

Restructuring Nepal's judiciary

Few changes needed to add constituent unit dimension to court system



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Lawyers and legal workers stage a sit-in at the Supreme Court in Kathmandu. The Nepal Bar Association organized the protest to protect the court from what they feared were threats to its freedom and dignity. Lawyers have played an important role in advocating for democracy in Nepal.

BY BIPIN ADHIKARI

One of the major issues before the Constituent Assembly of Nepal is deciding on the mechanics of devolving judicial power to the far-flung villages in the new state structure.

The Constituent Assembly (CA), a body of 601 members formed in the election held on 10 April 2008, is tasked with

writing a new constitution for Nepal within two years under the authority of the interim constitution.

The history of the modern independent judiciary in Nepal dates back to 1950, when a revolution overthrew the hereditary and despotic prime ministerial system, a system in which the

post of prime minister was passed from one member to another member in the same family. It 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 58 years within the framework of Nepal's unitary state. Thus,

Bipin Adhikari is a constitutional expert based in Kathmandu.

one of the key subjects of national debate in modern Nepal is restructuring the judiciary – in particular, devolving judicial power to the autonomous constituent units, according to the aspiration of the people of Nepal.

How Nepal's judiciary works today

Nepal's judiciary operates within the framework of its parliamentary democracy. 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. Judicial procedures are adversarial, largely based on common-law principles and lawyers play a key role in the process of judicial decision making.

Nepal has a National Code which deals with traditionally important:

- civil laws
- penal laws, and
- court procedures

Many of the modern areas of criminal and civil laws are not covered by the National Code as such. They were dealt with by special statutes enacted by the legislature after 1962 on different dates.

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 has all the requisite powers and status that such responsibilities call for. All other courts in the country -- that is Appellate Courts (of which there are currently 16), and District Courts (of which there is 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 are obliged to implement them. 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.

Moving towards a devolved system

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



The Supreme Court of Nepal in Kathmandu. The Interim Constitution provides for three tiers of courts: the District Courts, the Court of Appeal and the Supreme Court.



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 unified and unitary judiciary makes it easy to administer and to ensure necessary quality control. All judges are appointed on the recommendation of the Judicial Council led by the Chief Justice who, in turn, is appointed and supervised by a high-profile constitutional body. A flourishing law profession, a legally qualified judicial bureaucracy and an independent judiciary complement each other. This does not mean that the present three-tier structure and the workings of the judiciary are not in need of reform. But, to effect change, it may not be necessary to start from a blank slate and create everything anew.

There are many issues that could be reopened to ensure devolution of judicial power to the newly formed constituent units. It is important that the political issues are settled first -- including the degree of internal autonomy of these constituent units and their law-making powers. Establishing the number of constituent units and their territorial limits is also a substantial part of the job.

Options for change

However, there are feasible options. A four-tier judiciary is one option, with a National Supreme Court at the top, almost as it exists today, including a National Court of Appeal in each

devolved territory, acting under national laws. The court of appeal would have appellate jurisdiction over the lower courts and tribunals. No doubt, in such a changed context, the National Supreme Court should be looked at more as a constitutional court.

Apart from carrying out its normal duties as guardian of the fundamental rights of Nepalese citizens, it would deal with inter-constituent unit as well as national-constituent unit issues. Similarly, the National Courts of Appeal, replacing the existing Appellate Courts, may well have to serve as the top courts in each constituent unit, assuming some additional constitutional jurisdiction, and in effect become the local arm of the National Supreme Court.

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Again, if the current 75 administrative districts are divided into some workable constituent unit set-up of eight or 10 constituent units, with a national government at the top, it will be necessary to provide for a locally recruited and operated court of the constituent unit in each constituent unit. There would also be a locally recruited and operated district court in each district within the constituent unit.

As such, the existing district courts could continue working as the court of first instance for cases coming under laws and institutions of constituent units. Each constituent unit court in its area would not only enjoy the status of appellate court over all district courts, but also serve as trial court for all cases falling under the laws and institutions under the national jurisdiction. As such a court of the constituent unit, locally recruited and operated, would function not only for the constituent unit; but also as the court of first instance for the centre.

It is at the constituent unit level that access to justice in Nepal must be

ensured first. At this level, there is a need for an approachable judiciary. It must be simple enough to be accessed without the mediation of lawyers and must function in a participatory and transparent manner. Such an achievement would definitely require redefining the number, size and location of district courts, as well as their territorial and subject-matter jurisdiction.

For example, each district court (as suggested above) could have three or four separate one-member benches, according to the subject specificity, such as a family bench (dealing with marriage, divorce, domestic violence and women's rights), civil bench, criminal bench and small business bench.

Simplifying existing trial-court procedures should encourage greater respect for the law, making the judiciary more accessible to the public and self-represented litigants. Such restructuring at the district-court and constituent unit court

level could provide greater uniformity in rules and procedures — simplifying the tasks of lawyers, clerical personnel and judges, and cutting the costs of litigation.

There have been principles established and lessons learned in the restructuring of many other smaller democracies, especially in budgeting, planning and personnel administration, integration and standardization of the judiciary's information-management systems, judicial compensation and access to justice. These may be applicable in a wide variety of court-reform contexts, whether to justify a court's existence or its closure, or to accommodate political sensitivities. The CA must also be mindful of serious flaws in the current judicial system, that it is not accessible to most people in the countryside. Even worse, it is increasingly acquiring an elitist character. The problems start right there.