



Reforming the Judicial System in Nepal: Trusting Justice

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Reforming the Judicial System in Nepal: Trusting Justice

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Submitted in fulfilment of the requirements for the degree of

Doctor of Philosophy

Deakin University

July 2022



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ABSTRACT

This study is about access to justice in Nepal. Through a detailed exploration of peoples' everyday interactions with and experiences of access to the judicial system, the study sheds light on the disparity between Nepal's law reform promises and the reality of the judicial system. The way this gap between promises and reality has shaped the public perceptions of the judicial system is one of its major findings. Field visit, interviews and focus group discussions across the urban and the rural districts of Nepal reveal people's concerns about a lack of judicial competence and an absence of commitment to the requisite judicial values of impartiality and independence. Focusing on the public's everyday encounters with the judicial system, and by examining how those on the justice demand side (the people who seek justice) and its supply side (those who are responsible for delivering justice – judiciary and judges) experience these encounters, the study elaborates on how each perceive and make sense of the judicial system in Nepal. The study uncovers a severe lack of public trust in the judicial system, which presents itself as an urgent and ongoing problem for the law, justice and development in Nepal.

Through its theoretical, methodological, and empirical undertakings, this study seeks to contribute to the field of law and development. It finds that despite Nepal's lofty, and at times, sincere agenda of judicial reform, successive Nepali constitutions and governments have failed to deliver on the reform promises. Thus, sincere efforts to establish a fair, equal, accessible and trustworthy judicial system remain an unmet need in Nepal.

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Chapter 1

ACCESS TO JUSTICE, JUDICIAL INDEPENDENCE AND JUDICIAL REFORM IN NEPAL

1.1 Introduction

“Access to an independent judicial system” is one of the most proudly proclaimed post-liberation aspirations of Nepali¹ democracy. The Supreme law of the land – the Constitution – proclaims that fair and equal justice through competent and independent judicial institution is to be ensured for every citizen in Nepal.² In practice, however – seventy years since the establishment of the formal judicial system in Nepal – the majority of Nepali still lack this proclaimed access to justice, leaving the legal needs of most of the population routinely unmet (DCAF, 2017; GoN & UNDP, 2018; ICJ, 2012). Numerous surveys³ and sector assessments⁴ conducted in Nepal since the establishment of the judiciary in the 1950s have pointed out that “a significant portion of the population still perceives or directly experiences” (DCAF, 2017, p. 12) various types of barriers and obstacles to effectively access justice. The survey findings claim that overall access to justice for the citizens continue to be highly contextual, with gender, ethnicity and socio-economic status as critical variables. According to the study of the Ministry of Women, Children and Social Welfare (2013), 44.9 percent of the population considers proximity to the courts followed by legal education and awareness (32.5

¹ According to an official English translation of the Constitution of Nepal 2015, ‘Nepali’ is the official term to define people of Nepal. This study uses ‘Nepali’ instead of commonly used term ‘Nepalese’.

² Para. 5, Preamble, Constitution of Nepal, 2015.

³ A National Survey of Public Opinion conducted by the Law Society in 2002; A study on Advancing Justice Sector Reform to Address Discrimination and Violence against Women in Four Selected Districts of Nepal conducted by the Ministry of Women, Children and Social Welfare and International Commission of Jurists in 2013; and Baseline Study of Crime in Nepal conducted by the Ministry of Law and Justice in 2016.

⁴ High-level Judicial Reform Commission 1970; Royal Commission on Judicial Reform formed in 1983; Court Management Reforms Committee, 1997; Court Strengthening Committee, 2001; National Judicial Academy, 2015; Report of a Committee formed by the Supreme Court to Study Irregularities and Corruption in Judiciary, 2015; Report of a Commission formed to probe Irregularities, Malpractices or Corruption in Judiciary, 2021 and First, Second, Third and Fourth Five-year Strategic Plans of the Nepali Judiciary.

percent), fairness in judicial responsiveness (16.8 percent), lengthy procedures (16.6 percent), and economic burden (16 percent) as barriers to justice. Achieving fair, equal and more responsive justice means the systematic blocks to access need to be identified and addressed.

While reviewing the relationship between the court and the community in Nepal, legal expert Karna (2012) identifies several levels and layers of barriers to legal remedy: lack of full recognition of the constitutional and legal provisions; lack of legal awareness and education among vulnerable and marginalised citizens; lack of ability to make claims due to incompetence or abuse of powers; unequal and unfair court decisions, and a demonstrated lack of will to implement decisions and policies (p. 177). These barriers, as outlined by Karna, involve what is referred to in this thesis as both the *demand* side of justice (community people and lawyers) and the *supply* side of justice (Judiciary – judges and court staff) of the Nepali judicial system.

The *demand* aspect of justice relates to those seeking justice, that is, the population who seek to access the judicial system to resolve disputes or perceived injustices. The identified problems on this side are linked to problems related to the abilities and opportunities to seek and demand justice, including legal education and empowerment, legal assistance, legal representation, the proximity or distance of the public to the court, and the perceived competence and integrity of the judicial system. Indeed, data from my field research shows the gaps in legal awareness and rights among communities and their lack of clear knowledge about procedural rules and processes. Indeed, according to my focus group discussions, public are denied access to or prevented from accessing legal and judicial services because of their lack of knowledge (legal education) to demand justice and lack of ability and confidence (legal empowerment) in navigating the judicial system.

The *supply* aspect of justice refers to the deliverers or providers of justice and includes the broad legal institutional infrastructure. The barriers at the supply side are understood as institutional obstacles to access justice and are associated with matters of performance and the ability of the judiciary. These include the enactment of judicial principles including competency, fairness, responsiveness, integrity and

efficiency. In turn, these components are influenced by the lack of independent functioning on the part of courts and judges.

Judicial independence, the keystone in the democratic arch (Campbell & Lee, 2001) that controls abuse of political power, maintains accountability and rule of law and ensures proper functioning of institutional frameworks, and the judiciary itself is in pressing crisis in Nepal. According to a variety of evaluations and analyses, the access to justice in Nepal is frail (DCAF, 2017; ICJ, 2017; OHCHR, 2012) and the independence and integrity of the judiciary is being jeopardized by this crisis at the Supreme Court (AI, HRW, & ICJ, 2021). In addition, there are other indications of lagging justice systems in Nepal; for example, according to the *World Justice Project Rule of Law Index*⁵ (2021), Nepal's overall rule of law score declined to less than 1 percent, ranking 70 out of 139 countries. This report also ranked Nepal 93 out of 139 countries in the category "absence of corruption".

The judiciary in Nepal is currently being jeopardized by the crisis of its independence and integrity (AI et al., 2021) and the need to enhance access to an independent judicial system has been consistently identified as a significant gap in Nepal's democratic aspirations. Most critically, the Nepali judicial system is plagued by unwarranted interference from the political parties and executive branch of the government (Shrestha, 2020) and has an international and national reputation for overall corruption⁶. Concern about the weakening independence of the Nepali judiciary was expressed by the Supreme Court itself in a submission of a High-level Commission in 2021, which was formed to probe irregularities, malpractices or corruption in the judiciary. This report has raised serious concerns highlighting areas that require immediate attention for reform in the judicial system:

Weak implementation of existing laws; nepotism, favouritism, patronage and political manipulation; lack of judicial accountability and integrity; and failure to appoint judges based on merit are key issues that have influenced judicial appointment, promotion, transfer and unfair disciplinary actions and promoted

⁵ The World Justice Project Rule of Law Index measures rule of law performance of countries across eight elements: Constraints on Government Powers, Absence of Corruption, Open Government, Fundamental Rights, Order and Security, Regulatory Enforcement, Civil Justice, and Criminal Justice. See, WJP Report 2021.

⁶ In 2020, Nepal downgraded its score to 33, ranking 117 among 180 countries in the Corruption Perceptions Index of Transparency International.

corruption and judicial misconducts. These in turn have eroded judicial independence and accountability increasing serious threat to public trust and their access to judicial system. (Supreme Court, 2021, p. 2)

The United States Department of State on *2020 Country Reports on Human Rights Practices in Nepal* concludes that the “courts remained vulnerable to political pressure, bribery, and intimidation” (2020, p. 7). Consistent lack of respect for court orders by the authorities and susceptibility to political pressure have remained serious challenges for courts. Similarly, the report of the International Commission of Jurists observed a visible lack of independence in the judiciary:

Judicial institutions suffer from weaknesses in capacity and independence, and are vulnerable to and experience political influence and manipulation at all stages from the appointment process to operational practices and the transparency of judgements or reports. (ICJ, 2020, p. 1)

Given the executive influence on judicial appointments, in a context where corruption is widespread and accountability is minimal, decisions in favour of the executive become apparent (Shrestha, 2020). Such concerns have led to a number of warnings about the failure of the judiciary to maintain independence and accountability, and the increasing and serious ramifications of this for the access to justice, protection of the rule of law, and democracy in Nepal.

For a substantial segment of the population, accessing fair and equal justice is a daunting challenge even when their rights have been seriously violated (DCAF, 2017; ICJ, 2020; Puri & et. all, 2013; UKaid & DanidaHUGOU, 2011). Over the last seventy years, these obstacles and barriers to justice have continued to remain the same in Nepal (DCAF, 2017; GoN & UNDP, 2018; UKaid & DanidaHUGOU, 2011) and the gap between the justice demand side and justice supply side “remains a long-standing struggle for the Government, Judiciary, CSO community, and donors” (DCAF, 2017, p. 18).

As part of this nexus between justice and development, international aid and development have made significant investment in justice reform programs over the

last seventy years, and specifically in judicial reform in Nepal. Various programs⁷ to reform the judiciary have been conducted in a number of selected districts by civil society and the judiciary, particularly following the establishment of democracy in 1990. For example, between 2010 and 2018, bilateral donors⁸ invested USD 93.76⁹ million into programs to reform the rule of law, strengthen governance, and to improve basic rights of people in Nepal. Donors have therefore provided support for reform efforts to both the demand and the supply sides of the justice system. While these have focussed more on enhancing the capacity of the judiciary and other justice sector actors, and raising awareness among right holders (Karna, 2012), their limited coverage, lack of universality and understanding about the context, and an uneven focus on the demand and supply sides have undermined their effectiveness. At this stage there remains no nationwide, coordinated and integrated approach to informing and empowering the population about justice and how to access it.

Although judiciaries have received capacity building training and citizens have been involved in legal awareness campaigns, the provision of justice for all remains an unfulfilled promise. For example, the national baseline perception survey, conducted in 2014, revealed that only around 5 percent of people were satisfied with court services and only 6 percent of victims of sexual and gender-based violence felt confident to seek legal aid (GoN & UNDP, 2018). A study conducted

⁷ For example, UNICEF's legal empowerment through paralegal committees and community mediation committees in the late 1990s; UNDP 'rule of law' initiated in late 1990s has now become the conceptual focus to strengthening justice and rule of law through legal and judicial reform; the Asian Development Bank in 2004 implemented Gender Equality and Empowerment of Women; the European Commission's 2002-2006 Co-operation Strategy included support for the human rights and rule of law; supported by European donors, International Non-governmental Organisations (INGOs) such as International Alert, and International Commission of Jurists engaging with justice and security actors since 2010.

⁸ DFID focused on Reforming Security and Justice Sector programs such as legal empowerment through Local Paralegal Committees, support for institutional development and policy reform of the justice institutions including police, judiciary and the Office of the Prime Minister; European donors (Denmark, Finland, Germany, Norway and Switzerland) supported UNDP for the 'Rule of Law and Human Rights Program', which supported the judiciary to implement a strategic plan for the Nepali judiciary on the supply side and partnership with the civil society to enhance community legal awareness; Switzerland supported governance facility and a local governance and community development program; and USAID supported government and non-governmental organisations to combating trafficking in person.

⁹ Danida invested USD 41.84 million between 2014 and 2018; USAID funded USD 9.10 million from 2010-2016; Switzerland provided USD 34.56 million between 2012 and 2018; and Finland invested USD 8.26 million between 2014 and 2017. See: Donors' Investment for justice: A short reflection from Nepal, Namati, 2018.

by the Ministry of Law and Justice (2016) revealed that 87.7 percent of citizens were not aware of free legal aid services.

While access to justice and judicial reform initiatives have been taking place for several decades in Nepal, based on Justice Sector Reform programs implemented in Nepal, the International Security Sector Advisory Team (2017) concludes that

The judicial system continues to suffer from elite capture of resources and services, whereby perceived and actual access to justice largely depends on the status, gender or ethnicity of the person concerned. (p. 18)

Based on the empirical data collected as part of my doctoral research, the following factors continue to impede demand side accessibility: complexity of processes and systems; perceptions regarding the independence and accountability of the judicial institutions; beliefs regarding political interference and the susceptibility of the system to manipulation and corruption; and non-inclusion of gender, caste and ethnic groups. In my research I found there remain substantial institutional barriers to fair and equal access to justice.

Understanding public's demand for legal and judicial services from the bottom-up is important for a judicial reform that focuses on promoting fair and equal access to justice. Effective dispute resolutions prioritize public's needs and their perceptions and experiences sit at the centre of judicial services, with substantial effect on their wellbeing. This research is situated broadly in the context of law and development, and draws on the work of, among others, two of this paradigm's major proponents – economist and philosopher Amartya Sen (1999, 2009), and justice sector specialist Livingston Armytage (2012b) – both of whom have long argued that the notion of justice, which is built on fairness, ethics, equity and equality, is indivisible from economic development because it is fundamental to social stability and individual wellbeing. This thesis considers access to justice from the dimension of justice and development – a people-centred paradigm.

Despite the focus of judicial reform on public access to justice through judicial system, the reform initiatives in Nepal are so far underwhelming, raising concern and sparking interesting theoretical questions about what judicial reform is, and how reform can be defined, understood, supplied and maintained by both the justice demand and the supply sides in the context of Nepal. The reform agenda to date is

more heavily focused on the supply side (that is, an instrumental approach to reform), and pays insufficient attention to the demand side, or a people-centred approach to improving human wellbeing on the ground. The basic claim here is that judicial development is not simply about enhancing the legal capacity of the justice demand side, or the functionality of the judicial infrastructure, but requires a deeper consideration of what justice is, how people perceive it and how the judicial system formally responds to and delivers that justice.

This study is situated in the new and emerging fields of ‘justice development’ and ‘development justice’, which examine the routine and everyday experiences of law and justice, and sheds light on the disparity that exists between what the law promises and what and how the judiciary delivers, what the public seeks from the law when they come before the court, and in turn how this affects public perception of the judicial system. This study is a detailed exploration of people’s everyday interactions, experiences, and access to the judicial system. This kind of empirical lens is essential to facilitating fresh analytical conceptualizations of judicial reform, in alignment with an emerging body of scholarship that focuses on the concept of judicial reform, independence of the judiciary, and access to justice.

Judiciary is the exclusive focus of this study, and as practised globally, ‘judicial reform’ has been used synonymously with ‘justice reform’ or ‘legal reform’. This thesis principally examines whether the judicial reform carried out over the last seventy years has contributed to a greater judicial independence and a fair access to justice in Nepal. The inextricable link between judicial reform and the independence of the judiciary is the major conceptual and normative axis of the research. This research explores the ideals that inspire judicial reform in order to understand the nexus between judicial reform, independence of the judiciary and access to justice.

1.2 Access to Justice, Rule of Law and Significance of Reform in the Judiciary

Principally, ‘access to justice’ is an example of “that which we cannot not want” (Spivak, 1993, p. 42). But in practice, it is important to unravel a key point - what is ‘justice’ and what is its relation to the principle of ‘access to the justice’? How

does access “on the books” translate into access “in action”? Answering this entails a theoretical discussion of ‘justice’, ‘access to justice’, ‘how access is defined, perceived, practiced and provided’, and in terms of my study how both the demand and supply sides are implicated in the access to justice in Nepal.

Justice Roslyn Atkinson defines access as “both the ability to know what the law is and to make use of it” (2004, p. 2). Access to justice is therefore about the ability of people to pursue and achieve fair access to courts, access to equal legal representation, and the opportunity to get timely remedy for their grievances or violations of rights through independent justice institutions, as put forth in national and international principles (Parker, 1999). The principles of access to justice, according to Sen (1999) incorporate notions of fairness and equity that are fundamental to the “expansion of human capabilities because it contributes directly to the quality of life” (Armytage, 2009, p. 9), and to human development.

Access to justice in practice becomes manifest when there is access to a judicial system that is deemed competent and is capable of delivering justice based on core judicial values (Smith, 2017). The core judicial values include a standard norm of human conduct that includes freedom, equality, dignity, equity and fairness, standards that are generally accepted principles of justice in international treaties and laws (Gopal, 2009). These universal principles of justice are preserved in the core human rights covenants of the United Nations including the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Indeed, these core values are preserved in the constitutions of many countries and have been a critical response to ‘rule of law’ reform approaches that focus on the improvement of the justice system (Ibid). Nepal’s constitution refers to a majority of these core norms reflected in international treaties. It assures basic human rights protecting dignity and freedom, and pledges fair and impartial justice by independent judicial institutions.

Access to justice is compromised, or absent, when people fear or lack confidence to approach the system, or do not have adequate access to it (Rhode, 2004, 2009). If the judicial system is financially inaccessible, or if people lack access to adequate legal representation, or the system is not in reasonable proximity, or the public do

not have access to sufficient information or knowledge about the system, justice is considered inaccessible. But “access to courts is only one part of access to justice” (Jowitt, 2009, p. 138). If the judiciary (including judges and court staff) lack independence – if they are incompetent, inefficient, unreliable, and unresponsive or deemed untrustworthy due to political influence, corruption or other irregularities, justice is considered critically inaccessible. Nepal’s access to justice predicament illustrates both conditions.

Access to justice, consequently, is a fundamental principle of sustainable development, democracy and peace, affording judicial fairness, equality and equity as an objective and an outcome of justice. Democratic systems are founded on the values and norms of justice, warranted by its dynamism (Shrestha & Wagley, 2019). Access to justice, therefore, means giving people confidence to choose an appropriate mechanism, making justice easier and affordable, simpler to understand, quicker to deliver, and ensuring fairness by the competent and independent judicial authorities. Law professor Trevor Farrow states:

Access to justice as law enforcement, improvements in judicial system and courts procedures, policy and decision implementation and institutional reform to increase fairness in judicial responsiveness. (2014, p. 970)

It is important that everyone is equal before the law, has equal access to justice and is considered equal (UNDP, 2004). Access to justice focuses on measures to promote fair and equal access to the judicial system for all members of the society (Parker, 1999; Rhode, 2004). Considering the effect of injustice for specific groups (women, children, migrant workers, disappeared and disabled people), recent international conventions have focused on substantive protection of rights of these people. Access to justice is a desire for fair and equitable justice which possibly involve a substantial reform in existing legal and judicial system (Schetzer, Buanamano, & Mullins, 2002).

Access to justice through judicial reform efforts has become a focus of international development initiatives (Gopal, 2009). For example, normative standards on judicial independence, the Manila Declaration for a Twenty-first Century Independent Judiciary states that “almost every country is now embarking on judicial reform” (2005, para. 3) because the judiciary contributes significantly to

the legal and judicial reform process. Armytage (2009) claims that “the goal of the judiciary and of judicial reform initiatives should be to secure human conduct consistent with acceptable normative standards” (p. 12). Based on widely known precepts, the core function of the judiciary is to enhance judicial effectiveness in securing fairness in justice, drawing on experiences of demand side and supply side elements – institutional, organisational and human dimensions of judicial reform.

While it is important, providing access to courts is considered insufficient, particularly where the performance of the courts is inadequate and lack of independence and appropriate integrity is either a perception or a reality. Enhancing the ability of the courts to provide justice is the key goal of judicial reform. Judicial reform is inseparable from the endeavour of legal reform and development, which focuses on assisting the judicial branch of government to administer fair and equal justice. Academic literatures (Armytage, 2012a, 2012b; Carothers, 2006; Davis & Trebilcock, 2008; Trebilcock & Daniels, 2008) have described this as ‘law and development’ or ‘legal and judicial reform’ or ‘law and justice reform’ or ‘rule of law reform’. Sen (2006) argues that justice is constitutive of development and claims that it is almost impossible to presume development independent from “its economic, social, political, or legal components” (p. 38). Justice in development has been repositioned as the promotion of justice as fairness and equity (Armytage, 2012b), while Sen (2009) defines justice as a procedural fairness of judicial institutions, and the concept of substantive equality.

Justice has been an agenda of development and has been analysed and understood through shifting paradigms over time, which include expanding “strategies to close the gap between the need for, and the availability of, quality legal assistance” (Albiston & Sandefur, 2013, p. 102). Starting with the reconstruction of post-war Europe, the ‘law and development movement’ focussed on assistance in Latin America in the 1960s and 1970s to ensure equal access to legal services and courts. Since the 1960s, judicial reform has evolved and developed through key movements (Carothers, 2006; Trebilcock & Daniels, 2008; Trubek & Santos, 2006). Trubek and Santos describe and define three movements in which ‘law and development’ has evolved as distinct modalities: law as an instrument of the state (1960/70s); law as an instrument of the market (1980s); law as a regulator of the market (1990s); and the fourth moment, which emerged in 2000s defines law as an

instrument of human development. The concept of human development now considers law as an end of rather than a means to “development, and ordinary people are now a means *and* end of achieving development directly” (Cohen, 2009, p. 526).

Over the seven decades of access to justice reform globally, many countries have given priority to judicial reform as an essential precondition to democracy and development. Eastern Europe, Latin America, Africa and the Asia-Pacific have realized corresponding change in judicial processes as a prerequisite for development, and have also shared common goals to have an impartial, predictable, accessible and efficient judicial system (Armytage, 2009, 2012b; Baderin, 2011; Dakolias & Said, 1999; Hammergren, 2005; Hammergren, 2014; Skaar, Domingo, & Sieder, 2003). These experiences suggest a ‘justice-oriented approach’ or ‘people-centred approach’ for the development and implementation of judicial reform initiatives (Armytage, 2009, 2012b). Legal scholar Gopal (2009) suggests six critical variables of a ‘justice-oriented approach’: (i) institutional, organisational and human dimensions of judicial reform; (ii) role and responsibility of judiciaries; (iii) efficiency of judicial system; (iv) judicial and legal knowledge; (v) competency of judges; (vi) effectiveness of judicial administration and access of demand side. Gopal’s critical variables cover three broadly interrelated aspects: improving the quality of judicial adjudication; strengthening judicial capacity; and creating value-based judicial systems. These elements are addressed in this thesis as requirements of reform for the *supply side* of justice in Nepal.

While explaining the lack of more positive outcomes at the regional and global levels, Karna (2012) has pointed out that, “for two decades in South Asia, and since the 1960s in Latin America, “justice” has not been viewed as an ‘end in itself’ of justice (or rule of law) reform, but as a by-product” (p. 172). Justice reform has been generally perceived as a disciplinary instrument of ‘good governance’ and economic growth (OECD, 2008; World Bank, 2002). For example, a Judge in Nepal’s Supreme Court claimed in 2009 in relation to the Second Five-Year Plan:

The fact that the effectiveness of the justice sector has a positive relation between the investment in the justice sector and the overall economic development of the nation has been created among the principal stakeholders

and I feel that this has been one of the most important aspect of this Plan.
(Supreme Court, 2009, p. C)

1.3 Judicial Reform: Experience from Nepal

A popular old Nepali saying “*Saana lai ain thula lai chain* (Law is only to govern the poor; it serves the rich)” (Bhattarai, 2003, p. 72) is still pertinent in the context of contemporary Nepal. Public access to justice is influenced by several potential elements, such as socio-economic condition, legal awareness and empowerment of the demand side, and competency and integrity of the supply side. Such factors affect how citizens are able to access courts – promptly, slowly, or by opting out. These options are based significantly on who the litigants are, what position they hold in the society, or what connection they have with the political parties or with the judicial authorities. My data from the field also suggest that the greater the financial ability, personal connection and political influence that a person has, the easier their access to the courts. Indeed, the thought-provoking findings from my research on the lack of public trust among many people and communities in the judicial system have led lawyers and judges to suggest solutions to this issue. These included education and awareness; more pro bono legal services by lawyers, and more community outreach on the part of the courts. But questions remain: Is the system itself in good condition? Does the judicial system function independently? Do judicial services focus on justice and public aspirations? My research shows that the judiciary is aware that the public does not trust the system, and sees its many fault lines.

Supply side barriers, also understood as institutional barriers, have significantly impacted the demand side of access to justice. This is linked predominantly to problems relating to judicial independence. While analysing supply side access to justice, questions relate to how justice is delivered through the current legal system, what kind of services are available, and how they are provided, by whom, and under what conditions. Querying how these services are constrained by professional norms and values will help clarify the effects of supply side systems on access to justice in Nepal.

It is not unfair to say that the supply side is poorly resourced – institutionally, organisationally and in aspects of human conduct – which collectively have serious

effects on the independent adjudication of justice. The constitutionality of judicial independence has remained the root cause of numerous deficiencies in the supply side of access to justice, which has experienced constant erosion of its independence. Throughout Nepal's judicial history, the constitution has featured a good deal of ambiguity about the concept of judicial independence. These ambiguities are present in the preambular section, the provisions related to judicial structure, judicial appointment, jurisdiction and independent functioning, and separation of powers. This ambiguity is often exploited politically, leading to ambivalence about how to ensure independence and resist political influence.

The inception of the current Constitution has served as a model for a further discrepancy in the power relations between branches of the government. Political influence in the institutional “independence of the justice institutions often skews verdicts in favour of state institutions, political leaders, or other elites” (DCAF, 2017, p. 25). Political influence in individual independence has smudged established jurisprudence and damaged the principle of independence.¹⁰ Judges have a strong incentive to act in accordance with the executive's and political parties' “wishes” (Shrestha, 2020). Across the judiciary, political pressure regarding appointment of judges and judgement handling remains an endemic problem (Kharel, 2020). The lack of institutional autonomy and independence have severely impacted the judicial competency, effectiveness, efficiency responsiveness and integrity.

While there are several examples of legal and judicial efforts to promote the independence of the judiciary, the selection and appointment of judges to the Supreme Court and High Courts has become subject to political interference and lack of fairness in operational matters in recent years. Public concern about and distrust in the competence and integrity of judges has intensified as most judges in Supreme Court and High Courts are nominated and appointed based on political connections and nepotism, regardless of qualifications and experience. These are the key shortcomings in independent judicial appointment and accountability processes.

¹⁰ This is discussed in more detail in later sections of the thesis.

Judicial independence, including judicial competence and judicial integrity, has been an enduring concern for both the demand and supply side. Supreme Court Judge Ishwor Khatiwada, in his article published in editorial section of the national daily, noted: “The judicial system is inefficient and often unfair in delivering justice despite its long history of operation” (Khatiwada, 2006, para. 2). Similarly, the Strategic Plan of the Judiciary recognized that the judicial process is lengthy, tedious and expensive and without timely reforms, peoples’ “expectation of receiving speedy and inexpensive justice will not be possible” (Supreme Court, 2009, p. 53).

Reform in the judiciary to promote institutional performance and independence has been a notable and pressing concern of international agencies (AI et al., 2021; DCAF, 2017; HRW, 2017), the Bar Associations (NBA, 2013, 2019, 2020b; SC BAR, 2007) and the Supreme Court itself (Supreme Court, 2015a, 2021). Reform initiators including Supreme Court judges and international donors have declared that judicial reform in Nepal is “going backwards” (Shrestha, 2020, 2021), pushing access to justice into an ever-pressing crisis.

The seventy years of institutional reform in Nepal indicates that the judicial system is still plagued by many institutional, organisational and political challenges (Bhattarai, 2003, 2009; DCAF, 2017; Phuyal, 2009). This experience also underscores that legal empowerment of the demand side and capacity building of the supply side are not enough to secure fair and equal access, nor do they enhance the ability and accountability of power holders (Bhattarai & Uprety, 2006; Bhattarai, 2009). The purpose of judicial reform is to enhance judicial competency and integrity to ensure justice for all, rather than to merely resolve disputes and reduce the case arrears (Pandit, 2019). Retired High Court Judge Star’s remarks support this claim:

Fifteen years of strategic reform has not been able to deliver ‘justice’ to the public but rather concentrated on speedy reduction of the number of overdue cases based on the quantity and timeliness of disposal as indicator to measure success of judicial reform rather than ensuring quality justice. It is important

therefore to analyse whether the judiciary has been able to deliver ‘justice’ or merely furnish ‘decisions’.¹¹

While all commendable goals, reform approaches have largely been based on “the assumption that ‘looking inward’ at the needs of justice sector institutions (infrastructure, case management, training, appointments, promotions and discipline) will lead outward to responsive justice delivery” (Karna, 2012, p. 172). Nepal’s reform process has over-emphasised the instrumental or tangible measures of reform and under-emphasised core reforms to promote judicial independence, including increased judicial competence, responsiveness and accountability (DCAF, 2017). Reform efforts are mainly “based on a pre-determined ideal” (Decker, Sage, & Stefanova, 2005, p. 2), designed in terms of an instrumentalised look at the needs of judicial institutions, rather than on an understanding the functions the justice system plays to improve human wellbeing in any given society. Yet, it is apparent in Nepal that the public at large have not demonstrably benefited from the reforms undertaken.

Judicial reform has been understood and considered in terms of ‘procedure’ rather than its actual ‘role’ in the society (Decker et al., 2006; World Bank, 2011). An additional and important part of this critique is that the presumed beneficiaries of justice reform, particularly the poor and historically disadvantaged groups, must be able to participate actively in the reform process as its source of legitimacy and sustainability. According to Gopal (2009), it is vital that judicial reform is shaped and led by transformative processes, particularly where the law challenges aspects of traditional social authority. Imported reform agendas, with their substantial focus by donors and the judiciary on ‘traditional approaches’ to judicial reform, have generated “considerable scepticism about their effectiveness” (Ibid, p. 50). He further claims that there remains a substantial “lack of *consensus* and *clarity* about the goal and role of judicial institutions and the goals of judicial reforms” (Ibid, p. 48).

Fixing this will require a paradigm shift away from instrumental reform to a more people-centred approach to it, replacing the approaches that are described as “promoting ‘thin’ or procedural notions of reform” (Armytage, 2012b, p. 7) –

¹¹ Interview, Kathmandu, 28 August 2019.

mostly to the formal decision-making of judges and courts – with ‘thick’ or normative and value-based aspects of reform, which provide the “powerless and poor with the means to exercise their substantive rights” (Ibid, p. 24) such as legal awareness and the capacity/confidence to approach the judicial system. Armytage (2012b), Gopal (2009), and Sen (1999, 2009) argue that this people-centred approach, which focuses “beyond the needs of institutions to the needs of the people” (Karna, 2012, p. 173) and the community, is what is required. This is the nub of people-centred judicial reform: improving the quality of justice delivery to promote and ensure human wellbeing.

Searching for Success in Judicial Reform (2009), an analysis of judicial reform experience in the Asia-Pacific that also included contributions from Nepal’s Supreme Court Justice and advocate, offered recommendations for advanced and forward looking reform approaches – “a human-centered approach that looks beyond the needs of [formal] institutions to the needs of the most [vulnerable and] needy in society” (Armytage 2009 in Karna, 2012, p. 173). Analysis further suggests developing a shared understanding of the basic principles of justice for the success of reform efforts. Justice Sector specialist Livingston Armytage, in a meeting of the National Judicial Academy in Nepal in 2009, emphasized that the “need for bold and innovative approaches was not a call to abandon the strengthening of justice institutions, but rather a call for a better balance with a ‘human-centered approach’ to those still excluded from access to justice” (ICJ, 2012, p. 12). This evidence suggests “justice should be an end, in itself, not merely an instrument for achieving other diverse ends” (Karna, 2012, p. 173). Judicial reform would require efforts that would integrate and sustain needs of both sides of justice by developing shared understanding of the principles of justice.

1.4 Research Questions

This thesis looks specifically at the everyday efforts of the public to access justice and issues of judicial independence within the research questions. It narrates what happens to day to day justice, attending to the distinction between ‘law in books’ and ‘law in action’ as articulated by Dean Roscoe Pound (1906). The thesis investigates access to law in everyday contexts by engaging with people about what ‘access to justice’ means and how people ‘experience’ and ‘perceive’ this access.

With attention to measures on both sides of judicial reform, this research explores experiences of judicial encounters with both the demand side and the supply side of justice. Guided by the theoretical explorations with both sides of justice and evidence gathered from a qualitative method: one-on-one interviews and focus group discussions conducted in 2019, this research seeks to address three main questions:

- i. What is the relationship between access to justice and the *judicial reform* initiatives that have occurred over the last 70 years in Nepal?
- ii. How do the judicial reform initiatives undertaken in Nepal address the gaps between the demand for justice (by the community and the public) and the provision of justice (by the judicial system)? What are the gaps between the claims about access to justice and the lived reality of justice?
- iii. How do those at the demand side (communities) narrate their perceptions and experiences of access to justice, and how do those on the supply side (judges and court staff) perceive judicial reform in Nepal?

My data from the field addresses mounting public disappointment and frustration with the judicial system coupled with a lack of access, and therefore to an important pillar of justice. My engagement with the demand side and supply side of justice reveals many insights into how both these sides view judicial system and processes, judges, and the judiciary. Importantly, my in-depth empirical qualitative study leads to a thicker understanding of what drives perceptions and experience of the demand side, and how supply side perceives judicial reform. To discover this, as argued by Gopal (2009), the content (what) and the process or approach (how) of judicial reform will need to determine quality judicial system and ensure access to justice for all. Based on ‘critical variables’ of a ‘justice-oriented approach’ asserted by legal scholars (Armytage, 2012b; Gopal, 2009; Sen, 2009), my field research highlights the barriers to access to justice for the demand side and the requirements for the reform in the supply side.

This thesis is specifically concerned with public access to the entire judicial system and the elements that affect public access. It aims to offer generalised findings about the public’s perception of the country’s judicial system, and to consider how such perceptions hinder or enable access. It does not assess or investigate public

access with at specific judicial levels or comparatively within and between regions. Neither is this thesis a study to measure the level of public confidence according to membership of different sections and segments of Nepali society. In addition, my omission of non-professional informants in this study, is a conscious decision, as my main focus is on investigating how a demand side of justice (professionals at the local level – lawyers and community organisations) and a supply side (judges and judiciary) understand and perceive “law and justice”. This thesis does not investigate the experiences and understandings of non-professionals experience with the law and courts. In this sense the thesis is about the perceptions and experiences of legal “insiders” in Nepal, those who are located on the demand side, and those who are situated on the supply side of the system.

1.5 Chapter Outline and Explanation

This thesis is organized into nine chapters. This opening chapter sets the background for the study. It outlines the access to justice situation and the existing difficulties to accessing justice in Nepal, specifying the lack of judicial independence due to political and executive control as a major obstacle to fair and equal access to justice. This is a significant factor in Nepal’s failure to demonstrate measurable results of the law and development movement, or as Armytage calls it, “just development” (2012b, p. 25). This chapter provides a summary of the arguments to be presented and a guideline that explains structures and contents of this study. It introduces the research questions and discusses the significance of the study to law and development endeavours in Nepal, providing context for the later discussion.

Within the background of the previous chapter, which has set forth the context for this study and highlighted the main theoretical concepts regarding the law, justice and development, Chapter 2 details the methodological approach adopted to address the ‘real barriers’ to access to justice, the ‘needs’ of the demand side, and the experience of the supply side. This chapter presents and justifies the methodology adopted, including the data collection methods used. A brief introductory discussion of the main interlocutors on these issues is provided to contextualise the qualitative data that forms the basis of my findings, prior to the thematic presentation of the research. It introduces my fieldwork setting and the

interlocutors who engaged in the study. The development of qualitative studies and the use of empirical techniques are used to demonstrate how, in practice, implementation of principles of justice shape perceptions and experiences of justice for both demand and supply sides. This chapter also addresses the descriptive qualitative process and highlights the strength, limitations, and significance of this particular methodology in law and development studies.

Chapter 3 provides a historical overview of judicial reform, noting the paradigm shift in justice and development both globally and in Nepal, and considers how they have been practiced, transformed and developed over time. Based on an analytical explanation of justice and development advanced primarily by law and development scholars Amartya Sen, Livingston Armytage and Mohan Gopal, this chapter considers that the lack of systematic effort to clarify the purpose and goal of reform and the role of the judiciary has created substantial challenges to achieving the goal of judicial reform. This chapter argues that within the current context of the law and development discourse in Nepal, the first step would be a critical, empirical valuation of the law and development initiatives over the past seventy years to identify specific areas of success and failure, and how judicial reform can be operationalized in such a way that public trust in the judicial system as a guarantor of justice can be achieved.

Chapters 4 and 5 turn to the concept of trust. A significant thematic finding of my field research with communities and legal personnel in Nepal was the ongoing reference by all interlocutors to issues of trust, lack of trust, and the erosion of trust. Trust became such an important issue that it prompted further inquiry on my part into the relationship between access to justice and trust, and the ways that trust bear on judicial reform, justice and development.

Chapter 4 outlines theoretical and conceptual foundations of trust in the judicial system and seeks to understand the importance of public trust to the justice system. The concept of trust in justice is integrated into development theory, and this chapter, drawing on that theory, explores judicial competence and judicial values as determinants of public trust, examining their relation to trust in the judicial system and to the goal of judicial reform. This chapter also identifies a dearth of inquiry into trust in judicial reform studies, globally and in Nepal. It argues

ultimately that Nepal lacks an appropriate conception of the relation between ‘trust’ and ‘confidence’ to sufficiently capture the sentiments or sensibility of these phenomena. The chapter therefore suggests the need for an empirical exploration and analysis of an indigenous conception of trust in the context of Nepal and its relation to justice.

Based on the people-centred perspective, Chapter 5 examines the relationship between trust and the judicial system – the critical issue that has consistently emerged during the fieldwork. While Chapter 4 considers trust and confidence conceptually, the specific focus of Chapter 5 is on the factors that work for and against the satisfactory levels of public trust in the judicial system. The discussion is organised around two core elements – judicial competency (trust in the ability and capacity of judges) and judicial values (trust in the integrity of judges and the system). Persistent barriers to lifting the levels of public trust in Nepal are revealed. This chapter uncovers a profound sense of dissatisfaction and frustration among both the demand side and supply side, and the issue of lack of independence and accountability of the judges and the judiciary is raised consistently by those engaged in the study. The importance of a functional judicial system and an independent judiciary to the rule of law, democracy and constitutionalism in Nepal is highlighted here. This chapter therefore argues that public trust in the Nepali judiciary is undermined by the perceived and experienced systematic lack of judicial independence – in the book of law and in practice.

Following these powerful illustrations from the demand and supply sides about the lack of adequate protection for the judicial independence and judicial accountability, Chapter 6 describes historic attempts to bring judicial reform to Nepal. It traces the institutional cultures of the judiciary over the past seventy years and looks especially at issues of judicial independence across the major constitutional and political transitions, which resulted in a relatively weaker conception of the judiciary vis-à-vis parliamentary government. It discovers that the constitution itself has undercut the legitimacy and standing of the judiciary, allowing the executive and the legislative to adopt the position of sovereigns, thus overriding the ideals of the constitution. The chapter discovers that a lack of judicial independence is a relentless feature of Nepal’s constitutions and has largely undermined judicial independence and public trust.

Chapter 7 on judicial independence in Nepal focuses on issues of institutional and individual independence and their implications for issues of trust and public confidence. The approach is two-pronged. Following on from the previous chapter, this chapter highlights how the inadequacies of the constitution undermine judicial independence, resulting in a lack of *institutional* independence and a lack of *individual* independence of judges themselves when performing judicial functions. This compromises judicial integrity, thus undermining public trust in the justice system. The chapter takes as its principal analytic focus the appointment process of judges, and argues that the politicization of the judiciary through this process seriously hinders judicial independence.

Following the conclusion from the previous chapter about the increasing vulnerability to political interference inherent to the judicial appointment and disciplining processes, Chapter 8 examines the legitimacy and mandate of the judicial appointing body (the Judicial Council) in light of the overarching goal of judicial reform. It highlights how its problematic status – as neither an advisory body nor a governing body – fails to institute and authorise the Council as an independent oversight body. It argues that the constitutional reform that authorises the executive’s power over the Council and its codified institutional arrangements, particularly its composition, cannot produce reasonable confidence in its ability to secure judicial independence and accountability. The system’s insufficient institutional safeguards and ineffective accountability measures have allowed for additional sources of political interference, which amount to an institutional inability or failure to rebuild public trust in the judiciary.

Finally, Chapter 9 concludes this study highlighting the centrality of the nexus between access to justice and public trust in judicial reform endeavours. It reveals that judicial reform initiatives in Nepal are unfinished and have been largely experimental. It is argued that they have been shaped and guided by the political environment of the country rather than true judicial reform requirements, which has overshadowed judicial independence. Increased vulnerability of the Nepali judicial sector to external interference, the willingness of political leaders – that regulate the government mechanisms – to interfere in the administration of the judiciary and judicial decision-making process, and inclination of the judiciary, judges and judicial actors to undue influence have all contributed to an increasing lack of

public trust. The realisation of “real justice” is not possible without people’s access to an independent judiciary, which is in the realm of the executive, legislative and political parties. The chapter concludes that the question of “who guards the guardians?” remains both unanswered and unanswerable in relation to judicial reforms in Nepal today.

Chapter 2

MAKING ACCESS TO JUSTICE VISIBLE: THE USE OF PEOPLE-CENTRED QUALITATIVE METHOD IN JUDICIAL REFORM

2.1 Introduction

Research on legal and judicial reform has explored a range of issues that facilitate the reform efforts and has identified the important contribution that empirical research makes in transforming reform practice (Hanley, Fileborn, Larcombe, Henry, & Powell, 2016). While there is a growing body of literature on the success and limitations of judicial reform initiatives, research on the experiences and processes of judicial reform continues to be crucial because the judiciary and the judicial system are the least examined (Hanley et al., 2016) and least understood (Hammergren, 2004) elements of legal reform. Legal qualitative researchers (Copes, Beaton, Ayeni, Dabney, & Tewksbury, 2020; Copes, Brown, & Tewksbury, 2011; Worley, Worley, & Wood, 2016) express concern about the limited amount of qualitative research within the discipline of law, and strongly encourage scholars to conduct field studies to understand the dimensions of judicial reform and to experience the potential of first-hand qualitative research. The interpretation of judicial activities is not only a cognitive process, but also a practical and situated activity, that aims to study the logics and reasoning of the system. It is necessary therefore to pass beyond the “institutional facade” to investigate the “real goings-on of situations” (Verzelloni, 2015).

Qualitative research as a holistic and multifaceted research method, “looks at the larger picture and begins with a search for an understanding of the whole” (Denzin & Lincoln, 2018, p. 22). It provides insights into various aspects of social life and generates words as data for analysis, which place emphasis on peoples’ feelings, perceptions, and experiences in order to explore and understand the meaning of social or human problems (Hammarberg, Kirkman, & De Lacey, 2016). Examining and observing everyday settings on the ground (Flood, 2005) provides a basis for explicating perceptions and experiences of access to justice.

Developments in the fields of law have expanded the prominence of justice system, thereby attracting new avenues for qualitative research and discourse (Bacon, Loftus, & Rowe, 2020). Justice reform scholars such as Altheide and Dingwall (1997), Bacon et al.(2020), Bruce (2013), Jardine (2020) and Weitzer (2017) claim that descriptive qualitative research has proved to be a crucial methodology for entering and understanding justice systems, primarily because detailed qualitative accounts can make more visible the approaches, processes, and meanings to situational contexts.

For this thesis project, I engaged in descriptive qualitative research that illuminates its potential contribution to judicial reform in Nepal. Legal qualitative researchers Catey (2011), Rose (2015) and Starr and Goodale (2002) point to theoretical outlook and development of an applicable theory as two major goals of qualitative researchers. Led by the theoretical and methodological explorations, this thesis looks at public access to the judiciary and interprets how public and judicial actors perceive and experience access to justice through the judicial system. Drawing on a spectrum of sites and addressing a broad range of important theoretical and analytical questions, this research explores opportunities for using qualitative methods to improve the judicial reform processes.

This chapter describes the methods adopted to inquire into public access to justice, considers the impediments, and examines how judicial reforms put in place are working to overcome the challenges identified. The use of a people-centred qualitative method is discussed in the context of an interdisciplinary research project, which examines the engagement of stakeholders, including community members and judiciary personnel in judicial reform. This chapter explains the use and importance of qualitative research on judicial reform, with an aim to improve access to justice and achieve visible reform outcomes. This research is based on 28 interviews with demand and supply side actors and three focus group discussions with three different communities in Nepal.

2.2 Descriptive Qualitative Research and Judicial Sector Reform

Judicial reform focuses on how reform approaches are designed, executed and evaluated (Hanley et al., 2016) and also how it is experienced. Increasing the

outcomes of judicial reform has noticeable benefits for both the demand and supply side of justice (Dias, 2009; Gopal, 2009; Hanley et al., 2016; Karna, 2012). Research on judicial reform or law and development addresses both the functioning of law with regard to priorities and the way development is envisioned, as well as the extent to which scholarship should direct, inform or shape legal and judicial reform (de Feyter, Türkelli, & de Moerloose, 2021).

Law and development scholars reiterate a need to bring research on judicial and legal reform into dialogue with other disciplines to highlight the impacts of the social functioning of the law and the judicial system on development objectives. Literature (David Kennedy in Hatchard & Amanda Perry-Kessaris, 2003; Hanley et al., 2016; Kennedy, 2013) suggests that developing strategies for the implementation of judicial reform is particularly difficult in the absence of qualitative research that explores how the views of ordinary people can contribute to the reform process.

Legal realism, also understood as a naturalist approach to ordinary people and the legal elite, examines “law as it is practiced in everyday life” (Merry, 2006, p. 975), focusing on the ‘real need’ of ‘real people’ in ‘real life’ (Argyrou, 2017). It is assumed that justice delivery is determined not only by laws, precedents and general legal principles, but also by socio-economic background and political convictions of the supply side. Legal realism, according to an Anthropologist Sally Engle Merry (2006), is a qualitative research methodology that tracks people, ideas, laws and institutions. She presents it as “a valuable framework for examining the interactions and hierarchies among distinct fields” (p. 976), predominantly focusing on connections between various social elements, and on dimensions of legality that explore “how law constitutes persons and things” (Pottage and Mundy, 2004 in Merry, 2006, p. 976). At its heart, legal realism relies on empirical evidence of the objective of the law to draw conclusions about its impacts on persons and things.

Writing on the relationship between empirical qualitative research and improving law reform processes, legal scholars Hanley, Fileborn and Larcombe (2016) note that its principal contributions can include the examination of strengths and weaknesses of reform practices; its ability to test and assess reform proposals; and

the assessment of impacts and results of implemented reform. This suggests the benefit of empirical qualitative study to navigate the existing gaps between the content and purpose of judicial reform, which is the concern of this thesis.

Different approaches to legal reform research can reflect the purpose of law within the society and the standing of the judiciary in shaping the judicial system (Melville, 2007). The core aim “is to describe what happens, how the people involved see and talk about their own actions and those of others, the contexts in which the action takes place, and what follows from it” (Hammersley & Atkinson, 2007 in Henderson, 2016, p. 31). Qualitative accounts can produce fresh critical and reflective meanings, experiences, contradictions, and everyday practices. These accounts also contribute to the demand for more effective and innovative approaches to observe, analyse and reflect on the nature and extent of effects of development initiatives in the society (Bamberger, Rao, & Woolcock, 2010).

Reflexivity is essential to research that involves justice because justice is primarily viewed as “an emotional struggle of the self to live with virtue in our social and communal lives” (Johnson, 1995, p. 199), realized through analysis of social interaction including the contexts, experiences, perceptions and meanings (Altheide & Dingwall, 1997). The situatedness of the researcher in this is crucial (Jardine, 2020): it ensures that the research is processual, emotional, developmental, interactional and interpretative (Altheide & Dingwall, 1997).

Legal scholars Altheide and Dingwall (1997), Brunnegger (2020), Conley and O’Barr (1988) and Flood (2005) discover a renewed interest in empirical social sciences research relating to justice that is both descriptive and an analytical. Descriptive empirical methods are often the preferred methodology of those with a realist view of society, as they involve “systematic investigation of real-world facts” (Hanley et al., 2016, p. 561) and to making judicial systems more effective through fair administration of justice. Practicing descriptive methods in the legal and judicial sector opens the system up to scrutiny (Starr & Goodale, 2002) because empirical approaches provide analysts with information about social, political and legal settings (Garfinkel 1967 in Bacon et al., 2020). With a shared concern for access to justice, this scholarship opens up new ground toward research on judicial reform in empirical and theoretical terms.

Qualitative methods are useful tools for assessing the complexity of the judicial system and its processes, and useful for building a contemporary context for understanding the history of judicial reform (Starr & Goodale, 2002). That justice can be best explained and understood by interacting with communities on those features that legal and judicial systems share is a fundamental premise of these methods (Brunnegger, 2020; Hanley et al., 2016; Pakes, 2018). The assumption is that we can find indications of what requires improvement in justice administration, enhance judicial competency and judicial behaviour, as well as enhance effective ‘cultures of justice’ on both sides – demand and supply.

