

Independence of Judiciary under the Draft Constitution

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Independence of judiciary is one of the most important thinking in modern constitutional law. This thinking emphasizes the fact that the judiciary needs to be kept independent from the other branches of government.

Every sovereign state aspiring for democracy and the rule of law needs an efficient judicial system. This system should provide a mechanism for enforcement of the constitution and laws of the country and for dispute resolution. However, the judicial system should not be involved in drafting laws. This job belongs to the legislature. The judiciary should not administer laws either. This job is the responsibility of the executive arms of the government. As a judicial arm of the state, the judiciary is expected to be separate, independent and able to interpret constitution and laws. It is the responsibility of the judiciary to apply these laws to each case presented to it. A judiciary which is separate from and independent of the government is likely to ensure that the law is enforced impartially and consistently no matter who is in power, and without undue influence from any other source.

The theory of separation of powers therefore highlights the importance of the judiciary in the scheme of democracy and the rule of law in every society. The doctrine of "separation of powers", which provides theoretical background to this concept also emphasizes that each arm of the state should serve as a "check and balance" on each other.

Nepal is drafting a new constitution through an elected sovereign Constituent Assembly. In its preliminary draft, the Committee on Judicial System (one of the eleven thematic committees in the house) has already proposed a four tier court system for Nepal. This four tier court system is made up of the Federal Supreme Court at the top and the District Courts at the bottom. In between these two levels, there is a Provincial High Court in each province at the third tier. Apart from these regular courts of general nature, the draft report of the Judicial System Committee proposes the creation of area, city or village courts or judicial entities to deal with particular type of cases, or other alternative mechanisms for dispute resolution.

The draft constitution has provisions for the establishment of provincial legislatures empowered to create different subject specific benches at District courts to deal with specific issues like domestic violence against women, or Muslim religious and traditional laws. The draft constitution also allows creation of special courts to deal with particular type or nature of cases. It has also provided for a Special Court Martial to be led by a Supreme Court judge to hear appeals against court martial decisions.

This article is basically meant for law students at different levels. It gives an outline of the proposed framework of the judicial system in Nepal, and argues that the given framework under the draft constitution is not adequate to ensure independence of the judiciary.

The Four Tier Court System

In the four tier court system, the Federal Supreme Court is a court of record. It has supervisory powers over all the courts and tribunals (except on judicial proceedings). It also has some qualified powers to interpret the constitution and federal laws. As the apex court of the country, the Federal Supreme Court enjoys the extra-ordinary writ jurisdiction traditionally enjoyed by the Supreme Court to protect the fundamental rights guaranteed to the citizens. It has primary jurisdiction over all federal disputes. It also has appellate jurisdiction over certain defined cases. A Federal Legislature Special Judicial Committee has been proposed in the draft constitution as an institution to perform important constitutional roles in the matter of judiciary. The draft proposes that the Chief Justice and other judges of the Federal Supreme Court should be appointed by the Head of the State on the recommendation of Federal Legislature Special Judicial Committee and with the approval by the majority of the standing members of the federal legislature. This Special Judicial Committee also exercises power of disciplinary action and dismissal of the Chief Justice and other judges. The tenure of the Chief Justice is proposed to be four years from the date of appointment.

The draft provides for a Provincial High Court in each province of the country below the Federal Supreme Court. Each provincial court will have a Chief Judge and other judges as determined by the law of the said province. This court is intended to be working at the midlevel between the Federal Supreme Court at the top and the Provincial District Court at the bottom, and will enjoy the status of the highest court at the provincial judicial hierarchy. As the highest court of the province, it is responsible for inspection and supervision of other inferior courts and may give necessary directives to them. It is also a Court of Record, and capable of taking action where this statute is breached.

The system of appointment of the Chief Judge and other judges of the High Court is identical to the appointment procedure of the Federal Supreme Court judges. In other words, in each province, the Head of the Province appoints the Chief Judge and other judges of the Provincial High Court on the recommendation of the Special Judicial Committee of Provincial Legislature and with the approval of the majority of the standing members of the Provincial Legislature.

