

# **Judicial Independence And Accountability in Nepal: Conceptual Framework and Existing Discrepancies<sup>1</sup>**

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This paper has two parts. Part One presents the Conceptual Framework for the Judicial Independence and Accountability. It summarizes the social interest in judicial independence and describes the indicators of institutional and individual judicial independence as well as the external and internal sources and targets of influence and control.

Part Two of the paper presents detailed analysis of the existing discrepancies at the level of institutional arrangement and individual behaviors of the people working in judiciary of Nepal.

## **PART I**

### **Conceptual Framework of Independence of Judiciary**

Judicial independence represents a crucial element of the rule of law and can contribute positively to a process of stable, well-ordered economic, political, and social change and development in the developing countries of Asia. **Judicial independence is central to economic development, on the one hand, and good governance, on the other. A sound judiciary is a basic part of the infrastructure for ensuring property rights and human rights, as well as for promoting domestic and international investments.<sup>2</sup> At the same time, judicial independence is intimately linked to the accountability, predictability, transparency, and participation of the public in governance.**

**Accordingly,** strategies for strengthening judicial independence must reflect the need to balance judicial independence with judicial accountability and to take into account the actual role of courts within the larger economic, political, and governance structures of the country context. Because judges and courts provide a public service, and one that contributes directly and significantly to the overall legitimacy of state institutions in the public eye, it is essential that judicial independence must be balanced, for it always remains in tension with, competing concerns about democratic accountability and responsiveness.<sup>3</sup> Moreover, judicial independence and the role of courts in governance also depend, for example, on the habits and historical evolution of bureaucratic institutions which often compete with

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<sup>1</sup> *This paper is based on the country report prepared by the Author for the ADB project on Judicial Independence.*

<sup>2</sup> *See, for example, World Bank, World Bank Report 2002: Building Institutions for Markets (Washington, D.C.: World Bank, 2002).*

<sup>3</sup> *Judicial accountability must be considered in tandem with judicial independence. Both are equally important and, in a sense co-dependent. In general, judiciaries are more likely to expand their independence in ways that will be both substantively beneficial to the rule of law and broadly acceptable to other governmental institutions and the society at large to the extent that they demonstrate increased accountability: accountability both in their decisions and in the processes of deliberation that produce those decisions.*

judiciaries for decision-making authority. It may as well depend on the extent to which effective substitutes to a well-functioning judiciary have developed over time.<sup>4</sup>

In most countries in South and Southeast Asia--in particular, in Nepal--courts with which we are familiar today have existed for several generations. Other forums of third-party dispute resolution have been functioning at various levels of formality for centuries. In many countries, including Nepal, judicial systems face formidable challenges every day, as the enforcement of law is constrained by bureaucratic malaise, political interference, bribery and corruption, low standards of professional competence and integrity, inadequate financial resources, and barriers to equal access to justice.

To understand the relationship between judicial independence and good governance in Nepal, we must survey the status of courts, judicial reforms and independence initiatives in the past three decades and we must also determine what types of judicial reforms and interventions have been effective. More specifically, what arrangements and practices that have strengthened courts and public perceptions of their legitimacy? How? Why?

Thus, the Judicial Independence Study should provide an unprecedented opportunity to bridge judicial independence theory and practice in Nepal. It provides an important opportunity to systematically document what works, how, and why, in a way that leads to practical recommendations for future program design and implementation.

### **1. Challenges to Developing a Model of Judicial Independence**

Despite an abundance of doctrinal literature,<sup>5</sup> there is no single agreed upon model of (or precise set of institutional arrangements for) judicial independence. Nor, in spite numerous studies, is there consensus even on a common definition of "judicial independence."<sup>6</sup> Moreover, institutional

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<sup>4</sup> Among others, substitutes for a well-functioning judiciary include: relationships (such as clans); good-faith dealings (repeat dealings, guilds); abundant information (about trading partners and others available through new technologies); organization (mediation of risk and conflicts through firms); associations (voluntary associations and codes of conduct); private security; and communal action (a constellation of community-based groups engaged in dispute resolution). See Erik Jensen and Thomas Heller, *The Rule of Law, Governance and Judicial Reform: A Hard Look at the Record* (Stanford University Press, 2002).

