

ACCESS TO LAW IN NEPAL: CHALLENGES AND PROSPECTS

*Yubaraj Sangroula, PHD**

* Professor of Jurisprudence and International Law at Kathmandu School of Law,
Email, sangroula195@gmail.com

This presentation consciously avoids citation as the paper needs updating before it is ready for publication in any form. As a concept paper, it primarily discusses the hindrances the Nepalese legal professional society and law students are facing with regard to the 'access to legal information. It has made tentative attempt to look into the issues of access to legal information from the perspective of legislation and case law situation in Nepal. A brief history of the Nepalese legal system has been included in order to give a reflection on the root cause of the problem.

BRIEF HISTORICAL ANECDOTES OF THE NEPALESE LEGAL AND JUSTICE SYSTEM

Nepal has been the youngest 'republic' in the world. The monarchy that existed at least for 1500 years is eliminated in 2008. According to the history, Nepal as a nation exists for at least 2000 years. While historically it existed as a 'confederation of several smaller principalities', with considerable autonomy, it remained integrated and independent all throughout the history. Nepal remained independent even during the 'British colonial regime in India'. During most of the period in history, the Kathmandu Valley has been Nepal's political, economic, and cultural center. The valley's fertile soil supported thriving village farming communities, and its location along trans-Himalayan trade routes allowed merchants and rulers alike to profit. Since the fourth century, the people of the Kathmandu Valley have developed a unique variant of South Asian civilization based on Buddhism and Hinduism. One of the major themes in the history of Nepal has been the transmission of influences from both the north and the south into an original culture.

The long-term trend in Nepal has been the gradual development of multiple centers of power and civilization and their progressive incorporation into a varied but eventually united nation. The Licchavi (fourth to eighth centuries) and Malla (twelfth to eighteenth centuries) kings may have claimed that they were overlords of the area that is present-day Nepal, but rarely did their effective influence extend far beyond the Kathmandu Valley. Indeed, they ruled through their subordinate lords, which gradually grew into forms of varied principalities. By the sixteenth century, these principalities emerged as smaller kingdoms in several numbers. It was the destiny of Gorkha, one of these small kingdoms, to conquer its neighbors and finally unite the entire nation in the late eighteenth century. The energy generated from this union drove the armies of Nepal to conquer territories far to the west and to the east, as well as to challenge the Chinese in Tibet and the British in India. Wars with these huge empires checked Nepalese ambitions, however, and fixed the boundaries of the mountain kingdom. Nepal in the late twentieth century was still surrounded by giants and still in the process of integrating its many localized economies and cultures into a nation state based on the ancient center of the Kathmandu Valley.

Nepal has been the first country in the South Asia to promulgate 'a comprehensive code of laws and human conducts' – a document that blended the laws, religions and moral values.¹ In 15th century, one of the kings called Jayasthiti Malla promulgated this code which is considered by historians as the most 'comprehensive document of laws'. This code contains a few interesting characters: (1) it formally introduced the concept of plea-bargaining; (2) categorized the type of punishment in accordance with the intensity of the offence perpetrated; (3) introduced the concept of independent judge (*dharmadhikari*)

¹ . This Code was called "Code for Human Justice". It contained different sections for criminal and civil laws and rules of conducts of different groups of people. It was comprehensive enough as it provided an exhaustive list of rules in all aspects of life of people.

to preside the court which accompanied two more persons generally belonging from the community or village of the offender; and (4) eliminated the practice of 'ordeal'.

This code was popularly enforced for at least subsequent two hundred years. In the 17th century, king Ram Shah in Gorkha, the principality that unified the nation, received fame for introducing the 'concept of natural justice'² in the judicial process. He declared a rule to 'strictly refrain from penalizing the witness and the member of the suspect who defended their 'Keen and Keith'. The impartial court³ without interference of king was what assigned to 'adjudicate' disputes.

In the same period, in Kathmandu another king introduced the concept of permanent civil and criminal court. These courts were composed of three judges, the one who was known as 'dharmadhikari' (expert of law) did precede the court, but did not have his opinion on the fact. He suggested the applicable once the suspect was 'declared guilty' by two lay-judges.⁴ The appeal of the case went to the monarch, but he too did not pronounce acceptance or dismissal of the appeal without consultation of the *dharmadhikari*.

