

Water Use and Water Rights in Nepal: Legal Perspective'

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"The naturalness of natural rights to access and use of water as a resource rests on a belief that, all people, because they are people, whatever be their moral, legal, social or civil status, have a natural right to water since water as a resource is another way of describing the right to life." (Upendra Baxi, in Singh 1991:111)

INTRODUCTION

This paper attempts to analyze the existing Nepalese legal framework in relation to water management and water rights. Further it deals with the acceptable extent of customary water use rights of the Nepalese people and resolution of water related disputes by mediation under the existing legal framework. This paper also gives a brief introduction to the status of water management and history of legal development in relation to irrigation management in Nepal.

Nepal is divided into three distinct geographical sectors; the northern most portion of the country is mountainous area, the middle consists of hills and valleys the southern part is plain land, known as Terai. They cover 17%, 68 % and 15% of the country, respectively. About 18 percent of the total land area (2323 thousand ha in 1991-92) has been brought under cultivation, of which 53% lies in the Terai.

Nepal is endowed with abundance of water resources and the total surface run off of the rivers is estimated to be around 20 m.ha. The abundance of water resources of Nepal has yet to be utilized

and exploited to its considerable extent. For example, in 1992-93, out of 2323 thousand ha. of arable land only 882 thousand ha (37.96%) was irrigated; 250 MW³ of electricity was generated, and a total of 140560 thousand liters of drinking water was provided daily to 1109 thousand people⁴. In the irrigation sector, the contribution of Farmer Managed Irrigation Systems is 72% of the total irrigated area as compared to Agency Managed Irrigation System's 28 percent.'

HISTORICAL DEVELOPMENT OF LAW IN NEPAL

For about 500 years in the early Nepalese history Nepal was ruled by Gopal (cowherds) and Aahir (buffaloherds) dynasties but no information is available about their legal systems. Then after, Nepal, as many small principalities, was ruled by Kirat, Lichhavi and Malla dynasties. The duration of regimes of the concerned dynasty especially of Kirat and Lichhavi period is confusing to some extent because different historians have mentioned different dates.⁶ Prithivi Narayan Shah, king of Gorkha, took the painstaking task of unifying the country. Thus since 18th century the unified Nepal is being ruled by the Shah Dynasty.

The first single codified law, valid for the whole of Nepal was promulgated in **1854**, and is known as the **Muluki Ain** (National Code). This Code existed for over a hundred years as the sole codified law to dispense justice in the country. Before the promulgation of the Muluki Ain 1854 and after its promulgation in the matters not dealt in the code, the task of dispensing justice was done as per the provisions made in different religious scriptures.

The historical development of legal system in general and water related laws in specific in Nepal are sketched in **Table I** (See also Annex I for the chronology of the water related laws and policies).

Very little information regarding water management and water rights of the people is available while studying the past legal history of this country. The provisions of Muluki Ain, 1854 as mentioned in the chart still exist under the New Muluki Ain of 1963 which is a signal of the legal provisions being deeply rooted in the society.

Table 1
Water Related Laws: Historical Perspective

#	Ruling Dynasty	Duration\ period	3 Prevailing Dharmashastra/Law	4 Substantive Law
1.	Kirat Dynasty	Before 464 AD.	Mundhum" (Chapter on Khasem Kharon Theem" rules for Administration of Justice)	No specific provision regarding water management found to date
2.	Lichhavi Dynasty	464 - 782 AD.	lanusmriti. laradasmriti. Yangya 'alka Smriti and other religious scriptures	As per customary practices and Dharmashastra
3.	Malla Dynasty	782 - 1768 AD.	As above	Annual repair of canal by its users made mandatory and non-compliance was punishable. Every one had right to use water irrespective of their caste on turn by turn basis.
4.	Shah Dynasty			
a.	Legal system before codification of law	Begins from from the reign of Drabya Shah in Gorkha in 1559 to 1854 AD.	As above	<ul style="list-style-type: none"> * First come first service in drinking water & irrigation. * Petty cases relating to drinking water and irrigation was not heard by state agency or royal courts (Rules 6 & 8 of Ram Shah) * The person who cut tree around drinking water tap was fined Rs. 5 (Rule 14)
b.	Legal system since the promulgation of codified law in 1854	1854 - 1963 AD	As above + National Code of 1854	<p>Makers of the canal had first priority to use the water but traditional water sharing pattern was upheld.</p> <ul style="list-style-type: none"> * Irrigation from top to bottom was recognized. * Canals could not allowed to be constructed upstream of existing canals if that lessened water supply to the downstream canals.

Table 1 (contd.)

#	Ruling Dynasty	5 Concerned Authority	6 Jurisdiction	7 Remarks
1.	Kirat Dynasty	Local Assemblies and Individuals	Water related conflicts as well as other issues	
2.	Lichhavi Dynasty	<ul style="list-style-type: none"> * Panchali, Drang, Adhikaran. * Birtawala 	<ul style="list-style-type: none"> * Panchali was village level assembly of five adults like a trial court, all cases within their jurisdiction. * Drang was province level or appeal level court and Adhikarn was central level. * Birtawala had authority to hear local level water related cases within their Bitra land area. 	<ul style="list-style-type: none"> * Birtawalas were persons who received land grants, usually tax free, from the state.
3.	Malla Dynasty	<ul style="list-style-type: none"> * Pancha Samuchaya (Assembly of five local people) * Dwares (gatemans) * Birtawala (land lord) * Pundits (Priests) 	<ul style="list-style-type: none"> * All village level disputes including water related. * All appointed by king, princes or ministers to hear petty cases including water related issues of their respective areas. 	<ul style="list-style-type: none"> * In 1626 AD. Jitmitri Malla of Bhaktapur issued a royal order to levy for the use of canal water. * Water related disputes were not considered as important disputes of the society.
	<p>dhah Dynasty</p> <p>Legal system before codification of law</p> <p>Legal system since the promulgation of codified law in 1854 AD.</p>	<p>Pancha Dware</p> <p>Thare Mukhiya</p> <p>Birtawala</p> <p>Choudhary</p> <p>Court of Bichari</p> <p>(Trial Court)</p>		<p>jurisdiction of state agencies and their authorities overlapped,</p>

CURRENT WATER RELATED LAWS AND POLICIES

The human body consists of about 70% (in terms of weight) of water thus human life is not possible without water. Therefore, "Water Right" in its broad connotation may be termed as "right to life". However, water right does not only entail water right for consumption but also the right to use and discharge it. Further in many occasions water right also entails protection from destruction and pollution of water sources and related construction works.

Keeping in mind the general meaning of water rights mentioned above, all the current Nepalese laws, related to water, may be broadly grouped into the following categories:

1. Consumption Related Laws

- (i) Drinking Water: Nepal Water Supply Corporation Act, **1992**.
- (ii) Domestic Needs: National Code **1963** (Muluki Ain,)
- (iii) Irrigation: National Code **1963** (Chapter of Land Cultivation: "Jagga Abad Garneko" Mahal)

2. Use Related Laws

- (i) Industrial Production: Industrial Enterprises Act, **1992**
- (ii) Hydro-power
 - a. Electricity Act, **1992**
 - b. Electricity Rules **1988**
 - c. Fixation of Electricity Tariffs Rules, **1993**
- (iii) Transportation
 - Vehicle and Transportation Management Act, **1992**
- (iv) Fishing.
 - a. Aquatic Animals Protection Act, **1960**.
 - b. Forest Act, **1992**.
- (v) Recreation: Trekking and River Rafting Regulation, **1984**.

3. Discharge Related Laws

Sewage into surface water and sewage into aquifer

- (i) Solid Waste Management and Resource Mobilization Act, **1987**
- (ii) National Code, **1963**

4. Protection Related Laws

- (i) Decentralization Act, **1982**
- (ii) Decentralization (Working Arrangement) Rules, **1982**

- (iii) Essential Commodities protection Act, 1955
- (iv) Village Development Committee Act, 1991
- (v) Municipality Act, 1991
- (vi) District Development Committee Act, 1991
- (vii) Soil Conservation and Watershed Management Act, 1982 and its Regulation
- (viii) Local Administration Act, 1971
- (ix) Some Public Offences and Punishment Act, 1970

5. Umbrella Laws

- (i) The Constitution of the Kingdom of Nepal, 1990
- (ii) Water Resources Act, (WRA) 1992.
- (iii) Water Resources Rules, 1993.