<sup>5</sup> See, e.g., the Appendix: Selected Topical Bibliography on the Dimensions of Judicial Independence.

<sup>6</sup> See, e.g., Peter Russell and David M. O'Brien, eds., *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* (Charlottesville: University Press of Virginia, 2001); United States Agency for International Development (USAID), *USAID Judicial Independence Handbook* (Washington, D.C.: USAID, 2001); World Bank Website, "Judicial Independence, What It Is, How It Can Be Measured, Why It Occurs," at <http://www.worldbank.org/publicsector/legal/judicialindependece.htm>; J. Mark Ramseyer, "The Puzzling (In)dependence of Courts: A Comparative Approach," 23 *Journal of Legal Studies* 7 (1994); Yash Vyas, "The Independence of the

arrangements or socio-economic and political conditions for securing and maintaining judicial independence vary widely within and outside Nepal.

Frequently, for instance, it is assumed that countries must have constitutional provisions for guaranteeing judicial independence and the separation of powers. Such constitutional provisions, however, remain subject to interpretation and manipulation. And they do not necessarily guarantee judicial independence, as the experience of a number of courts in various countries including Nepal loudly demonstrates. Furthermore, some countries have neither written constitutions nor a rigid separation of powers, yet their judiciaries, as in New Zealand, enjoy considerable autonomy.

Nor, for that matter, does a guarantee of lifetime tenure appear necessary to securing judicial autonomy. Judicial independence need not be threatened by term-limits or mandatory age retirements, as post-World War II constitutional courts in many parts of the world illustrate. Indeed, such requirements may strike a better balance between judicial independence and democratic accountability than lifetime appointments or systems subjecting judges to periodic partisan or nonpartisan retention elections. Based on the experience and evidence across countries, what appears to be of much greater significance is that the causes for removing judges be clearly specified in advance and the removal process be transparent, consistent, and publicly accountable.

So too, undeniably, the absence of economic security and inadequate resources for judges and judicial administration also pose a serious threat to judicial independence in many countries in Asia. Nepal is no exception to that. In this regard, the United Nations' *Basic Principles on the Independence of the Judiciary* emphasizes that governments must "provide adequate resources" for courts--at all levels within a judicial system--in order that they may perform their functions and maintain the rule of law. Inadequate judicial remuneration undermines the basis for judicial independence in poorer countries, and insufficient financial resources have hindered caseload management and access to justice.<sup>7</sup> In some cases, high courts enjoy more than adequate resources, while lower courts confront overwhelming caseloads and inadequate financial resources. In addition, judicial budgets in some countries have been targeted in retaliation for unfavorable rulings. Even in more affluent countries, judicial independence may be in jeopardy if judicial salaries, benefits, and budgets are not protected from reductions and otherwise regularized. Clearly, judicial independence is a relative, not an absolute, concept,<sup>8</sup> but it nonetheless

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Judiciary: A Third World Perspective," *Third World Legal Studies* 127-177 (1992); United Nations, "Basic Principles on the Independence of the Judiciary" (1985); and Shimon Shetreet and Jules Deschenes, eds., *Judicial Independence: The Contemporary Debate* (Dordrecht: Martinus Nijhoff, 1985).

<sup>7</sup> See Erik Jensen, "Context for Judicial Independence Programs: Improving Diagnostics, Developing Enabling Environments and Building Economic Constituencies," United States Agency for International Development (USAID), *USAID Judicial Independence Handbook* (USAID, 2001).

<sup>8</sup> Notably, the definition of "dependency" that John Ferejohn developed highlights the relative nature of judicial independence: "[A] person or institution [is] . . . dependent . . . [if] unable to do its job without relying on some other institution or group." John Ferejohn, "Independent

requires adequate remuneration of judges and financial resources for judicial administration.

