

The Judiciary

Concept and conditions to improve Judiciary in Nepal

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Concept

The Judiciary is the bedrock of any democratic constitution. The legislature and the executive may influence by the majority electorate politics and attempt to apply and interpret constitution according to the party compulsion and interest. However, Judiciary, as an impartial and independent organ of the State, expected to apply judicial mind and interpret Constitution and other laws according to letter and spirit of the provisions and protect them from unauthorized encroachment.

The role of Judiciary, as a whole, and particularly of the Supreme Court, is paramount in constitutional democracy as it is the final arbiter of any constitutional and legal dispute between state and citizen and among the institutions of the State. Hence, a functional judiciary must protect right of the citizen and maintain constitutional order at any cost as it is the guardian and authorized interpreter of the Constitution, the supreme law of the land, and all other laws of the State.

Basic Principles of the Independence of the Judiciary (Basic Principles) endorsed by the UN General Assembly (resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985) has formulated some basic principles to assist Member States in their task of securing and promoting the independence of the Judiciary. Nepal as a member of UN and aspiring to have a new democratic constitution should strictly follow those principles. They are as follows:

“Independence of the judiciary

1. The independence of the Judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all government and other institutions to respect and observe the independence of the judiciary.
2. The Judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.
4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or

- commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.
5. Everyone shall have the right to be tried by the ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.
 6. The principles of the independence of judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.
 7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.”

Judiciary in crisis in Nepal

It was widely believed that the Constitution of Kingdom of Nepal 1990 (the 1990's Constitution) had respected and followed the Basic Principles in order to established independent of judiciary in Nepal. However, irrespective of judicial power largely remained as it was in 1990's Constitution, the independence of judiciary has been compromised under the Interim Constitution of Nepal 2006 (the Interim Constitution) by making it submissive and answerable to legislature and executive (see Article 117,106 (1) and 100 (2)).

The current constitutional changes in Nepal have precipitated with the successive of people's movement in 2006. The movement was primarily against the autocratic monarchy. Before the final phase of the movement begun, the political parties, civil societies, and people at large had expected the Judiciary, especially the Supreme Court, to fulfil its constitutional obligation by interpreting and protecting the 1990's Constitution by taming the unconstitutional activities of the King. Largely, its failure to do so is being vindictively reflected in the Interim Constitution.

Constitutional provisions and reality

The provisions of 1990's Constitution supported important arguments that the independent judiciary guaranteed in the Constitution may not be enough to make the judiciary independent in real term. For example, Part 11 of the 1990' Constitution had comprehensive provisions for the establishment of Independent Judiciary in Nepal. The appointment of the judges and their removal procedures were made stringent so as to protect the independence of Judiciary. Under the Article 87 (1) of the 1990's Constitution His Majesty, as the Head of the State, had to appoint the Chief Justice of the Nepal on the recommendation of the Constitutional Council, and other Judges of the Supreme Court on the recommendation of the Judicial Council.

For the removal of the Judges of the Supreme Court, except for the resignation and expiry of the tenure, Article 87 (7) provided that “the Chief Justice or any other Judge of the Supreme Court shall be removed from his office if, for reasons of incompetence, misbehaviour, or failure to discharge the duties of his office in good faith, the House of Representatives, by a two-thirds majority of the total number of its members, passes a resolution for his removal and the resolution is approved by His Majesty.” Except by following these procedures, Chief Justice or a Judge of the Supreme Court couldn't be removed from the office.

For the appointment and removal, similar provisions exist under Article 103 and 105 of the Interim Constitution 2006 where in terms of appointment the President has to follow recommendation of the Constitutional Council and the Judicial Council and for removal the impeachment resolution ought to be approved by a two-thirds majority of the total number of members of Legislative-Parliament.

Similar to Article 87 (11) of the 1990's Constitution, Article 104 of the Interim Constitution guarantees that the remuneration, privileges and other conditions of service of the Chief Justice and other Judges of the Supreme Court shall not be altered to their disadvantage.

Similarly, independence of the Appellate Courts and District Courts were protected by the 1990's Constitution. Under Article 91 (1) of the 1990's Constitution, the Head of the State shall appoint any Chief Judge and Judges of the Appellate Courts and any Judges of the District Courts on the recommendation of Judicial Council. Article 91(3) had given complete power to the Judicial Council to recommend any action to be taken against any Judge. Similar power has been given to Judicial Council under 113 of the Interim Constitution.

