politics. All Attorneys General were, with the exception of only the most recent two past Attorneys General and the current Attorney General, also Members of Parliament who sat in the House of Commons.

### *India*

17. In India, the Attorney General is appointed by the President amongst those qualified for appointment in the Supreme Court under Article 76(1) of the Constitution. Under Article 76(4) the Attorney General holds office at the pleasure of the President, who also determines his remuneration.

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<sup>3</sup> HC Constitutional Affairs Committee, Constitutional Role of the Attorney General, Fifth Report of Session 2006-07.

18. Initially, from Sri Lanka's independence in 1946, the position of Attorney General was a non-political position. However, as the Constitutions of 1972 and 1978 weakened the safeguards to protect the judiciary from parliamentary and presidential intrusions, in a similar way the independence of the Attorney General was undermined.<sup>4</sup> By 1978, there was complete Presidential control over all judicial appointments and those of the Attorney General. In 2001, the 17<sup>th</sup> Amendment established the Constitutional Council, which was to recommend candidates for the office of the Attorney General and other constitutional bodies to the President. However, the Council last convened in 2005.<sup>5</sup>
19. Following the appointment of Mohan Peris as Attorney General in 2008, a petition was filed before the Supreme Court challenging the legality of the appointment, arguing that the President had failed to follow the procedure set out in the Constitution by failing to convene the Constitutional Council before the appointment. Between the filing of the petition and the hearing, Article 41 of the Constitution was amended, thereby abolishing the Constitutional Council. In March 2011, the Supreme Court held that the 18<sup>th</sup> Amendment, as approved by Parliament was legal. The 18<sup>th</sup> Amendment removed the two terms limit on presidential elections as well as abolishing the Constitutional Council, which has been replaced by the Parliamentary Council. The case was dismissed on the ground that the President cannot be called as a respondent in a lawsuit. As a result, the appointment of the Attorney General was upheld.<sup>6</sup>
20. The 18<sup>th</sup> Amendment to the Constitution sets out in Article 41A (1) that "the President shall seek the observations of the of the Speaker, the Prime Minister, the Leader of the Opposition; two Members of Parliament nominated each by the Prime Minister and the Opposition Leader, when appointing Chairpersons and members of the Commissions listed in Schedule I and when appointing persons to offices listed

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<sup>4</sup> "Sri Lanka's Judiciary Politicised Courts, Compromised Rights" Asia Report N°172 – 30 June 2009 International Crisis Group.

<sup>5</sup> Ibid.

<sup>6</sup> "SC Rules President can't be cited as respondent as dismisses petitions against AG's appointment and non-appointment of CC" Sri Lanka Foundation 18 March 2011.

in Schedule II”.<sup>7</sup> The office of the Attorney General is listed under Schedule II. Under this new procedure, Ms. Eva Wanasundera, the first woman to be nominated as Attorney General in Sri Lanka, took oath before the President on 12 September 2011.

### *Comparison*

21. In comparison, in Nepal, the Attorney General is a political appointee whose tenure is dependent on the goodwill of the Prime Minister, while all the Government Attorneys are civil servants whose career advancement is regulated by the JSC, a constitutional body whose composition is tilted in favour of the executive branch of government. The situation is similar in India and Sri Lanka where the President controls the appointment of the Attorney General in a discretionary manner. In the UK as well the Attorney General is a political appointee.

### Powers and Functions of the Attorney General

#### *Nepal*

22. In Nepal, the Attorney General fulfils a number of functions. First, the Attorney General is the chief legal advisor to the Government under Article 135(1) of the Interim Constitution. Second, the Attorney General and all the Government Attorneys subordinate to him act as legal representatives in any legal suits in which the Government of Nepal is a party to under Article 135(2) of the Interim Constitution. Third, as the Head of Nepal’s public prosecution service the Attorney General is empowered to make the final decision to initiate legal proceedings in any type of case on behalf of the Government of Nepal in any court or judicial authority under Article 135(2) of the Interim Constitution. Fourth, the Attorney General is entitled to appear in any court, office or authority in the course of discharging his duties under Article 135(5) of the Interim Constitution. Fifth, the Attorney General is empowered to appear in and address Parliament and any committee meeting under Article 137 of the Interim Constitution. Sixth, the Attorney General may delegate the powers granted by the Constitution to the subordinate Government

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<sup>7</sup> Constitution of the Democratic Socialist Republic of Sri Lanka 1978 Amendment 18 September 2010 Article 41A(1).



