

SPOTLIGHT ON PROCESS OF SELECTION AND APPOINTMENT OF JUDGES IN NEPAL

INTRODUCTION

Courts in Nepal can be broadly classified in to two categories: 1. Regular Courts as provided in the constitution and 2. Special Courts as provided in the special legislations enacted by Parliament. The selection, appointment and promotion policy guidelines for the judges of regular courts are broadly mentioned in the Interim Constitution 2063 (hereinafter called constitution) itself. The laws such as Judicial Council Act 2047 B.S. and Judicial Council (procedure) Regulation 2056 B.S. further elaborate and strengthen the constitutional policies on judicial appointments. In contrast to the selection, appointment and promotion of the judges in regular courts, the parent legislation of the Special Courts and Tribunals provide its own selection and appointment policy for judges of the special courts. The review of the special legislations establishing special courts reveal that the approach of the government and the Parliament has been to bypass the regular courts in special disputes and establish executive as the deciding authority in appointing process.

The regular courts are very important institutions for dispute settlement and enforcement of the rule of law in Nepal. They consist of three tier courts, namely, District Court, Appellate Court and Supreme Court. Along with these regular courts, there exist Military Court, Special Court, Labor Court, Administrative Court, Debt Recovery Tribunal and Revenue Tribunal as special courts.

Level of Judges	Appointing Authority	Pool
District Judges	Judicial Council	Qualified Gazetted Officers from Judicial Service (Interim constitution has made a provision for recruitment of district judges from the members of the bar through open competition exam. This option has however not been exercised as of now.)
Appellate Court Judges	Judicial Council	1. District Judges 2. Members of the Bar, Academia, Public Prosecutors, Civil Servants from Judicial Service.
Supreme Court Judges	Judicial Council	1. Appellate Court Judges. 2. Members of the Bar, Academia, Public Prosecutors, Civil Servants from Judicial Service.
Chief Justice of Nepal	Constitutional Council	Supreme Court judges
Military Court	Chief of Army Staff (Subject to overriding power of Nepal Government)	Army Commissioned Officers
Special Court	Nepal Government	Judges of the Appellate Court
Administrative Court	Nepal Government	Sitting judges of Appellate Court/senior lawyers Administrative service officers with ten years experience

		Officers from the Judicial Service
Labor Court	Nepal Government	First class gazetted officers from the Judicial Service
Tax Tribunal	Nepal Government	Each of the three members of the Tribunal coming from following three different pools. <ul style="list-style-type: none"> • Independent Lawyers/Judges • Independent Tax Expert • Independent Accounts Expert
Debt Recovery Tribunal	Nepal Government	Gazetted Officers from Law Ministry/District Judges or persons qualified to be district judge; Sr. Chartered Accountants/ Sr. Banking Officers and professionals
Debt Recovery Appellate Tribunal	Nepal Government	Judges from Appellate Court or Ex-judges from Appellate Court or persons qualified to hold such post.

QUALIFICATIONS FOR APPOINTMENT AS A JUDGE

The Constitution, The Legislature-Parliament Rules 2063, Judicial Council Act 2047 B.S., Judicial Council (Procedure) Rule 2056 B.S are the governing laws for appointment of the judges. The constitution and the law prescribe the following qualifications as a basic minimum (but not the only qualification) for the appointment of judges. They are:

Level of Judges	Qualifications Required
District Judge	<ol style="list-style-type: none"> 1. He/she has to be a citizen of Nepal; 2. He/she has a bachelors degree in law; and 3. He/she has worked as a gazetted second class officer in judicial service for at least four years.
Appellate Judge	<ol style="list-style-type: none"> 1. He/she has to be a citizen of Nepal; 2. He/she has a bachelors degree in law; and 3. He/she has worked as a District Judge or worked in any other equivalent post for a period of at least seven years or has practiced law for at least ten years as a law graduate advocate or has taught law or done research thereon or has worked in any other field of law or justice for at least ten years.
Supreme Court Judge	<ol style="list-style-type: none"> 1. He/she has to be a citizen of Nepal; 2. He/she has a bachelors degree in law; and 3. He/she has worked as an Appellate Judge or worked in any other equivalent post of judicial service for at least seven years or has practiced law for at least fifteen years as a law graduate advocate or is a distinguished jurist who has worked for at least fifteen years in the judicial or legal field .
The Chief Justice of Nepal	Any person who has worked as a judge of the Supreme Court for minimum of three years.