With these important safeguards one would expect the Judiciary to play completely independent and impartial role by upholding the constitution and rule of law. However, the judicial independence in paper had failed to make our judiciary effective and competent, particularly of our Supreme Court in times of crisis on the Constitution and overall democratic system of government. Hence, for the success of independent judiciary, the competent judges with high level of integrity must be appointed in the judiciary. The capacity and integrity of any institution, including Judiciary, heavily rely on the capacity and integrity of the personnel working in that institution. Hence, the objectives should be to establish competent and independent Judiciary with Judges of high level of capacity and integrity.

Furthermore, it is an established fact from the recent experience of Nepal that the Constitutional provisions aiming to protect and promote democratic and fundamental rights and interests of the citizen in line with constitutional values and principles would remain in paper unless they are jealously guarded by the independent and competent Judiciary.

Impact of Armed conflict

Apart from the question of public trust, competency and integrity, Nepalese justice system suffered from severe dysfunction as the result of 12 years of armed conflict. In one point, apart from some districts of *Tarai* region and Kathmandu valley, almost all disputes in the country were settled by the rebellion group under their so-called people's courts which did not follow fundamental principles of justice, rule of law, and principles of natural justice and absurdly applied primitive methods of torture, intimidation, and killing if required, for confession and punishment. Many people from rural area, poor and downtrodden classes of society seemed happy with the so-called people's courts as they delivered quick verdict with no or minimum cost.

The so-called people's court was totally against the entire provisions of the Basic Principles endorsed by the UN. Particularly, it conflicts with article 5 of the Basic

Principles that states “Everyone shall have the right to be tried by the ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.” Therefore, any remaining of so-called people’s court shall be immediately closed.

At the same time, our justice delivery system also needs to be thoroughly examined in order to make it more competent, affordable, accessible, proactive, and able to provide speedy justice even to the people living in remote and rural area so as to provide justice and earn public faith and confidence in the judicial system.

Conditions to improve Judiciary

To make Judiciary competent, independent and impartial, some essential conditions must be fulfilled and be protected by the State. By keeping in mind the past experience of Nepalese judiciary and to make it more effective in future, some changes need to be incorporated in the future constitution.

1. Reorganization, power and authority

Three tiers system of Courts, the Supreme Court, Appellate Court and District Court, apart from special types of courts or tribunals for special type of cases, envisage by the 1990’s as well as the present Interim Constitution have fairly fulfilled the country’s requirement. However, in the changed context where country has decided to move towards federal set up, some changes with the structure and power of the Courts would be inevitable.

Similarly, from our past experience, one would positively argue that we had very little or no serious disagreement on the organizational structure of the Courts. However, there has been a serious dissatisfaction on appointment process, effectiveness, and competency of the Judiciary. The new Constitution drafted by the Constituent Assembly needs to address these issues effectively apart from deciding the new structural set up of Nepal’s judiciary.

While reorganizing the Nepal’s Judiciary, one very important historical fact should not be forgotten. Since Nepal opened before the world in 1950 with the success of people’s revolution which toppled 104 years of one family autocratic *Rana* Regime and brought multi-party democracy for the first time, it has been following Common Law system. Like any other country where Common Law is followed, the importance of judicial precedent has deep-rooted impact and importance in our legal System and it has totally entranced in our physic. Even when we did not have multi-party democracy and ruled by the one party *panchayat* system directly headed by the King from 1960-1990, our Supreme Court had claimed fairly independent status within the constitutional constraint created under that system. At that time, some able and courageous judges with integrity had strongly rejected the claimed of then Legislature (*Rastriya Panchayat*) that it is superior to the Supreme Court. In *President of Nepal Bar Association Surbagya Ratna Tuladhr v Rastriya Panchayat* (2035 (1978) Nepal Kanon Patrika 169), the full bench of the Supreme Court unequivocally declared its superiority and independence from the legislature and reclaimed power of judicial review and out rightly rejected to answer the

summon issued by the legislature. Such encouraging aspect of our Judiciary shall be protected and enhanced in the new constitution.

