Human Rights of Civil Parties

By BIPIN ADHIKARI

Nepal's civil justice system is the oldest in the region. The system and procedures laid down by National Civil Code of Nepal and a number of other statutes including summary procedures, which deal with civil justice system have already become obsolete by modern standard. That means that improvements are needed to respond to the needs of just and efficient court services, effective mechanisms to provide cost-effective access to the court, and development of logical and comprehensible structures for the future. As such, a proper assessment of civil justice system in the context of human rights of the civil parties has already become due in Nepal.

Civil Justice Reforms: An effective and credible system of criminal law and procedures has always been emphasized around the world as a key component in the quest for global justice and human rights for all. But the human rights people talk little about civil justice reforms. In fact, the amount of injustice done by the legal system to the civil parties in fact exceeds the amount done by criminal justice system by many folds. Additionally, the demand for civil justice in its widest sense is growing and is likely to continue to grow in Nepal as elsewhere. With it, the problems of access to civil justice system will continue to increase if appropriate reforms are not in place.

A look into the Nepalese civil court practices can tell about enormous problems of civil justice in the country. There is an excessive delay in the progress of many cases. This delay is caused by procedural complexity and lawyers' tardiness. There is an excessive cost in bringing or defending a legal action, both in absolute terms and in proportion to the value or importance of what is at stake. The high cost of litigation is driven by the use, sometimes for tactical reasons, of over-elaborate and disproportionately complex procedures and by the level of lawyers' fees and the way they charge for their services.

The issue of undue complexity of law and court procedure is reported everywhere. The British Middleton Report (1997) is a revelation. It says that the undue complexity of law and court procedure is a major factor causing both cost and delay. Complex legal and procedural requirements can make the employment of lawyers unavoidable when they would not otherwise be needed.

There is also uncertainty about how much time and money will be required. This can act as a serious disincentive against starting or pursuing a case that would otherwise be worthwhile. A financially strong party can exploit delay, cost and uncertainty to deter a weaker opponent from pursuing a meritorious case. Court fees are not set at a level that reflects the cost of court services, with cross-subsidy between different fees kept to the minimum practically achievable.

In our specific national context, the civil justice system, as a whole, is not managed coherently, nor do its individual parts seem to be managed with efficiency in mind. Our clients are more poor, the infrastructure more distressed, lawyers more problematic and professional ethics more beggared. The adversarial court system has to be practiced in such a messy situation. Even in Britain, where adversarial judicial techniques developed and prospered, and issues are resolved by argument, the Middleton report describes the system as expensive.

It maintains that cases take a long time to argue out. Large numbers of professionals are involved. Issues are debated at length, subject to rules that vary among different courts. The procedure itself can be subject to extensive argument in interlocutory proceedings. Moreover, the system is difficult to manage.

The timetable is largely in the hands of opposing professionals - the lawyers. There is high order unpredictability about when a case will be ready for a hearing; and how long that hearing will then take. So the only form of management actually practiced is to ensure that the time of judges is fully used.

Lord Woolf of Britain made a large number of recommendations to tackle these and similar problems involved with civil justice system. The essence of his solution is a greater degree of control by the court over the conduct and progress of cases, to ensure that they are dealt with in a way that is proportionate to the value and importance of the issues involved.

The means of securing this is by a transfer of power from lawyers to judges. What is proposed is a limited judicial management function, underpinned by a unified set of court rules. Judges would allocate cases to different tiers or tracks, and actively manage the more complex ones.

Defended cases would be assigned to one of three tracks, principally based on the value of the case. There would be scope to transfer a case into a lower track if a party could not otherwise afford to proceed, or into a higher track where this was justified by an unusual degree of complexity.

The proposed tracks are: a small claims track for cases worth up to £3,000 (as at present), involving little procedural formality, with judicial intervention at hearings to assist litigants-in-person. The cost of legal representation would not be recoverable between the parties; a new fast track for cases up to £10,000, involving a standard timetable, some limitations on procedure and evidence, and scales of fixed inter parties costs; and a 'multi' track involving hands-on judicial case management tailored to the needs of individual cases.

Taken together, the proposals should address the problems identified in the following ways. Strict time-tabling, whether by a standard time-table or one tailored for a particular case, would reduce delay and uncertainty in progressing cases. Limited procedures would reduce cost and delay generally, and in particular make it harder for the stronger party to deter the weaker by using procedural devices to drive up costs.

In larger cases, hands-on judicial case management (case management conferences, pre-trial hearings etc.) should also reduce delay and the scope for unfairness. The development of best-practice protocols about steps to be taken before litigating, and an opportunity built into the court process to consider alternative dispute resolution, should both help encourage more and earlier settlements.

A system of tiering or tracks to categorize the wide variety of disputes coming before the courts are, in Lord Woolf's view, essential if cost and complexity are to be contained in a workable way. It should be exceptional for a case to be assigned to a higher track on the grounds of unavoidable complexity. The over-riding objective should be to ensure that disputes can be, and are, resolved in a way that is proportionate to the value of the issues involved.

Unified rules are a basic requirement if the court system is to be understood by ordinary people. Lord Woolf expected this change, together with the greater use of technology, to lead to further changes in the structure of the civil court system. But as the changes proposed for the system - including those for legal aid - are very wide-ranging, he did not advocate more than the rule changes at this point.

Solutions: Even in Britain where we keep visiting to for systemic norms and standards, the old common law rules are being changed in favor of more efficient and bold rules. In such a situation, there is no reason why we cannot also be objective in the reform process. The recommendation of Lord Woolf's final report on Access to Justice together with the new code of rules, form a comprehensive and coherent package for the reform of civil justice. We can also have the British expertise to help us do what is necessary through the DFID. The time is right for change. ■

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