My research is motivated by a degree of confidence in the role that empirical and qualitative methods can play in enabling and enhancing judicial reform processes. This research is grounded in social interaction insofar as subjective understanding and interpretation is key. More broadly, my research includes both explanation and analysis with the objective to generate rich, in-depth, and ‘thick descriptions’ of my engagements and interactions during a modest period of fieldwork – in this case, two and half months, from late June to early September 2019.

2.3 Focus of the Research

This study explores people’s perspectives on justice: what it is for them that makes the judicial system in Nepal meaningful. This thesis engages with their everyday justice concerns and narrates what actually happens for them in this space between ‘law in books’ and ‘law in practice’. It asks about access to law in everyday contexts: what does ‘access to justice’ mean, and how do people ‘perceive’ this access. While this research began with a probe about the nexus between judicial reform efforts and public access to justice, the object of analysis is the gap between public claims about access to justice and the actual response of the justice system reform in meeting that gap. It is this relation that constructs the interaction of this research with law in society and development. The objectives of this study are to theoretically, methodologically, and empirically examine and analyse the challenges of judicial reform in Nepal, and explore better possibilities for judicial reform.

This descriptive qualitative study is about the gap between rhetorical commitments and everyday concerns regarding access to justice through a competent and value-based judicial system in Nepal. This research forms part of my larger interest in access to justice and judicial reform and achieving the goals of the latter to enhance human wellbeing of people in Nepal. In this research, however, I focus specifically on access to justice and the judiciary for several reasons: first, because access to justice is foundational in phenomenological and empirical terms; and secondly, Nepal's goal of judicial reform highlights the potential for achieving fair access to justice through a focus on the independence of the judiciary, which has emerged as a critical inhibitor to reform success. In order to enter into an examination of access to justice and judicial reform, I draw attention to the inclusion of reform of the judiciary in the recent constitutions of Nepal.

The Supreme Court states that 'Access through independent and trusted judicial system is a goal of judicial reform' (Supreme Court, 2009c, 2019c). This was something I initially did not pay much attention to. My primary interest in this study was to seek answers about what might constitute key elements of effective judicial reform that impact public access to justice. Although I have studied and reviewed many judicial reform projects, mostly involving the role of international donors in prioritising Nepal's route to judicial reform and its seeming ineffectiveness, fieldwork shifted my emphasis. In the field I discovered, somewhat unexpectedly, that the nexus between 'access to justice and judicial reform' is precarious, and that research interlocutors from both the demand side and supply side of justice are much more concerned with fair and equal distribution of justice than with structural or instrumental reform of the judiciary.

All 36 members from demand side and 22 judicial personnel from supply side I spoke with about access to justice expressed a widespread lack of trust and confidence in the system and saw trust as an issue crucial to achieving judicial reform. This unexpected finding of an emphasis on trust, and the discovery that this held serious implications for all research participants about the potential for reform, affirmed for me as a researcher that a people-centred approach offers an enhanced path to reform. Reforms which are focussed primarily on structural and systems reforms at the supply side miss its crucial elements. The lack of trust at the supply side related to perceptions and experiences of political interference in decision

making and in judicial appointments, while community members spoke of the denial of fair and equal access to systems of justice. In my focus groups and interviews, it became increasingly clear that the lack of trust and confidence was experienced primarily due to the lack of judicial independence, and issues related to judicial competence and values. While my research maintains its focus on the success or otherwise of the law and development aspirations in Nepal, including inquiring into the persistence of barriers to accessibility and fairer justice despite a long history of judicial reform, trust also became a major conceptual and empirical focus of this research. The nexus of trust, fairness, access and integrity of the judicial system became an important axis of my research and its findings.

2.4 Research Setting

This section presents the settings and sites where fieldwork was based. I undertook fieldwork comprising interviews, participant observation and focus group discussions in Kathmandu – the nation’s capital and the administrative district, the home of the Federal government and the Supreme Court. I also spent substantial time with communities in three rural districts (Banke, Kaski and Morang)¹² to understand their concerns about access which involved significant time engaged in important informal conversations and observations. The value of being immersed, over a prolonged period, developing relationships and gaining trust, offers insights, has benefited the analyses of this thesis.

The districts I visited and the communities with whom I undertook focus group discussions were selected with a view to their geographical variation (terai and hilly districts ranging from eastern to western region), to gain an interesting spread of experiences. Critically reflective ethnomethodological analyses of the researcher’s experience added a significant dimension to this study. In addition to the understanding gathered from the literature, my work with these communities in the

¹² Banke is located in the mid-western region (Lumbini Province), Kaski in the western region (Gandaki Province), and Morang in the eastern region (Province 1). Each district has diverse culture, ethnicity, geography and socio-economic conditions.

past, provided me with an awareness of the gravity of the access to justice issues experienced by these communities.¹³

Figure 2.1: Map of Nepal Showing Study Area



These multiethnic, multi cultured and multilingual districts, although geographically, politically and socially different, share common justice concerns. Kaski district, located in Gandaki province in the western region, is a low hill environment, with one of the highest levels of literacy. It also suffers from a significant rate of domestic violence, trafficking, sexual assaults including rape, land disputes, polygamy and other crimes. Issues of ethnicity and its relation to federalism remain a major problem of the region. Morang district located in province no.1 in the eastern region and Banke district located in Lumbini province the mid-western region mostly consists of plain lands (the Tarai region). These districts share an open border with India, which has brought an increased risk of drug and human trafficking. The shared border with India has an inherent impact on justice issues with individuals who have engaged in crime or violence in India hiding over the borders. Morang district still suffers from the grievances from the

¹³ Analysis of this experience is contributed to my own participation through the adoption of a critically reflexive ethnomethodological analysis of my experience. I have used this method to examine the subject under investigation and myself as a practitioner, using my previous professional engagements for the purpose of constructing evaluative judgements.

Madhesh movements¹⁴ and conflict between *Madheshis*¹⁵ and *Pahadis*,¹⁶ which began after the ending of the decade-long internal armed conflict in 2006. In addition to the ongoing justice issues, a chronic lack of education among Madheshi and Muslim communities means that these justice issues often go unidentified due to the discriminatory attitudes of justice providers, male domination in the society, and a lack of awareness of available services and facilities. Forced cross-border marriages, land disputes, human and drug trafficking, child marriages, polygamy, rape and disputes over dowry are the most frequently reported cases in these districts. Banke district still has a significant number of unsolved cases of disappearance and extrajudicial killings committed during the internal armed conflict.

Justice in these regions comprises “a complex matrix of formal and informal systems” (Aitken, 2010, p. 1). Despite a considerable number of these systems, access to justice in these regions continues to be restricted due to systematic weaknesses and the prolonged effects of the internal armed conflict. Geographical diversity coupled with weak infrastructure means that people are often unable (or cannot afford) to travel to the nearest justice services. Inadequate human and financial resources within the formal justice sector have not only exacerbated this problem, but also made it difficult to decentralise services.

In addition, similar to the situation in the centre, the justice agencies in these districts are also marred by politicization and corruption, doubts over the impartiality of decisions, and unequal treatment of marginalized groups. These factors have seriously undermined levels of public trust. People in rural villages, where the formal system is weak, would approach informal justice mechanisms for ease of resolution, but the accountability and effectiveness of these mechanisms is often questionable. Corresponding with the formal justice system, discrimination, politicization, corruption, and use of arbitral methods of dispute resolution

¹⁴The Madhesh movement, based in Madhesh, has been demanding equal rights, dignity, identity and representation in the Constitution of Nepal, 2015. Since the movement erupted in 2007, Nepal has already witnessed three Madhesh Movements: the first in 2007, the second in 2008, and the third in 2015.

¹⁵ Madheshi live in Tarai and speak Madheshi (Maithili, Bhojpuri, Awadhi) as their first language. In other words, Madheshi is a geographical term.

¹⁶ Pahadis are peoples inhabiting the hilly regions of Nepal; they speak Nepali and other indigenous languages. It is a geographical term.

operating outside of the recognized norms of international and national justice standards also characterise the informal systems.

2.5 Fieldwork

Anthropologist Margaret Mead once wrote that the “way to do fieldwork is never come up for air until it is all over” (Mead, 1977, p. 136) because qualitative studies aim for a holistic yet localised understanding of processes, meanings and arrangements (Pakes, 2018). As Rogers (2017) emphasises, taking a qualitative approach to law connects the law with the society to understand the social structures and functions in everyday life.

Descriptions are central to qualitative fieldwork, which includes extensive observations in depth as well as casual discussions and interviews in order to reveal meaning, values and interpretation of everyday interactions (Flood, 2005). Reflection of people’s perceptions and my own understanding and experiences help the reader understand the context that is being discussed (Rogers, 2017), bringing life to legal and judicial studies (Flood, 2005). The qualitative study allowed for an in-depth understanding of the research topic, producing thick and in-depth narration of perceptions, experiences and reflections of participants (Cohen, Manion, & Morrison, 2000). In addition, the constructive paradigm acknowledges the researcher’s own experiences and background in shaping the interpretation and analysis (Creswell, 2013), making use of my professional legal experience and academic background.

Sustained immersion to the context helped the collection of lived experience and allowed for an in-depth understanding and examination of everyday concerns about access to justice from the point of view of the demand and supply side of justice in Nepal. My immersion with these two groups in Nepal meant, over time, understanding the claims of the demand side and the responsiveness and institutional behaviour of the supply side, which have influenced the goals of judicial reform. Participants’ perceptions and experiences of barriers to access to justice clearly demonstrated that there is a relationship gap between justice reform, access to justice and the *judicial reform* initiatives in Nepal, and a pronounced gap between public access to justice and the responsiveness of the judicial system. This

gap is evident in the ‘lack of trust and confidence’ expressed by all my interlocutors. For example, the public intuits that the judges are appointed on the basis of a ‘political quota’ or due to ‘political manipulations’, resulting in a judicial loyalty to political parties rather than to constitutional values and public aspirations.

For the first two weeks of my fieldwork, I situated myself in the office of the Centre for Judicial Reform (CJR - pseudonym of the institution where I based my study) located in the Northern suburb of Kathmandu, which was initially my site for the ‘organisational ethnography’. Due to a variety of constraints including time and resources, I modified my original plan to a descriptive qualitative study. Throughout my stay in Nepal, I continued to base myself at the CJR and spent a significant amount of time observing and interacting with people that frequented it. The CJR was selected mainly owing to my past experience and existing relations¹⁷ and the strength of its work on judicial reform.

After gaining a clearer understanding of the judicial reform context, content and concern of Nepal, interviews and focus group discussions were carried out in Kathmandu and in the rural districts respectively. At a later stage of the fieldwork, I spent a substantial amount of time in the rural districts conducting discussions with community members and engaging in ongoing casual conversations with local leaders to understand everyday justice concerns of this ‘demand side.’ I also observed their perception of the ‘supply side’ response to their concerns. To balance and cross check the voices of both groups, focus group discussions and interviews were conducted in parallel.

Through purposive sampling, the population parameter being ‘experience and engaged’ in supporting judicial reform initiatives, a total of 58 participants (36 from the demand side and 22 from the supply side) were engaged in this study. This represents two main types of respondents – demand side and supply side. The sample included participants from justice supply side who had significant experience in judicial reform and participants from the justice demand side who

¹⁷ While working as a Program Manager for a local NGO and as a National Legal Advisor for an INGO for a Justice Sector Reform Project in Nepal, many projects were implemented in partnership with the CJR, and some current members of the CJR were my former colleagues and friends from the law faculty at university. However, not any instances of unequal relationship were experienced during the fieldwork.

were actively contributing to reforms at the local level through their engagement with the community members. This approach enabled members of both groups to make sense of their social world and phenomenon.

These participants are all identified by *plant name* (focus group discussions) and *universe* (interviews) derived pseudonyms, which were chosen by them during the discussions. Thus, I have made every effort to erase any identifiable institutional or social markers. Considering the intensity of recent internal armed conflict and the tense history of access to justice in Nepal, it was difficult to engage those who have been justice seekers, so it is important to preserve their anonymity.

Except for two interviews (due to the internal security reasons for the international development agency interviewed), all interviews and focus groups were audio recorded upon formal approval to do so. All discussions were transcribed verbatim by the researcher, coded and given a pseudonym chosen by each participant, including the institution where I was located during my fieldwork. As far as language is concerned, the conversations took place in Nepali, and I translated these conversations into English. In certain cases, I have retained the original language or phrases to reflect the essence of what was said.

2.6 Participants

Both the justice demand side (the community and the public) and the justice supply side (the judges and the judiciary) are the central focus of this study. It is particularly through their life stories and my observations that the story of barriers to justice is told. The situation I witnessed and voices I recorded appear at various stages in my chapters. The table below shows the account of the participants engaged in this research.

Table 2.1: Research Participants

Participants (Justice Demand Side and Supply Side)			
Participant	Description	Rationale	Method
Justice Demand Side	<p>Three Focus Group discussions with 30 (12 female, 18 male) community people in three districts in Nepal</p> <p>10 participants in each focus group comprising lawyers, community workers, health workers, teachers, and media personnel</p> <p>Semi-structured interview with 4 lawyers and 2 academics.</p>	To understand public's everyday experiences and perceptions of justice and access to the judicial system.	<p>Participant Observation</p> <p>Focus Group Discussion</p> <p>Life Stories</p> <p>Informal discussions</p>
Justice Supply Side	<p>22 semi-structured interviews (2 female, 19 male) with the justice supply side including judges of the Supreme Court, High Court and District Court, court administrative staff, and the members of CJR.</p>	To understand the experience and concern of the judges and judicial staff in action and the reform activities they are engaged in.	<p>Participant Observation</p> <p>Semi-Structured Interview</p> <p>Life Stories</p> <p>Informal discussions</p>

2.6.1 Participants: Demand Side of Justice

The thirty community members who engaged in three focus groups had varying experiences and knowledge about the legal and judicial system. Community-based advocacy groups are important allies that identify and explain complex

neighbourhood dynamics and serve as a voice for underserved populations facing bias or prejudice. These groups were included to provide space to explore the lived experiences of the public, including their perceptions, expectations and insights into the structural conditions of the law and justice, as they experienced them.

They worked closely with a broad range of individuals and communities, connected through their roles as social workers, civil society representatives, lawyers, health workers, media personnel and teachers across the three selected districts. A total of eight participants were lawyers¹⁸, 13 were NGO workers¹⁹, six were human rights trainers and educators,²⁰ two were media personnel²¹ and one was a community health worker²². Lawyers who participated in the focus groups were also working as legal aid lawyers and had been providing legal awareness and education to people in the community. NGO workers were implementing donor supported awareness programs in the community. They were active in linking local problems to the national level through their affiliation with national level networks. The latter were the platform for most of my participants to meet once a year in Kathmandu.

Advocate Venus, Advocate Sun, Advocate Moon, Professor Quarter, Professor Asteroid and Mr. Pulsar who participated in the semi-structured interview in Kathmandu, on the other hand, had been intensively monitoring judicial activities aimed at judicial independence and accountability.

Out of the 36 participants, 13 were female and 23 were male. Despite my best attempt, a gender disparity among the participants was present. This was due to the involvement of fewer women in the legal and community services (FWLD, 2019).

2.6.2 Participants: Supply Side of Justice

Twenty-two participants took part in semi-structured interviews conducted in Kathmandu. They had experience across a range of issues related to the judicial

¹⁸ Three in Banke (Aster, Primrose and Lotus), two in Kaski (Basil and Orchid), and three in Morang (Daisy, Olive and Sunflower).

¹⁹ Five in Banke (Rosemary, Bluebell, Zinnia, Petal and Lilac), four in Kaski (Rose, Dalia, Cosmos and Lily), and four in Morang (Daffodil, Jasmin, Camella and Dahlia).

²⁰ One in Banke (Fern), Three in Kaski (Gardania, Alovera and Tulip) and two in Morang (Thyme and Poppy).

²¹ One each in Banke (Saffron) and Morang (Lavender).

²² Kaski (Marigold).

reform beyond their current positions, and several had worked in an advisory capacity for reform activities. At least six sitting judges – Mercury, Earth, Saturn, Nova, Nebula and Mars; four retired judges – Pluto, Star, Galaxy and Orbit; and three judicial staff – Solstices, Lunar and Planet were closely engaged in judicial reform; most notably, they were directly involved in designing the strategic plan of the Supreme Court.

Inclusion of gender and other marginalized groups is a serious problem in the Nepali judiciary and legal sector,²³ thus explaining the large disparity in women’s participation (2 out of 22). Male predominance in the judicial service and in the judiciary – from the entry into legal education, through to judicial service, the legal profession and the judiciary itself – is high (NJA, 2013), and representation of women and socially excluded groups remains problematic.

Table 2.2: Participants’ District

District	No.
Morang	10
Kathmandu	28
Kaski	10
Banke	10
Total	58

Table 2.3: Participants’ Profession

Professional Affiliation	No.
Supreme Court Judge	3
High Court Judge	1
District Court Judge	2
Retired Judge	4
Judicial/Government Staff	6
Senior Advocate	2
Advocate	11
Professor/Teacher	7
NGO/INGO Worker	19
Media Personnel	2
Health Worker	1
Total	58

2.7 Research Strategy and Description of the Method

According to philosopher Joseph Ponterotto (2006), qualitative research “offer guidelines for presenting “thick description” [and] bring some clarity and consensus to our understanding and usage of the concept” (p. 538). ‘Thick description’ involves immersing in, accurately understanding, describing and

²³ According to the Judicial Council Secretariat, out of 409 judges in three tiers of the judiciary, only 28 are women. See, Annual Report of the Judicial Council and Judicial Service Commission, 2020. Similarly, according to the 2020 statistics of Nepal Bar Council, out of 18943 legal professionals, only 15.3 percent are women. See, <https://nepalbarcouncil.org.np/abhilekha/>.

interpreting contexts; reflecting behaviours (thoughts, emotions, relationships) (Denzin, 1989) and promoting thick interpretations of the actions; and grasping the attentions of viewers and readers (Rogers, 2017).

By employing various methods and tools of research, different kinds of data were produced, including detailed field notes; interview transcripts with the demand side and the supply side; several informal interactions and conversations during participant-observation; interviews; and focus groups. These forms allow for an immersion in settings to understand the what, how, when and why, and these perspectives help with crosschecking the perceived and actual role and responses of institutions involved in judicial reform (Larcombe, Hanley, Fileborn, Henry, & Powell, 2015; Nheu & McDoland, 2010). As I have largely focused my work on judicial reform for several years, a qualitative study engaging justice providers and justice seekers was the obvious choice as a method to gain a more informative, richer and deep understanding (Tewksbury, 2009) of peoples' knowledge and experience, and I attempted to gain this by situating my research within settings that are dynamic in their social structure and functions.

This research comprised observational work over several months. Witnessing the enactments of several understandings and behaviours of public and judicial actors offered a rich view of what is happening in the judiciary, how judiciaries respond to grievances of the people, and how people perceive the judiciary. Overall, it provided a lens towards the distinction between perceived access and actual access. The key questions addressed by this study relate to the relationship between access to justice and judicial reform, and are framed in two parts: 'what are the perceptions and experiences of the demand side?' and 'how can reforms be meaningful?' Analysis of the current practices of judicial reform allowed me to observe 'content' (what) and 'processes' (how) of reform while they are occurring, and to gain an understanding of people's experiences of how the judicial system operates. Thus, the methodology is robust, the data is genuine, credible, authentic, original and generalisable regarding the knowledge and experience of those involved in justice demand and supply side. Moreover, the analysis of the data generated by the study contributes to the literature of judicial reform in Nepal, and similar processes occurring elsewhere. It is also inflected by the experiences of the researcher who comes to this project as a practitioner and researcher.

2.7.1 Participant Observation

A major proportion of the time in the field was spent in the CJR, which I had strategically planned with the aim to get access to the judges, judiciary and the community. My main task at the CJR involved conducting participant observation of everyday activities. This involved being present in the offices, attending meetings, discussing matters of interest and/or concern with staff, either individually or collectively. I also often discussed my research with them, always with a mind to receiving their views about how my methods and questions might be refined or questioned considering their knowledge, experience and concerns. Not surprisingly this primary method of data collection became more intensive towards the end, after getting to know people within the organisation and after their trust in me deepened. This also worked in favour of the research as I engaged in outreach work, getting involved in meetings organised by the CJR and other local organisations.

While engaging in participant observation, the researcher not only requires to be a participant in the setting, but also needs to maintain the ability to observe participants and themselves (Rogers, 2017). I tried to make my observations unobtrusive but systematic, focusing on the key elements such as what was happening, where, when and how did it happen, what was the purpose or cause, and how the actions were addressed, and in turn making connections with my topic. This involved detailed notes of ongoing activities and interactions with staff members and visitors. This changed my views over time, providing a way to understand how experiences interact and shape the view of the society. While the justice demand and supply sides differ in their experiences and understanding, observations allowed me to go further, and examine and illustrate specific stories.

2.7.2 Interviews

I conducted one-on-one interviews with 22 members of the supply side and 6 members of the demand side in different settings, which enabled me to search clarity and investigate for deeper understanding. The participants were identified based on my previous professional connections with members of the judiciary, lawyers and community leaders, and through referral from the initial participants.

Being a member of the legal fraternity, approaching judges and lawyers was not a problem for me. I contacted them by phone to introduce my work and ask for an appointment.

Based on a pre-designed list of questions developed in line with the objectives of the study, the informants were asked to share their observations on the performance of the judiciary, particularly in relation to the constitutional aspiration of access to justice for all. However, participants spontaneously raised issues about the judicial independence, the judges and the judicial staff. They also raised issue of public trust as necessary in Nepal, noting that greater judicial independence and accountability was crucial for building trust.

In order to understand the perceptions of the demand side in relation to judicial performance, I was careful with recruitment. People expressed views about two categories of judges, ‘cadre’ and ‘appointed’ judges²⁴. While cadre judges are considered to have much experience, making them familiar with ‘judicial politics’, appointed judges are perceived as lacking adequate understanding and experience, and are largely distrusted due to the processes by which they are appointed. I purposively included both ‘cadre’ and ‘appointed’ or ‘non-cadre’ judges’ to gain a clear understanding of their perspectives, particularly on the appointment process, which has since become one of the major issues considered to have undermined judicial independence since 2007.

Interviews included conversation focused on the research topic and questions, which inevitably led to long unstructured interviews, conversation and life stories of the participants. The interviews took 1 hour and 15 minutes on average, but lengthy interviews of up to two and half hours ensued with some participants. Interviews were conducted in their personal offices at their law firms and in their residences on Saturdays. Other conversations took place in their personal chambers in the Supreme Court and in the High Court building during their lunch breaks. I met and interviewed on several occasions three judges, two members of the CJR and one staff of the Supreme Court. This included attending public programs of the

²⁴ Judges who have passed the examination of judicial service, are recruited by the Judicial Service Commission, and have served in each level of the court are cadre judges; the judges nominated and appointed by the Judicial Council among lawyers for the High Courts and Supreme Court are ‘appointed’, or non-cadre judge.

CJR and joining in on meetings with the Chief Justice. The details and content of all 28 interviews do not appear in this thesis, and not every conversation with judges and judicial staff finds its way into this thesis, although almost all the 28 informants I write about reappear in several chapters. The generated database is so extensive that it exceeds the extent of this thesis and will be utilised in future research analysis.

2.7.3 Focus Group Discussions

The inclusion of focus group discussions in this research indicates the importance of reflections of community to understand social and political contexts on the ground and to offer different perspectives on law in the society. All of the participants I interacted with had experience with courts and with one or more judges, participating as a party or juror, or otherwise interacting with a judge and judicial staff in a personal or professional setting. Each focus group had a mix of participants who willingly identified their views on the underlying barriers to justice.

Focus groups are increasingly understood as a reliable social research tool for collecting information and understanding research problems (Odimegwu, 2000) and an appropriate and trusted platform for the community people to share their concerns and experiences. The participants in my research found this platform comfortable and suitable for sharing their experiences. This was due in part, I expect, because I was not a complete stranger to some of the participants, having worked with them whilst I was engaged in human rights advocacy (2004 – 2011) and justice sector reform projects (2012-2014).²⁵ I was able to share the research aims and objectives with them and requested local NGO leaders (who for ease of reference I call community leaders) in each district to assist me with the selection of participants. Participants were invited to participate in a discussion of approximately two-hour duration. We agreed to meet in July in Kaski, and in August in Morang and Banke. Researchers such as Palmer, Fam, Smith, and

²⁵ Based on my prior experience as a program manager for the human rights advocacy program at the INSEC and as a National Legal advisor for the ICJ, I had an opportunity to visit 36 districts including these three. While working at the ICJ, my project sites were Banke and Bardiya districts, with frequent visits to Kaski and Morang; I had built a professional relation with the people in these districts.

Kilham (2014) affirm that trust and conversational intimacy are both significant aspects of the data collection and validation process.

Based on a pre-designed list of discussion topics, participants were asked to share their experiences and the barriers that they had been facing while attempting to access judicial services. Subsequently, they were requested to share their ideas about the elements they considered essential for enabling them to access the justice system or related services. Focus groups were intended to elicit information about people's everyday experience with judicial system, including: 1) how people accessed judicial services and how they were responded to by the judicial authorities, and 2) their views on the delivery of justice by judicial authorities – whether their decisions were clear, fair and understandable, and ways in which this might be improved. Questions were modified according to the experience of participants, which enthusiastically participated without any hesitation.

2.8 Data Analysis

I conducted focus groups and interviews in Nepali language and recorded them digitally, except for two interviews for which I took notes. I transcribed verbatim of a total of 28 interviews and three focus groups with 30 participants, totalling more than 50 hours of recorded material in the original language. After I reviewed all the transcriptions against the original tapes for accuracy and reliability, I translated the transcriptions into English. While translating the results and quotations stemming from the data in Nepali into English, I paid meticulous attention to the words chosen by participants and the key concepts and themes that began to emerge. While analysing my data, I drew on the insights of Dunne, Pryor, and Yates (2005) who explain the importance of constantly reviewing experience and data from the field through the resulting texts and advancing to product the outcomes document.

As experiences and thoughts of participants were central to this study, I began with the narratives from the focus groups and the data gathered through the observations and interviews, because all of these had strong themes of concern and insight. The data were coded and analysed thematically. Constantly referring back to my major questions, analysis and exploration of data was carried out in several stages

(Silverman, 2011). The slow labour of this involved making notes on emerging themes; identifying recurrent ones, noticing similarities and divergences between them, linking them to previously formed research question and theoretical framework, and to the fieldwork; and narrowing down and identifying central ones. Additional themes were developed throughout the entire analysis based on those that continued to emerge.

My decision guided me to prioritise the descriptions of the focus group participants (demand side) and the versions of interview participants (supply side) into three major chapters, but these voices are intertwined throughout the thesis. I believed it important to introduce and describe the data mainly from reflections and experiences of both categories of data sources.

2.9 Conclusion

This chapter presents a detailed account and illustration of the methods employed in this thesis. A qualitative approach is closely linked and therefore appropriate to the purpose of the topic under examination. This method offers a means to study the social conditions and contexts under investigation combining lived experience that produce significant meaning in everyday practice. Based upon its exploratory methods and findings, it enabled me as a researcher to deeply engage with peoples' knowledge and experience about fundamental elements of the justice system in Nepal. It enabled me to not only engage with narrations, but also to reflect on how the substantive findings and the context of particular situations, central components of empirical study, may contribute to future conceptualisation of the judicial system and access to justice in Nepal.

People-centred research design and people-centred judicial procedures, both share a common purpose – to prioritize the experiences of people. Indeed, a focus on participatory and inclusive approaches which put people at the centre are more likely to produce outcomes that benefit the people, by allowing systems to heed broader perspectives and focus on problems in their particular contexts. The literature reviewed in this chapter illustrates the significance of empirical research for legal and judicial reform processes and highlights the potential of this research

to be integrated into law reform process. There still remains a dearth of recognition of the importance of empirical research in the process.

The judicial sector in Nepal lags behind other sectors in relation to the availability, accessibility and use of empirical data. Very limited efforts and resources have been directed towards identifying and understanding justice concerns and experiences in everyday lives. It is important that participant's opinions and experiences are central throughout the review process, through narratives, interactions, interviews, and observations. For this reason, usefulness of the empirical research in legal and judicial reform is often connected to its ability to collect a range of information in the form of data. Utilising a descriptive analytical approach in complex research environments allows for the adaptability and flexibility required in the context of my study. It provided me an opportunity to completely engage in the research setting, even though it was a snapshot in time. I trust that the method selected for investigating the nexus between access to justice and judicial reform highlights the elements of the latter that are important to this group of people, and is able to shine a light on the gaps that exist in the judicial system.

The further chapters provide a narrative account of the key issues and themes that emerged from the analysis of the data collected from the fieldwork in Nepal and narrate the stories of law and development, the attempts at reforming the Nepali judiciary, and the gaps that remain to ensure fair and equal justice to all.

Chapter 3

JUSTICE, LAW AND DEVELOPMENT – GLOBALLY AND IN NEPAL

3.1 Introduction

The law has been identified as an important endeavour of a development “that limits state power in an economically and socially efficient manner” (Quigley, 2009, p. 18). Philosophers such as Plato and political theorists such as Max Weber and Karl Marx all acknowledge the central role of stable, predictable law in enabling order, growth and prosperity. There is, however, ongoing unresolved debate about the purpose and goal of law reform, and what exactly the rule of law and access to justice entail. Despite these uncertainties, the indispensable role of law in enabling well governed and economically and socially reliable societies is well acknowledged, and it informs law and development programs at the global level. These programs consider law as crucial to social and economic development, and provide resources directed particularly to judicial reform. Assistance to legal and judicial reform has become a key agenda of international involvement in advancing the socio-economic conditions of the developing countries.

The earliest efforts for these types of involvement were the law and development movement that started in the United States of America during the 1960s. The interest for law and development increased massively during the 1990s, globally (Santos, 2006). The disciplines of law and economics guided the law and development movement, and it aimed its reforms at making the judiciaries of developing countries more efficient (Carothers, 1998). The ongoing efforts of the international development actors to instil the rule of law have nonetheless been demonstrably unsuccessful, failing to deliver the expected results (Armytage, 2012b; Carothers, 1998; Hammergren, 2002; Quigley, 2009; Santos, 2006). Critics have challenged the theory and approach that certain legal institutional frameworks are necessary for economic growth and have also assessed the effects of reforms carried out in different countries.

Despite these analyses, the constant demand to establish the ‘rule of law’ to promote justice continues to inspire reforms. Since the beginning of the law and development approaches of the 1960s, and after the critiques of the 1990s, the traditional focus on law and development has shifted profoundly to concerns more specifically related to judicial reform and development (Armytage, 2012a, 2012b; Jensen, 2003; Parker, 1999; Trubek & Santos, 2006). This shift now uses ‘rule of law’ synonymously with ‘justice reform’ globally. Since the 1990s, a series of problems in measuring and sustaining impacts that benefit citizens have emerged. Armytage (2009) argues that the lack of success of traditional approaches to judicial reform during the last thirty years in South Asia and the last fifty years in Latin America and Eastern Europe, is now also evident.

The first part of this chapter reviews the historical evolution of global development approaches to judicial reform and the paradigm shift in justice and development. Further, it also elaborates on conceptions of law and justice in the literature on law and development. Based on an analytical account of justice and development advanced primarily by Amartya Sen (1999, 2009), Mohan Gopal (2009) and Livingston Armytage (2012b), it also considers the lack of shared understanding and absence of conceptual clarity about the ‘role of the judiciary’ and the ‘goal of judicial reform’, and argues that this lack of consensus and clarity has created considerable challenges to achieving the goal of judicial reform.

There exists now a global paradigm of ‘judicial reform’ of which Nepal has been a part, and with which this thesis is concerned. The theoretical frameworks and analyses of Amartya Sen (Sen, 1999, 2009), Livingston Armytage (2012b), and other judicial reform theorists (Carothers, 2003; Dakolias, 1996; Gopal, 2009; Hammergren, 2007; Trubek & Santos, 2006) has been deployed in this chapter to analyse these approaches to judicial reform. These theories offer an evaluative framework for assessing human development and individual wellbeing, and also new approaches for reform. For example, their work is used to analyse questions such as: what is judicial reform; why is it important to development; what are the focus and approach of judicial reform interventions; and how such reforms are implemented effectively? I draw on all these to provide an analysis of the correlation between access to justice, judiciary and judicial reform.

The discussion draws on four movements of change in the law and development movement as outlined by Trubek and Santos (2006). Each movement is marked by a different emphasis and set of reform priorities, which ranges from broad support for ‘law and development’ to ‘judicial reform’ focusing on the need for specific legal systemic changes. Through all the movements, however, a persistent tension remains between reform as necessary for the larger aim of development, or reform for the justice. This would require a robust, reliable and trustworthy legal system willing and able to protect citizens from potential misuse of state power. Focus on the demand side of justice or on the supply side is where these tensions are most evident. Is reform about efficiencies or is it about competence and values, and what is the relation between these two (competencies and values)? This chapter reviews the literature and reflects on the evolution of law and development to identify how these issues are at play in legal and judicial reform attempts in Nepal.

3.2 Law, Justice and Development

Law reform is an inseparable and important endeavor of development (Armytage, 2012b; Hammergren, 2014; Sen, 2006). The development cannot be considered in isolation from the law and justice (Sen, 2006). Several justice and development scholars (Armytage, 2012b; Gopal, 2009; Jensen, 2003; Prillaman, 2000; Sen, 2006, 2009) have critically examined the contribution of a fair and equitable judicial system in development process. They argue that both the law and development address the functioning of law with regard to the way development is envisioned. Armytage (2012b), too, sees judicial reform as an inseparable endeavor of ‘legal reform’ which he describes as an important element of “‘law and development,’ or ‘the rule of law’, or ‘law and justice sector-wide reform’” (p. 29), all of which engage the judges, the courts and the administration of justice (Armytage, 2009). Improving the role of the judiciary is an essential and central component to sustain the rule of law and development.

Development mainly focuses on promoting human wellbeing through fair distribution of resources, and the justice considers the legal awareness and empowerment of the poor and marginalised, but the development policies have not been able to focus on the law and justice (OECD, 2019; United Nations, 2016). This is a curious omission, as policy approaches often aspire to democracy and

broad justice for populations. This may in part be due to the predominance of legal researchers and political theorists rather than development planners with issues of law and justice. For example, Peruvian jurist Javier Ciurlizza (2000) views legal reform as crucial to both the democracy-oriented development and market-oriented development. Reform is increasingly justified because of its presumed contributions to broader development goals (EC, 2018) which is crucial in meeting development and poverty reduction goals.

Legal scholar Santos (2006) argues the central role of law in development discourse and practice with an emphasis on creating and protecting rights and assisting the entire legal and judicial sector to function independently, effectively and transparently. Trebilcock and Daniels (2008) acknowledge the important role of the rule of law to the success of development, and thus suggest a set of procedural values²⁶ to enlighten the reform approach. Underscoring the purpose of the law reform, Tamanaha (1995) asserts that

The central premise of the liberal rule-of-law system is the protection of individuals from the tyranny of government. Law-and-development theorists should be striving to devise ways in which the rule-of-law model can be adapted to local circumstances and nurtured into maturity, rather than expending the bulk of their efforts in tearing this model down. (p. 476)

They also recognize the difficulties that countries are facing in implementing this institutional structure, identify the probable impediments on institutions to be reformed, and the illusion about the benefits of such reforms, and suggest reappraisals to move forward. The World Bank (2003a) has identified these requirements particularly challenging in nations where the executive branch has tended to see the legal sector as an instrument for enacting political goals.

Amartya Sen (1999), however, upholds a fundamental proposition about the rule of law and justice. He opines that the legal and judicial system should be considered in relation to its ability to improve opportunities for people to exercise their legal rights. He further argues that the rule of law and development of people's freedom

²⁶ According to Trebilcock and Daniels (2008), procedural values consist of three clusters: i) process values (transparency, predictability and enforceability and stability); ii) institutional values (independence and accountability); and iii) legitimacy values.

should be considered as ends in their own right, rather than a means to achieve certain other ends. He views legal development as constitutive of development which “is an amalgam of developments in the distinct domains of - economics, law, etc” (Sen, 2006, p. 37). Sen’s articulation reflects judicial reform as a component of a larger legal reform program and that the development cannot be considered “in isolation from each other” (Ibid).

Even if legal development were not to contribute one iota to economic development...even then legal and judicial reform would be a critical part of the development process. The notion of development cannot be conceptually delinked from legal and judicial arrangements. (Sen, 2006, p. 10 – emphasis added)

Sen’s idea of legal reform “is not about what the law is and what the judicial system formally accepts and asserts” (Ibid p. 39), but essentially “it must consider the enhancement of [people’s] capability, their freedom, to exercise the entitlements” (Ibid). Positioning justice at the core of any notion of development, Sen’s conception focuses on a human-centred approach to development, evaluation of social arrangements, and fairness, which expands the capacity of the justice demand side and the role of the justice supply side. Sen’s notion of justice pay attention on its purpose to strengthen the capacity of people through empowerment rather than merely reforming state institutions (Golub, 2003). Similarly, Armytage (2012b) suggests that Sen’s empowerment approach “may be described as a more justice-centred” (p. 97).

More recent understanding encompasses broad range of ideas such as social economic and political aspects of the rule of law and development. The rule of law is significant to all three dimensions of development: ensuring stable and transparent legal regimes to promote economic development; safeguarding equal opportunity and equal access to services to enhance social development; and strengthening legal frameworks. Improving the rule of law has evident benefits for both the demand side and supply side of justice, and shifting the paradigms include approaches “to close the gap between the need for, and the availability of, quality legal” (Albiston & Sandefur, 2013, p. 102) and judicial services. Thus, the rule of law is a pathway to development, as succinctly articulated by Professor Harold

Berman: “justice based on law must give way to law based on justice” (Berman, 1983 in Khan, 2017, p. 215).

3.2.1 Law, Justice and Development: Past to Present

Starting with the reconstruction of post-war Europe, the ‘law and development movement’ led to support in Latin America in the 1960s focusing on access to justice that ensures equal access by citizens to legal services and courts. Since the 1960s, the role of judicial reform transformed tremendously (Armytage, 2012b) and can be traced, according to Trubek (2006), through four movements. The academic literature describes this as ‘a wave of justice reform’ or ‘moment of law and development’. First, law as an instrument of the state (1960s); second, law as an instrument of the market (1980s); third, law as a regulator of the market (1990s), and the fourth movement, evolved in the 2000s, explains “law as an instrument of [human] development” (World Bank, 2006, p. 89).

The ‘law and development movement’ emerged in the 1960s, along with the transition of many countries from colonialism to independence in Africa, Latin America and Asia. According to Blair and Hansen (1994), since the 1960s the improvement of judicial efficiency has been recognised as a pre-requisite for a country’s development, but a move that has not been met with great success. They analyse this movement as guided by four “subsequently crumbled” pillars – cultural reform and transplantation strategy; an ad hoc approach to reform based on simplistic theoretical assumptions; over dependency on democracy and human rights; and stress on state-led development strategy. The movement, driven by American professors, largely concentrated “on strengthening the role of the state in managing the economy” (Armytage, 2012b, p. 31). According to Trubek and Galanter (1974), the major goal of the movement was to transform legal cultures in the form of interventions towards improving legal education and capacity. However, this movement, which reflected an American “legal style”, was largely criticised as having too limited a vision (Hammergren, 2006), being unattractive to other cultures (Merryman, 1977), and “as being decontextualized and unaware of the political and institutional reality of the recipient countries” (Trubek & Galanter, 1974 in Berg & Desai, 2013, p. 18). It was declared a failure soon after it was launched (Carfield, 2005; Dezalay & Garth, 2002).

While reviewing judicial reform in Chile, Oyanedel (2019) points out that unsuccessful attempts were caused by both academic and political weaknesses – “failure of constructing a strong body of theoretical work to support the reforms” (p. 7) – and inevitability of social “differentiation that led to capitalism, liberal democracy and rule of law” (p. 8). Similarly, claiming this to be an “ethnocentric” approach, Salas (2001) argues that the assistance was focused mainly on strengthening formal aspects of justice rather than considering the traditional or informal means of justice that already exists in the countries. The guiding assumptions of the movement were ultimately its major problems. These assumptions included conceptions of law as an instrument to transform society through reform actors such as judges and lawyers, and public in developing countries would necessarily and inevitably benefit reform efforts.

A paradigm shift of law and development occurred during the 1970s introduced ‘second movement’ focused on the “primary role of markets in economic growth, limiting the power of the state” (Armytage, 2012b, p. 31), but emphasising the need for legal reform with significant effects on development projects and policies. Structural adjustment programs were designed to assist governments in supporting defined sets of reforms aimed at economic growth and development, but the promoters of the second movement, failed to utilize the experiences from the earlier movement. This approach was criticised for “emphasising technical institutional arrangements” (Ginsburg, 2000, p. 833) and being “against politics and culture” (Rittich, 2001, p. 934). It proved “futile or counterproductive” (Cohen, 2009, p. 516), failing to achieve their intended outcomes.

The third movement recognizes the limits of the market and emphasises the necessity of equitable and inclusive forms of development (Quigley, 2009). The concept of *justice* is preferred over approaches that foreground *the rule of law*, reflecting a significant shift in the law and development paradigm since the 1990s towards sector-wide reform. With this shift in 1990s, international donors embraced reform in the justice sector as an integral element of economic growth, state building and the consolidation of peace in post-conflict and less-developed countries (Desai, Isser, & Woolcock, 2012). This movement flourished under the semblance of the rule of law as a foundation for designing strategies of key international development organisations, including the Inter-American

Development Bank, the UNDP, the USAID and the World Bank (Quigley, 2009). The international community invested massive levels of aid in developing and transitioning economies to support democratization, equitable and inclusionary forms of development, and judicial reform projects (Desai et al., 2012).

This movement also understood as “rule of law revival”, grounded on the cooperation between the public and the justice system which was supported by the “systematic adoption of alternative dispute resolution mechanisms already present in the local cultures” (Oyanedel, 2019, p. 8). During this period, the focus was on correcting structural inequalities within the justice system including changing laws and enhancing formal judicial capabilities and infrastructure, drawing on top-down and technical approaches to make access to justice more meaningful (Tamanaha, 2009). The intense focus on the direction of assistance to institutional reform of the judiciary, has also been subject to criticism (Albiston & Sandefur, 2013; Davis & Trebilcock, 2008; Domingo, 2016).

The ‘fourth’ movement in law and development evolved in 2000s and introduced a significant shift in the paradigm to include social, economic and political rights. The movement focused on ‘process and method’ of reform. Inspired by economist Amartya Sen’s concept of development, the UNDP introduced a framework known as the “human development approach” to advance human wellbeing, rather than simply the richness of the economy in which human beings live. The framework of “human development” enabled the law and development movement to gather pace through the promotion of human rights, freedom, and social and political norms (Sikkink 2004 in Domingo, 2016, p. 6). A people-centred approach to judicial reform highlights the responsibility of the States to promote equal access to justice for all, positioning justice at the centre of the program and empowering rights holders to demand remedies, and aims to increase fairness and responsiveness of the justice providers through the establishment of competent and independent judicial system (UNSDG, 2019). It considers both the justice demand and supply sides as important components of justice programming and stresses the enhanced ability of the poor and marginalized to access justice institutions. This principle has been articulated in the core human rights instruments which set outcomes and benchmarks for justice sector programs.

Reform priorities shifted from broad law and development to specific judicial reform, and the international donor community recognized the need for this reform in order to achieve the targets of their development agendas. USAID (2002) has consolidated judicial independence in its assistance and focussing on the performance of the judiciary to enhance the rule of law and democracy. The World Bank (2003) claims that a quality performance of the legal and judicial institutions promotes economic growth and social development, and the UNDP (2004) sees justice as elementary to development outcomes.

Goal 16 of the Sustainable Development Agenda, 2030 has recognized the centrality of justice and judicial institutions to sustainable development and increased access to justice as a significant enabler for many of the other development goals (Manuel & Manuel, 2018). Thus, “the pillar of justice” (Lwabukuna, 2016, p. 92) is considered a strong element of the agenda for sustainable development, because it improves the role and status of rule of law across all Sustainable Development Goals (SDGs), which aspire towards their global realisation by 2030. According to Helen Clark (2012), a UNDP administrator, the SDGs are an enabling framework for “governments to govern better, respond to emerging challenges, and advance human development” (para. 15).

These frameworks of the SDGs are being promoted as ‘people-centred’, bottom-up, driven by partnership and collaboration across all sectors and segments of society, instead of top-down (Rodrigues, 2016). The European Union (EU) in 2018 defined justice reform more broadly as changing, adopting and improving judiciaries and courts, and has been encouraging its member to promote quality, efficacy and accountability of their justice system to preserve the rule of law (2018). UNDP and the World Bank claim that along with the economic development and human rights programming, their rule of law efforts also addresses democratization and peace building (Quigley, 2009), attesting to Sen’s idea that the relationship among freedom, human wellbeing and institutional reform for development is inseparable.

3.2.2 Purpose and Goal of Judicial Reform

An effective and accountable judicial system is an important goal of judicial reform. Literature (Armytage, 2009, 2012b; Gopal, 2009; Parker, 1999; Rhode, 2004) suggests an inseparable link between legal reform and judicial reform, which primarily endeavours to improve justice. Judicial reform focuses on supporting the judicial arm of government to improve the quality of judicial services and secure fairness and equality (Gopal 2009). It aspires to enhance impartiality and autonomy of the judiciary while also providing improved efficiency in responding to public justice needs and demands. Such reforms, together with the separation of powers between the executive and legislative, enable the judiciaries to be independent of political and other interference. Successful judicial reform is founded, therefore, on achieving public access to an impartial, competent, and independent judicial body (Dakolias, 1996; Lowndes, 2016; Rankin, 2012). In this manner, access to justice is based on perceptions and experiences of fairness and equality – which are the foundation of human wellbeing.

Judicial reform, in many developing countries, is perceived as instrument of ‘good governance’ (Skaar, Samset, & Gloppen, 2004) rather than means to advance the relationship between the societies and the state institutions. Many see the role of the judicial system as an instrument to achieve larger policy goals, including strengthening economic growth, and advancement of human rights, good governance and the rule of law.

Arguments in the judicial reform debate hinge on whether judicial system is a precondition for economic development (Buscaglia & Dakolias, 1999; Dezalay & Garth, 2002; Domingo, 2016; Knack, 2003; Munshi & Abraham, 2004; Skaar, Domingo, & Sieder, 2003) especially where endemic corruption is identified as a major barrier to development. There remains a central tension: whether judicial reform is a means to enhance economic development or is an inherent good, limiting the potential excesses of the state against its people.

Alternative motivations for judicial reform refer principally to international legal norms which aim to protect human rights rather than economic development, in order to promote access to justice for all and increase judicial responsiveness (Domingo, 2016; Gopal, 2009; Skaar et al., 2004). Securing law and order,

democratic accountability, institutional transparency, and the integrity of the political process are substantial aspects of the reform motivations in modern democracies where power is divided between different branches of the state institutions (Desai et al., 2012). Ensuring access to justice is a key task of judicial reform initiatives (Armytage, 2012b; Dias, 2009; Jowitt, 2009; World Bank, 2003b). As a World Bank's technical paper outlines:

The basic elements of judicial reform should include measures with respect to guaranteeing judicial independence through changes to judicial budgeting, judicial appointment, and disciplinary systems, improving court administration through adoption of case management and court management reforms; adopting procedural reforms; providing alternative dispute resolution mechanisms; enhancing the public's access to justice; incorporating gender issues in the reform process; and redefining and/or expanding legal education and training programs for students, lawyers and judges. (Dakolias, 1996, p. vii)

These responses however still retain a tension in law reform initiatives around whether the best outcomes will stem from the demand side of justice or supply side of justice, and how to balance the relationship between them. Thus, judicial reform focuses on the numerous methods in which reform is designed, executed and evaluated (Hanley et al., 2016). Developing a strategy and implementing a plan for judicial reform to increase public access to justice is challenging and particularly difficult when addressing the needs of poor and marginalized peoples (Ibid). The rule of law and judicial reform efforts have developed substantially and rapidly in various iterations, globally (Armytage, 2012b).

3.2.3 Criticisms of Judicial Reform Approaches and Outcomes

Despite the substantial growth and evident importance of judicial and legal reform, the literature presents diverse observations on the results, effectiveness and sustainability of reform accomplishments. Literature highlights substantial gaps between understandings of theories and the realization of those values. While assessing recent global judicial reform initiatives, Hammergren (1998, 2014), Carothers (2003), Decker, Sage, and Stefanova (2005) and Franco (2008) express concerns not only about the lack of understanding on what is being done and why, but also about the settings, and where and how the interventions are taking place.

More recent critiques of rule of law interventions point to the absence of shared understanding on the concept of the rule of law, the detrimental impact and outcomes of the reform programs and the fundamental assumptions underpinning rule of law assistance (Armytage, 2012b; Gopal, 2009). Acknowledging the usefulness of the rule of law in creating prosperous communities, Thomas Carothers (1998) argues that despite the significant works in the justice and the rule of law sector, the constraints of current approaches cause difficulties in fulfilling the goals. Carothers (1998), Santos (2006) and Trubek (2006) and many others have pointed to the limited evidence of success, despite extensive efforts to execute the rule of law programs to improve the economic or political situations of developing countries to transmit liberal values.