The classifications made above are not hard and fast because one law or act often leads with many aspects. And water related laws are not confined to the provisions of one or two laws but scattered in different laws. We have included policies in the classification of laws because though policies may not have a direct bearing on a person's water rights, they nevertheless may affect water rights by affecting laws or implementation of laws.

Due to lack of space, this paper has not discussed all the water related laws but only with the following issues/topics and referred to the related laws wherever felt necessary. The chronological development of the water related laws and policies have been presented in Annex I.

Ownership Versus Management of Water Resources

As per the provision of Water Resources Act, 1992 (WRA 1992) the ownership of the water resources of surface, underground or in whatsoever form, available in the Kingdom of Nepal, is vested in the kingdom of Nepal. [Sec. 2 (a) and Sec. 3]

This provision rejects the existence of any individual or community ownership right over any of the water resources available within the kingdom of Nepal irrespective of its origin, place, mode of use, nature of water resources and management system. This provision rules that any water resources originated on private land should be considered as state owned, and negates the constitutionally awarded property right (to use it as he/she pleases) of the Nepalese citizen.

There may be serious questions raised in this regard such as: Will individuals or communities (who have been managing their water resources since time immemorial) keep "loving" the water resources as they used to when they know that the water resources no more belongs to them? Will they not take it as state's intervention in their local matters? Can the government manage and maintain the water resources for beneficial uses, for which the WR Act has come into existence, with its limited number of administrators and experts in this field?

While talking about nationalization of natural resources one may remember the Private Forest Nationalization Act 1957. This Act was brought into existence in the name of "better preservation

of the forest resources” but afterwards it was realized that the government, keeping the local communities out of the management system, can not effectively manage and protect the natural resources with its limited number of officials and the experts. Will the same story be repeated?.

Access to Water is a Natural Right

Considering the constitutional provisions, two provisions relating to fundamental rights, namely a) right to equality [Art. 11 (4)] and right to property (Art. 17) are found related in this regard. According to Article 11(4), no person shall be discriminated against as untouchable and be denied access to any public place or be deprived of the use of public utilities. Contravention of this law is punishable. According to Article 17, all citizens have right to property and private property can not be confiscated without paying due compensation. These constitutional provisions entail that every Nepali citizen has natural right of access to water of all public utilities without any kind of discrimination and the water source limited to a private land be considered as the owner's private property so far the use of water is mingled with the use of the land.

Every Citizen Has Right to Sue with Regards to Public Water

Among other related provisions of the present constitution (under Art. 126) the ratification of, accession to, acceptance of or approval of a treaty or agreement including about natural resources and the distribution of their uses are subject to be done in the parliament. On the other hand, if any agreement or treaty is of an ordinary nature which does not affect the nation extensively, seriously, or in the long term, the ratification of, accession to, acceptance of, or approval of the same, may be done at the meeting of House of Representatives by a simple majority of the members present. Otherwise it may be done only by a majority of two-thirds of the members present at a joint sitting of both the Houses of the parliament.

Article 126 is vague in terms of spirit as well as letter and has provided grounds for debates and controversies. It is very difficult to define whether a treaty concerning water resources is of an ordinary nature or whether it affects the nation extensively, seriously or in long term. The criteria and mechanism to determine the nature of a treaty have not been fixed so far, either in the laws or in legal practices. Therefore, certain issues sharing of water resources in the “Tanakpur Barrage” case, in which the Supreme Court has made it clear that the deal of His Majesty's Government (HMG) with India during the visit of the former Prime Minister, Mr. Girija Prasad Koirala, on Dec. 1991, was not merely an understanding, but a treaty, are still under consideration by the parliament. However, in the said case the Supreme Court has clearly established the precedent that water is one of the natural resources and matter of concern for common people so every citizen has a right to sue against anyone and a right to get information about the acts of the government in this regard.

It may be recommended that the Nepal Treaty Act, 1990 should contain clear cut criteria or establish specific mechanisms to determine the nature and extent of a treaty concerning natural resources, particularly water resources and sharing of their benefits.

Right to Utilize Water Resources

Although all water vests in the Kingdom of Nepal, i.e., that the state is the owner of all water resources in whatever form, all Nepalese citizens have the right to utilize water. Water may be utilized for some purposes without acquiring licence from the concerned state agency, while for other purposes licences are required. The WRA has defined when and for which purposes licences are required and when they are not required, as described below.

Water Uses for Which it is Not Necessary to Obtain Licence

As per the WRA everyone is entitled to utilize water resources (without obtaining a license) for the following uses:

- (i) For one's own drinking and other domestic use on an individual or collective basis;
- (ii) For the irrigation of one's own land on an individual or collective basis;
- (iii) For the purpose of running a water-mill or water grinders as cottage industry;
- (iv) For the use of a boat on a personal basis for local transportation;
- (v) For the use, as prescribed under Water Resources Rules, of the water resources confined to a plot of land by the owner of such land.

Although licence is not required for the use of water for the purposes mentioned above, the users are not free to use water as they wish. They must make beneficial use of water without causing damage to others (see Sec.4, subsections (2) and (3) of the WRA).

Water Uses For Which License is Required

Since the ownership of all the water resources available within the national boundary vest in the Kingdom of Nepal, no person is entitled to utilize the water resources, except as mentioned above, without obtaining a licence from the concerned authority under the WRA (Sec. 3 and 4). For the purpose of awarding license for survey and utilization of water resources, Rule 8 of the Water Resources Rules, 1993 has made a provision for one "District Water Resources Committee" in each district, under the chairmanship of Chief District Officer (CDO), and comprising the following members: representative from district level Agriculture Development Office, Forest Office, Drinking Water Office, Irrigation Office, Electricity Project Office of HMG, office relating to utilization of water resources, District Development Committee (DDC) and Local Development Officer (LDO). It is noted that the members, except the representative from DDC, all are bureaucrats.

Persons willing to make use of water resources for collective benefits or on an institutional basis can form a water users association and register it with the concerned District Water Resources Committee (Sec.8). [The registered water users association becomes an autonomous corporate body]. Even a person willing to survey water resources for possible project implementation needs to obtain a license and apply to the concerned authority as prescribed under the said Act. The license obtained under this Act can be sold or transferred otherwise to others. The licensee may collect fees from the users for the use of services generated out of the water resources and services

may be stopped on default of payment. A person or a corporate body, who is utilizing water resources prior to the commencement of WRA, is also required to apply to the concerned authority as prescribed under the act *within* one year of commencement of the Act.

The licensee is liable under the WRA to pay a charge or annual fee for utilizing water resources to HMG [(Sec. 8(5))]. HMG may prescribe the necessary quality standard of water resources for various uses and that should be maintained (Sec. 18 WRA). Similarly HMG may prescribe the tolerance limit for water resources and may prohibit water resources pollution by any means (Sec. 19 WRA)..

The license relating to the survey of water resources and its utilization for the generation of hydro-electricity is not governed by the WRA provisions as mentioned above but other matters relating to the water use is governed by the provisions of the Act (Sec. 9).

The license of such a licensee can be cancelled if he or she performs acts contrary to the WRA or Rules framed under it, or does not comply with the order given by the prescribed officer prescribing necessary improvements thereon.

While providing license for utilizing water resources following priority order, shall, in general, be followed:

- (i) Drinking water and domestic uses
- (ii) Irrigation
- (iii) Agricultural uses, such as animal husbandry
- (iv) Hydro-electricity.
- (v) Cottage industry, industrial enterprises and mining
- (vi) Navigation
- (vii) Recreational uses
- (viii) Other uses.

Hydro-Power

All forms of water use and license awarding process has to be guided by the Water Resources Act and rules framed thereunder except the use and licence awarding process for hydro-power. Thus the legal provisions regarding awarding license for hydro-power needs to be dealt *seperately*. No person or institution is authorized to generation, transmission and distribution of electricity unless permission or licence is obtained under the Electricity Act, 1992. However, it is not required to take permission to generate and distribute electricity up to 1 MW by a citizen or national institution, who only needs to inform the concerned authority about the project (Sec. 3).

