

Laws Related to Banking Offences: A Social Analysis

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Abstract:

Banking is an important institution and in banking too, there are many more offences over its activities. Law is a formal tool to socially control such activities. The article is an analysis of such discourses.

The factors that come into play while the Judiciary delivers verdict to some particular banking offence case are not solely technical; for social aspects also come into play. Laws are made with reference to some particular state of society; and need to be complemented with certain assumptions and extrapolations when used in a different state of society. This creates room for multiple explanations as shown in the different case studies listed in this paper.

Key Words: *social control, banking, offence, bafia, bopa, nia, sc, institutions*

Introduction:

Banking is an institution which was developed and shaped by some social facts like values, norms, sets of rules and contemporary social practices. The valid knowledge about banking for me has been obtained from some sets of rule here. Every social phenomenon is termed on the base of people how they have the knowledge and experience. The knowledge and experience regarding bank have been basically guided by the sets of rule in Nepal and the sets of rule related to banks like other are guided by the values norms and social practice. It may be these all above have helped me to understand even to make such kinds of reality towards banking. It is my epistemology.

A bank is a government regulated, profit making business that operates in competition with other banks and financial institutions to serve the savings and credit needs of its customers (Hatler & American Bankers Association. Education Policy and Development Group., 1991). Banking has been defined on the base of

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its function here. “The accepting of deposit of money from the public with the purpose of lending or investing these deposit as the main functions of the bank has been stress in the Indian Banking Regulations Act, 1949 in which the term banking has been defined as “accepting for the purpose of lending or investment of deposits of money from the public, repayable on demand or otherwise and withdrawal by cheque, draft, order, or otherwise (Vaish, 1989). Nepal Rastra Bank act defines with its own way. The term “bank” refers to any financial institution licensed by the Nepal Rastra Bank to carry out “A” category financial transactions, abiding by the prevalent law (Nepal Rastra Bank, 2008).

Similarly according to the Bank and Financial Institution Act (BAFIA) 2017, bank is that which perform its role according to the sub section 1 of section 47 of the same act.

In course of defining the bank we should illustrate the access and authority of the institution. Bank is that which perform its role according to the sub section 1 of section 47 of the same act. Bank is that which accept deposits or to mobilize deposits through various financial instruments and make payment thereof with or without interest (Nepal Rastra Bank, 2008). This definition puts forward a different kind of version in course of defining the bank. Financial activities like deposit more over lending is possible even without the interest.

Talking about the social control, the banking activities are the most relevant to study interconnecting. There are two types of tools for social control. Values norms culture and morality which are known as the informal tools are not binding but the laws promulgated by the nation and known as the formal tools is binding for each citizen. Thus to control for most popular and day to day activities there are some provisions of different sets of rule in the world and Nepal is not exception of this principle and practice.

The Bank may issue directives from time to time to commercial banks and financial institutions on banking financial system, currency and credit (Government of Nepal, 2002). It shall be the duty of commercial banks and financial institutions to abide by such directives (Government of Nepal, 2002).

In course of this the central bank works as the bank of the state as well. It not only regulates the commercial banks in the state but also makes the total monetary policy for the state through the controlling.

Nepal Rastra Bank is to formulate necessary monetary and foreign exchange policies in order to maintain the stability of price and balance of payment for sustainable development of economy, and manage it (Government of Nepal, 2002). Our main concern is about social control over the activities of the bank here. The term social control is associated to offences. Talking about the social control in banking activities, offences that happen in some of banking activities are subject to analyses. Banking Offense and Punishment Act 2008 has used the term 'banking offense' which is broad in definition, including instances of frauds. They are misuse of authority, misuse of credit, unauthorized withdrawal and payment, abuse of electronic means, wrong valuation, violation of banking norms and rules alteration of B&FIs account or making fraud, forgery in account, misuse of banking means, property and resources, unauthorized act against the interest and right of depositors and shareholders, not to repay interest, principles and charges. That is why the activities defined as offense is so comprehensive that it even includes third person who deals with the bank in any transactions, for e.g. if somebody provides falsified details to the bank while availing loan is doing an offence. So, offense or fraud (as auditor's say) could be anything-like granting loan to a personally related party and then diverting the fund for own's purpose, misuse of loan by the borrower in collusion with bank management and directors, other cases of fraudulent loans, falsification of loan applications and credit appraisals or even abuse of electronic cards etc. Thus in spite of we talk about some of the laws which are indirectly related of social control in banking activities we specially amylyses about the banking offence act and the section provisioned in it.