Mohan Gopal (2009), the legal expert in India says: “Even after over half a century of experience in legal and judicial reform, there is considerable lack of consensus and clarity about the goal and role of judicial institutions and the goals of judicial reforms” (p. 48). He claims, substantial divergence and little agreement about the objectives of the reform²⁷ and a “lack of clarity and agreement about the goal and roles of the judiciary itself”²⁸ (p. 50). Professor Upham, (2002) while analysing reform efforts of donors, claims that the World Bank and other donors attempt to replicate the approaches in developing countries “without sufficient attention to indigenous contexts” (p. 1) and warns the consequences of this in existing mechanisms. Similarly, Jensen describes judicial reform initiatives as producing “modest success and frequent failures” (Jensen 2003 in Gopal 2009, p. 6) and claims that results are elusive and disappointing because of the substantial gaps between conceptual clarity and realization of those concepts while implementing the reforms. The absence of a clear vision within donor-funded projects that contain ambitious promises, experimental approaches and “designed and manufactured, not produced or grown” (Gopal, 2009) has generated considerable interest and

²⁷ For example, the World Bank and Asian Development Bank focus on legal and judicial reform to foster economic activity and sustainable development by strengthening market institutions. DFID interprets justice reform as a tool to promote safety, security and access to justice. USAID focuses on the rule of law. The European Union, Canada and Sweden describe the role of reform as strengthening the justice mechanisms to enhance quality of life and have an emphasis on human rights.

²⁸ Judiciaries in the world have diverse views on their role, for example: the US judiciary limits the executive and legislative through the power of judicial review; common law countries create law through judicial precedents; courts play a modest role in implementing law in civil law countries.

controversy (Hammergren, 2014), and now represents a fundamental challenge to aspirations of improving 'rule of law and justice' (Armytage, 2009, 2012b; Gopal, 2009; Hammergren, 2008, 2014; Tamanaha, 2011).

The appraisal of the donor supported judicial reform efforts in Latin America concludes the reform process as “neither obvious nor easily measured” (Deshazo & Vargas, 2006, p. 2) and further suggests to “generate broad-based agreement” (Ibid, p. 14) following models of agreements of justice, which requires an effective and sustainable reform program. Similarly, Professor Perez Perdomo argues “that too many Latin American reform programs reflect only the needs and perspectives of judges and others with an institutional role in the judicial system” (Perdomo 1993 in Messick, 1999, p. 125), rather than delivering citizens access to justice and equity. For example, while analysing the reform experience in Latin American countries, Martinez Neira in 1996 also discovered “too much emphasis on increasing the number of judges, courts, buildings and computers at the expense of more fundamental changes to the legal system” (Neira 1996 in Messick, 1999, p. 124). These claims reflect the disparity between the consensus and clarity on the scope of reform.

Literature based on judicial reform experiences from different political and geographical settings suggest some typical problems, practical barriers and complex challenges to the goals and objectives of judicial reform. For example, judicial reform efforts in Latin America are considered as inadequate, insufficient and counterproductive, due to their failure to secure political support to sustain efforts at judicial reform (Oyanedel, 2019). Similarly, judicial reform initiatives in Asia-Pacific shows noticeable challenges on developing shared understanding on goal and approach of reform. For example, Jowitt (2009), while reviewing the justice reform initiatives in Vanuatu, suggests the need to ensure the involvement of all stakeholders, particularly marginalised groups, to facilitate change “to multiple parts of the justice system, as well as changes to underlying social values” (p. 159). Similarly, the experience from India reveals problems in building consensus about approach and goals of reform leading to suggestions for fresh approach which would integrate both sides of justice (Gopal, 2009). Hammergren (2007), while envisioning the reform to improve judicial performance in Latin America suggests five approaches for judicial reform: access to justice, criminal

justice reform; developing a professional, institutionally independent judiciary; judicial modernization; and strengthening the role of the judiciary as a check on other branches of government. Hammergren, however, misses the opportunity to suggest approaches and strategies to sustain these efforts.

Livingston Armytage (2012b), after analysing various theories and practices of judicial reform in the Asia-Pacific, concludes that

The existing instrumentalist approach to judicial reform [ie, instrument for improving the economy] is demonstrably insufficient, opening the space to explore a more humanistic approach which aims to promote justice as fairness and equity. (p.76)

According to Armytage, justice in development is core to instigating rights enshrined by various laws, and

Development without a rights-based ‘thick’ concept of justice as fairness is not just insufficient, but perverse; focusing on improving the ‘thin’ efficiency of a captive court system does nothing more than accelerate the impunity. (2012b, p. 10)

He makes a clear distinction between ‘thin’ and ‘thick’ notions of justice and argues that the reforms have “predominantly focused on promoting ‘thin’ or procedural notions of reform – as distinct from the substantive or ‘thick’ aspects” (Armytage, 2012b, p. 7) – which put emphasis on advancing the quality of justice through the formal judicial institutions. The ‘thin’ notions of justice is instrumental in the development of courts, whereas the ‘thick’ concept promotes fairness and equity to secure justice (Armytage, 2012b). The ‘thin’ definition of justice refers to formal decision-making and focused on competency, efficiency, reliability and fairness in the application of the laws, whereas the ‘thick’ conception gives equal value to substantive outcomes and procedural fairness through legal norms (Khan, 2016; Kyle, 2020). For example, the ‘thick’ conception seeks to improve court processes by engaging various stakeholders to better understand the problems in the context, widening the potential for solution and its impacts.

Arguing that excessive focus of the institutional measures to strengthen the needs of the judges and lawyers, Blair and Hansen (1994) and Hammergren (1998) recommended and Messick (1999) also endorsed that the “institutional

strengthening should always follow structural reforms and measures to increase access to the [independent] judicial system” (p. 125) and ways of making them more accountable to the public. Armytage (2009, 2012b), while analysing judicial reform experiences in Asia-Pacific also observes the assumption that strengthening rule of law institutions will automatically produce positive gains for ordinary people, claiming that this is neither supported by the global reform experience, nor by the available empirical evidence. Armytage (2009) further asserts two major deficiencies of reform programs – “development practice” and “evaluation practice” – and suggests both are required to take greater account of the goal and outcomes of reform projects.

Armytage and Sen, among others, also argue that a ‘human-centred approach’ or ‘people-centred approach’ that focuses beyond the demands of judicial institutions and the economy to the requirements of the community is necessary because of its holistic and systematic nature. It puts people at the heart of the reform process, which gives primacy to their needs and experiences rather to procedures, infrastructures and technology. Indeed, it is argued that judicial independence and impartiality, which are crucial for broad justice, do not mean isolation from communities and that a remoteness between the law and the people undermines public access to justice (Bathurst, 2021; Lowndes, 2016). This has led to some major aid institutions, for example the Asian Development Bank, to move away entirely from directly supporting the formal justice sector towards sustainable economic development and inclusive social development (ADB, 2005, 2009). The World Bank has shifted its focus from the formal to the informal justice sector (Messick, 1999), notably *Justice for the Poor* and mediation, which is a notable trend in Nepal, and one that has attracted criticism for lacking a robust strategy and for inadequately ensuring basic rights protections (Aitken, 2010; Stein, 2013). This indicates a need to reposition justice, and access to justice as a central plank of such development programs. Promoting *justice as fairness and equity*, in Sen’s (2009) definition, includes and prioritises procedural fairness and values of justice institutions and notions of substantive equality such as respect, non-discrimination, and equity.

These arguments by Sen, Armytage and several others (Dakolias, 1996; Hammergren, 2014; Messick, 1999; Prado, 2016; Salas, 2001) emphasise what

Gopal (2009) concludes about the need to identify the “goals and role of the judiciaries; criteria for measuring the effectiveness of judicial institutions; and goals and criteria for determining the effectiveness of judicial reform” (p. 51). They further argue that the focus of interventions is problematic and conclude on the need for an adequate consensus and clarity on the content (what) and the process (how) of judicial reform initiatives.

The content of the reform entails a clear understanding of the purpose and the role of the judiciary, which requires it to secure justice rather than delivering decisions. National constitutions are obliged to address these provisions, which entrusted judiciaries with responsibilities through competent, efficient and independent institutions.²⁹ Similarly, international documents on human rights and rule of law consider establishing justice as a core objective.³⁰ While defining the elements of effective judicial institutions, Gopal (2009) lists indicators that includes the proximity of courts; availability of legal aid and legal awareness; quality (professionalism and legal education) of judges, court staff and lawyers; judicial appointment; financial autonomy; use of technology; court decisions and quality enforcement agencies; interpretation of justice; and standards of human conduct guided by ethics, dignity, respect, freedom and equality.

Global reform experiences in various jurisdictions suggest that the reforms targeting legal rules and judicial institutions would benefit from a bottom-up approach of reform that aims to respond the practical deficiencies in the legal and judicial system (OECD, 2019), and strengthen the ability of citizens to claim their rights. Institutions need greater levels of accountability especially in the area of

²⁹ The International Covenant on Civil and Political Rights, 1966 ensures equality for all before the law and a fair hearing by a competent, independent and impartial tribunal established by law (art. 14). The Convention on the Rights of the Child, 1989 gives children the right to access to a court or other impartial and independent authority (art. 3). The Convention on the Elimination of All forms of Discrimination against Women, 1979 provides for effective remedies through competent national tribunals (art. 2). The Committee on the Economic, Social and Cultural Rights in 2007 issued general comments specifically on ensuring fairness through independent judiciary in domestic legal system of the member states (General Comment 32).

³⁰ The Preamble of the Charter of United Nations, 1945 declares that the purpose of the United Nations is to ‘...establish conditions under which justice can be maintained’ (para. 3). The Basic Principles on the Independence of the Judiciary require impartiality of judges and judiciaries from any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any source. The Bangalore principles of judicial independence, the Beijing principles, the Manila declaration and the Tokyo principles emphasise constitutional guarantee of judicial independence.

exerting control over corruption and power abuses. From the 1990s until now, “democracy-building and “rule of law” initiatives have become critical determinants of development assistance” (Carfield, 2005, p. 350). Messick (1999) argues that the “rule of law assigns a prominent place to the judicial system” (p. 121). The World Bank (1997) also places the judiciary in a distinguished position to assist sustainable growth, by holding the executive and legislative responsible and accountable for their decisions.

Development agencies have lofty aspirations and programs for judicial reform, but these plans often lack clarity of vision, with goals that are articulated vaguely, and are often guided by transplanting institutions and legal rules from elsewhere, thus lacking in indigenous content and design. These plans, based on concepts and designs to be replicated without modification, challenge whole idea of ‘rule of law and justice’ funding programs and policy interventions.

Success of reforms entail adopting and adapting institutional measures, specific commitments, and collective action to solve problems for further development. A human rights-based or human-centred approach of judicial reform highlights States’ obligation to promote equal access to justice for all. It considers both sides of justice as important components of justice programming, which empowers rights holders to demand remedies and increase the responsiveness of justice providers. The human-centred or people-centred approach potentially offers the best and effective strategic framework for both measuring the success of judicial reform and enhancing human well-being.

3.3 Reform of the Judiciary and Law and Development Movement in Nepal

The concept of ‘law and development’ has been an important framework for initiating reforms within national legal systems of many developing countries, including Nepal. Enhancing effective access to justice has been a major effort and concern of law and development movement for over seventy years. These processes of reform in Nepal follow older, domestic predecessors. Nepal’s experience of internally driven legal reform offers an insight into the intersection of reforms initiated by the domestic government and those that are internationally driven and

donor sponsored. Improving justice and promoting the rule of law has been challenging due to the weaknesses in institutional capacity to oversee the reforms, insufficient mechanisms for justice itself, public perceptions of the justice system and lack of resources (Karna, 2012; Shrestha, 2011). Improving justice implies the need for an institutional capacity to administrate the law fairly and equally to all, so that the judicial process and its outcomes are perceived as impartial and legitimate by the public.

3.3.1 Early Law and Development Movement in Nepal

The establishment of democracy in 1950 which recognised the judicial institution as one of the important branches of the government can be considered a cornerstone towards rule of law reform in Nepal. Separation of the judiciary from the executive and the legislative specifying its powers, laying out the structure for judicial independence and establishing the basic standards of judicial administration in 1950s, indicates the clear importance of the judiciary (Bhattarai & Uprety, 2006) to fulfil the aspirations of Nepali people.

Continuous efforts have been made to empower the judiciary to deliver justice. One of the early legal contributions to the Law and Development Movement in Nepal was the establishment of a separate law school in 1954 to develop legal resources at the national level. This was geared towards transforming legal cultures through formal legal education and the foundation of modern law institutions. Publication of a law journal (*Nepal Kanoon Patrika*) under the banner of the Supreme Court in 1959 was a critical move to increase public communication and to contribute invaluable to the development of law. Since then, the journal has been published continuously under the banner of the Supreme Court.

The creation of a legal mechanism to establish a mobile court in early 1960s was an innovative approach to deliver speedy justice - an effort of the judiciary to reach out to the community and strengthen public trust. However, the mechanism was abolished based on the recommendations of the High-level Judicial Reform Commission in 1970 (Mulmi & Shrestha, 2012). Similarly, the enactment of the Summary Procedure Act, 1972 and establishment of regional courts was a critical move to increase easy and speedy public access to the courts in the rural areas.

While restructuring the judiciary, these regional courts were abolished in 1990 by the Constitution.

The High-level Judicial Reform Commission formed in 1970 and the Royal Judicial Reform Commission in 1983 undertook a comprehensive review of the works and procedures to increase the efficiency of the court system. Enhancing equal access to justice and improving human wellbeing have been major efforts and concerns of the law and development movement since the formation of these two reform commissions. For example, the Royal Judicial Reform Commission, for the first time in Nepal's judicial history, highlighted and linked the development with justice and peace. In its report, it stated: "Justice can only be achieved through peace and this is important for development and progress" (HMG, 1983, p. i). In fact, this can be understood as the law and development movement, a momentum that evolved in Nepal alongside the global movement. It illustrates the importance of law and development to achieving justice through judicial institutions.

A significant reform was the formation of Judicial Council in 1990 to regulate the appointment of judges, to maintain professional standards, and to take disciplinary action against judges where warranted. Significant procedural reform of the judiciary occurred after the adoption of administrative, institutional and human resource management changes recommended by the Court Management Reforms Committee formed in 1997.³¹ These efforts were largely focused on contributing institutional reforms of the judiciary.

3.3.2 Shift to the Modern Judicial Reform Approaches

The reforms that were introduced in 1990s attempted to modernize the judiciary. These reforms include efforts to reduce backlogs of cases; capacity building and education for the judges and judicial staff; development of a modern computerized system; creation of a webpage and the publication of court decisions on their

³¹ The key priority areas of the judiciary were: Case management and streamline court process, reform procedural laws and policies, improve execution of court judgements, improve institutional capacity and equip courts with technology. The Court Management Reforms Committee suggested improvements in court management, amendment of court rules, formation of civil bench as a pilot project, operation of the calendar system, in-camera hearings, and creation of National Judicial Academy to design and provide training to judges, attorneys and court staff, and undertake judicial research.

websites; initiation of in-camera and continuous hearing systems; establishment of a Judgement Execution Directorate (JED) and implementation of Differentiated Case Management (DCM) systems. The National Judicial Academy (NJA), established in 2004, has put substantial effort to provide capacity building to the judiciary and to undertake judicial policy research. The NJA has been involved in some of the most focused law and development activities in Nepal.

The development of a Five-year Strategic Plan of the Nepali Judiciary following the recommendation of the Court Strengthening Committee³² established in 2001 was an added reform impetus for the institutionalisation of planned reforms to the Nepali judiciary and also to address expectations of the judiciary in changing legal and constitutional contexts (Supreme Court, 2019c). In 2004, the judiciary introduced and enforced a Five-year Strategic Plan for the first time in South Asia, with stated goals to promote access to justice and judicial good governance, and to strengthen public trust and confidence in the judiciary. This enforcement also encouraged other justice institutions such as Office of the Attorney General, Nepal Police and Nepal Bar Association to develop their own Strategic Plans. The judiciary is now implementing its Fourth Strategic Plan which came into force in July 2019.

The judiciary's Strategic Plan has been considered as a milestone in the judicial reform in Nepal, even though it continues to lack clear objectives, expertise, experience, and human and financial resources for its effective implementation (Pandit, 2019) and it struggles to convince major stakeholders including the judiciary. The Strategic Plan of the judiciary notes that even judges "doubt that the court could produce a plan and implement it" (Supreme Court 2019, p. 5), as development agencies do.

On this, one of my interviewees from the supply side of justice chain - the retired judge Star³³, claimed:

³² The Committee was established in 2001 to examine challenges faced by the courts and other justice institutions.

³³ Note 11.

Continuous execution of the Strategic Plans for 15 years illustrates best answer on general perception about ‘whether the court requires strategic plan and whether the performance of court can be measured in the form of data’.

Learning from the achievements and challenges, the Plan has been owned and institutionalised by the judiciary and its major stakeholders including the government (Supreme Court, 2019c). As a result, the judiciary has been promoting its vision, mission, goals and strategic objectives, and discussing the outcome of reform programs based on data. According to the Supreme Court (2019a), 72.27 percent of progress has been achieved in terms of performance indicators within goals and strategies determined by the Strategic Plan. But it is apparent that the reform expects the judiciary to focus on both forms – instrumental as well as humanistic reform.

The incremental experience gained from the Plans has enabled the judiciary to bring some instrumental reforms to organizational structures, the introduction of infrastructure-based information technology, improved case-flow management systems, and an enhanced culture of judicial human resources to assist operating in a more planned manner. This has created a basis for operationalizing the Plan, although the support and coordination from the responsible stakeholders has been a challenging requisite to attain its goals (Supreme Court, 2019c). The development of standards to measure the quality-of-service delivery by courts has created opportunities and also posed challenges, but overall responsibility for its implementation remains with the judiciary - the major actor in the adjudication and delivery of justice. Judicial reform priorities have now shifted to strengthening the competency and responsiveness of justice institutions to ensure fair, equitable and accessible justice on the one hand, and amplifying the voices of rights holders on the other. These are all important reforms that have added to the fabric of judicial reform in Nepal.

3.3.3 Results of the Reform Experience

Although considered as a significant progress in legal and judicial sector, these efforts are criticized largely for focusing more on bringing visible changes to the supply side of the justice chain. Thus, the reform initiatives have gained little public confidence on the judiciary even after 18 years of the execution of the first Strategic

Plan, which had an emphasis on making the ‘judiciary worthy of public trust’. For instance, a baseline study conducted in four selected districts of Nepal in 2013 shows that only 2.6 percent of women victims of domestic violence believe that the formal justice system meet the compliance (Puri & et. all, 2013). Legal scholars Mulmi and Shrestha (2012) conclude that “the judiciary is required to mull over a solid program” (p. 187) to increase judicial responsiveness and public trust. For example, the Strategic Plan of the Nepali Judiciary centres more on the supply side (case backlogs, infrastructure and capacity building of the court authorities) rather than the basic requirements of the demand side (legal awareness and empowerment; judicial fairness and responsiveness).

Nepal’s judicial reform efforts are focused typically on instrumental (or what Armytage refers to as ‘thin’) aspects of reform, placing less effort on humanistic or ‘thick’ aspects. Efforts to strengthen institutions ‘at the top’ and meet the demands for justice ‘from the bottom’ have not realised sufficient gains. For example, the role of the courts in responding to public litigations to set the applicable standards for public policy has been commended, but the practical realization and local operationalization of these decisions remains a serious challenge. For instance, Chapagain and Shakya (2014) discovered that a lack of clear guidelines and procedures to inform victims about the outcome of their cases resulted in the majority of court decisions on rape cases not being implemented. Similarly, the UNDP in Nepal revealed that massive 87.7 percent of citizens were not aware of free legal aid services (GoN & UNDP, 2018). *Judicial Mapping and Judicial Assessment*, a study accomplished by the Walsh & Associates and Gandhi & Associates (2010) discovers numerous structural problems and inadequacies in the operation of the courts: case backlogs and management, problematic judicial conduct and irregularities, lack of sufficient legal awareness and trust in the system, and the need for better education and training of the judiciary.

Support for judicial reform constitutes a significant element of donor assistance in Nepal. Despite this hefty investment, the excessive focus by government and donors on economic development has left little space for the legal and judicial development agenda in the nation’s periodic development plans and in the international donor assistance plans. For example, presuming that the judiciary does not contribute to overall economic development, the agenda of ‘justice’ did

not find its place in the national development plan until the initiation of Eleventh National Development Plan in 2007 (Supreme Court, 2009c). In the context of mainstreaming and internalizing the key aspects of 2030 Agenda for Sustainable Development, the Fifteenth National Development Plan recognizes the importance of justice system to achieving development outcomes, but it does not explicitly integrate the judiciary in its vision or goals. In addition, non-recognition of the judiciary in the national budget³⁴ and national development plan, considering judicial function as “non-productive” (Shakya, 2007, p. 11) sector of the national economy, poses challenge in the effective implementation of the Strategic Plan.

Even USAID, which has the longest³⁵ engagement in Nepal since 1951, prioritised its activities in the legal sphere after the political change in Nepal in 1990s. USAID and other donor agencies reviewed their assistance and restructured them to suit the changed political context (Skerry, Moran, & Calavan, 1991). Partnerships with judicial institutions were increased in 2000s with several donors focusing on enhanced internal infrastructure to improve efficiencies and address court delays.³⁶ Donors have since renewed support for reforming and strengthening the judicial system (Aitken, 2010). Since 2001, UNDP has been supporting access to justice, adjudication and management function improvements in the Supreme Court and District Courts. In 2008, the UNDP shifted its focus to protecting access to justice of the poor and marginalised, supporting gender justice, and strengthening the justice system in a partnership with the Supreme Court of Nepal. However, UNDP’s rule of law assistance³⁷ has been heavily concentrated on the Supreme Court and District Courts (UNDP, 2010).

³⁴ Annual budget allocation for the judiciary is less than 1 percent of the national budget. This is discussed in more detail in chapter 7.

³⁵ USAID signed an economic assistance agreement on 23 January 1951 to support Nepal’s development progress. For four decades, USAID concentrated in education, health, agriculture and industrial development. In the 1970s, it shifted a focus to the rural poor, and in the 1980s, focused on macroeconomic policy reforms and economic growth.

³⁶ For example, the Asian Development Bank supported the judiciary for the establishment of the National Judicial Academy in 2004; the World Bank engaged with the Office of the Attorney General (OAG) in 2003 to transform prosecution and processing of cases, and USAID supported the NJA for strategic planning and conducting training between 2005–2006.

³⁷ Since 2001, UNDP has focused on human rights, access to justice and rule of law in partnership with ministries, judicial institutions and non-governmental organisations. In support of other bilateral donors, the UNDP has invested approximately 15 million USD to improve access to justice through institutional reform in Nepal. See UNDP Nepal - Outcome Evaluation of UNDP Nepal Access to Justice and Human Rights (2001-2010).

Although bilateral donors have been supporting the capacity of judiciary and the community, lack of clarity by donors about the demands of the community and the short-term nature of engagement has been a major challenge to the achievement of visible impact (DCAF, 2017). Despite its huge focus and investment on the judicial side, the UNDP and other donors have been grappling with the immense challenge to establish local ownership of the judicial institutions in support programs. Despite significant focus in justice and rule of law reform, Nepal's rule of law and access to justice efforts have been largely ineffective. Former Supreme Court Chief Justice Kalyan Shrestha noted: "the effectiveness of the justice system was seriously imperilled due to long delays, the distances and costs of access, lack of victim support system and external pressure" (ICJ, 2012, p. 8).

The World Access to Justice Project Index 2021, undertaken by the independent World Justice Project, ranked Nepal 70 out of 139 countries and jurisdictions followed in the South Asian region, by Sri Lanka (76th) and India (79th). However, Nepal is among the countries in Asia and the Pacific with the weakest rule of law ranking 93rd position with regard to the absence of corruption; 70th position for maintaining order and security, 65th position in enforcing laws and policies, 96th and 72nd positions in delivering civic justice and criminal justice respectively.³⁸ This reflects diminished dimensions of civic space (civic participation, freedom of opinion and expression, and freedom of assembly and association) and increased delays in administrative, civil, or criminal justice delivery in Nepal.

Seventy years of constitutional and judicial development initiatives have not been able to produce meaningful progress towards a responsive rule of law and access to justice mechanism in Nepal. The International Community (DCAF, 2017; DFID, 2011; ICJ, 2017; OHCHR, 2012; UKaid & DanidaHUGOU, 2011) has responded to this situation with substantial assistance, but to date this has not realised significant improvements. Supreme Court Justice Earth³⁹ shares the underlying problems of the reform as follows:

The main problem of the reform is the failure to institutionalize the initiatives rather limited to the interest of the individual. They were individualized and

³⁸ Note 5.

³⁹ Interview, Kathmandu, 22 August 2019.

driven by personal interest. Building consensus among all judges to initialize the efforts depends on the interest of the judicial leadership. This will create moral obligation to next judge in the row because that judge has agreed on those agendas. This process will create ownership of all judges and ultimately whole judiciary will be obliged to follow.

Participant from demand side professor Asteroid⁴⁰ comments,

Reform agenda is like a political movement – raised by certain group, made sensational and catchy, but failed to build shared understanding and address the aspirations of general public.

It is important, therefore, to not only observe this failure and to note the high levels of interference in the judicial system, but to also understand reasons for previous reforms not being able to bring measurable and substantial results. Senior advocate Sun⁴¹ claims no institution exists in Nepal that is serious about reforming the judiciary. According to him,

In our justice system no one has a clear view on the need and objectives of reform. Judiciary thinks that since it is a constitutional body, it has to keep maintaining status quo to secure its constitutional status. Judges also have the same perception. On the other hand, lawyers perceive themselves as the part of justice system. No one is ready to take responsibility for reform.

This slow pace of reform and disappointment balancing reforms between justice demand and justice supply, as discussed in Chapter 1, echoes the results of internationally funded judicial reform assistance in Nepal, which parallels with those across the Asia-Pacific region. To cite two examples, DFID and UNDP (among the most significant supporters of security and justice reform) commissioned reviews of the sector in Nepal. While analysing the UNDP reform efforts in Nepal, the International Commission of Jurists notes:

From the period 2001 to 2010, it [UNDP] draws a number of important lessons that echo regional and global experience: the need to better target justice delivery around key rights of excluded groups, the need for a better balance between supply and demand side of justice delivery, and the need for a more

⁴⁰ Interview, Lalitpur, 8 August 2019.

⁴¹ Interview, Kathmandu, 12 August 2019.

knowledge-based approach rooted in an understanding of local realities (ICJ, 2012, p. 11).

Assessment of ten years (2001 – 2010) of UNDP engagement to promote access to justice and human rights identified the ongoing challenge to “make the entire rule of law system more robust and build people’s confidence in the judiciary” (UNDP, 2010, p. viii). It concluded: “UNDP support tended to exhibit more of a top-down than bottom up development approach” (Ibid, p. 85) and suggested further to increase focus on the demand side. While mapping judicial reform, Walsh & Associates and Gandhi & Associates (2010) suggests the development agencies including UNDP to prioritise institutional reform to increase access of poor through legal awareness.

Similarly, the DFID evaluation of security and justice sector reform initiatives in Nepal highlights the need to better understand how the justice delivery system governs, emphasizing the impact and challenge of patronage, corruption and political interference across all sectors (DFID, 2011; Independent Commission for Aid Impact, 2015).

Aitken (2010), while evaluating international assistance to access to justice in Nepal, concludes: “Donors are often willing to work highly dysfunctional formal systems” (p. 16). She further suggested donors should “look much closely at user perspectives of judicial mechanisms and the role they play within the wider system of justice” (Ibid.) so as to deepen their understanding about the local context and enhance the culture of learning and coordination among them.

Assessment of Justice Sector Reform program⁴² implemented by the International Commission of Jurists in Nepal concludes that donors have invested very little time to understand the local context and aspirations of the communities, and have underestimated the complexities of strengthening the links between the judiciary and the community (Chapagain, 2015). Indeed, the assistance has missed the opportunity to carefully strategize about how best to concentrate their investments in the demand and supply sides of justice (ibid).

⁴² The International Commission of Jurists implemented “Strengthening Substantive Equality Rights through Justice Sector Reform Project” from 2011 to 2014 with the assistance of European donors.

While addressing a critical need of the demand side, there are imminent issues about the coverage and long-term sustainability of donor support. Assessment of Security and Justice Sector Reform Program (DCAF, 2017) found that “donor programmes compete rather than aim to develop synergies or complementarity between programmes” (p. 42) and concluded the “need for donor coordination to ensure coherent coverage” (p. 50) and “minimize overlaps in services”. A regional analysis (Armytage, 2009) that also included voices of the supply side from Nepal, offered recommendations for forward looking and innovative reform approaches – a human-centred approach that focuses on the most needy population of the society. Livingston Armytage, in a meeting of the NJA in 2009, also emphasized that the “need for bold and innovative approaches was not a call to abandon the strengthening of justice institutions, but rather a call for a better balance with a ‘human-centered approach’ to those still excluded from access to justice” (ICJ, 2012, p. 12). This suggests judicial reform requires efforts that would integrate and sustain needs of both sides of justice by developing shared understanding of the goal and role of the judiciary.

Although Nepal’s judicial reform experience also shows its active and constant involvement in the reform over the seventy years, it shares challenges generic to the experiences of other countries across the Asia Pacific region discussed above in section 3.2.2. These experiences comprise a range of initiatives to improve the quality of justice and shows existence of common challenges pertain to key aspects of reform including – goals, purpose, approach, integration, leadership, independence, accountability and results. The experience suggests the need to develop clear understanding of the goal and purpose, refinement in the approach, and sharpen the outcomes of the reform. The reform initiatives and approaches are more focused on bringing visible changes to the supply side rather than improving areas that facilitate fair and speedy access to justice. For example: quantity of court cases and timeliness to dispose those cases are considered as a primary indicator to measure success in the area of judicial reform. It trumps an emphasis on the quality and timely execution of judgments. It is essential to find a way to use these as benchmark indicators of judicial reform. The lack of fair and speedy access to justice represents a significant threat to peoples’ trust in the justice system and

confidence in the rule of law. The lack of public trust which has been increasingly expressed, forms the basis of discussion elsewhere in this thesis.

3.4 Conclusion

To generalise law and development reform initiatives across various nations and regions, reform has been perceived as important for a range of purposes, but human wellbeing has not been the priority. The lack of positive results in this area, as experienced in Latin America since the 1960s and in Asia since the 1990s, is testament to this. Law and development assistance has immense aspirations for change that will come from programs of judicial reform, but the efforts to date lack clarity of vision; they are shaped by ambiguously articulated goals, and feature a notable lack of consensus of donors. The approaches and ideas transplanted or replicated from different contexts lack indigenous content and context, and challenge context-specific ‘rule of law and justice’ funding programs and policy interventions. It is deeply concerning that there seems to be relatively little understanding and consensus about the wider context, purpose and approach to the delivery of reforms. Depending on the approach—thin or thick – the rule of law can be an instrument for empowering poor and marginalized and increasing judicial responses. But thin reform has thus far dominated most reform efforts.

Reform of the judicial system does require the re-design of programs aimed at the improvement of experiences and perceptions of both the justice demand side and supply side. This requires a clear articulation and grasp of the justice experiences and demands of people in order to better design more responsive judicial services. People-centred reforms aspire to improve fair and equal access to justice through legal education and services, policies to bridge the gaps between justice demand side and justice supply side, and improving laws that improves the court procedures simple, easy and accessible. These kinds of reforms offer the promise of improving effectiveness, accountability and fostering justice and the rule of law. Judicial reform is an iterative and recursive process which has prospective to address the concerns of people in Nepal and elsewhere. Approaching judicial reform this way has a better chance of contributing to higher levels of confidence and trust in the justice system among citizens and the community.

Development assistance has clearly contributed to expand the capacity of the Nepali judiciary to deliver quality justice and to the public's access to it, but the effects have been limited. Seventy-two years (since the establishment of the formal judicial system in 1950) of institutionalized reform initiatives and 18 years (since implementation of first Strategic Plan of the judiciary in 2004) of planned judicial reform initiatives in Nepal have not given expected returns on law and development: access to justice is still not certain, and an independent judiciary has not yet been realised. These challenges remain a constant problem and it becomes clear through historical analysis that the approach to reform in Nepal is missing an emphasis and clear and shared understanding of the context, concept, concern and approach of judicial reform. The reforms to date have overwhelmingly focused on the 'supply-side' technical, administrative and procedural changes to legal institutions and infrastructure. The needs of the 'demand-side' remain largely unfocused and unaddressed.

Chapter 4

TRUST IN JUDICIAL SYSTEMS – GLOBALLY AND IN NEPAL

4.1 Introduction

Justice Felix Frankfurter noted that “the Court’s authority—possessed of neither the purse nor the sword – ultimately rests on sustained public confidence in its moral sanction.”⁴³ While trust in the public institutions other than the judiciary is fostered and maintained in large part through free and fair elections, in the absence of an electoral connection between the public and the judiciary (Bühlmann & Kunz, 2011), public trust in the judicial system is crucial. As custodians of the rule of law and justice, judiciaries depend on public trust and confidence to efficiently discharge their responsibilities (Matsui, 2017; Miller, 1970). This state of confidence in the judiciary to operate with independence, in the common interest of public (Lowndes, 2016), and for the larger benefit of the public (Cakir & Sekercioglu, 2016) contributes to the sustainability of the rule of law (Tyler, 1990).

An independent and accountable judicial system of high integrity is one of the prerequisites for its proper functioning (Ferejohn, 1999; Larkins, 1996; Prillaman, 2000; Shetreet, 2012). Consequently, every action it takes is an opportunity for maintaining independence and strengthening public trust and confidence, as an essential thread in the fabric of the rule of law and democracy (Uusitalo, 2019). This is particularly important when the courts are at risk of becoming targets of authoritarian governance or are struggling to maintain accountability. In this context, the capacity of the judiciary to resist such pressure lies in its ability to preserve strong public support (Garoupa & Magalhães, 2021). Such public confidence offers important protection for the justice system (Uusitalo, 2019), building judicial legitimacy and allowing for the consolidation of access to justice and the rule of law.

⁴³ *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting). See Caldeira (1986), Neither the Purse Nor the Sword: Dynamics of Public Confidence in the Supreme Court, *The American Political Science Review*, 80(4), 1209-1226.

Given the centrality of public confidence to judicial independence and accountability, considerable interest has been dedicated to assessing, understanding and addressing this phenomenon. There is a growing literature on the significance of trust and confidence in the judiciary (Benesh, 2006; Boateng, 2020; Bradford, Jackson, & Hough, 2017; Bühlmann & Kunz, 2011; Cakir & Sekercioglu, 2016; Kaire, 2019; Kiršiene & Gruodyte, 2019; Tyler, 2001; Uusitalo, 2019; Van De Walle, 2009). But these literatures overwhelmingly focus on Western societies, offering different concepts, indicators and theories.

Many scholars consider that a dearth of public confidence in judicial systems is not only limiting public access to justice (Hough & Sato, 2011; Oyanedel, 2019; Van De Walle, 2009b), but also indicates the challenge of reforming the entire system (Sherman, 2001). While research into trust in the judiciary is growing, inquiry into trust in legal and judicial reform studies remains scant, including in Nepal. Since the focus of this study is about how perceived values and abilities of the judicial system ensure not only confidence, but also the trust in the judicial system, this chapter focuses on ‘trust’ rather than confidence.

Determining what drives or builds trust and confidence among the public and understanding how public trust is shaped and maintained, is important. Theoretical frameworks and analyses advanced by Bradford et al. (2017), Govier (1993, 1997, 1998), Luhmann (1988) and Tyler (1990) will be deployed in this chapter to comprehend the drivers of trust and to analyse the development and transformation of the concepts within the discipline of law and development. The literature scrutinizes the correlation between trust and confidence, considering whether these two terms can be separated and how they relate to judicial reform, asking what it is that makes a judicial system trustworthy. While this chapter examines trust and confidence in judicial systems more generally, it highlights on the centrality of trust as a driver of judicial reform. That is, judicial reform seeks to foster public trust and confidence in the legal and judicial system. This chapter, therefore, closely analyses the concept of public trust and confidence in the judicial system in Nepal. To date, discussions on this topic have largely been confined to public institutions, other than the judiciary.

Despite an overwhelming emphasis on trust as critical to enhancing access to public services (including justice and the judiciary) and on prioritizing reform efforts to make the “judicial system worthy of public trust” (Supreme Court, 2009c, p. ii), Nepal lacks appropriate literacy in the relation between trust and confidence. There are no policy documents or public discussions that sufficiently capture the meaning of the terms and the significance of this phenomenon for the Nepali context. The reform efforts to date lack a clear definition and understanding of what exactly trust means in the context of Nepal. Several studies (Dahal, 2020; Gupta, 2020; Jamil & Dhakal, 2015; Jamil, Dhakal, & Paudel, 2017; Shakya, 2007) have discussed the importance of trust and confidence in public institutions, but there is a dearth of discussions, both conceptually and operationally. This raises questions about whether there is a theoretical gap in understanding of trust – how it is defined, understood, built and maintained in the context of Nepal. This chapter also aims to explore an indigenous notion of trust and confidence in Nepal in order to grasp how trust is fostered in society and within the judicial system reform process.

4.2 Meaning of Trust

Although the concept of trust is as old as political philosophy itself, a concise and unanimous understanding of trust is missing (Baier, 1986). ‘Trust’ is a frequently used term, yet it was largely overlooked in Western philosophy until the 1950s (Ibid). Empirical studies on trust originated from the “escalating suspicion created by the Cold War and by an optimism” (Tschannen-moran & Hoy, 2000, p. 249) created by Deutsch about conflict resolution. Because of its crucial importance in everyday interactions and public and political life, the notion of trust generated much attention and examination in academic literatures in the 1980s and 1990s. In the 1990s, with the transformation in the society and technology, “trust emerged as a subject of study” (Ibid) in different disciplines such as sociology (Coleman, 1990; Govier, 1997; Hardin, 2002; Hollis, 1998; Luhmann, 1988), economics (Fukuyama, 1996; Putnam, 1993), organizational and behavioural science (Cummings & Bromily, 1996; Mishra, 1996; Robinson, 1996; Tonkiss & Passey, 1999) and legal system (Berry, 2007; Bradford et al., 2017; Bühlmann & Kunz, 2011; Grimmeliikhuijsen & Klijn, 2015; Hough, Ruuskanen, & Jokinen, 2011; Hough & Sato, 2011; Tyler, 2001). These literatures have linked trust with the

concept of social capital (Fukuyama, 1996; Putnam, 1993), and argued that trust has functional (Luhmann, 1988) and indispensable role in the society in maintaining social cooperation (Lewis & Weigert, 1985) and is the necessary ground for everyday interactions in communities or among people (Axelrod & Hamilton, 1981; Gambetta, 1988; Zucker, 1986). Institutional performance is related to confidence, especially public confidence in institutions (Newton & Norris, 1999).

Historically, John Locke (1980) asserted trust to be ‘the common bond of society’. Without trust, social life is almost impossible because it pervades our dealings with person and institution. In his essay on the Law of Nature, Locke recorded three basic elements to define trust: it implies responsibility; it presupposes a structure of objective rights; and it is the idea of ultimate accountability (Gardner, 1992), which makes people trustworthy and binds society. Aristotle (2012) explained trust as a virtue – a strong belief or feeling in the ability or strength or moral of a person or institution.

Philosopher Trudy Govier (1993, 1997, 1998) elaborates trust as attitude, thought or perception that imply expectation and disposition. According to Govier (1993), “trusting someone or something incorporates an expectation of ‘moral competence’ – being competent to do so and being motivated in the right way” (p. 157). Blind (2007), Nooteboom (2007), and Tonkiss and Passey (1999) refer trust as the foundation of all human contacts and institutional interactions. Similarly, Luhmann (1988) considers “trust as the medium of interaction between social systems and the representatives [individuals] of those systems” (Meyer & Ward, 2009, p. 3) to reduce complexity in society, and suggests elements such as good will, benevolence, motivation, availability, competency to perform to satisfy society.

Sociologist Uslaner (2002) draws a strong distinction between interactions as either particularized or generalized trust. Generalized trust is ‘thin’, based loosely on social ties that represent trust between casual acquaintances and complete strangers (Kumagai & Lorio, 2018; Putnam, 1993), and particularized trust is ‘thick’, based on strong social ties which represents trust between two people, or people and institution who know each other well (Bradford et al., 2017). Depending upon the context, philosophers, sociologists and economists have observed the usefulness of

trust in the human conduct and have stressed trust as “pivotal to all societies” (Newton & Norris, 1999, p. 7) and essential to “maintain peaceful and stable social relations” (Newton, 2001, p. 202). While defining trust as distribution of benefits which manifest in a collaborative arrangement, Wallace and Goodman-Delahunty (2021) claim that “giving trust or choosing to trust, carries with it an element of risk” (p. 5).

While stressing that trust entails vulnerability, Zand (1972) separates trust into personal behaviour and individual expectations. Personal behaviour, which he terms a decision to trust, is guided by degrees of vulnerability and individual expectations as a consequence of level of trust (p. 232). Given the risk of vulnerability and insufficient control of trustor, according to Zand’s conception, trust is a perception about positive expectation on the result. Literatures (Hamm, 2019; Siegrist, 2010; Zand, 1972) have interpreted vulnerability as key element of trust, where the trustor relies on optimistic expectations or the good will of trustee, hence the good will of trustee determines the level of vulnerability of trustor (Hardin, 2002). Some scholars (Coleman, 1990; Gambetta, 1988a; Sztompka, 1999) have related trust with the reduction of uncertainty. Bennis and Nanus (1985) observe trust as an achievement which is difficult to win and easy to lose. Thus, “trust is seen as risky as it is based on the assumption that the counterpart will honour one’s expectations” (Bormann & John, 2014, p. 2). According to Meyer and Ward (2009), trust, therefore, “is the optimistic acceptance of a vulnerable situation which is based on positive expectations” (p. 3) regarding another’s conduct.

Butler and Cantrell (1984), while considering the conditions required to measure the trust, suggest integrity, competence, consistency, loyalty and openness as specific components of trust, but assume that degree of each element would be different depending on the context. Holmes and Rempel (1989) identify the importance of predictability, reliability and responsiveness; whereas Zucker (1986) term trust as a combination of confidence in trustee’s anticipations and in the trustor’s benevolence. Measuring trust is difficult because trust is influenced by the context, ability and the behaviour.

While analysing public trust in public and social institutions in Nepal, policy analysts Jamil and Dhakal (2015) observe trustworthiness as an expectation of

positive outcomes, and identify the correlation of higher positive expectations with higher levels of trustworthiness. Fukuyama (1996) points to the benefits of trust and distinguishes between high-trust societies and low-trust societies, arguing that in high-trust societies culture of trust exists; whereas low-trust societies suffer from the crisis of trust. This culture of trust means that those who are obliged to ensure services know how to provide them in the best way for their receivers. Trust implies certain degree of honesty, less likelihood of corruption, and a feeling that the institutions act in accordance with certain standards (Askvik, Jamil, & Dhakal, 2011); these virtues in turn generate more trust.

Attempts to identify the core drivers of trust (how to gain trust or retain it) have considered it as contingent on the congruence between citizens' (and institutions') expectations (their knowledge and understanding about what is fair and what is unfair) and the familiarity about the real functioning of public institutions (Walle & Bouckaert, 2003; Walle, 2009). This shows the complexity of the concept, which establishes trust as multifaceted and may have various lawyers and levels based on the context of the relationship (Tschannen-moran & Hoy, 2000). For example, a philosophical standpoint of trust is related with ethics, moral and reasoning (Baier, 1986; Giddens, 1990; Govier, 1998; Hollis, 1998; Hosmer, 1995; Luhmann, 1988). Individual envisages trust as the degree of optimistic expectations (Bradford et al., 2017; Sherman, 2001), whereas in institutional terms trust is a shared decisions on institutional ability and values (Hardin, 2002; Van De Walle, 2009b).

Scholars have reached a consensus that trust is positive expectation of a person or a community about the behaviour of another person or a community in relation to the outcome of an action, which occurs under conditions of weakness or vulnerability and depends upon the willingness or confidence of other. Following this assertion, in the case of a judicial system, trust implies a dependency of an institution (judicial system) and the goodwill of the public. Considering the institutional vulnerability and the weakness of judicial function and system, it needs public support in the form of trust to maintain the operation of the rule of law (Benesh, 2006). Askvik, Jamil and Dhakal (2011) elaborate conditions for a trustworthy institution as a combined structure “of rules, roles and human actors [which] generate activities, and people may trust or distrust such entities, depending upon how they perceive them and assess their actions” (p. 2). Given the lack of

electoral connection to the judiciary, legitimacy derived from the public (i.e. trust in what the judiciary does and how it does) is crucial.

Sociological and institutional economic literature (Boateng & Kaiser, 2019; OECD, 2017) posits the influence of trust on society. Many studies show how the capacity of the state and the quality of government have strong and positive effects on various standards of human wellbeing, and have enhanced measures of social trust and political legitimacy (Rothstein, 2012, in OECD, 2017). The core elements of trust as outlined in the literatures feature trust as embedded in public expectations about what is right and fair and what is wrong and unfair, and public perceptions about the actual functioning of public institutions. This aligns with the purpose of this study, which investigates the connection between trust in institutional or the judicial governance, and expectations of fairness in processes and outcomes.

4.2.1 Trust and Confidence

Although trust and confidence seem interrelated and are often used interchangeably (Hough, Bradford, Jackson, & Roberts, 2013), their purposes are contextual and the literature highlights a significant difference between them, as most often ‘trust is a practice of confidence’ (Hardin, 2002; Meyer & Ward, 2009; Simpson, 2011). Trust is the means by which someone achieves confidence in something. One critical distinction between these two concepts identified by Giddens (1991) and endorsed by Bathurst (2021) is that “confidence arises as a result of specific knowledge; it is built on reason and fact, [whereas] trust presumes a leap to commitment, a quality of ‘faith’, which is irreducible” (p. 83).

Trust is sometimes subjective, determined by a personality or a psychological state of the individual, which is strictly linked to their values and attitudes (Rotter, 1967). This attitude relies on moral motivation, and a set of feelings and emotions that individuals adopt. Confidence is more certain when an individual knows or assumes that a political or a public institution will perform in their interest; in this sense, confidence characterises an attitude to abstract systems (Smith, 2004; Wright, 2010). These standards are precondition for confidence (Cakir & Sekercioglu, 2016), which highlights how both the individual and the institution are performing (Siegrist, 2010).

Trust establishes confidence, which is mostly dependent on the self, but trust may depend on the other. Confidence is more connected to indications of fair conduct or functioning, whilst trust is guided by perceptions of ability and shared values, as Hardin (2002) stated. Thus, confidence can be understood as a voluntary or motive-based trust rooted in a relationship between public institutions (trustee) and the public (trustor) (Bradford et al., 2017). Trust is understood as a willingness to commit to the unknown, whereas confidence is a willingness to commit to something one is already familiar with (Earle, 2010; Siegrist, 2010). For example, in relation to the law and justice, confidence is linked to consideration of the execution of law – how the administration of justice works, interprets and implements the law, and on the perception of public in relation to its functioning. “Trust refers to the social attitudes relating to this implementation” (Oyanedel, 2019, p. 79) – how people perceive and recognise the justice institutions and its functions. Therefore, confidence is connected to the performance of the institution, and its ability to forecast and implement law, whilst trust influences the relationship between the public and the institutions, and impacts the outcomes of their functions. Usually, people trust institutions that are credible, responsive, reliable, responsible, impartial and legitimate.

4.3 Importance of Trust in the Judiciary

While definitions of trust applied directly to the judiciary are imprecise, scholars have assessed public trust in the judiciary and presented analyses covering multiple issues. Trust in the judiciary is described as a mix of ideologies, experiences and interests, but it has not focussed on specific aspects of the judicial institution and its functioning. Professor Aharon Barak in *The Judge in a Democracy* (2006) asserts that public trust and confidence in the judiciary is a precondition for realizing the judicial role. His claim about public confidence indicates that judges are required to perform in accordance with ethical standards to promote the constitutional values, rule of law and democracy. Bradford et al. (2017) question the problematic relationship between people and judicial system – people are required to trust the justice system that has an unusually intrusive set of powers to protect them, and the judicial system requires the trust of citizens to function. Judges and the judiciary rely on public trust and confidence, which signal “that the

public recognizes the legitimacy of judicial decisions, even if it disagrees with their content” (Barak, 2006, p. 109) of the decisions. The judiciary does not need recognition in the way that the other two branches are held accountable; rather, public trust which includes voluntary acceptance of judicial decisions is crucial for judicial legitimacy (Urbániková & Šipulová, 2018). Compared to other public institutions, judicial authorities hold unique positions in society; but they also require a significant amount of public support.