The person or institution willing to survey or generate hydro-electricity needs to file application to the concerned authority for the purpose of obtaining a license as prescribed under the Electricity Act and the concerned authority will provide the required license following the due process as prescribed under the laws. The licensee with prior approval of the concerned authority can transfer his right by any way to others (Sec. 4). The duration of license of survey for hydro-power will be maximum 5 years and maximum 50 years for generation, transmission and distribution unless that

is renewed. The land and installation related to electricity generation, transmission and distribution lines established by foreign nationals or corporate body in which they have financed more than 50% of the total investment shall be under the ownership of HMG after expiry of the license (Sec. 5 and 10). The licensee is authorized to collect fees from the hydro-power users and terminate the service if the fee is not paid (Sec. 16, 17 and 19). He/she needs to run the project without polluting the environment (Sec. 24) and such license can be cancelled if the licensee acts in contravention to the Act and Rules framed thereunder and order given by the concerning authority (Secretary of the Ministry of Water Resources) in this regard.

The Electricity Act, 1992, has been promulgated with the objective to attract national and foreign private sector entrepreneurs to invest in the development of hydro-power and utilize the available water resources. Therefore, the Act has made provisions for many concessions and facilities to such investors.

But within the new legal framework, license to the private sector has yet to be issued. The private sector feels that until the Nepal Electricity Authority itself is privatized and/or greater opportunities are provided, the prospect of private sector participation in medium and small projects (1 MW and above) are bleak. The major constraints are as follows:

- (i) The uncertainties involved in the development of hydro-power projects due to a lack of hydro-meteorological data.
- (ii) Uncertainty over the continuous flow of the benefits and guarantee of being paid in the future.
- (iii) Uncertainty over tariffs which would be fixed by a proposed public tariff commission and further negotiation with Nepal Electricity Authority.

The legal situation of water rights regarding other uses such as agriculture, cottage industry, transportation, recreation, etc. are not dealt with separately in detail in the existing Nepalese laws. However, for the use of water for such a purpose a license is required.

Water Rights to a Water Source Which Originates in and Confined to a Private Land

The owner of the land on which the water resources is confined (to his/her land) may use the same without obtaining a license but subject to the provisions made under the Rules framed under the WRA (Sec. 4 (2) (e) of the WRA). But, surprisingly the Rules are silent on this issue; thereby it leaves room for confusion regarding the use of such water resources to both, users and law implementors.

All the water resources as per the provisions of the WRA is owned by the kingdom of Nepal whether it is originated or existed on private or public land and the provisions regarding to legal restrictions on its use may be considered as contrary to the constitutional provision of the property right, (See Secs. 2, 4 (2) (e) of WRA and Art. 17 of the Constitution) because the use of water is attached with the use of land.

Similar arguments can be put forward regarding to the Aquatic Animals Protection Act, 1960, which states that the term water includes lake, water reserve, waterfall, stream, river, watercourse,

pond, canal, etc. and their sources; and defining the term aquatic animal it states that the term includes all animals which live in water. The Act has made a provision that the owner of the private water may use the water to kill or catch aquatic animals anyway he likes except by using poisonous substances and without aquatic animals in other water. [See. Sec. 2 (a) and (b) and Sec. 3] The term “private water” has been defined as the lake, pond, watershed, or water reserve on a land of which the owner is paying land revenue of the land to HMG. [Sec. 2 (g) of the Aquatic Animals Protection Act, 1960]. Thus the concept of private water and its use to the extent accepted by the Aquatic Animals Protection Act has not been confirmed by WRA. Further the WRA has made room to frame rules imposing some restrictions on the use of private water which may contravene the provisions made under the Aquatic Animals Protection Act.

Irrigation and Customary Water Use Rights Vis-a-vis the Existing Legal Provisions

As mentioned above, *Muluki Ain* is the oldest codified law of Nepal. In 1950, there was a successful popular political movement against the then Rana rulers and the social, political, and economic situation of the country was changed but the same law remained in existence till 1963. It was only in 1963 that the old *Muluki Ain* was revised thoroughly as per social and political changes and a new, revised *Muluki Ain* promulgated.

The *Muluki Ain* devotes one out of its 44 chapters, known as *Jagga Aabad Garneko* (Land Cultivation) to basic legal provisions regarding irrigation. Under the said chapter if someone wants to make a new irrigation canal above the existing canal he/she can make the new one only if that does not lessen the quantity of water to those plots of land which are being irrigated through the old one (Sec. 1).

Similarly, for the purpose of cultivating land, an irrigation canal can be made through anyone's private land, whether fallow or cultivated, and water can be channelized; no one should prohibit such an act. A landlord, on whose land the irrigation canal is made, unless his/her land is revenue exempted fallow land, should be given the price of the land or substitute land as a compensation for the loss of his/her land. The revenue of the cultivated land, on which the irrigation canal is made to cultivate a fallow land, should be exempted if the revenue of such newly cultivated land comes around double of the cultivated land used for making the canal (Sec. 3).

Likewise, land, on which a water resource or hank of a pond exists, should not be cultivated (Sec. 4). The person who cultivates such a land is liable to be fined five times the revenue in addition to the revenue of the land and such land should be left fallow again (Sec. 12).

The *Muluki Ain* contains several provisions that recognize existing social norms, values and practices. But the *Ain* is also confusing to many people. In the first place, the original *Muluki Ain* was drafted over one hundred years ago. The language is very difficult to understand. It contains many Urdu and Persian words which has made it very difficult for the common people to read and understand. Secondly, it contains some provisions that may lead to contradictions. For example, the upper riparian have prior right of water use to irrigate their land. On the other hand the traditional water distribution system is also recognized. What happens if the upper riparian turn

their *bari* (unleveled cultivated land which can be used to grow other crops than rice) into *khēt* (rice fields) lessening the quantity of water to the lower riparian? It is difficult to answer such a question under the provisions of this Ain.

Third, the fine of up to Rs. 50 for a person who compels someone to leave his/her land uncultivated is very nominal and therefore not a good protection against infringement of rights.

Fourth, being a general law of the nation specific laws, such as the WRA, prevail over it. This legal provision often leads to confusion, even among lawyers. Thus the Muluki Ain has recognized the prior appropriation and customary water use right, but the WRA of 1992 does not explicitly recognize customary water use rights. For example, in many parts of the country water users associations, who in general are not registered as institutions, have constructed irrigation canals and are charging fees from the beneficiaries: such water users committee and customary practices of levying water fees is not legally valid unless and until they obtain a license under the WRA [Sec. (8)3].

Likewise the WRA has broadly “nationalized” all water resources within the kingdom of Nepal. It also has fixed priority order for the use of the water sources and drinking purpose is on the top of the priority list. In such a situation, if someone or a group, without obtaining a license, has constructed an irrigation canal using the water from long past but someone comes to claim the same water for drinking purpose then what kind of right will prevail over there? The right of the person who constructed the canal as customary water use right under Muluki Ain? Or the right of a person who would like to use the water source for the drinking purpose? This question may be answered by a legal expert saying that WRA is applicable in this case because Muluki Ain, being a general law, cannot prevail over the specific law. But, will it be justified, that someone gets water use right under Muluki Ain since time immemorial but loses the same right under WRA?

Here the question arises what is customary water use rights? The meaning of the term customary water use rights has not been defined in any of the Nepalese laws. Thus it is up to the courts to define this term and determine how many years of use does it take for a practice to be considered customary use. The number of years may differ from one court to another unless and until the Supreme Court ascertains the number of years in this regard.

Nevertheless, the WRA has not completely rejected the customary water use right because some provisions of the Act have made room to recognize such rights. For example;

- i. Using water for certain purposes such as drinking, domestic, irrigation purposes on individual or collective basis does not require obtaining a license [Sec. 4].
- ii. On receipt of an application for survey and utilization of water resources from an individual or a corporate body the concerning authority or officer is required to make necessary enquiries before issuance of the license [Sec. 8 (2) and (4)].
- iii. If a dispute arises while utilizing water resources, the prescribed committee shall decide as to whether or not or in what manner such use could be made. Such decision must be made on the basis of priority order of water use, the beneficial use, i.e. rational uses of the water resources within the available means and resources and use of the water resources without

causing damage to others [Sec. (2)a and 4(3)] or misuse of water resources and also other necessary enquiries. [Sec. 7(2) and Sec.10].

