

Barriers to Justice

A Glimpse on Nepalese Situation

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Prologue

Nepal, a Himalayan country, sandwiched between her two neighbours, arguably the heavyweights of Asia namely China and India, is an independent state, which was never colonized or ruled by the colonial power. Nepal somehow managed to keep its sovereignty and independence from the colonial subjugation albeit the time when the entire Indian subcontinent was in the grip of British Colonial rule. Thus, Nepali people were not aware about the wrath and atrocities of the alien dictator even though many of Nepali native rulers were far more prejudicial than what a foreign invader possibly could be by directly denying justice or access to justice to its people.

The Nepali judicial history dates back from the period before the Christian era where every reigning ruler of some ambition has been fulfilling the role himself of giving the best social order of his time to his people. Similarly, the judicial system during all the different historical era was different as the most of the laws made were based on the custom, usages, rituals and habits that suited the ambition and interest of the ruler thus giving birth laws based on caste system, which ultimately favoured the upper caste.

As per the first historical records found, there was *Kirat* rule in Nepal before the Christian era. During the *Kirat* period there used to be a local body, which used to settle the disputes. This body was elected by the people of each village.

The *Kirat* rule in Nepal was more followed by the *Lichhavi* rule for 5th-8th century AD. *Licchavi* Kings were committed to the idea of fair dispensation of justice and the administration of justice during *Lichhavi* period was more polished and developed. *Dauwarik*, a well versed in religious tenets, were the important officials of the King who used to hear complaints of the people on behalf of the king, which he later used to report to the king for final decision. There were also different officials for the apprehension of criminals and for the execution of punishment.

After the *Lichhavi* period, Kathmandu came under the rule of *Malla* kings. *Malla* Kings administered justice according to customary law including religious usage and rituals. For the purpose of simplicity in the administration of justice, King *Jayasthiti Malla* ordered the compilation of the then prevailing rules into comprehensive code, which was mainly based on the Hindu religion and philosophy.

After *Malla* Kings, *Shah* Kings have been ruling Nepal from 18th Century onwards. Kings of the *Shah* dynasty were ruling small province called Gorkha (Now a district of Nepal) when Kathmandu was being ruled by *Malla* Kings. *Prithvi Narayan Shah*

became the king of Gorkha in 1742 and two years later he began the military campaigns that united Nepal. Unification of Nepal by King *Prithvi Narayan Shah* also helped the systematisation of judicial administration. During his time, the Nepalese achieved unity.

In 1846, *Junga Bahadur Rana*, a courtier, seized effective power from the monarch and began an oligarchy of hereditary prime ministers that would last for over a century. Although the *Rana* regime was mostly known for its atrocities and violation of human rights that it bestowed to Nepalese people by alienating basic individual needs from the people, the first *Rana* Prime Minister *Junga Bahadur* deserves special mention for his contribution to the improvements of Judicial administration. *Muliki Ain* (literally meaning "Code of Country"), which was prepared as the first proper code of the country was promulgated in 1954 during the rule of *Jung Bahadur*. In fact, the motivation for preparing the *Muliki Ain*, which was largely inspired by the code of Napoleon of 1810, could have come entirely from internal reason giving the need to provide people with a uniform and more accessible justice as part of continuing reforms in Nepal's legal system. It is interesting to point out that the *Muliki Ain* was heavily influenced with custom and usages that were evident during the time of *Rana* oligarchy as it mostly dealt with functions of the caste and caste-specific behaviour in variable circumstances of inter-caste relationship. The punishments to the lower class used to be harsher than to upper class for the same offence.

The year 1951 marks the end of the *Rana* regime and beginning of a new era. A need for democratic Constitution for the governance of the country paved way for the promulgation of *Interim Government Act*. This Act pioneered the concept of independent Judiciary in Nepal's legal History. In 1960, the *Shah* King, King *Mahendra* who was profounder of *Panchayat* System (Party less System), staged a coup against the democratically elected government and the Nepali politics once again to the rule of the monarch under the *Panchayat* system. The Judicial system in Nepal in 1963 consisted of Supreme Court, fourteen zonal courts and seventy-five district courts. King *Mahendra* promulgated a new *Muliki Ain* in 1963 to replace the old one. This new *Muliki Ain* of 1963 abolished the legal recognition to caste and all the discriminatory laws made on the grounds of caste. But it still retains pro-Hindu provisions such as imprisonment for twelve years for killing a cow, bull or ox. Killing of any person in an attempt of stopping the killing of these animals is an excusable homicide.