## **2. The Beijing Statement of Principles of the Independence of the Judiciary - The View of Asian Chief Justices**

Aware of not only the importance of judicial independence but also of the wide-ranging experience and views on judicial independence in different countries in Asia, the Foundation co-sponsored with the Judicial Section of LAWASIA a conference series throughout the 1990s which culminated in thirty-two chief justices signing the *Beijing Statement of the Independence of the Judiciary in the LAWASIA Region* ("Beijing Statement").<sup>9</sup>

The *Beijing Statement* provides a useful baseline of views on judicial independence in the region, and ostensibly reflects a growing consensus among the most eminent actors within Asian judiciaries on three essential elements or principles of judicial independence, and to do so publicly.

The three essential principles include:

First, courts and individual judges within judicial systems must be (and publicly perceived to be) impartial in rendering their decisions. They should not have a personal interest—whether due to bribery and corruption, or as a result of undue pressures brought to bear from within or outside of the judiciary—in the outcome of the adjudication of disputes between private parties and between individuals and the government.

A second and closely related component is that judicial decisions must be accepted by the contesting parties and the larger public. In other words, judges and courts should function, and be perceived by the public to function, in a manner that ensures the equal application and protection of the rule of law.

Third, judges must be free from *undue* interference from other branches of government as well as from higher court judges within a national judiciary. That is also to say that it is unrealistic and misleading to define "judicial independence" as "totally uninfluenced." Nevertheless, judicial independence is most at risk when either external or internal forces undermine a judge's or a judiciary's capacity to adjudicate as a neutral third party.<sup>10</sup>

These principles inform and underlie the conceptual framework and working methodology set forth below.

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Judges, Dependent Judiciary: Explaining Judicial Independence," 72 *Southern California Law Review* 353 (1999).

<sup>9</sup> *Beijing Statement of Principles of the Independence of the Judiciary in the Lawasia Region*, sponsored by LAWASIA: The Law Association for Asia and the Pacific, and The Asia Foundation (1998).

<sup>10</sup> For a further discussion see Martin Shapiro, *Courts* (University of Chicago Press, 1981), Ch. 1.

### 3. Categories of Indicators for Judicial Independence

Under any definition, judicial independence is multi-dimensional and multifaceted. The Judicial Independence therefore has to focus on five broad categories of indicators that provide a framework for assessing the status of judicial independence, the most serious problems and challenges confronting courts, and reforms that may be designed. They are:

- (1) the structure, organization, jurisdiction, and procedures of courts;
- (2) judicial selection, appointment, and promotion procedures;
- (3) judges' tenure and removal mechanisms;
- (4) judicial remuneration and resources for court administration; and
- (5) public confidence **and participation** in the judiciary<sup>11</sup> **as well as** understanding of its relation to economic development and governance.<sup>12</sup>

Each of these categories of indicators conditions the relative autonomy of judges—individually and collectively—from other institutions and from other judges. Consequently, these five broad categories of indicators must be analyzed within the context of both (a) the *sources of influence and control* and (b) the *targets of influence and control*.

### 4. Sources of Influence and Control - External and Internal

The *sources of influence and control* include both *external* and *internal* pressures that may be exerted on judges and the operation of courts. In the *external category* are forces within the governmental and nongovernmental as well as public and private sectors that may bring pressure on judicial organizations, staffs, and their administration.

Obviously, courts are vulnerable to governmental bodies that create and may modify, even destroy, them. And judges—whether recruited by election, appointment by elected officials, or selection into career judiciaries—are subject to political forces aimed at influencing the course and outcome of adjudication.

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<sup>11</sup> In the country studies, we will want to capture data from public opinion polling, to the extent it is available, about the judiciary itself, and vis-à-vis other public institutions.

<sup>12</sup> The empirical supportive evidence of the extent to which formal legal institutions are central to economic development is uneven, despite many doctrinal claims that a well functioning judiciary is needed for economic development. Certain countries with a weak rule of law call into question judicial centrality. For example, China has enjoyed high levels of FDI and growth, and Brazil has a growing credit market where dense information, available through new technologies and data bases, substitutes for strong legal institutions. On the other hand, in hyper-lexic India we find Indian New Economy actors, in the pursuit of international capitalization, importing and adhering to more rigorous international standards of corporate governance, despite less stringent domestic legal requirements.