Statement of the Problem:

It is known that laws are any nation's tool for social control. Laws are diverse, and each social institution has particular tailor-made laws. It is expected that laws tackle every issue completely and effectively to ensure proper justice. Banking is an important social institution; and as such, there exist laws formulated to regulate financial institutions and banking activities.

The job of upholding and explaining said laws is that of the Judiciary; and at times, instances arise where law can be interpreted in multiple ways which hinders the effectiveness of law to fully address the situation. It can be assumed that during interpretation and explanation, there exist aspects that are not entirely technical and that still manage to affect the scenario. This results in there being different

explanations of the same law. Do such aspects exist? If they do exist, are they social aspects?

Objectives of the Study:

Acts and Bills that are made in the Parliament are not the sole constituents of law; explanations and interpretations offered by the Judiciary in answer to particular problems are also as much part of law. This study aims to analyze some prominent Acts, made to handle banking and financial issues. This study also aims to analyze Judiciary's approach to financial issues, its interpretation of aforementioned Acts and how interpretations are affected by social phenomena. Overall, this study aims to analyze the social aspects related to banking.

Literature Review:

The Banking Offence and Punishment Act, 2008 has declared some activities of banking offences.

Opening a bank account or demanding cash payment in an unauthorized manner is known as bank offence. The following activities, if undertaken, shall be regarded banking offence:-Opening or knowingly opening an account using false documents, Opening or allowing to open an account on the name of a fictional character or organization, Trying to deliberately withdraw money via cheque when the withdrawer knows that there is insufficient amount on the account, Obtaining or issuing cheque, cheque books or bank statements in an unauthorized manner, Some other person trying to withdraw by claiming to be the true holder, Providing a cheque in an unauthorized manner without the request of the concerned person (Nepal Rastra Bank, 2008). It is one of a provision of social control. But the cases of forgery account and fake cheque seemed in society not only this but also explanations from the authorities and the laws accompanied by them are also conflicting.

In Case of **Mahesworlal Vs Bisnu Maharjan et. al** is an example of dilemma in the rule (Mahesworlal vs Bisnu Maharjan et. al., 2070). In case any person who deliberately transfers a cheque by drawing it to some body that he/she does not bear deposit in the bank or even if there is a deposit which is not sufficient, and if the cheque thus transferred is dishonored due to lack of sufficient deposit when the Cheque is presented to the concerned Bank for the payment, the Amount mentioned in the Cheque as well as interest on it shall be caused to be recovered to the holder from the drawer and he/she shall be punished with an imprisonment. Verdict came

in this case standing on the section 3 (a) of BOPA 2008. Equally on the on the other hand there was a Negotiable Instruments Act, 1977 (Nepal Rastra Bank, 1977) which has provisioned the rights and liabilities of the party. These provisions are also related to control the banking offence.

The SC's verdict on a case involving Nirmala Sodari, a resident of Kailali district, said that since the Negotiable Instruments Act (NIA) 1977 had included provisions related to dishonored cheques, such cases should be adjudicated under NIA, not BOPA. BOPA is a strong preventive to fraud involving on bad cheques as the blundering party could be imprisoned and also fined. But the Supreme Court's recent verdict that ruled against invoking the Banking Offence and Punishment Act (BOPA) 2008. SC passed a verdict based on NIA when it has been succeeded by BOPA. On March 12, 2022, Nepal Rastra Bank, the central bank, had put up a notice calling on the people not to issue cheques if there was inadequate bank balance or face the penalty under BOPA.