Attorneys under Article 135(6) of the Interim Constitution. Finally, the Attorney General is also the President of the Nepal Bar Association.

### *United Kingdom*

23. The Attorney General has a variety of different responsibilities: he or she is the Government's chief legal adviser, superintends the prosecution agencies, is a Government minister with responsibility for criminal justice and acts as the guardian of the public interest in certain other cases. The current powers and functions of the Attorney General are:

- a. Chief legal adviser to the Government – One of the main functions of the Attorney General is the provision of legal advice to the Government. Until comparatively recently, the Attorney General was expected to be able to advise on a wide range of matters based on his own knowledge of the law. In reality, much of this advice is prepared by civil servants who are lawyers, expert in a particular field, for example EU law. The Attorney General may also consult specialist counsel when necessary.
- b. Superintendence of the prosecution agencies – The Attorney General has a number of functions in relation to criminal proceedings, which include:
  - The requirement for consent to prosecute certain categories of criminal offences, such as those relating to Official Secrets, corruption, explosives, incitement to racial hatred, and certain terrorism offences with overseas connections.
  - The power to refer unduly lenient sentences to the Court of Appeal.
  - The power to terminate criminal proceedings on indictment by issuing a *nolle prosequi*.
  - The power to refer points of law in criminal cases to the Court of Appeal.
  - The Attorney General is also responsible by statute for the superintendence of the main prosecuting authorities: the Crown Prosecution Service (CPS), Serious Fraud Office (SFO), Revenue and Customs Prosecution Office (RCPO) and the Director of Public Prosecutions in Northern Ireland.

- The Attorney General's superintendent functions are exercised independently of his functions as a Government minister who is jointly responsible for criminal justice with the Home Secretary and the Lord Chancellor.
  
- c. Arbitrator of the public interest – In exercising his function as superintendent of the prosecution agencies, the Attorney General has to take particular responsibility for ensuring that the public interest is taken into account when deciding about whether or not to bring or discontinue prosecutions. In practice, the current Code for Crown Prosecutors identifies a two-stage test as to whether prosecutors should proceed with a prosecution. The first is the evidential test, which asks whether there is enough evidence to secure a conviction. The second is that a prosecution must be in the public interest. The CPS code states that:

*The public interest must be considered in each case where there is enough evidence to provide a realistic prospect of conviction. Although there may be public interest factors against prosecution in a particular case, often the prosecution should go ahead and those factors should be put to the court for consideration when sentence is being passed. A prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour, or it appears more appropriate in all the circumstances of the case to divert the person from prosecution.<sup>8</sup>*

Ultimately, it is for the Attorney General to take responsibility for this decision.

- d. Representing the public interest in civil proceedings – The Attorney General has a variety of other responsibilities and powers to safeguard the public interest in individual cases, e.g. the power to bring proceedings for contempt of court; power to bring proceedings to restrain vexatious litigants; power to bring or intervene in certain family law and charity proceedings and, most importantly, the power to bring or intervene in other legal proceedings in the

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<sup>8</sup> See: [http://legal.practitioner.com/regulation/standards\\_11\\_2\\_5.htm](http://legal.practitioner.com/regulation/standards_11_2_5.htm)

public interest. In cases of major importance the Attorney General may represent the Government in the hearing in person.

- e. Responsibilities on behalf of Parliament – The Attorney General has additional responsibilities in relation to Parliament covering the constitution and conduct of proceedings in Parliament, including: questions of parliamentary privilege; the conduct and discipline of Members; and the meaning and effect of proposed legislation. The Attorney General may intervene in court proceedings to assert the privileges of either House, either of his or her own motion or, more usually, at the request of the House authorities or indeed the trial judge.
- f. Responsibility as criminal justice minister – As part of the trilateral responsibility for the criminal justice system in England and Wales between the Lord Chancellor and Secretary of State for Justice, the Home Secretary and the Attorney General, the latter also exercises a political role as a criminal justice Government minister. Together with the two Ministers of the Crown with responsibility for criminal justice and other ministers and, the Attorney General sits on the National Criminal Justice Board; he also has shared responsibility for the cross-departmental Office for Criminal Justice Reform, which is now ‘domiciled’ in the new Ministry of Justice. The Attorney General therefore participates in the formulation of criminal justice policies.
- g. “Guardian of the Rule of Law” – In addition to his role in defending the public interest in the exercise of his responsibilities, Lord Goldsmith considered that ‘upholding the Rule of Law’ was one of his key functions. He identified this role as “most obviously my role as the Government’s chief legal adviser, although it goes wider”.<sup>9</sup>
- h. In oral evidence to the Committee, Lord Goldsmith identified three specific elements in relation to his role in upholding the Rule of Law. The first aspect he identified was compliance with the law, “that means domestic and