JUDICIAL COUNCIL AS A NOMINATING AUTHORITY

Under the former constitution of 2047 B.S. His Majesty the King formally appointed the judges of regular courts on the recommendation of the Judicial Council which was under the influence and control of the leaders of the judiciary¹³. The Chief Justice of Nepal however is selected and recommended by the Constitutional Council.¹⁴ The promulgation of Interim Constitution 2063 however has changed the power relation in appointment regime. The status of the King as an appointing authority has been deleted. Under the new arrangement in the constitution the Prime Minister appoints the Chief Justice on the recommendation of the Constitutional Council and the Chief Justice appoints the other judges on the recommendation of the Judicial Council¹⁵. The Interim Constitution has also changed the composition of the Constitutional Council and Judicial Council. Judicial Council is now under the influence and control of the political wings of the government. Majority of the members are from non-judicial constituencies.¹⁶ The Judicial Council and Constitutional Councils, nevertheless, are the independent constitutional bodies. Judicial Council consists of members representing both the executive and the judiciary. The institution of Judicial Council is led by the Chief Justice of Nepal. In Nepal the

¹³ **Article 93 of the Constitution of Kingdom of Nepal 2047 B.S.**

Judicial Council:

- (i) There shall be a Judicial Council to make recommendations and give advice in accordance with this Constitution concerning the appointment of, disciplinary action against, and dismissal of judges, and other matters relating to judicial administration, which shall consist of the following as its Chairman and members:-
- | | | |
|-----|---|--------------------------------|
| (a) | the Chief justice, | ex-officio Chairman; |
| (b) | the Minister of Justice, | ex-officio member; |
| (c) | two senior-most Judges of the Supreme Court, | ex-officio members; and |
| (d) | one distinguished jurist to be nominated by His Majesty. | Member |
- (ii) Notwithstanding anything contained in clause (i) above, if it becomes necessary for the Judicial Council to consider any matter relating to a Judge who is a member of the Council or to make a recommendation to His Majesty about such Judge, the Judge next in seniority shall take part as a member.
- (iii) The term of office and privileges of the member referred to in sub-clause (d) of clause (i) shall be as prescribed by His Majesty.
- (iv) The powers and duties of the Judicial Council other than those referred to in clause (i) shall be as prescribed by law.
- (v) The Judicial Council may frame rules to regulate its business. Such rules shall become effective upon approval by His Majesty

¹⁴ See footnote 3.

¹⁵ See Article 103 and 109 of the Interim Constitution.

¹⁶ See Article 113 of the Interim Constitution: The composition of the Judicial Council under the Interim Constitution is as follows:

- | | | |
|-----|---|-----------------------------|
| (a) | the Chief justice, | ex-officio Chairman; |
| (b) | the Minister of Justice, | ex-officio member; |
| (c) | one senior-most Judge of the Supreme Court, | ex-officio members; |
| (d) | one distinguished jurist to be nominated by Prime Minister | Member |
| (e) | One senior advocate appointed by Chief Justice on the recommendation of the Nepal Bar Association . | Member |

judges are not selected and recommended by a pure executive body. Unlike in many countries such as India and U.K. the cabinet has no role to play except influence its decision through Minister for Law and Justice and other members of the Judicial Council.

Under the Constitution of the Kingdom of Nepal 2047 there were no provisions requiring legislative approval of members recommended by the constitutional bodies such as Constitutional Council and Judicial Council. Legislature had no role in selection, appointment and promotion of judges in Nepal. Its role was limited to impeachment of the Supreme Court judges for incapacity, misbehavior and failure to discharge duty in good faith.

When the Constitution of 2047 introduced the concept of Judicial Council, it was generally applauded as a creative invention to ensure healthy selection process and an institutional arrangement to prevent personal biases of both inside and outside political wings of the government. The review of the selection and appointment process in Judicial Council over the last fifteen years shows that there was very minimal governmental influence on appointment and promotion of career judges as most of them were selected on a routine basis of seniority. There were some cases where government was able to push their candidates from the Bar. But this practice had also been controlled with the introduction of Coordination Committee as an intermediary body to select and recommend the candidates to the Judicial Council.