Reorganization

How appropriately the Judiciary can be reorganized so as to make it more effective for justice delivery system is a very important question for Constituent Assembly. In democracy, the Judiciary is the protector of the Constitution, its values and principles. Hence, in the one hand, any emotional or adventurous adoption of new system, alien to our understanding or practice, may give counter-productive result and we may lose already established system. In other, we cannot close our eyes to some unacceptable problems open to everyone notice in the justice delivery system. Particularly, delay justice and corruption in Judiciary are two major problems need to be addressed by the future reorganization of the Judiciary. Besides that, like other institutions of the State, our Judiciary severely lacks inclusive character where women and people of socially backward classes are highly underrepresented.

As mentioned before, with adoption of the Federal set up, the organizational structure favoured by the present Interim Constitution need to be changed by making the present Appellate Court more powerful under the name of High Court or Provincial Court. It should have ordinary as well as extra ordinary jurisdiction so that citizen need not come to the Supreme Court as the first court for dispute except for issues between two Provinces or between Centre and Province.

There are some arguments made to have separate Constitutional Court for exclusively addressing constitutional matters. Apart from some European Country, such as Germany and Spain, idea to have Constitutional Court is lately emerging, particularly, in post-conflict and post-authoritarian States of Africa and Asia, for example, Angola, Cambodia, Bosnia & Herzegovina, Russian Federation, South Africa, and South Korea. In this example, except for South Africa, all other countries are largely following civil law system whereas we have been following common law system. In civil law system, judicial precedents are not strictly followed and judiciary does not enjoy the prominent role as that of in the common law system. There are large numbers of judge made law or the gap of the law is filled by the Judiciary in common law whereas in civil law system it just followed the codified statute. Some examples of the countries that are following common law system are Britain, USA, India, Canada, Australia, and New Zealand etc.

The example of the Constitutional Court illustrates that the members are appointed from outside the Judiciary for fixed term and all the members sit together to constitute the Bench. In our system, there are hierarchy of the Bench within the Supreme Court and ruling, decision or precedent of the Larger Bench is binding to the lower bench and all other courts and state organ. This has given predictability and certainty to our system where the Supreme Court has already settled numbers of legal issues and established judicial precedents, having authority of law. If we have a constitutional court, the rule of following judicial precedent may end its relevance as all the constitutional cases are decided by the same bench with similar number of judges and they are not bound to follow ruling of the same bench. This will create uncertainty and unpredictability in each case. Similarly, the Constitutional Court may not follow the precedents established by the Supreme Court, as it may consider superior in the constitutional matters. This will sever 50 years of important history of our Supreme Court with a new apex court,

concerning with the constitutional matters. I believe ignoring our own history of a half-century instead of improving the system would not be an appropriate choice.

The other serious problem would be of the adaptation the system. Our entire judicial and legal manpower is educated, trained and accustomed to the Common Law system. If there is a gap of statute or precedent to resolve on a disputed matter in any court, we argued before the Supreme Court and other courts by citing judicial precedents, especially of apex court who follow common law system, such as India, England or USA where separate constitutional court do not exist.

Hence, the best option would be to make the Supreme Court more competent and effective to meet the challenges, particularly of the constitutional issues. For this, following provisions can be included in the new constitution.

1. A separate constitutional bench should be established in the Supreme Court, consisting minimum of seven judges. Judges in constitutional bench shall be appointed in the recommendation of the Judicial Council. The head of the constitutional bench shall be the senior judge of that bench who could be the Chief Justice of the Supreme Court as well.
2. The Judicial Council shall recommend known constitutional lawyer or expert or professor of constitutional law or jurist with high moral and impeccable characters, having minimum of bachelor's degree of law or more with working experience of 15 years in the respective field. A sitting judge of the Supreme Court with known expertise in the constitutional law may also be appointed to the Constitutional Bench. The head of the Constitutional Bench shall decide the composition and cause list of the constitutional bench.
3. Constitutional bench shall be of three levels. Single Bench, Special Bench (minimum three judges), Full Bench (five to seven judges).
4. As long as there is any kind of constitutional matter pending before the Supreme Court, judges appointed at the constitutional bench shall not be deputed to hear other cases.
5. Constitutional Bench may review its own judgments or final orders subject to the specific conditions and circumstances prescribed by law. The review shall consist of Full strength of constitutional bench (minimum of seven judges).
6. The Chief Justice of the Supreme Court should be selected from any permanent judge of the Supreme Court on the recommendation of the JC. For this purpose, the ability and integrity should be given priority to experience or seniority. (This principle goes in line with Article 13 of the Basic Principles UN.)
7. The Constitution should make High Courts or Provincial Courts more powerful in terms of jurisdiction, competency, resources, and strength, as they could provide speedy justice to the people at regional level than that of the Supreme Court.