All these three provisions give room to the implementors to consider the customary water use ~~rights~~ of the local people and respect them before they take a decision within their respective jurisdiction. But two things have to be considered. First, these provisions do not ~~make~~ it mandatory for the law implementors to ~~respect the customary~~ water user right. Second, to follow the intentions of the legislature [which ~~are~~ not directly mentioned] by the law implementors not only require knowledge of the law but also proper understanding of such legal provisions. These two things have made it doubtful that the law implementors would respect customary water use rights of the people or at least it can be concluded that it depends upon the bureaucrats which may vary from place to place.

RESOLUTION OF WATER RELATED CASES BY MEDIATION

The Village Panchayat Act 2018 (1961) gave judicial power to the village Panchayats (village councils). The judicial power of the village Panchayats included power to hear cases relating to encroachment of water outlet, embankment of water resources and irrigation water, etc. (Sec. 41). The village Panchayats were authorized to exercise the powers like a court while hearing cases. The village Panchayats were required to form a three member judicial committee headed by the village chairman or vice-chairman and two other members, i.e., the ward members from the wards of the disputing parties, but maintaining some of the basic judicial principles, e.g., a relative of the the disputing parties could not be member of the judicial committee. The appeal against the decisions of the village Panchayat Judicial Committee was heard by the concerned District Court. After the successful popular movement of 1990 the place of the Village Panchayat Act has been taken by the Village Development Committee (VDC) , as per the VDC Act of 1992.

However, the judicial power given to the Village Panchayats is not given to Village Development Committees under the VDC Act of 1992. The judicial power given to local village Panchayats was directly or indirectly justified in many ways. It was argued that local disputes would be solved locally without going out of the village and entering into a complex judicial process ~~thus~~ saving time and money of the disputing parties. It was also considered to help the social development process of the local communities. But surprisingly neither had the Village Panchayat Act, 1961 given any justification for giving such judicial power to Village Panchayats, nor did the Village Development Committee Act mention why such a judicial power is not given to the VDCs.

Under Section 44 of the Village Development Committee Act, 1992, the Village Development Committees ~~are~~ authorized to mediate in minor cases relating to encroachment of (water) outlets, use of bathing platforms in a water source and protection of public properties (those kinds of property which are not owned by individual persons) and water reservoirs (dams), irrigation canals or distribution of water. Under Sec. 45 of this Act the VDCs should summon both the parties and ~~try~~ to bring about a compromise after due discussions. If an agreement can not be reached then the parties should be told by the VDC that they may take their case to the concerned court of law within

three months from the date of registration of the first petition in the VDC. If agreement is reached the VDC is authorized to take fees from the parties as per the rate prescribed under the existing laws.

These provisions show that there are some basic differences between the judicial power of the village level unit under the Village Panchayat (VP) Act and the VDC Act. They are:

1. The village Panchayat had given authority to hear and decide on cases prescribed under the VP Act and the appeal was heard by the district court, including the authority to bring agreement between the disputing parties; but the VDC Act has not given power to decide over such cases, but just to try to bring about an agreement between the disputing parties.
2. The VDC Act has much more clearly mentioned that VDC should hear complaints about distribution of water and try to bring an agreement between disputing parties which was not clear under VP. Act. (Sec. 44 of VP Act and Sec. 44 of VDC Act.)
3. The VP. Act had authorized Village Panchayats to bring compromise (agreement) between disputing parties even in those cases which were not under their jurisdiction (as mentioned under Sec. 44). But, such a power is not given to VDCs under the VDC Act.

Thus we can notice that there are substantive as well as procedural differences between the VP Act and the VDC Act regarding to the judicial power of the concerned local bodies. The village Panchayats under the VP Act, 1961 were given much wider judicial power and power to bring compromise between the disputing parties than the power given to VDCs under the VDC Act of 1992. Why has such changes been brought? Is it the consequence of feed back from the concerned local bodies or agencies or is it because of the change in the political system? Perhaps the second one prevailed because such a change is not based on any study or study report. However, the report of the Royal Judicial Improvement Committee of 1983 mentioned, "though it is noticed that many people were not interested to comment on the effectiveness of the judicial power given to the Village Panchayats as per being for short expansion of time. However, in the opinion of the majority of the people it was appropriate to award such a judicial power to Village Panchayats. Further, evaluation of the benefits and experience of exercise of such a power is needed to wait up to a proper expansion of time." (p. 159)

The study of the Royal Judicial Improvement Commission 1983 reflects that on the spot observation revealed that many VP officials were neither aware of, nor exercised, their judicial powers. These officials, in accordance with their historical tradition, effected compromise between disputing parties even on such cases which were not under their jurisdiction under the VP Act. They also brokered compromise between disputing parties without preparing any document. Further, the same legal provision was used differently by different VP officials. At the same time, the Commission report also commented that this practice has helped the villagers find a practical solution of their disputes and only a negligible number of cases went to the courts (p. 160).

It may be argued that assigning too many judicial tasks to the village units might slow down local level developmental works. Nevertheless, termination of such a judicial power of village units in

the absence of a proper study into the question whether such a provision is justified in accordance with tradition, geographical situation, social and economic condition of the citizen, and the concept of decentralization, may be called a “blunt step”, and, accordingly, the impact of this is another issue for research.

CONCLUSIONS AND RECOMMENDATIONS

Water rights are available to the people in Nepal by the following four ways:

1. Natural rights for which license is not required. but only for limited purposes;
2. Rights acquired by licensing. Such rights are limited to the purpose for which the license is awarded. However, by acquiring the license, the licensee gets right over the use of water as property, which he can sell (license) to others, collect fees from the users of the water or product thereof, and terminate the service upon non-payment of the charge/fee.
3. Riparian rights have been recognized, under which the upper riparian has prior right to irrigate his land in comparison to the lower riparian.
4. Customary use right and prior appropriation rights have also been recognized in two senses. First no other irrigation canal can be constructed above the existing one if water supply to the existing canal is decreased. Second, the water share of a person who has been getting it traditionally should not be stopped and he should not be compelled to leave his land fallow.

All these rights can be adversely affected by government interventions. The government may acquire a water source to develop it as long as this does not cause substantial adverse effect to the existing users and benefits a larger population than the existing beneficiaries. Thus none of these water rights can prohibit the government to acquire or develop water resources and construction works. However, the government is liable to pay compensation for acquiring construction works in accordance with the law but the compensation does not include payment for the loss of possible income by selling the water services.

The elected VDC members are unaware of their judicial power due to their socio-economic and educational background. If power is given to the local bodies, we naturally expect them to utilize the power in a proper way. To help them carry out their responsibilities successfully, they have to be trained, provided with the necessary physical facilities, experts, and copies of laws. They have to be provided with guidelines and orientation which should be monitored and evaluated from time to time. Unfortunately these have not been provided to them.

We should make very simple and cost effective procedures which should be followed and flexibility should be adopted in the laws.