The Judicial Council selects and recommends candidates for appointment as District Court Judges, Appellate Court judges and Supreme Court judges. The candidate for Chief Justice, however, is decided and recommended by the Constitutional Council. With the promulgation of Interim Constitution 2063, the composition of the Constitutional Council has also undergone a change. As of now the Prime Minister not only leads but can also control the decision making process in the council. Article 149 of the Interim Constitution has given the majority of the members coming from executive side a final say in appointment of Chief Justice.¹⁷ The analysis of the constitutional changes clearly

¹⁷ Article 149 of the **Interim Constitution 2063** provides as follows:

Constitutional Council:

(i) There shall be a Constitutional Council, for making recommendations in accordance with this Constitution for appointment of officials to Constitutional Bodies, which shall consist of the following as Chairman and members:-

- | | | |
|-----|---|------------|
| (a) | the Prime Minister | Chairman; |
| (b) | the Chief justice | Member; |
| (c) | the Speaker of the Legislature Parliament | Member; |
| (d) | three ministers nominated by the Prime Minister | Member;and |

(ii) *For the purpose of recommendation of an appointment of the Chief justice, the Constitutional Council shall include among its members the Minister of justice and a Judge of the Supreme Court.*

(iii) The functions, duties and powers of the Constitutional Council shall be as determined by this Constitution and other laws.

suggest that the political wings of the government are not willing to leave the judiciary in the hands of judges alone. There may be two reasons for this. Firstly the leaders of the major parties may have come to conclusion that the judiciary has generally failed to come forward with courage in times of highhandedness of monarchy and that is basically due to conservative and bureaucratic background of the most of the cadre judges. Secondly the leaders may have also thought that the present leadership of the judiciary may not be able to adequately respond to the demands of the aspiration of new Nepal. The Interim Constitution 2063 therefore made a departure from the past and introduced major changes in the constitutional scheme of Nepal. The message was loud and clear. Firstly Political wings of the government have the mandate and responsibility to create a judiciary that is responsive to democratic aspirations of the people and Secondly, the judges are finally accountable to people through their elected representative for their overall performance.

The review of the past performances reveal that in most cases decisions in Judicial Council were taken by unanimity. The trend remains the same as of now too. This has at times led to complaints, though not substantiated, of political bargains between the judiciary and government in selection and promotion of judges. Generally speaking Nepal Government keeps a watch on judicial appointments and promotions through Ministry of Law, Justice and Parliamentary Affairs. The Judicial Council is led by the Chief Justice and he is supported by one senior judge (previously two senior judges). There used to be majority representation from judiciary in Judicial Council in the past. But under present regime it is the majority of the members from non-judiciary constituencies who rule the decision making process. The judges have now a role to check and balance decision making process and not to dictate them as before.

Article 117 of **the Constitution of the Kingdom of Nepal 2047** on the other hand provided the composition of the Constitutional Council as follows:

Constitutional Council:

- (i) There shall be a Constitutional Council, for making recommendations in accordance with this Constitution for appointment of officials to Constitutional Bodies, which shall consist of the following as Chairman and members:-
- | | | |
|-----|---|------------|
| (a) | the Prime Minister | Chairman; |
| (b) | the Chief justice | Member; |
| (c) | the Speaker of the House of Representatives | Member; |
| (d) | the Chairman of the National Assembly | Member;and |
| (e) | the Opposition Party leader in the House of Representatives | Member. |
- (ii) *For the purpose of recommendation of an appointment of the Chief justice, the Constitutional Council shall include among its members the Minister of justice and a Judge of the Supreme Court.*
- (iii) The functions, duties and powers of the Constitutional Council shall be as determined by this Constitution and other laws.
- (iv) The Constitutional Council constituted pursuant to clause (i) shall have the power to regulate its working procedures on its own.