Power and authority

To effectively address problem of delay justice, the jurisdiction of the Supreme Court and High Courts or Provincial Courts should be amended. At present the Supreme Court is burden with excessive numbers of all types of cases as it exercises original, appellate, and extraordinary jurisdiction.

1. The piling of the all types of the cases at the Supreme Court should be prevented. To achieve that objective, it should be largely made the final Appellate Court in specific cases where Provincial Courts have original jurisdiction. Except for challenge of any central law inconsistency with the constitution, contempt of court, and cases between Centre and Province or between two Provinces, it should not have ordinary or original jurisdiction.
2. The entire writ jurisdiction enjoys by the Supreme Court should be shifted to the Provincial Courts. Under this, Provincial Courts shall, for the enforcement of the fundamental rights conferred by the Constitution, for the enforcement of any other legal rights 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 legal question involved in any question of public interest or concern, have the extraordinary power to issue necessary and appropriate orders to enforce such rights or settle the dispute. For these purposes, the Provincial Courts may, with a view to imparting full justice and providing the appropriate remedy, issue appropriate orders and write including the writs of *habeas corpus*, *mandamus*, *certiorari*, prohibition and *quo warranto*. The Supreme Court shall have Appellate Jurisdiction in all the cases decided by the Provincial Courts under extraordinary and original jurisdiction.

2. Appointment process

The noble idea for having independence and competent judiciary to protect rule of law and supremacy of the constitution heavily relies on the judges appointed in the respective courts. It is rightly said by the Chief Justice Hughes of USA in 1907, a century ago, "we are under a Constitution, but the Constitution is what the judges say it is." It may look arrogant statement but the Chief Justice stated the truth. The judges give true meaning and life to the Constitution and laws and until then it may remain a dead letter. In reality, what apex court judge interprets becomes the authorized and final meaning of the constitution and law. The constitutional values and principles and the fundamental rights of the people remain in paper unless judges working in judiciary jealously protects them. Hence, the appointment of individual with personal capacity and integrity at judiciary is crucial for the survivor of democratic system, constitutional order, and protection of individual rights.

To keep judiciary totally independent from other organs of the State, the recruitment process in the judicial service and appointment process to the bench shall be independently protected by the Constitution.

Judicial Service Commission (JSC)

The provisions of the Interim Constitution, under Article 114, with regard to the JSC are fairly adequate and need not be changed, except for making law to create **inclusive judicial service so that women and backward and downtrodden classes of society** should be given adequate representations. The JSC consist of the Chief Justice, *ex-officio* chairman, the Minister of Justice, the senior most Judge of the Supreme Court, the chairman of the Public Service Commission, and the Attorney General are the *ex-officio* members. The principal functions of the JSC are to recommend the government in appointing, transferring or promoting Gazetted Officers of the judicial service or taking departmental action concerning such officer in accordance with law. The Government

shall take recommendation of JSC on these issues. This is required to create and maintain independent and specialized judicial service.

Judicial Council (JC)

The JC had been harshly criticized for none function according to the mandate of the 1990's Constitution. Article 93 of the 1990's Constitution authorized JC to make recommendation and give advice in appointment, transfer, disciplinary action, and dismissal of the Judges and other matters relating to judicial administration. Had the JC acted according the constitutional mandates, our Judiciary would not have come under severe criticism as none functional and corrupt institution.

The main reason behind the none-functional status of JC is regarded to its composition where Judges had predominated role. There were two principal criticisms against JC. First, it made judiciary largely a closed-club of the bureaucrats as almost all judges in the courts were appointed and promoted from the judicial service. JC had disregarded constitutional provisions for appointing adequate number of judges for the Appellate Court and Supreme Court from outside the judicial service. Second, JC was hesitating to take disciplinary actions against their fellow judges for incompetence or corruption even it was widely reported in the press. This had badly affected integrity of Judiciary in public eyes' and also hampered the overall efficiency and competency of the Judiciary. Hence, there was growing demand that the composition of the JC ought to be changed in order to give other stakeholders predominant positions so that the appointment and monitoring of judiciary could become more effective.