For example, nongovernmental forces, especially the media and organized interest groups and associations, may press for greater accountability in judicial performance, or they may target and threaten judges and courts with whom they disagree. Judges have resigned or been forced into early retirement due to high-pressured media campaigns, even in well-developed democracies. On the other hand, in some countries courts have been strengthened by the support of the media, forces opposed to the controlling party in the government, and associations or organizations created to reform and strengthen the rule of law and governance.<sup>13</sup>

These examples show that there is no single preferred model of the relationship between judicial independence and the media, organized interest groups, and civic organizations, or with other sources and mechanisms of external influence and control. Instead, they may present challenges and threats to, no less than support structures for, judicial independence.

In the *internal category* are the mechanisms of influence and control in the recruitment, training, assignment, promotion, and remuneration of judges that may be brought to bear on individual judges within a judiciary. Mechanisms of internal influence and control are especially prominent in civil law countries with career judiciaries, and in countries where the judiciary is simply part of a larger governmental bureaucracy. On the other hand, "internal" mechanisms often, but not always, are less prominent in more decentralized, common law judicial systems.

It bears emphasizing that external or internal influences and sources of control do not *per se* violate judicial independence. For instance, within any national judiciary, higher courts generally exert influence over lower courts in terms of overruling decisions and in exercising their supervisory capacity and responsibility in order to ensure the equal protection and application of the law. Still, higher courts may cross boundaries on their appropriate supervisory role.

For example, higher courts and higher court judges may manipulate lower court judges' recruitment, promotion, and salaries, because of their decisions or for purely personal reasons. Such internal manipulation and limitations on individual judges' independence may be particularly problematic in the career judiciaries of some countries, while less problematic in some common law countries that have generalist judges, relatively decentralized judicial structures, and generally strong external political controls.

The crucial point of all of these examples is to underscore that the manipulation of judges and courts may arise either from external pressures (whether political, economic, or institutional) or due to forces operating internally within a national judiciary. Moreover, some form of external and internal influence is present in all countries, as well as necessary to the balancing of judicial independence with accountability.

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<sup>13</sup> We do not assume that civil society organizations are *per se* good (virtuous) or *per se* bad (tainted) for judicial independence and accountability: rather, it depends. Our "it depends" approach to civil society organizations raises questions such as: Do local NGOs focus on judicial accountability and independence? If so, do they enjoy local legitimacy? Are they representative? Do they enjoy local funding? Are these NGOs placing too many demands on weak legal institutions? Do these NGOs take a rights based approach? If so, is this approach overwhelming the system?

## **2. Targets of Influence and Control - Institutional and Individual**

With respect to the *targets of influence and control*, those aimed at the institution of a judiciary as a whole must be distinguished from those focused on individual judges for their decisions. In other words, judicial independence embraces both (a) *institutional judicial independence* and (b) that of *individual judges* in their decision-making.

There is no exact or necessary correlation between a high or low degree of *institutional* vulnerability to external forces and a high or low degree of *individual* judges' vulnerability. In other words, the institution of the judiciary may enjoy a high degree of independence from interference from other political institutions, while individual judges do not, and vice versa.

### **PART II**

#### **Existing Discrepancies in Indicators of Judicial Independence**

##### **1. STRUCTURE, ORGANIZATION, JURISDICTION AND PROCEDURE OF COURTS IN NEPAL**

Over the last fifty years the western influence has led to mutilation of Nepalese legal system which essentially carried the characteristics of continental features. It is now more of a common law system where the courts are guided by adversarial procedure and precedent system. The judiciary obviously is passing through internal contradictions. Its structure and culture is quasi continental and quasi common law system. There is a strong pressure to civil law culture judges to behave like a common law culture judges. There is no denying the fact that the entire judiciary is cadre based regimented bureaucratic origin. The present interim constitution seeks to establish west-minister model of government with a strong and independent judiciary. Nepal's model structure is guided by western common law system where as the entire process of recruitment of judicial personnel is civil law system. There has been lot of complaints about inconsistencies and controversies in cases involving constitutional interpretation. There is a demand for constitutional bench or court to address this issue.

The draft constitution prepared by dissolved constituent assembly tried to keep judiciary under the control and influence of the political wings of the government. This I think was a serious mistake and if enacted could lead total anarchy in the justice delivery system in the country.