APPOINTMENT OF THE CHIEF JUSTICE OF NEPAL

Article 87 (1) of the former constitution made it clear that the appointment of the Chief Justice, unlike in other countries, was to be made by the King on the recommendation of the Constitutional Council, a body created under Article 117 of the then Constitution for the purpose of appointing heads of most of the constitutional bodies. The creation of the Constitutional Council was suggested by the framers of the constitution then as a way of minimizing the monopoly of either the King (who had been absolute in Nepal before 1990) or the majority party government in Parliament (which is the general practice in other countries adopting the Westminster model of democratic government).

Since the Constitution of the Kingdom of Nepal 2047 gave an important role to the Chief Justice of Nepal, the framers of the constitution felt that the establishment of the Constitutional Council would be critical for the establishment of independent judiciary. This was specially so in view of the past practice of meddling with judicial power to ensure the verdict in favor of the establishment. It was felt that the new appointment system would enable the state to find and appoint people to head the Supreme Court and the judiciary who would be independent and capable of maintaining the dignity of the position to which he or she was appointed. The presence of the opposition leader in Constitutional Council was the most significant feature of the whole appointment process. The other judges of the Supreme Court were appointed by the King on the recommendation of the Judicial Council (under Article 93). The Judicial Council is headed by the Chief Justice and it did not provide birth to the opposition party leader in Parliament. The idea obviously was to ensure national consensus in judicial leadership.

Despite the apparently free hand given to the Constitutional Council by Article 87(1) of the former constitution¹⁸, a convention had been established since 1990 that in the appointment of a Chief Justice of Nepal, " seniority" – in terms of date of appointment to

¹⁸ **Article 87 of the Constitution of the Kingdom of Nepal 2047**

Appointment, Qualifications and conditions of Service of judges of the Supreme Court :

- (i) His Majesty shall appoint the Chief Justice of Nepal on the recommendation of the Constitutional Council, and other judges of the Supreme Court on the recommendation of the Judicial Council. The tenure of office of the Chief Justice shall be seven years from the date of appointment.
- (ii) Any person who has worked as a judge of the Supreme Court for at least five years is eligible for appointment as Chief Justice.
- (iii) Any person who has worked as a Judge of an Appellate Court or in any equivalent post of the Judicial Service for at least ten years; or has practiced law for at least fifteen years as a law graduate advocate or senior advocate; or who is a distinguished jurist who has worked for at least fifteen years in the judicial or legal field is eligible for appointment as a Judge of the Supreme Court.

the Supreme Court bench – must be respected.¹⁹ The intention of the Constitutional Council in establishing this tradition had been to restrain itself from making any controversial decision in the matter of appointing leader in judiciary. Such a tradition was not fully complied with during the Pachayat regime and there are instances where junior judges of the Supreme Court were appointed as Chief Justice with a view of bringing in somebody sympathetic to the regime. Nepal is also aware of a bitter Indian experience of Mrs. Indira Gandhi trying to cow down the judiciary by appointing junior judge as the Chief Justice during the time of 1975 emergency.

The development of this convention, however, does not mean that the Constitutional Council has waived its power to give appropriate leadership by appointing a competent junior judge as Chief Justice. The Council could always dispense with the "seniority convention" if the judge "next in line" for the appointment was not thought to be suitable. It may also be noted that the appointment of a Chief Justice on the basis of seniority alone has led to a number of short term appointments in rapid succession which has not allowed sufficiently effective leadership to be given to the judiciary, and has generated numerous judicial and bureaucratic problems through instability. Seniority as a sole basis for the appointment of the chief justice is fraught with two major problems. Firstly, it makes the senior most judge complacent in his or her performance. He or she may not think it necessary to go out of his or her routine work to prove his worthiness as a candidate for chief justice. Secondly, the junior judges have no incentive to give their extra effort to make judiciary result oriented. The obvious incentive for a next judge on line is to carry on routine work avoiding controversies and risks in decision making process. The post of Chief Justice has got to be earned and it should not necessarily come as a time bound gift. This however does not mean that the constitutional council should be allowed to bypass the seniority and pick and choose anybody from the pool. Giving such liberty would be the end of independence of judiciary and beginning of judicial sycophancy. Judges who should be limiting the powers of the government would be in no position to do justice to the basic principles of constitutionalism and there will be virtual rush for unhealthy competition to please the political masters for future appointment as a chief justice of Nepal. So, the issue is where to draw a line? The answer is not easy. Judicial leadership planning should start from the very beginning. The chief justice in making has to be searched in time and appointment has to be given with a time plan to ensure at least three to four years of tenure so that he or she has an incentive to make a dent in judicial reform process. This does not seem to have happened in Nepal.