The spirit of WRA is to make legal arrangements for beneficial use of water resources and keep them free from environmental and other hazardous effects. The WRA must be regarded as legal provisions in the interest of the people but. if the spirit of the law is not properly understood by its implementors, then it can be used to terminate peoples' customary water use rights as well. The following recommendations may be put forward

1. It has been internationally accepted that natural resources can be managed best if the indigenous management systems and the customary rights of the people are accepted and protected under the formal laws of the country. Therefore, it is recommended that the WRA should clearly mention that the customary water use rights of the people are given legal recognition and the term "customary water use rights" be defined in accordance with international practices.
2. All the members in the District Water Resources Committee, except the representative from DDC, are bureaucrats. It is widely accepted that the elected representatives and representatives from the concerned sector should also be included in the decision making process for the purpose of involving people in the governance of the country. It is, therefore, recommended that the District Water Resources Committee should include one representative from the concerned VDC or municipality and one also from the water users association as prescribed by the DDC.
3. It is recommended to provide one legal expert in all District Administration Offices and give them necessary orientation and guidelines regarding implementation of the concerned laws, otherwise such law implementors even may not know that there exists a law called Water Resources Act !
4. The background mentioned above clearly shows that there is little input of the government in the efforts of the people in managing water resources. Law always affects, one way or the other, their management systems but the laws are never brought into public discussions before their adoption. Therefore, it is recommended that the laws and amendments thereon which affect the people at large must be brought into public discussion before they are passed by the parliament. And for the effective implementation of the laws people should be made aware of their water rights and necessary steps should be taken in this regard. ■
5. The WRA has made provision for registering water users associations under it. However, they are registered under the Society Registration Act, which may not be enough to provide proof of the rights of the concerned people to the use of certain water resources. So, necessary instructions should be given to all the District Administration Offices in this regard.
6. Necessary amendments should be made in the laws so as to avoid overlapping and contradictory law. †
7. Legal provisions should be made to establish coordination so as to avert duplication in planning and implementation of water related projects.

NOTES

- 1 This is the revised version of the paper presented at the workshop on “Water Rights, Conflict, and Policy” held in Kathmandu, Jan. 22-24, 1996.
- 2 The author is associated with **FREEDeAL**.
- 3 It is expected that major river systems of Nepal bear a potential of about 83000 MW of electricity of which **42000-45000** MW is economically and technically feasible for commercial exploitation.
- 4 Center Bureau of Statistics 1994 47, 83 and 94.
- 5 **DIO/IIMI Nepal 1995: 53**
- 6 Sharma 1975:62-112.
- 7 Some writers have translated “Jagga Aabad Garneko Mahal” as “Land Reclamation”

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ANNEX I

Chronology of Water Related Laws and Policies in Nepal

Prepared by Mr. Madhav Poudel, Joint Secretary, Ministry of Law and Justice

1. 1854 AD (1990 B.S.): Promulgation of the *Muluki Ain* (National Code). One section of the National Code deals with rules concerning irrigation in general and construction of canals and priority of: water distribution in particular.
2. 1952 AD (2009 B.S.): Amendments made to the *Muluki Ain* to provide further legal rules with regard to canal construction and protection of fishery resources.
3. 1955 (2012 B.S.): Enactment of the *Essential Commodities Protection Act, 2012* to regularize water resources as an essential commodity.
4. 1961 (2017 B.S.): *Aquatic Animals Conservation Act, 2017* was enacted and introduced with a view to conserve fisheries and other aquatic animals.
5. 1963 (2018 B.S.): Promulgation of the *Irrigation Act, 2018* to provide legal provisions concerning water use, construction and maintenance of canals, distribution of water, collection of water charges, sewerage etc.
6. 1963 (2018 B.S.): Enactment of the *Electricity Motor or Power Transfer Act, 2018* to provide legal provision concerning the transfer of private ownership of electricity.
7. 1963 (2019 B.S.): Enactment of the *Nepal Electricity Corporation Act, 2019* for the establishment of the Nepal Electricity Corporation, as a corporate body for production and distribution of electricity.
8. 1964 (2020 B.S.): Introduction of the *Nepal Electricity Act, 2020* to provide legal provisions concerning policy to be developed by the Government on hydro-power, distribution of licences, fixation of power tariffs, etc.
9. 1964 (2019 B.S.): Enactment of the *Village Panchayat Act, 2019* to empower the Village Panchayats in the field of irrigation, water supply and fisheries.

10. 1964(2019 B.S.): Enactment of the Town *Panchayat Act, 2019* to provide legal provisions for management and utilization of streams, wells, ponds and other water resources within the jurisdiction of the concerned Town Panchayat.
11. 1964 (2019 B.S.): Introduction of the District Panchayat Act, **2019** to provide legal provisions concerning water rights to be applied within the territory of the concerned district.
12. 1964 (2020 B.S.): Enactment of the new Muluki Ain; the existing **Muluki** Ain (with amendments) is repealed.
13. 1964 (2020 B.S.): Commencement of the new Muluki *Ain*
14. 1967 (2025 B.S.): Introduction of the *Irrigation, Electricity and Related Water Resources Act, 2024* to provide legal provisions related with irrigation, production of electricity and other matters concerning water resources.
15. 1968 (2026 B.S.): Commencement of the Irrigation, Electricity and Related Water Resources **Act, 2024**.
16. 1974 (2032 B.S.): Introduction of the Canal Operation *Regulation* to govern water use for irrigation.
17. 1982 (2039 B.S.): Introduction of the Soil and Watershed *Conservation Act, 2039* to protect soil and watershed.
18. 1984 (2041 B.S.): Enactment of the Nepal Electricity Authority Act, 2041 to merge two institutions existing at that time, namely, Electricity Department and the Nepal Electricity Corporation.
19. 1984 (2042 B.S.): Commencement of the Electricity Authority Act, 2041
20. 1982 (2039 B.S.): Enactment of the Decentralization Act, 2039.
21. 1984 (2041 B.S.): Implementation of the Decentralization Act, *2041*.
22. 1988 (2045 B.S.): Adoption of a new working policy on irrigation development by HMG.
23. 1988 (2045 B.S.): Enactment of *Irrigation Regulation, 2045* to provide legal provisions for formation of water users' groups, water distribution, realization of water charges, etc.
24. 1989 (2046 B.S.): Enactment of the Nepal Water Supply Corporation *Act, 2045* to constitute a public utility company to supply clean water in various regions of Nepal.

25. **1989 (2045 B.S.):** Commencement of the *Nepal Water Supply Corporation Act, 2046*.
26. **1990 (2046 B.S.):** Publication of the list of water resources and irrigation systems or projects to which the *Irrigation Regulation, 2045* is applicable.
27. **1990 (2047 B.S.):** Drafting and promulgation of the *Constitution of the Kingdom of Nepal, 2047*. The Constitution provides some leading provisions on water resources and their utilization.
28. **1990 (2047 B.S.):** Introduction of the *Village Development Committee Act, 2047* to replace the *Village Panchayat Act, 2019*.
29. **1990 (2047 B.S.):** The *Municipality Act, 2047* was introduced and the existing **Town Panchayat Act, 2019**.
30. **1990 (2047 B.S.):** The *District Development Committee Act, 2047* replaced the *District Panchayat Act, 2019*.
31. **1992 (2048 B.S.):** The *Village Development Committee Act, 2048* replaced the *Village Development Committee Act, 2047*.
32. **1992 (2048 B.S.):** The *Municipality Act, 2048* replaced the *Municipality Act, 2047*.
33. **1992 (2048 B.S.):** The *District Development Committee Act, 2048* replaced the *District Development Act, 2047*.
34. **1992 (2049 B.S.):** *Hydro-power Development Policy, 2049* was adopted to invite private sector investors in the hydro-power development areas.
35. **1992 (2049 B.S.):** Adoption of the *Irrigation Policy, 2049* to clarify the government's policy in this field.
36. **1992 (2048 B.S.):** Enactment of the *Water Resources Act, 2049* as an umbrella Act on management of water resources.
37. **1992 (2049 B.S.):** Enactment of the *Electricity Act, 2049* to provide legal provisions concerning production and distribution of electricity, issuing of licences, incentives to be given to the private sector entrepreneurs, etc.
38. **1993 (2050 B.S.):** Commencement of the *Water Resources Act, 2049*.
39. **1993 (2050 B.S.):** Commencement of the *Electricity Act, 2049*.
40. **1993 (2050 B.S.):** Introduction of the *Water Resources Regulation, 2050* to provide for the procedures of the *Water Resources Act, 2049*.

41. **1993 (2050 B.S.):** Introduction of the *Electricity Regulation, 2050* to carry out the objectives of the *Electricity Act, 2049*.
42. **1993 (2050 B.S.):***Electricity Tariffs Foreign Regulation, 2050* framed and introduced to provide a mechanism for fixation of electricity tariff.