Normative standards on trust have reflected the relevance of public trust and in the judicial system. The Bangalore Principles of Judicial Conduct of 2002 is the first effort to discuss public confidence explicitly in judicial circles. It describes public confidence as having the “utmost importance in a modern democratic society”⁴⁴, and requiring individual and collective responsibility among judges to improve confidence in the system⁴⁵. The United Nations Judicial Group on Strengthening Judicial Integrity⁴⁶ pronounces judicial accountability and judicial independence as crucial to improve levels of confidence in the rule of law. Similarly, the Bangalore Principles of Judicial Conduct recognises various levels of confidence in judicial activities, based on the applicability of the information delivered to the public about the judicial system, including its role, functions and behaviours. The Kyiv recommendations⁴⁷ on judicial independence emphasise on the influence of administration of justice on enabling public trust in the judges and courts. The clearer and more transparent the information is provided to the public, the higher the level of public confidence is likely to follow.

Scholarly evidence shows that public trust and confidence are central to ensure judicial efficiency and accountability (Benesh, 2006; Boateng & Makin, 2016; Bradford et al., 2017; Cakir & Sekercioglu, 2016; Uusitalo, 2019) and are preconditions for sustaining institutional independence (Boateng & Kaiser, 2019).

⁴⁴ Para. 6, Preamble, Bangalore Principle of Judicial Conduct, 2002.

⁴⁵ Para. 7, Ibid.

⁴⁶ The Round Table Meeting of Chief Justices in The Hague in 2002; See, Commentary on Bangalore Principles <https://rm.coe.int/168066d6b9>.

⁴⁷ The Kyiv Recommendations were adopted in June 2010 to conduct in-depth research and consultations involving independent experts from academic and judicial practices as well as the participating States. This document attempted to include the overall topic of judicial independence from three angles: judicial administration, judicial selection and training and accountability of judges and independent decision-making.

Legal scholar Boateng (2020) reiterates the views expressed by Gibson (1991) and Tyler (1990) as: “Public confidence legitimizes [the action of] the authority and decisions of the court and makes citizens less likely to challenge and disobey court processes” (p. 287). Trust and confidence encourage the active engagement of the public in setting priorities, thus working towards institutions becoming more locally accountable and responsive, and securing greater compliance among legal and judicial institutions.

Global judicial reform experience also suggests that improvement in the performance of courts supports development in other spheres of the society. Legitimacy and effectiveness of the courts and of the system of justice, rest upon public confidence and support to regulate the administration of justice. Literatures (Bradford et al., 2017; Cakir & Sekercioglu, 2016; Hough & Roberts, 2004; PytlikZillig & Kimbrough, 2015) on judicial legitimacy identify public knowledge, understanding of judicial procedures and decisions, and visibility of the judiciary as correlates of public trust, claiming “that people who know more about the judicial system are more likely to be sensitive to its priorities” (Garoupa & Magalhães, 2021, p. 708) and support the judiciary and demonstrate a greater willingness to rely on its legitimacy. These perspectives indicate that trust is a process that resides not only in people’s attitude toward the judiciary or in its response, but in the interplay between the two (PytlikZillig & Kimbrough, 2015). Nevertheless, most of the existing analysis is built on the experience of well-established democracies and on the assumption that courts are functional element of the democratic governance system. This conception, however, may not apply in contexts where nations are struggling to establish democracies and judiciaries are not fully independent.

Contrary to the above claims, some critics (Askvik & Jamil, 2013; Kiršiene & Gruodyte, 2019) argue that well informed public with a better understanding of the judicial system may have less confidence “because more informed people seem to notice the failures and chronic systemic problems of justice system” (Kiršiene & Gruodyte, 2019, p. 142) . Others (Salzman & Ramsey, 2013; Van De Walle, 2009b) argue that public confidence in judicial institutions is contextual and multidimensional. That is, people may trust or distrust the judicial system based on their experiences and understanding. When people find it ineffective, unfair, slow,

inaccessible, sluggish or a combination of all of these, and when they see that the judges are inaccessible to the poor and marginalized (Franco, 2008), they are likely to form an understanding that the justice system works better for the rich or powerful than for the poor and weaker members of the community.

Understanding trust in the judicial system, according to scholars (Berry, 2007; Bühlmann & Kunz, 2011; Cakir & Sekercioglu, 2016; Matsui, 2017), requires consideration of factors that will enhance public perceptions of the court: the experience of a person, feeling of procedural fairness, and the institutional design. This demonstrates that the judiciary is functioning well and fulfilling its goals (Benesh, 2006; Gopal, 2009). This requires judicial performance to be based on the ability and integrity of judges functioning within the framework of the law, and within and outside the judiciary (Miller, 1970). Judicial competency, integrity and public benevolence are key factors that influence trust and stability (Bathurst, 2021; Bauer & Freitag, 2017; Wallace & Goodman-Delahunty, 2021).

However, empirical research in this field is limited or insufficient in Asian countries (Boateng, 2020), especially in the specific area of judicial reform and public trust. This dearth is because large-scale studies are focused mainly on demographics and variables explaining public perception of the judiciary, rather than measuring level of trust (Benesh, 2006; Boateng, 2020; Boateng & Makin, 2016). While noting influence of issues such as democratic practices, rule of law and institutional independence and corruption on levels of public confidence in the judiciary, Boateng (2020) suggests that given the uniqueness and diverse character of the Asian continent, country-level assessments are required to grasp public perceptions and attitudes toward the courts and judicial systems. Assessing studies from various jurisdictions may provide generalizable explanations about the key elements of public confidence in the judiciary.

4.4 Elements of Trust in the Judiciary

Despite the complexity of the concept and the variety of approaches, literatures on trust (Bathurst, 2021; Boateng & Kaiser, 2019; Bradford et al., 2017; Govier, 1998; Miller, 1970; Sherman, 2001) frequently highlight two different, but complementary elements that are crucial to understanding and analysing trust:

competence or operational efficiency and *values or integrity*. That is, trust in the ability of institutions to perform their function with integrity (or values), and trust in the underlying intentions of the institutions and the principles that guide actions and behaviours. The public accesses institutions based on their perceived experience of service delivery, but also regarding the efficiency, fairness and transparency of the policy developing process and its outcomes. A paradigm of trust that highlights *competence and value* connects trust with an actionable outcome. The concept of judicial competency and values strikes a balance between a thin and a thick concept of justice.

Building on the above literatures and normative standards⁴⁸ developed by the international community, the following section analyses in more detail two key components of trust – competence and values. These components have also been identified in Chapter 3 as integral components to the achievement of judicial reform goals.

4.4.1 Trust in Competence

Competence refers to the operational proficiency of any institution that is capable to accomplish legally and constitutionally assigned functions effectively and efficiently (Bühlmann & Kunz, 2011; Cakir & Sekercioglu, 2016). Any actor or institution without the ability to deliver on expectations cannot be trusted (Bauer, 2019; Tschannen-moran & Hoy; 2000; Tyler, 2001). Chief Justice of New South Wales, Justice Bathurst (2021) said: “We cannot expect the public to trust in the judiciary if we do not competently exercise our power and perform our duties” (p. 86). Judicial effectiveness, reliability and responsiveness are seen, therefore, as necessary indicators of a competent justice system (Lelièvre, 2017). For example, the quality of case-processing in general, which includes the absence of delays, consistency in court decisions, responding to local demands, and adequate annual public allocations to legal aid, is seen as having a positive correlation to trust.

⁴⁸ IBA New Delhi Code of Minimum Standards of Judicial Independence 1982 (New Delhi Standards); UN Basic Principles on the Independence of the Judiciary 1985 (UN Basic Principles); Universal Declaration on the Independence of Justice 1983 (Montreal Declaration); Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region 1997 (Beijing Statement); and Commentary on The Bangalore Principles of Judicial Conduct 2007 (Bangalore Principles).

Several studies have pointed to a ‘perception gap’ and the degree to which levels of trust can be increased through quality information sharing (Govier, 1998; Hough et al., 2013; Sherman, 2001; Singer & Cooper, 2009). Improving public understanding to secure accessibility to the court system therefore is central to foster trust in the competence of the judiciary (Bathurst, 2021). For example, an assessment of the judiciary-community outreach program designed to facilitate engagement between the judiciary and the public has been one attempt at connecting the information gap between the public and the judicial system. Mobile courts in the Philippines, the ‘Justice on Wheels’ program operating in India, and the Judiciary-community outreach program in the United States have achieved some success in strengthening public accessibility to the judicial system (Mulmi & Shrestha, 2012). Responding to the local concerns and being directly open to the public, these efforts are focused “on the notion that the judiciary is required to reach out to the communities and promote public trust towards the judiciary” (Ibid, p. 189).

The presumption here is “that people who are more familiar with the courts will regard the courts as having greater legitimacy or express more support for their decisions” (Nielsen, Robinson, & Smyth, 2020, p. 384). Literatures (Gibson, 1991; Gibson & Caldeira, 2009; Gibson, Lodge, & Woodson, 2014; Tyler & Rasinski, 1991) on positive theory suggest that increased public exposure and understanding about the role of the judiciary, the process the judges and judicial staff are appointed and the procedural awareness on decision making and implementation of those decisions stimulates positive associations, which help to build and maintain trust and legitimacy. An annual global survey on institutional trust – the Edelman Trust Barometer, 2020 – also supports this correlation.

Researches on the judicial system in Europe (Lelièvre, 2017; Urbániková & Šipulová, 2018), America (Cornett & Knowlton, 2020; Hammergren, 2002; Rivas, 2021) and Asia (Gopal, 2009; Phuyal, 2009; Sengupta, 2019) conclude that transparency around judicial appointments and public assurance that the judges are chosen on their ability, inspires public trust and maintains judicial legitimacy. The Conference of Judges of Asia Pacific in 2012 (Kirby, 2012) concluded that judicial independence including appointment, transfer, court budgets and judicial salaries are crucial aspects of judicial competency and integrity.

In the context of the changed scenario due to the COVID-19 pandemic, where a number of judicial activities have been shifted to the virtual mode, judicial involvement with the public has also changed. This shift has significantly increased public access to the court proceedings and enabled public to observe judicial proceedings (Bathurst, 2021) in some jurisdictions. But in under-developed countries where judiciaries lack sufficient infrastructure and public lack adequate access to the required technologies, the pandemic is likely to have intensified trust deficit in competency of the judiciary.

Based on the literatures (Colquitt & Rodell, 2011; Hardin, 2002; OECD, 2017; Pettit, 1998), these expectations entail two critical dimensions: *responsiveness and reliability*, i.e. the authorities are virtuous, trustworthy and trust-responsive. Judicial responsiveness is an explicit dimension of trust that reflects the competency of public institution to serve the public (Pettit 1998). Responsiveness for effectiveness and fairness of services does not only include availability, access, timeliness and quality, but also mutual respect and engagement. Judicial reliability combined with logical predictability is a prerequisite for judicial responsiveness (Tschannen-moran & Hoy, 2000). Trustworthiness exhibits the competency and fairness of the institution to respond efficiently to the anticipated needs of the public, and minimizes uncertainty.

4.4.2 Trust in Integrity

Value-based trust or integrity is another significant precondition of trust, which “consistently adheres to a set of principles that the public finds acceptable” (Bathurst, 2021, p. 87). The way the institutions behave or regulate their conduct and the method they safeguard the public interest or accountability without the need for scrutiny influences the level of public trust (Kirby, 2012; Shaw, 1997; Soeharno, 2009). The integrity of any “institution is dependent on the integrity of each and every judge” (Bathurst, 2021, p. 87). Any compromised trust of an individual judge may compromise trust in the entire judicial system (Kirby, 2003). Trust in the judiciary, therefore, can be secured only in a condition where judges are competent to uphold the “highest standards of integrity in their professional, public and private lives” (Bathurst, 2021, p. 87). Any conduct perceived as displaying disregard for professional integrity, law and constitution, erodes the

trust. Judges, therefore, require the highest and most rigorous behavioural standards of all professions.

Integrity is often understood in narrow terms, simply as the absence of corruption or of explicit abuse of power (Kirby, 2012). Integrity, however, is better understood as the “consistent alignment of, and adherence to, shared ethical values, principles and norms for upholding and prioritising the public interest” (OECD, 2017, p. 29). Integrity demands a commitment to morals and behaviours that are beyond corruption, and which are built on notions of fairness, equality, high quality service delivery, courtesy and transparency. In addition, trust is more likely to arise and sustain where there is demonstrated openness, transparency and fairness.

The judiciary is not, however, an ordinary public institution. It is an elemental to the rule of law, which is foundational to all other public institutions in the democracy. Presumably, the public are more inclined to trust the system if they perceive that the system represents, enacts and even embodies the values they share (Bradford et al., 2017). For example, the process judges are appointed or every decision the judiciary makes has profound implications for those who come before the court, and it also has flow-on effect on people beyond the courtroom (Guarnieri & Pederzoli, 2002). The public do not wish to trust those whose ability, behaviour and honesty is questionable; such transgressions significantly undermine trust.

Honesty is a personal attribute that exhibits integrity and authenticity, and while it is pivotal to trust, it is insufficient for the attainment of full institutional integrity. Robust and transparent mechanisms and policies to prevent and respond to all unacceptable judicial behaviours foster compliance with laws and cooperation with judicial system. For example: procedural justice is focused on fairness in judicial processes; this in turn influences access to justice services, which depends on institutional procedures that demonstrate its integrity. These include the abilities to render independent, impartial, binding and enforceable decisions; reasonable length of proceedings (existence of fast-track system); the level of legal costs (right to legal aid); and limitations of access to victims. If such procedures are in place to enhance the operation of the system, the public trust will be more easily attained.

Justice Bathurst (2021) opines that a justice institution isolated from the public cannot operate in such a vacuum. He suggests that “there was a period where we

expected the public to blindly trust the [judicial] institutions” (p. 84) and judicial actions, but current public attitude towards the former has become more questionable and challenging. Constant public concern about judicial impartiality and integrity highlights the public perception of trust on individual and institutional judicial responsibility. Trust in the judiciary is fragile and is based on either stability or perceived fluctuations in judicial competency, integrity and benevolence.

Perceptions of political influence, corruption and misconduct significantly diminish trust, and judicial misconduct in turn undermines the esteem with which society holds the judiciary, making the public less willing to accept judicial decisions. Unbridled and unwarranted threats, attacks or criticism from within the judiciary also create a threat to public trust. Such threats may also come from the executive, legislative, political parties, political commentators or academics, and risk damaging public confidence. To ensure that such denigrations do not imperil the public integrity of the system, judicial disciplinary procedures are expected to be credible, effective and swiftly implemented. Judicial Councils, such as the one that is established under Nepal’s constitution for the purpose of handling judicial complaints and maintaining institutional integrity, enhance trust in the ability and character of the judiciary. However, the independent functioning and accountability of such councils are important.

4.5 Modelling Public Trust in the Judicial System in Nepal

Comprehensive research on trust in public institutions including the judiciary is lacking in Nepal. Nonetheless, a small number of literatures have reflected on the level of trust in public institutions. Based on Western concepts, most of them have assessed demographic variables and perceptual variables such as knowledge, perception and experience. These studies (see Gupta, 2020; Jamil et al., 2013, 2017; Jamil & Dhakal, 2015; NASC, 2018; Nepal Law Society, 2002; Puri et al., 2013), however, indicate a pressing need for institutional reform and exhibit a pattern of evidence in relation to lack of public trust in public institutions including the judiciary. For example, based on the Nepal National Governance Survey 2017/18, sociologist Gupta (2020) found low level of public trust and confidence in public institutions. This was due to perceived lack of efficiency, effectiveness,

transparency, responsiveness, accountability, and corruption, indicating that the public are not satisfied with the performance, activities and behaviour of the institutions, and the institutions are struggling to retain these qualities.

Similarly, while analysing trust in public institutions, policy analysts Askvik et al., (2011) delineated two major aspects of “institutional trust: trust based on *social identity*” (p. 3) – a social connection that extends trust to the members of a particular group or society – and “*performance-based trust*” (p. 3) – the citizens’ perception of the current policy achievements of public institutions or the level of public satisfaction with their performance. They have identified five models to study trust in public institutions: (i) personal well-being; (ii) political systems and public perceptions on development and democracy; (iii) attitudes toward politicians; (iv) competency, reliability and honesty of public institutions; and (v) assessment of policy performance. These significant factors contribute sustained democracy and suggest “that assessments of democratic performance are the most important components of trust in public institutions in Nepal” (p. 13). Likewise, public policy analysts Jamil, and Dhakal (2015) concluded that the majority of Nepali people are clear that they do not trust political institutions due to their failure to meet public expectations, and think that a democratic renewal is required to address the elements that are undermining core democratic values.

Askvik and Jamil (2013) claims that “an important approach to institutional trust focuses upon the trustworthiness of institutions...to act in accordance with certain responsibilities” (p. 154). Governmental or institutional measures that improve institutional competence, reliability and impartiality among public service are examples of mechanisms that can produce a trustworthy public service. Enhancing institutional trustworthiness relies heavily on institutional arrangements (Askvik & Jamil, 2013; Kumagai & Lorio, 2018; Morgan, 2002).

While important judicial reforms to ensure speedy and fair justice have been initiated in Nepal for more than half a century, a significant portion of the population are still denied access to justice. The declining level of public trust in the judicial system is a major concern of the citizens (NASC, 2018; NBA, 2020b; Nepal Law Society, 2002) as well as the judiciary (Supreme Court, 2009b, 2015, 2019c, 2021). The judges and the judicial system are not the most trusted

institutions in Nepal. Available findings show that certain aspects such as judicial appointment and judicial irregularities (DCAF, 2017; Puri et al., 2013; Supreme Court 2015, 2021), unequal and unfair public access (proximity, cost, case backlogs) (DCAF 2017; National Judicial Academy, 2015; Nepal Law Society, 2002; UKaid & DanidaHUGOU, 2011) and the lack of a well-functioning court system (CeLRRd, 2015; DCAF, 2017; NASC, 2018) have significantly diminished public confidence.

A myriad of survey⁴⁹ data collected by civil society organisations and government ministries from rural communities of Nepal indicates low levels of overall public confidence, and explore a range of complex and inter-related judicial competence-values concerning trustworthiness in the formal justice system. Many of these studies have focused on generic levels of trust, while others have developed detailed indicators or determinants of trust to measure attitudes towards specific aspects of justice delivery. Levels of trust in Asia as identified by the Global Barometer survey shows mixed levels of trust compared with other regions of the world (Global Data Barometer, 2022). South Asia tends to achieve less trust than Southeast Asia. These measures of trust include numerical award for governance, institutional capabilities and integrity. Compared to other countries in South Asia, levels of public trust in Nepal are with the data suggesting that accountability, transparency and corruption are serious problems in Nepal. Nepal scores only 19, below India (47) and Bangladesh (24). Global Integrity Evidence (a UKAID funded research program) finds that despite setting up new legal and institutional apparatuses, Nepal has failed to tackle institutional independence, corruption and accountability (GI-ACE, 2020). There is a strong correlation between trust and levels of judicial independence. Trust is much higher where there is perceived and actual high levels of independence among the judiciary.

⁴⁹ For instance, a baseline survey of the Ministry of Law and Justice (2016) shows that the 50 percent of citizens do not trust the criminal justice system; the Nepal Law and Society (2002) survey in 31 districts shows 15 percent of the public trusts the judiciary; and a baseline survey of the Ministry of Women (Puri et al., 2013) in four districts reveals that only 2.6 percent of the population believes that the formal justice system fulfill the requirements of the law. The National Baseline Perception Survey of 2014 (GoN & UNDP, 2018) reveals around 5 percent people were satisfied with court services and 26.7 percent people felt that justice sector actors are responsive. It is highly significant to note that 90 percent of people prefer informal justice mechanisms because they believe that they are accessible, responsive and user-friendly (DCAF, 2017).

Across the nation a considerable swathe of the Nepali population expect judicial services to be fair and accessible (DCAF, 2017; Nepal Law Society, 2002; Puri et al., 2013; UKaid & DanidaHUGOU, 2011). For example: 99.6 percent men and 97.3 percent women believe that inexpensive, easy and prompt services increase access to the judiciary (Puri et al., 2013). The general lack of access to law, knowledge about the judicial institutions and judicial experience have a sizeable effect on confidence in the judiciary because knowledge positively affects individual's level of confidence. For example a study of the National Judicial Academy (2015) shows 40 percent of the public having encountered barriers accessing justice; 25 percent are aware of judicial institutions and 76.1 percent consider cumbersome judicial process as a major hindrance.

Similarly, a survey by Nepal Law Society in 2002 in 31 districts concluded that 15 percent of people have trust in the judiciary, 21 percent thought that most judges decide cases impartially, 45 percent experienced court procedures as expensive, 31 percent claimed to have witnessed bribing of the court officials, and 75 percent said the court procedures are cumbersome (Nepal Law Society, 2002). These surveys have also identified public preferences for the informal justice system due to the perceived lack of fairness of the formal one⁵⁰ (DCAF, 2017). Most citizens consider the justice system as inaccessible, non-responsive, biased and relatively incompetent, lacking integrity (Ibid). These qualities remain considerable obstacles to public confidence in judicial competency and the ability to translate judicial values in reality. Survey data (CeLRRd, 2015; DCAF, 2017; Nepal Law Society, 2002; Puri & et. all, 2013; UKaid & DanidaHUGOU, 2011) demonstrates deficient public trust in the judicial system clustering around inefficient, unfair, incompetent, and unaccountable judicial actions. Particular conditions and events affect citizen attitudes towards the justice system. For instance, political interference while appointing judges, frequent miscarriage of justice, corruption scandals and extra-judicial activities are all associated with plummeting public confidence.

It is noteworthy that the periodic Strategic Plans of the Nepali judiciary have recognized: "Justice is not only slow and cumbersome; it is also expensive"

⁵⁰ Informal justice mechanism, also known as the traditional justice system, is practiced by many castes and ethnic groups across the nation (Chhetri & Kattel, 2004) due to easy access and cheaper cost in many situations.

(Supreme Court, 2009, p. 64) and aspired to implement an ambitious plan to make the justice system ‘accessible to all’ (Supreme Court, 2004, 2009c, 2014, 2019b) and ‘*worthy of public trust*’ (Supreme Court, 2009c) within the plan’s five-year period. These strategies have, however, remained largely static, resembling aspiration rather than blueprints. The judiciary has admitted that “the court has failed to earn public trust and easy access to justice” (Supreme Court, 2009, p. 64) and also noted that the public cannot experience reform made primarily through physical aspects of the courts, rather than through procedural and behavioural aspects (which are required to bring about significant change in public confidence) (Supreme Court, 2009, p. D). The focus of the plan on court administration, caseload management and modernization (IT and new buildings), and training programs are necessary for administration of justice, but a much deeper institutional introspection on the need for public perception about the competency and integrity is important to fulfil public aspirations of access to justice.

A report of the High-level Commission formed to Probe Irregularities, Malpractices or Corruption in the Judiciary published in 2021 suggested several measures to reform the judiciary, acknowledging the low level of public trust in it due to their concern on the competency of judges, corruption and irregularities. The beginning of this was attributed to the selection and appointment of justices and judges at courts (Supreme Court, 2021). Several studies commissioned by the government (HMG, 1971; HMG, 1983), Supreme Court (Supreme Court, 2009a, 2015, 2021) and the Bar Associations (NBA, 2020; SC BAR, 2007) have raised serious concerns about the lack of public trust in judicial competency, integrity, reliability, responsiveness, transparency and overall judicial independence. This trust deficiency is, according to these reports, due to specific factors, including: lack of knowledge and experience among the public in court procedures and functions, perceived bias due to lack of judicial diversity (judges and judicial staff from diverse social and cultural background), political influence in judicial appointments and massive corruption.

Based on the above empirical studies, public trust in the system is driven by quality of performance which includes effectiveness, reliability, responsiveness, transparency, fairness and integrity. These complementary rather than mutually exclusive theories include two interrelated themes – *individual* traits and

institutional qualities – which are relevant for shaping public trust in the judiciary and lays the foundation of trust in Nepal. Almost all the empirical analysis has confirmed the level of public confidence is determined by both their level of knowledge and experience, are closely interlinked with the level of performance of the courts and judges. For example, Justice Star⁵¹ pointed to two propositions of trust, ‘trust in *ability*’ and ‘trust in the *character* of a person’ as he elaborated,

Judge is responsible to deliver clear messages through their acts and behaviours
- that the judges are able to make fair and right decisions without any biasness.
It is the role of the judge to build public confidence through the delivery of judgments based on fair procedures of law; [It is] not the job of public to cross check whether legal or judicial principles were followed or not.

Retired Supreme Court judge Pluto⁵² made a similar remark:

It is not wise for the judiciary to expect people to trust it when it has failed to create a connection between public and the judiciary – the connection of trust through fair, quality and timely justice delivery is necessary.

4.6 Conclusion

Trust, understood undeniably as linked to doing what is right, cannot be achieved by simply demanding it. It must be earned through competency, integrity and commitment to fairness, equality and justice. Literatures that cover both the theoretical and empirical aspects of trust in relation to the judiciary together with scholarly arguments from a wide range of disciplines and settings have considered trust in a number of distinct perspectives. They all agree on the need to prioritising the interest of the trustee than the need of trustor because the former expects helpful behaviour from the latter, which creates a sense of obligation. Trust expressed as an optimistic and positive expectation is likely to increase cooperation between groups and improve institutions’ performance. The trust occurs under conditions of vulnerability for the individual, who depends on the behaviour of other people, and it is associated with willingness rather than coerced cooperation. This conduct

⁵¹ Note 11.

⁵² Interview, Lalitpur, 23 July 2019.

enhances confidence and embodies values and competence as an essential component of trust.

According to the literature reviewed, trust in the judiciary is necessary for ideological, normative and instrumental reasons. There is an extensive consensus that the legitimate exercise of power by the judges and the judiciary is a universal norm of the rule of law and democracy. Thus, the concepts related to trust in the judiciary focus on the performance of courts through procedural fairness and judicial values, and seek to disclose the systematic practical obstructions to judicial competence and integrity. Public trust in the judicial system is achieved when the preconditions of competency and judicial values are fulfilled (Bathurst, 2021). These conditions include accessibility, reliability, responsiveness, integrity, fairness and openness of the judicial system (Lelièvre, 2017). These concepts and conditions for judicial competency (ability) and values (integrity) also provide a solid basis for linking the conceptual frameworks on public trust to an actionable judicial reform agenda.

At all levels – institutional, social and the individual – trust facilitates cooperation. Trust is essential for shaping reforms in social and institutional system of governance, collaborative decision making, and transformation of social conduct. Trust is formed across several levels of institutions – its functions, performances and its attitude towards the society. Public engagement improves government transparency and accountability, which ultimately helps to meet citizens' expectations – a primary element of rule of law.

Based on the existing theoretical and empirical results, this chapter concludes, therefore, that public trust in the judicial system is determined by a range of intersecting elements, including institutional performance, individual experience and personal attitude. Public perceptions of these aspects vary as a result of reform approaches, and peoples' experiences is crucial in shaping attitudes (including trust) towards the judiciary. Public confidence depends on public perception that the judiciary operates with the highest respect for principles of competency, integrity and fairness. Arguably one of the most important areas in this regard is a demonstrated willingness to safeguard judicial independence. The focus however

should not be limited to whether the demand side *trusts* the judiciary, but also include whether the supply side is taken to be *trustworthy*.

This study has noted serious limitations and hopeful prospects for reform and suggests an ongoing need to consider the public aspiration carefully to enhance the public trust on the judicial system and support to the judiciary to sustain rule of law and justice in Nepal. Court-sponsored surveys to measure the level of trust in Nepal can explore significant factors that are crucial to enhancing public trust and confidence in the courts. These can possibly contribute to the design and adoption by the courts of strategic approaches to building and maintaining public trust for the benefit of the wider polity.

In the following chapter, the theoretical and practical aspects of trust dealt within this chapter will be applied to analyse data collected from the field through key informant interviews with the justice supply side and focus group discussions with the justice demand side.

Chapter 5

PUBLIC TRUST AND THE JUDICIARY IN NEPAL – AN UNREALISED IDEAL

5.1 Introduction

Notwithstanding Nepal's commitments to judicial reform and its outwardly sincere approach to delivering justice and maintaining the rule of law, there is increasing evidence that such reform is not being realised. Indeed the level of public trust in and access to the judicial system in Nepal is poor (Acharya, 2009; CeLRRd, 2015; DCAF, 2017; Nepal Law Society, 2002; Puri & et. all, 2013; UKaid & DanidaHUGOU, 2011). Several recent studies on the judiciary discussed in the previous chapter measured satisfaction levels among court users and found very low levels of public trust. Moreover, in 2007 Transparency International labelled the judiciary of Nepal as one of the most corrupt and reported corruption at all three tiers of the judicial system. Nepal remains at the bottom of the Transparency International Corruption Perception Index.⁵³ Recently, the Supreme Court (2021) has also confessed that corruption, which begins with judicial selection and appointment, is rampant in the judiciary.

This chapter highlights on the relationship between trust and justice, the importance of public trust to the provision of justice and the rule of law, and Nepal's continuing failure to increase public's trust in the law and confidence in justice. As has been consistently proposed in this thesis, access to justice is dependent on high levels of trust and a perception that the judiciary is independent, fair and free of corruption and irregularities. Trust in the judiciary, which is failing in Nepal, is therefore the specific focus. The chapter seeks to understand and scrutinise a range of factors that are considered to work against fair and satisfactory levels of public trust in Nepal.

⁵³ According to the 2021 Corruption Perception Index of the Transparency International, Nepal scored 33. The index uses a scale of 0 to 100. A score below 50 is considered as having a relatively high corruption.

This chapter is organised around two elements crucial to public trust in the justice system – judicial competency (trust in *ability*) and judicial values (trust in *integrity*). Judicial competence refers to judicial performance and incorporates qualities such as sufficient and appropriate expertise and qualifications, the capacity to deliver prompt adjudication. In addition to exploring these as properties “of individual judges and the judiciary as a whole” (Shetreet, 2014, p. 492), it is also essential to understand the conditions that would enable or obstruct the accomplishment of such competence, for example whether the court systems are conducive to efficiency, including the ability of judges to discharge their duties. Judicial values underline the necessity of integrity, transparency and fairness among judges and the judicial system. The professional integrity and honesty of the Nepali judiciary are repeatedly questioned by the public and the entire system is now renowned for its compromised impartiality, lack of independence, endemic corruption and executive influence (Acharya, 2020; Bhandari, 2007; Bhandari, 2012a, 2017; Chapagai & Karna, 2020; Pimentel, 2011; Varughese & Payne, 2019). The Supreme Court in its several reports (Supreme Court, 2015a, 2021) has admitted that judicial integrity, including corruption and judicial misconduct and other irregularities, has become endemic within the judiciary, mainly at the Supreme Court.

Following the discussion in previous chapters on trust in the judiciary, and a consideration of some general trends of how Nepal sits in relation to the legal scholarship on this topic, this chapter discusses judicial competence and judicial values as they operate in Nepal and demonstrates how an analysis of these elements reveal persistent barriers to lifting the levels of public trust and confidence in Nepal. This discussion emerges primarily from fieldwork data gathered in Nepal where I worked among judges from Supreme Court, High Courts and District Courts; government and private lawyers; academia; NGO and community workers; and the court service seekers. During my field research, the issues of judicial competence and judicial values emerged as a persistent and pressing concern for a considerable number of my informants.

5.2 Trust in the Judicial System: The Experience of the Demand Side and the Supply Side of Justice

Based on the underlying ‘aspirations’ of the Constitution and the Strategic Plans of the Nepali judiciary, a large body of data collected through several surveys highlights the level of public trust and concern about the role of public institutions, such as the judiciary, in Nepal. These surveys provide valuable insights into how the public experience and perceives courts and judicial system in Nepal, although they are limited in terms of the gravity of evidence they provide. A qualitative approach can be an appropriate method to enhanced understanding of the insights that survey and statistics have emphasised. To date, this critical qualitative lens has been absent in the context of Nepal.

My participants represented a diverse swath of the public in terms of gender, education level, profession, roles in their community and geographical location. In terms of experiences of the interviewees, they had been involved in legal cases or had experience serving with the judicial system. Participants from the community had mostly been involved directly or indirectly with courts.

The following section is based on data generated from one-on-one interviews with both the supply side (justice personnel) and the demand side (lawyers and academics) and focus group discussions with those from the demand side of justice.

My objective to engage these two groups of participants was to explore:

- i. Understandings on the value judicial system provide, what a well-functioning judicial system would look like, and concerns about the access to judicial system;
- ii. Perspectives on the public’s knowledge of the process, needs and aspirations about the judges and judicial system.

The research was focused on the experiences of the informants and also sought their views on how best to increase public access to justice. Our discussions covered issues including judicial effectiveness, reliability, responsiveness, fairness and transparency. Although the findings only scratch the surface, this qualitative inquiry provides new, important insights into the access to justice experience of the demand and supply side. A better understanding of how the public perceives the

judicial system based on their experience can provide the latter and its stakeholders with insights into how public access can be increased to achieve judicial reform goals. Surprisingly, during the discussions, both demand and supply sides revealed an issue related to the public's trust and confidence. An examination of an inevitable interaction between access to justice and how the contributors to my study experienced and perceived the justice they encountered, conveys low levels of trust. My subsequent focus on the relationship between public trust, access to justice and the perceived need to reform the judiciary in terms of their competence and integrity emerged from the insights of my informants.

This section below presents the findings in two sections: Trust in judicial competency (judicial system and processes) and trust in judicial values (integrity and fairness of judges and the judiciary).

5.3 Trust in Judicial Competency and Integrity: The Experience of the Demand Side of Justice

In this section I recall and lay out some of the broad topics that describe the aspirations of the focus group participants on 'what has been promised to them by the legal and the judicial system'. Essentially, I explored their experiences, understanding and perspectives on the values of access to independent judicial system, and existing gaps between their demands and fulfilment of those demands. My discussions touched a broad range of topics, cautiously structured to understand experiences and needs of the justice demand side, and to consider how reforms might be more meaningful, leading to greater access and justice for all users of the system. At the outset of each discussion, I requested participants to reflect on their primary concerns in relation to access to judiciary. This elicited, among other things, information about their views on judicial competency and performance, and judicial values – or the behavioural aspects of judges and the judiciary.

5.3.1 Understanding Access to Justice and Value of Justice

Community experiences and understanding can influence respondents' beliefs and perspectives on public institutions, including courts and the judicial system. This section, therefore, is an opener to understanding community perceptions on access

to justice and how they understand their experiences of the system which vary from actual promises. An overwhelming majority of participants confirmed that courts are important to them in everyday contexts, yet reflected on existing barriers to equal access to justice, describing several areas that require immediate reform.

The institutional pathways to gain access to justice is different for some specific groups of population and can be affected (DCAF, 2017) by a lack of basic understanding of the law and its application and information about judicial procedures. Among many of the poor and disadvantaged groups, level of clear understanding about the availability of legal and judicial services is very low. Lack of adequate knowledge means least likely to have confidence and knowledge required to navigate the legal system. Education and legal awareness programs, a practical problem-solving approach, have been limited in areas beyond district headquarters and have excluded considerable segments of the population. Many participants reflected that justice is closely connected with the everyday life of people, and that negligence or mistakes on the part of the judiciary or the courts can damage trust and confidence in the system. Zinnia⁵⁴, a local NGO worker in the Banke district shared:

Justice is closely associated with our emotions and everyday life. I believe Judiciary is created to respond fairly to the grievances of people who seek justice. But in reality, it is totally opposite. Courts have not been able to reach to the community to educate the people, who cannot make any difference between ‘what justice is and what injustice is’. In fact, it is a distant dream for the poor and marginalized, who do not have any political or family connection.

The physical environments of courts may produce an atmosphere of exclusion, alienation or disempowerment, or may impinge upon the individual’s access to justice process. A significant number of participants pointed to hesitation and unwillingness to seek assistance due to an inadequate knowledge/awareness about laws and court procedures, often made worse by ineffective information dissemination procedures about available support systems. Lavender,⁵⁵ a media reporter in Morang district and Rosemary,⁵⁶ an NGO worker in Banke expressed

⁵⁴ Focus Group Discussions Participant, Nepalgunj, Banke, 26 August 2019.

⁵⁵ Focus Group Discussions Participant, Biratnagar, Morang, 6 August 2019.

⁵⁶ Note 54.

similar feelings that the complexities of the court procedures and the infrastructure, especially the setting of the courtroom (the bench), create hesitation and discourage people.

Dahlia,⁵⁷ a local NGO worker in Morang, pointed to a direct relationship between levels of community awareness and the motivation to approach the court system: “Who and how the communications are made is crucial.” For a majority of these participants physical accessibility, such as proximity of the courts, complex procedures, and the use of highly technical language rendered the system inaccessible. Lily,⁵⁸ an NGO worker in Kaski, noted that the language used is generally beyond the public’s everyday understanding. Aster,⁵⁹ a lawyer in Banke, noted:

Decisions are prepared as per the requirements of the legal system, rather than the people receiving them. These documents contain crucial information about what is expected to proceed further. We can imagine the mind-set of those uneducated and vulnerable people, who do not even understand official language [Nepali language] of the court, do not have information about the available services and do not have money to hire a lawyer.

A poorly functioning administrative system, lack of resources and prohibitive distances from the courts impede access to justice for people living in rural areas. Many participants described the judges and judiciaries as “opaque institution”, “sophistically maintained”, “inclined to keep the poor and marginalised away” and courts as “the place where nothing happens for the poor and marginalized”. Saffron,⁶⁰ a media reporter in Banke, said

Not everybody feels comfortable using the legal system. Not everyone knows how to utilize or navigate the legal system. So, this may put a person at a greater disadvantage when they have a legitimate claim. Lack of adequate awareness about legal and judicial mechanisms, how it functions in practice, and limited knowledge about available remedies are the major difficulties associated to access to justice and are equally problematic.

⁵⁷ Note 55.

⁵⁸ Focus Group Discussions Participant, Pokhara, Kaski, 17 July 2019.

⁵⁹ Note 54.

⁶⁰ Ibid.

Geographical inaccessibility of the district courts is one of the main reasons for the low number of court cases in rural areas, where there is a much easier access to the informal justice system. Major concerns were expressed about public perceptions of fairness in the formal system, particularly in relation to systematic bias based on caste, ethnicity and gender, and differential treatment based on financial capacity. While the range of available options and means of access to the judicial system is necessary for improving accessibility, the court itself is often intimidating and involves complex tasks for the majority of justice seekers. Alovera,⁶¹ a human rights trainer in Kaski, reported:

Services located in the district headquarters cannot satisfy the need of the people in remote rural areas due to geographical barriers. They do not have any emotional attachment with the system because of the way they are designed to operate and the way they behave with the people.

Participants expressed concerns about courts not performing to acceptable standards and how this results in low motivation to access them, and lower level of trust in the judicial system overall. Olive,⁶² a lawyer in Morang, said:

Judges should understand that judicial independence is not isolation or keeping distance from the public. In many situation judiciaries need to be proactive to protect rights of citizens but majority of litigants do not get any information about the hearing dates, court procedures and even the information about the final decision of their cases on time, neither do they get any information about the process and the institution that implement their decision. Despite having best constitution and laws in Asian continent, everyday our people are victimized by the court due to lack of willingness or lack of knowledge to implement laws – laws are confined within the paper.

Rosemary⁶³ revealed:

People cannot have access to the support without accessing some judicial inhibitors. As a consequence of this, even serious criminal cases, are settled in the engagement of community leaders or mediation. For example, victims

⁶¹ Note 58.

⁶² Note 55.

⁶³ Note 56.

request for a mediation of cases of domestic violence because they often find court procedures and behaviour not friendly to them.

A substantial majority of participants perceived that support facilities in the system are for those who have power and (political) connections. Fern,⁶⁴ a teacher in Banke, reflected that “lawyers are so expensive, and it seems like poor people are forbidden to desire justice”. Sharing a similar sentiment, Saffron⁶⁵ said with disappointment: “If you can spend a good amount of money on a lawyer, you are more likely to move your case further, but it still cannot guarantee you will get a better verdict, on time”, while Lotus,⁶⁶ a lawyer in Banke, remarked: “Facility of legal aid is a privilege for those who are near and dear to the judges and court officials”.

A significant number of participants in all three focus group discussions identified the economic burden as a major barrier to accessing justice. Camellia,⁶⁷ an NGO worker in Morang, pointed to “the economic burden associated with formal justice system such as increased court fees, lawyers’ fees and other unforeseen cost attached while proceeding”. Several other phrases emerged during our discussions on economic burdens. These included: “justice is becoming expensive day by day”; “hurdles that discourage people to approach the courts”; “irrational increase [in fees] is intended towards restricting public who wishes to knock on the door of the court”; “forced to live a miserable life with perpetrators because of the cost involved” and “a deliberate strategy to demoralize people to approach court system”. Considering the massive increase in court fees,⁶⁸ Poppy,⁶⁹ a teacher in Morang, thought:

The cost associated with the formal judicial system is extremely high and unreasonable, it is very unlikely that poor and marginalised people and people living in remote rural areas can afford that. People are facing extra financial hardship along with the mental and physical stress.

⁶⁴ Note 54.

⁶⁵ Note 60.

⁶⁶ Note 54.

⁶⁷ Note 55.

⁶⁸ Although victims of domestic violence receive free legal aid, those who want to file a case must pay NRs 700 (8.75 AUD); this fee used to be just NRs 50 in the past.

⁶⁹ Note 55.

Pointing to unsatisfactory activities in the courts, a lawyer in Kaski, Orchid,⁷⁰ argued:

Justice seekers have to follow-up constantly and in many cases, they have to feed [bribe] court officers to transfer file from one department to another. Principally, courts give life to victims but how can people develop positive perception in such conditions? People do not feel that the court will solve their problem.

Lotus⁷¹ pointed to:

Non-reporting as the major consequences of ineffective services because service seekers do not want to waste money and time, and most importantly they do not want to be re-victimized. They would rather prefer to tolerate their grievances than endure humiliation in public.

Many participants ascribed the tendency among members of the public to substitute formal justice with informal justice mechanisms to an increasing lack of trust in the formal judicial system. Improving quality and responsiveness of judicial services would address some of these issues associated with low levels of confidence in the institutions. Marigold,⁷² a health worker in Kaski, stressed that “Courts are not for poor and voiceless. This is why local people prefer to seek justice through informal justice mechanisms located in their vicinity”.

5.3.2 Judicial Competency: Concerns about the Judicial System

As a follow-up to questions related to the accessibility, I requested participants to reflect on the competence of the current court system and to imagine what well-functioning courts would look like. Notably, a substantial number of participants presented clear ideas related to fairness, impartiality and justice. They expected court procedures to be efficient, speedy, fair and transparent.

Judicial responsiveness and reliability are two key elements of judicial competency that are failing in the Nepali judiciary. The majority of participants repeatedly cited

⁷⁰ Note 58.

⁷¹ Note 66.

⁷² Note 58.

“procedural hassles” and “slow processes”, “case backlogs”, “non-dissemination of decision”, “excessive time taken to publish full text of the decision” and “problems associated with the execution of the decisions” as major issues related to judicial lack of responsiveness, which are contributing to increased doubt on judicial performance. These elements are linked to the factors that ensure aspects of judicial competence. Tulip,⁷³ an educator in Kaski, noted:

An efficient and transparent judicial environment, quality, impartial and speedy services delivery putting less, or no economic burden are examples of competent justice. Fairness in judicial appointments and demonstrable judicial value are a quality of well-functioning court.

An overwhelming number of participants expressed concern that judicial performance seems to be measured mostly based on case backlogs. A senior lawyer in Kaski, Basil,⁷⁴ stressed:

Statistics of case finalization should not be considered a sole basis for the assessment of performance; whether the victims got justice or were satisfied with the decision should be an equally considerable factor.

Similarly, Sunflower,⁷⁵ a lawyer in Morang, noted “Justice is a very ‘serious subject matter’ which can create severe damage to the life of the people if not handled properly.” He further added:

We are getting decisions from the court, not justice. Judiciary and judges need to understand clear distinction between decision and justice. Decision of the courts are just a paper judgement which may serve the intention of the executive but does not serve the purpose of justice. Justice should be delivered effectively in a way justice seeker comprehends justice.

Cosmos,⁷⁶ an NGO worker in Kaski, revealed that

Judges make decision based on whatever information they receive from initial investigation of the police. Courts do not make any further analysis because judges do not have that capacity, or they are restricted to make their own analysis

⁷³ Note 58.

⁷⁴ Ibid.

⁷⁵ Note 55.

⁷⁶ Note 58.

or guided by internal/external powers to make judgements that are not in favour of those who are in power. This is an irony of Nepali judicial system.

Primrose,⁷⁷ a lawyer in Banke, said: “Well-reasoned judgments greatly contribute to the public trust in judiciary”. Similarly, Olive⁷⁸ noted: “Extensive delays in preparation of the final decisions undermines judicial goal and principle of access to justice”. Orchid⁷⁹ identified “technical judicial failure such as delays in case registration, decision writing, all phases of case handling has decreased a public trust in judicial system.”

Zinnia⁸⁰ stressed: “the need for effective mechanisms in the court that motivates people to bring cases and also facilitates speedy and effective justice delivery”. Defining processes regarding transferring a case from one court to another as “deliberate judicial carelessness”, she shared a very distressing story:

The Banke District Court and the High Court are barely 20 minutes apart, but it takes up to a year for District Court to transfer a case file to the High Court. Sometime files get disappeared on the way. Those who are active and have some access [power and money] can easily get their work done but for those without any access, who does not have any option, have to wait years, simply to get an order. What is the meaning of those beautiful jargons they frequently use?... Those commitments are just a rhetoric. How can we trust the judiciary?

Significant number of participants commented about the incidence of judicial responsiveness based on political affiliation, favouritism and nepotism. Many participants related judicial competency and quality decisions to competent and fair judicial appointments. Lotus⁸¹ made a serious note about the political influence in the selection and appointment process due to the incompetence of the Judicial Council. An NGO worker in Banke, Bluebell⁸², noted: “Fairness in justice to address public needs cannot be expected from the political appointee.”

Another set of serious concerns were related to the reliability of decision-making processes, with claims by participants that judges make emotionally or politically

⁷⁷ Note 54.

⁷⁸ Note 62.

⁷⁹ Note 70.

⁸⁰ Note 54.

⁸¹ Note 66.

⁸² Note 54.

driven decisions instead of decisions based on laws and the constitution. A trainer in Banke, Lilac⁸³, pointed out the current trend of ‘selective approach’ of the court to deal with individual cases, which usually depend on the condition, “who the victim or the accused are” and “what connection they have with whom [political parties, social elite or judges].” Aster⁸⁴ remarked:

Based on the composition of the bench, public can already make assumption about the decision. Recent trend of trial by media on judiciary has been a serious concern lately. This is a very undesirable trend. But this reflects the level of public’s dissatisfaction on the system.

Lotus⁸⁵ noted:

The way the facts are tampered with while presenting information in the court, people know that they won’t get justice from the court, but they don’t have any option. That’s why they come to the court although courts lack user friendly environments for justice seekers – both in terms of procedures and behaviour.

Referring to barriers in judicial system, considerable remarks were made regarding peoples’ tendency to explore alternatives to the formal justice system. Marigold⁸⁶’s experience suggested that “silencing of justice has consequences”.

Similarly, Bluebell⁸⁷ assumed: “People consider that formal judicial remedies only focus on the elite, wealthy and those who have connections – political or any other.” Therefore, she thought “it is reasonable for the public to seek support from the informal justice mechanisms, because that is the only reasonable option available for them at local level.” Likewise, Lavender⁸⁸ argued:

Judicial failure to build public confidence is a reason for people turning to the informal justice systems. Locally available mechanisms are easily accessible and less stressful even though they also lack fairness and competency.

Similarly, Thyme,⁸⁹ a media reporter in Morang, pointed out that the society will explore alternative ways to serve their purpose. He suggested that “the judiciary

⁸³ Ibid.

⁸⁴ Note 59.

⁸⁵ Note 66.

⁸⁶ Note 72.

⁸⁷ Note 82.

⁸⁸ Note 55.

⁸⁹ Ibid.

should know the reason for this public unwillingness, which is a serious threat to judicial independence.”

Senior Advocate Venus⁹⁰ noted:

With the view to increase public trust through regular and direct communication, Strategic Plan of the Nepali Judiciary in 2009 introduced a concept of ‘Judiciary Community Outreach Program’, but it has not been able to bring measurable impact due to the increasing public concerns about the judicial appointment and judicial mindset that ‘the bench should be insulated and separated from the community.

A majority of participants commented on the knowledge and experience of judges.

Senior advocate Sun⁹¹ underlined:

The role of judge is dynamic – quality, efficiency and experience of judges at the time of appointment is not sufficient throughout the judicial journey. The Supreme Court judges are out of the scope and approach of the academy [National Judicial Academy] because they perceive that they [judges] are master in every issue that come to the court, and no further updates or learning is required, hence, they only act as a facilitator. This misconception needs to be cleared. In fact, judges should read, train and upgrade their knowledge throughout their judicial journey.

5.3.3 Judicial Values: Integrity of Judges and the Judiciary

The participants were asked to share their perspectives on judges and courts. This request was intended to gain a further understanding of how they perceive judges and judiciaries in their communities, as well as how they would like judges to perform. An overwhelming majority of participants shared negative perceptions of judges and judiciaries. The Supreme Court was the least trusted. Significant concerns were related to the corruption and misconduct at all levels of the courts. In the context of the District Courts, participants were concerned about judicial irregularities and corruption in relation to decisions, whereas in regard to the Supreme Court and the High Courts, participants felt strongly about both the judicial appointments and the court decisions, and the corruption linked to them.