Review of the population judge ratio indicate that a judge in Nepal has a population load of more than 100,000. In many districts the case load has substantially decreased while the case load continue to be high in supreme court and some appellate courts. There is lack of time to give quality decision at the supreme court level and it has at times shaken the public confidence in judiciary of Nepal.

The backlog of cases goes on increasing as the level of court increases. A Supreme Court judge is having three times the burden of a judge in average. The Supreme Court is under a pressure to dispose of more cases thereby loosing its vision of being an apex court for disputes involving policy decision only.

Development of modern legal profession can be traced back to 1950s. Prior to that there hardly existed any independent legal profession. There are altogether 20,692 licensed legal practitioners. Only little over 16% of them are active in legal profession. The per-capita caseload for total enrolled law practitioners is 6.7 cases and for total active law practitioners is 41.5 cases. The per-capita distribution of population load to each law practitioner in terms of total enrolled law practitioners is 1122 persons and in terms of total active law practitioners is 6874 persons. Likewise the population load for each judge in Nepal is around 100,000.

About 1.5 % of the total population is in litigation in one way or the other and not every body is able to afford a lawyer. Legal aid is not adequately available for poor and indigent litigants in Nepal. More than quantity, the quality of service provided by the legal professionals remains an area of concern. The quality of law education provided in law schools and the lack of opportunity for continuing legal education after enrolment in the Bar Council has been seen as a major constraint.

## **2. JUDICIAL SELECTION, APPOINTMENT AND PROMOTION PROCEDURES IN NEPAL**

In Nepal His Majesty appoints the judges on the recommendation of Judicial Council. The Chief Justice of Nepal however is recommended by the Constitutional Council. This is an ideal system developed in Nepal and has served as model for many countries of Asia. District judges are selected from the pool of judicial service staff alone. This is a serious constraint and has led to bureaucratization of cadre judges. It is only at the Appellate and Supreme Court that the Bar members are recruited as judges. Even here the lateral entry of bar members is restricted to 10 percent at the most and it has led to monopoly of cadre judges in justice delivery system of Nepal. Seniority based appointment of Chief Justice has led to a number of short term appointments in rapid succession. This is a serious problem which needs to be tackled. A Chief Justice with short term has no incentive to introduce any reform initiatives which will survive his tenure. The threats to politicization of judiciary is a biggest concern in the changing context.

There is no public hearing system in the appointment process. 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 demand the same against the appointment of judges in Supreme Court at least. The present interim constitution provides for parliamentary hearing before finalizing nomination of supreme court judges and chief justice for appointment by the President.

Role of the Bar in judicial appointments is basically limited to identification of eligible lawyers for appointment to the post of judge in Appellate Court and Supreme Court. 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 recent protest of Nepal Bar in some appointments sets the example. 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. The draft constitution further strengthens the influence of Bar in judicial appointments. It gives Bar the authority to ensure its representation in the judicial council by recommending its representative in the judicial council.



Until now appointment to judgeship has not been an attraction to a highly successful senior lawyers. There are many mediocre lawyers interested in joining as a judge. The Judicial Council however did not seem to be so enthusiastic about them.

### 3. JUDICIAL TENURE AND REMOVAL MECAHNISM

Average age of appointment of career judges in the District Court is 35 to 40, for Appellate Court is 45 to 55 and for Supreme Court is 55 to 60 years of age. Permanent judges of District Court and Appellate Courts, once appointed, hold the office till 63 years of age. The permanent judges of the Supreme Court, including Chief Justice, hold their office till 65 years of age. Legal community believes that there is a need for extension of retirement age by another two to three years but rejects the idea of life term as impractical.

The constitutional provision has made the provision for *ad hoc* judges in the Supreme Court to dispose of backlog of cases. The existing practice of appointing *ad hoc* judges however show that this practice has been used as a means to put the newly appointed judges on probation before their confirmation as a permanent judge. There is also a provision for appointment of term based additional judges in the District Court and Appellate Court to clear backlog of cases.

This practice of appointing *ad hoc* and additional judges has both advantage and disadvantage in justice delivery system. On the advantage side it has given an opportunity to the senior judges to put a new recruit on probation and on the disadvantage side it has made the new recruits extremely insecure and vulnerable in the hands of senior judges. The tenure of the Special Court judges, however, is determined by the parent law itself and it is usually term based.