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The Court System in Nepal¹

*Ramchandra Bhattarai*²

INTRODUCTION

The main purpose of this paper is to give a general introductory information on the Nepalese court system. It highlights the changes in the tiers and jurisdiction of courts, basic court procedures and time limit as well as work load of the courts.

HISTORY OF THE JUDICIAL SYSTEM AND TIERS OF COURTS

The history of the judicial system in Nepal can be divided into three periods: 1) before the unification of Nepal (pre- 1768 A.D.), 2) post-unification and the Rana period (1768 to 1951), and 3) modern period (1951 to the present). In each period the tiers or levels of courts (court of first instance, appeal and apex courts) have undergone changes. These changes are described below and the Nepalese court structure over the past fifty years are presented in Table I. below.

Before the Unification of Nepal

They were the first historically documented ruling dynasty in Nepal. During their reign they administered according to the *Mundhum* (religious book of the *Kirats*)³. The Lichhavi dynasty in 464 A.D. and introduced judicial system based on Hindu scriptures. The Mallas (782-1768 A.D.) instituted separate central courts for civil and criminal cases known as *Kotilinga* and *Itachapali*, respectively. Justice was delivered according to customs and practices⁵. King Jayasthiti Malla, one of the rulers during

Table I: The Nepalese Court Structure **During** the Last Fifty Year

Duration	Tier of Courts	Court of First Instance	Appellate Court/s	Appex Court
1940-1945	Four	Amini/Adalat	a. Appeal Adda b. Bharadari Adalat	Pradhan Nayalaya
1945-1956	Three	Amini/Adalat	Appeal Adalat	Pradhan Nayalaya
1956-1959	Three	Amini/Adalat	Appeal Adalat	Supreme Court
1959-1961	Four	Ilaka Adalat	a. District Court, b. Uchha Adalat	Supreme Court
1961-1974	Three	District Court	Zonal Court	Supreme Court
1974-1990	Four	District Court	a. Zonal Court, b. Regional Court	Supreme Court
1990 to date.	Three	District Court	Court of Appeal	Supreme Court



was in the hill districts. Both Amini and Adalat are now known and function as district courts. There were two levels of Appellate Courts, known as *Appeal Adalat* and *Bharadari Adalat*. The Pradhan Nyayalaya was the apex court⁹. But in 1945 A.D., the *Bharadari Adalat* was repealed and only three tiers of courts were retained.

Modern Period

(i) *1951-1961 A. D.*: The Rana regime was overthrown in 1951 and a democratic government was installed. The Interim Government Act, 1951 A.D. for the first time recognised the judiciary as an independent institution¹⁰. The judiciary comprised of three tiers, i. e., the Amini or Adalat as court of first instance, the Appeal Adalat as the appellate court and the Pradhan Nyayalaya (Supreme Court) at the apex¹¹. The Pradhan Nyayalaya Act was enacted in 1952 A.D. under which the Pradhan Nyayalaya had jurisdiction to hear appeal and all five types of writ petitions, i. e., the writ of habeas corpus, mandamus, prohibition, quo-warranto and *certiorari*¹². In 1959 A. D. the Judicial Administration Act again changed the name and tier of the courts. Ilaka Adalat was established as the trial court, District Court as first appellate court, Uchha Adalat as the second appellate court and the Supreme Court as the apex court¹³. (During this period, the term 'Ilaka' covered areas, smaller or larger than the present district and the term 'district' covered an area which was larger than the present district, known as *zilla*).

(ii) *1961-1990 A. D.*: In 1961 A.D. the Judicial Administration Act repealed the provision of Uchha Adalat which left only three tiers of courts. Under this Act the District Court was the Court of first instance, the Zonal Court was an appellate court and the Supreme Court was the court of final appeal¹⁴. In 1974 the Judicial Administration Act, 1974 was enacted. One more tier, i. e., the Regional Court (second appellate court) was added in the court system. After this enactment there were two tiers for appeal according to the disputed matter or level of crime. Though some amendments were made in the jurisdiction of the appellate courts in 1986, the tier of the courts remained the same¹⁵.

(iii) *1990 to the Present*: After the popular movement of 1990 A.D., a new constitution, the Constitution of the Kingdom of Nepal, 1990 was promulgated. In the new constitution, provision was made only for three tiers of courts, namely, the District Court as the court of first instance, the Court of Appeal as the appellate court and the Supreme Court at the apex¹⁶. Thus at present there are 75 District Courts, one for each district, and 14 Courts of Appeal, one for each zone, and the Supreme Court.

Presently Nepal is divided into five development regions, 14 zones and 75 districts. Village Development Committee (VDC)/Municipality is the lowest local level administrative unit in each district. The number of VDCs and municipalities in the country amounts to 3995 and 36 respectively¹⁷.

There has not been any study as to why the tiers of courts have been changed so often. However, during each change, the government officials had given similar reason why the tiers had to be altered to save time and cost of the disputing parties. Further research is required to determine whether three or four tier system is more efficient and saves money and time.

JURISDICTION OF THE COURTS

Jurisdiction of Courts Prior to the Constitution of 1990

Prior to the Constitution of 1990, the District Court was the Court of First instance. It also had appellate jurisdiction in cases decided by the Village Judicial Committee (VJC), which was part of the Village Panchayat and was in existence from 1980 to 1989. The first appeal against the decision of the District Court was taken as a right of the disputing party. During the period of 1974-1986, cases were divided into two groups according to the value of disputed matter or the level of crime (possible year of imprisonment or penalty). Appeal on low valued (i. e., less than NRs. 5000) disputed matter or cases incurring punishment of less than 5 years of imprisonment were filed in the Zonal Court and cases other than these were filed in the Regional Court. In cases where there was error of law or error of the case law then there was also a provision of leave petition for appeal. The Judicial Administration Act was amended after 1986 and some changes were made in the jurisdiction of the Zonal and Regional Courts. After this amendment, the Zonal Court was taken as the first Appellate Court while the Regional Court was made the second appellate court. First appeal was taken as a matter of right of the party. There was a provision for second appeal but only when the decisions of two tiers of courts differed.

Under the fourth amendment of the Judicial Administration Act 1986, the appeal against the decision of either the district or the zonal level quasi-judicial bodies could be filed in the Zonal Court. Second appeal was also allowed to the regional court in case of difference in decision of the first appellate court to the initial decision.

The ordinary jurisdiction of the Supreme Court was almost the same in the previous constitution also. But the jurisdiction related to declare any law *ultravires* (law or act made/done going beyond constitutional provisions) was not directly stated in the previous constitution and there was no clear provision to revise its own judgement. There was a provision to issue order by the King to revise the judgement of the Supreme Court. The King was the last resort of judiciary.

The village judicial committee (VJC) was introduced in 1980. The original jurisdiction for the settlement of other disputes in addition to canal water was provided to the VIC by a notice published in the Nepal Gazette (in September 1980) as stipulated in the Village Panchayat Act. The village judicial committee would be formed by the concerned village Panchayat. There would be three members in the committee. The chairman of the committee would be chief or vice-chief of the Village Panchayat. There was also a provision for District Judicial Council (DJC) and the appeal against the decision of VJC could be filed in DJC. The provision of appeal in the DJC against the decision of the VJC changed in 1986 and appeal against the decision of the VJC could be filed in the District Court since 1986. These provisions of the VJC remained in effect up to 1989. The VJC was required to follow the same procedure as a court of law. As discussed in B. Khanal (this volume) 15 cases have been filed in the Supreme Court against the decisions of VJC and DJC.

In 1992 the new Village Development Committee (VDC) Act was adopted. The Act provides the VDC the power only to mediate all disputes, except criminal cases, arising within the village.

Jurisdiction Since 1991

District courts

The District Courts have exclusive jurisdiction as the court of first instance over all types of cases except as otherwise provided by the law¹⁸. For example, some cases have to be first registered with Land Revenue Office and the disputants can take the case to Appellate Court only to appeal.

Courts of Appeal

Courts of Appeal are at the second level of the court hierarchy. They have jurisdiction to hear appeals against the decisions of the District Courts and to ratify references made to them by such courts or against the order of the judicial or quasi judicial bodies within their jurisdiction¹⁹.