RECRUITMENT OF DISTRICT JUDGES

There are altogether 75 District Courts in Nepal. These courts are the courts of first instance and have both civil and criminal jurisdiction on all cases other than the ones

¹⁹ After the retirement of the Chief Justice Bishwonath Upadhyay in 1995 (who had been appointed by the first elected government after 1990), the senior-most judge, Surendra Prasad Singh was recommended by the Constitutional Council. And this tradition has been continued by the subsequent appointments of Trilok Pratap Rana, Om Bhakta Shrestha, Mohan Prasad Sharma, Keshab Prasad Upadhyaya, Kedar Nath Upadhyaya, and so on.

assigned to special courts under special Acts. They are the lowest court in the hierarchy of judiciary. There are altogether 110 to 120 District Judges working at any time of the year. These District Judges are appointed by Judicial Council (hereinafter called the Council) from the pool of civil servants belonging to judicial service.

The appointment as a District Judge has always been an attraction to the officers of the judicial service as the remuneration, status and benefit conferred on District Judge is quite attractive. The former constitution and the law did not make provision for appointment of District Judges outside the pool of civil servants belonging to judicial service. Hence there was practically no role for a bar to influence the selection and appointment of judges at the district level. But the situation has changed. Interim constitution has provided provision for recruitment of district judges from the members of the bar as well through open competition in written and other exams. This opening has led to an end of the monopoly of civil servants from judicial service in the first ranking recruit of cadre judges.

PROCEDURE OF SELECTION AND RECOMMENDATION BY JUDICIAL COUNCIL FOR APPOINTMENT OF DISTRICT JUDGES

The Judicial Council Act 2047 B.S. requires the Judicial Council to keep the data of the people eligible for appointment as a judge for different levels of courts.²⁰ Data include personal details, academic qualification, experiences and other relevant information. The secretary of the Judicial Council is required to collect data of probable candidates for appointment as a judge to different levels of court from places like the Supreme Court and the courts under its jurisdiction, Ministry of Law and Justice, Office of the attorney general, Faculty of Law in Tribhuvan University, Nepal Bar Association, Nepal Bar Council and other related institutions and agencies. The Judicial Council is also required to keep up to date personal files of each of the judges appointed at different levels of court in Nepal.

These records and files of the sitting judges and the other probable candidates outside career judges are, as a matter of practice, treated as classified documents and are not available for public inspection.²¹

The procedure for selection and appointment of judges consist in review of qualifications, seniority, experience, knowledge of law, integrity, impartiality and moral character of the person in consideration. The Judicial Council is required to put in writing with regards to matters concerning his eligibility, qualification and give the reasons for the selection. The Council members have the practice of verifying the integrity, capability and character of the judges to be appointed from the institutions where he is working and the concerned courts. All these processes are treated as confidential and the probable candidate may not know the comments against his character by his seniors or peers.

²⁰ Section 3 of Judicial Council Act 2047 B.S. and Sections 3 and 4 of Judicial Council Procedural Regulation 2056 B.S.

²¹ There is no law on classification of documents in Nepal.

This has often been criticized as a threat to independence and impartiality of the judges at the lower level. The meetings of the Judicial Council and Constitutional Council are held in camera. There is virtually no scope for interest groups to influence decision making process. The only way to influence the decision making process is to lobby each individual members of the Judicial Council. Lobbying may help to certain extent in appointment of non-career judges from the Bar. Lobbying may not be of significance in appointment and promotion of career judges as it is strictly based on seniority. There is no public hearing system in the selection and appointment of district and appellate judges. But this issue has drawn the attention of the people and political parties in Nepal. There are cases of informal public hearings by civil societies before the appointment of constitutional bodies such as Election Commission. It should not be surprising if the civil society demands the same against the appointment of judges in Appellate Court at least.