The draft also provides that the Chief Judge or other Judges of the Provincial High Court will cease to hold office if the Provincial Legislature passes a resolution of impeachment by two-third majority support.

As in the case of the Federal Supreme Court, the Provincial High Court also has extraordinary writ jurisdiction and jurisdiction over original and appellate cases.

The District Court makes up the third layer of the regular court system as provisioned in the draft. Every District Unit in the Province is to have a District Court. These district courts will have supervisory powers over all the courts at village, municipal and local unit levels. Here again, the Head of the Local House of Representatives will appoint the Judges of the District Court on the recommendation of the Special Judicial Committee

and with the approval of the majority of the standing members of the House of Representative. The qualifications of the district court judges have been specified in the draft as with the case of Supreme Court and Provincial High Court. Their remuneration and conditions of service are to be as determined by law. Identical provisions of the Supreme Court and Provincial High Courts apply in the case of pension and gratuity of these district judges, their impeachment provisions, and their assignment elsewhere. Unless otherwise stated by law, all District Courts have an original jurisdiction to hear all the cases of its territory, to issue an order of habeas corpus, to hear appeals against the decision made by quasi-judicial bodies, to hear appeals against the court of village, local units, and municipality level as constituted by provincial laws.

The preliminary draft of the Judicial System Committee clearly states that a proportional method and the principle of inclusiveness on the basis of population shall be followed in the appointment of judges. Women, indigenous and ethnic communities, Madhesis, Dalits, Muslims and other disadvantaged groups shall also be included while appointing judges following the proportional method and principle of inclusiveness.

In light of these provisions, a Special Judicial Committee in the Provincial Legislature has also been proposed to make recommendations and give advice in accordance with the new Constitution concerning the appointment, transfer, disciplinary action, and dismissal of the Chief Judge and other Judges of the Provincial High/ Supreme Court. This Special Judicial Committee is also empowered to regulate these above mentioned provisions, and to determine its functions, power and duties.

Similarly a Special Judicial Committee of District/ Local House of Representatives is also proposed to make recommendations and give advice in accordance with the new Constitution concerning the appointment, transfer, disciplinary action, and dismissal of the Judges of District/Local Courts, and on other matters relating to judicial administration.

Additionally, there is a provision for a Federal Judicial Service Commission. This Commission has the responsibility for recommending the Government of Nepal in appointing, transferring or promoting gazetted officers of the Judicial Service or in taking departmental action concerning such officers in accordance with law. This is based on the past experience of the Judicial Service Commission. The Federal Judicial Service Commission shall have the Chief Justice of the Federal Supreme Court as its Chairperson and the Federal Minister for Law and Justice, the senior most judge of the Federal Supreme Court, the chairperson of the Public Service Commission, and the Federal Attorney General as its members. A Provincial Judicial Service Commission has been proposed in the case of Provinces as well with similar terms of reference and membership structure from the concerned province.

The draft report of the Judicial System Committee has continued with the erstwhile system of an Attorney General in Nepal. The Attorney General is to be appointed by the Head of the State on the recommendation of the Executive Head. Comparable qualifications of the Chief Justice of the Federal Supreme Court are required for the

Attorney General position. The Attorney General holds office during the occupancy of the Executive Head of State.

The draft gives continuity to the Attorney General's role as the chief legal advisor to the Government of Nepal. The Attorney General or officers subordinate to him/her are to represent the Government of Nepal in suits in any court in which the rights, interests or concerns of the Government of Nepal are involved. Generally, the Attorney General has the right to make the final decision to initiate proceedings in any case on behalf of the government in any court or judicial authority. His/her opinions are to be taken while withdrawing the governmental suits. Additionally, the Attorney General has the power to appear and express opinions on any legal question in the federal legislature. The draft gives him/her the responsibility to enforce the interpretation of law and implementation of the legal principles propounded by the Supreme Court in the course of litigation. These powers of the Attorney General are largely inherited from the constitutional traditions of Nepal. The Attorney General is also responsible as before to prepare annual reports every year for submission to the legislature through the head of state.