The traditional legal and judicial system of Nepal demonstrates the following attributes:

- a. Monarch oversaw the judicial proceeding but abstained from interference.⁵
- b. Attention to the concept of natural justice was emphasized in all proceeding in the court.
- c. Concept of plea-bargaining was very popular in all stages of judicial proceeding.⁶
- d. Importance of witness was very high in the trial.
- e. The concept of independent judge and lay judges was popular.
- f. The suspect was supposed to prove his innocence with the help of witnesses or ordeal.

Nepal thus practiced a rudimentary/classical form of inquisitorial system. Probably, its traditional familiarity inspired the first Rana ruler to 'promulgate the comprehensive code in 1854' generally based on Napoleon Code, which also provides an inquisitorial system of justice.⁷ The 1854 code is the second 'written law in Nepal'. The common law system got way to Nepal only after 1951, when a popular revolution overthrew the autocratic Rana regime. Interestingly enough, while this regime was politically strongly backed by the British colonial regime in India, it had been able introduce 'French continental system' which continued to be a part of the Nepalese legal system till British left India.

INFUSION OF INDIGENOUS NEPALESE LEGAL SYSTEM AND IMPORTED SYSTEMS

As briefly hinted in the previous paragraphs, Nepal as a country with very short history of import of Common Law system is facing acute problems regarding access to 'legal resource'. To capsulate, two

² . Prior to his reign, entire family of the convicted person was subjected to punishment. The property of family was confiscated by the state. He proclaimed by a rule that onwards that time only the convicted persons would punished and other memebers of his family would the protection of the state as in the past.

³ . Judges before they appeared in the court room had to go in front of an idol (God) and take oath that they would not be influenced by anything while making the judgement.

⁴ This system seems to be similar to that of modern Scandenevian judicial process, in which the lay judges become part of the justice instead of jury.

⁵ . King was informed by the *dharmadhikari* about the judgment made by the court.

⁶ . Confession resulted in 50% relaxation of the punsiment.

⁷ . Rana ruler Junga Bahadur visited UK and France. It is said that when he saw the Nepolean code, he also made up a mind to introduce the silmilar written law. He thus got a copy of the code. He accordingly promulgated the Code

fundamental problems loom large. Firstly, bulk of laws are written in vernacular (Nepali language), and secondly, the system of translating law into international languages is scant. Obviously, it is really difficult to analyze, at least for foreigners, the consistency of the principles of law and justice historically evolved by the indigenous Nepalese legal system.⁸ The comparison of the indigenous legal system with other systems is thus difficult for jurists who are not Nepalese.

The first so-called comprehensive legal code of Nepal was promulgated in 1854. This code mainly drew from the Napoleon Code. The code made efforts to amalgamate the 'local law with Napoleon code not by 'creating a synergy between two systems' but by allowing the both systems to function simultaneously. The code had been considered the law of the state, and, hence, provided rules of law covering almost all aspects of life. The procedures for litigation on civil matters, the prosecution of crimes and the system of punishment were major components the 1854 code significantly drew from the Napoleon Code. Many others sectors such as marriage, inheritance, *aungsabanda* (partition of ancestral property) and debt were, on the other hand, largely based on Hindu notions of law.

Moreover, a section of the 1854 code emphatically recognized the 'rights of people to regulate such issues' in accordance with their own local customs. The 19th century Nepalese legal system was thus obviously composed of three different components: (1) concepts copied from the Napoleon code, (2) concepts traditionally derived from Hindu system of law, and (3) tribal or ethnic customs. While these varieties of law recognized the 'polycentricism' of legal system, but the same character made it difficult for people to 'understand the rationales of system scattered into three different varieties'. The polycentricism is not well defined and hence it is prone to give misconceptions to jurists out of Nepal.

