

Chapter 12

A Case of Digital Rights Discourse and Advocacy within Nepali Judiciary

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The usage of legal tech is a comparatively new phenomenon, with gradual development within the field of the judiciary in Nepal. As digital technology is pervasive in every sector possible these days, the judiciary system in Nepal is also stepping ahead with different digital components in its daily administration. Starting from the replacement of handwritten documents and typewriters with computers in 1998,¹ now it has evolved into different kinds of software applications for virtual hearing practice. Today legal tech consists of several software applications and systems too, such as digital attendance, email correspondence, publication of daily cause list,² online case status, websites of courts and bar, case management system (CMS), e-library, video conferences and many more facilities. Adding to the list, the ten-year IT master plan for the court, training³ on digital evidence and the effective implementation of legal tech for human resources can be highlighted too. During the COVID pandemic, the Supreme Court of Nepal also began online hearings⁴ for a brief period, which can be considered one of the milestones in the history of the Nepali judiciary in the light of digital tech and its usage in the legal system. However, the return to in-person procedures, and the documentation of such procedures being scarcely covered by the media, has therefore meant that the public is mostly unaware of such development.

It is a well-known fact that the judiciary system entails different entities such as courts, lawyers, Bar Associations, Judges, and laws. Similarly, law firms, citizens/clients, and legal provisions of the country also play a role as stakeholders in this system. However, the existing Cis-het Brahmanical Patriarchy has a significant impact on who gets to sit at the table of delivering justice and who is on the receiving end, how accessible and fair the process is for them, especially for women and the marginalised group.

Within this scenario, legal tech has already arrived and been accepted as a supportive tool to facilitate the justice delivery procedure. It is also predictable that judiciaries will continue implementing and adding various digital tech applications in future. This is because the government and private sector have been working together for the establishment of an e-governance system in Nepal, including a digital economy, e-commerce, online education and

so on with the development of digital infrastructures.⁵ The private sector and individuals have played an influential role in the development of such digital infrastructures in Nepal. This kind of private sector influence persists and will continue within the judiciary and legal tech's application. Therefore, civil society, including law scholars and activists, also has an important role to play in regard to knowledge production and advocacy from a digital rights perspective, keeping women and marginalised groups at the centre of the legal tech application and justice discourse. Here, 'digital rights' mean human rights applicable within the digital landscape: freedom of expression, privacy, right to information, right to association. Nonetheless, digital rights should be inclusive and guided by the feminist principle of the internet.⁶

Civil society organisations in Nepal and activists have yet to figure out the digital rights discourse within the legal system, and advocacy intervention is needed on the matter. The digital rights discourse is somehow being initiated in general from relevant civil society organisations but is lacking in relation to the judiciary, even among human rights activists, lawyers and CSOs. Therefore, to identify this gap and initiate discussion on how digital rights advocacy should look, and what impacts the application of legal tech leaves within the whole judiciary system – especially to the marginalised communities in the Nepali context – this study was conducted with the following objectives:

- To map out what and how the court is implementing legal tech at different levels for justice delivery.
- To navigate issues of access to justice, privacy and security within the application of this legal tech while providing justice, especially for women and marginalised groups in Nepal.
- To find out digital rights concerns in civil society and that activists need to be aware of while working towards human rights and justice for women and marginalised groups.

For the purpose of this study, media monitoring and literature review through desk study were done at first to map the scenario and kinds of legal tech being used in the justice system. Additionally, a qualitative research approach was applied in which purposive and snowball sampling was done for primary data collection. In total, five key person informants (lawyers, law scholars, activists and government officers at the Supreme Court) were approached for the in-person and semi-structured interviews to find out how these legal techs are being used as well as to evaluate their effectiveness and impact.

However, during the study, the researcher was not able to reach out to multiple stakeholders to assess the phenomenon from an intersectional perspective. Since Nepal is gradually moving forward to the implementation of legal tech in the judiciary system, and various gaps still exist in the digital

rights discourse, the researcher could not find any digital rights activists or civil society stakeholder working on the same issue.

A. MAPPING PROVISIONS AND SYSTEMS RELATED TO LEGAL TECH IN COURTS AND JUDICIARY

The use of digital technology in courts and for judicial systems is envisioned through different laws, policies and plans. In this section, a few landmark initiatives and policies related to them will be presented as it is important to understand the recent advent of legal tech and its usage in Nepal.