Another case like **Sundari Rai et al. vs Nepal Government** (Sundari Rai vs Nepal Government et al., 2069) is also there. As the judges use the discretionary power they have to maintain the intention of principles and different types of prevailing laws. Discretionary power does not mean the action done in sentiment and haphazard mentality. As per the banking offence act it has been said that if someone opens an account in an unauthorized manner or obstructs the customer's second installment, he/she shall be fined up to Rs. 10,000 depending on the degree of the offence committed. In this type of clear situation what is the essence to fine 8000 or 9000 by the courts of different level. This verdict put forward two ground realities. Either there is no appropriate rule for this case or the existing laws are insufficient to address this case. Otherwise why they gave this kind of verdict and gave the counter verdict by the Supreme Court whether the clear rule regarding this case is already.

About another way of social control providing loans by submitting false financial documents and like other is also an offence.

Act has cleared that providing or availing loans in an unauthorized manner is also offence under which, availing or providing loans by submitting false financial documents, availing or providing loans by way of unnatural evaluation of collateral protection, availing or providing by unreasonably increasing the cost of, Availing

or providing credits or facilities above the limit set, availing loans through an entity established in the name of a person who doesn't have the financial capability to run the proposed business are known as banking offence (Nepal Rastra Bank, 2008).

In case of **HMG Vs Dayanidhi Pankaj et al.** (Hmg vs Dayanidhi Pankaj et al., 2063), The Supreme Court declared to provide the loan without any due process and the rule and regulation of the bank is the malafide intention of bank staffs. The Supreme Court declared to provide the loan without any due process and the rule and regulation of the bank is the malafide intention of bank staffs. In this type of crime as per the law government has clear provision to file the case through Corruption control act 2017 section 7 (2) and section 29 of same act. But the filing of case directly by the bank itself was approved and explained legally was the decision made by appellate court was ultimately nullified by the Supreme Court. This decision of Supreme Court has clarified the right agency for social control in case of banking offence according to the existing law. It is a case before to promulgate the Banking offence Act 2063.

The Prevention of Corruption Act, 2002 A.D Act is also one of the important to combat the corruption. Regarding the banking offences, this act does not directly address the banking offences, but this act has an important role in the sense that sometime, it came to be effective to prevent the banking offences. Banking offences are not done only by the public; it is also done by the people who are in the post of public authority. In another sense, even the public can be the matter of this act since they are the citizens of Nepal. As per the definition of corruption and punishment, concern it has been defined in the act. There are many provisions of punishment for corruption in this act. Since there are many forms of corruption, the degree of punishment may differ according to the offence committed.

Talking about the case of corruptions and collateral, the case **Banijyabank Vs MohanKrishna Gurung et al.** (Banijyabank Vs Mohan Krishna Gurung et al., 2063) has raised question over the knowledge of bank authority regarding the offence in case of collateral. There is no any ground of saying accused has been involved in corruption where as there is no any accuse of the collateral is not equivalent to the loan. There is no any possibility of dispute if the bank wants to recover its investment by the collateral. There is no any ground of claim that the bank has fixed loss by the collateral. In this condition there is no any ground of saying corruption.

Values are also obtained by false means and this is also considered an offence. It is considered an offence if some authorized evaluator miscalculates movable or immovable assets held by a bank or financial institution as a collateral security of a loan or non-banking movable or immovable asset of a bank or financial institution which may cause harm to the bank or the financial institution.

Another type of offence is Misusing credit: Misusing the credit facilities obtained from a bank or any other financial institutions or using the facilities for purposes other than that for which the credit was availed (Nepal Rastra Bank, 2008).