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<sup>9</sup> HC Constitutional Affairs Committee, Constitutional Role of the Attorney General, Fifth Report of Session 2006-07.

international obligations.” The second aspect was the relationship with the courts, which he defined as “partly respect for the courts and their judgments” but also about “being sure within appropriate boundaries... we subject ourselves as Government to the scrutiny of the independent courts”. The third element was identified as “certain basic values which it is important to stand up for. Quite a number of them are to be found, of course, in the European Convention.”<sup>10</sup>

### *India*

26. In India, the Attorney General is the chief legal advisor of the Government as prescribed by Article 76(2) of the Constitution. Under Rule 5 of the Law Officer (Conditions of Service) Rules 1987, the Attorney General is under a duty to (a) to give advice to the Government of India upon such legal matters, and to perform such other duties of a legal character, as may from time to time, be referred or assigned to him by the Government of India; (b) to appear, whenever required, in the Supreme Court or in any High Court on behalf of the Government of India in cases (including suits, writ petitions, appeal and other proceedings) in which the Government of India is concerned as a party or is otherwise interested; (c) to represent the Government of India in any reference made by the President to the Supreme Court under Article 143 of the Constitution; and (d) to discharge such other functions as are conferred on a Law Officer by or under the Constitution or any other Law for the time being in force. Rule 8(1) of the Law Officer (Conditions of Service) Rules 1987 places the Attorney General under the following restrictions: to (a) hold briefs in any court for any party except the Government of India or the Government of a State or any University, Government School or College, local authority, Public Service Commission, Port Trust, Port Commissioners, Government aided or Government managed hospitals, a Government company as defined in Section 617 of the Companies Act, 1956 (1 of 1956), any Corporation owned or controlled by the State, any body or institution in which the Government has a preponderating interest; (b) [advise any party against the Government of India or a Public Sector Undertaking, or in cases in which he is likely to be called upon to advise, or appear for, the Government of India or a

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<sup>10</sup> Ibid

Public Sector Undertaking;] (c) defend an accused person in a criminal prosecution, without the permission of the Government of India; or (d) accept appointment to any office in any company or corporation without the permission of the Government of India; (e) [advise any Ministry or Department of Government of India or any statutory organization or any Public Sector Undertaking unless the proposal or a reference in this regard is received through the Ministry of Law and Justice, Department of Legal Affairs].

### *Sri Lanka*

27. As Legal Advisor to the Government, the Attorney General advises the government on how to implement its policies within the law.<sup>11</sup> During criminal prosecutions the Attorney General holds quasi-judicial powers and ensures that the verdict is in accordance with the law. He advises Government Departments, particularly the Police Department. In cases of serious offences, the accused will be indicted in the name of the Attorney General. Some of the powers of the Attorney General are set out in the Code of Criminal Procedure Act No. 15 of 1979.
28. In Civil matters, the Attorney General acts as advisor to the government, all government departments and state institutions. The Attorney General also represents the government in court. All actions by or against the State are instituted in the name of the Attorney General. Section 461 of the Civil Procedure Code makes it compulsory for one month's notice of action to be given to the Attorney General before any action is filed against him, any Minister, Secretary or a Public Officer. He promotes the settlement of disputes between Government Departments and/or Public Corporations on the one hand and the public on the other in appropriate case. He entertains petitions from the public and endeavors to effect administrative relief in appropriate cases.
29. The Attorney General is also the head of the Bar. The role of the Attorney General is unique, as he interacts between the different organs of Government, the Legislature, the Executive and Judiciary. Thus, the Attorney General appears in contempt of court proceedings, in disciplinary proceedings against Attorneys-at-Law, he assists the court as *amicus curiae* to reach a decision consistent with the

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<sup>11</sup> Constitution of the Democratic Socialist Republic of Sri Lanka 1978 Chapter XI Article 77.

relevant principles of law and the rights of litigants as a case may be. He has a duty to ensure that a correct decision is given after balancing the rights of the State and the public in respect of applications for the issue of prerogative writs. He examines draft legislation for constitutionality. The Attorney General also assists in matters pertaining to the negotiation of international treaties, bilateral treaties and trade agreements. He appears in the Supreme Court in fundamental rights cases in order to safeguard the interests of the State as well as the public.