Supreme Court Guideline 2016, in section 124 and 125 outlines the usage of IT in court and judiciary activities. It allows the Court to develop its own website, useful software and all digital infrastructures for judicial proceedings.⁷ The District Court Guideline 2017 followed the same envisioning of digital infrastructures and necessary outputs for the district-level courts. Similarly, the fourth five years Strategic Plan (2020-2025) envisions the establishment of e-judiciary by using ICT for court management for effective and citizen-centric service. It aimed to enhance public access to justice through e-court by establishing and implementing automated court management and judge support systems. It further proposes to establish court-owned data centres, data recovery centres, a single window or integrated e-court systems, usage of digital signatures, encryption of data and so on (ibid.).

The ICT initiative was earlier envisioned through the Judicial five-year strategic plan in 2004–2009. The current Judicial five-year strategic plan 2020–2025 aims to have an institutional improvement in hearing and decision-making from the court and to increase the public's access to justice by using ICT, effective legal support mechanisms,⁸ and establishing necessary infrastructures.

Beyond the Supreme Court's plan and initiatives, there also were projects like Enhancing Access to Justice through Institutional Reform⁹ by the United Nations Development Programme (UNDP) that supported the Ministry of Law and stakeholders for legal reforms and access to justice in general. Their outcomes included digitisation of a total of 9,045 cases during the project phase. Similarly, another project also supported private firms to develop software for courts, as mentioned by one of the staff of the Supreme Court.

Some laws that included or allowed the use of digital technology in court procedures were also found while mapping out the legal framework in the context of legal tech usage in the court. The entire provisions of the Electronic Transaction Act 2008 are aimed to authenticate and regulate electronic transactions carried out by any means of ICT.¹⁰ The Evidence Act 1973 has accepted audio-visuals and digital output including digital signatures as evidence during trials.¹¹ Similarly, section 109 of the Criminal Code 2017¹² and section 182 of the Civil Code 2017¹³ also elaborate on the use of audio-video materials in legal proceedings including the virtual witness-keeping practice.

B. CURRENT STATUS OF LEGAL TECH, ITS USAGE AND PURPOSE IN THE COURT

Within the judiciary system all over the world, people complain that the courts and justice system are hard to access, the process is very lengthy as well as the judiciary being corrupted.¹⁴ This scenario is similar in the present case too. The impeachment case of a former chief justice¹⁵ has also shed light regarding how tangled yet serious the case of corruption within the judiciary is. The influence, interference and interconnection between the court and political authorities as an open secret has put the judiciary in crisis, says scholar Bikram Timilsina.¹⁶ The aftermath of this incident brought about a lottery system for judges in case delegation until the automated system is implemented to establish the transparency and accountability of the court.¹⁷ However, the intended outcome of transparency, accountability and fast justice delivery is not yet guaranteed or proven.

Given this context of judiciary reformation discourse, the present writer reached out to a couple of people working in the legal sector to further investigate what legal tech is and how it is being used in court in order to deliver quick and efficient justice. In this chapter, the findings and observations will be presented around this issue.

In an interview with IT personnel of the Supreme Court, it was found that the Supreme Court has its own data storage system in its periphery whereas all the other governmental data is stored in Singhadurbar, the central administrative area for the executive works of the state. All kinds of software as per judicial needs are developed, managed and implemented by the twenty-four members of the internal team within the Supreme Court and 124 people in total all over Nepal. The work is not outsourced to other private companies. The IT person claimed the privacy and security of the data is a serious concern and it is being taken care of by the Supreme Court. Proof of the data security maintained by the Supreme Court is that its website and tech infrastructure were safe and sound even during the recent incident of government servers and websites going down.¹⁸ However, in another conversation with a trans rights activist Rukshana Kapali, she mentioned facing technical glitches in the Supreme Court's website and its server being down at crucial times¹⁹ during her case's proceeding related to her identity and right to education.²⁰

Similarly, the Case Management Software recently developed by the Supreme Court is installed to integrate and manage all kinds of cases from District-High Courts to the Supreme Court. In this software, a unique registration number and case number is provided to each case, and the Supreme Court can access all sorts of information needed for a case's update using that number, said the IT personnel. It is supposed to make the case management task easier, faster, effective, and cater to the public/clients given how cases assigned to particular judges can go undecided if the judges retire or the cases are re-appealed, and so on. There is another software in the making

to digitise entire cases from the beginning, which is approximately 36 lakhs (3.6 million) in number from all over Nepal (*ibid.*). One of the initiatives is to make the courts paperless. The Supreme Court also provides a daily cause list²¹ to update a case's status whether registered, hearing ongoing or decided, to the related parties. It is done through a website and SMS system. This initiative is believed to reduce fraud by lawyers too where they are found demanding higher charges from their clients in the name of 'handling' cases catering to client's time availability and needs, say IT personnel.²²