The tenure of all kinds of judges is held in good behavior. A judge may be removed any time before the expiry of his or her tenure if he is found guilty of misconduct, incapacity or failure to discharge his duty in good faith. The chief justice and other judges of the Supreme Court may be impeached by the House of Representatives while other judges may be removed by Judicial Council. There is a strong feeling that the parliament has failed to initiate even a single impeachment process when there has been several complaints of substantial misconduct by Supreme Court judges. About judicial council too the allegation is that it has tried to hide the crimes of the judges by asking resignation rather than impeachment.

The laws of Nepal do not make provision for voluntary retirement of the judges. The law makes provision for compulsory retirement at 63 for lower judges and 65 for Supreme Court judges. There has been no instances of early retirement except in rare cases. A judge retiring after minimum number of service years gets pension for lifetime.

The judges in Nepal are morally bound by Judges Code of Conduct 2055 B.S. But this can be a ground for appointment and promotion. It is a very simple guideline for judges behavior. It is provided in the form of statements and it needs to be updated and annotated to be result oriented.

Transfer of judges has been one of the most controversial issues in judicial administration of Nepal. Judicial Council has started the practice of giving reasons for transfer decisions. There has been, however, demand

for increased transparency and objectivity in transfer decisions. The new constitution also prohibits the transfer or engagement of judges in any other assignment other than that of a judge without the approval of Judicial Council. This has put an end to the practice of misusing judges for executive functions of ordinary types.

The constitution and laws of Nepal do not make any provision for departmental action against the judges. There is no provision for punishments such as demotion, grade reduction, fine etc. Removal is the only punitive action against the judges for incapacity, misbehavior and failure to carry out the duty in good faith. A judge once impeached, however, may be prosecuted for corruption if the ground for impeachment is an offense of corruption.

In Nepal there is no instance of impeachment of a Supreme Court judge. At the lower court there are around thirteen cases of resignation by judges. They were all accused of corruption and misbehavior. Most of them were asked to resign on the threat of impeachment by Judicial Council. There are only two cases where district judges were removed for misconduct.

The Supreme Court judges supervise Appellate Court judges and Appellate Court judges are responsible for performance evaluation of District Court judges. The Chief Justice, however, has the most important role in disciplining the judges. The Chief Justice is the chief of Judicial Council, Chairman of Judicial Service Commission, presides over the Full Court and finally the head of the entire judiciary in Nepal. His leadership and dynamism makes an impact. The role of Bar in disciplining the judges cannot be minimized. The Chief Justice and other senior judges fear the Bar and the Press. There are times when the Bar has confronted the judiciary in the issues of corruption in judiciary.

Judicial Council is responsible for appointment, transfer and disciplining of judges other than that of Supreme Court. The Judicial Council has been charged of being a lax institution in taking disciplinary action against delinquent judges. The Judicial Council lacks investigation skill and technical staff to make meaningful investigation. Judicial Council, as of now, is not required to report its activities to any other body. This has been questioned as a serious gap in ensuring its accountability.

#### **4. JUDICIAL REMUNERATION AND RESOURCES FOR COURT ADMINISTRATION**

*The entire expense of the judiciary, both for Supreme Court and other courts, comes from the annual allocation in the Budget. There is no source of funds for judiciary other than the ones provided from the consolidated fund of Nepal. All the revenues generated by the court by way of court fees, fines, stamp duties etc are deposited in the account of the consolidated fund and the court has no access to funds generated by way of internal revenue. Less than 10% of annual budget contribution tax came from the revenues generated by the courts and more than 90% came from tax payers.*

Supreme Court gets around 10% of total budget allocated for judiciary and likewise Appellate Courts get around 30% and District Courts 60% of total budget for judiciary. The criteria for budget allocation are basically three: 1. Caseload, 2. Number of Staff, and 3. Geographic location. The budget allocation for each court has no relation with the performance of the judges and the staff. Budget allocation is purely routine exercise and it is not used as a reward or punishment based on performance evaluation.