### Role of the Attorney General in Human Rights Litigation

#### *Nepal*

30. In Nepal, human rights litigation in the form of public law (i.e. judicial review of executive actions on the basis of the alleged violation of citizens' fundamental rights by state bodies) is carried out through writ petitions which can be filed in the District Courts for *habeas corpus* and injunctions; in the Appellate Courts for *habeas corpus*, *mandamus* and injunctions under Section 8(2) of the Administration of Justice Act 1991; and in the Supreme Court for all the writs under Article 107(2) of the Interim Constitution and through Public Interest Litigation. In this type of cases, the Government is the respondent and the office of the Attorney General acts on its behalf as its legal counsel.

#### *United Kingdom*

31. The Attorney General has a role in the process of preparing legislation and has a duty under section 19 of the Human Rights Act 1998 to ensure the compatibility of Government Bills with the Convention rights: Section 19 of the Human Rights Act requires that for every Government Bill the Minister in charge in each House make a statement that in his/her view the Bill's provisions are compatible with the Convention rights. Alternatively, if s/he is not able to provide that personal assurance, s/he must state that nevertheless the Government wishes the House to proceed with the Bill.

32. There is no specific role for the Attorney General in relation to human rights litigation but there may be circumstances as outlined above where the Attorney General will intervene in the public interest.

### *India*

33. In India, the Attorney General is the chief legal advisor of the Government as prescribed by Article 76(2) of the Constitution. The Attorney General, therefore, appears in the Supreme Court on behalf of the Union Government in cases in which the Government is a party to, for instance in Public Interest Litigation cases where a constitutional right has been violated.

### *Sri Lanka*

34. The Office of the Attorney General appears in the Supreme Court and Court of Appeal in cases where the constitutionality or legality of a statute or executive action is called into doubt. The Attorney General represents the government in Court.

35. According to Art 17 Chapter III of the Constitution of Sri Lanka “Every person shall be entitled to apply to the Supreme Court as provided in Article 126 in respect to the infringement or imminent infringement, by the executive or administrative action, of a fundamental right to which such a person is entitled under the provisions of this chapter.” The role of the Attorney General appears in such fundamental rights petitions to safeguard the interests of the State as well as the public. There is a clear conflict of interest between these two roles. One office cannot both represent the executive or administration which is alleged to have infringed on the public’s fundamental rights while at the same time safeguarding the interests of the public.

### Role of the Attorney General in Criminal Prosecutions

### *Nepal*

36. In Nepal, the prosecution of human rights crimes (i.e. where the individual charged of the crime is a public official, often a member of the executive like the police or the army) is carried out through the ordinary criminal justice system. Under Section 29 of the State Cases Act 1992, Government Attorneys have the final word in deciding whether to indict the alleged perpetrator of the crime. Additionally, Section 6 of the State Cases Act 1992 provides that Government Attorneys ought to

direct the police in their investigations. Significantly, Article 135(2) of the Interim Constitution empowers the Attorney General to initiate or choose not to initiate legal proceedings, which means that the Attorney General – a political appointee of the Prime Minister – has ultimate authority to decide whether to indict or not public officials investigated for criminal offences.

#### *United Kingdom*

37. [refer to above section]

#### *India*

38. In India, the Attorney General has no role in deciding about the indictment for criminal offences and needs to obtain the permission of the Government to defend in a criminal prosecution under Rule 8(1)(c) of the Law Officer (Conditions of Service) Rules 1987.

#### *Sri Lanka*

39. The Attorney General's office is responsible for the prosecution of criminal cases. It also has the dual role of advising the government on the legality of counter-terrorism and other government matters and also prosecuting when those measures step across a constitutional line. This has led to clear conflicts of interest, and human rights advocates have noted that with only rare exceptions, the Attorney General's office has failed to effectively investigate and prosecute cases of extrajudicial executions, disappearances and other human rights violations by state officials.

40. However there have been some initiatives within the Attorney General's Office to resolve such conflicts of interest. When Sarath Silva was head of the Office (1996-1999), he instituted a policy by which, when the Attorney General determines there is credible evidence of torture no State Counsel will appear on behalf of the office to defend the case. Officials in such cases are required to retain private legal counsel to defend them in Supreme Court in applications to challenge the alleged violations.