⁹⁰ Interview, Kathmandu, 30 August 2019.

⁹¹ Note 41.

Throughout the discussions, many responded with descriptors such as unfair, biased, guided and influenced. Most of the participants perceived judges to be biased mainly due to their political affiliations. Rose,⁹² a women activist in Kaski, said: “The concern that I typically have is judicial political partisanship”. Sunflower,⁹³ believed “Judges are politically influenced because they are appointed in the quota of the mainstream political parties.”

Petal,⁹⁴ an NGO worker in Banke, explained:

The public would like judges to be unbiased regardless of their position or feelings about the case; I expect them to deliver judgement based on fact, evidence and the letter and spirit of the law.

Similarly, Dalia,⁹⁵ an NGO worker in Kaski, explained:

We have already been witnessing the problems in the higher courts where judges are politically appointed. I do not think they care for poor and marginalized. People are aware of how they [judges] are appointed and think they are loyal to those who [political parties] appointed them and follow their footsteps.

Primrose⁹⁶ questioned:

Even we have doubts when political parties appoint their cadre in the judiciary. How can they expect the public to trust that they are impartial and transparent? Those judges who are labelled as party cadre, cannot deliver fair justice and if they try to deliver, public will not trust in their fairness.

On questions related to the Supreme Court, participants expressed largely negative views. A majority shared concerns that the Supreme Court has been overly politicized. Lotus⁹⁷ phrased it as “a club of party cadre.” Basil⁹⁸ thought: “It is a politically guided organisation, and cannot satisfy public aspirations of fairness and

⁹² Note 58.

⁹³ Note 75.

⁹⁴ Note 54.

⁹⁵ Note 58.

⁹⁶ Note 77.

⁹⁷ Note 66.

⁹⁸ Note 74.

justice.” Aster⁹⁹ offered revealing glimpses into the more systemic failings: “Public do not perceive ‘judiciary as my institution’”. Primrose¹⁰⁰ claimed:

The judicial system during the *Panchayat regime* was much better compared to the system established after the democracy. People had respect for judges because judges also guided themselves with principles of law and justice. Now what can we expect from people who have experience drafting political parties’ manifestos, and who rely on blessings of the party leaders more than on law and the constitution?

Cosmos¹⁰¹ was adamant that the “foundation of the judiciary is rotten”, while Aster¹⁰² said that “Judges have become “job holders”, and Basil¹⁰³ remarked that they “are not serious about fulfilling the judicial function to deliver justice.” Olive¹⁰⁴ said:

Judges are concerned about hassle-free work rather than entangling themselves in serious judicial disputes and setting principles. They do not care whether people get justice or not. Judicial independence, fearless judiciary is just a principle. They are intentionally too busy with criminal cases and tend to overlook the civil cases because of the benefits attached to criminal cases.

Lotus¹⁰⁵ noted:

Well-reasoned judgment contributes greatly to the public trust in the judiciary, but it has become very rare. Only a few judges have that capacity and boldness.

Senior Advocate Sun¹⁰⁶ shared similar views:

This is how we suffer if we appoint the wrong person in wrong position. How can we expect public to trust those [judges] who we do not consider competent and credible? How can people trust that they do not trade justice with their integrity?

⁹⁹ Note 59.

¹⁰⁰ Note 77.

¹⁰¹ Note 76.

¹⁰² Note 59.

¹⁰³ Note 74.

¹⁰⁴ Note 62.

¹⁰⁵ Note 66.

¹⁰⁶ Note 41.

A large number of participants agreed that political intervention and financial irregularities are endemic in the judiciary. Bribery, corruption or financial irregularities are some of the terms that were rife in our discussions on the judiciary and the courts. Orchid¹⁰⁷ claimed that “Unless the judiciary is free from political pressure and executive influence, it cannot deliver impartial justice.” Basil¹⁰⁸ reiterated:

Growing number of judicial scandals on appointments, corruption, mismanagement and unethical behaviour such as furnishing false academic and citizenship certificates for the position of Chief Justice, visiting offices of the political parties and delivering decision against the law and constitution have assassinated the rule of law.

In addition, participants frequently remarked on judicial bias and unequal treatment based on caste, ethnicity and gender. Olive¹⁰⁹ reported: “Environment that victims are entitled to get in the court is ‘Zero’ because of the traditional mentality of judges.” Daisy,¹¹⁰ a lawyer in Morang, stressed judicial bias as an irony of the system:

We have been seeing that those who are poor and vulnerable groups are often being overlooked. But the individuals who are powerful and are able to spend money are protected by the system. This must come to an end. Everyone understands that the ‘door to justice’ should be equal for all, and access to competent and independent judicial system is one and the only road to justice.

Rose¹¹¹ reported that

Women and marginalized groups face additional challenges. The level of trust among these groups is even less compared to the other groups because they never get opportunity to experience ‘how judicial system look like?’ and ‘what difference does it make in individuals’ life?’

Gardenia,¹¹² a teacher in Kaski, pointed out:

¹⁰⁷ Note 70.

¹⁰⁸ Note 74.

¹⁰⁹ Note 62.

¹¹⁰ Note 55.

¹¹¹ Note 92.

¹¹² Note 58.

Representation of judges from diverse castes, ethnicity and gender could be a step to increase the confidence of people belonging to various socio-cultural and economic background.

According to Professor Asteroid,¹¹³ “Dual standards of justice have diminished public respect for the judiciary.” He further noted: “while poor and marginalized suffer humiliations from the judicial system, judges have been accused of serious neglects such as ‘coddling criminals’ and protecting violators.”

Similarly, Daffodil,¹¹⁴ an NGO worker in Morang, pointed to a big gap between promises and realization of those promises and failure to fulfil public expectations. He further noted, “Trust in justice is a cooperation between both parties – those who seek justice and those who deliver justice.”

A significant number of participants referred to fairness, transparency and competency of actors within the judiciary. They believed that the judicial authorities who value the rule of law and judicial principles are always concerned and cautious about their actions and impact on public trust. Several participants expressed their concerns about the role of judges and lawyers for “not maintaining professional ethics”, “constituting a cadre of political parties”, “politicising Bar” and as “acting as a negotiator between courts and litigants.”

Orchid¹¹⁵ was critical of lawyers “acting as a gatekeeper and with a great amount of impunity.” Saffron¹¹⁶ noted the increased fees of lawyers and expressed misgivings that “only rich people can afford to hire expensive and better skilled lawyers.” Rose¹¹⁷ said: “Lawyers’ fees are determined according to their popularity. Shouldn’t there be a standard fee so that public are protected from economic exploitation?” Lotus¹¹⁸ presented a distressing trend in a court about judges choosing the lawyers and vice versa for the bench. She said:

¹¹³ Note 40.

¹¹⁴ Note 55.

¹¹⁵ Note 70.

¹¹⁶ Note 60.

¹¹⁷ Note 92.

¹¹⁸ Note 66.

Judges are concerned who is pleading the case. If a lawyer is popular or influential, they handle the case differently. This is even more of a trend in the Supreme Court.

Olive¹¹⁹ argued:

Understanding the mentality of the judiciary and judges is important because they have developed an understanding that ‘we are always right, whatever we do is correct’, and this mentality needs to be changed.

Advocate Sun¹²⁰ said:

Principally, judicial leadership should be responsible to clear all this mess. But it is almost impossible to see that level of reform, in a context where the leadership is appointed in political parties’ quota.

5.4 Trust in Judicial Competency and Integrity: The Experience of the Supply Side of Justice

Interviews with supply side were structured to cover broad topics, purposively designed to gain a thicker understanding of the perspectives of those who are engaged in the supply side of justice. Specifically, I sought their experiences, understanding and perspectives on court systems and processes – their functioning, guiding judicial values, and other issues related directly to the judicial system. In addition, the interviews aimed to identify existing gaps to be addressed in order to achieve meaningful judicial reform in Nepal. This section, therefore, is a prelude to understanding how they understood ‘justice for the public’ and how and why they feel their experiences of the system and priorities for change might differ from the articulated reform promises.

5.4.1 Importance and Value of the Judiciary and the Judicial System

A considerable number of interviewees recognized the responsibility of the judiciary in maintaining justice, rule of law and democracy. Retired District Court Judge Mars,¹²¹ saw the “absence of the ‘system’ in the judiciary as situation of

¹¹⁹ Note 62.

¹²⁰ Note 41.

¹²¹ Interview, Kathmandu, 16 August 2019.

anarchy.” A member of the Judiciary Planet,¹²² perceived “the legal system as critical to enforce the rule of law and to sustain democracy.” Several participants acknowledged the importance of courts as a mechanism for justice. Orbit,¹²³ a retired Supreme Court Judge, noted that courts are charged to provide “competent and impartial justice based on rule of law.” Similarly, research officer at the CJR Moon¹²⁴ reflected on the important responsibility of the judiciary in “securing law and order in your community.” High court judge Nova¹²⁵ remarked:

Constitutionally, while our judiciary system is completely separated from the executive and legislative, judiciary is expected to administer judicial functions independently. But this does not mean, judiciary is separated from the people they serve, in particular. Judicial competency and integrity rely on the confidence of the public. Courts need public trust to effectively discharge their functions and secure judicial accountability. If this element disappears, a serious problem will emerge in the rule of law and in democracy.

Undermining the country's rule of law and democracy, the independence of judicial institution has sharply deteriorated in last few decades due to the intensive concentration of power in the executive and judicial inclination to enter politics. Many interviewees expressed concerns about public trust which they felt was declining due to systemic deficiencies with judges and the position of the judiciary in compromising the rule of law. Justice Pluto¹²⁶ declared that “the present law and justice suffers from a rule of law ‘deficiency syndrome’ and the lack of independence and accountability is a symptom of this backsliding rule of law”. Judge Earth¹²⁷ pointed out that

Miscarriage of justice is a significant judicial problem which has created massive distrust by the public, threatening the purpose of establishment of the judiciary and principles of justice. Gross and deliberate disregard for the actual legal procedure and fairness due to the judicial incompetency and behaviour has often led to travesties.

¹²² Interview, Kathmandu, 2 September 2019.

¹²³ Interview, Kathmandu, 20 August 2019.

¹²⁴ Interview, Kathmandu, 8 July 2019.

¹²⁵ Interview, Lalitpur, 12 July 2019.

¹²⁶ Note 52.

¹²⁷ Note 39.

Similarly, Justice Star¹²⁸ nostalgically shared:

The image of the judiciary, 36 years back when I started my career is now completely opposite. Implementation of constitutional values and legal procedures used to be prime focus of judges then, now they [judges] have exchanged their values and morality with the position, power and money. Public perceives that judges simply do whatever their personal or political philosophy dictates. Judges should not forget that every judge has the potential to inflict havoc on the public's trust.

Apart from the judicial goal, participants frequently raised several other concerns such as judicial education/knowledge and public communication, and their concerns were directed to both the demand and the supply sides of justice. According to Supreme Court Judge Mercury,¹²⁹ “public perception about the judiciary is based on the way information, or the messages are delivered to them.” Justice Pluto¹³⁰ thought the judiciary had failed to communicate what it has done to increase judicial responsiveness. For Mars,¹³¹ “Trust is based on the information or the messages that the judiciary delivers to the public. This includes judicial transparency on what is happening, why and how.” Justice Star¹³² noted:

Our reform efforts are confined within the strategic plans and other technical documents. Rather we should have created a system to communicate what we have done to make justice inclusive, accessible and reliable. Increasing transparency through increased visibility in the communities by creating opportunities for interactions with public improve public attitudes but judges prefer to confine within the bench and the court room.

Justice Mercury¹³³ observed:

All judges of the higher courts [Supreme Court and High Court] are expected to be highly qualified but considering the current trend of judicial appointment, training those judges who are politically appointed, should be a primary focus of the judiciary.

¹²⁸ Note 11.

¹²⁹ Interview, Kathmandu, 16 July 2019.

¹³⁰ Note 52.

¹³¹ Note 121.

¹³² Note 11.

¹³³ Note 129.

Significant numbers of participants stressed that an assurance of equal access is a key value of the judicial system. Supreme Court Judge Saturn¹³⁴ noted:

People come to us with the hope to get remedy for their grievances, but it is unfortunate in our context...we are simply giving them decisions, not delivering the justice they deserve.

5.4.2 Judicial Competency: Court System and Processes

An overwhelming majority of participants reflected on what a competent court system would look like. Notably, there was a clear consensus around notions relating to equality and fairness, and justice, but many conceded the lack of willingness of key stakeholders, including the judiciary and the executive, to realise these components. Many participants reflected a sense of fairness are crucial elements of quality justice. As Justice Earth¹³⁵ observed,

Public concerns about costly court fees, delays and cumbersome procedures have come to the surface. It means we are not accessible, affordable and trusted – elements that are required to ensure justice. These are serious challenges to justice.

Justice Saturn¹³⁶ admitted:

But the irony is, we don't want to allocate sufficient time for poor and marginalized because we cannot get any benefit from them. How can we expect them to trust us if we cannot be reliable to them and if we cannot spare time to respond them fairly?

Participants also reflected on the ability of judiciaries to reduce case backlogs, the ability of judges to deliver quality justice, and discrepancies in the jurisdictional backgrounds of justices. These factors contributed to the differences in the time needed to settle a case and had a bearing on the quality of the outcome. Senior judicial staff Solstice¹³⁷ raised several critical questions that are closely connected with public access to justice:

¹³⁴ Interview, Bhaktapur, 20 July 2019.

¹³⁵ Note 39.

¹³⁶ Note 134.

¹³⁷ Interview, Kathmandu, 30 June 2019.

The courts are expected to act as a powerful voice for rule of law and justice which is dependent upon the public trust, the trust that the judges are able to make fair decisions. But ‘public access’ has been limited to physical and monetary accessibility. We need to explore other aspects that impact judicial competence and influence trust. For example, what is the meaning of ‘access’? What happens if the ‘infrastructure’ of the courthouse is not user-friendly? What happens if ‘hearing’ is denied? What happens if hearing remains uncertain and ‘out of reach’? Is the failure to conduct timely hearing a denial of justice and access? What if the decisions are made but remained unimplemented?

Some participants expressed concerns about the case load, and that the speed of disposal has diminished the quality of judgements. Justice Saturn¹³⁸ reported: “A large number of cases are being overruled (*ulti hune*) by the upper courts because decisions are made hastily by the lower courts.” District Court Judge Nebula¹³⁹ observed: “While accelerating the clearing of backlogs, vigilance against miscarriage of justice is crucial, in order to guarantee that the due process of law is not shattered.” Many participants were concerned about the decreasing quality of judgement in all levels of courts. Justice Nova¹⁴⁰ remarked: “Judges lack expertise in judicial writings”, and expressed his worry about the low quality of judgements:

Judicial precedent is the jewel of judiciary, but it’s been a long [time since] we have seen any good precedent coming [from the court]. The Supreme Court is no longer exercising its jurisdiction effectively rather making controversial decisions. Judges are concerned with case disposal. Quality of justice cannot be compromised to reduce the caseload.

For example, Justice Mercury¹⁴¹ linked the quality of justice with the competency of the judges and expressed his disappointment on the quality of those appointed by the Judicial Council:

Private practice [lawyer] and the interpretation of law on the bench are two different aspects. Judicial interpretation by a person appointed based on party affiliation or *Rajnitik bhaagbandaa* [sharing of powers and privileges by political parties] is nearly impossible.

¹³⁸ Note 134.

¹³⁹ Interview, Kathmandu, 23 July 2019.

¹⁴⁰ Note 125.

¹⁴¹ Note 129.

Justice Nova¹⁴² remarked: “Current judicial leadership has completely slaughtered jurisprudence. Judicial expertise is questionable. Judges tends to go outside the briefs, record, and argument of counsel.” For example, Justice Star¹⁴³ reported:

We [cadre judge] work with them [judge who are appointed from lawyers] every day, we watch them. The way they interpret laws and take reference of jurisprudences is disappointing. They have not only created a situation of massive distrust and dissatisfaction on judiciary but also destroyed the essence of laws and ruined all the established jurisprudence.

A significant number of respondents frequently reported that “control of leadership in case allocation, scheduling and tracking hearings” and “postponement of cases to a date uncertain” were threatening judicial competency. Justice Pluto¹⁴⁴ commented:

Everyday court releases a ‘list of cases’ which assigns cases among judges including Chief Justice, and the judge must hear the case assigned unless there is any ‘conflict of interest’. But everyday hearing of substantial number of cases are ‘postponed to a date uncertain’ because the judge ‘cannot hear’ (*herna namilne*) the case due to possible conflict of interest, and due to postponement of the hearing date by the lawyers. The leadership is not serious about the impact of this on justice delivery and on public trust.

Various participants identified case management as a major challenge for judicial competency. Neither has the judiciary prepared thematic experts, nor the court procedures and laws, have separated civil and criminal bench. All judges work in a generalist manner – both on civil and criminal cases. It is essential to manage the shortage of human resources and bring effectiveness in administrating justice. Although the Constitutional Bench has been established as per the Constitution, Supreme Court does not have any plan to strengthen the bench and human resources required to operate the bench effectively.

Justice Star¹⁴⁵ noted,

¹⁴² Note 125.

¹⁴³ Note 11.

¹⁴⁴ Note 52.

¹⁴⁵ Note 11.

Actually, we have already practiced hearing cases from two separate civil and criminal benches. Despite the effectiveness of the system, the system was dismantled. Those judges who were responsible for civil cases were unhappy about this policy because civil cases do not have that charm/glamour than criminal cases do. Frankly speaking, the unseen benefits associated with the criminal cases attract the court authorities. The Supreme Court amended the policy on the pressure of judges.

While strategic judicial reform has been a priority of the judiciary to improve judicial competency, Justice Pluto¹⁴⁶ expressed concern on the material aspects or the instrumental aspect of the reform. He further noted:

There is no doubt that the material aspects of reform like reducing case backlogs, setting up IT systems and constructing buildings help increase accessibility and responsiveness of courts. But my worry is whether we have been able to communicate clearly, whether public understands the processes and essence of verdicts. How do we envision illiterate people to understand and use it?

5.4.3 Judicial Values: Integrity and Fairness

Concerns were raised about the impartiality and reliability of the current judicial procedure and approach. The majority of interviewees were not satisfied with the current system. They perceived the judiciary as corrupt, politically guided, and unfair, and judges as not acting according to judicial ethics. In the words of Justice Earth¹⁴⁷:

Judges need to behave with moral integrity and a sense of ethics. They are role models of the society, so they have to be very cautious about not hitting the front page of the newspaper that will shame or embarrass the entire judiciary.

Justice Nova¹⁴⁸ emphasised the role that judges should play in order to remediate the negative perceptions of people towards the judiciary and pointed judicial failure to maintain integrity and independence is critical to rule of law. He noted:

¹⁴⁶ Note 52.

¹⁴⁷ Note 39.

¹⁴⁸ Note 125.

This body began to lose faith in its fairness and integrity of the system since 1990, and that trend continues until today. The insidious politicization of the judicial branch has crept over the judicial values in these three decades.

Similarly, Justice Saturn¹⁴⁹ expressed his disappointment: “Judicial ‘ability’ and ‘behaviour’ both are in the state of crisis in our judiciary.”

Disciplinary irregularities, including corruption of judges and mismanagement by judicial staff, were raised as the significant factors that negatively influence public trust. Planet¹⁵⁰, reported that “even a single mistake of the requisite standards of integrity creates threats to the public confidence,” while advocate at the CJR Supernova¹⁵¹ concurred that “a minor mistake of administration might cast blame on the whole judiciary.” Pointing out how important it is for the judiciary to maintain discipline and integrity, Justice Nova¹⁵² stated:

.... but those who sit in the chair of the judge, do not understand the value and importance of “justice”, [and are] interested rather in fulfilling their personal interest. Motives are clearly visible, when analysing their decisions. It is very disappointing, [and I] cannot be optimistic anymore in this situation. In this situation, the efforts of only a few people to uphold judicial values and principles will not bring any change.

Justice Earth¹⁵³ claimed corruption as an endemic in judiciary and expressed his doubts on judicial failure to control corruption: “Why has corruption always become a problem in a judiciary? Why is this issue always discussed? And why is this issue always being ignored? This irony needs to be analysed”. Justice Nebula¹⁵⁴ saw “the judicial appointment process as one of the major forms of judicial irregularities and corruption, and it is the responsibility of judiciary to fix declining situation of public distrust.”

Participants also expressed concerns about the professionalism and ethics of judges. Off-bench activities; receiving outside incomes; heading special commissions; submitting fake academic certificates; making public statements on controversial

¹⁴⁹ Note 134.

¹⁵⁰ Note 122.

¹⁵¹ Interview, Kathmandu, 9 August 2019.

¹⁵² Note 125.

¹⁵³ Note 39.

¹⁵⁴ Note 134.

matters; visiting offices of political parties; discussing pending cases outside, and judicial groupism as common activities were frequently cited as examples of unethical activities of the judges. Judge Nova¹⁵⁵ said: “The off-bench activities of judges distort the ideal role and image of the judge and the judiciary.” Justice Saturn¹⁵⁶ noted that judicial behaviour has undermined competence, ethics and fairness:

It is a mockery on rule of law that the chief justice was appointed based on his fake documents [conflicting birth dates in citizenship and academic certificates], and his decisions have received constitutional validity.

A number of participants spoke in alarming terms about the tendency of Chief Justices to foment groupism within the Supreme Court through allocations of procedures attached to cases of national importance and less controversial cases based on favouritism rather than the expertise of the judges. Justice Earth¹⁵⁷ noted:

It would be problematic to speak publicly about judicial groupism. But I have been raising this issue because it is scooping the judiciary and it must come to an end, before it invites any judicial disaster.

Conventional judicial behaviours such as acting with neutrality, maintaining appropriate dignity, consistency in decision making, self-disclosure and disqualification from cases where there is some conflict of interest, and respect for communities, were seen to be lacking among judges. According to, Moon¹⁵⁸:

Judges are behaving in totally opposite way. They have compromised judicial ethical norms with the interest of political parties, criminals and corporate houses. Judges swap benches in the cases they have personal and political interest in, or have close relationship with litigants, lawyers or witness. Judicial impartiality threatens when the judges are appointed based on other criteria rather than the standards norms of judicial competency and integrity.

Retired District Court Judge Galaxy¹⁵⁹ suggested that “improving procedural fairness can rectify the perceptions of the poor and marginalized, who have low

¹⁵⁵ Note 125.

¹⁵⁶ Note 134.

¹⁵⁷ Note 39.

¹⁵⁸ Note 124.

¹⁵⁹ Interview, Kathmandu, 25 August 2019.

confidence in the system”, although Judge Earth¹⁶⁰ pointed to the clear lack of mechanisms to “ensure scrutiny of legal process, prompt enforcement of decisions and political protection to the judges.” Acknowledging this as the responsibility of the Judicial Council, he assessed its role in this regard as “disappointing.”

The actions of judges and lawyers were subject to a particular scathing criticism by the interviewees. As Lunar¹⁶¹ noted, “people do not trust the system because the system is not trustworthy because of both lawyers and courts.” Galaxy¹⁶² asked:

Do you think they focus on serving the public or act to make the system fair and effective? I think they just wither in a system that no longer fulfils the need of the public.

Judicial staff Solstice¹⁶³ said: “An expectation of trust requires a massive effort and serious dedication”, while Nova¹⁶⁴ said: “friendly behaviour of judicial staff does not cost anything to the judiciary but in turn, the judiciary gets from the public an immeasurable treasure – the level of trust”.

5.5 Positioning Trust and Confidence in the Judicial System in Nepal

One of the principal motivations of my fieldwork was to gain a deeper knowledge about how access to justice and the judicial system was understood and interpreted by both the demand side and supply side of justice. I had questions about what access entails, the factors that work against access and what an accessible judicial system looks like. Issues of public trust, trustworthiness and legitimacy of judges and the judiciary arose consistently among my research participants. In my discussions about access and barriers to it, a pervasive lack of trust in the competency of judges and their adherence to judicial values was conveyed as a major concern. Political influence and interference in the judiciary together with widespread corruption were reported as major contributors to this lack of public trust. Although there were differences between groups, their views on trust and

¹⁶⁰ Note 39.

¹⁶¹ Interview, Lalitpur, 4 July 2019.

¹⁶² Note 159.

¹⁶³ Note 137.

¹⁶⁴ Note 125.

their experiences (both direct and indirect) with the justice system were largely shared.

Trust in the judicial system was perceived by most as crucial to the effective functioning of the judicial system and to secure justice. Many remarked that trust and confidence in the judicial system depended upon the quality of performance, efficiency, fairness, transparency and integrity, which is at a critical state at the moment. “Trust in the judiciary is inseparably interconnected” (Kiršiene & Gruodyte, 2019, p. 126) with the judicial system, and this trust is central to the reflection of judicial values and legitimacy (Bühlmann & Kunz, 2011). It is a precondition for efficient judicial functioning and crucial to judicial legitimacy, which protects the rule of law and justice.

The findings here reflect how those from the justice demand side perceive judges and the judiciary, and how the justice supply side experiences the judicial system. A significant number of participants expressed dissatisfaction with the fact that judges and the judiciary missed the opportunity to increase public trust at this critical juncture in Nepal. The issues related to public perception about the political interference in judicial appointments, biasness in the decision-making, and lack of judicial ethical standards are all closely linked with the trust and justice, and are issues that judges could take an active role in addressing. The implementation of the current constitution offered opportunities for them to contribute on a range of issues, including how judges are appointed, to whom they should be held responsible, and how to better regulate judicial processes to uphold rule of law and justice. Creating opportunities for judges to interact in their communities, increase transparency and accountability of the court through information sharing, improve judicial performance and decision making, and increase transparency in the appointment process, can enhance public trust and confidence in the system.

This chapter forms a pillar of my study on how both justice receivers and service providers ‘consider’ trust in the judicial system. This section reveals a deeper understanding of not only how they view the system, but also what drives public attitudes and behaviours. This study reveals two influential factors in relation to trust in the judiciary: judicial competence (the ability of judges and judiciaries) and

greater accountability (the values of judges and judiciaries). These findings, in turn, have implications for what can be done to increase levels of trust and confidence.

As a threshold matter, the two groups of research participants acknowledged the importance and value of the formal court system, although there were some inclinations towards informal justice mechanisms because they perceived those formal institutions are susceptible to political intervention and subject to influence, manipulation, exploitation, corruption, and are not inclusive. The perceived lack of competency and accountability of the courts to provide a fair, equal, easy, and speedy justice has, on occasions, encouraged the public to use informal judicial processes.

Across all the discussions, participants shared similar understandings of the judicial system: to protect people and to function towards fulfilling its goal of justice. Particularly, participants value the significance of the rule of law and justice to sustaining democracy. Although the literature lacks a clarity and consensus on the notion of the rule of law and justice, the most widely accepted definitions converge on a similar set of ideas.

The UN rule of law entails

measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability of the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance to arbitrariness and procedural and legal transparency.¹⁶⁵

International normative standards such as UDHR, ICCPR and ICESCR affirm the principles of equality before the law, and the right to a fair adjudication of cases by a competent, independent and impartial tribunal established by law, as elements of justice. Similarly, the World Justice Project (2021) defines four core values of the “rule of law as a durable system of laws, institutions, norms, and community commitment that delivers: accountability, just law, open government and accessible and impartial justice” (p. 14). The Supreme Court of Nepal in several decisions has illustrated the importance of ‘fair judicial procedures by the

¹⁶⁵ Para. 6, p. 4, Report of the Secretary General, The rule of law and transitional justice in conflict and post-conflict societies, 2004 (S/2004/616).

independent and competent judiciary to check the attack on the rule of law and justice.’ Likewise, the strategic plans of the Nepali judiciary vision “to ensure justice for all” (Supreme Court, 2019d, p. 22) and the mission of the plan is “to provide fair and impartial justice on the basis of the Constitution, laws and the established principles of justice.” (Ibid).

Both groups of participants consistently reported a desire for an accessible, reliable and responsive system based on the principles of justice. According to them, equal application of the law, irrespective of socio-economic status, ethnicity and gender is essential. Fairness in decision making and a system that is independent, competent, transparent and accountable will, according to them, best serve the motive of justice. The remarks made by the participants elucidate that knowledge of the legal system and judicial processes affects satisfaction with the services, and is crucial to determine more broadly their trust in the institutions.

A clear and shared understanding emerged around efficiency, accessibility, fairness, impartiality and justice as important qualities of well-functioning courts. Participants noted functional courts being equipped with professional authorities and providing equal and speedy services as an indicator of a competent judicial system, nevertheless they also pointed out that these are missing in the context of Nepal. An independent and accountable judiciary is fundamental for upholding constitutionalism and the rule of law, by safeguarding that the fair and just remedies are delivered in a timely manner (UNGA, 1985). Competency, legitimacy, fairness and equality are not only desirable, but a precondition for the effective functioning of the judicial system on which public confidence is based.

In terms of criteria for effectiveness and quality of services, participants, in general, reported absence of delays (length of proceedings and enforcing decisions), effective legal aid, access to available information, fostering consistency in court decisions, limitations of access to victims and usage of technologies as the standard of quality. Although these variables do not directly indicate levels of public trust, they do provide important views about improving it. If an efficient justice system is a pre-requisite of enhanced public trust, it is ironic that Nepal is positioned poorly in this regard. In the fiscal year 2018/19, 24,180 cases were pending in the Supreme Court, of which 1,964 cases had already exceeded five years and 7,448 cases

exceeded four years (Supreme Court, 2019a). Respondents however also feared the impact of an excess focus on reducing backlogs, as this might undermine the principles of justice. This lack of efficiency and predictability in the way cases are processed frustrates users.

Similarly, the provision of the Legal Aid Act, 1997 has categorized some of the cases where legal assistance for the victims is involved. This is inconsistent with the provision of the Constitution 2015 that ensures ‘equal rights relating to justice’. Considering that the majority of legal aid programs are external donor-funded, respondents feared that the agenda of donors and funding sustainability would be prioritised, rather than the needs of the nation and its people. Likewise, IT systems have been established in Nepal as an essential tool for the modernisation of the judicial system, however, they are limited to publishing cause lists, reports, records of the cases, and sending SMS to the clients about hearing dates, and have not fully taken into account the principle of people-centredness. IT has a potential to tremendously improve public access to law, improving the productivity of the courts, including increasing communication, case management and recording of the court proceedings.

Participants described their thoughts on ideal judicial behaviour and values of the court system using words like independent, fair, expert, experienced, professional, moral, and ethical. Participants referred to the standards set out by the international principles of judicial conducts as well as the national code of conduct and ethics. For example, the National Judicial Code of Conduct for Judges (Supreme Court, 2009a) centres on six key values of judicial behaviour: independency, impartiality, integrity, propriety, equality and competency and diligence. Similarly, the concerns also align with the standards set by the code of conduct for judicial staff (Supreme Court, 2018), which requires them to maintain , institutional and individual professionalism, dignity of the bench, and high standards of personal behaviour. Concerns about judicial conducts and behaviours – bias in decision making, deep-rooted favouritism, nepotism and prejudice, politically driven decisions, and lack of access to the courts – starkly contrast these ideals and notions.

The executive control in institutional and individual independence has severely impacted the effectiveness and quality of judicial performance: adjudication of

cases remains a key concern. Participants noted with dissatisfaction about the increased level of judicial irregularities and political influence in judicial operation in recent years. There was a clear consensus and belief between both groups of participants that to expedite a case one needs to have a strong political support or connection with the judicial authorities or have to bribe the authorities. In this sense, the concerns of the participants align with the recent findings of the Supreme Court (2021), which concluded that widespread corruption and irregularities begins with the selection and appointment of judges, and claimed that both the judges and the lawyers are working as intermediaries. In 2015, the Supreme Court (2015) reported an immediate challenge to the rule of law and public trust due to rampant corruption and irregularities in the judiciary. These findings describe how vulnerable the judiciary is.

5.6 Conclusion

The depiction of people's everyday struggle for justice in Nepal reveals their hopes for the ideal judicial system alongside a profound disappointment that not only is Nepal not moving towards it, but also that reform seems like a distant, almost improbable quest. An examination of access to justice and how the contributors to my study experienced and perceived the justice they encountered conveys high level of distrust. Public concern about judicial competency, impartiality and integrity highlights the "perception of trust" in judges and the judiciary. The rural people in Nepal expressed their sense of betrayal by an institution whose very legitimacy is grounded in the public trust. Discussions with the demand side illustrate that trust in the judiciary has been understandably shaken by the actions of the judiciary.

The judges, lawyers and judicial staff shared their insights, which challenge many long-held assumptions about justice and judiciary, what drives public trust, and how trust affects the rule of law, judicial independence and public access to justice. The depth and nuance revealed here has the potential to facilitate a clearer and thicker understanding of not only how the public views the system but also what drives public perceptions and attitudes. Public trust and confidence in the Nepali judiciary is undermined by the perceived and experienced systematic lack of judicial independence – in the book of law and in practice.

The unsatisfactory judicial reform efforts thus far raise even more questions as to whether success in judicial reform can be achieved in an environment of external influence, corruption, and a pervasive erosion of public trust in judicial independence. The present predicament of judicial independence and accountability can be tracked back to the formation of the formal judicial system in Nepal, which has been persistently compromised by the constitutional reform process and has thus been unable to command public trust and confidence.

Chapter 6

CONSTITUTIONAL REFORM OF THE JUDICIARY IN NEPAL: ACHIEVEMENTS, DISAPPOINTMENTS AND EMERGING ISSUES

6.1 Introduction

The political and constitutional changes that took place in Nepal in 1948 have yet to result in comprehensive institutional changes that would ensure broad access to justice and independence of the judiciary. This is not unrelated to the centuries-old centralised authoritarianism and discriminatory social practices, and nearly seven decades of political struggle in Nepal – including the decade-long armed conflict – that have collectively led to the social, political and judicial transformation of the state, culminating in the establishment of the current federal democratic republic (Dhungel, 2017). There are several crucial time periods which explain the rule of law and democratic disorders that have beset the country. Understanding of how this tumultuous history affects current legal and judicial reform efforts in Nepal is necessary. These time periods include the following: the efforts to establish democracy in Nepal between 1948 and 1960, the absolute monarchy between 1961 and 1989, the internal armed conflict between 1996 and 2006, the King’s coup in 2002 and 2005, the transition towards the federal republic Nepal from 2008 to 2015 and the ongoing political instability. Each of these periods have in their own way weakened the state institutions that are responsible for preserving the rule of law and justice in the country.

Importantly, while struggles to reform the judiciary and to increase an access to justice in Nepal often centre on the constitution, it is essential to recognise that in judicial history the constitution itself has been an instrument to weaken the judicial legitimacy (Tripathi, 2007). Structural problems with all iterations of the constitution have resulted in poor specificity and unclear directions in relation to judicial independence and accountability implying that, the constitution itself has undercut the legitimacy and standing of the judiciary. This continues to have tangible negative effects on both the demand and the supply side of justice. Instead

of protecting everyday access to justice of Nepali people by serving as a check on the misuse of power, these constitutional lacks and absences have enabled some courts, especially the Supreme Court, to become an instrument for the agendas of the executive and the political parties (Chapagai & Karna, 2020; Shrestha, 2018b).

The constitutional positioning of the executive and political parties could arguably be conceived as a continuation of the legacy of the monarchs, who were considered ‘a source of law and retained unilateral power’ attempting to keep the judiciary subordinate to their prerogatives (Pimentel, 2010). While measures for judicial independence and accountability are intrinsic to constitutional democracy, there appears to be both a historical habit and discipline in Nepal that is not so malleable to change through constitutional democracy. These habits/disciplines of the government, courts and judiciary and individual judges remain problematic and, as suggested in this chapter, obstruct legal and judicial reform in Nepal. This chapter explores the constitutional positioning of the judiciary throughout the transformation of constitutions in Nepal, demonstrating that the lack of an assured separation of power among three organs and independence of the judiciary has become entrenched as a *habit* of Nepali governance, from one era to the next.

Since the formal separation of the judiciary from other branches of the government in 1948, its members and other legal professionals have expressed considerable interest in ensuring the constitutional and practical realization of the principles and values of judicial independence (Karna & Yadav, 2017; KC, 2020; KC, 2020; Shakya, 2007; Shrestha, 2007; Shrestha, 2018a; Tripathi, 2007). The legal and judicial reform implemented “through a number of legal and institutional measures” (Bhattarai & Uprety, 2006, p. 7) since the 1970s and 1980s brought several substantive procedural and institutional changes, and has demonstrated a continuing concern with streamlining the judicial institutions of the country (Bhattarai & Uprety, 2006; Nepal, 1971; Supreme Court, 1998, 2004). This chapter traces the historical attempts to bring judicial reform to Nepal, and in doing so, it discovers that a lack of constitutional guarantee to judicial independence is a constant feature of Nepal’s judicial system. It traces the institutional cultures of the judiciary over time and looks especially at issues of judicial independence in the major constitutional and political transitions. It contextualises the current status of

the judiciary in Nepal vis-à-vis its independence, impartiality, accountability, and its competency to respond on important public interest over the past seventy years.

This chapter examines this historical perspective through the lens of the independence of the judiciary and an analysis of the Nepal's various forms of constitution, highlighting how the nation's attempts at reform consistently fall short of the ideals it says it aspires to. Indeed, the nation's commitment to justice and judicial independence are not articulated eloquently or clearly in the constitution, the document which institutes the apparatus of the nation's courts. Attainment of such ideals in Nepal is an enduring story of disappointment and failure. This chapter's narrative history of events also includes case examples and the articulated experiences of justice demand and supply side personnel, as it endeavours also to theorise successes and enduring disappointments of judicial reform in Nepal. While successive constitutions articulate a commitment to the separation of powers between the three branches of the government and to judicial independence, the practical realization of these has suffered in part because it has never been a priority agenda of popular movements in Nepal (Shrestha, 2018b). This chapter investigates these arguments in three areas: first it follows a summary of the historical perspective for the constitutional reform; second, it examines how the constitution has inhibited reform; and finally, it reveals several peculiarities within the constitutional reform process which result from that history, and which still impinge on the present-day judiciary. The chapter argues that a lack of strong assurance to judicial independence is a persistent feature of Nepal's constitution and judicial system that has largely undermined public trust.

6.2 A Historical Overview of Constitutional and Judicial Reform

Nepal's history of constitutionalism and judicial reform stretches back to the 1940s and even before, during the time of the *Kirat* rule (900 BC – 300 AD). Subsequent dynasties ruling in Nepal held that fairness, equality and equity were based on the Hindu religion, but the ideal of judicial independence was not firmly institutionalised as the sovereign used to exercise unlimited authority over the executive, legislative and judiciary (Khanal, 1999). Thus, the institution of judiciary was subordinate to the executive control until it was formally separated in the 1940s. The formal judicial system has evolved through long processes of

reform and development, comprising three distinct constitutional and political transitions and seven (including two interim) constitutions proclaimed between 1948 and 2015.

6.2.1 First Stage (1940 - 1990)

In the late 1940s a nation-wide concern for establishing democracy and democratizing Nepal's governance institutions emerged. The end of the British colony in India in 1947 coincided with a modernisation of the judicial system in Nepal. Political change and constitutional development in India propelled public demands for constitutional guarantees in Nepal as well (Malagodi, 2015, 2016). Although the traces¹⁶⁶ of a modern judicial system can be seen emerging in the nineteenth century with the ending of the Rana regime, a fuller transformation of the Nepali judicial system into a separate judicial institution, unencumbered by the other branches of the government (including non-interference of the executive and the royal palace), subsequently became a rhetorical commitment of all political parties and actors in the 1950s and beyond.

Somewhat surprisingly, the separation of the judiciary from the other two branches of the government was among the few areas that gained political consensus around the new Constitution in 1948. Although influenced by the British Model, the explicit constitutional recognition of the principles of separation of powers in 1948 created the third branch of government – the judiciary – as a part of the constitutional agenda in Nepal, investing on the *Pradhan Nyayalaya* (Apex Court) with the final authority for resolving disputes. The proclamation of the Nepal Constitution Act 1948, however, did not meet expectations of the required constitutional protection of separation of powers and independence of the judiciary (Shrestha, 2007) because the Rana rulers were reluctant to implement it in reality (Joshi & Katuwal, 2014). This symbolic gesture to constitutionalism, made in recognition of the mounting popular dissatisfaction with their rule, “lasted only a

¹⁶⁶ Prime Minister Jung Bahadur Rana, after visiting Europe in 1853, developed the legal arrangements in Nepal. He consolidated and codified various legal provisions into the *Ain* (Code) of Nepal, which was inspired by the French legal system. Although, the code was inspired by the French Napoleonic Code and written laws in England, it was a collection of Hindu dogmas and customary laws, which set up the prospect for the constitution in Nepal because it brought everyone under the purview of the code. See Joshi & Katuwal (2014).

few months until anti-Rana rebels joined the monarchy to overthrow the Rana system” (Pimentel, 2010, p. 287). Since then, constitutional recognition of judicial independence has remained a matter of controversy and struggle between the judiciary and the executive and legislative.

With the ousting of the autocratic Rana regime in 1951, Nepal began its experiments with constitutionalism and democracy. The Interim Constitution of 1951 encoded the judiciary as one of the main branches of the government. However, the formal separation of the judiciary in the Interim Constitution and acknowledgment of the *Pradhan Nyayalaya* as a highest judicial authority under Article 32¹⁶⁷ of the Constitution was more rhetorical than effective, because it effectively reasserted that all powers – law making, administration of laws and interpretation of laws – reside with the king (Schoenfeld, 1959) and it neglected the power of judicial review to check on the acts of other branches. The fate of the judiciary was determined by a separate act of parliament, *but not guaranteed constitutionally*.

Although established by an Act of Parliament in 1952, power related to the establishment of *Pradhan Nyayalaya* and the appointment, removal and transfer of judicial personnel was vested in the king.¹⁶⁸ Despite the absence of constitutional assurance, the judiciary actively exercised writ jurisdiction under section 30¹⁶⁹ of the *Pradhan Nyayalaya Act 1952* and it voided several actions of the government.¹⁷⁰ The King, however, was dissatisfied with the way the judiciary was functioning and resisting his prerogative (Shrestha, 2007). In 1954, through a second amendment to that Act, the King dismissed section 30 of the Act and repealed all the exclusive judicial review powers of the *Pradhan Nyayalaya* (Raut, 2014). As a consequence of this continued tussle between the King and the First

¹⁶⁷ Article 32 (2) of the Interim Constitution 1951 notes that the composition, powers and functions of the *Pradhan Nyayalaya* shall be as determined by separate law. The *Pradhan Nyayalaya Act 1952* was enacted to regulate the apex court and judicial functions.

¹⁶⁸ According to Section 6 and 7 of the *Pradhan Nyayalaya Act 1952*, the King appoints five judges including the Chief Justice, on the recommendation of the Minister of Council.

¹⁶⁹ Section 30 of the *Pradhan Nyayalaya Act 1952* provides power to the Judiciary to issue orders to settle disputes.

¹⁷⁰ While exercising writ jurisdiction, the full bench of the *Pradhan Nyayalaya* declared laws and governments actions incompatible to the section 30 of the *Pradhan Nyayalaya Act*, 152. See, *Bisheshwor P. Koirala v. Commissioner Magistrate*, NLR 2016 (1959) at 123 and *Bed Krishna Shrestha v. Department of Industries, Commerce Food & Civil Supply*, NKP 2016 (1959) at 234.

Chief Justice of Nepal, Hari Prasad Pradhan, the king repealed the *Pradhan Nyayalaya Ain* 1952 and replaced the Act with the Supreme Court Act, 1956. The intention here was to oust the Chief Justice and “create a legally favorable environment for the government” (Shrestha, 2007, p. 3), free from unwanted judicial review.

The 1959 Constitution recognized the separation of powers between all three branches of the government, but it was not supplemented by the principles of check and balance (Schoenfeld, 1959). Provisions related to the Supreme Court and other various subsidiary courts to safeguard the rights of the citizens were incorporated in the Constitution. Judges at that time tried their best to protect the independence of the courts from the executive and to retain the integrity of the judiciary, but the Constitution of 1959 and the Constitution of 1962 reinstated the King’s discretionary power to appoint the Chief Justice of the Supreme Court and the other Judges. These constitutions also curtailed the powers of the Supreme Court to undertake judicial reviews (Bhattarai, 2006). The King tightened the grip over the system of governance, abolished all political parties, and formed a *Panchayata* system of local and regional government (Pimentel, 2010; Tripathi, 2016). Indeed, by this time the Constitution included even stronger affirmations of the king’s power than previous constitutions. The monarch retained the power to suspend it during emergencies. The Constitution declared constitutional supremacy and any law deemed incompatible with it was declared void. However, the constitutional positioning of “the monarch a sacrosanct” (Shrestha, 2007, p. 11), seeing them as a privileged source of law, and ensuring the king retained judicial oversight and authority (which included limiting judicial power and appointment and termination powers) rendered judicial independence secondary to monarchical power.

Sir Ivor Jennings, who was one of the drafters of the Royal Constitution of 1959, admitted the unusual grant of “wide powers to the King” and criticised the Constitution “as undemocratic” (Malagodi, 2016). Malagodi (2016) interpreted the Constitution of 1959 “as the progenitor of the 1962 Panchayat Constitutions” (p. 172) that compromised constitutional democracy in the name of securing political stability in Nepal. The growth and independence of the judiciary experienced a series of obstacles during the three decades (1960-1990) of Panchayat

authoritarianism, due to the direct rule of the monarch and control over all the three branches of government.

6.2.2 Second Stage (1990 - 2006)

After three decades of autocratic monarchy, a democratic transition in 1990 followed the first ever democratic movement. A constitution was promulgated with an aim to establishing a stable constitutional monarchy, parliamentary democracy and an independent judiciary (Dhungel & Adhikari, 1998). The Constitution of the Kingdom of Nepal 1990 clearly separated powers between the three branches, with appropriate provisions for check and balance to secure institutional accountability and responsiveness. Alas, it also contained at least one loophole. Although the Constitution provided a framework for the transformation of the public institutions such as the judiciary, and confined absolute monarchy within the four walls of the Constitution establishing the Nepali citizen as the ultimate source of sovereignty and political authority of the State (Tripathi, 2016), the Constitution left the door open under article 127 granting significant powers to the royal, including the invocation of emergency powers.

The legacy of executive emergency powers implanted in the Constitution of 1959 remains “visible even in the text of the 1990 Constitution and its implementation” (Malagodi, 2016, p. 22). Legal scholar Bhandari (2012b) notes: “The Constitution of 1990 was guided by the fundamental idea of power-sharing between the King and the other political actors” (p. 2). He further claims that “the drafters were indoctrinated by a concept of the supremacy of the king and demonstrated their excessive loyalty” (p. 8). Malagodi (2016) concluded: “hereditary manifestation and draconian emergency powers took root in Nepal’s constitutional culture” (p. 172).

The 1990 Constitution envisioned competent, impartial and independent system of justice with the aim to reforming the judiciary into a vital source to uphold constitutional and international human rights obligations. The Supreme Court emerged as an increasingly powerful institution – “the sole and final interpreter both of statutes and of their constitutionality” (Stith, 1996, p. 49). It made explicit and unambiguous provisions guaranteeing a structured three-tiered judicial system

to exercise powers related to justice, including detailed provisions for the appointment, tenure, and termination of the judges. It prescribed that an appointment of a Chief Justice is to be made by the King on the recommendation of a Constitutional Council¹⁷¹, and a Judicial Council¹⁷² for the appointment of all other judges including judges of the Supreme Court, Appellate Courts and District Courts. However, the composition of the Constitutional Council and Judicial Council did not stipulate requirements for the independence of commissioners, and it is widely considered to involve a high degree of influence by both the executive and the judiciary. The appointment processes for the Chief Justice and for all other judges were generally understood as systematic procedures to impair the independence and accountability requirements of the system (Malagodi, 2013b). These processes were also accused of “being a source of patronage, at times resulting in the politicisation of the judges and low levels of socio-cultural diversity in the Judiciary” (Malagodi, 2013a, p. 214).

Since its inception in 1990, the Constitution has been criticised for institutionalizing and legitimizing patterns of social exclusion and discrimination (Bhandari, 2012b). The Constitution was criticized for preserving supremacy of monarch and the vital role of the Hindu religion in regulation of the state (Hutt, 2004), and for not being able to ensure wider public participation and inclusion (Bhandari, 2012a). Indeed, an armed Maoist insurgency – the People’s War (*Janayuddha*) – launched by the Communist Party of Nepal (Maoist) (CPN-M) in 1996 against the government demanded to adopt new constitution written by the Constituent Assembly (CA), a creation of federalist and secular state, and stripped of the monarchy and its privileges. A 10-year-long ‘People’s War’, which took the lives of 13,000 Nepali citizens, disappeared more than 1200, physically disabled more than 8000 and displaced hundreds of thousands of citizens, ended in the 2006 peace agreement that included the proclamation of a new constitution by the CA.