The Judicial Council is also required to keep up to date record of each of the judges working in different levels of court in Nepal. The personal files of each of the judges contain information such as inspection reports and performance evaluations by judges from higher courts. In fact any appointment of an officer from judicial service to the post of a judge or the promotional appointment of a judge to a higher court is basically based on seniority. Seniority is ignored only in cases of serious complaint about his or her capacity or integrity. This has often been criticized as a stumbling block in infusing incentive to work hard. The Judicial Council however sticks to this practice as it reduces the scope of manipulation in selection of career judges²² for appointment and promotion. There are very exceptional cases where seniority has been bypassed. Any decision of superseding senior judges is taken as an exception and the appointment on seniority basis is taken as a matter of convention.

As a matter of practice and convention the Judicial Council decides the candidate for appointment and promotion of career judges on the basis of seniority if there is nothing serious against him. Section 5 of the Judicial Council (procedure) Rule 2056 B.S. provides following checklist for clearing a candidate for selection and appointment purpose. Many however consider these checklist as mere show piece and does not really mean any thing at the time of real decision making process.

1. The level of expertise, experience and quality of work in related field and subject;
2. Capacity of understanding the fact in issue and legal issues involved in the cases and level of judgement writing skill and quality of judgements made;
3. File records about his work and conduct;
4. Matters noted in inspection report;
5. Status of performance evaluation;
6. Educational qualification, research and publications related to law;
7. Law related experience, knowledge and contribution and the recognition and public image of the person;
8. Fearlessness and capability; and

²² Career Judges are the ones appointed and promoted from Judicial Service Staff.

9. Conduct prior to appointment as a judge and violation of code of conduct if any after the appointment.

There were several reasons for keeping the selection and appointment of judges out of the control of executive and legislature in Nepal. The constitution envisages the judiciary as a guardian of the fundamental rights and enforcer of the constitutional limitations on government. Constitution mandates the judiciary to act as a strong check on the excesses of the executive and legislature. This will be a difficult proposition if the executive or legislature have a final say in their appointment.

ROLE OF THE BAR IN SELECTION, APPOINTMENT AND PROMOTION OF JUDGES

Role of the Bar in judicial appointments is three fold. Firstly, the Bar keeps the data of the practicing lawyers. Secondly, as a major stakeholder in independence of judiciary, it may work as a pressure group to ensure right decision in selection process. Thirdly it may provide necessary but informal feed back to the Judicial Council on the fitness of a proposed candidate from the Bar for appointment to the post of a judge. The latter part of its responsibility however will be discharged only when the Judicial Council requests its opinion on particular candidate. The Bar may lodge its complaint on its own if it feels that the proposed candidate is unfit and his or her integrity is known to be questionable. The practice over the period of ten years reveal that the Judicial Council rarely seek its feed back for the selection of career judges for appointment and promotion. Its opinion has been sought only in cases of selection of candidates from the Bar for appointment to Appellate Court and Supreme Court judge. One of the reasons given for not involving Bar leaders in promotion of career judges is that it would undermine the independence of judges. The president of the Nepal Bar Association participate as an ex-officio member in the Coordination Committee. He or she may play a vital role in pushing candidates from the Bar for judicial appointments.

COORDINATION COMMITTEE AND ITS ROLE IN SELECTION

Judicial Council (procedure) Rule 2056 B.S provides for a Coordination Committee.²³ This Coordination Committee consists of following members:

A member of the Judicial Council commissioned by the decision of the Judicial Council	<i>Ex-officio Chairperson</i>
Attorney General of Nepal	<i>Ex- officio Member</i>
Registrar of the Supreme Court	<i>Ex- officio Member</i>
Secretary of Ministry of Law and Justice	<i>Ex- officio Member</i>
President, Nepal Bar Association	<i>Ex- officio Member</i>
Dean, Faculty of Law, Tribhuvan University	<i>Ex- officio Member</i>
Secretary, Judicial Council	<i>Ex- officio Member Secretary</i>

²³ Section 18 of the Judicial Council (procedure) Rule 2056 B.S.