The draft report of the Judicial System Committee provides for a Prosecutor General, as determined by law, under the control and direction of the Attorney General. The details of the Prosecutor General's appointment, functions, powers, conditions of service etc are to be determined according to the concerned laws.

Under a federal set-up, an Attorney General has been provided in each province of the country as the chief legal advisor to the provincial government. This system is akin to the system proposed for the federal government. The head of the province will appoint the provincial Attorney General on the recommendation of the head of the executive. The qualification of the appointee must be equivalent to the qualifications of the provincial high/supreme court judge. The Attorney General is also entitled to the remuneration and other facilities enjoyed by a provincial judge. The office of the Attorney General becomes vacant upon submission of his/her resignation or on removal by the head of the province on the recommendation of the head of the executive. A provincial Prosecutor General has also been envisaged. His/her appointment, qualification, conditions of service, functions and powers are to be determined according to the concerned provincial laws.

Similarly, every District/Local unit shall have a District/Local Prosecutor. The appointment, qualification, conditions of service, and functions, duties and right of the District/Local Prosecutor are to be as specified by provincial laws. They are also on equal footing with the District/Local Judges in terms of conditions of service and facilities.

Comparative Scenario

The history of the modern independent judiciary in Nepal dates back to 1950, when a revolution overthrew the hereditary and despotic prime ministerial system. This system was replaced by an interim constitutional regime meant to be a modern constitutional

democracy. Different forms of judiciary have been in place during the last 59 years within the framework of Nepal's unitary state.

Comparative Status of Supreme Court under Different Constitutions

Supreme Court Under the 1990 Constitution	Supreme Court Under the 2007 Constitution	Federal Supreme Court Under the Draft Constitution
<ul style="list-style-type: none"> • Courts to exercise powers related to justice • Appointment of Chief Justice on the recommendation of Constitutional Council (Comprising of Prime Minister, a senior most Justice of the Supreme Court, Speaker of the House of the Representatives, Chairman of National Assembly & the leader of the opposition in the House of Representatives) • Chief Justice always from among the Supreme Court Justices • Appointment of other Judges by Judicial Council (comprising of Chief Justice, the Minister of Justice, the two senior most Judges of the Supreme Court & one distinguished Jurist to be nominated by the King) • Judges guaranteed tenure till 65; remunerations, privileges & conditions of service not to be altered to their disadvantage • Impeachment by a two third majority of the House of Representatives allowed for the reasons of incompetence, misbehaviour, etc. • Power to judge over issues of constitutionality • Writ remedies & judicial review 	<ul style="list-style-type: none"> • Courts to exercise powers related to justice • Appointment of Chief Justice on the recommendation of Constitutional Council (Comprising of Prime Minister, a senior most Justice of the Supreme Court, Speaker of the House of the Representatives, Chairman of National Assembly & the leader of the opposition in the House of Representatives) • Chief Justice always from among the Supreme Court Justices • Appointment of other Judges by Judicial Council (comprising of Chief Justice, the Minister of Justice, the two senior most Judges of the Supreme Court & one distinguished Jurist to be nominated by the King) • Judges guaranteed tenure till 65; remunerations, privileges & conditions of service not to be altered to their disadvantage • Impeachment by a two third majority of the House of Representatives allowed for the reasons of incompetence, misbehaviour, etc. • Power to judges over issues of constitutionality • Writ remedies & judicial review 	<ul style="list-style-type: none"> • Courts to exercise powers related to justice • <i>Appointment, disciplinary action, dismissal of Chief Justice and Justices on the recommendation of Federal Legislature Special Judicial Committee and simple majority vote of the legislature.</i> • <i>Chief Justice maybe picked up from outside the sitting Federal Supreme Court Judge</i> • <i>Judges guaranteed tenure till 65; remunerations, privileges & conditions of service not to be altered to their disadvantage</i> • <i>Impeachment by a two third majority of legislature allowed for the reasons of incompetence, misbehaviour, etc.</i> • <i>No power to judge over issues of constitutionality; no power to interpret the constitution or laws as much as they concern positions and powers of national importance, and issues directly related with politics</i> • <i>Writ remedies & limited judicial review</i>