The Supreme Court is developing decision implementation software in which decisions of cases, including the punishment or financial charges for the guilty, could be updated. This software's access will later be provided to entities such as the passport department, police and other related government agencies so that they are aware of the court's decision and can take immediate or further action against the alleged culprit (*ibid.*). For example, if anyone is guilty of any crime and applied for a police record, the Department of Police can check this software and identify the person and their history to eventually decide whether or not to provide the clearance certificate to them. This sort of legal tech has indeed a positive and moral intention but, when it comes to application, or say the software is not updated regularly or the digital footprint is there, it could hamper citizens' right to a dignified life or even the right to be forgotten in digital spaces.

For future initiatives, the Supreme Court is going to establish systems such as courtroom technology or an online case registration system. First, the online registration is aimed at writ petition in which law firms will be given access to the procedures. They are hoping to expand the service to other types of cases too. Further, they are planning to link the registration process to financial apps such as e-Sewa or Khalti for clients to pay for the court's respective services online. It is aimed at the public's hassle-free experience while registering cases and in terms of increasing access to the initial process. Another kind of software to interlink and integrate the service of government lawyers, police and the Supreme Court is in the planning phase. This will bring all the criminal and civil cases into one integrated system where each entity could know the status of the case and act as per their jurisdictional rights (*ibid.*).

C. RIGHT TO ACCESS TO JUSTICE

Every person has the right to access to justice, which is also accepted as a human rights issue.²³ However, rights to access legal justice for women and people from marginalised communities are found to be very limited in Nepal, which is a serious concern. Overall, the justice delivery system is not as rapid as it is supposed to be. According to the recent news report by Kantipur Television, a total of 29,107 cases are on the to-be-decided list and waiting,²⁴ of which 16,922 cases have been ongoing for more than two years and 4,563

for more than five years. If the 'justice delayed is justice denied' phrase is to be considered, all of these cases' parties are directly and indirectly denied their rights to justice.

Besides the court's inability to solve and decide the accumulated cases over time, there is Nepal's socio-economic foundation, which comes into play when people, especially women, poor and from marginalised backgrounds, have to go through legal proceedings and are unable to get justice easily or denied at different levels by the state's authorities. A case report also shows how it is very difficult to get justice in sexual violence cases and how the survivors have to go through different levels of harassment and hardships in pursuit of justice.²⁵

Research by Body & Data regarding online violence and relevant laws also found that there are sociocultural barriers for women and queer individuals trying to access the justice system.²⁶ The barriers usually come in the form of manipulation, silencing or threats to victims in the name of case reconciliation before court procedures. The onus of proof on the victim, victim blaming and backfiring on the victim through slander are other barriers after the case is filed. A survivor who filed a rape case against a national cricket player recently shared in interview²⁷ that the player, who is very powerful and influential, has seven lawyers on his side and they debate for thirty-five minutes even if they speak for five minutes each, whereas she has only two lawyers, who can speak for ten minutes only (five minutes each). She is also unable to pay for her lawyers due to her low economic status. This interview also proves how lack of power, influence and access makes the justice process very difficult, unequal and unpleasant for women, poor and marginalised survivors.

The statute of limitation is also another factor that blocks survivors from the road to justice if they are not able to file the case within the legal timeline. There is probability that a survivor dealing with trauma due to the violence that occurred against them could not have taken immediate action to access justice.

Additionally, the existing digital divide from accessing justice²⁸ is also difficult to cross for women, poor and marginalised people, who do not have access to information about legal parameters or structures. There are incidents and discourse around women and girl children being deprived of the use of information and technology in Nepal in the name of morality and decency.²⁹ Although such deprivation is claimed to be for their own protection, it is actually the cis-het Brahmanical patriarchy that is in the background wanting to control sexuality and freedom of women, to protect the existence of the status quo and the establishment. Similarly, people with disabilities often find it challenging to access digital information and infrastructures due to inaccessible designs and structures.³⁰

In this sense, it is clearly seen that women and marginalised groups have less access to information and technology. And even if the information

related to a case from its hearing date to the decision is publicly available through the court's website and SMS (as claimed by the authorities) or the tech infrastructure is very informative, easy and protects their right to access and information from the user's perspective, such infrastructures cannot work efficiently unless the digital divide and lack of access to the internet and devices is addressed in Nepal.