The Coordination Committee has the responsibility of scrutinizing the list of probable candidates from judicial service, bar and faculty of law. It then recommends the list of candidates for selection by the Judicial Council. Judicial Council is not bound by the recommendation of Coordination Committee. It can review and reject the candidates recommended by the Coordination Committee. In practice the Judicial Council has been going by the list of the candidates proposed by the Coordination Committee. It however reserves the right to use its discretion when the need arises.

Prior to 2051 B.S. (1994), there was no division of judicial service in to three separate groups (law group, public prosecutor group and judiciary group). Until then an officer working as a bench assistant could be easily transferred to the office of the Attorney General and likewise an officer working as a bureaucrat in Ministry of Justice could be easily transferred to a Court as a bench assistant or assistant registrar. After 1994 the judicial service has been divided into three groups and transfer of staff from one group to another group has become very difficult. Any transfer decision of Nepal Government from one group to another requires the approval of the Public Service Commission and recommendation of the Judicial Commission. The candidates appearing in the public service commission exam has to make a choice at the time of filling up the form itself. Those who aspire to become a career judge usually opt for judiciary group as 80 % of District Judges are appointed from this group. The experience, however, shows that the judges appointed from the pool of government attorneys are efficient in criminal cases while the judges coming from the pool of judicial officers are efficient in civil cases.

One of the complaints about the judges recruited from career bureaucrats is that they have a tendency to be bureaucratic and hierarchic in decision making process. They have a tendency to follow the instruction of their seniors and are more of a compliance oriented rather than creative minded. The stronger point of these career judges however is that they are well informed about the court procedure and trained in judgment writing.

It may be noted that the Coordination Committee has not been given any role in selection of judges for promotional appointment purpose. The matters related to promotional appointment of District Judge to Appellate Court judge and Appellate Court judge to Supreme Court judges is decided by the Judicial Council on the basis of their performance evaluation and seniority.

ROLE OF THE PARLIAMENT IN APPOINTMENT OF THE JUDGES

Article 155 of The Interim Constitution 2063 made a special provision for parliamentary hearing of appointment of judges and chief justice of Nepal. It requires the nominating authority to send the selected candidate for parliamentary hearing prior to their appointment. Rule 213 of the Legislature-Parliament Rules 2063 provides the procedure for hearing and decision making. Parliamentary hearing for appointment of judges is an unusual phenomenon in cabinet system of government. There is no parliamentary hearing in Britain, Canada, India or Australia. But they do discuss the government policy on appointment of judges and transfer of judges. In parliamentary system, the parliament is expected to call the government to account for any unhealthy policy or practice in appointment of judges. This also imply that the judiciary is very much the concern of the

elected government and representatives and they have the right and responsibility to ensure the proper nomination and appointment of judges in the courts. Keeping the elected government free from appointment process is to make them unaccountable for matters which are of special concern to sovereign people. But at the same time there is also a great concern of politicization of appointment process by the political wings of the government. It has been a matter of great challenge to balance between the two values. When the concept of judicial council was introduced, it was basically meant to check and mitigate negative impact of involvement of political wings of government in appointment process and not to bypass them.

Legislative hearing is more akin to presidential system. This is adopted as an essential check and balance in exercise of executive authority by the chief executive in presidential model of governance. In presidential system of government, president is not accountable to legislature for day to day exercise of executive power. He or she cannot be censured on the basis of policy issues. He cannot be removed by passing vote of no confidence. He can at best be impeached for proven ground of misbehavior, incapacity or failure to discharge the duties in good faith through two third majority of the legislature. Hence the legislative control on appointing power was thought to be a necessary evil.

In Nepal we have introduced a mix of both. Hearing in itself is an effective method of ensuring accountability and transparency. But the question is whether the hearing should be at the level of Judicial Council and Constitutional Council or at the level of parliament. Nepal being parliamentary democracy we should avoid any constitutional regime which will shift the burden of accountability of appointment to candidates themselves. The burden of accountability is to be discharged by the elected government and its concerned agencies which has a final say in appointment process. The provision itself being interim we cannot say whether it would be retained in the final constitution to be enacted by the constituent assembly. What would be the selection and appointment process for judges in a federal republic Nepal is again an altogether a different issue which cannot be predicted here. It all will depend on how the election result will emerge.