SUBSTANTIVE CHALLENGES FOR ACCESS TO LAW

In 1951, Nepal eliminated the 'Rana oligarchic system', an era popularly known as the 'dark century' in the history of Nepal. After 1950, Nepal ushered to an open democratic system. This political change was phenomenal in all aspects of life of the people. The end of British Empire and nationalist euphoria in India had tremendous impact on the 'thinking pattern and attitude' of the Nepalese people too. Right after liberation of India from British rule, the Nepalese people's access to India emerged significantly which was purposefully blocked in the past. The Nepalese democratic political segment was immensely influenced by what happened in India. As a matter of fact, right after the Rana oligarchy was ousted, the Nepalese politico-legal system started being closer to democratic framework established in India. The multi-party system in the line of India was set up in Nepal. The major change in Nepal was brought about with regard to the traditional justice system which was largely inquisitorial in character. The judicial set-up was restructured, and the judges trained in India on common law system were increasingly inducted in the judiciary. Hence, the common law system made obvious headway to Nepalese legal and justice system onwards 1951. Interestingly, the common law system appeared in Nepal only after British regime left India. Number of laws was then changed too formalize and institutionalize the common law system.

In 1956, the Civil Liberty Act was promulgated which granted 'extraordinary jurisdiction' to the Apex court. In 1963, State Cases Act was enacted which formally introduced accusatorial system in Nepal. The Evidence Act, almost fully in the line of British Evidence law, was introduced in 1978. In 1990, the State Cases Act 1963 was replaced by the new one, which fully institutionalized the adversarial system. Unfortunately enough, the State still continues to 'enforce the 1954 code with some amendments, but

⁸ . The scant availability of the literature about Nepali legal system is responsible to generate a number of misconceptions about it. Some opine it is a Common law system, while others argue it is an offshoot of Hindu system. These assertions are wrong.

the court procedures and many others aspects of justice system still continue to be 'inquisitorial'. Thus, the present legal and justice system of Nepal seems to exist as an unplanned infusion of the adversarial and inquisitorial system. The complication of the Nepalese legal system has thus gone deeper. This complexity poses serious setback to the proper understanding of the Nepalese legal and justice system.

To summarize, the following characters of the Nepalese legal system can be gleaned:

- a. To some extent, the legal system of Nepal is framed by the indigenous customs. Many such popular local customs have been recognized and enforced by statutes. Substantial portion of such local customs have found place in the 'written laws' now. The private prosecution system is the most unique instance. Nepalese legal system does not have 'concept of tort'. The private prosecution system which consists of procedures for the enforcement of compensation for damages or injuries, penalty along with imprisonment, in some conditions, and state' responsibility to execute decisions of the court. Bulk of civil laws is based on customary practices. The land ownership and tenancy is substantially customary. However, these customs are not well documented. Hence, it is simply impossible to know what the custom the courts can rely on.
- b. Certain part of the criminal procedure is still apparently inquisitorial in nature. The court proceeding starts with 'record of the deposition' of the suspect necessarily. The suspect is free to confirm or reject the statement he/she made in the police office. The staggering proceeding continues of many weeks, sometimes many months. Suspects play crucial roles in collecting and submitting evidences in their favor, and it is not unusual for judge to come to decision on the basis of 'evidences' provided by suspects. Due to influential shadow of inquisitorial system, the role of prosecutors seems not active. The literature about this structural complexity is lacking. The publication of professional journal is lacking to delve into this kind of issues.
- c. The 'modes operandi' of the court is largely adversarial. Lawyers argue on behalf of the clients and judges in principle are considered to be 'umpires'.
- d. In many issues such as marriage, property inheritance and so on, the disputes are decided based on local customs of tribes or ethnic groups. The definition of incest, polygamy and polyandry are different for different groups. The 1984 code recognizes the legitimacy of such customs. The judgments of the court thus seem different on same issues for different groups. This problem is in fact disturbing for lawyers from countries other than Nepal.