The 1990 Constitution of Nepal, which came into existence after popular uprising against the *Panchayat* System which eventually restored the multiparty democracy in Nepal has envisioned in its Preamble a judiciary that would establish a system of justice which is independent, competent and that transforms the concept of the rule of law and human rights into a living reality. The Constitution has also guaranteed several fundamental rights to the citizens of Nepal. The Constitution has also sturdily provided remedies through Article 23 and 88, which empowers every citizen to seek and obtain justice from the Supreme Court in case of infringement of their rights by any formal or informal body of the Government or by commons as well. At the present there are about 100 judiciary related institutions in Nepal including 75 District courts, 16 Appellate Courts and a Supreme Court.

The barriers

Nevertheless, in spite of all the noble proclamation of the Constitution the subject of access to justice still remains a sordid tale in Nepal. It is universal knowledge to term access to justice as the right of every member of the society and as well as a key means to defend other rights. Human rights instruments also guarantee access to justice. *Article 10 of Universal Declaration of Human Rights* has provided that “*Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of their rights and obligations and of any criminal charge against them.*”

However, there are many factors involved in Nepal such as social and economical discrimination, inequality, primitive law, illiteracy, poverty, custom and usages, geographical conditions, incompetent judiciary, etc. which collectively has posed as a barrier and denying access to justice.

Eroded faith on judiciary refrain people coming to court and resolve their dispute administratively wherever possible. A survey conducted by *Nepal Law Society* in 2002 shows that people believe that there is rampant corruption in courts. Two *ships* are popular amongst the lawyers in Nepal regarding the Nepal's judiciary state - kinship and friendship. Coaxing or bullying is necessary to become a successful court practitioner. Judicial delays culminate a frustrating sense of injustice, uncertainty, disorder and notoriety. The problem of judicial delay challenges the right to life, liberty, livelihood and property. There are instances where the aspirant of justice died litigating for decades in quest of judicial redress. In average it takes five to six years for the finality of litigation. The Supreme Court alone has more than 14,000 pending cases as of the year ended July 16, 2006.

The illiteracy rate that is found in the villages is another major barrier towards the achievement of justice. The lack of knowledge and education has diversified the privileged and underprivileged ratio in the village. Furthermore, the major impediments to access to justice in Nepal are illiteracy and poverty. According to the study carried out by UNICEF reflects that the literacy rate of Nepal is only 49%. Besides this 40 percent people are below poverty line in which they earn as low as \$1 a day. The per capita income of Nepal is as low as US\$ 260. All this figures is really disheartening in the universal context as the lack of education and poverty gives rise to social evils and discriminations. As mentioned earlier, the illiteracy rate in Nepal is one of the major factors affecting the access to justice as more than half the population are illiterate with little or no knowledge regarding their rights and legal protections and aid provided thereof by the government.

The poverty has its own ill effects as the legal remedies can be expensive and as much as half the population cannot meet up the legal expenditures and court expenses even if they are aware of their rights which are being infringed. The legal proceeding in Nepal is very time consuming and which in turn increases the cost and for half the Nepalese population the cost of the justice which they had yearn to get for many fold of years comes at a heavy price which they may not find worth at all. Considering the economic inability of the indigent people, various organization working for the benefit of the needy and underprivileged people in Nepal have developed programmes to provide legal aid and support to them. There have been notable steps taken by various

organizations of Nepal in this regard. The Supreme Court of Nepal through its administrative decision on 26 June 1958 made a provision of court paid lawyers for the legal proceedings required by the indigent ones. The role of *the Nepal Bar Association (NBA)* in this regard is also applaudable as well. *NBA* has initiated free legal aid programmes for the underprivileged with the help of annual financial aid provided by the *Norwegian Bar Association* as the result of an agreement reached between them in 1987. A few NGO's of Nepal has also been actively involved to provide free legal aid to the underprivileged. *Nepal Law Society* and *Service for underprivileged section of society* (better known as *SUSS* locally) have enormously provided services to the disadvantaged group and backward female class of Nepal by running various legal awareness program and giving them legal knowledge and trainings. A Legal Aid Act, 1998 is also in existence.