¹⁷¹ According to Article 117 of the Constitution of 1990, the Constitutional Council constituted the Prime minister (Chairperson), the Minister of Justice (member), a judge of the Supreme Court (member), the speaker of the House of Representatives (member), the chairman of the National Assembly (member), and the Leader of the Opposition in the House of Representatives (member).

¹⁷² According to Article 93 of the Constitution of 1990, the Judicial Council comprised of the Chief Justice (Chairperson), the Minister of Justice (member), the two senior-most judges of the Supreme Court (member), and one distinguished jurist to be nominated by the king on the recommendation of the Council of Ministers (member).

The justice system was adversely affected by the mechanisms created by the Maoists to settle disputes – ‘people’s courts’. Although the Maoist courts were unconstitutional and operating against the fundamental values of the rule of law and justice, rural people used these courts because they were quick and involved no cost (Ghai & Cottrell, 2008). The Comprehensive Peace Agreement between the Government of Nepal and the CPN-M in 2006 not only concluded the decade-long internal armed conflict which commenced in 1996, but also marked a fundamental constitutional and structural transformation in governance structures.

6.2.3 Third Stage (2007 onwards)

The Interim Constitution in 2007 overthrew 240 years of monarchy and declared Nepal a republic. This document served as the Constitution of Nepal until a new constitution was approved by the CA in 2015. Nepal finally achieved its 70-year-old quest to draft a constitution through an elected CA, although it has been a cumbersome and divisive process.

Preserving elements related to the principles of the separation of powers ensured in the Constitution of 1990, this Interim Constitution also made a clear separation between the three branches of the government and retained the established principles of power of judicial review to secure the independence and autonomy of the judiciary. This Constitution however deliberately concentrated power in the Prime Minister to circumvent the tendencies of the judiciary and minimized the capacity for checks and balances, the compromised judicial independence weakening these principles. The executive has control over the appointment of judges¹⁷³ and authorizing the government to deploy the Chief Justice and other judges¹⁷⁴. This Constitution also introduced distinct provisions for the selection and

¹⁷³ Article 103 of the Interim Constitution 2007 requires the appointment of the Chief Justice on the recommendation of the Constitutional Council, and of other judges of the Supreme Court on the recommendation of Judicial Council. The Executive has control over both the mechanisms.

¹⁷⁴ Article 106, Interim Constitution of 2007 states:

Provided that the Government of Nepal may, in consultation with the Judicial Council, depute the Chief Justice or any Judge of the Supreme Court to work concerning judicial inquiry, or to legal or judicial investigation or research, or to any other work of national concern, for a specified period.

appointment of judges to the apex court, incorporating parliamentary hearings¹⁷⁵ as practiced in the American legal system.

This loss of judicial independence intensified during the post-conflict phase, and under the Interim Constitution of 2007. Judicial independence was further compromised by the constitutional provision requiring the Chief Justice and other judges to take an oath from the Prime Minister.¹⁷⁶ From here on, open attacks by the government on the judiciary became a frequent phenomenon.

This constitution maintained the Constitutional Council and the Judicial Council¹⁷⁷ with a modification on the composition of the latter, with the majority of members representing the executive or political parties. This has effectively and in practice politicised the Judicial Council. The involvement of the Executive in the Constitutional and Judicial Councils, and its main role in recommending the appointment of Supreme Court judges including the Chief Justice, has rendered the judiciary subordinate to the executive and political parties. An overwhelming majority of my research respondents, from both the demand side as well as the supply side concurred with the comment of Justice Nova¹⁷⁸ that “appointment of judges has largely remained a source of privilege for executive to reward its supporters.”

The seventh Constitution – Constitution of Nepal, 2015 – was endorsed by the second CA in September 2015, after the failure of the first CA in 2012. It came after a seventy years long political struggle to establish democracy and justice (Zhu & Kouroutakis, 2019), but has not been able to effectively transform the Nepali governance system from a unitary model to a federal one that promised to fulfil

¹⁷⁵ Article 155 (1), Interim Constitution of 2007 states:

Prior to the appointment of any persons to constitutional positions to which appointments are made on the recommendation of the Constitutional Council pursuant to this Constitution, to positions of Judges of the Supreme Court and to positions of ambassadors, there shall be parliamentary hearing about them as provided in law.

¹⁷⁶ Article 162 (2), Interim Constitution 2007 states:

Judges working in the Supreme Court, Appellate Courts and District Courts, after the commencement of this constitution, shall take an oath of commitment to this constitution as determined by the Government of Nepal. The judges who decline to take oath shall be considered automatically relieved from the position.

¹⁷⁷ According to the article 113 of the Interim Constitution, 2007, the Judicial Council consists of: the Chief Justice (Chairperson), the Minister of Justice (member), a senior advocate, or an advocate appointed by the Chief Justice on the recommendation of the Nepal Bar Association (member), a person nominated by the Prime Minister from amongst the jurists (member), and the senior-judge of the Supreme Court (member).

¹⁷⁸ Note 118.

aspirations for democratic governance and the independence of the judiciary. Interestingly, the Constitution adopted as a result of the remarkable intervention¹⁷⁹ by the Supreme Court in 2011 lacks explicit and binding provisions guaranteeing judicial independence in line with the international normative standards. Legal scholars Zhu and Kouroutakis (2019) state that “structure of the constitutional jurisdiction is based on a diffuse model of constitutional review” (p. 12). It differs the concentration of the Supreme Court’s power to review the constitution.

Indeed, this constitution amounts to a watering down or erosion of constitutional provisions to safeguard judicial independence (Acharya, 2020; Shrestha, 2018d). On the one side it recognizes the centrality of judicial impartiality to democratic governance, and on the other, the lack of assurances about *institutional* and *individual* judicial independence subordinates the judiciary to the executive and legislative. This constitution retained the provisions of the Interim Constitution of 2007 regarding the composition of the Judicial Council, which created significant room for political discretion in appointing judges for the Supreme Court and High Courts, and elevating judges from District to High Court and from High Court to the Supreme Court. The constitutional mechanisms to make judges accountable – the parliamentary hearing system and the impeachment of judges – are easily prone to political manipulation. Therefore, judges are implicitly and explicitly incentivised to act in accordance with the government’s wishes.

Despite constitutional proclamations to the contrary, the judicial institution has been subject to undue external interference through the vestiges of sovereign control. Using constitutional prerogatives, the executive has, on several occasions, either dismissed Chief Justices, forced them to resign, or transferred them to assume other responsibilities (Shrestha, 2007). This tempers the capability of the courts to perform independently through the expansive use of executive prerogatives.

¹⁷⁹ *Bharatmani Jungam & others v. Office of the President & others*, Writ No. 68-ws-0014. The Tenth Amendment to the Interim Constitution that extended the length of the CA was questioned at the Supreme Court. The Supreme Court on the writ petition interpreted such extensions as the violation of the constitutional provision related to the principle of periodic elections.

Justice Kalyan Shrestha (2007) notes that “There is a material difference between a judiciary created by ordinary law and by the constitution” (p. 3) because the formal constitutional guarantee to the judicial independence ensures constitutional safeguards grounded on the doctrine of separation of powers (Shetreet, 2012). This assurance grants that a judge (as an individual) and the judiciary (as an institution) (Shetreet, 2021) are protected from potential adverse actions by other organs of the state. The instability of constitutional order and the historical failure of various constitutional arrangements to give equal recognition to all branches of government stem from an as yet unrealised capacity to establish democratic and independent institutions. The relationship between the judiciary and executive throughout history reflects a relationship of continuous distrust and judicial subordination. High degrees of executive and political dominance, and a lack of judicial accountability to the rule of law, have become progressively entrenched even in federal Nepal. This history of judicial transformation reveals that the system was undermined by an autocracy that stripped the judiciary of its independence, and a succession of administrations that failed to strengthen its foundations.

6.3 Judicial Structuring and Re-structuring

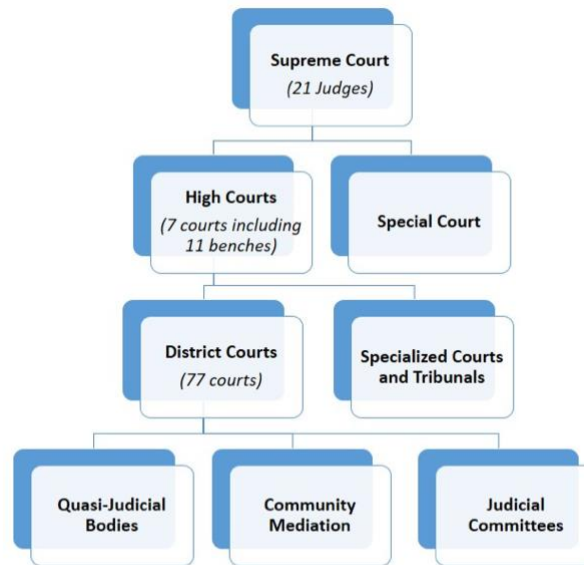
In seventy years, Nepal has changed its constitution seven times, and each time restructured the judicial system in line with the political environment of the country (Shrestha, 2021; Shrestha, 2018d), centralizing and increasing executive control. Since its formal separation from the executive in 1951, the judiciary has faced frequent changes in its hierarchical position, altered through legislative enactments and constitutional provisions (Joshi & Katuwal, 2014). For instance, the Administration of Justice (re-organization) Act 1960 introduced four tiers of judicial hierarchy: the *Ilaka* (Area) Courts were established as court of first instance, District Courts as the court of first appeal, the High Courts as the court of second appeal, and the Supreme Court continued as the apex court (Khanal, 2001). In 1962, the Administration of Justice (Miscellaneous Management) Act substituted the Administration of Justice Act 1960, which also abolished the High Courts and restructured the judiciary into three tiers of hierarchy. The first amendment of this Act replaced the Court of Appeal with Zonal Courts established in each of the fourteen Zonal areas. The Administration of Justice (Reforms) Act

1975 introduced four tiers into the judicial hierarchy: district courts as a court of first instance in each 75 districts in Nepal; Zonal courts as a court of first appeal for petty cases in 14 zones; regional courts in each of the nation's five development regions as court of appeal for serious cases, and the Supreme Court again remained as the apex court (Joshi & Katuwal, 2014; Khanal, 2001).

The Constitution of 1990 specified three tiers of court hierarchy, abolishing the concept of regional and zonal courts, introducing instead the Appellate Court as a court of first appeal for all cases and mandated with writ jurisdiction; District Courts became the court of first instance and the Supreme Court was retained as the apex court with powers of judicial review. The Constitution also established specialist courts or tribunals to hear specific types of cases and to adjudicate cases speedily and effectively.

Although the Interim Constitution of 2007 continued with the three-tiered hierarchy of the court system structured by the 1990 Constitution, it introduced a CA Court. The three-member CA Court was established in 2007 to deal exclusively with complaints regarding CA elections, and was dissolved after the inception of the Constitution in 2015. The current Constitution of 2015 established a three-tier judicial system but refashioned 16 Appellate Courts as seven High Courts with their 11 benches extended across seven provinces, and added two District Courts to make 77 District Courts. This constitution also provided power to the Supreme Court to form a Constitutional Bench headed and regulated by the Chief Justice to settle constitutional disputes. However, a serious question has been raised by the legal fraternity over its relevance due to the confusion in jurisdiction between it and the Supreme Court, and misunderstandings between the Chief Justice and other senior-most justices at the Supreme Court. Also, disputes and internal politics concerning the appointment of judges for the bench (Luitel, 2018) and increasing cases of a political nature have been creating problems to the effective performance of the Constitutional Bench.

Figure 6.1: Nepali Judicial System



The Constitution also specifies the provision for the establishment of other judicial bodies as required at the local level to settle disputes.¹⁸⁰ The establishment of 753 judicial committees at the municipal level¹⁸¹ is a milestone in judicial governance and reform which in theory ensures easy access to justice. However, multiple constraints involving capacity, coordination, policy and implementing guidelines along with coherent understanding of the role of judicial committees have been an obstacle for practical realization of this reform (Shrestha & Wagley, 2019).

6.4 Constitutional Reform of the Judiciary: Progress, Accomplishments and Disappointments

Nepal has moved through seven constitutions, each accompanied by different upheavals. These important events mark several steps, from absolute monarchy to republicanism, from a unitary system of governance to a federal democratic system, and from a Hindu state to a secular state. As a corollary to all these constitutional reforms, the judiciary as an institution has always been impacted – securing separate status with the power of judicial review, continuous struggle to protect independence as well as inherent tensions between judicial power and restraint alongside the long-standing prerogatives of the executive – originally of the

¹⁸⁰ Article 127 (2), Constitution of Nepal, 2015.

¹⁸¹ Article 227, Ibid.

monarchy, and now of other powerful political subjects. Based on the seventy years of constitutional development and judicial history, the following section analyses the key areas of reform that have demonstrated tangible success in judicial reform, areas that need further efforts to achieve measurable results, and issues that have emerged and are precondition for the success of judicial reform in Nepal.

This part of the chapter considers the creation of the judicial branch as a separate third branch of the government, and the power of judicial review to protect judicial independence as a remarkable and tangible achievement of judicial reform in Nepal. The practical realization of the separation of powers between the judiciary and other two branches, and the protection of judicial independence have remained a daunting challenge of constitutional reform. Qualitative data generated from an in-depth interview I conducted with the supply side in Kathmandu and focus groups with the demand side in rural districts also revealed a strong judicial tradition guaranteeing fundamental rights of the citizens alongside a disappointing constitutional protection for judicial independence, and a judicial obsession with political parties and executive. My field data indicates perceptions among the participants that the judicial struggle for constitutional safeguards to limit political pressure has endangered the independence of the judiciary and undercut public access to and trust in justice.

6.4.1 Establishment of the Judicial Branch with the Power of Judicial Review

Since the formal separation of the judiciary in 1948, the sector has expanded noticeably, and the reforms have resulted in noteworthy impacts. The establishment of *Pradhan Nyayalaya* held significant potential, although this branch did not enjoy true independence and the government repeatedly stymied the judicial review power that judges were able to invoke. However, one of the significant changes during the initial period of its establishment was the growing judicial autonomy and the corresponding substantial development of fundamental judicial principles. This occurred even though the system was under the direct control of the King (Shrestha, 2007), and well written constitution safeguards ensuring judicial independence were lacking.

Despite the constitutional reaffirmation of the King's unlimited powers over all three branches of the government and the attempt to keep the judiciary subordinate to the monarch, the first Chief Justice managed to command the Supreme Court independently and deliver bold decisions, which are still viewed as milestones of judicial independence in Nepal. This jurisdiction was problematic for the government because the King and the government took "judicial strictures or resolutions... as interference with the functioning of the executive" (Shrestha, 2007, p. 3). One of the justices (Justice Pluto¹⁸²) I interviewed put it as follows: "Placing itself into danger, the judges and judiciary were always concerned to secure the rights of the people". He recalls the efforts of the *Pradhan Nyayalaya* to establish an independent system of justice by using whatever legal tools were available under the dynamic leadership of the First Chief Justice. The Chief Justice on one occasion had to defend the judicial action as:

...government is like an eagle which circles freely in the open sky; citizens are like chickens whom the eagle always tricks to entrap whereas the judiciary, like the mother of those chicks, spreads its wings over them to protect them from the eagle whenever it tries to swoop down and catch them.¹⁸³

Several actions of the executive have been declared *ultra-vires* as an effect of the process of judicial review (Raut, 2014). Fearless decisions and an impartial role of judicial leadership are the foundation upon which the modern judiciary stands, even though efforts to circumscribe its independence and effectiveness have been continually imposed. Important interpretations continue to be "made in regard to the powers and limitations of the constitutional functionaries" (Shrestha, 2007, p. 12) and jurisprudence in many areas grounded on the principles of rule of law and justice have been developed, many of which are considered as landmark. These ongoing trends have provoked increasing confrontations between the judiciary and the executive, and occasionally renewed efforts are taken to control the bench.

The transformation of the Nepali judiciary in 1990 enabled a more progressive and proactive judiciary in matters concerning social, economic, cultural and political claims. The Constitution of 1990 (Article 88), the Interim Constitution of 2007

¹⁸² Note 52.

¹⁸³ See, Shrestha, 2007 for the testimony of the Chief Justice Hari Prasad Pradhan.

(Article 107), and the Constitution of 2015 (Article 133) have vested exclusive jurisdiction in the Supreme Court to determine all questions related to the constitutional validity of laws and issue orders for the resolution of dispute that involves any constitutional or legal questions. Malagodi (2013b) states that “the adoption in Nepal of a modified common-law system has made the doctrine of *stare decisis* one of the pillars of the Nepali legal system” (p. 213) which has been playing a pivotal role as binding precedents (Dhungel & Adhikari, 1998).

The Supreme Court demonstrated commendable leadership in upholding its position as the custodian of the constitution in various cases and made exemplary judgements in cases related to gender equality, discrimination based on gender, caste, and ethnicity, sexual orientation, economic rights, democratic rights and access to justice. These decisions have directed authorities to the enactment of new legislation or amendments of existing laws; the repeal of discriminatory and inconsistent laws; instruction to formulate policies and laws in accordance with the commitments under the Constitution and international laws; banning certain social practices, and creating special measures for improving rights to a legal remedy and awareness of processes to do so. Jurisprudence and case laws established by the judiciary illustrate the courts’ performance as constitutional guardian and the judiciary working to ensure the fundamental rights of citizens. One advocate¹⁸⁴ I interviewed said: “The Supreme Court’s response on the Public Interest Litigations has transformed the judiciary into one of the rare public spheres in which reasoned public policy standard setting has occurred.”

These exemplary judgments provided direction to secure the rights of poor and marginalized communities (Karna, 2012), including decisions regarding the formation of transitional justice mechanisms, the direction to establish a Fast Track Court to speed up justice delivery for victims of violence, and policy measures for the effective investigation of cases of gender-based violence by requiring confidential hearings in rape cases, although implementation of the decisions and relationship between the executive and political parties and the judiciary have often been questioned.

¹⁸⁴ Note 90.

The judiciary relies on the executive for judgement execution, including imprisonment and restraining orders, collecting fines, seizure and sale of property for non-payments of judgments debts, and imprisonments for contempt of court. All these orders can only be effectively realized with the support of the executive and legislative branches, but it has been a serious problem for the judiciary to exercise its jurisdiction to deliver justice.

Despite the establishment of a Monitoring Division and Judgement Execution Directorate in 2007 to administer and scrutinize the implementation of the decisions and preparation of judgement execution guidelines in collaboration with the NJA, the effective execution remains beset by several challenges. These range from identified political and practical reasons that require legislative and procedural reforms, budgetary reasons, unclear judgements, delays in judgement writing, reasons related to interference of other institutions, and a lack of associated human and economic resources (Chapagain & Shakya, 2014). According to 2018 data of the Judgement Execution Directorate, 77,424 cases were pending execution (Supreme Court, 2019b). A Supreme Court report suggests that 40 percent of the decisions of district courts and 90 percent of the Supreme Court decisions on Public Interest Litigations (PILs) remain unimplemented in 2019 (Ibid). Considering the significant amount of time consumed by the PILs¹⁸⁵ and the increasing flow of those of a political nature has been an overwhelming challenge for the judiciary.

6.4.2 The Paradox of the Judicial Reform: Position of the Judiciary within the Separation of Powers

Despite this major development, the judicial system, the constitution and some legislations still impede an independent judiciary. The jurisdiction and structure of the judiciary have been complicated since its formal separation. The persistent restructuring of the judicial system, alongside each of the country's seven constitutional changes, has still not produced a strong commitment to and fulfilment of the ideal of the separation of powers. Although each of these constitutions claim to be "the fundamental law of the land", most of them have

¹⁸⁵ According to the annual reports of the Supreme Court, 46 PILs were filed in the fiscal year 2017/18. Similarly, 36 PILs were filed in 2018/19 and 96 PILs in the fiscal year 2019/20.

undermined conventional constitutional standards such as the fundamental rights, rule of law, parliamentary supremacy, and an independent and effective system of justice (Tripathi, 2007), and the principles of separation of powers. The 1962 Constitution empowered the role of the King in every organ of government, making these principles entirely meaningless (Dhungel & Adhikari, 1998). For instance, ‘assurance’ of judicial independence in separate legislation rather than in the constitution and the formation of a ‘special complaint department’ controlled by the King and his lawyers¹⁸⁶ to oversee the decisions of the judiciary was a strategy for diluting judicial power and weakening judicial independency (Shrestha, 2007). Deficiencies in the drafting and realisation of the Constitution have led to a failure in the institutionalisation of democratic governance, parliamentary supremacy and the rule of law. These deficiencies have marked the constitutions of the King’s regime as well as those of ‘democratic Nepal’.

Several instances in the past seventy years clearly demonstrate a violation of the principles of separation of power and rule of law. These include the following: the King’s action to abolish the multi-party system guaranteed by the constitution, and subsequent announcement of the absolute power of the monarchy; the failure of the government to control Maoists so-called People’s Courts; the government of the Maoist party’s attorney threatening the judiciary that it would activate “People’s Courts” if lawsuits were filed against their cadres; the King’s move to dissolve the parliament in 2005 and to run cabinet under his chairmanship; the establishment of a parallel constitutional anti-corruption body with both investigative and adjudicative power; receiving oath of the office from Prime Minister in 2007 by two Chief Justices of the Supreme Court; the cabinet’s decision and budget allocation to set up branches of the Supreme Court in other parts of the country in 2008; the appointment of former judge of the Supreme Court as the vice-president of the country in 2008; and the appointment of the sitting Chief Justice as the Chairman of the Minister of Councils in 2013. These last two examples represent an undermining of the constitutional provision that restricts members of the judiciary from assuming an executive role. An appointment of the serving Chief

¹⁸⁶ One of the employers of this committee, Trilok Pratap Rana, later became Chief Justice of the Supreme Court. This department was abolished after the promulgation of the Constitution in 1990.

Justice Khilaraj Regmi in 2012 to perform as Chairperson¹⁸⁷ of the Council of Ministers obliterated the separation between the executive and the judiciary. Nepal Bar Association declared this act as “a black day in the history of Nepali judiciary” (NBA, 2013, para. 1) which was a flagrant breach of the separation of authorities and a serious threat to the judicial independence and rule of law (Karl, 2015), disregarding judicial integrity.

Significant political disagreements over the matters concerning the judicial powers, the independence of the judiciary, the separation of powers, and rule of law within the draft Constitution were among the issues that hindered its drafting process between 2008 and 2015. In 2013 for example, the CA failed to promulgate the new Constitution and disregarded these core constitutional principles and values.

The CA had significant controversial disagreements over the judicial authority to interpret the new Constitution (Pimentel, 2011). For example, the Restructuring of the State and Distribution of State Power Committee of the CA recommended the formation of a Constitutional Court to resolve disputes emerging from federal structure; however, the members of the judiciary and the Bar refused assuming that “the constitutional court would split judicial power and dominate the Supreme Court” (Phuyal, 2014, p. 283) and stood “strongly against this proposal, alleging that the constitutional court is an unnecessary parallel institution to the Supreme Court and could lead to jurisdictional issues, inconsistent judgements and may undermine a long standing judicial history of Nepal” (ibid, p. 273). But with the intention to control institutional independence, the CPN-M proposed a Special Judicial Committee under the parliament to regulate the judicial system and oversee the constitution. According to legal scholar Phuyal (2014), the position of CPN-M was radical, which may have intended to erode the separation of powers between the legislative and the judiciary.

¹⁸⁷ After the failure of the first CA in 2012, to clear constitutional hurdles for formation of a new election government, four major political parties signed an 11-point agreement whereby sitting Chief Justice Khil Raj Regmi would restrain from performing in his regular duties as Chief Justice of the Supreme Court while exercising the powers of the Prime Minister under the Interim Constitution 2007, in holding an election of the CA. While he took the executive post, he stepped down from the post of Chief Justice but did not resign for about a year. A senior judge, next in row, served as acting Chief Justice until February 2014. The agreement also provided that the Chief Justice would resume his duties as Chief Justice.

In the end, the 2015 Constitution retained the Supreme Court as ‘the highest authority to interpret the constitution and law’ but introduced a Constitutional Bench to settle disputes arising from country’s new federal structure, inviting widespread disagreements between the judges. For example, the Constitution gives the Chief Justice extensive powers to make decisions to set the Constitutional Bench and choose judges for it. More recently, the nature of cases entering the Constitutional Bench and the impartiality of the Chief Justice have been key concerns generating public dissatisfaction with judicial performance.

The Constitution also altered the mandate of the Supreme Court, minimizing its extraordinary jurisdiction provided by the Constitution of 1990.¹⁸⁸ This modification based on “a diffuse model of constitutional review signals that the Supreme Court does not have the exclusive power to interpret the Constitution” (Zhu & Kouroutakis, 2019, p. 3); rather, the Supreme Court, the Constitutional Bench and High Court holds jurisdiction over the interpretation of the constitutional questions. Under the diffuse model, lowest to the highest, all courts have jurisdiction to review the constitutionality of statutes and administrative measures (Harding, 2017). The Supreme Court can hear appeals from the High Courts, so constitutionally it hold jurisdiction and “elements of a Constitutional Court” (Zhu & Kouroutakis, 2019, p. 4). However, the Constitution created a Constitutional Bench¹⁸⁹ within the Supreme Court with jurisdiction on constitutional issues and it lacks adequate rules to help the bench depart from existing traditions (Adhikari, 2020a). Institutional design – particularly, the composition of Constitutional Bench and the scope of jurisdiction – accounts for the disagreements between the Supreme Court and the Constitutional Bench.

The Constitution confined the principles of “‘separation of powers and check and balance’ among the core principles on which the structure of the state is grounded¹⁹⁰ and established the principle of judicial independence as an element of the right to justice¹⁹¹” (Jeffery & Timilsina, 2021, p. 10), and established an executive

¹⁸⁸ Article 116 (1) of the Constitution of the Kingdom of Nepal, 1990 states:
A Bill to amend or repeal any Article of this Constitution, without prejudicing the spirit of the preamble of the Constitution, may be introduced in either House of Parliament: Provided that this Article shall not be subject to amendment.

¹⁸⁹ Article 137, Constitution of Nepal, 2015.

¹⁹⁰ Article 56 (6) Ibid.

¹⁹¹ Article 20 (9), Ibid.

controlled process of judicial appointment and removal. While Article 133 of the Constitution provides scope for constitutional review, clause 4 of the article restricts the powers of the judiciary to oversight the internal matters of the Federal Parliament. The Constitution does not explicitly explain the power of the courts to interfere if they find errors or excesses in jurisdiction (Zhu & Kouroutakis, 2019). The ambiguity and lack of clarity in the Constitution about the separation of powers and safeguarding institutional arrangements remains problematic.

The unprecedented upheavals of the judiciary in terms of its structure, jurisdiction and independency have not reduced the continuous tensions that remain between it and other two branches. Indeed, whenever the judiciary holds other branches of government to account, these tensions increase, and it becomes evident that the systems of checks and balances are not effectively articulated in the constitution, offering insufficient protection and authority for the judiciary. Justice Nova¹⁹² noted:

The rhetorical attacks on judges and judiciary, is evidence that Nepal's constitutional experiment has not (yet) fully delivered on its promise to maintain separation between the executive, legislative and the judiciary based on principles of check and balance.

The doctrine of the separation of power pledges a weak separation in Nepal, because the powers and agencies who undertake the checks in the system to control the abuse of the power are not authorised to override the whims of political parties or governments. For instance, judicial appointments and removal, staffing, budgeting and various aspects of court management are controlled by the executive and legislative. These instances are consequential on not having well written and comprehensive provisions in the constitution that mandate clear assurances to facilitate and ensure the judicial independence. Thus, the judiciary lacks constitutional textual standards and a set of jurisprudence interpreting those standards to ensure its independence, as inevitable provisions which cannot be overridden by any power.

¹⁹² Note 125.

6.4.3 Vulnerability of the Judicial Independence

The judiciary holds an exceptional responsibility in upholding the rule of law, democracy, and justice. The formal and informal association of the judiciary with other branches of the government shape its ability to perform an instrumental role in constitutional guardianship. However, the outcry about executive control and political influence in judicial appointments, and other obstructions of judicial processes, has been relentless since the formal separation of powers. The judiciary has become vulnerable due to the lack of constitutional protection, and because judicial appointments, security of judicial tenure, and responsibility for disciplinary measures lack constitutional clarity (Adhikari, 2020b). Political control and influence in these areas has relegated the judiciary to a subservient status (Niti Foundation, 2019), undermining both institutional and individual independence. This remains an ongoing concern for many in the legal fraternity:

It has eroded the effective functioning of the judiciary by influencing both the institutional and individual independence impacting outcomes of the court and creating serious implications for the achievement of the constitutionalism and rule of law.¹⁹³

The political influence in the “appointment of judges with close personal ties and affiliation to political parties” (Ghimire, Subedi, & Devkota, 2017, p. 223) has politicized the judiciary deteriorating political culture and the rule of law. The appointment process under the current Constitution¹⁹⁴ indicate “indirect political legitimacy of the members of the Supreme Court” (Zhu & Kouroutakis, 2019, p. 6), which is decisive to maintain impartiality and independence from external interferences. This politicisation has not only affected the appointment process of judges at all levels of the courts, but has also manipulated the judicial decision-making processes, damaging the public image of the judiciary.

The inadequacy of the constitution also extends to the institutions established to make fair selection and appointment of judges, and the composition of the Judicial

¹⁹³ Note 39.

¹⁹⁴ According to Article 129 (2) the President appoints the Chief Justice on the recommendation of the Constitutional Council and the other Judges of the Supreme Court on the recommendation of Judicial Council.

Council and Constitutional Council. This unique provision advanced by the Constitution of 1990, intending to make the judiciary completely independent from the other branches and to ensure real checks against the power of the executive, has been made irrelevant by the present constitution (Acharya, 2020). The Judicial Council represents 60 percent of members from the executive and representatives of mainstream political parties. This includes a representative of the Nepal Bar Association, which has a well-known tendency to appoint judges who are close to the mainstream political parties (Khanal, 2019). The judiciary has encountered threats to its independent functioning due to the failure of the Judicial Council to track the record¹⁹⁵ of the judges, staff of the judiciary, and legal professionals.

A preferential treatment for less competent and professionally dedicated people to the High Courts and at the Supreme Court demoralised a competent judge and diminished judicial confidence (Khanal, 2018). Some of the appointees displayed a lack of moral character and competency in the past and were previously considered unqualified for appointment in the lower courts (Khanal, 2019). For instance, the appointment of judge Cholendra Shamsher Rana¹⁹⁶ for the position of Chief Justice of the Supreme Court, the appointment of five judges to the Supreme Court, and of 18 judges to the High Courts in 2019 display the extent of influence on the judiciary, which the ‘democratic’ system has broken down. Justice Mercury¹⁹⁷ expressed his dissatisfaction on judicial appointments:

It is very disappointing for every legal scholar to hear that newly appointed Appellate Court judges appointed among the lawyers, immediately after taking an oath met a leader of the UML [Communist Party of Nepal-Unified Marxist Leninist] to express gratitude for their appointment.

After strengthening the “role [and power] of the executive in the appointments process, the Interim Constitution moved towards creating a significant space for the legislature” (Dahal, 2018, p. 271). The provision regarding parliamentary

¹⁹⁵ Chief Justice Cholendra Shamsher Rana during his tenure as High Court Judge was directed by the judicial council to punish a political leader who was engaged in corruption. Similarly, Chief Justice Gopal Prasad Parajuly and Deepak Kumar Joshi furnished fake academic certificates and citizenship certificates.

¹⁹⁶ Chief Justice appointed despite receiving nine complaints against him over his rulings on corruption cases, during his tenure as the judge of Special Court.

¹⁹⁷ Note 129.

hearings¹⁹⁸ introduced by the Interim Constitution 2007 establishes parliamentary supremacy over the judiciary. Retained by the Constitution of 2015, this mechanism aims to confirm judges' accountability and impartiality, but the procedure has become a ritual for party quotas for judge posts (Ghimire, 2018).

Positioning the judiciary under the parliament is the main weakness of the hearing system. The response of the Supreme Court on a petition filed to scrap the constitutional provisions of the parliamentary hearing signals a nonchalant approach to protecting the dignity of the judiciary. While responding to the petition that challenged the significance of the parliamentary hearing about the provisions regarding impeachment of judges for their wrongdoing, the court said that

The hearing [parliamentary hearing] as a process of regular check and balance between organs of the state, and the provision of the parliamentary hearing does not have any implications on the judicial independence. Rather it supports to improve competency and accountability of judges. (*Subodhman Napit v. Prime Minister and others*, 2010)

On this judgement of the Supreme Court, justice Pluto¹⁹⁹ commented:

It is a mockery of rule of law that the Supreme Court turned its eye from the constitutional provision that restrict the independence of judiciary.

Law professor Bipin Adhikari claimed that

The constitution does not share any power between the Judicial Council and the parliament neither is there any legal framework to regulate parliamentary hearing which is in stark contrast to the principle of separation of powers. (Spotlight, 2014)

The parliament lacks regulatory legislation and guidelines. Parliament is yet to form a hearing committee even after seven years of proclamation of the Constitution. This is a clear indication that judicial competency and accountability to the public is not a serious business for the parliament.

The independence of judiciary is further threatened by the impeachment clause of the Constitution, which has been used as a tool by politicians to intimidate judges

¹⁹⁸ Article 155, Interim Constitution 2007.

¹⁹⁹ Note 52.

to fulfil political interests (Acharya, 2020) or to threaten those judges who are perceived to have obstructed the prerogatives of the executive and/or the political parties. For instance, an impeachment proposal against Chief Justice Sushila Karki on the grounds that it intruded into the prerogatives of the executive exemplifies political domination, while the case against Supreme Court Judge Dr. Ananda Mohan Bhattarai illustrates that just a few members²⁰⁰ of the parliament can gather, make an official complaint, and easily begin impeachment proceedings.²⁰¹ This can be done in the absence of reference to constitutional bodies and without any factual or legal evidence presented. Referring to the parliamentary power of impeachment, one of the members of the CPN-UML after the parliamentary hearing of the Chief Justice Cholendra Shamsher Rana said: “Some may think that all the troubles end after completion of the hearing. But the parliament and constitution still remain alive” (Setopati, 2018, par. 3). These incidents demonstrate the manipulation of constitutional loopholes by the executive and legislative to increase the vulnerability of judges and to weaken judicial independence.

The case of alleged judicial misconducts of Chief Justice Cholendra Shamsher Rana, despite clear evidence of judicial irregularities and misconduct, is an example of the opposite. The Federal Parliament and political parties were seen reluctant to impeach him despite the submission of an impeachment motion by ruling parties on 11 February 2022²⁰². Since the proposal was presented in the parliament on 13 March 2022, the opposition party (CPN-UML) has been obstructing meetings of the parliament. Even the Supreme Court declined to register a petition²⁰³ that demanded an immediate order in the name of the Speaker of the parliament to initiate the necessary steps to investigate allegations against the Chief Justice. The court responded that “the matter does not fall under the mandate of the Supreme

²⁰⁰ Under Article 101 of the 2015 Constitution, three members of the parliament submitted a complaint before the impeachment committee requesting it to begin an impeachment process against a Supreme Court Judge, Dr. Ananda Mohan Bhattarai.

²⁰¹ The Impeachment Committee rightfully refused the impeachment motion against Judge Dr. Ananda Mohan Bhattarai. In relation to the impeachment motion against Justice Sushila Karki, two ruling parties withdrew the impeachment motion due to the Supreme Court interim order against it, and the pressure from the UN Special Rapporteur on the Independence of Judges and Lawyers, Diego García-Sayán.

²⁰² At the time of finalization of this thesis in June 2022, the Parliament had not made any decision on the Impeachment proposal. Justice Rana stepped down from his position in February 2022 and senior-most judge is serving as an acting Chief Justice.

²⁰³ *Madhav Kumar Basnet v. Supreme Court*, 16 January 2022.

Court.”²⁰⁴ However, the court on 24 February 2022 registered a writ petition that challenged the impeachment motion against the Chief Justice and demanded interim order to scrap the motion and reinstate Rana as the Chief Justice. This demonstrates a strong nexus between judicial leadership and political parties, and it is unfortunate that reforming the judiciary remains absent from the agendas of both the political parties and the judiciary. Rather, the impeachment motion should be considered as an attempt to protect judicial sanctity and erosion of public faith from the judges and the judiciary.

In addition, the judiciary in Nepal lacks constitutional protection of its self-governance including financial autonomy and management of staff. As a result, it is suffering from fiscal dependency and major procedural delays. The Constitution requires the executive to determine the number of judicial officers²⁰⁵ to be appointed and the amount of funds²⁰⁶ to be allocated, and for legislative to pass necessary legislation to allocate public funding. While the judiciary continues to be substantially controlled by the executive and legislative on the administrative and financial matters, the judiciary cannot exercise institutional independence.

6.4.4 Judicial Irregularities and Misconducts

The legitimacy of the judicial system depends on judicial authorities, including judges, to function legally and ethically (Upadhyaya, 2002), including substantive independence from external influence and self-restraint (Shetreet, 2012). However, corruption and judicial misconduct are core problems plaguing the judiciary in Nepal (Pimentel, 2010). This has been acknowledged by the Supreme Court (2021) itself as posing an immediate threat to ordinary people and hindering rule of law situation in the country:

The corruption is virulent in the judiciary. Findings of previous reports, information received while commissioning this report and the facts reported in the media reveals systematic corruption in the judiciary in the protection of high-level authorities. Public has been raising concern about the role of Judicial Council and has been demanding fair and impartial investigation and necessary

²⁰⁴ Para 10, Ibid.

²⁰⁵ Article 154, Constitution of Nepal, 2015.

²⁰⁶ Article 118 (f), Ibid.

action by a mechanism that comprise an experts who have earned public reputation on their professional fairness, integrity, competency and honesty. (Supreme Court, 2021, p. 158)

As justice David Malcolm (2004) stated, “The role of a Chief Justice is one of leadership” (p. 150). They act as spokesperson and leader of the judiciary, dealing with the executive, the legislative and the community. As the executive head of the judiciary, Chief Justices are to assume responsibility for administering the judiciary, to exercise judicial power as an independent judge, and to maintain the independence of entire judiciary. The Chief Justice, while executing responsibility, has the ultimate authority in determining the distribution of the workload, the formation of the benches, allocation of cases, and most importantly the appointment of independent judges through the Judicial Council. However, a trend to fix benches, the delivery of controversial decisions, controversies over judicial appointments, birth dates and academic credentials have dragged the judiciary into a period of chaos, adding to the existing distrust by the public.

Judicial misconduct became chronic when controversy and serious questions were raised about the Chief Justice Cholendra Shamsher Rana in relation to his professional integrity and commitment to safeguarding the judicial independence and rule of law. The Chief Justice’s reluctance to end the discretion-guided system of allocating cases to benches of his choice (as recommended by a high-level committee in 2021), and attempting to preside over cases on the Constitutional Bench where he was a defendant, was a perceived and actual affront to the principle of justice. He was also alleged to have entered an implied deal with the executive by seeking to induct his brother-in-law in the cabinet and other appointments in the constitutional bodies, and not listing important political matters until there was a serious demand from within and outside the judiciary for his resignation. These controversies involving the Chief Justice have reached the highest degree and intensity of concern and outrage in Nepali judiciary history.

In October 2021, 18 out of 19 judges went on a strike for a week, boycotting hearings and calling for Chief Justice Rana to step down, and passing a resolution demanding the use of a lottery system to assign cases. The judicial system was brought to a complete standstill. After immense pressure from the public and the Bar, the Supreme Court amended its rules and directives to determine cases through

a ‘lottery system’ until an automated system is established. Although this process (based on ‘fortune rather than competence’, which evolved as a result of massive lack of trust) is now in place, it does not settle all the allegations against the Chief Justice, nor does it meaningfully tackle long-standing issues related to judicial misconduct. It is, however, a step towards solving the current impasse and represents a significant departure from the traditional common law Chief Justice privilege. It will be an interesting example for consideration by other judiciaries operating under the common law system.

The politicisation of the judiciary and lack of accountability in relation to professional responsibility and integrity has imperilled the public reputation and standing of the judiciary, and has also demoralized significant sections of the judiciary. Serious erosions of public trust in the law and governance continue as does the flourishing of judicial impunity. Professor Daniel Meador in 1996 remarked: “The judges themselves can be potential threats to judicial independence by what they do” (in ABA, 1997, p. 22). This is an apt descriptor of Nepali judiciary.

The legacy of the power exercised by the King seems to be found in a continuation of this power by political parties, and a judiciary which is either resigned or used to this kind of control from “higher” authorities. This legacy of the past has helped the incumbent judges to disregard judicial values and insinuate themselves into legal anomalies. All the former Chief Justices²⁰⁷ of the Supreme Court, upon retirement from their posts, have denounced the prevalence of irregularities and corruption in the judiciary, in one form or another (INSEC, 1999). The current situation is symptomatic of deep systemic problems. The accountability mechanism – the disciplinary procedures under the Judicial Council – has never been applied effectively. This mechanism even lack a clear procedure for regular evaluation of the performances of judges (Kunwar, 2018). Judicial ethics and a Code of Conduct were adopted by the Judicial Council in 2017, “but professional values of conduct

²⁰⁷ Former Chief Justice Bishwo Nath Upadhyaya said that “no Judges and even Chief Judges can be said non-corrupt”. Judge Krishna Jung Rayamajhi resigned citing ‘unnatural practices’ in the appointment of judges and Chief Justice. See INSEC Human Rights Yearbook, 2008, 2011, 2012.

are neither reflected nor strictly enforced” (Ibid). On this point, retired Senior Judicial Staff Lunar²⁰⁸ said:

Corruption and malpractice in the justice system distort the image of judiciary, engaging public official in corrupt practices and creating public distrust in the judiciary and the judicial system. It is a serious threat to the human rights, justice, rule of law, and democracy.

6.5 Emerging Issues: Erosion of the Public Trust in the Judiciary

Despite ongoing commitments of the judiciary to make the “judicial system worthy of the public trust” (Supreme Court, 2009d, 2019c) and its apparently sincere approaches to judicial reform, overwhelming evidence of the lack of public trust in judicial competency and independence persists. The lack of a perceived judicial independence in Nepal has serious implications for the overall levels of trust and mistrust in the democratic governance in the nation, with public trust at an all-time low (Chapagai & Karna, 2020; Karna & Yadav, 2017). In the legal system that Nepal follows, apart from the judiciary, the legislative and executive branches of the government also have a major role in sustaining public trust in judicial institutions. For instance, the role of the executive in the implementation of the court decisions, and ensuring sufficient funds to the judiciary and the role of the legislative in facilitating appointment of the competent candidate for the judiciary.

6.5.1 Political Inclination of the Judiciary

The politicisation of judicial system and the function of the courts in regulating the other organs of government to ensure impartial access to justice are the key issues for public trust (Gleeson, 2002; Roussey & Deffains, 2012; Uusitalo, 2019). At present, the actions of the judiciary are not limited to resolving disputes between parties and applying the law; there is a noticeable tendency to enter into politics. Settlements of a political nature of cases that involve constitutional issues fall under the jurisdiction of the judiciary, and judicial seriousness and sensitivity are crucial while considering such cases (Supreme Court, 2021). However, recently the trend to entertain cases that are purely political in nature has increased. While judges do

²⁰⁸ Note 161.

not have a warrant to involve themselves in political disputes, they are increasingly involving themselves, with adverse impacts in areas of public policy. For example, while conducting a hearing on the dissolution of the parliament by the Constitutional Bench in 2021, two senior judges opted out of the hearing citing their moral objection to sharing a bench with the other two judges who had a ‘conflict of interest’, while the other judges adamantly denied it.

The public has constantly questioned (Jamil et al., 2017; Nepal Law Society, 2002; Shrestha 2018a; Chapagain & Karna, 2020) judges’ personal credibility, accountability, and most notably the political intervention in judicial appointments, external influences in judicial decision making, and judicial misconduct including the controversial role of the Chief Justice. Efforts to reform the appointment system have generated big disappointment (Acharya, 2020; Adhikari, 2020b; Gyawali, 2020; Shakya, 2017; Shrestha, 2018b; Tripathi, 2016), while others suggest that the performance and integrity of judges and officials who remain in office is inadequate (Chapagai & Karna, 2020; Karna, 2012; Shrestha, 2020, 2021). Before 1990, “there was an influence of the monarchy in the court, but judges were not known to be divided along political lines” (Bhattarai, 2021, para. 14) but now as a result of increased political influence in their appointment, judges have started leaning politically for personal and professional gains.

The appointment process – controlled by a Judicial Council – is “perceived to be prone to adopting recommendations more on political connections rather than on qualifications” (Kunwar, 2018). The Nepal Bar Association raised doubts about the experience, qualification and competence of some of the justices appointed to the Supreme Court and High Courts (NBA, 2019, 2020b). The Supreme Court in its reports has also admitted (Supreme Court, 2015a, 2021) significant problems concerning judicial integrity attached to judicial appointments and to the lack of specific training requirements for law graduates appointed to judicial posts. Political executives, who hold an important power to appoint judges, must consider public trust and confidence in the judiciary, and on the other, the judicial institution must be mindful of political interference in judicial matters, including appointments. The participation of other branches of the government does not always obstruct the independence of judiciary if there is a strong willingness to support the process. However, this is impossible where the majority of judges in

the Supreme Court and High Courts are sympathetic and loyal towards political parties, and not first and foremost to the rule of law. Political interference over the judiciary and the notable political inclination of the judiciary reflects the ‘nexus’ between politics and the justice system.

6.5.2 Judicial Criticism and Media Trial

In recent years, the judiciary has been criticized, sometimes severely by the executive and legislative, the public and the media, for decisions in particular cases and for matters of judicial misconduct. The confidence of the public has been further influenced by the way judicial activities are reported in the media. The public relies largely on media reports and develop their perceptions about the performance of the state institutions including judiciary. In fact, the media can be seen to act as proxies for the public, providing substance to the principles and other matters of justice. The courts are also subject to media scrutiny and comment (Campbell & Lee, 2001), serving a significant role in maintaining public trust. However, the trend of media involvement in *sub judice* cases, particularly criminal and high-profile political cases, has become an emerging issue of concern in terms of protecting the judicial independence and accountability (Acharya, 2020).

In numerous instances the media have been accused of conducting a trial of the suspects and passing a ‘verdict’ to influence the decision of the courts and perception of general public. For example, while the case of parliament dissolution was being heard by the Constitutional Bench in January 2021, media reports on public criticism, opinions of the political leaders and press statement of four former Chief Justices claiming the unconstitutionality of the dissolution were intended to influence the court decision. Professor Surya Dhungel (2021) defined the critiques of major judicial stakeholders, including former Justices and Chief Justices, on the case *sub judice* at the Supreme Court as “most unusual and constitutionally questionable” (para. 2). The way court related incidents are being reported in the media has undermined the judicial decision-making and judicial independence.

The lack of will to maintain judicial values is precarious to judicial reform and the pervasive generalised climate of lack of public trust is a severe threat to constitutionalism and the rule of law. Judicial competency and values together

uphold the highest standard of public trust in the judiciary because “the independence and impartiality of the judiciary are not private rights of judges; they are rights of citizens” (Gleeson, 2002, para. 19). Trust in the judiciary fosters compliance with laws and cooperation with the judicial system “when the institution and the public share the same values” (Gregoire & Nedim, 2021, para. 20). Supreme Court Justice Dr. Ananda Mohan Bhattarai on 1 June 2021, while responding to the composition of the Constitutional Bench, noted:

Judicial power is built on public trust. Justice delivered by untrusted judge cannot be trustworthy. Fair outcome is not sufficient to achieve justice rather the entire judicial process must be fair and impartial.²⁰⁹

The judges themselves are in a position to play a part in moulding public perception. Judges are responsible for consequences (NBA, 2019) because the public assumes that the judges and the judiciary are obliged to demonstrate high level of professionalism, integrity and fairness (Supreme Court, 2021). Unlike areas of compliance which are relatively easy to implement and monitor, judges who habitually and intentionally breach judicial codes of conduct and professional ethics, delay decisions and exploit or present biased interpretations of the laws, present a much more difficult set of problems to address (Hammergren, 2008). Addressing judicial behaviour and attitudes remains a problematic aspiration of judicial reformers in Nepal.

6.6 Conclusion

Nepal’s seventy years of constitutional reform attempting to fully separate powers between state institutions began with optimism. Reform efforts aimed to improve the sector and its performance for the lofty purposes of creating and maintaining justice and reaching broader development goals. Principally, constitutional reform in Nepal attempted to transform the judiciary, notably through the constitutional inclusion of the principle of separation of powers and measures to empower the judiciary to function independently from the executive and legislative. But a

²⁰⁹ Opinion of Justice Deepak Karki and Ananda Mohan Bhattarai: Justice delivered by untrusted judges cannot be trustworthy, *Himalkhabar*, 2 June 2021, see: <https://himalkhabar.com/news/124025>.

judicial history and experience of Nepal provides numerous examples and characteristics of accomplishments and disappointments.