<ul style="list-style-type: none"> • Judicial Service Commission for appointment, transfer, and promotion of gazetted officers • Orders and decisions of courts to be binding 	<ul style="list-style-type: none"> • Judicial Service Commission for appointment, transfer, and promotion of gazetted officers • Orders and decisions of courts to be binding 	<ul style="list-style-type: none"> • <i>Federal Judicial Service Commission for appointment, transfer, and promotion of gazetted officers</i> • <i>Orders and decisions of courts to be binding</i>
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As of today, Nepal’s judiciary operates within the framework of its parliamentary democracy. As far as judiciary is concerned, the Interim Constitution of Nepal 2007 has inherited almost the same judicial set up that existed under the 1990 Constitution.

All powers relating to justice in the country are exercised by courts and other judicial institutions in accordance with the constitution, the laws and the recognized principles of justice. The judicial branch is led by the Supreme Court, the highest court in the judicial hierarchy of the land. In this capacity, the constitution confers upon the Supreme Court not only original and appellate jurisdiction, but also extraordinary constitutional jurisdiction. This includes the authority of the Supreme Court to hear petitions challenging the constitutionality of any law, and declare such law or any part of it void in order to ensure that justice is done. It can also, when convinced, respond to public-interest litigation involving constitutional issues regarding the rights of the marginalized.

As the guardian of the constitution, the Supreme Court hitherto this day has all the requisite powers and status that such responsibilities call for. All other courts in the country -- that is Appellate Courts (currently 16 in number), and District Courts (one for each of the 75 administrative Districts in Nepal) -- are subordinate courts and are administered by the Supreme Court. Based on constitutional prescriptions, the Administration of Justice Act of 1991 has empowered the Supreme Court to inspect and supervise its inferior courts, and give them directives, which they are obliged to implement. The Supreme Court is a court of record -- its decisions are accepted to be of evolutionary value and are not to be challenged when produced before any court. They are binding on all and the Court has the power to mete out punishment to anyone it holds in contempt of court.

In addition to Nepal’s three-tier unitary judiciary, there are several tribunals and specific types of courts established by parliamentary statutes. They are meant to hear special types of applications, claims and controversies. There is one Administrative Court, two public-debts courts, four revenue tribunals, one Town Development Committee Court, one Military Court, one Labour Court and one Constituent Assembly Court. The Constituent Assembly Court has been functioning since early this year. It deals exclusively with complaints regarding CA elections. Except for the CA Court, all these special courts and tribunals are created and regulated under the terms of their enabling parliamentary statute. These statutes define the number, size and location of courts, as well as their territorial and subject-matter jurisdiction. Where there are complicated questions of law,

or issues of fundamental rights and constitutional interpretation, cases decided by these courts or tribunals may be referred to the appellate courts, or the Supreme Court, according to the terms of the enabling law.

The structure of Nepal's court system is one of the simplest in the region. It is constitutionally defined in substance, and statutorily elaborated in detail. The Office of the Attorney General of Nepal is responsible for catering to the legal requirements of the Government and public institutions and the government attorneys working under this office handle public prosecutions. They have their offices in each district of the country.