The Interim Constitution has recognized the growing demand and changed the composition of JU under Article 113. At present, the composition of 5 members JU is as follows:-

The Chief Justice, Chairman, and the Minister of Justice, one senior most judge of the Supreme Court, one distinguished jurist-member appointed by the president on the recommendation of the Prime Minister and one Senior Advocate or Advocate with 20 years experience are members. This composition should be continued with new constitution.

The JC should have efficient secretariat. One of its main functions should be to keep up to date roster of qualified potential candidates to be considered in the Supreme Court, Provincial Courts and Districts or any other specialized courts. It should prepare such list confidentially and impartially by giving specific numbers to each potential candidate. It should establish that someone is qualified because of high academic qualification, research or publication, public perception, ability to address constitutional or legal problem, member of Bar or any other constitutional or legal organization etc.

3. Facilities required/attractive judicial service

The judicial service should be made very attractive, which is not at present in Nepal. The Judges, including officials working in the judicial service, are highly under paid compared to the service they are supposed to provide. A judge needs to maintain certain level of aloofness and she/he cannot practice after the retirement. Hence, except for some exceptional cases, any experienced and able practising lawyer or legal academician would hesitate to join the court unless it is more attractive than what they have been

achieving, not only in terms of monetary gain but also in research and publication activities, participating in national and international seminar, and academic or other opportunities. These issues should be adequately taken care off if judiciary needs to attract competent individuals.

A judge not only needs independence and security but also adequate remuneration, reasonable working conditions, research facility and appropriate working conditions, adequate budgetary resources, pension and long service tenure. In Nepal, for last fifty years, age of the retirement of the Supreme Court judge has remained 65 years whereas life expectancy of Nepali has substantially risen in these years. In many countries, judges are appointed with life tenure. By keeping in mind the fact that after retirement they will not be able to practice as a lawyer and example of other judiciary, the retirement age should be raised to 70 years.

Besides that, predominantly, promotion in the judiciary is made on the basis of experience or seniority where a cadre judge (bureaucrat-promoted from the judicial service) would generally supersede a judge directly joined from the practice. Such practice is also prevailing in Nepal that ought to be changed.

Article 13 of the Basic Principles of the Independence of the Judiciary (Basic Principles) endorsed by the UN General Assembly provides that promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience. This principle clearly categories priority for the promotion and favours ability followed by the integrity and experience. The new Constitution and law should strictly follow this principle to order make judiciary efficient as well as attractive to capable individual.

4. Monitoring

How to judge the judges is a crucial and difficult question faced in the constitutional democracy. To maintain constitutional order and to protect rights of the citizen, the Judiciary must be kept independent from any kinds of interference. However, it cannot be regarded infallible as it also manages by human beings like any other institutions. In democracy, people elect the executive and legislature. They are answerable to their electorate and there are many possibilities to correct them, through period elections or by independent institution or courts. However, people do not directly elect judges and they cannot correct them through the votes. There has to be an independent but strong and effective mechanism to punish judges for their incapacity or behaviour that renders them unfit to continue in their service, such as corruption.

Judges are answerable to their oath to protect the Constitution and defend rule of law without fear and favour. They must maintain high standard, impeccable character and dignity in the eyes of ordinary people. People should feel that they get impartial and speedy justice from the court, presided by the judges. If they fail to discharge their duty for reasons of incapacity or behaviour that renders them unfit to continue, they shall be swiftly removed from the service.

To maintain independent of judiciary, any disciplinary or other action such as suspension or removal should also be undertaken by the JC. However, JC should be properly equipped with law and institutional capacity so that impartial and speedy investigation

and action could be taken against dishonest or accused judge. In Nepal, there is habit of making resign or simply removing a judge even in proved corruption charge without taking further criminal action similar to that of against any other civil servant. That should be corrected and JC should file case against miscreant judge.

However, the Supreme Court judge shall only be removed on the charge of incapacity or behaviour that renders them unfit to continue through impeachment from the highest legislative body with two third majorities.

The decision of the court itself cannot be examined or overruled or corrected by the legislature or any other organ of the state but incapable or unfit judge shall not be allowed to continue for the sake of justice and rule of law. If legislatures fail to remove incapable or unfit judge from the Supreme Court, they are considered to be failed to fulfil their constitutional obligation. It would also be considered that they are indirectly encouraging unacceptable behaviour at the Apex Court as no one except the legislatures can prevent that to continue. For this purpose, a Parliament Committee should be established with thoroughly efficient and professional secretariat working with utmost confidentiality.