Acts such as Misusing banking resources, means and assets is also an offence where The Promoter, Director, shareholder who has financial interest under the prevailing laws, CEO, employee, advisor, Managing Agent or associated person or organization or family member or close relatives of such persons shall not misuse the resources of a bank or financial institution by availing a credit or facility or in any other manner for personal benefit are also considered banking offences (Nepal Rastra Bank, 2008).

In the case of **Nepal Indosuez Bank Vs Madhusudan Puri** (Nepal Indosuez Bank vs Madhusudan Puri, 2070), the law as well as verdict goes together. In this case Supreme Court has decided that the defendant has been found guilty on the ground of not presenting sufficient evidence of corruption and misuse of bank property by the accused. The court said that accused has to prove his property is not accumulated by the corruption and misuse of the bank property since he is suspected and accused that his property is accumulated by the banking offence. Both tools for social control like law document and the verdict go together.

Moreover, Opening account by a borrower who has over dues is also an offence. act has cleared that those who have over dues shall not be allowed to take loan from a local or international bank or financial institution or operate the account or purchase any movable or immovable assets in any manner or acquire without paying the remaining dues to the financial institution are also considered acts of offence. However, one shall be allowed to take loan from one financial institution and pay his dues in another institution before overdue (Nepal Rastra Bank, 2008). The same cases law and verdict go together such as seen in case of **Sreekrishna Shrestha Vs Nepal Government** (Sreekrishna Shrestha vs Nepal Government, 2069). In this case the Supreme Court approved the decision made by special court accusing Sreekrishna Shrestha et al. The accused is corrupted in the sense that he

has provided loan in facilities of letter of credit second and third time whenever the party has not refunded the previous loan. Whoever, being a public servant under the duty has to provide loan with the secure collateral. But the accused has not accomplished this duty. Moreover he continued to provide the loan.

Law has not restricted on the activities of client but also it has protected the business of client by awaking banks not to stopping loan by bad intentions. Moreover, stopping credit facility in a way to loss the borrower's working project is also considered a banking offence. Financial institutions or banks who have provided first installment shall not cease borrower's second installments unreasonably in a way that results in the loss of the borrower's working project (Nepal Rastra Bank, 2008).

The verdict given in the case of **Rubi Joshi Vs Nepal Government** (Rubi Joshi vs Nepal Government, 2073) also provides room for analysis. Rubi Joshi, the then chairman of Sri-Lankan Merchant Bank and Finance Ltd., was charched for two kind of action. One was to lend money against the security of the shares and another is to add other loan whether the loneyes had not paid the principle and interest of the previous loan amount. There the two type of action which is effected by the two acts. First was affected by the stating section 10 (1) of Bank and Financial Institutions Act, 2063 and second was effected by the section 10 of the BAFIA. But the case was prosecuted mentioned activities through guidelines of Nepal Rastra Bank and section 10 (1) of Bank and Financial Institutions Act, 2063 as reference.

However, the judicial bodies where the case was run cleared the accused from all charges claiming that the Act which was cited while filing the case was irrelevant to the activities the accused was charged with. And this was also a case where multiple charges were made against the same accused based on the same Act. However the same Act did not provide sufficient legal directions for all charges and required referencing other Acts as well. The accusing party was the Supervision Department of NRB. It is an example of how the lack of appropriate knowledge regarding banking activities can cause adverse circumstances even for an organization as powerful as NRB.