Perhaps it may be shocking to know that the share of the Judiciary in total budget of the country is less than 0.5 %. It has been constantly in and around 0.4 % over the last ten years or so. There has been slight improvement in budget allocation in terms of figure but in terms of percentage it has further gone down. The improvement of judicial service through better allocation of the fund has always been a least priority of HMG and the judiciary has always been treated as a non-productive sector.

Every year an annual estimate for the entire judiciary is prepared by the Supreme Court and it is presented to the Ministry of Finance for approval and inclusion in the National Budget. The preparation of annual estimate is done on the basis of the annual estimate provided to the Supreme Court by each individual court in advance. Supreme Court may revise and adjust the estimates sent by the lower courts. Ministry of Finance, in turn revise and adjust the budget according to national priorities and availability of budget. Ministry of Finance has been ruthless in cutting administrative expenses and expenses proposed for new constructions and maintenance. The salaries and benefits of judges are all defined in the Acts of parliament and therefore they are neither discussed nor altered at the Ministry of Finance.

The salary and benefits of the Supreme Court judges have been secured by the constitution. The salary and benefits of the Supreme Court judges cannot be altered to their disadvantage even during financial emergency. The salary and benefits of the judges stand at much better level than that available to the civil servants of His Majesty's Government of Nepal. Their salary is determined by law and they stand at a better footing from that of the civil servants.

There is not much of a difference in pay scale between higher court judges and lower court judges. In a country with per-capita income of USD 170 per annum, a district judge gets almost USD 3400 per annum, an Appellate judge gets almost USD 3900 per annum and a Supreme Court judge gets almost USD 4800 per annum. This salary scale may be quite small in the context of developed countries but they are certainly not a small salary for a poor country like Nepal.

##### **5. PUBLIC CONFIDENCE IN JUDICIARY AND ITS RELATION WITH ECONOMIC DEVELOPMENT AND GOVERNANCE**

Courts in Nepal, perhaps, may be the cheapest one in the world. However, the courts remain inaccessible to the marginalized people of Nepal because they are just too poor and illiterate. Poor and marginalized people view the courts as complicated, costly and incomprehensible. On the other hand the perception of the people who can access the courts has changed over a period of time. It is no longer viewed as an institution for dispute settlement between two litigating private parties. It is viewed as an independent institution, free from influence and control of the government, who has a duty to not only settle disputes between two private parties but also enforce human rights and legal limitations on the government. The people generally approach alternative forums for dispute settlement. They approach to the court when all other possible options are exhausted.

General people tend to believe that the courts are not free from corruption and have a tendency to discriminate in favor of rich and powerful. This perception of the people does not however match the opinion of the people who have the experience of approaching the court. Overwhelming

majority of litigants not only believe that the courts are basically corruption free but they also view the court as fair impartial and just.

In Nepal there has been very limited association of civil society in justice delivery process in formal courts. The people do not participate in selection and removal of judges. They also do not directly participate in justice delivery process. Their participation is limited to legal representation in front of judges as a party to the dispute.

Courts in Nepal have not succeeded in giving confidence to business community. Business community view court as dilatory, traditional and incapable of enforcing contractual commitments. Foreign investors believe that the courts in Nepal lack reliability and predictability. In most of the major joint venture agreements, dispute settlement clause refer to foreign law and foreign jurisdiction as governing law and forum for dispute settlement.

The courts in Nepal have been playing important role in preventing abuse of discretionary power by administrative authorities. Judicial review of administrative action and enforcement of fundamental rights remains the top agenda in the list of writ petitions filed in the Supreme Court and Appellate Courts. Its role in enforcement of rule of law and constitutional norms has been highly recognized. The strict enforcement of rule of law and constitutional norms has often irritated bureaucrats and politicians in the government.

The constitution of Nepal made judiciary independent and powerful. It has sought to establish judicial supremacy in governance. But over a period of time, judiciary had to face criticisms from media, political parties and the Bar for its lack of performance and accountability. Leaders in judiciary have been accused of being passive and soft on corrupt judges and court officials and have failed to take disciplinary actions. It has also been criticized for its failure to handle complicated issues of international banking and corporate disputes efficiently. All these challenges basically point to the urgent need for addressing the issue of recruiting competent manpower, judicial accountability and providing them with proper education and adequate training. It also points to the urgent need for strictly enforcing discipline at the level of judges and court staff. Improving efficiency and ethics of court officials and judges would go a long way in improving the public perception of the judiciary.