However, all these efforts which is being done for the backward classes and indigent section is still not sufficient enough to obliterate the barriers of access to justice. The total and full access of justice for everyone still remains a far fledged dream. The system of court paid lawyers to the needy has not been able to reach to the far corner of the country. The main problem for this is that the courts are under-resourced. The annual budgetary outlay for the judiciary is less than 0.64% of the national budget. In many courts, file for the case is to be purchased by complainant in addition to payment of court fees. Most of the courts have primitive working conditions with no access to modern work milieu and geographical location of the courts is far away. Because of all this, court procedures become expensive, time consuming and cumbersome. The access to justice is unduly denied, as there is no easy access to court records and court related information. Likewise, an assessment of the duty bearers reflects that the formal legal institutions lack trained and efficient human resources. They have poor infrastructure and very limited budget to fulfil their requirements and because of this they are bound to follow all technicalities prescribed by the laws even if they are redundant. The quasi-judicial bodies practically serve more people than the courts do but the former lack legal experts and very often their decisions are quashed by courts so there is a need to train them on legal matters. For all these reasons, justice delivery has not been speedy and access to justice, especially for the poor and disadvantaged groups is limited and difficult in most instances.

As in most countries, half of Nepal's population are female in which many of these women are held back from reaching their full potential by outdated state laws and traditions. The women of Nepal are victims of social and economic discriminations and deprived of educations. Even though the social status of Nepali women in urban areas have comparatively improved in recent times with help of various programs run by the NGO's and INGO's located in Nepal, the situation of women in rural and village areas still remains volatile. The women have whatsoever no access to resource in monetary terms, as the women in Nepal mostly confined as housewives with little or no experience with official works. The male dominant society of Nepal has created fewer opportunities for women in Nepal, which adversely effects women's access to justice. Even in the case of incarcerated women the access to justice is meagre as the judge may obdurately sentence a women to a harsher punishment in order to prevent or teach other women to refrain from committing crimes indulging in unbecoming work. Another factor, which affects women's access to justice, is the vehement concern of social prestige. There is always a fear of social stigma among women as women have a very vulnerable position in Nepal due to partial and discriminate nature of Nepalese society.

Because of this many crimes and violence on women goes unnoticed because they are often afraid to come out in open and report such crimes in fear of being stigmatised. This fear leads to many domestic melees and social crimes pass by unnoticed which exceedingly affects the women's access to justice keeping in lieu the universal terminology of "justice delayed is justice denied". Lack of empathy for women also denies women's access to justice, as the bias nature of society tends to underrate the worth of problems and privations faced by the women. The illiteracy and unemployment among women population makes them vulnerable to human trafficking and many of them are sold in brothels in the neighbouring country like India. 5,000 to 7,000 women or girls are estimated of being trafficked every year from Nepal. Most of them are forced for prostitution. The estimated price of sale of such ill-fated women or girls is a meagre 333 to 666 US dollar. Though many NGO's like *Maiti Nepal* have carried out humanitarian works for the rescue of these women who were forcibly sold, the wrongdoers behind these heinous acts go scat free without any apprehension as majority of the rescued women are reluctant to report such crimes because of fear of social stigma and being socially disregarded. Wherever reported, the role of enforcement mechanism is not adequate.

In some way, the constitution of Nepal itself has also forced some gender inequality among citizens. The Constitution states that women cannot transmit nationality to their husbands and children but there is no such restriction on men. This violates the principle of gender equality. Women who married foreigners are discriminated against as their husbands and children are not provided equal rights of citizenship and the rights and privileges recognized or granted to the wives and children of the Nepali man thus bringing the barrier to the concept of access to justice. According to survey conducted by *Forum for Women, Law and Development* there are 174 gender discriminatory laws in Nepal ranging from nationality to employment, and property right to sexual violence.