41. Furthermore, all allegations pertaining to deaths in custody, perpetration of torture under interrogation or custody, detention contrary to provisions of the law, abduction or disappearances are forwarded by the Attorney General's department to specialised investigation bureaus of the police department. Upon completion of criminal investigations specialised units of the Attorney General's department such as the Missing Persons Commissions unit and Prosecution of Torture Perpetrators Unit, considers the investigational findings with the view to instituting Criminal Proceedings.
42. At the same time the Attorney General's office has failed to effectively prosecute criminal cases involving serious human right violations. These cases can take even longer than the "normal" criminal cases, the "normal" cases regularly taking up to 10 years.

## SUMMARY

43. The Attorney General across the four jurisdictions analysed in this brief is a political appointee. This fact presents the institutional design surrounding the role and powers of the Attorney General with extraordinary challenges, especially in situations in which state agents are prosecuted for human rights violations. In this scenario two issues surrounding the position of the Attorney General arise within Nepal's current legal framework: first, the discretionary power of the Attorney General to stop prosecutions, especially when defendants are state agents charged with human rights violations, might lead to accusation of politicisation of the office of the Attorney General and be detrimental to the carrying out of justice if the rule of law is made subservient to contingent political considerations. Secondly, when state agents are prosecuted for human rights violations, the office of the Attorney General might find itself in a clear conflict of interest acting as both counsel for the prosecution and for the defence.
44. In comparison, the Attorney General may be involved in criminal prosecutions in the UK, Nepal and Sri Lanka, while in India the office of the Attorney General is institutionally removed from criminal litigation. Significantly, the power of the Attorney General to halt criminal proceedings in Nepal and Sri Lanka seems to derive from the English concept of *nolle prosequi*, which in the UK has been

deemed to be not amenable to judicial review because it forms part of royal prerogative power granted to the Attorney General [R v Allen 1862) 1 B & S 850; R v Comptroller-General of Patents ('Ex p Tomlinson') [1899] 1 QB 909 (CA); Gouriet v Union of Post Office Workers [1978] AC 435 (HL)]. Interestingly, the Judicial Committee of the Privy Council in the case of Mohit v DPP of Mauritius [2006] UKPC 20 argued that the Director of Public Prosecution of Mauritius could not 'rely on the immunity enjoyed, at any rate in the past, by the English Attorney General when exercising the prerogative power to enter a *nolle prosequi* since he is not the Attorney General, he is not (like the Attorney General) answerable to Parliament, he has no prerogative power, his power derives from the Constitution and the Constitution does not use the language of *nolle prosequi*'. In Nepal, neither the Interim Constitution 2007 nor Section 29 of the State Cases Act 1992 mention the prerogative power of *nolle prosequi*; additionally the legal basis of the power of Nepal's Attorney General to stop prosecutions reside in the Constitution and statutory provisions, which are both amenable to judicial review.

45. In the UK, the Attorney General's prerogative power of *nolle prosequi* has been preserved intact in its original form as the Attorney General is ultimately answerable to Parliament and – according to the so-called 'Showcross exercise' – dating back to 1951, the Attorney General in the UK must act with propriety to shield the office from allegation of political partisanship: 'Prosecution may involve a question of public policy or national, or sometimes international, concern; but in cases like that, the Attorney General has to make up his mind not as a party politician; he must in a quasi-judicial way consider the effect of prosecution upon the administration of law and of government in the abstract rather than in any party sense'.<sup>12</sup> Finally – as highlighted in the 2006 *Mohit* case – the prerogative power of *nolle prosequi* has been sparingly used: 'The Attorney General of England and Wales in practice exercises his power very infrequently: twice in the past five years, in each case because of the defendant's ill health'.

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<sup>12</sup> See: <http://hansard.millbanksystems.com/commons/1951/jan/29/prosecutions-attorney-generals> [Accessed 21/11/2011].

## CONCLUSION

46. We hope that the comparisons above can assist this Court in seeking to ensure that the role of the Attorney General in Nepal complies with the constitutional principle of the division of powers and that fair and independent prosecutions are carried out, while securing the right to redress to victims of human rights abuses at the hand of state actors. The Supreme Court of Nepal could take this opportunity to take steps to invite/ensure legislative change to secure:

- Creation of a separate and independent Prosecution Service for human rights crimes
- Institutional reforms designed to insulate the Public Prosecution Service from the control of the Office of the Attorney General
- Enactment of an Act of Parliament criminalising human rights violations
- Enactment of guidelines for the protection of human rights crimes victims and witnesses
- Enactment of a legal framework by Parliament to carry out independent and timely forensic investigation

02 February 2012

Respectfully submitted,

  
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