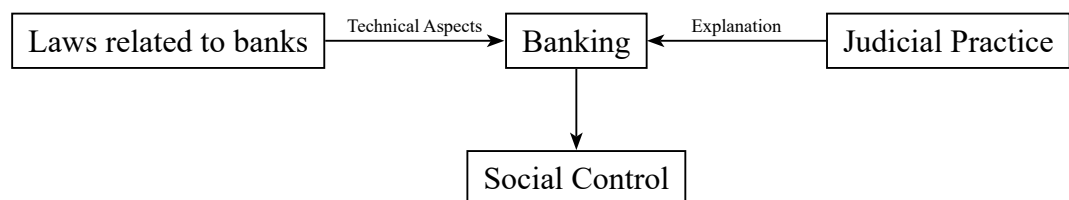
In case of **Indraraj Humagain Vs Nepal Rastra Bank** (Indraraj Humagain Vs Nepal Rastra Bank, 2073) who worked in Banepa branch of Infrastructure Development Bank The supreme court commanded made alert to prosecutor to suet any case objectively. The person in question was charged with disobedience of law such that the actions he committed were outside his official rights and was hence unlawful.

The case was a situation of what happens when some bank personnel does any activity not within his authority. The court then stated that people in power should obey the laws they are subjected to and provide their services with equality.

In Case of **Mahendra Prasad Yadav vs Nepal Government** (Mahendra Prasad Yadav vs Nepal Government, 2072), it has been said that there are differences between a tort committed by a person that harms banks and ultimately the government; and a tort committed by a person that harms another person such that the bank and government remain unaffected. The legal treatments for the two scenarios are also different and hence the legal articles to be used also differ. This is a case of how an incorrect process cannot provide correct answers.

Case of **Geeta Stahapit vs Nepal Government** is different here (Geeta Stahapit vs Nepal Government, 2074). This is a case of insufficient funds in account. For section 3 (c) of Banking Offence Act 2064 to be applied in any scenario, there must be involvement of both parties: customer and bank personnel. Not only does a person have to provide false or unlawful cheque to the bank, but bank personnel also have to issue that cheque for this section to come into play. If some scenario lacks even one of the two sides, then that scenario becomes subjected to some other legal article, not this particular section in consideration. Since this particular case was one where both parties were not involved, the section was not applicable here. Instead Negotiable Instruments Act, 2077 Section 107 (a) was used. Hence a dilemma was created because the prosecution was based originally on Banking Offence Act but the decision was made on the basis of Negotiable Instruments Act, 2077 by the judiciary. Ironically, the case immediately became weak for the prosecuting party.

Conceptual Framework:



The term offence is vague to mean. Normally we have problem to make people happy and satisfy by giving the definition of offence. It has to be meant on the base of contemporary society and sociological norm. In this article we have accompanied

the law document and artifacts which has beautifully provided the concrete ground for definition.

Methodology:

This article focuses on practice and efficacy of laws for social control in banking offence. In course of this it has passed many historical ups and down. Not only this also the law practice in banking has followed different ideas from different school. The data are collected from the Banking and Financial related Acts, verdicts, books, journals and articles published by different national and international agencies. In addition to these, different published articles, reports, books and magazines have also been analyzed. The case study models are applied to test the institutionalized process efficacy of banking in Nepal. Therefore primary and secondary data have been used in this article.

Limitations:

Before the introduction laws related to banking Offence and Punishment, cases of offences were explained under forgery, cheating, corruption or bad governance and the trend is still prevalent. This means sole Act and definitions and explanations it has provisioned are still unable to cover the cases. The judiciary analyzes several aspects and tries to find the most appropriate legal tool to base their verdict on. Even so, there are cases whose elements are so vast and unique that existing legal documents cannot provide concrete decisions. That is why, only the Banking Offence and Punishment Act is not sufficient to address the cases. In the sense I am just talking about some of the laws which are directly related to banking offences that are known as the important tools for social control.

Findings and Discussion:

The writer is keenly interested in the laws related to banking specially BOPA, its adequacy and effectiveness. Talking about the sources of information, government offices and NGOs, research, Central Law Library etc. were the writers' study sites to collect required law books and documents. In this article, analytical research design was employed. This study was analytical because the laws and sections inside have been analyzed and the explanations of books, papers and other journals are also there. This research analyzed objectively the nature of banking related laws and law books and their provisions. Both primary (Acts) and secondary data were used for the proposed study. Primary data were collected through precedent and

Acts to know the existing provisions of banking and banking offences. As for the method, case study method was used.