Systems for judicial review, and institutional and strategic reforms to increase quality in the performance of the judiciary (as discussed in Chapter Three) tell a pleasing story of reform, while the systematic assault on the judicial independence, the institutionalized vulnerability of the judicial system and the declining state of public access and trust tells a more sordid story of judicial upheavals. The constitutional discourse of Nepal can be likened to a series of constitutional experiments. Over seven decades, Nepal has experimented with six constitutions and is now implementing the seventh. While the reforms have made rhetorical commitments to an independent judiciary, in reality, the constitutional provisions for this have lacked clarity and force, and these obstacles have left the judiciary at a crossroad. An assessment of constitutional history suggests that the constitutions are committed to promoting institutional independence, but on the other are constrained with their jurisdiction relating to judicial review and the strength of constitutional amendments.

Importantly, the judiciary and its independence from the executive never became a ‘national agenda’ of several pro-democracy movements. The heavy involvement of the government in the judiciary, even during multiparty democracy and the republic, reflect the legacy of the autocratic regime. The continued external control has paralysed the judicial reform process and the independent functioning of the judiciary. The loopholes in provisions related to judicial appointments, manipulation of constitutional ambiguities and lack of individual accountability are the most notable problems that beset judicial independence in Nepal. These will not be overcome unless and until executive and political influences on the judiciary ends. By and large, the Nepali judicial system dissatisfies the basic conditions required to ensure independence and public trust, and a number of problems surfaced concerning threats to judicial competency, impartiality and integrity.

The problems experienced by the Nepali judiciary are a legacy of its lack of public accountability, and of historical power relations with sovereigns and political actors. The marked decline in public trust in the judicial branch stems from the controversial actions of judicial leadership against the provisions of the constitution

and principles of the rule of law. The independence of the judiciary has been circumscribed by the 'supreme authority' – the king at one time, and now the political parties. This has apparently become a culture of the executive and habitual for the judiciary over seven decades.

Chapter 7

JUDICIAL INDEPENDENCE IN NEPAL: RHETORIC AND REALITY OF INSTITUTIONAL AND INDIVIDUAL INDEPENDENCE

7.1 Introduction

From the 1950s, Nepal has undergone a remarkable constitutional and political transformation from authoritarian rule to constitutional democracy, and to the current federal republic state. Throughout this long history, however, and as discussed already in previous chapters, the place of judicial independence in the Nepali constitutions has remained an ongoing challenge, under both authoritarian and democratic regimes (Bhattarai, 2003; Pimentel, 2010). Constitutional reforms have been consistently weakened or have had their loopholes exploited, undermining judicial independence. A democratic requirement of the judiciary is that it must demonstrate and enact *institutional* (judiciary) and *individual* (judges) independence. History shows that the combination of institutional and individual independence is yet to be realised. When institutional changes have been installed, individual members of the judiciary have been known to transgress institutional protocols, while individual judges who have endeavoured to uphold the separation of powers have been impeded by institutional culture and practices in the judiciary.

Legal critics and scholars (Bhandari, 2007; Bhandari, 2012; Chapagai & Karna, 2020; Shrestha, 2011, 2020; Tripathi, 2007) comment candidly that the judiciary has virtually collapsed, with both institutional and individual independence seriously compromised as a consequence of political intervention and deep-rooted irregularities, including corruption. This, in turn has threatened the principles of justice, the rule of law, and democratic values in Nepal. The judiciary (Khatiwada, 2019; Supreme Court, 2009c, 2015a, 2019c, 2021) on several occasions has conceded that reductions in judicial independence and autonomy and the presence of corruption are major weaknesses within judicial administration, and has identified these as ‘the biggest threats’ it faces. Judicial independence, a touchstone of the rule of law and democracy (Lowndes, 2016), is not only perceived to have

been compromised, but some claim that the level of political interference and corruption has been immense that Nepal's democracy now faces a serious lack of public trust and confidence.

In this context, it is not controversial to say that since its creation, the Nepali judiciary does not exhibit the hallmarks of an 'independent' entity. Indeed, it has been the subject of much discussion and debate. A central claim of this dissertation is that while broad judicial reform is crucial to accessible justice as a founding norm of society, the most urgently required reforms lie in the realm of judicial independence. An independent judiciary, one which is sufficiently separate from and independent of state, political and private influence or patronage, is the most urgently required reform.

As already discussed in previous chapters, political pressure on judges, coupled with inadequate constitutional provisions to safeguard independence, procedures related to the judicial appointment, issues of security of tenure, and non-implementation of decisions by the executive continue to challenge the impartiality and independence of the judiciary (DCAF, 2017; ICJ, 2017; UNDP, 2016). Judicial independence also raises issues concerning judicial administration, judicial budgets and public confidence (Tobin, 2004), which have often been neglected in Nepal. Cappelletti (1983) argues that judicial independence from the executive is not an 'ultimate value' or an end in itself, but a way to ensure a higher value: the "impartiality of the judges" (p. 16). The centrality of this, and the implications of its absence for public trust in democracy and law in Nepal, have been overlooked constitutionally and politically. Serious questions of public trust and confidence in Nepal's fledgling democracy cast doubt on its commitment to safeguarding access to justice for all. The nexus between public trust and judicial independence is the focus of this chapter.

Issues of institutional and individual independence emerged as persistent and pressing concerns for a considerable number of informants during this field research. Therefore, this chapter focusses on two-pronged aspects: (i) It will highlight the inadequacies in the constitution that undermine judicial independence, and (ii) It will shed light on how the ensuing lack of institutional independence compromises the independence of the individual judges, thus weakening public

trust in justice and judicial institutions. As a principal analytic focus, this chapter reflects on the appointment process of judges, and argues that the politicization of the judiciary through this process seriously hinders judicial independence and accountability.

The chapter begins with a discussion on the relationship between judicial function and judicial independence, drawing on the research of Ananian-welsh & Williams (2014), Larkins (1996), Shetreet (2012), Tobin, (2004), Tiede (2006) and Smith (2017), and a consideration of general trends in Nepal in relation to the legal scholarship on this topic. This is followed by a discussion on institutional and individual independence, particularly in relation to the weaknesses of the constitution and institutional infrastructures.

7.2 Judicial Independence

“Judicial independence is a fundamental constitutional value” (Ananian-welsh & Williams, 2014, p. 594) and critical to democratic rule (Larkins, 1996; Shetreet, 2012; Smith, 2017). The United Nations has laid out the basic principles of judicial independence, which require a guarantee “by the State and enshrined in the Constitution or the law of the country”²¹⁰, and it obliges “all governmental and other institutions to respect and promote the independence of the judiciary.”²¹¹ A concept of an independent judiciary “constitutes a safeguard against disagreements over rulings by other institutions and their potential refusal to comply with them” (Zeitune, 2007, p. 21).

The Nepal Bar Association describes judicial independence as “an essential component in securing access to justice, rule of law and democracy” (NBA, 2020, p. 1). The Former Chief Justice of the Supreme Court of Nepal, Ram Prasad Shrestha, while delivering a speech at World Justice Forum in 2009, similarly observed that:

In order to address the very many challenges to the rule of law, an independent and competent court is essential. The constitutionalism, democracy, human

²¹⁰ Principle 1, Basic Principles, 1985.

²¹¹ Ibid.

rights and the rule of law can be protected only through the independent and competent judiciary. (2009, p. 5)

The Former Chief Justice of the Supreme Court of Nepal, Kalyan Shrestha described the independence of judiciary as follows:

An independent and impartial judiciary is the constitutional right of all Nepali people. The primary beneficiary of judicial independence is not the judiciary itself, but the society at large. The rule of law which is the basic value of the constitution cannot endure unless the judges who are responsible for interpreting and applying the law and the constitution are guaranteed functional independence. (Shrestha, 2007, p. 5)

It is generally accepted that a democratic constitution, directed by the values of the rule of law and justice, must effectively guarantee judicial independence (Bingham, 2000). Globally, governments strive to declare that their judiciaries are independent and international donors are pouring significant amount of assistance to help establish judicial independence in transitional democracies (Tiede, 2006). However, it is essential to understand two aspects: independent from whom, and for what purpose?

Political and legal theorists (Cappelletti, 1983; Ferejohn, 1999; Larkins, 1996; Shetreet, 2012; Smith, 2017; Tiede, 2006) consider judicial independence as a precondition for an effective protection of fundamental rights, rule of law and justice. It provides institutional protection to the judiciary and enables judges to act impartially and free from threat, coercion, interference and manipulation. Prillaman (2000) and Trebilcock and Daniels (2008) conceive judicial independence as a 'dynamic concept' that involves formal processes to insulate judges and the judiciary from the executive and legislative, to maintain the judicial integrity, and to ensure public accountability. Former Justice of the Supreme Court of the United States of America, Stephen G. Breyer (1996) suggests five key components: (i) constitutional protection for judges, (ii) the independent and efficient administration of the judiciary, (iii) an independent judicial disciplinary mechanism, (iv) judges' duty to refuse in case of bias, and (v) effective enforcement of judgments (p. 986), as an institutional assurance for judicial independence to allow judges to fulfill their social roles.

The promotion of judicial independence, in recent years, has been foregrounded by justice actors as central to democracy and development. The SDGs, specifically goal 16 (3), aim “to promoting the rule of law at the national and international levels and ensuring equal access to justice for all” (UNGA, 2015, p. 25), and explicitly advocate for impartial and competent judicial systems. Significant international efforts in the form of treaties, declaration, regional instruments and other global standards all attest to and document the necessity of independent judiciaries. For example, normative standards observe judicial independence as a prerequisite and “essential to the attainment of objectives and proper performance”²¹² of the judiciary “free from any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect.”²¹³ These texts posit a normative international order for judicial independence to safeguard the protection of judiciary from external influence (Malleon, 1999), and the independence of the judiciary from the hierarchical structure (Shetreet, 2012). They insist on the importance of guarantees of impartiality in adjudication. There is a strong connection between independence and accountability (Dijk & Vos, 2018) that stipulate minimum benchmarks of judicial independence.

Judicial independence is not just about processes and procedures, but it derives from and promotes a host of values and requisites of a functional and principled judicial system. These principles²¹⁴ comprise independence, impartiality, integrity, propriety, equality, competence, and diligence. Correspondingly, the Montreal Declaration²¹⁵ emphasises the interrelationship between the judicial independence and judicial appointment processes. Similarly, the Beijing Statement²¹⁶ focuses on broader judicial appointment issues and elements such as tenure of office and remuneration, privileges and immunities, judicial conduct and jurisdiction. Inspired by these principles and standards, the periodic Strategic Plan of the Nepali Judiciary has introduced a plan to institutionalize “an independent, competent and enhanced judicial system” (Supreme Court, 2019b, p. 5).

²¹² Section 4, Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (Beijing Statement), 1997.

²¹³ Article 2.02, Universal Declaration on the Independence of Justice (Montreal Declaration), 1983.

²¹⁴ Bangalore Principles of Judicial Conduct (Bangalore Principles), 2002.

²¹⁵ Articles 1.11 – 1.13, Montreal Declaration, 1983.

²¹⁶ Claus 4, Beijing Statement, 1997.

Although the normative value of judicial independence is universally recognized and supported, the concept itself has never been fully unpacked (Larkins, 1996; Oseko, 2011; Stevens, 1993). A clear and consistent understanding remains relatively elusive (Larkins, 1996; Rankin, 2013; Shetreet, 2000; Smith, 2017; Tiede, 2006). Political scientist Theodore Becker (1970), in his book *Comparative Judicial Politics: The Political Functioning of Courts* noted “we all know what it means” (Becker, 1970 in Zhao, 2018, p. 134), but another scholar Christopher Larkins in 1996 remarked “its full significance, intricacies and implications still seem beyond our reach” (Larkins, 1996 in Zhao, 2018, p. 134). Indeed, the principle is very extensive and complex, and creates enormous definitional difficulties (Shetreet, 2011). However, pared back to its most simple form, judicial independence means ‘judges as an individual and judiciary as an institution’ (Shetreet, 2021) are free to administer justice without undue interference and influence (Burbank & Friedman, 2002; Larkins, 1996; Malleson, 1999; Prillaman, 2000; Shetreet, 2012; Smith, 2017). There is a dearth of single definition and standard for determining judicial independence; however, it is possible to elaborate on its crucial dimensions.

7.3 Dimensions of Judicial Independence

Conceptually and practically, the judicial independence comprises two basic dimensions: ‘independence from all other branches of government’ (*institutional independence*) and ‘independence of a particular judge in carrying out their professional duties’ (*individual independence*).

Appointment, tenure, disciplinary measures and remuneration of judges (Larkins, 1996; Tiede, 2006) are key indicators of individual independence. Other elements such as administrative control and budget, also known as *operational independence* (Ananian-welsh & Williams, 2014; Viapiana, 2018), and constitutional powers granted to courts and judges – that relate to *decisional independence* (Colbran, 2003; Tiede, 2006) – are prerequisites of institutional independence. This mutual relationship between institutional and individual independence underscores different ways of ensuring judicial independence.

7.3.1 The Notion of Institutional Independence

Institutional independence is generally preserved by the constitution or the laws. The notion of institutional independence demands the functional and operational independence of the judiciary from the executive and the legislative. The UN Basic Principles on the Independence of the Judiciary, 1985 states:

The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.²¹⁷

Likewise, principle 7 of the Basic Principles requires member states to secure sufficient funds to help the judiciary to function appropriately. Consideration should be given to judiciaries having the power to control their budgets (Mceldowney, 2001; Melton & Ginsburg, 2014). Those with administrative control over the daily operation of courts (Malleon, 1999) have greater independence when there is effective and sufficient resource management. Control of budgets includes adequate and commensurate judicial salaries and pensions; assurances that these allowances will not decrease during tenure ensures the dignity of the office. Control over the administration includes the ability to handle its own administration and matters concerning its operation, including assigning cases to judges.”²¹⁸

Independence of judiciary is not merely specified as the capacity to judicial decision-making withstanding undue influence. It also entails *judicial power* that relies on the preparedness of the political branch to execute the judgments of the court. This demands judicial competency and judicial decision-making power not to be influenced, manipulated or controlled by the powers of the other branches of government. Proper execution of court decisions²¹⁹ and independence of judges within the judiciary in the exercise of their judicial power are crucial for decisional independence. Judicial power also resides in independent functioning of Judicial Councils that provide support in a variety of areas such as judicial appointments,

²¹⁷ Principle 1, UN Basic Principles, 1985.

²¹⁸ Principle 14, Ibid.

²¹⁹ Clause 7, IBA New Delhi Code of Minimum Standards of Judicial Independence (New Delhi Standards), 1982; clause 2.06 (d), Montreal Declaration, 1983.

terminations and disciplining. These rules of autonomy are the determinants of judicial competency.

Whilst these elements secure the institutional independence, additional features, including specifying security of tenure of office and disciplining measures, and providing adequate judicial education and training (Gopal, 2009), provide holistic accounts to judicial independence. Despite all forms of institutional protection, judicial system remains vulnerable to threats, enticements (Ferejohn, 1999), or political manipulation (Ramseyer, 1994), which focus on the behavioral issues linked with individual independent judicial decision-making.

7.3.2 The Notion of Individual Independence

Individual independence indicates judicial impartiality, the capacity to withstand undue pressure, which is influenced by *de jure* independence (Rios-Figueroa, 2006; Van Dijk, Van Tulder, & Lugten, 2016). The proponents of independent judicial behaviors emphasize two major behavioral aspects: the ability of judges to act without political manipulation or influence (Ramseyer, 1994) and/or professional norms and expectations within judicial system (Tobin, 2004), and the readiness of the other two branches of the government to refrain from interfering and influencing judicial authority (Ferejohn, 1999; Garoupa & Ginsburg, 2009). It requires judicial settings for judges to exercise administrative, procedural and substantive roles without fear of influence or interference from inside or outside (Cappelletti, 1983). It reflects an ability or willingness of judges to make an impartial decision based on objective examination of facts and application of relevant laws “free from any order or instruction.”²²⁰

Individual independence is usually measured by indicators of formal safeguards arranged by constitutions, laws and other formal rules (Keith, 2002; Melton & Ginsburg, 2014), which are the structural safeguards to ensure judicial liberty to make decision without any forms of unwarranted external influence (Bruce & Gordon, 2007, p. 37). Judicial appointment, tenure or length of appointment, and adequate benefits and facilities including remuneration are essential to the

²²⁰ Clause 5.08, Montreal Declaration, 1983.

individual independence of the judiciary. These elements have been discussed in the larger international body of scholarly work.

The most emphasized structural indicator to ensure judicial independence is the method and process of judicial selection and appointment (Akkas, 2004; Ananian-welsh & Williams, 2014; Spigelman, 2008; Tiede, 2006) that includes careful appointment to avoid the risk of actual or perceived independence from the executive. International standards require merit based judicial appointment in consultation with the judiciary and objective criteria for the transfer and promotion.

Some scholars (Burbank, 2002; Smit, 2015) argue that safeguarding life tenure or length of appointment helps insulate judges from political influence. Normative standards require the term of office to be assured “by law either for life, until a statutory age of retirement, or for a substantial fixed term without interference by the executive” (Ananian-welsh & Williams, 2014, p. 599). The logic for insulating judges with longer judicial office, as argued by scholars, is to encourage judicial “decisions based on the law rather than political or personal considerations” (Ramirez, 2008, p. 692) and career goals or fear of termination, and signals that judges may outstay the executives and legislators who appoint them (Tiede, 2006). According to legal experts (Hammergren, 2002; Urbániková & Šipulová, 2018), serious misconduct or irregularities, and inability to discharge duties of the office should be the major conditions for taking disciplinary measures or processes to remove judges from the office. An independent entity of judicial ability and character, such as Judicial Council, should oversee these processes.²²¹

International normative standards recognize a different kind of extra-judicial duties for judges that are consistent with actual or perceived impartiality. A judge can involve in commissions of inquiry or investigation, hold administrative positions within a court, and engage in certain executive activities after retirement. Individual independence requires immunities and privileges, such as reward or punishment for the conduct of their judicial functions; and exemption from lawsuits.²²² These rules of autonomy are the determinants of judicial integrity.

²²¹ Clause 36, New Delhi Standards, 1982; Clause 3.25, Montreal Declaration, 1983.

²²² Clause 44, New Delhi Standards, 1982; Clause 1.15, Montreal Declaration, 1983.

7.3.3 Relationship between Institutional and Individual Independence

Legal and political scholars (Carrubba, Helmke, Gabel, Martin, & Staton, 2015; Keith, 2002; Melton & Ginsburg, 2014; Van Dijk et al., 2016) claim that institutional independence depends also on individual independence. For instance, the rule governing the selection and removal of judges is formal protection for individual judges, but it also promotes independence in general. Both institutional and individual independence are instrumental to legal, constitutional and democratic values (Ferejohn, 1999; Ferejohn & Kramer, 2002), the presence of which promotes trust and legitimacy in the system. Yet, the other organs – executive and legislative – remain able to influence and interfere with the judiciary, for example by influencing the judicial appointment process or not allocating adequate funds to it.

All the themes discussed above reverberated with the concerns raised by my fieldwork informants. In the following section I analyze in more detail specific aspects of the constitution which are expected to safeguard independence. I consider how the constitution conveys matters of judicial appointments, judicial tenure and removal, remuneration and transfer, and independent decision-making. In short, I am asking: what are the constitutional arrangements in the areas of institutional and individual independence?

7.4 Constitutional Safeguards for Judicial Independence in Nepal

“Independence” encapsulates the constitutional value that establishes the mutual support between the judiciary and other two bodies of the government. The following illustrations of the constitutional ‘safeguards’ to ensure judicial independence in Nepal are based on data from the field that emphasises how each of the dimensions of judicial independence have been positioned in the constitution and how this has shaped practice. This analysis highlights the insufficient protection of both institutional and individual independence, and the resultant eroded public trust and confidence in the Nepali judicial system.

7.4.1 Judicial Independence in the Constitution

While judicial independence requires constitutional safeguards for the clear separation of powers, the Nepali Constitution has featured a good deal of ambiguity about the concept of judicial independence. These ambiguities are reflected in the preamble that has provision related to judicial structure, judicial appointment, jurisdiction and judicial independent functioning. Supreme Court Judge Mercury²²³ relayed during the interview:

Since the judiciary was separated from the executive and legislative in 1948, the principle of power separations has not been expressly articulated in the Nepali constitutions. Although the constitution provides separate chapters on the different arms of the government including on the judiciary, this branch is not explicitly independent from the executive.

Nepal had to wait almost forty years to embrace the principle of judicial independence in its constitution, which resulted following the inception of the Constitution of the Kingdom of Nepal in 1990. The Constitution envisioned “an independent and competent system of justice with a view to transforming the concept of the rule of law into living reality”,²²⁴ and made explicit and unambiguous provisions guaranteeing a three-tiered judicial system to exercise power related to justice, including detailed provisions on the judicial appointment, office of tenure, promotion and removal. In the 1990s, the Supreme Court²²⁵ emerged as an increasingly powerful institution, with the power of judicial review.²²⁶ However, the Constitution reserved significant authority, including the judicial appointment and invocation of emergency powers on the King, which were misused several times.

The current Constitution of 2015 has replaced in its preamble the phrase ‘an independent judiciary’ – protected by previous constitutions – with ‘an impartial and competent judiciary’, recognising these elements as a precondition to consolidation of the rule of law and democracy. The Constitution makes rhetoric arrangements to protect judicial independence in several important areas. For

²²³ Note 129.

²²⁴ Preamble, Constitution of the Kingdom of Nepal, 1990.

²²⁵ Article 85, Ibid.

²²⁶ Article 88, Ibid.

example, the constitutional emphasis on the administration of justice to be based on the constitution and laws signals protection of both individual and institutional independence. Similarly, constitutional arrangements restrict any judge of the Supreme Court from assuming any public post after their retirement, to ensure their decisional independence.

These Constitutional references to the rule of law in multiple places, including in the preamble, mark the gravity of judicial responsibility for upholding the principle (Zhu & Kouroutakis, 2019). Therefore, the independence of Nepali judiciary should be realized in the context of Article 126 of the Constitution of 2015, which confirms, “Powers relating to justice in Nepal shall be exercised by courts and other judicial institutions in accordance with the provisions of this constitution, other laws and recognized principles of justice” and it also creates a mandatory obligation to all to “adhere to the order or verdict given by the court in relation to the court cases”.

However, outlining the principle of the independence of judiciary as a component of the right to justice²²⁷; defining ‘separation of powers, check and balance, and rule of law’ among the core values under which Nepal’s federal structure is grounded;²²⁸ and the innovation of a Constitutional Bench²²⁹ within the Supreme Court to hear issues arising from new federal structure, undercut the core substance of Article 126 – the notion of judicial independence. In addition, the provisions²³⁰ of the Supreme Court (Constitutional Bench Operation) Regulations, 2015 give power to the Constitutional Bench to adjudicate cases *sub judice* in other benches of the Supreme Court; the verdict given by the Constitutional Bench in relation to the case is considered final and restricts any appeal or revision of the decision, overriding other benches of the Supreme Court. These provisions can be misled or misinterpreted, thereby, threatening the basic values and the norms of constitutionalism.

The text and phrase of the Constitution do not suggest explicitly on how to define and understand the principles and processes through which the judiciary is expected

²²⁷ Article 20 (9), Constitution of Nepal, 2015.

²²⁸ Article 56 (6), Ibid.

²²⁹ Article 137, Ibid.

²³⁰ Rule 3 & 5, Supreme Court (Constitutional Bench Operation) Regulations 2015.

to exert checks on other organs of the government. Indeed, the Constitution embodies certain restrictions and limitations on the judiciary. For instance, any questions related to the internal business of the parliament cannot be brought to the court. In an interview, Judge Galaxy²³¹ observes how the principle of independence through the separation of powers has been disregarded:

Judicial independence and constitutionalism are parallel – interconnected and interrelated. But in the context of Nepal, the notion of constitutionalism has not strongly been established. Complex text and ambiguous provisions with dual meanings in the Constitution open avenues for external intervention and places the judiciary subordinate to the executive and legislative.

The Constitution of Nepal, 2015 stipulates a fundamental separation of the judiciary from the executive and legislative. It provides structures, powers, and jurisdictions of the three branches of the government – the Federal Executive, the Federal Parliament and the Judiciary.²³² However, Nepal's model of government, which is guided by the West-minister model, does not have an actual separation between the executive and legislative. For instance, the constitutional provision²³³ requires the members of the Council of Ministers to be drawn from the members of the Federal Parliament. This creates a collective responsibility of the Council of Ministers to the Federal Parliament and continues to remain in power until the confidence of the majority of members of Parliament remains. As Justice Pluto²³⁴ shared in an interview:

The clear separation of powers between all three branches of the government is a foundation to the independent judiciary. But the constitution seemingly create a basis for imbalanced power relations between the branches of the state and it controls the judicial check on the executive and legislative.

The memorandum of the Nepal Bar Association (2020b) has noted, “The excessive political influence on the judiciary has undermined the values and principles of democratic governance to a considerable level which is serious challenge to the constitutionalism, rule of law and democracy” (p. 2).

²³¹ Note 159.

²³² Part 7, Part 8 and Part 11, Constitution of Nepal, 2015.

²³³ Article 76 (9), Ibid.

²³⁴ Note 52.

Researcher Moon, in her discussion with the author, shared frustrations about how separation of powers is being understood and applied in the context of ‘judicial review’ in Nepal. According to her, the power assured under the part 11²³⁵ of the Constitution neither illustrates the meaning and the purpose of the doctrine of separation of powers, nor does it operate in a rigorous manner; rather, it has created constitutional confusion which amounts to an erosion of constitutional provisions to safeguard judicial independence.

The Constitution places the Chief Justice in the positions of the executive head of the judiciary as well as the head of the judiciary as an independent judge. Though the Chief Justice is expected to demonstrate independent leadership, the various roles/ responsibilities as a Chief of the Constitutional Bench and the Judicial Council, and a member of the Constitutional Council have at times created conflict of interest. The report commissioned by the Supreme Court (2021) makes a serious comment concerning the responsibilities of the Chief Justice and suggests that some of the roles be removed to keep the judiciary independent from other organs of the government.

In Constitutional Council, all the members are political authorities except the Chief Justice and due to political nature of the body and the process, often decisions of the Council invite controversies. In this context, it is important to review significance of the presence of judicial leadership in the Council. (p. 143)

Considering the experience of the Constitutional Bench, it is crucial to reach to the conclusion whether to provide responsibility of Constitutional Court to the Supreme Court or establish separate Constitutional Court or continue with the Constitutional Bench as it is. (p. 144)

It is significant to note that the Supreme Court and the political parties on 8 June 2015, agreed²³⁶ to establish a Constitutional Court to deal with the issues that emerge from the federal structure. However, serious concerns regarding their jurisdiction and status were raised while drafting the Constitution (Zhu &

²³⁵ It provides structure of the judiciary, judicial appointments, conditions of service and benefits, powers of the courts, formation of the Constitutional Bench, provisions about the Judicial Council and judicial service commission.

²³⁶ Point 13, Agreement between four major parties in the Constituent Assembly on June 8, 2015. See, http://www.satp.org/satporgtp/countries/nepal/document/papers/16-point_Agreement.htm.

Kouroutakis, 2019) which permitted the formation of the Constitutional Bench under the direct administration and control of the Supreme Court in 2017.

7.5 Individual Independence

Apart from the explicit reference to the model and character of the judicial system and its relationship with other organs, a range of institutional assurances are required to protect its individual independence. Constitutional affirmations that insulate individual judicial independence are of paramount importance for institutional independence. These institutional guarantees are weak or non-existent in Nepal and the areas they impact on are the focus of the sections below.

7.5.1 Individual Independence: the Judicial Appointment Process

The current judicial appointment process is full of controversies, resulting in a number of court litigations²³⁷ and claims for constitutional amendments to the appointment process. Both groups of the interviewees criticised the judicial appointment process as being politicised and non-transparent, and fueled by nepotism. As Justice Nova²³⁸ shared:

Looking at the present appointments, the judiciary will be a club of the worst of the worst in 10 years. Yesterday worst was an exception, now best has become an exception. Those people who have never entered the court premises, never pleaded any cases – inexperienced and incompetent are getting appointments in the High Courts. Appointment criteria is never followed, rather politically negotiated and picked from the ‘street’. I am sorry to say, but this is how the judges are being appointed. Even judiciary is not serious on bringing competent and honest people in the judiciary. Those appointed are also not serious in justice delivery to bring real change in people’s life. It affects legitimacy of the institution, performance of the judiciary and erodes the public trust on the judiciary.

The Nepali judiciary is a national unitary institution staffed by cadre and non-cadre judges selected and appointed by the centralized Judicial Council and it has three

²³⁷ *Subodhman Napit v Prime Minister and others*, NLR.6, 2010; *Madhav Kumar Basnet v Judicial Council and others*, 2015; *Advocate Madhav Kumar Basnet v Judicial Council*, 2017; *Bhakta Biswokarma v Judicial Council*, 2019; *Surendra Bhandari v Judicial Council*, 2021.

²³⁸ Note 125.

tiers presence throughout the country. However, the appointment in the Supreme Court comprises two major processes: appointment by the Executive and confirmation hearing by the Federal Parliament. This provision is greatly skewed in favour of the executive and legislative. The parliament becomes the confirming authority and the President and Prime Minister, the appointing authorities.

According to Article 129 (2), the President appoints the Chief Justice on the recommendation of the Constitutional Council (which consists of both high ranking political and judicial officials),²³⁹ and other judges of the Supreme Court on the recommendation of the Judicial Council.²⁴⁰ The Chief Justice of the Supreme Court appoints the judges for the High Courts and District Courts on the recommendation of the Judicial Council.

The judges of the District Courts are appointed as per the Article 149 of the Constitution through an open or internal competition among judicial service officials. Appointment of District Court judges based on open completion is discouraging. For example, in an examination conducted to select 18 District Court judges, only 3 candidates passed the exam out of 196 applicants (Judicial Council, 2021).

Prior to making the appointments in the Supreme Court, Article 292 requires a mandatory parliamentary hearing²⁴¹ of the nominees. According to Justice Nebula,²⁴² a “parliamentary hearing is a fraught problem that has sabotaged the dignity of the judiciary.”

²³⁹ According to article 284 of the Constitution of 2015, the Constitutional Council consists of: the Prime Minister (Chairperson), the Chief Justice (member), the Speaker of the House of Representatives (member), the Chairperson of the National Assembly (member), the Leader from the Opposition Party in the House of Representatives (member), and the Deputy Speaker of the House of Representatives (member).

²⁴⁰ According to article 153 of the Constitution of 2015, the Constitutional Council consists of: The Chief Justice (Chairperson), the Federal Minister for Law and Justice (member), a senior-most judge of the Supreme Court (member), one jurist nominated by the President on the recommendation of the Prime Minister (member), and a senior advocate who has gained at least twenty years of experience, to be appointed by the President on the recommendation of the Nepal Bar Association (member).

²⁴¹ The second amendment to the Interim Constitution, 2007 introduced a compulsory parliamentary hearing of judges nominated to the Supreme Court. Two-third majority of the parliament hold the power to disqualify the nominees.

²⁴² Note 139.

The relationship between the executive and the legislative is often symbiotic – both institutions may have the same agenda and may collectively reject the judges, which may directly or indirectly create a judicial deadlock (Karki & Baral, 2018). The effectiveness of the parliamentary hearing is controversial in the context of the failure of parliament to establish procedures for judicial scrutiny and guidelines for parliamentarians. The members of the judiciary, lawyers and the public have raised concerns regarding the rationale for conducting such hearing, which undermines the dignity of the judiciary, impacting on the sensitivity of the institution (Pradhan, 2019; Shrestha, 2018a) and the public perception towards the judiciary. PN Bhagwati, the former Chief Justice of India, noted:

The provision of parliamentary hearing in the Interim Constitution for confirmation of the judges of the Supreme Court is against the Basic Principles of the Independence of Judiciary and most objectionable in a developing country like Nepal. Rather, the Judicial Council should be strengthened on all issues related to appointments. (*Kantipur*, 2007, p. 1)

Neither the Judicial Council nor the Constitutional Council fulfils the profile of independent commission (Malagodi, 2014). They are typically identified by high degree of executive and legislative representation (Zhu & Kouroutakis, 2019). For example, the current speaker of the parliament, who is also the member of the Constitutional Council bearing the responsibility for judicial selections, is a murder suspect with a case of homicide sub-judice before the Supreme Court. There is an absolute risk of conflict of interest and a chance of manipulation in judicial appointments. Justice Pluto²⁴³ shared:

As far as appointments are concerned, the constitution makes it [the Judicial council] very weak to stand against the executive and legislative, because the Chief Justice is also accountable to the Prime Minister ultimately. I don't think we have fearless and courageous judiciary that is willing to intervene and question the Prime Minister and the Parliament. I don't remember any incident in recent time when the judiciary took bold step against the other two branches of the government in the interest of justice. The independent stand of the judiciary is difficult to determine at this moment.

²⁴³ Note 52.

The weak and inadequate institutional provision for the judicial appointment is correlated with the composition of the Judicial Council.²⁴⁴ The level of protection provided in the constitution does not meet international requirements for judicial independence, which is necessary for keeping the judiciary away from the executive/ political influences and suspicion.

Following the implementation of the Constitution of 1990, “a convention had been established...that in the appointment of a Chief Justice of Nepal, “seniority” – in terms of date of appointment to the Supreme Court bench – must be respected” (Shakya, 2017, p. 18-19). However, since the proclamation of the Interim Constitution in 2007, political parties have overruled this convention (NJA, 2013, p. 21), sidelining next-in-line worthy candidates and appointing instead a person with strong political affiliations. For instance, the response of the Supreme Court on petitions²⁴⁵ that challenged the qualification of the High Court judge not only approved ineligible and less experienced candidate for the post, but also disregarded the judicial general practice and precedents, and overstepped the limits of its jurisdiction regarding the parliamentary hearing of the nominee (Ghimire, 2021), endangering the principle of separation of powers. Law professor Bishal Khanal claimed: “Junior lawyers were enlisted as senior in chronological order with a covert, clandestine and *malafide* intention of giving access to making future Chief Justice” (2018, p. 60). He viewed these appointments as an increasing source of ‘patronage’, against the competence and integrity of appointees. Neither the Supreme Court nor the parliamentary hearing committee has been questioning this course of action, even though it contradicts with the eligibility criteria prescribed by the Constitution.²⁴⁶

The appointment of judges consistently draws considerable publicity and controversy related to political influence, and judges’ reluctance to intervene in the action of the executive has overshadowed judicial independence (Shrestha, 2018a). For instance, in 2016, the appointment of senior advocate Sapana Pradhan Malla²⁴⁷

²⁴⁴ This is discussed in more detail in chapter 8.

²⁴⁵ *Surendra Bhandari v Judicial Council*, March 2021; *Dinesh Tripathi v Legislative Parliament*, March 2021.

²⁴⁶ Article 129 (5), Constitution of Nepal, 2015.

²⁴⁷ Sapana Pradhan Malla was appointed to the Constituent Assembly under the proportional representation seats for the CPN-UML.

– a former parliamentarian, as judge of the Supreme Court drew public criticism because her association to the political party was perceived as inappropriate for the position in the judiciary. Her controversial decision²⁴⁸ that allowed Agni Prasad Sapkota (against whom a murder case is pending at the Supreme Court) to hold a position as parliamentarian, raised doubt on the independence of the judiciary. Similarly, two sitting judges²⁴⁹ of the Supreme Court also served as the Attorney General for the CPN-UML led government. People raise questions as to whether the politically appointed judges can perform impartially in the interest of justice without being politically influenced. A senior lawyer Venus²⁵⁰ stated:

When an incompetent, but honest member of the political party is appointed as a judge, the public invariably suffer and are denied access to justice, creating massive public distrust on the judicial system. It severely hinders the judicial independence, which is worse than the challenges that judiciary encountered during the *Panchayat* autocratic regime.

Justice Nova²⁵¹ commented:

Political representation in the Judicial Council has politicized the judiciary; the Judicial Council has become a political cadre recruiting agency. Reform in the system is not possible from the politically affiliated judges as their affiliation may guide their decisions.

Judge Nebula²⁵² also shared similar observation:

Competent, accountable and transparent persons are needed to drive the judiciary, and not the ones who are placed in the position of judge on political backing. People who are politically recommended for the judiciary, do not meet the eligibility requirements for the judge pursuant to the Constitution, the Judicial Council Act and its Regulation. Those who are appointed to the Supreme Court should have high morals and qualification.

²⁴⁸ *Advocate Dinesh Tripathi the Office of the Prime Minister and Cabinet of Ministers and Others*, 2020.

²⁴⁹ Hari Krishna Karki was appointed as Attorney General for the CPN-UML led government in October 2015 and resigned on 1 March 2016 when he was recommended to the Supreme Court. Hari Prasad Phuyal, legal expert close to CPN-UML party, served as an Attorney General from 18 April 2016 to 4 August 2016 for the CPN-UML-led government and was later appointed to the Supreme Court on 19 April 2019.

²⁵⁰ Note 90.

²⁵¹ Note 125.

²⁵² Note 139.

The Constitution and other laws regulating judicial appointments are silent on the issues of prior engagement in the politics. However, a petition filed to disqualify from judgeship those who are either members of a political party or party nominees for the election, was quashed by the Supreme Court after two years. While annulling the petition, the Supreme Court noted:

Those people who were involved in politics prior to their appointment to the judiciary, have been maintaining judicial impartiality and have demonstrated their outstanding performances keeping judicial services entirely distinct from their previous life.²⁵³

This judgment reflects the symbiotic relationship between the judiciary and the political parties. Judges are not allowed to be political, and those ‘political judges’ who shift camp from a party to the judiciary demonstrably lack competency and integrity as an independent judge.

Judicial appointments do not reflect the gender and other ethnic populace the judiciary serves. This is due to the contradiction in the constitutional provision and the Judicial Council Act, 2016. For the post of the judge in all tiers, the Act requires to make recommendations pursuant to the principle of proportional inclusion under the Constitution, whereas Articles 129, 140 and 149 of the Constitution do not mention appointments based on proportional inclusion. The demand for the inclusion of people from all sectors of the society in judicial positions was challenged in Supreme Court due to non-implementation of the constitutional requirement²⁵⁴ for proportional inclusion of all social groups in all branches of the government. Paradoxically, the Supreme Court found that there was no clear constitutional breach²⁵⁵ involved in these controversial actions and elaborated in respect to judicial appointment:

Judicial appointment cannot be based only on principle of proportional inclusion, rather judicial competency and seniority are the foremost criteria for the judicial appointment. Criteria such as merit and qualification cannot be compromised with the inclusion. The only criteria that count is competency, integrity,

²⁵³ *Madhav Kumar Basnet v Judicial Council and others*, 2015, p. 11.

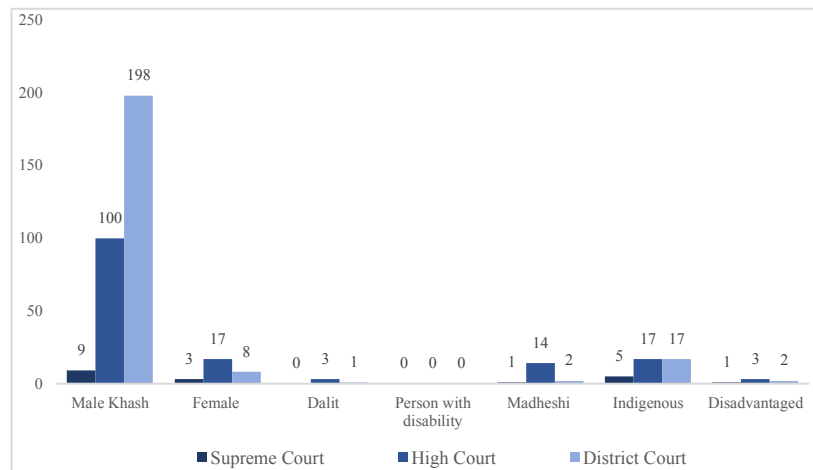
²⁵⁴ Articles 38(4) and 40 (1) of the Constitution requires representation of all groups of society in all structures of the state based on the principle of inclusion.

²⁵⁵ *Bhakta Biswokarma v. Judicial Council*, 2019.

experience, capacity coupled with the requirement that the person is competent to perform their duties and not excluded by personal incompatibility.²⁵⁶

The NJA, however, highlights the lack of representation of all segment of the society including women, Dalit, indigenous and other ethnic groups in the judicial appointments (NJA, 2013). For example, in 2017, the Judicial Council recommended 80 High Court judges, which included 62 male judges from *Khas Arya* group, which accounts for 31.25 percent of the population of Nepal; three women (51.4 percent of the population are women), and only four from other ethnic communities (*The Himalayan*, 2019). The current Supreme Court is dominated by a single gender and particular ethnic group. According to the Judicial Council (2021), 307 out of 401 appointments (76.5 percent) in three tiers of the courts were male (*Khash*), 66 appointments were male from other communities and 28 were female.

Figure 7.1: Judiciary as of December 2020



The statistics of the Supreme Court (2019a) shows that out of 21 judges of the Supreme Court, 18 are men and only three are women. In 70-year history of the Supreme Court, 29 Chief Justices were men of which 21 Chief Justices were from the Brahmin/Chhetri community and 8 were from the other ethnic and indigenous community; only one-woman judge served the position of Chief Justice.²⁵⁷ In the fiscal year 2018/19, there were total of 21 women judges which included 3 women judges in the Supreme Court, 13 in High Courts and 5 in District Courts. Similarly,

²⁵⁶ Para. 34, Ibid.

²⁵⁷ Information obtained from the record of the Supreme Court in September 2019.

the inclusion of women in the position of judicial officials is also extremely low – only 156 out of 809 judicial officials are women (Supreme Court, 2019b).

Prioritizing the diversification of the bench and implementing reforms to make the judiciary more inclusive indicate that the courts are fair and equitable institution. Justice Galxy²⁵⁸ focused on the need to ensure the judiciary encapsulated to all walks of society rather than a narrow section of society, and commented:

Diversity in the judiciary is fundamental to build public confidence that the judicial system is fair. It is substantial for balanced interpretation of the constitution and laws which effectively promotes trust in the judiciary. The bench that is represented by different sections of the community, upholds various aspects of the community; Court has to be for all people.

Diversity demonstrates that the judiciary serves for all, and a heterogeneous judiciary stands to strengthen trust in its impartiality. As Justice Michael Kirby (1983) noted:

Judges judge the community in all its diversity. There must be qualities of mind and character first. But it should be possible, within such requirements to re-mould the third branch of government, gradually and patiently to reflect the community's variety. I do not envisage exact proportionality of minority groups. But I do look for an end to the judicial stereotype and more balance and variety in the selection. (p. 17-18)

7.5.2 Individual Independence: Tenure and Removal

Despite several judicial submissions to the drafting committee of the CA, the Constitution did not include measures to entrench guarantees for the tenure of its judges. For the last seventy years, the retirement age for Supreme Court judge has remained 65 years, and 63 years for the High Court and District Court judges. The constitutional provision only determines the tenure of the Chief Justice of the Supreme Court, which is six years. This restrictive provision “reduces judicial independence by creating competition among remaining judges” (Jeffery & Timilsina, 2021, p. 11), prohibits significant institutional contribution (Tripathi,

²⁵⁸ Note 159.

2016), and leaves space for the executive to interfere in a discretionary or arbitrary manner.

Criterion based on seniority alone for appointing the “Chief Justice has led to a number of short-term appointments in rapid succession” (Shakya, 2017, p. 19) restricting effective leadership, and generating numerous judicial and bureaucratic problems. Due to the age limit, no Chief Justice has completed their full tenure of office. For example, Justice Anup Raj Sharma served only about six weeks (11 February 2010 to 25 March 2010) as a Chief Justice. Law professor Purna Man Shakya (2017) opines:

New Chief Justice should be appointed in time with a plan to position him/her at least for three to four years of tenure so that s/he has an incentive to make an impression in judicial reform process. This does not seem to have happened in Nepal. (p. 19)

The office of tenure of judges is not protected. Judges may be removed²⁵⁹ at any time and before the completion of their term. The Constitution prescribes performance incompetency, misconduct, and serious breach of the code of conduct as grounds for impeachment²⁶⁰ against all judges of the Supreme Court. The Chief Justice and other judges of the Supreme Court may be impeached²⁶¹ by a one-fourth majority of the parliament, and a two-third majority vote is required to endorse the impeachment motion leading to a removal, while other judges may be removed by the Chief Justice on the recommendation²⁶² of the Judicial Council. This weak criterion is the main reason behind frequent impeachment motions against the Chief Justices. These provisions are incompatible with international principles and best practices on judicial independence and the process does not expressly and fully guarantee due process and fair trial to give judges a fair opportunity to defend themselves against the allegations (ICJ, 2015). Legal protection is framed broadly, and practical facets lack explicit protection, recognizing judges’ vulnerability to undue pressure by the other organs.

²⁵⁹ Article 131, 142 and 140 (6), Constitution of Nepal, 2015.

²⁶⁰ Article 101 (2), Ibid.

²⁶¹ Article 131 (c), Ibid.

²⁶² Article 131 (d), Ibid.

The impeachment clause has often been used as a tool to intimidate judges to fulfil politicians' vested interests (Acharya, 2020) rather than to protect the sanctity of the judiciary. For example, an impeachment proposal was submitted against the Chief Justice Cholendra Shamsheer Rana on the grounds of judicial irregularities, despite the political parties' inability to reach consensus on impeachment motion against the Chief Justice though evidences of trespass of judicial values and encouraging corruption in the judiciary were reported. This suggests that political parties are keen to interfere if the judiciary is perceived to be acting against their interest. Justice Earth²⁶³, who I interviewed in Kathmandu, raised the following concern about the impeachment proposals:

The move was an attempt to intimidate and weaken the judiciary by targeting the senior member of the judiciary. Political parties have no morals, and they simply refuse to abide by the law and constitution. Political motive of such motions violates judicial principles, invites serious risks to the rule of law and democracy, and affects public faith.

These motions starkly demonstrate the problems with the constitutional provision: it lacks well-defined explanations which allow politicians to subjectively decide the grounds for an impeachment. These instances illustrate the risk of empowering political parties with the potential to abuse the power. The “threat of removal interferes with judges' exercise of decisional independence on the bench” (Pimentel, 2010, p. 322) and tarnishes the image of the judiciary. An independent body – constitutional or statutory – with an adequate power to make decision can be less subject to this kind of preoccupation.

7.5.3 Individual Independence: Remuneration and Transfer

The Constitution safeguards the financial security of all judges by securing remuneration²⁶⁴ and conditions of service. As per the provision, the remuneration and facilities of the judges cannot be changed except during the situation of extreme financial emergency. The Constitution²⁶⁵ makes provision on pension for the Chief Justice and other judges of the Supreme Court, whereas separate law makes

²⁶³ Note 39.

²⁶⁴ Article 130, Article 141 and Article 149, Constitution of Nepal, 2015

²⁶⁵ Article 130, Ibid.

arrangement of pension scheme for the judges of the High Courts and District Courts.²⁶⁶ In addition, judges are entitled to remote allowances for serving in the High Courts and the District Courts situated in remote areas.

The salary scale of the judges is quite low,²⁶⁷ but much higher than the other civil servants. The constitutional/legal provisions on salary and benefit make an attempt to assure that judges are not to be engaged in any non-judicial activities and that the independence and integrity of the judges remain protected. However, due to the failure to specify the amount of agreed government funding, both the judges and the judiciary remain obliged to the legislative and the executive for financial matters. There is no independent mechanism to fix the remuneration of judges.

The law prescribes the transfer of judges within the same tier of courts with an approval of the Judicial Council, but such transfer requires judges to complete at least two years of tenure in one court. Due to the failure of the Judicial Council to transfer District Court judges, 153 judges have been serving in the same district for 31 months (*Kantipur*, 2022, p. 1). The local activist Rosemary - my focus group discussion participant in the rural area of Banke – explained that she finds the trend of judicial transfer controversial:

Marred by the political negotiations between the political parties and the judiciary in appointment and promotion, questions have been raised about transparency and objectivity in decisions related to judges transfer. ‘Internal politics’ while making decisions of transfer is even more unfair.

While responding to concerns regarding unfair transfer based on nepotism and favouritism, the Supreme Court report (2021) highlighted the need for transparency and fairness according to legal standards.

7.6 Institutional Independence

Institutional independence, also described as structural or organisational independence, indicates the relationship of the judiciary with the Executive and

²⁶⁶ Section 14, Remuneration, Facilities and Conditions of Service of Judges of the High Court and District Act, 2016.

²⁶⁷ Nepal’s per-capita income per annum is USD 1071. The annual salary of District Court judge is about USD 5801, High Court judge is about USD 6866, and Supreme Court judge is about USD 7668 See, <https://www.mof.gov.np/site/publication-detail/2376>.

Legislative with a focus on its collective independence from those branches. It covers operational independence and decisional independence. The ability of the judges or the judiciary to perform their work independently from external influence as well as internal interference is weak in Nepal.

7.6.1 Operational Independence

Operational independence is a central facet of judicial independence (Ananian-welsh & Williams, 2014), but remains controversial (Smith, 2017). The reliance of judiciary on the executive and legislative for funding and management of human resources has been an issue of concern for the legal fraternity including judges, as this may impact on judicial independence. Majority of interviewee from the supply side observed that the judiciary is under resourced in both aspects – financial and human resource, and asserted that it is a “careful strategy” to make judiciary dependent. Justice Saturn²⁶⁸ of the Supreme Court commented:

Where the executive has entire control over budgeting and administrating the court staffs, the judiciary simply becomes a branch of the government Ministry. The absolute control of the administration of the judicial budget and human resources on the executive and legislative comprises an unnecessary incursion on the separation of powers. It controls the judicial functional competency to work as an independent watchdog on other branches. Judiciary becomes vulnerable to undue pressure this way.