The Courts of Appeal have also been granted extraordinary jurisdiction to issue orders in the form of writ of habeas corpus, mandamus and injunction²⁰. In addition to this jurisdiction the Courts of Appeal have original jurisdiction over the cases prescribed by the law and over the cases ordered by the Supreme Court²¹.

Supreme Court

The Supreme Court has Ordinary as well as Extraordinary jurisdiction

Ordinary Jurisdiction

- (i) The Supreme Court has appellate jurisdiction in cases which are decided by the Courts of Appeal within their original jurisdiction, cases decided by the District Courts with more than ten year's imprisonment and cases where there are basic differences in decision of Appellate Courts to the decision of the District Courts or other quasi judicial bodies²². In addition to this, the Supreme Court may ratify references made by the lower courts²³.
- (ii) The Supreme Court may review its own judgments or final orders²⁴. The Supreme Court may provide opinion on any complicated legal question to His Majesty²⁵.

Extraordinary Jurisdiction

- (i) Any Nepali citizen may file a petition in the Supreme Court to have any law or any part thereof declared void on the ground of inconsistency with the constitution because it imposes an unreasonable restriction on the enjoyment of the fundamental rights conferred by the constitution or on other grounds and extraordinary power shall rest with the Supreme Court to declare that law as void either *ab initio* or from the date of its decision if it appears that the law in question is inconsistent with the constitution²⁶.

- (ii) The Supreme Court shall, for the enforcement of the fundamental rights conferred by the constitution, for the enforcement of any other legal right for which no other remedy has been provided or for which the remedy even though provided appears to be inadequate or ineffective, or for the settlement of any constitutional or legal question involved in any dispute of public interest or concern, have the extraordinary power to issue necessary and appropriate orders to enforce such rights or settle the dispute. The Supreme Court may issue appropriate orders and writs including the writs of habeas corpus, mandamus, certiorary, prohibition and quo warranto.²⁷

Public Interest Litigation

If there is a public interest or concern by its subject or nature, any person may file a case with the permission of the concerned court. The application seeking permission should also be filed along with the petition.²⁸ Thus before 1990 the provision of public interest litigation was only in national code (Muluki Ain) and it was conditional i.e. it was necessary to get permission from concerned court before filing the petition (Muluki Ain Nineth Amendment). After the Constitution of 1990 such provision was stipulated in the constitution without any condition.

BASIC PROCEDURES

Basic court procedures are different in criminal and civil cases. The major differences are in the matter of filing a case, process of summons, execution of judgements, etc. Details of the procedures are discussed under the following headings:.

Civil Cases

In civil cases when a person comes to the court to file the claim, defence statement or appeal, he should go to the Registrar/Shrestedar of the court. After due examination of the document the Registrar/Shrestedar decides to register the document if all basic procedures are fulfilled or he may reject to register the document stating the reason on the back of the document²⁹.

After the filing of a case by a plaintiff, the first action to be taken by the court is the delivery of the summons (*Italayanama*) to the defendant ordering him/her to present his/her defence within the time prescribed by law (35 days in general). A copy of the petition /claim should also be sent along with the summons³⁰.

After the submission of defence statement the court provides the same date for appearance in the court to both the parties. When both the parties appear in the court on the same day, the court will fix a hearing date. In the first hearing, the court may order to submit necessary documents and necessary witnesses stated in their claim and defence statement, and on the spot mapping in the presence of both parties and other villagers (if necessary)³¹.

Only after the execution of these orders the next hearing date will be fixed. In the hearing, a party may represent himself or he may present his lawyer to represent his case. The court should give a reasoned judgement. All the facts, claim, counter claim, pleadings of lawyers, reason of acceptance or rejection of the claim, defence statement as well as lawyers' pleadings should also be clearly stated in the decision of the court³². After hearing both the parties, the court gives its decision. One level appeal is a matter of right to the party.

After the final decision, again the decided case returns to the concerned District Court (court of first instance) for its execution and record. The concerned party should apply in the related District Court for the execution of the judgement within the time prescribed by law (in general within two years of the final decision).

Criminal Cases

Criminal cases (where one of the parties is the state) start after the registration of First Information Report (FIR) in a police office and that can be filed by any person. The police investigate the case and forward it to the District Public Prosecutor's Office with their opinion about the claim. The Public Prosecutor decides and prepares the claim and forwards the same to the District Court. The court records the statement of the accused. After analyzing the claim, defence, statement and other documents submitted by the claimant, the court makes first order whether the accused person should be kept into judicial custody or released in bail depending upon the possible punishment on the claim and whether the accused person is seen to be culprit on the grounds of proof available at that time³³.

The court also issues order to present the witness(es) and other necessary documents to both parties. After examining the witnesses and documents the court fixes the hearing date again. During the hearing, the Public Prosecutor represents from the claimant's side and the accused person may appoint his lawyer for his defence³⁴. If the accused person is poor and unable to appoint a lawyer, then a lawyer will be appointed by the court to defend him. If the person who filed the FIR wants to be represented by a lawyer he may also appoint his lawyer/s.

Time Limit for the Delivery of Judgement

There is also a legal provision of time limit to decide the cases. In case of the District Court, the judgment should be delivered within six months after the submission of defence statement or completion of time limit to submit defence statement³⁵. But in case of appeal it should be decided within three months after the receipt of the case file decided by the lower court³⁶. But very few cases are decided by the courts within the prescribed time limit. One of the studies conducted by FREEDEAL³⁷ shows that in the District Court it took one to two years to decide a case in the selected districts in 1993³⁸. But in case of the Courts of Appeal it varied from 7 months to 31 months during the same year in the selected courts³⁹. The Supreme Court took more time to dispose a case than the lower courts. In 1993, on an average it took 16 months to decide writ petition cases and 31 months for other types of cases⁴⁰. This may be either due to heavy work load of the Supreme Court or due to more time taken by the lawyers or may be due to more time required to study the case.

Types of Cases	Supreme Court				Courts of Appeal				District Courts			
	1991192		1992193		1991192		1992193		1991192		1992193	
Land	70	(1. 69)	369	(6.17)	5530	(28. 69)	6662	(27. 46)	19603	(21. 72)	21896	(19. 41)
Transactions	20	(0. 48)	63	(1. 05)	1637	(8. 49)	1965	(8. 10)	10920	(12. 09)	9888	(8. 77)
Family Dispute	525	(12. 69)	1052	(17. 59)	1638	(8. 51)	2547	(10. 50)	14498	(16. 07)	16088	(14. 26)
Forgery and Cheating	25	(0. 61)	33	(0. 56)	1046	(5. 43)	1361	(5. 62)	6842	(7. 58)	12343	(10. 94)
Looting	23	(0. 55)	37	(0. 62)	961	(4. 98)	957	(3. 95)	6478	(7. 17)	6013	(5. 33)
Defamation	1	(0. 02)	-	-	188	(0. 98)	222	(0. 92)	4651	(5. 15)	11139	(9. 87)
Election	2	(0. 05)	-	-	-	-	3	(0. 01)	249	(0. 28)	348	(0. 3)
Assault	4	(0. 09)	22	(0. 36)	427	(2. 22)	456	(1. 88)	5869	(6. 49)	5607	(4. 97)
Murder	298	(7. 21)	444	(7. 42)	700	(3. 64)	846	(3. 49)	2878	(3. 18)	2615	(2. 32)
Theft	22	(0. 53)	30	(0. 51)	972	(5. 04)	731	(3. 02)	2622	(2. 91)	2417	(2. 14)
Sexual Offence	-	-	6	(0. 11)	138	(0. 72)	104	(0. 43)	366	(0. 41)	347	(0. 31)
Corruption	80	(1. 94)	42	(0. 71)	263	(1. 37)	242	(0. 99)	81	(0. 08)	143	(0. 13)
Juvenile Delinquency	-	-	-	-	2	(0. 01)	-	-	27	(0. 02)	51	(0. 05)
Abortion	3	(0. 07)	4	(0. 06)	25	(0. 13)	30	(0. 12)	102	(0. 11)	53	(0. 05)
Miscellaneous	349	(8. 44)	284	(4. 74)	5008	(25. 99)	6307	(26)	15115	(16. 74)	23858	(21. 15)
Sub-Total	1422	(34. 37)	2386	(39. 90)	18535	(96. 20)	22433	(92. 49)	90301	(100)	112806	(100)
Habeas Corpus ⁴¹	158	(3. 81)	109	(1. 83)	27	(0. 14)	91	(0. 37)				
Mandamus ⁴²	85	(2. 05)	72	(1. 21)	50	(0. 25)	270	(1. 11)				
Prohibition ⁴³	27	(0. 65)	15	(0. 25)	-	-	-	-				
Quo-warranto ⁴⁴	3	(0. 07)	1	(0. 01)	-	-	-	-				
Injunction ⁴⁵					657	(3. 40)	1463	(6. 03)				
Certiorari ⁴⁶	2442	(59. 02)	3397	(56. 80)	-		-	-				
Sub-total	2715	(65. 63)	3594	(60. 1)	734	(3. 8)	1824	(7. 51)				
Total	4137	(100)	5980	(100)	19269	(100)	24257	(100)				