The Nepalese system is thus a 'scattered polycentric system'. It has yet to be evolved in order to be successful to pragmatically 'infuse these varieties of systems' into a modern functional legal and justice system. In the light of the abovementioned discussion, the following characters of the Nepalese legal system can be said as one of the major hindrances' in meaningful access to law and justice in Nepal:

- a. Bulk of customary laws is not documented. There are several groups with distinct cultural identities. Largely, the systems of personal laws of these groups vary. This is a problem for the court too.
- b. The laws enacted by the parliament often wrongly infuse the traditional inquisitorial and adversarial systems. The procedural law is especially problematic from this point of view. It is not unusual to find different procedures provided by the 1854 code and modern Acts enacted by the Parliament. The review of such contradictory overlapping or differences in law is not done yet. Hence, the access to law might be affected by this ambiguity.
- c. The modern Acts enacted by the parliament might not have fully able to 'introduce the concepts' developed within the common law framework. Nepal not being under British

regime in the past has not a 'culture of working within the common law system'. The Nepalese legal professionals have had no direct experience of working within the common law tradition and framework as in India. Obviously, certain of common law concepts are not properly familiar in Nepal, and thus the prospect of wrong interpretation cannot be overruled. This problem also indirectly poses hindrance to access to law.

- d. Misinterpretation or contradictory interpretation of such concepts by courts also cannot be overruled. Law practitioners make jokes in Nepal saying that 'you can find type of precedent in Nepal as you need'. It means that the practice of strictly following the 'doctrine of precedent' is not properly followed in Nepal. It also imply that 'no one can fully rely on precedent' as they are easily ignored by the Supreme Court with or without reason. In fact, such a undefined practice of precedent poses a difficulty in determining the authority of case law'.

To be further precise, the legal system of Nepal needs to be seriously overviewed and harmonize with the modern principles of law and justice. For this purpose, the systematic documentation of the laws is a pre-condition. For making the Nepalese legal system widely understood and critically examined by jurists other than the Nepalese, it need to be fully and perfectly translated into international languages. Access to legal information without these very primary conditions are fulfilled would continue posing difficulty.

TECHNICAL CHALLENGES FOR ACCESS TO LAW

Systematic Documentation and Publication of Laws: The practice of documentation of different categories of law is scant. Statutes enacted by the Parliament are officially published in the "Nepal Gazette". Subsequently, Nepal Law Books Publication Committee, a government service enterprise under Ministry of Law, takes responsibility to compile and publish newly enacted Acts. Unfortunately, the publication is neither systematic nor sufficient in volumes. No cataloguing of the Act takes place. The numbering of the Act is neither done. Obviously, one has to look the desired Act through long unsystematically maintained roster of laws.

Every statute is presumed to be effective from the day of its publication in the Nepal Gazette, except otherwise provided by it. The Nepal Gazette is available to government offices and who have subscribed to it. It is not available in the market. Parliamentary Acts become available for general public only after they are published by the said Committee. The publication of government 'Regulations' follow the same practice. Further, the volume of the publication of each Act is not enough-it is hardly five thousand copies in one time. The second print is never a priority of the Committee.

The amendment made in the laws is notified through the Gazette. However, sometimes it takes long time for amended version of the Act to be reprinted. Hence, the users are often compelled to cite the laws using the bare Act published by the committee and the amended portion by using the Gazette. Indeed, it is too inconvenient for professionals. The danger of overlooking the amendment is thus obvious, at least the amendment is very minor or smaller physically.

The parliamentary service to inform the people about the amendment of laws is almost absent. The archive section of the parliament is totally rudimentary. One has to search with great efforts to find out the 'original bill'. The study of 'legislative history is painfully difficult' in Nepal. There are scant attempt to 'computerize the roster of the enacted' legislation in the last few years. Nevertheless, the system is hardly reliable. The record f the older legislation is totally chaotic.

Similarly, the process of the annulment is also not properly documented. The statute book may not be so frequently published by the committee, and, hence, the annulled law might be attached in the statute book quite long even after it has been in no use. This situation often makes difficulty for the users. The law ministry is where the most of the 'bills' to be presented in the parliament occur for formalization. The access to history of the bills is thus possible only in the Ministry of Law. However, the mechanization of archival system in here also is not good. The management organization of 'Drafting Section' of the ministry is very poor.

Another serious problem with regard to access relates to copies of the Statue Book (popularly known as Ain Sanghara) published. Hardly about 5000 copies are published at a time. Hence, only very few people may have access to laws. One of the reasons for such low volumes of publication is the 'minimum budget' made available by the government. The publication is heavily subsidized by the government. The committee can hardly make any profit out of sale of such copies. On the other hand, a significant number of copies go to the government departments free of cost. Over the last many years, the government has not increased the budget for such publication. While the government seems liberal to let private companies to publish it, the authenticity of such publications, in lake of proper cataloguing and numbering system, is often questioned. Most importantly, the quality of such publications is very low.