Important Issues

Nepal has been experiencing modern judiciary since many decades. If the proposed arrangements are studied against the arrangements in the immediate past, there are many changes. The first and foremost change of course is the reorganization of judiciary along a federal line. The erstwhile unitary system of judiciary has been given up. There is a new structure now. The draft report of the Judicial System Committee recommends three layers of courts in Nepal: the Federal Supreme Court; Provincial High Court; and District Courts. This more or less reflects the existing three-tier court structure that existed before, but each tier is tied to the scheme of division of powers between the centre, province and district units of government. In any case, the draft report is firm on upholding that the powers relating to justice in Nepal shall be exercised by courts and other judicial institutions in accordance with the provisions of the Constitution, laws and recognized principles of justice. All shall abide by the orders and decisions of the courts.

The draft constitution has created a Federal Legislature Special Judicial Committee. This has been proposed to make recommendations and give advice concerning the appointment, transfer, disciplinary action and dismissal of the Chief Justice and other Judges of the Federal Supreme Court, and other matters relating to judicial administration.

The Committee comprises of the Vice-Chair of the Federal Legislature as its Chairperson, the Federal Minister of Law and Justice as a member and other members not exceeding nine, elected by the Federal Legislature from among its members. These members will be elected proportionally on the basis of population represented by them in the Legislature and on the principle of inclusiveness.

It is the responsibility of the Federal Legislature Special Judicial Committee to prepare and submit a list of potential candidates for the Chief Justice and other Judges of the Federal Supreme Court adhering to the principle of inclusiveness and proportional representation to the Federal Legislature for approval. The Head of the State shall appoint the Chief Justice or any other Judge of the Federal Supreme Court from the list as approved by the Federal Legislature.

In the same vein, the committee also makes recommendations to the Head of the State for any disciplinary actions, or for dismissal of the Chief Justice and other Judges of the

Federal Supreme Court from their posts in case of any complaint regarding appointments. It also makes recommendations on other matters related to the judicial administration.

In the case of contradictions, the Federal Legislature Special Judicial Committee has the power to interpret the Constitution and Federal Laws. It also has the power to interpret issues relating to the positions of the persons of national importance and other issues directly related to politics. The position of national importance shall include the Head of State, or the Executive Head or any position that is elected by the legislature.

There is significant development regarding the access to the provision of justice. The draft report of the Judicial System Committee categorically states that by virtue of their laws provinces may constitute area, village or town level courts, or judicial entities or bodies for dispute resolution by alternative means under their territorial jurisdiction. Such entities or bodies are to ensure easy access to justice to all citizens by hearing cases stipulated by provincial statutes. Similarly, the draft allows the provinces to create special benches at District/local courts, or even to create courts or entities under their supervision, to deal with disputes involving domestic violence, child rights, Dalits, indigenous people, Madhesis, and Muslims. It also has dispute resolution provisions for disputes involving cultural, religious and traditional laws and customs of minority communities.

The draft report of the Judicial System Committee also holds that the law may establish and constitute special types of courts, judicial institutions or tribunals for the purpose of hearing special types of cases. To avoid misuse of this provision, the report provides for two safeguards. A court, judicial institution or tribunal shall not be created for the purpose of hearing a particular case alone. Similarly, as an additional feature, the draft prohibits handing over any criminal case that may result in imprisonment exceeding a term of six months to any entity other than (a regular) court. This later provision, which is new to the legal system of Nepal, further limits the possibility of abuse of power to constitute special courts.

The draft allows constitution of military courts as before. But the report has a new arrangement regarding the Court Martial that did not exist before. A Special Court Martial has been envisioned on the chairpersonship of the judge of the Federal Supreme Court to hear appeals on decisions made by Court martial within the army discipline as the court of first instance. This is a remarkable feature.

The power of the Federal Supreme Court to declare any law inconsistent with the Constitution has been taken away by the legislature. No citizen can now file a petition in the Federal Supreme Court to have any law or any part thereof declared void on the ground of inconsistency with the constitution. It is no longer the job of the Federal Supreme Court to see if there is unreasonable restriction on the enjoyment of fundamental rights conferred by the constitution. However, the Federal Supreme Court continues to have writ jurisdiction for the enforcement of the fundamental rights conferred by this Constitution. It also has writ jurisdiction for the enforcement of any other rights for which no other legal remedy has been provided or when such remedies

provided are inadequate or ineffective. It also has jurisdiction for the settlement of any constitutional or legal questions involved in any dispute of public interest or concern.