Article 14 of the *International Covenant of Civil and Political Rights* has defended people's access to justice by stating that "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, Independent and impartial tribunal established by law" However, in Nepal the nature of the court proceedings and competence of judicial actors also undermines access to justice for the citizens. The court does not recognize the equality to the parties of "crime". As per the international practice standards both parties must have access to the document produced against one another. However, during remand, the courts have no practice of granting documents to defence lawyers and thus defence is generally meaningless which in turn affects the access to justice of the defence. The investigations carried out in relation to the criminal cases are often defective and often supports the prosecutor. The unsystematic geographical location and distribution of the courts in Nepal has also played a pivotal role in denying access to justice.

The Maoists insurgency declared on 13 February 1996 has also severely devastated the judiciary and judicial system in Nepal. The country is in deep crisis because of insurgency problem. The 11-year-old conflict between government force and the Maoist has created severe human rights crisis, which has affected, among others, the judicial functions too. The number of cases in courts is in a decreasing trend due to the insurgency related problems and access to justice in these conditions seems improbable. A good number of district courts are not in a position to function at all as the judgement

of the courts does not get easily implemented. They cannot even send summons to be served to the parties due to all the stumbling block wrought by the ugly side of insurgency. There are many parallel Peoples' Courts created by the insurgents to deal with disputes issues in the rural areas. In this situation, the independence and autonomy of the judiciary are faced with serious challenges thus affecting citizen's access to justice.

Conclusion

Access to justice requires that the public have available understandable information about the justice system, its resources, and means of access. The justice system should promote and widen public knowledge of access to justice by developing and disseminating information and materials as broadly as possible in any means that can reach the largest possible number and variety of people. In order to obtain this it is necessary for the government to allocate budget for this work.

Even though the insurgency problem now is being dealt politically and positive result is being expected out of the ongoing peace talks, it would be wise for the judiciary to be sceptical of the ongoing situation and think and develop strategies to defend courts as an institution and protect their records, resources and premises and thereby protecting citizen's access to justice. In order to avoid cultural, socio-economic, geographical and political barriers to access to justice, the judiciary must adopt the most effective substantive and procedural mechanisms capable of reducing the transaction costs faced by those seeking to resolve their conflicts. This is a humongous task for the judiciary taking into account its miniscule budget but we must not forget that the stability of our society depends upon the ability of the people to readily obtain access to the courts and denying access to the courts forces dispute resolution into vigilantism and violence.

Various INGO's and NGO's of Nepal has launched different programmes with the objective to enhance the people's access to justice, especially of the poor and disadvantaged groups. The Access to Justice Programme initiated by *UNDP* aims to raise civic consciousness on rights and responsibilities through civic education campaign. The legal awareness campaigns were launched to make people aware of their rights and responsibilities through radio and TV messages, publication of articles and books and conducting field orientation programmes in rural areas. *UNDP's* Access to Justice Programme has established a Mediation centre in Kathmandu through a joint initiation with Supreme Court and Ministry of Law, Justice and Parliamentary Affairs. The Fundamental objective of the centre is to provide an easy access to justice to people by solving family and local-level social conflicts through mediation. Other than this several other organizations like *Nepal Bar Association*, *Nepal Law Society*, *Nepal Judicial Academy*, etc. has been operating various programmes to make access to justice more feasible to the people, especially the poor and underprivileged.

However, all the works being done by these organizations is just the small dot in a big vicious circle. The circle itself represents the poverty and economic condition of Nepal. There are many regions in Nepal where people have no access to road let alone access to radio and television. The people of these regions cannot read the articles and publications circulated by these organizations even if it manages to reach them. In this circumstances peer-to-peer contact is necessary to aware these people of their rights and responsibilities and these projects needs sufficient resource and funds.

The Access to Justice Program run by organizations is rooted in the belief that all people should have the ability to enforce their individual and civil rights, resolve disputes, and defend themselves against governmental abuses. However, the organizations that work to serve the legal needs of the most vulnerable members of Nepali society are simultaneously overburdened and under-funded. If such programmes can initiate funds or grants from foreign donor then it will help further more to eliminate barriers of access to justice, develop new approaches to the delivery of legal aid and broaden the number of such service providers. Hitherto, there are some foreign donors like *Norwegian Bar Association*, *European Union* and *UNDP*, which have been supporting the legal aid, human rights, and access to justice projects. But Nepal still needs more of foreign donors to implement numerous withheld projects, which will eventually educate disadvantaged section of the population with proper judicial protection, which in turn will enhance their access to justice. The developed bars can considerably help towards this.

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