Source: Annual Reports of the Supreme Court 19916'2 and 19926'3

WORKLOAD OF COURTS BY TYPE OF CASES

This heading discusses mainly type of cases under different levels of courts and their percentage to the total cases during 1991/92 and 1992/93.

Table 2 shows that in the District and the Appellate Courts, the highest percentage of cases was about land disputes followed by family disputes: while in the Supreme Court the number of writ petitions was very high in comparison to the appeal cases. Writ petitions were almost two thirds of the total cases registered in the Supreme Court. Among the cases registered in the Supreme Court more than 50 percent were writs of Certiorary (59.02% in 1991/92 and 56.8% in 1992/93). The percentage of cases filed in the Courts of Appeal against the decisions of the District Courts was 21.33% and 21.5% in 1991/92 and 1992/93 respectively whereas in the Supreme Court it was almost five percent in both the years. If we exclude the Writ petitions from the Courts of Appeal and Supreme Court the percentage comes down to 21.8% (1991/92) and 18.86% (1992/93) in case of the Courts of Appeal and nearly two percent in case of the Supreme Court. The percentage of the cases registered in the Supreme Court against the decisions of the Courts of Appeal was 21.46% and 24.65% in 1991/92 and 1992/93 respectively. If we compare only the cases filed under the headings of appeal and ratification then the percentage of cases registered in the Supreme Court to that of the Courts of Appeal comes to 7.67 and 10.63 percent for the year 1991/92 and 1992/93 respectively. The classification of cases as published by the court does not reflect the cases relating to water management and water rights which may be a cumbersome task to study such cases. The workload of the Supreme Court seems to be very high. Cases per judge is about 295 in 1991/92 and 427 in 1992/93. It is even worse since a minimum of two judges are required to decide cases and sometimes three, five or more depending upon the gravity of the cases. This may be one of the reasons why more time is taken to dispose of cases in the Supreme Court than in lower level courts.

CONCLUSION

During the last 50 years there have been many changes in the court structure of the country. Why has there been such frequent changes? No systematic study has been done in this regard. However, whenever the tiers of courts were changed the authorities had given the explanation that the tiers were changed so as to save time and money of the disputing parties. Whether the three tier system or four tier system is more efficient to save time and money is a matter of further research in this area. When the three tier of courts was changed to four tier, it was assumed that the burden of the Supreme Court would be reduced. But this did not happen because every litigant wants to go up to the Supreme Court to satisfy himself.

In the process of changes and development, the present Constitution, the Constitution of the Kingdom of Nepal 1990, has brought some changes to the existing court structure. Some of them are as follows:

- a. The four tier system of courts has been changed into a three tier system which has helped save time and money of the disputing parties.
- b. The jurisdiction of the Supreme Court has been expanded to include the review of its own judgements under conditions stipulated under the existing laws. It was the prerogative of the King to issue an order to the Supreme Court in this regard under the constitution of 1962.
- c. Similarly, there are also provisions of public interest litigation in the National Code (Muluki Ain 9th. amendment 1986) as well as in the Constitution of 1990; before that such provisions were not made in the Nepalese laws.

The comparison of the workload of the courts for the last two years shows that less than 22 percent of the total decided cases were filed in the appellate courts. Though, according to the existing law, one level appeal is a matter of right for disputing parties. It indicates that nearly 80 percent of the disputing parties are either satisfied with the decision of the concerned courts or unable to file appeal due to financial or other social constraints. This may be an issue for further study.

NOTES

- 1 This paper is a revised version of the one presented at the IIMI, FREEDEAL-WAU-EUR-Workshop on Water Rights Conflict and Policy, Kathmandu, Jan. 22-24, 1996.
- 2 Associated with FREEDEAL
- 3 Royal Commission's Report, 1985: 3
- 4 Khanal. 1995: 48.
- 5 Royal Commission's Report, 1985: 3
- 6 B. Khanal, Op cit p. 49.
- 7 Ibid p. 49.
- 8 Ibid p. 50.
- 9 Shrestha, 1985: 128.
- 10 *The Interim Government Act* 1951, Chapt. 3, Sec. 32.
- 11 Shrestha. 1985: 168.
- 12 *Pradhan Nyayalaya Act*, 1952.
- 13 *Judicial Administration Act* 1959 (Sec. 4, 5, 6).
- 14 *Judicial Administration (Miscellaneous Arrangement) Act* 1961.
- 15 *Judicial Administration Act* 1974, Sec. 3 and 4.
- 16 Constitution 1990, Art. 85(1)
- 17 Central Bureau of Statistics, 1994: 2.
- 18 *Judicial Administration Act* 1991 Sec. 7.
- 19 *Judicial Administration Act* 1991 Sec. 8 (1).
- 20 Ibid Sec. 8(2).
- 21 Ibid Sec. 8(3).
- 22 Judicial Administration Act, 1991, Sec. 9 (1)
- 23 Ibid Sec. 9(2).
- 24 Constitution 1990, Art. 88 (4)
- 25 Ibid Art. 88 (5)
- 26 *Constitution* 1990, Art. 88(1).

- 27 Ibid **Art. 88(2)**.
 28 **Sec. 10 of Court Procedure, National Code (Muluki Ain), 9th Amendment 1986**
 29 *District Court Rules* 1995, Sec. 7(Ka).
 30 Ibid Sec. 22.
 31 *District Court Rules 2052*, Sec. 24 and Sec. 184(Ka) of Court Procedure of the National Code.
 32 *District Court Rules* 1995, Sec. 47 and Sec. 185 of Court Procedure of the National Code.
 33 Sec. 118 of Court Procedure of National Code.
 34 Ibid Sec. 185.
 35 Sec. 14 of Court Procedure. National Code.
 36 Ibid Sec. 198.
 37 FREEDEAL, 1995.
 38 Ibid P. 35.
 39 Ibid p. 40.
 40 Ibid p. 53.
 41 'Habeas Corpus' = the writ, meaning "you have the body to testify". This writ is used to bring a
 42 prisoner detained in a jail or prison to give evidence before the court [*Black's Law Dictionary*]
 'Mandamus' = 'we command'. This is the name of a writ (formerly a high prerogative writ) which
 issues from a court of superior jurisdiction, and is directed to a private or municipal corporation,
 any of its officers, or to an executive, administrative or judicial officer, or to an inferior court,
 commanding the performance of a particular act therein specified, and belonging to his or their
 public, official, or ministerial duty. or directing the restoration of the complainant to rights or
 privileges of which he has been illegally deprived.
 43 "Prohibition" is that process by which a superior court prevents an inferior court or tribunal
 possessing judicial or quasi-judicial powers from exceeding its jurisdiction in matters over which
 it has cognizance or usurping matters not within its jurisdiction to hear or determine.
 44 "Quo-Warranto" = A common law writ designed to test whether a person exercising power is legally
 entitled to do so.
 45 "Injunction" = A court order prohibiting someone from doing some specified act or commanding
 someone to undo some wrong or injury
 46 "Certiorari" = Certiorari is a prerogative writ of superior court to call for the records of an inferior
 court or a body acting in judicial or quasi-judicial capacity. [Saha, 1994:131]

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