There are many more artifacts of laws related to bank and banking offence. Some of the volumes have been introduced in form of banking offence laws and some of the volumes are just related to banking offences.

Banking Offence and Punishment Act, 2008 is the main law book to control banking offences in Nepal and Banking and Financial Institution Act and Nepal Rastra Bank Act are other important laws to support the abstract of Banking Offence and Punishment Act, 2008. Not only this, these two Acts have provided the ground to implement the Banking

Some of the Acts related to banking are unable to cover all the aspects in detail. For example the leading act Banking Offence and Punishment Act 2008 seems unable to define each and every kind of offences as we discussed the many more types of potential offences above in this study. Although it was later amended, till the date it has not been adequately modified to include many essential aspects of banking offence. There are many more things that have not been adequately justified. Activities related to banking offence have been alternatively defined and explained on the ground of some important acts like Corruption Control Act, Government Case Act, etc.

Law of any country is an important tool that facilitates and promotes banking in that country. Therefore, this article is specifically prepared to address the different provisions, inadequacies and contradiction in the prevailing laws that need to be modified or amended to make them more forthcoming, practical to implement and ensure to banking offence for social control.

Ultimately, only correction and revision of laws related to banking offence is not the panacea for all the problems. It is not our intelligence to think the problems will be completely solved by evaluating the laws. We must see how the laws have been implemented and what kinds of explanation of the law are there where the law is practiced. If the Judiciary doesn't provide the abstract and sentiment of laws, there is no meaning to laws though they are based all over the world. For this sociological ground of Nepalese society must be evaluated. There are different kinds of provisions in the law books. In spite of this offences are also there in a way and they have been explained as per their comfort. Due to ignoring social part such dilemma

and problem have come there. There are many more lacunas whether they are in the process of law making or in the process of implementing our laws. The most important fact is this: the legal documents that provide guidelines and the verdicts that have come from judiciary point to two different directions when they should be telling the same thing. In this situation two things can be deduced. The first is that stakeholders of state in the role of prosecutors need to objectify their cases more principally. This lack of legal awareness academically has manifested in mainly two forms: first is the inability to determine the Acts to base prosecutions on; and the other is the inability of prosecuting parties to create an Act-wise categorization of their case (there have been instances when the Act used during a prosecution did not aptly address all charges which in turn resulted in the case being weak for prosecuting party). These legal documents themselves are full of loopholes and need rectifying. It must be co-ordinated. It is needless to say that legal documents are an important tool for social control. Instances of improper application and the presence of loopholes in these legal documents directly imply ineffective social control. So to make social control more effective, academic exercise about these legal documents is required.

Laws are made by legislature. However, the act of explanation and implementation of said laws is done by judiciary; and it is often observed that the scenario in which a given law is implemented differs greatly from the scenario that had led to its making. Sociological aspects play a vital role during the implementation and explanation of laws; and hence, implementation and explanation can vary depending on the contemporary society. This has happened with banking laws as well and the aforementioned cases are such instances.

Conclusion:

There are many legal documents that oversee different aspects of banking and financial transactions. Such laws are made by the state, namely the Legislature, in some particular situation with respect to some particular period of society. Offences are committed and problems are subsequently created in contemporary society. The Judiciary, in course of delivering justice, take into account both factors: legal documents made by the Legislature and social aspects of the contemporary society.

As such, laws which were applicable to one particular scenario in one particular period of time are not universally applicable. No two offence is the same and

oftentimes, the law used to address some offence is not one which addresses that particular offence in its entirety because such a law does not exist; but it is one which is the best fit for that situation. In course of making that fit, extrapolations need to be made and these said extrapolations can take different routes. Thus, multiple explanations of the same law are possible and so is the case also for laws related to banking offence.

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