Documentation and Publication of Court Decisions: The condition seems to be absolutely poor in this regard. No kind of system of documentation and archiving the decisions exists in the district level of judiciary. The Case files in such courts are dumped into sacks with some unscientific marks of 'year'. They are then dumped into a poorly managed room. Study of such decisions is virtually impossible. Since the judgments of the district courts are not published, the access to such judgments is nothing but a myth.

The condition of the appellate court is hardly different. Since the judgments of the district and appellate courts have no meaning in terms of 'precedent'. It might be one of the reasons that the administration of such court hardly pays any attention towards proper preservation of judgments.

Supreme Court's judgments are regularly published, though in a smaller percentage of the bulk. The practice of publication of the judgments of this court has become increasingly popular and enhanced in the last some years. Nevertheless, the publication is limited and, hence, only very smaller percentage of the selected judgments comes to the notice of the consumers. In addition, the following problems make the quality significantly degraded:

- a. The Supreme Court publication is not innovative. It brings all the published judgments in full version. The editing is very poor. It is really difficult to find out what actually is the 'ratio' of the judgement.
- b. In the recent past, the Supreme Court has liberally allowed the private sector companies to reprint its past volumes, but it has invited serious 'haphazardness'. Some judgments are repeatedly published whereas others are forgotten. Users are thus compelled to buy the volumes of some judgments repeatedly, because the volume contains some of the judgments already published in another volume. Hence, the users are put on a situation to buy a numbers of volumes without need.
- c. The framework of compilation is also not user friendly. They are published in a shape as the publisher feels convenient to it.

Publication of 'digest' is not established practice in Nepal. Hence, the search of precedents of the Supreme Court is full of inconvenience for professionals.

PROGRESSES

Online Networking of Supreme Court: Supreme Court of Nepal has recently completed the electronic networking of its judicial functions. It has now introduced the system of placing the 'decisions' in the database. Hence, it is now possible to search the relevant precedents of the Supreme Court at least in places where the internet facility is installed. The translation of such judgements is however not started yet.

Development of Database by the Nepal-Bar Association: Nepal Bar Association has developed a database of the already published precedents of the Supreme Court which can be accessed by obtaining the password from the Nepal Bar Association. Currently, the membership is available to the lawyers and professors. However, the database contains only very small percentage of the Supreme Court's judgment.

Database of Kathmandu School of Law: Kathmandu School of Law through its website has created legal resource database focusing on the need of the law students. The date base contains, among other things, (1) the research reports, (2) research articles by faculties and students, (3) some bare Acts translated into English, (4) well-researched dissertations and term papers of students, and (5) journals, manuals and similar resources. In 2007, KSL compiled about 200 cases on 'rights of marginalized communities' into a CD Rom form, which is also featured in the website.

Linkages among Institutions: Most of the institutions involved in the field of law and justice are now having connected with online system, and most of them maintain their own websites. These developments have opened the way for institutional information sharing linkage.

RECOMMENDATIONS:

- a. Law schools in Nepal are facing the challenges of maintaining the 'national and international language' competency. The court procedure in Nepal is conducted in 'local language'. However, it would be simply not possible for students to keep them limited with the national official language. Hence, most of the law schools offer classes in international language. Nevertheless, it really a challenge to have the Nepalese judgments and legislation available in English. Hence, the government and international organizations helping to enhance the 'system of law and justice' must give priority to translate the domestic legislation into international languages.
- b. Legal information database such as Westlaw, Lexisnexis, and so on are very expensive for students and professionals in developing countries like Nepal. Such agencies must adopt policy of subsidizing the subscription or making provisions to provide free cost online access to library of the law schools.
- c. Institutions in country like Nepal need support form developing countries to 'systematizing the documentation and archiving of legal information'.
- d. The Government and funding agencies must support the initiatives of translating Supreme Court's judgments into English language, so that Nepalese judgments would be accessible to professionals out of Nepal.
- e. AustLII can help in developing a 'setting up of package system of legal information'. This can include varieties of sources of legal information.