During an interview with activist Rukshana Kapali, she mentioned that things are digital as well as manual in court these days. In her experience, one has to submit both printed and soft copies of the documents to the court and, although everything is claimed to be digital, the signature process after the case's decision is done manually. Also, the court does not provide digital copies of the decision. One has to request a copy of such a decision, after which they will get a photocopied version of the printed version, that too only after paying tax. She added that, although such copies are comprehensible for her compared to handwritten documents, which had chances of being misinterpreted as different people have different handwritings; for people with disabilities, the whole process is very inaccessible. If they give a printed document, it is not in braille, or, if it is digital, it is not an accessible version at all, she added.

As mentioned earlier, the Supreme Court started an online hearing procedure to continue the work of justice delivery for the public despite the crisis during the COVID-19 pandemic). However, it could not run as successfully as imagined due to the trust issues of clients towards their lawyers. They did not take virtual hearing as seriously and real as physical hearing because it is still a new thing for non-tech people. When it comes to online expression, presence or even online violence, it seems elusive compared to real-life experiences for many. Although the pleasure or harm received through online activities is real, it still is not accepted as real-life experience by many.

On the other side, lawyers or accused parties tend to escape the online hearing in the name of 'slow internet' or 'technical problem' to delay the procedure, according to an internal source. Therefore, online hearings could work efficiently only if both parties are equally responsible and eager to settle with the proceeding no matter what the decisions and consequences are. However, remote areas or district courts such as Dipayal and Kanchanpur have been practising virtual hearings as their geographical status is far away from the Supreme Court located in the capital, and virtual hearings are helpful for them to connect with the case's processing and all, says the Supreme Court officer.

Staff also stressed that the development and installation of software alone is not enough when it comes to legal tech applications in justice delivery. The issue of its implementation by lawyers, judges, staff or related parties is equally important for the smooth functioning and targeted outcome. They explained that the entire responsibility of implementing the system falls

upon them after developing such software, which is a very adverse situation and should in fact come under the auspices of the management department. Even if they train others on the interface and its application after the software is released, the willingness to learn and follow instructions for the functional aspect of the software is low from the implementation team. This is due to the lack of digital literacy and enthusiasm to adopt new technologies in their work, along with the lack of work integrity and desire to provide quality work and enough reward/encouragement from the government, which is a pervasive problem in Nepal. 'Who do you think is willing to digitise all those dusty papers stored for years if there are no extra incentives or rewards from the management?' asked the staff.

In such a scenario, it is essential to ask: will digital/legal tech actually be able to facilitate and provide the actual justice sought and demanded? Or is it just another illusionary promise that has been given to us by the authorities within the parameters of the neoliberal, tech-solutionist approach currently reigning the world?

D. PRIVACY AND SECURITY CONCERNS

Privacy as a human rights issue protects us from unwanted interference from others by helping us to manage our boundaries with the outer world.³¹ As per human rights treaties, it is related to individual autonomy, which is guaranteed by Article 12 of the UDHR³² and Article 17 of the ICCPR.³³ Nepal's current Constitution in Article 28 also ensures the right to privacy of citizens, while there is the Individual Privacy Act 2018 which lays the ground for the protection of an individual's right to privacy both online and offline.

Besides these legal frameworks and treaties, privacy is a crucial phenomenon for our dignified and autonomous life with agency and freedom, which is also referred to by different scholars who voice our rights to exercise privacy. In her article 'When our body becomes data, where does that leave us?',³⁴ Anja Kovacs talks about different nuances of privacy both online and offline in a socio-political context, where she highlights that privacy is especially important for women and individuals from oppressed and marginalised groups. She provides examples of Dalit individuals' autonomy to be anonymous in the bigger city than the villages where their caste status is well known; trans-sex workers' agency to choose sex work as their profession and maintain privacy; or women's abortion or STD issues that they want to keep private due to the societal judgement and vilification. All of these examples, and her argument for protection of privacy, prove how the privacy concern is very important to people, mostly the marginalised or oppressed groups, and how they are vulnerable in terms of their life and livelihood when their privacy and anonymity is violated.

Meanwhile, the privacy issue is equally important and should be considered and addressed accordingly when we are talking about being online and using technology. Also during this study, issues of privacy, data privacy and security came across, which will be thoroughly discussed.