As the highest court of the land, the Federal Supreme Court has the power to interpret the Constitution and federal laws except the issues that relate to the positions and powers of national importance. These positions and powers of national importance are those relating to the President of Nepal, or executive chief of the country, or the positions elected by the legislature. These exceptions also apply to the subjects that directly concern political matters and issues relating to the laws that are inconsistent with the constitution. The description is fairly exhaustive.

One can see the change in the appointment procedures of the Chief Justice and other Judges of the Supreme Court as well as the provincial and District/local courts. It heralds a departure from the erstwhile traditions. The draft report of the Judicial System Committee has clearly dispensed with the system of Constitutional Council and Judicial Council, which existed as semi-political bodies to deal with the appointment procedures of these Judges. Now, it is the Federal Legislature Special Judicial Committee, a political body of legislators, who will do the job. The head of the state will appoint the chief justice or other judges of the Federal Supreme Court on the recommendation of this Special Judicial Committee and with the approval of the majority of the standing members of the Federal Legislature.

Similarly, the system of appointment of Chief Judge and other judges of the High Court is also identical to the appointment process of the Federal Supreme Court judges. In other words, in each province, the Head of the Province appoints the Chief Judge and other judges of the Provincial High Court on the recommendation of the Special Judicial Committee of Provincial Legislature and with the approval of the majority of the standing members of the Provincial Legislature.

The Chief Justice of Nepal may be appointed from outside the Supreme Court Judges of the country. There is no bar for anybody duly qualified to be appointed as the Chief Justice of Nepal - be it from the bar, the university law faculties, or other institutions. It is possible for independent jurists or legal researchers to be considered for appointment.

The proposed dismissal procedures are also new to Nepal. The Federal Legislature Special Judicial Committee not only has the power to recommend candidates for the appointment as Chief Justice or a Judge of the Supreme Court, but it can also take disciplinary action against them, and recommend their dismissal, when needed. It has the required investigation powers as well. In fact the Federal Legislature Special Judicial Committee has powers to make recommendations on all justice administration issues. This system trickles down to the provinces as well within the federal parameters.

Major Drawbacks

- a. The provision of the legislative body for appointment and dismissal of Judges, including the Chief Justice has been largely criticized. This has raised debates about the independence of judiciary. It has been widely perceived that the appointment or dismissal process of the Chief Justice and Judges are politicized under this new arrangement.
- b. Another debatable issue is the power given to the Federal Legislative Committee to interpret the constitution on political and some other issues of national importance and the inconsistencies between the laws and the constitution. This is debatable because it could very well affect the well recognized principles of separation of powers and effective checks and balances.
- c. The appointment of the Chief Justice from outside the judicial service also raises some questions although this is an internationally acceptable notion. It is perceived that the selection of non-political persons in the judiciary cannot be guaranteed because of the power given to the legislature to appoint the Chief Justice and Judges.
- d. While mentioning about forming a Provincial Special Judicial Committee, the committee seems to have made a mistake (typing error) by giving the Federal Legislature an authority to elect the members of the Committee from among the members of the Provincial Legislature.
- f. The Chief Justice, Chief Judge and other judges of the Federal Supreme Court and Provincial High Court are deprived of the opportunity to defend themselves in case of a motion of impeachment.

Conclusion

People might raise doubts on the observance of the rule of law due to politicization of the judiciary's personnel. The process of declaring the law inconsistent to the Constitution will be affected, which will ultimately affect the status of rights guaranteed by the constitution. Judiciary being under the control of the legislature will affect people's trust towards the transparency of judiciary. Although the appointment of judges will be inclusive under the draft constitution, the revised system will not be able to support the theme of independence of judiciary by and large.