Over the period of last four to five years there has been some commendable judicial reform initiatives. These reform initiatives focused on improving court management, building physical infrastructure, improving information access, strengthening legal aid and developing human resources. But there are many areas which still need to be addressed to make large scale impact. They may be listed as follows:

## **6. RECOMMENDATIONS**

### **Human Resource Development**

Improving the quality of law education in Nepal.

Review and update the public service commission exam system and its curriculum for recruitment of competent judicial service staff.

Improve the training courses in Judicial Service Training Center.

Strengthen the curriculum and faculty in the judicial academy for judges training.

#### **Physical Infrastructure Development**

Provide improved court buildings and improved court rooms.  
Secure court compound by wall construction and security system.  
Develop well equipped court secretariat and library system.  
Develop facility for preservation of record files.

#### **Review and Reform in Related laws**

Introduce mediation law for out of court settlement of disputes.  
Introduce separate criminal procedure code and civil procedure code.  
Introduce a consolidated law of limitation.  
Enforce informal dispute settlement at the local level.  
Strengthen and reactivate Law Reform Commission.

#### **Development and Enforcement of Court Management Plan**

Make a study of existing court management practices.  
Identify the problem areas and introduce the international best practices for enhancing the efficiency.  
Introduce information technology for management of case flow in selected and feasible districts.

#### **Need Assessment and Capacity Building of Judicial Council**

Develop investigative skill on corruption crimes.  
Develop necessary information network for proper monitoring of judicial conduct.  
Develop objective criteria for objective evaluation of judges for appointment.  
Provide adequate space for Judicial Council and equip with necessary furniture and electronic information networking for data banking system to help make performance evaluation of judges and judicial service staff.

#### **Improve Judicial Accountability and Public Perception.**

Introduce merit based recruitment of career judges at the District Court.  
Develop a system of appointment of Supreme Court judges that will ensure at least four years of tenure to a newly appointed Chief Justice.  
Revise the related laws to increase the retirement age for judges by at least three years.  
Modernize and annotate the existing code of ethics on the basis of best international practices.  
Develop a system of judicial complaints that can be accessed by the people.  
Give publicity to the process of registration of complaint and the place where complaints can be lodged.

#### **Improve Information Access, Networking and Discovery of Case Law**

Develop the practice of posting Supreme Court cases on Supreme Court websites.  
Information network among the Bar Associations for sharing latest information on development of case law.  
Develop case law digest for better discovery of case law.  
Development of private sector initiative for programs like Westlaw and LexisNexis.

#### **Improving Public Perception and Awareness about Judicial Independence**

Sensitize members of parliament on the need of independence of judiciary for sustaining democracy and rule of law.

Sensitize the members of the bar on the need to improve the public perception about judiciary.

Introduce awareness campaign for general public and legal professionals about the role of judiciary and its utility in protection of public interest.

#### **Strengthen Legal Aid**

Support and strengthen legal aid and legal literacy program through bar associations.

Introduce special legal aid program to the poor and marginalized community of Nepal including women and socially disadvantaged.

#### **Financial Autonomy**

Pass a constitutional amendment to ensure at least one percent of total budget allocation for judicial sector.

Develop a mechanism to coordinate between judiciary and Ministry of Finance for allocation of budget on an objective basis.

#### **Political Commitment for Judicial Independence**

Judicial reform will be meaningful if there is a political commitment at the top and the leaders of all the wings of the government are ready to work for it. The government is ultimately accountable to the people for the management of justice delivery system in the country. It should have a strong voice in its improvement. It cannot afford to leave the management of justice delivery system to the judges alone. In Nepal there is a tendency in executive and legislature to not to discuss the problems of judiciary in the country and leave them alone with their problems. This must end and a new era of judicial accountability and convincing performance must begin. Introduction of a comprehensive judicial reform program based on detail study and adequate resource allocation may be only hope of Nepal.