During the interview with IT personnel, the researcher was told that neither the public nor any other party except the system manager has access into the server and data centre of the Supreme Court. If the IT staff are using the software, their activity log is recorded so that the administration or the IT staff themselves can check what they are doing. Similarly, every activity log by working staff is recorded into the software and can be observed by the administration. Due to such a system, the IT personnel claimed that the data is very private and secured; but, somehow, if staff make any mistake at their end, for example, uploading incorrect decisions or information, that can be tracked and the staff could be made liable for their mistake.

As mentioned above, the private sector was involved in the initial phase of digitalisation and digitisation of the judiciary in different stages in collaboration with development projects related to judiciary reform. Currently, the Supreme Court IT management team also consists of a consultant who worked on the same project and is continuing the same work of software updates, management and implementation at Supreme Court.³⁵ This raises the concern of data privacy and security as there had been similar concerns of data privacy over government-collected data in which private consultants were given access to the data.³⁶

However, the Supreme Court IT personnel member assured the interviewer of his integrity, honesty and dignity towards his work and expressed that he is also aware of the possible charges and liability in case of fraud or privacy violation. Another concern is the lack of sufficient budget from the government to protect and manage the system from privacy and security aspects as per the IT consultant.³⁷

The software being developed and implemented, such as case management or decision implementation, should be able to protect the privacy of people, especially victims from vulnerable groups. The court follows the practice of closed-door hearings in sensitive cases. The name of victims is anonymised in the legal documents. This trend should be followed in all the available software at the Supreme Court to protect the privacy of victims; and the staff there claimed that the software has such provisions and practice of keeping the names private in sensitive cases. However, a lawyer working with an NGO that supports women and marginalised in access to justice procedure mentioned the gap in the privacy of the information of lawyers in every step of the legal procedures from filling up forms during the litigations to asking for copies of final decisions. They mentioned that lawyers' names are explicitly published in the list offline and online, which is a serious case of privacy violation. It is a serious concern especially when it comes to lawyers who side with women and marginalised victims in

sensitive cases such as sexual assault. Also, the system by default promotes transparency and the right to information that undermines an individual's right and choice to remain undisclosed. As privacy is an individual's choice to manage their boundary, lawyers should have the agency to choose where and to whom to reveal (or not) their names. In this case, the legal system does not seem to care about the agency of individual lawyers although it somehow does care about victims' privacy.

Overall, privacy and security of data are very important to ensure access to justice through the means of technology. Relevant actors, whether the government's lawyers, administrators, IT personnel or anyone involved in the system, should strive to make the process easier and beneficial to all, especially women and individuals at the margins while in the journey of seeking and accessing justice.

E. CONCLUSION

The usage of legal tech within the judiciary system in Nepal is increasing. Things are being digitised and digitalised gradually under the concept of a paperless/digitalised court which is supported and addressed by different policies, plans and legal measures. Similarly, different kinds of software, systems and tech are developed and implemented as well as planned to aim for efficient, quick and people-centric justice delivery.

Additionally, people's right to justice by exercising their agency and autonomy to remain private both online and offline is an important issue. This should be considered and addressed within the digital system being developed and implemented for people-centric justice delivery. However, there is also Nepal's socio-political landscape, which is cis-het Brahmanical patriarchal and oppressive to women, queer and marginalised folks and plays an adverse role in making these groups more vulnerable and deprives or denies them of the justice they seek. Therefore, the idea of suggesting and applying tech usage for any kind of services, including judicial proceedings, needs to be handled very carefully and sensitively given all these hegemonic socio-political complications already thriving among people and their social realities. Otherwise, the usage of legal tech will be useless for the people who are already suffering. Their right to a dignified life will be far-fetched even if the legal tech application has good intentions such as effective, easy, people-centric and quick justice delivery, elimination of frauds from authorities, hassle-free experience for the public, and so on. Meanwhile, if a Supreme Court owned data storage centre is functional, it can be assumed and understood that separation of power is quite assured between the judiciary and the executive when it comes to handling cases of political authority and public concerns as well as civil cases. This is yet another topic to research and find out about rather than using assumptions as a basis.

Additionally, an evaluation is needed in the long run to assess if the good intentions of such legal tech usage is real or not and whether these legal techs are able to achieve their aim of people-centric justice delivery or not.

Civil societies on the other side should also be aware of the application and implication of the legal tech being used within the judiciary. They should play the role of observers as well as be able to organise against the idea of tech solutionism if it is doing more harm than good to the public, especially towards those who are at the bottom of the social hierarchies.

NOTES

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