Similarly, the Supreme Court Report noted:

Whereas the constitution has embraced the principle of independence of judiciary, transparency, fairness and impartiality of judicial administration and promotion of public trust has been a challenge. Execution of notion of judicial independence in internal proceedings of the court to protect courts from undue pressure has been additional matter of concern (p. 82).

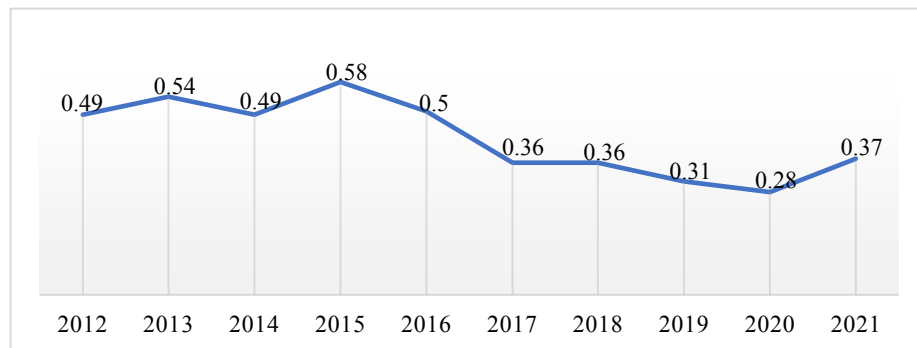
The judiciary cannot be considered properly independent unless it holds substantial power in its own administrative affairs and court administration. The self-management of judicial administration is the most efficient ways to achieving the highest level of independence (Garoupa & Ginsburg, 2009). The functional ability

²⁶⁸ Note 134.

of the judiciary is dependent on public funding, which is developed as part of a national budgetary system. “There is no source of funds for judiciary other than the ones provided from the consolidated fund of Nepal” (Shakya, 2007, p. 10). Judicial allocation stands at less than one percent of the national annual budget, which is grossly inadequate to meet its reform agenda. This allocation comprises the operating costs of the Judicial Council, three tiers of courts, other Specialized Courts, the Judgement Execution Directorate, and the NJA. During the public launching of the Fourth Five-year Strategic Plan of the Judiciary on 1 July 2019²⁶⁹, while delivering a welcome speech, the Chief Justice expressed dismay over the trend in low budgetary allotment as follows:

Over the years, long before and after the advent of federalism and until now, the budget of the Judiciary has remained extremely low compared to the other entities of the government. Judiciary has requested time and again that the operating cost of the Judiciary is not any less than the running costs of the other branches of government. But each year executive makes substantial reductions on the proposed budget.

Figure 7.2: Annual Budget²⁷⁰ of the Judiciary



The judiciary has been suggesting a realistic budget allocation – at least up to one percent of the national budget. The annual reports of the Supreme Court indicates that the allocation to the Judiciary is less than one percent. The budget allocation since 2016/17 has lowered down to 0.36 percent, and was reduced sharply to 0.28 percent in 2020. Despite a substantial increase in the workload since the adoption of federalism, the workforce and resources has remained the same.

²⁶⁹ Public launching program attended by the author at the Supreme Court, Ramshahpath, Kathmandu on 1 July 2019.

²⁷⁰ Budget Speeches (2012/13 to 2020/21), Ministry of Finance, Nepal Government.

The Judiciary prepares annual estimates for consideration by Ministry of Finance which, subsequently revises and alter as per the government priorities (Shakya, 2007). As the judicial salaries and benefits are defined by the law, all budget cuts detract directly from administrative expenses related to the institutional and infrastructure development. The public has advanced criticisms that the parliament and the executive have been deliberately ignoring and sidelining the financial autonomy of the judiciary (Varughese & Payne, 2019). The executive sees judicial administration as part of its own law and justice portfolio rather than as independent, and the judiciary also accepts the Prime Minister or the executive as its “administrative head”. Principally, court administration is considered as an independent institution, but the budget of the court belongs under the Ministry of Finance; the court does not have instructive power and thus cannot alter decisions made by the ministry. In addition, the court – being “an independent third branch of the government” – has the possibility to present its budget directly to parliament, while the judiciary has never exercised this power.

Recalling the government’s move to allocate a budget to establish Supreme Court benches in Biratnagar and Nepalgunj in 2008 without consulting with the judiciary, Supreme Court administrative staff Planet²⁷¹ viewed executive control of the judicial budget as subject to “institutional arbitrariness to manipulate judicial functions”. Former administrative staff of the Supreme Court Lunar²⁷² and senior advocate Venus²⁷³ expressed similar views regarding constitutional safeguards for the allocation and management of judicial budget that is constitutional guarantee for at least one percent of the national budget.

Advocate Venus²⁷⁴ opined that courts should not be financed based on executive discretion, but rather based on objective and transparent criteria. He recommended:

There is a need to establish a mechanism that is systematically and practically free from inappropriate interference of the executive and political parties. Guaranteeing allocation of at least one percent of national budget for the judiciary in the constitution and granting additional power to the Judicial Council

²⁷¹ Note 122.

²⁷² Note 161.

²⁷³ Note 90.

²⁷⁴ Ibid.

to administer the budget can minimize external interference. However, this would require independence and autonomy of the Judicial Council.

“Operational independence also requires [an assurance] that the number of judges on the nation’s highest court should be fixed by legislation” (Ananian-welsh & Williams, 2014, p. 611). In Nepal, the Supreme Court consists of a maximum of 21 judges including the Chief Justice, and it cannot be modified by the executive’s decisions unless altered by constitutional amendment. The constitution permits the appointment of a maximum of ten temporary justices, if required to deal with the increased workload at the Supreme Court, and the number of judges in the High Courts and District Courts can also be increased as per the Administration of Justice Act, 2016.²⁷⁵ However, these provisions may affect the judicial independence and impartiality. In the hope of being re-appointed as judges after their temporary term is over, cases may be decided in the government’s favour (Ghai & Cottrell, 2008) and on the other, there is a high chance of government control over the judicial appointments.

In addition, the administrative independence of judges and the judiciary from any superior control promotes the internal governance of the judiciary. While the Constitution creates a three-tiered judicial system to be supervised by the Supreme Court, in terms of jurisdiction, the “lower courts are entitled to have their independence protected in the same way as higher courts” (Okpaluba, 2004, p. 113). This assurance protects the institutional independence and enables judges to work freely without undue influence. Justice Nebula²⁷⁶ observes two key prongs for such assurance:

District courts and High Courts are entitled to review the verdicts. The High Court holds the power to hear appeals over the decisions of district courts and supervise them to discharge their function. On the other hand, district courts are not mandated to deal with the matters related to constitutional interpretation.

However, all the administrative affairs of the court system reside within the Supreme Court through the Chief Justice, which can be jeopardized by a hierarchical structure of the judiciary through preliminary instructions, and

²⁷⁵ Article 4 and 6, Administration of Justice Act, 2016.

²⁷⁶ Note 139.

directives and subsequent checks by senior judges. Article 134 of the Constitution which grants the authority to the Supreme Court to transfer cases from one court to another, is potentially worrying as there is possibility for use of this centralized power in influencing the outcome of court decisions. Similarly, article 147 of the Constitution which gives ultimate power to the Chief Justice to give necessary instructions to the subsidiary courts, represents an infringement of the individual independence of judges. In the context of executive control of the judicial appointment, the control of court administration by the Supreme Court and the Chief Justice poses risks of manipulation, intentionally or unintentionally, and lends itself to abuses of power. Entire governance of the lower courts is apparently controlled by the Supreme Court. This might be a reason for the High Courts and the Supreme Court for rarely having dissenting judgements; verdicts are mostly unanimous.

The executive has control over the judicial administration through its crucial role in the Judicial Service Commission (JSC) – the body that has mandate for the appointment, promotion, transfer and departmental actions against judicial staff. Although the power and functions of the JSC are provisioned under Article 156 of the Constitution, they appear to be limited and are yet to be defined by law. A majority of the members²⁷⁷ of the JSC are high-level executives who subsequently control and regulate institutional independence, attempting to resemble an apolitical executive body. An executive-dominated JSC cannot be expected to safeguard the political neutrality and independence of the JSC. This was observed in 2018 when the secretary of the Judicial Council (who also serves as a secretary of JSC) issued a letter of removal from the post to the then Chief Justice Gopal Prasad Parajuli, instead of writing to the Constitutional Council for disciplinary actions (Ghimire, 2018). In addition, the judicial selection process lacks assurance for “an inclusive judicial service with adequate representation of women and under-privileged” (Ghai & Cottrell, 2008, p. 228) groups of the society.

Capacity building of judicial staff is another key concern. The Judicial Service Training Centre, controlled by the Ministry of Justice, holds a mandate to design and run capacity building trainings for judicial and legal officers and other law

²⁷⁷ Article 154, Constitution of Nepal, 2015.

enforcement authorities. Training that makes no distinction between judicial and legal officers and civil servants further erodes judicial independence. The National Judicial Academy, a statutory body established in 2004, works to promote judicial education and build the capacity of judges and the judiciary. Resource constraints and direct influence of the Supreme Court for the execution of the mandate are, however, seriously problematic.

7.6.2 Decisional Independence

Judicial independence entails protection of judicial decision-making powers from any inappropriate and undue direct or indirect interference. Jurisdiction over the judicial matters and the decision-making powers of courts are two key facets of decisional independence, which has a complex and multidimensional impact on institutional and individual decision-making powers. It “further requires that a court’s decision-making powers and processes are not controlled” (Ananian-welsh & Williams, 2014, p. 616). Fulfillment of these standards has, however, been particularly controversial in Nepal – constitutionally and politically. The Supreme Court, as the highest authority as the interpreter of the constitution, sets legal precedents and exercises a supervisory role over the lower courts.²⁷⁸ The Supreme Court is empowered with the power of judicial review, including the review of federal and state legislation, the interpretation of the provisions of the Constitution, and check the constitutionality of the legislation and the actions of the other two branches.

The Constitution confers extensive jurisdiction to the Supreme Court and the High Courts to exercise its extraordinary jurisdiction.²⁷⁹ Commonly known as writ jurisdiction, this empowers courts to oversee capacity of the government over judicial matters. Significantly, the right to constitutional remedy²⁸⁰ – the citizen’s right to use writ jurisdiction – is directly linked to secure the fundamental rights through judicial intervention. Courts have exercised these jurisdictions to “preclude judicial determination of issues that are non-justiciable” (Ananian-welsh & Williams, 2014, p. 614) and have, thus, developed a precedent through the case-

²⁷⁸ Article 128 (3) and 133, Ibid.

²⁷⁹ Article 133 and 144, Ibid.

²⁸⁰ Article 46, Ibid.

law. While responding to the PIL cases concerning the protection and promotion of fundamental rights, the court has displayed judicial activism through constitutional interpretation. In effectively regulating and transforming its jurisdictional competence, the Supreme Court in several instances preserved its independence from the executive and the legislative. According to Justice Earth²⁸¹:

Exercise of judicial power – whether to invalidate the Royal Corruption Control Commission or taking a judicial stand against the impeachment motion to protect the dignity of the judiciary – both signal the judicial determination against the non-justiciable move of the executive and the legislative, which was an attempt to intimidate and weaken the judiciary. These instances have established a precedent and illustrated the importance of an independent and competent judiciary to check against the attack on the rule of law and public trust. These are significant achievements made by the Supreme Court which have translated constitutional values into reality. But it has not been possible in several instances due to the authoritarian regime of the rulers.

The proactiveness of the courts through its decisions on the PILs have demonstrated measurable impact on the lives of Nepali citizens, shifted a paradigm on constitutional interpretation of law and international human rights principles, and transformed the role of the judiciary. The court has used its jurisdiction at an optimum level, testing the constitutionality of the decisions made by the King and the Executive, and questioning its discretion in highly politicised cases due to frequent controversial House Dissolution cases (five times since 1990). There are examples of some individual judges who have established very positive and landmark jurisprudence, while others have failed to do so. Experience shows appointment processes, competency, corruption and the political affiliation are elements that impact judges' ability to demonstrate professional behaviour and attitudes on the bench.

Nevertheless, there are several places in the constitution that restrict the court's jurisdiction, and these provisions breach the principles of check and balance. For example, Article 103 and 133 (4) explicitly limit the jurisdiction of the Supreme Court in internal affairs of the Federal Parliament, including the question about whether the internal proceedings of legislature are regular. Similarly, the court does

²⁸¹ Note 39.

not hold any jurisdiction in cases of suspension of some of the critical fundamental rights during a declaration of emergency.²⁸² These limitations have seriously undermined judicial power and relegated the judiciary to the weakest among the three entities of government (Malagodi, 2014).

In several instances, the Supreme Court has been dragged into serious controversies, in relation to its decisions on inherently political matters such as who to appoint a Prime Minister, responding to petitions related to the dissolution of Parliament, and frequent deferral of cases of political nature. These decisions and actions have serious impacts on judicial independence. For instance, the Supreme Court has been delaying the hearing of a murder case against the Speaker Agni Prasad Sapkota for several years, while it responded and approved his appointment as a Parliamentarian within a few months despite a risk of conflict of interest that could arise when he took over the responsibilities of speaker and member of the Constitutional Council. These two instances demonstrate the Court's unwillingness to exercise its jurisdiction impartially, which is often guided by the executive and by political will. They are evidences of how executive and legislative can use the courts to achieve their purpose. These show that judiciary controlled or unduly influenced by the executive and the "parliament puts the universally accepted values of independence, impartiality and accountability in jeopardy" (Phuyal, 2014, p. 281). This has further affected public confidence because politicians are using the judiciary to serve their interest.

Although Nepal follows the common law-derived doctrine of binding precedent, courts have disregarded these principles for political reasons when making decisions. In serious cases such as a case related to the citizenship²⁸³, the Supreme Court has superseded its precedents. The Supreme Court changed its ruling thrice and each ruling contradicts the others. "The Supreme Court has been widely criticised for its inconsistent judgments, not only on constitutional issues, but also in civil and criminal cases" (Ibid, p. 274). Senior advocate Star²⁸⁴ noted:

²⁸² Article 273, Constitution of Nepal, 2015.

²⁸³ In case of *Borna Bahadur Karki v Home Ministry* (2019) the direction of the Supreme Court to the government to issue citizenship by descent to children of citizens by birth is against its own verdict.

²⁸⁴ Note 11.

You can only get a decision from the court not a justice. Lawyers and judges – those who hold responsibility to develop milestone judgements, have slewed the judicial dignity and principles. I believe that the jurisprudence established by the courts adds significant value to the principles of constitutionalism and judicial independence, but in our context, judges are destroying whatever good jurisprudence we had developed in the past.

Consequently, the executive has been largely reluctant to respect and implement the courts’ directives and orders,²⁸⁵ although compliance with the judgements of the courts has remained a mandatory constitutional obligation. Such mandates aim to protect decisional independence. Majority of the contempt of court cases processed by the judiciary in regard to the non-execution of the orders and decisions of the courts have neither contributed to effective constitutional protection, nor have they improved the willingness of the judicial system to safeguard public access to justice. Respect and execution of decisions are indispensable to preserve the rule of law and to encourage judges to exercise their decision-making power (OHCHR & IBA, 2003). Expressing its frustration on the government’s continuing attitude, the Supreme Court in *Suman Adhikari et al. v. the Office of the Prime Minister and Council of Ministers* (2015), stated:

“The continuous practice of the State organs in disregarding and violating the Court orders and directives not only undermines the rule of law, but also make joke out of justice and people’s democracy [and public trust on judiciary].²⁸⁶

7.7 Personal Independence: Judicial Impartiality and Accountability

While “[institutional] independence remains the absolute primary requirement for the proper functioning of the judiciary” (Malagodi, 2014, p. 293), personal independence (also understood as impartiality) is required to ensure judicial accountability (Shetreet, 2012; Tiede, 2006). It also requires adequate arrangements to ensure immunities in exercising judicial functions, limitation to

²⁸⁵ Out of 246 orders issued in 2019/2020, only 15 percent of them were implemented. Majority of the decisions on the public interest litigations awaiting implementation. See, Annual Report of the Supreme Court, 2020/21.

²⁸⁶ An unofficial translation of the decision by the United Nations and the International Commission of Jurists See, <https://www.decrechos.org/doc/npl3.html>.

fulfil extra-judicial roles, and most importantly, regulation of internal administration of the court. Judicial immunity is crucial to judicial accountability, relieving judges of the fear of undue influence – both internally and externally. But the Constitution is silent on provision guaranteeing immunity and privileges for any actions while fulfilling their duties. In Nepal, there are various instances of an undue influence and threats to the individual independence of judges. For example, the replacement of *Pradhan Nyayalaya Ain* 1952 by the Supreme Court Act 1962, an impeachment proposal against Chief Justice Sushila Karki for delivering a decision contrary to the preference of the political parties, and a public demonstration in the street to influence a case *sub judice* in the courts.

The Constitution²⁸⁷ restricts the Chief Justice and other Judges from engaging in non-judicial roles. This constitutional provision focuses on regulating the practice of using judges for executive or ordinary functions, and also on protecting judges from possible conflicts of interest. Conversely, the executive in consultation with the Judicial Council holds the power to engage judges in non-judicial roles such as investigation and research. In practice, however, district judges are being appointed as ‘Chief Officer’ in elections, exposing them to the political environment, and the Supreme Court has also deputed judges to non-judicial work without any approval from the Judicial Council (Luitel, 2020). For example, as required by the NJA Act, 2004, the retired judges of the Supreme Court or the sitting judges of the High Courts are being appointed as Executive Directors²⁸⁸ of the NJA for a period of four years. This requirement of the NJA Act contradicts with the constitutional provision.

While appointing judges to non-judicial functions, there is no guarantee that the appointment is compatible with their position as a judge and there are no provisions for assuring that their performance and integrity will not be compromised or impaired as a result of non-judicial functions. Senior Advocate Sun²⁸⁹ illustrated some examples of these issues:

The judiciary has been spending significant amount of judges’ time by engaging them in donor funded programs. For example, the UNDP funded Rule of Law

²⁸⁷ Article, 132, 143 and 150, Constitution of Nepal, 2015.

²⁸⁸ Article 17 (2) of the National Judicial Academy Act, 2004.

²⁸⁹ Note 41.

and Human Rights Program and ICJ funded Justice Sector Reform Program engaged judges for ‘community outreach’ events and research for the donor community which have had substantial impacts on judicial hours and their daily work in court. Various donor agencies including national NGOs are influencing the judiciary. What value these works add to the judiciary is questionable. We do not want our judiciary guided by these external interests.

It is noteworthy that Chief Justice Sushila Karki was criticised by her colleagues, lawyers and the different agencies of the executive, including Police and Attorney General, as taking an “activist role of the Supreme Court” (Ghimire, 2016, p. 1), when she designed and attended a joint event of the Supreme Court and UNDP which presented the police as collaborators in a case of sexual exploitation of women. Considering the possible influence of donors in judicial functions – including the outcome of court decisions – controlling the access, engagement approach, and influence of donor organisations on the judiciary is important.

Judicial accountability linked with corruption, judicial malpractices and misbehaviours is mentioned frequently by the participants of this study as serious issue backsliding the judicial values. Increased corruption and judicial irregularities signal the problems in functioning of the accountability mechanism. Challenging corruption and maintaining judicial ethics requires strong moral willingness, and accountability of the judges and the judicial leadership. Former Chief Justice Min Bahadur Rayamajhi in his memoir noted:

In my experience, judges are 40 percent responsible for distorting judicial functions and misleading public trust in the judiciary. 30 percent legal professionals, 10 percent judicial staff and 20 percent brokers and biased media are responsible for impairing the public perception and image of the judiciary. (Rayamajhi, 2019, p. 307)

Similarly, Dr. Ram Krishna Timalsena, Former Registrar of the Supreme Court, in his biography pointed out:

What have Chief Justices done to promote dignity of their position? Everyone claims that they have done everything. One or two good actions of the Chief Justice during their tenure can bring remarkable change in the whole judicial system. On the first day of their office, everyone says, ‘I will do everything to uplift values of the judiciary’, but on the last day of their office, they try to escape saying, ‘I couldn’t do what I wanted. System didn’t allow me to work. I didn’t

get support that I needed.’ But no one said, who actually restricted them, why and how. These kinds of irrational excuses from the leadership is stopping the growth of the judiciary. (Timalsena, 2019, p.143)

A similar conclusion was also drawn in the Report of the Committee on *Promotion of Public Trust on the Judiciary* commissioned by the Supreme Court Bar Association in 2007:

If the judges in all three tiers of the judiciary take reformatory steps, at least 60 percent of corruption and irregularities can be minimized. Chief Justice and Chief Judges should take the major responsibility to reform judiciary. (SCBAR, 2007, p.5)

The Supreme Court report (2021) also suggests that the judiciary needs revitalisation, and that the politicisation of the judicial system through the political appointment of judges must come to an end to control judicial irregularities and corruption. Moreover, the former Chief Justice of the Supreme Court in an article published in a national daily remarked that the “the judiciary is in the hands of illegitimate judges” (Shrestha, 2020, para. 1).

A significant number of participants expressed their concerns around the case allocation procedure, which they believe is not fair and transparent. The issue of ‘judge-shopping’ or ‘bench-shopping or swapping’, widely considered as an unacceptable abrogation of judicial independence, is not uncommon in Nepal. Judge Nova²⁹⁰ remarked in an interview that:

Bench shopping has become ritual in each and every level which has increased corruption. You might get surprised to hear if I tell you that judges bring proposals for this [bench swapping]. I assume that most of the judges in the High Courts and Supreme Court have deep political connections.

The controversy over the Constitutional Bench and apparent ‘conflict of interest’ of the Chief Justice became a serious risk to the rule of law in Nepal when the Chief Justice formed a Constitutional Bench to decide 30 petitions, including the one

²⁹⁰ Note 125.

where the Chief Justice himself was one of the defendants.²⁹¹ The Chief Justice decided to leave the bench, leaving the senior-most justice to lead, but while responding to a petition concerning the presence of the Chief Justice in the bench, single bench of justice Hari Prasad Phuyal observed that “the Constitutional Bench cannot function without the presence of the Chief Justice”.²⁹² This decision has further created judicial chaos rather than offering a solution. Legal critics (Bhattarai, 2021; Ghimire, 2021c; Sangroula, 2021) have commented that this overruling of the decision of Constitutional Bench by a single bench is “substantial breach of judicial discipline, impacting the credibility of judicial institution”. Advocate Meghraj Pokheral on 8 September 2021 in his Facebook status noted:

This order is a deviation from the principles of judicial standards in adjudication proceedings as a bench of lower capacity cannot issue any order against its higher stature. This is the minimum discipline and decorum to be maintained by judicial fraternity.

This unfortunate situation is a by-product of the method of preparing the case list and constituting the bench; cases strongly linked to the political interest have been purposefully assigned to a Chief Justice’s own bench, or to a judge who is loyal to the Chief Justice, or to some of the younger, less experienced judges, contributing to increase in judicial irregularities, misconduct and corruption. For example, in December 2020 and July 2021, lawyers questioned the composition²⁹³ of the Constitutional Bench formed to settle the dispute related to the dissolution of the Parliament. Constitutional expert Dr. Bipin Adhikari sees this situation of distrust as “unfortunate [insofar as it] allowed parties to choose the justices, instead of the Chief Justice exercising prudence while constituting the bench” (Ghimire, 2021a, par. 5).

²⁹¹ In June 2019 and December 2020, an advocate filed petitions demanding the quashing of the appointments of the Constitutional Bodies made after amending the Constitutional Council Act through an ordinance. Chief Justice Cholendra Shamsher Rana as one of the members of the Council was present in the meetings of the Constitutional Council. See “Chief Justice in dock for attending council meet”, <https://tkpo.st/3o2iws9>.

²⁹² *Advocate Ganesh Regmi v. Supreme Court*, 2021.

²⁹³ In December 2020, lawyers questioned the presence of Justice Hari Krishna Karki, who had served as a government Attorney General for the CPN-UML led government. In July 2021, questions about Justice Bam Kumar Shrestha were raised saying it constituted a serious conflict of interest.

After a massive protest from the Bar and judges, for the first time in the judicial history of Nepal, from 1 December 2021 the Supreme Court started case allocation²⁹⁴ based on a lottery system. Although this appears as an option to end the age-old monopoly of the Chief Justice in assigning cases to the judges, this system is less likely to deliver ‘real’ justice and establish landmark cases to contribute to the goal of judicial reform. The latter requires reform in procedural as well as in behavioural aspects – judges’ accountability and integrity, which are lacking in the context of Nepal.

There is an endemic tension between the judiciary and the other two branches of the government, particularly in relation to the adjudication and judgement execution that involve government interest. The exclusive control of the executive to nominate and appoint Chief Justice and the other judges of the Supreme Court and the High Court demoralizes the judges who are appointed based on their competency. Whether it is the decision of the government conferring a medal to five²⁹⁵ sitting judges of the Supreme Court including the Chief Justice, or the media reports regarding the Chief Justice seeking to appoint his people in the Constitutional Bodies and in the Cabinet (*Republica*, 2021, p. 1), all instances appear completely unconstitutional and unacceptable under the rule of law.

Regardless of the veracity, these allegations of collusion between the executive and the judiciary have led to interference in the state apparatus, raising a question about the impartiality and fairness of the judiciary and raising a concern about whether the judiciary can come clean in public. For example, an unprecedented crisis calling for the resignation of Chief Justice Cholendra Shamsher Rana is a serious warning to the independence of judiciary. In the seventy years of judicial history, for the first time, judges of the Supreme Court called the Chief Justice to step down, and the Bar called for his resignation for failing to maintain judicial integrity, issuing controversial verdicts and stalling even basic reforms. The ruling parties were reluctant to initiate impeachment against the Chief Justice and maintained an

²⁹⁴ Despite the consistent request of the Nepal Bar through a ‘clean sweep campaign’ (2020b) and the recommendation of the Supreme Court report (2021) to install a fully automated system to determine fairness in the daily cause list to save judicial hours and reduce case backlog, the Chief Justice did not make any moves to introduced the system.

²⁹⁵ On the occasion of Constitution Day 2021, the government decided to confer an award to the Chief Justice and other four justices who heard the House of Representatives dissolution case in January 2021.

unfathomable silence for long, even when the legal fraternity was demanding an intervention. Following the impeachment motion submitted to the Federal Parliament on 13 February 2022, the Chief Justice was suspended. The attempt of the ruling party at this stage was meaningful only if the impeachment was initiated to preserve the sanctity of the judiciary and bring the justice system back on track. However, considering past experiences, the question arises as to why the parties, who were dithering to take action against the Chief Justice, came together for the impeachment proposal.²⁹⁶

The current debacle is an example of the results of political meddling in the work of the judiciary, a systemic flaw in the appointment process and lack of ‘judicial character’ in judges. For example, manipulation of powers and monopoly in judicial work of current acting Chief Justice has started to surface in the form of appointment and allocation of cases. It is important that judicial competence and values are embedded in the judiciary at the outset, before judges and chief justices are appointed. The yearly reviews of the quality of their judgements, their conduct on and off the bench, and the discharge of their duties are crucial for their selection for the post of judge, because judges should perform based on law and in the interest of justice.

The Constitution, the Judicial Council Act and its Rules, together with the Code of Conduct of Judges constructed based on Bangalore Principles of Judicial Conduct 2002, are significant normative conditions for regulating judges and judicial staff in Nepal. In an interview to a national daily, former justice of the Supreme Court, Prakash Wasti noted:

[This evident] failure of the Judicial Council in performing its constitutional duties of selecting judges in a fair manner, and rewarding and taking action as per their performance, is largely responsible for the present mess in the judiciary.²⁹⁷

²⁹⁶ At the time of finalization of this thesis in June 2022, the proposal was pending at the parliament.

²⁹⁷ Former judge Prakash Wasti with Binod Ghimire, see, Bench-hunting sets a bad precedent for the judiciary, according to experts. See, <https://tkpo.st/3vaCAuA>.

7.8 Conclusion

Literature concerning definitions and fundamentals of judicial independence is diverse. There is, however, a common understanding that an independent and fearless judiciary is what makes a judiciary free from unwarranted interferences from all sectors. “Independence is not an end in itself, but an *instrumental value*, a means of safeguarding a fundamental value, that of the impartiality of the judge” (Storme, 2012, p. 86). All elements and dimensions are dynamically interrelated.

This chapter has highlighted the structural and regulatory requirements for judicial independence and has presented evidence of the shortcomings of the Constitution in ensuring that institutional independence is assured in Nepal. It has also revealed how this lack of institutional independence compromises the independence of individual judges and undermines public trust. Analysis of the constitution together with data from fieldwork, particularly from those who have experience of the Nepali judiciary, reveals that judicial independence is at a critical stage in Nepal, with all three tiers of court being demonstrably weaker than the other two branches of the government.

The most important issue is the role of the constitution in compromising judicial independence. The constitution seems to preserve the judicial independence, but also limits institutional, operational, decisional and individual independence, creating ample opportunities for the executive and legislative to interfere and influence. The individual independence of judges is not only weakened by the lack of adequate constitutional protection, but also tainted by the overall lack of judicial accountability and integrity. The executive, the legislative and the judiciary show lack of willingness to protect judicial independence.

Despite the strengths of the Nepali judiciary in exercising its independence through the constitutionally prescribed ‘jurisdiction’ and ‘decision making powers’, a holistic analysis reveals that institutional independence is jeopardized by the executive through the means of judicial appointment, politicization of the Judicial Council, and control by the legislative in way of threats of impeachment. Administrative and financial control by the executive have further inadvertently influenced the judiciary. Judgement delivery processes highlights the lack of accountability and integrity of judges, creating vulnerability of the judiciary.

It is concluded that keeping judicial selection and appointment processes apart from the executive and legislative branches will enable greater accountability, impartiality and independence of judges. The justice system cannot be made independent and impartial unless the existing system and procedure of appointments and disciplining are improved. The constitutional amendment only does not ensure solution to this problem unless there are changes in the mindset, culture and behaviour – abidance by the principles of separation of powers, and check and balance. Nepal still has a way to go to ensure these basic separation of powers measures in the long attempt to implement judicial reform and transform judicial culture in the system.

Chapter 8

THE JUDICIAL COUNCIL: LIMITS TO ITS INDEPENDENCE ACCOUNTABILITY AND PUBLIC TRUST

8.1 Introduction

The Constitution, in principle, provides the basis for rule of law and safeguarding systems for the advancement of judicial independence and the establishment of mechanisms to ensure accountability of the judicial system. The principle of judicial independence seeks to ensure that the judiciary is free to administer justice impartially, without fear of repercussions and favours (Akkas, 2004; Shetreet, 2012). At the core of this impartiality is the process that regulates the appointment and disciplining of judges (as discussed in the previous chapter). These explanations meaningfully “reflect attempts at strengthening the independence of the judiciary by insulating judicial career processes from external interferences” (Autheman & Elena, 2004, p. 2), strengthening the quality of the appointments, enhancing the fairness of the selection and disciplining processes, promoting diversity and inclusion in the composition of the judiciary, and building public trust and confidence in the system (Malleon, 2004).

Judicial independence itself is closely linked to the constitutional provisions on appointments, promotion and judicial disciplinary measures. These issues are major emphasis of this chapter. While the previous chapter discussed these subjects in relation to the broad provisions of the Constitution, the focus of this chapter is the Judicial Council (herein after ‘the Council’), a constitutionally created body vested with the overarching mandate of promoting and facilitating independence, impartiality and accountability of the judiciary. To achieve this goal, the Constitution of 1990 made a provision to establish the Council envisioning the Council as an autonomous and accountable body. Despite these aspirations, from the outset, the arrangement of the Council – with a majority of its membership being judicial and political representatives – foreshadowed concerns about its possible monopoly by the judiciary, whom it was meant to oversee. In fact, it appeared to have become more manifestly problematic and pernicious through

subsequent constitutions; consequently, in the last three decades, the struggle has largely remained unchanged.

The 2007 reform of the Council – with a majority of members representing the executive – reflected the gravity of political influence, with each reform recommendation of the Council impairing the accountability and neutrality requirements of judicial institutions in Nepal (Karna & Yadav, 2017). This provision, subsequently embraced by the Constitution of 2015, gives the executive extensive control in judicial affairs, thereby contradicting the principle of judicial independence and separation of powers. Instead, it has become “a source of patronage ...resulting in the politicisation of the judges” (Malagodi, 2014, p. 297) and the entire judiciary. For example, weakening the provisions on responsibility and accountability to be overseen by the Council leaves open the potential for some candidates to influence appointments based on political ideology, geographical affinity, ethnicity, or other modes of nepotism (Khanal, 2018). Indeed, many highly competent judges with more than 15 years of experience have been dismissed and replaced with less qualified and junior candidates (Khanal, 2018; Shrestha, 2018c).

The performance of the Council has been the source of much dissatisfaction from the public and from professionals, including judges, lawyers and academics. They have expressed serious concerns about the ‘vulnerability’ of the judiciary (Kunwar, 2018; Shrestha, 2018e) and about the Council not fulfilling a goal to establish independence of the judiciary (Regmi, 2009; Shrestha, 2018a, 2018e). Further, they have expressed serious doubts about its approach and desire to oversee and ensure a strongly committed and courageous judicial leadership (Khanal, 2018). The manner of its operational mandate is also subject to serious questions (NBA, 2020b; Supreme Court, 2021). Legal experts Karna and Yadav (2017) have criticized the lack of transparency in selection, promotion and disciplinary actions, and labelled the judicial appointment process as “fundamentally defective”.

Creating an institution like the Council was a promising initiative for safeguarding judicial independence, but its establishment is neither in itself a solution nor is it a guarantee; other operational mechanisms and steps are required. Significant among these are the streamlining of appointments and disciplinary procedures, and the rationalization of responsibility and accountability of the Council itself (Kunwar,

2018; Malleon, 1999). Based on the constitutional provisions and gleaned also from my interviews and interactions with both the demand and supply sides of the system, this section begins with an outline of the evolution of the Council within the historical trajectory of Nepal's transition from an authoritarian state to a constitutional monarchy and further to a federal democratic republic. This chapter analyses the status of the Council in the current Constitution, which is controlled by the executive through three primary institutional aspects: i) power of the Council; ii) composition; and iii) secretariat.

The current composition, scope of its functions and prerogatives have generated confusion about the status of the Council, notably whether it is a *governing* body with its own constitutional authority or whether it is an *advisory* body to government (executive and legislative), with whom final authority rests. This chapter critically analyses whether the 'status' of the Council is best described and understood as an advisory body or a governing body, and argues that the objective conditions of the institutional arrangements of the Council (particularly its composition and power) do not inspire confidence in its capacity to make independent selections. This lack of clarity in the constitution about whether it is an advisory or governing body shapes its work and limits its effectiveness. It is "constantly struggling to maintain a balance between impartiality and accountability" (Kunwar, 2018, p. 1), and settling this is a major locus for institutional reform.

Moreover, considering the important role of the Council, this chapter also considers whether the model under which the Council has been established is compromising the principles and values of the constitution – particularly, the separation of powers and the rule of law – due to its severe lack of autonomy. This chapter aims to show that institutional autonomy and public accountability have been effectively excluded from institutional safeguards and argues that this system of insufficient institutional safeguards has become an additional source of interference, failing to maintain public trust in judicial appointments and, hence, the judiciary. This chapter attempts to show how judicial reform in Nepal, which would lead to greater public trust in the independence of judiciary and the overall accountability of the justice system, has not yet occurred genuinely.

8.2 Evolution of the Judicial Council in Nepal

The system of judicial appointment by the executive government is widely employed all over the world (Akkas, 2004; Garoupa & Ginsburg, 2009; Hammergren, 2002), but exclusive power of the executive always risks the misuse of the power (Malleon, 1999). In many international jurisdictions, the establishment of independent body to oversee these matters seeks to minimise such risks. Because as argued by Bunjevac (2017), “entrusting certain framework aspects of court governance to independent judicial councils” (p. 821) aims to detach executive influence and to provide independent oversight in matters of judicial administration (Garoupa & Ginsburg, 2009). The concept of an independent, competent and fair body was taken up in Nepal, as it strove toward insulating judicial selection and appointment from executive and partisan politics.

In addition to establish a culture of accountability and impartiality, an autonomous Judicial Council covers a range of other issues, including ensuring fairness in access to justice for all (Malleon, 2004). The underlying justification for the formation of the Judicial Councils was to insulate the judicial system from domination by the executive, legislative or political parties. It also endeavoured to limit excessive control of the Supreme Court over lower court judges, and to improve the competency of judges by “transferring the managerial function to [an independent] body” (Autheman & Elena, 2004, p. 2).

The restructuring of the judicial system in Nepal’s post-democratic period was a key outcome of the judicial reform initiatives. It represented a significant and historic shift, stipulating a set of independent mechanisms to maintain independence and accountability. The formation of the judicial self-government body – the Judicial Council – “small in size, with judicial and non-judicial members” (Phuyal, 2009, p. 187) along with the specific responsibility to appoint, promote and to maintain discipline of judges in the court system – was considered a benchmark in South Asia to ensuring judicial independence and accountability (Shakya, 2007). However, it excluded the appointment of the Chief Justice of the Supreme Court, who is appointed on the recommendation of the Constitutional Council. This insertion of the Constitutional Council has made both the Judicial Council and the judiciary vulnerable to the executive influence.

Indeed, “characterized as international best practice to ensure judicial independence and accountability” (Pimentel, 2010, p. 295), the Constitution established the Council as a constitutional body and described its composition²⁹⁸ and responsibilities, and the legal framework that further guided the Council to fulfil its mandate (Kunwar, 2018) which was a substantial achievement (Phuyal, 2009). The majority of the research participants believe in the practical effectiveness of the Council and demonstrable independence of the institution as core elements of a well-functioning judicial oversight body. According to them, constitutional and legal provisions are the major hurdles to sufficiently safeguard institutional integrity; rather, conduct and impartiality of the body contribute significantly to build public trust.

Enactment of the Judicial Council Act 1991, together with an accompanying regulation that defined the grounds for judicial misconduct and the formation of a secretariat to be administered by a secretary, was considered, especially by the legal fraternity, as a step towards meaningful reform. The purpose of granting the judiciary ‘self-governing’ capacity through the implementation of an internal judicial governance structure was to insulate the functions of judicial appointment, promotion and discipline from external interferences, while still guaranteeing accountability. One of the members of the 1990 Constitution Drafting Committee, Senior Advocate Mukunda Regmi (Regmi, 1997) said:

Judicial Council is an outcome of the visionary speculation of the Chairperson [the then Chief Justice Bishownath Upadhyaya] to recommend or advise appointment, transfer, disciplinary action, and dismissal of judges and other administrative matters of the judiciary. I believe, if this body remains impartial and committed to improve the public trust in the judiciary, it will establish fair and competent judicial system to fulfil the notion of the rule of law. Judiciary must be free from groupism. Success of this institution depends on the competency, honesty, impartiality and integrity of all the members. (p. 10)

Although this reform was promoted as a means to achieve the goals of strengthening both the institutional and individual independence of the judicial system and promoting public trust, the Council has been severely criticized by the

²⁹⁸ Note 172.

legal fraternity for not fulfilling its constitutionally prescribed mandate efficiently. Critics mention that the Council has been failing in its duty to make recommendations to appoint experienced, efficient, impartial, and distinguished professionals to lead the judiciary (Adhikari & Bhandari, 1999; Shakya, 2007). Given the manner in which it was mandated to operate, Senior Advocate Mukunda Regmi – the former member of the Council who served the Council for some time before resigning from the post due to unsatisfactory working modalities, said:

I did not see the Judicial Council fulfilling its responsibilities properly as specified by the Constitution and the Judicial Council Act. It has even failed to maintain the record of the persons eligible for the position for different levels of the courts. (Regmi, 1997, p. 10)

Fundamental problems with the Council are always evident and this is related to the problem of ‘judges judging judges’, which is a serious conundrum in Nepal. Furthermore, the work of the Council was criticised for level of lack of transparency due to its failure to sufficiently engage other sectors, such as the legal professionals. As senior advocate Sun²⁹⁹ shared,

One of the major weaknesses of the Judicial Council [under the Constitution of 1990] was being judiciary dominated and the priority of the Judicial Council was much focused on the comforts of the judges themselves and the judiciary, rather than the needs and aspirations of the people.

Advocate Kumar Regmi, in his presentation at a conference on Constitution-making in Nepal, stated, “Had the Judicial Council acted according to the constitutional and legal mandates, Judiciary would not have come under severe public criticism” (Regmi, 2009, p. 8).

While reviewing the experience of the Judicial Council in Nepal, Phuyal (2009) identified that “rules alone, without effective, consistent and sustained implementation measures, are unlikely to achieve significant improvements in ethics, integrity and accountability” (p. 187). Legal scholars (Regmi, 2009; Shakya, 2007) have pointed to two major problems in relation to the independence of the Council:

²⁹⁹ Note 41.

- (i) The Council had disregarded constitutional provisions for appointing an adequate number of judges for the Appellate Court and Supreme Court from outside the judicial service. Although the Coordination Committee³⁰⁰ was formed to select candidates from the judicial service, the Bar and the Faculty of Law (Nepal Law Campus), the Coordination Committee was not given any role in the selection of judges for promotional appointment purposes.
- (ii) The Judicial Council Act granted power to the Council to form an Inquiry Commission³⁰¹ to investigate allegations against judges, but it was hesitant to use disciplinary measures effectively against the judges.

Growing discontent from the advocates and an increased recognition from the wider legal community that the accountability of judges cannot be established in isolation (which must also be the subject of accountability processes), led to a modification of the composition of the Council.

The Interim Constitution of 2007 retained the provision of the Council while bringing significant changes to its composition³⁰² to include other stakeholders in leading positions. This allowed for the substitution of a judicial member with a non-judicial one – a representative of the Bar. It also enabled the reconstitution of the membership with ‘substantial executive representation’ – three of five members representing the executive. Arguably, there was a semblance of an attempt to ensure that the Council was independent. The Constitution of Nepal 2015 retained this provision; however, there was a politically motivated specific interest against an independent judiciary. The re-structuring of the composition of the Council in the Constitution of 2007 and 2015 was a political effort to curb judicial independence (Kunwar, 2018), invoking the lack of transparency, accountability and integrity, and the continuation of such a practice has obstructed the rule of law and justice system.

³⁰⁰ Section 18, Judicial Council (procedure) Rule, 1999.

³⁰¹ Section 6, Judicial Council Act, 1991.

³⁰² Note 177.

8.3 The Judicial Council in the Present Constitution: Establishment and Composition

The Constitution of 2015 establishes the Council and provides the framework for judicial appointments and disciplining with further operational details in legislation and regulations. The constitutional arrangement outlining the composition, mandates and powers of the Council is important to exercise decisional and jurisdictional independence (Colbran, 2003; Malleon, 2004). Formation of the Council in countries like Nepal, where the democratic exercise of powers remains inadequate and the threat of executive interference is high, has been perceived “as a potential progress and solution” (Selejan-Gutan, 2018, p. 1721); however, it has generated complications and threats to the system in return. The independence of the Council is controlled by the executive through three institutional aspects: i) power of the Council; ii) composition and iii) secretariat.

8.3.1 Power of the Council: Recommending Body or Appointing Body

The creation of the Council emphasizes its significance as a custodian of judicial independence in Nepal. Principally, this protection grants the “legitimacy of constitutional recognition and may help insulate it from the executive, legislative or judiciary” (Autheman & Elena, 2004, p. 7) within the legal and judicial framework, reduces dependency on interest of the other institutions, and strengthens the authenticity of the Council .

Article 153 (1) of the Constitution of Nepal, 2015 prescribes for the establishment of the Judicial Council, but it does not clearly articulate how much authority this body has to take. This article clearly mentions that the functional objective of the Council is “to make recommendations and give advice” in matters related to the appointment, promotion, transfer, removal and disciplinary actions, and other issues concerning administration of the judiciary. Thus, according to the provision of the Constitution, the Council is an independent recommending or advisory body, not an appointing or governing body. This reflects the weakest formulation (recommendation and advice): that the executive is not bound by the views of the Council and can presumably be disregarded if not considered on moral grounds

(Pimentel, 2010). A stronger approach would have been one that ‘orders’ the executive to follow on the decision of the Council.

Similarly, the article also prescribes the Council to recommend or offer advice on other issues related to judicial administration. It reflects that the Constitution itself “is not entirely clear what role the Judicial Council may play in the process” (Pimentel, 2010, p. 283) of judicial administration. This vaguely structured text can be easily manipulated politically and judicially. However, it constitutes grounds for the judiciary to make significant use of the provision to promote participation of the Council in its strengthening, and grant it some degree of responsibility in institutional planning as well as defining and supervising the implementation of judicial policies. The participants of this study view that the Council could be entrusted with a substantial responsibility in managing human and financial resources, including increasing judicial capacity and public awareness on access to judicial processes and system.

Likewise, according to this article, the Council ‘may be consulted’ by the government while assigning any other tasks such as commissioning an inquiry commission or investigation and research in legal and judicial issues.³⁰³ The provision does not call for ‘recommendation’ or to seek ‘advice’ from the Council; the use of the word ‘consultation’ does not create any legal obligation, and can be misused and exploited against the notion and concept of judicial independence.

This recommending body, presumably, is an entity with an insufficient institutional independence from the government to make a merit-based selection and ensure decisional independence to restrict the executive from nullifying the decision of the Council or making political decisions. Indeed, its consistency with the purpose of the constitutional provision is questionable; it reflects the constitutional dilemma on delegating authority to the Council (Kunwar, 2018). This ambiguous constitutional provision appears to preserve the final authority for judicial appointment, promotion, transfer and removal on the Chairperson – the Chief Justice of the Supreme Court – “who may receive advice, recommendations, and even decisions of the Judicial Council, but ultimately makes the [decisions on] the appointment or removal personally” (Pimentel, 2010, p. 301) and holds absolute

³⁰³ Article 143 and Article 150, Constitution of Nepal, 2015.

authority to make decisions. The centralised power vested in the Constitution – particularly, in the Chief Justice – does not empower or create accountability for the entire body; it is particularly contentious and problematic, and there are several instances of manipulation of this power “as a governing body, [and] not merely an advisory [body]” (Pimentel, 2010, p. 298). This is a serious constitutional error.

According to Justice Nova,³⁰⁴ this is a problematic constitutional safeguard. He further noted:

The structure and mandates of the Council are protected by the constitution; it means all other stakeholders including the government, judiciary, and other actors are required to protect these mandates. However, the issue that retained government’s power through its majority of members, is itself interesting which reflects the status of the Council as a ‘political governing body’.

8.3.2 Composition of the Council

The membership of the Council represents a combination of judicial and non-judicial actors, indicating a combination of legal and political views. According to article 153 (1), the Council comprises of five members: the Chief Justice; the Federal Minister of Justice; the senior-most Judge of the Supreme Court; a legal expert recommended by the Prime Minister and nominated by the President; and a senior advocate or an advocate recommended by the Nepal Bar Association and appointed by the President.

It is noteworthy that in 1990, when the Constitution was drafted in the leadership of the then-Chief Justice of the Supreme Court, the Council was structured with a majority of judicial members (three judicial and two non-judicial members). But in 2015, the Constitution was drafted by the political leadership, which included more politically influenced actors in the Council. Thus, majority of Council members are now politically influenced actors (three non-judicial and two judicial members). Although this provision respected the demand of the legal community to include stakeholders, the composition provides significant control over judicial governance because out of five members, four members including the Chairperson are

³⁰⁴ Note 125.

appointed by the executive and fifth member is nominated by the Bar, who is in turn appointed by the executive.

Constitutionally, the suggestion or opinion of the Council is considered an executive prerogative towards the judiciary with an aim to protect its freedom and impartiality from political pressure (Kunwar, 2018). This gives exceptional power to the executive to influence the judiciary, while offering poor safeguards for judicial independence. The selection process of the members based on objectivity, predictability and transparency can possibly avoid politicization and unnecessary infringements on the autonomy of the Council (Autheman & Elena, 2004). Independent functioning of the Council can be assured through a broader, diversified and inclusive membership, and withdrawal/ safeguarding it from the influence of the executive branch and political entities. There has not been any attempt at making gender and ethnic inclusion in the composition, except for a female Chief Justice and Law Minister. Thus, sharing the power to appoint members among several sectors and segments of the society can build check and balance in the system. Inclusion of diverse professions and groups of the society including gender, caste and ethnicity, legitimizes the trustworthiness of the body.

The scholarly arguments (Chapagai & Karna, 2020; Khanal, 2018; Shrestha, 2018d) and also my data from the field point out that from the beginning, the Council was under the influence of patronage, favouritism and nepotism. Orchid,³⁰⁵ a lawyer in the Kaski district, commented:

It is a widely known fact that people, whose ability and integrity have been questioned publicly, are often being appointed in the Judicial Council. What do we understand from this? It is clear as crystal that partisan politics is hollowing the entire system.

The Council has become more controversial as it is charged with being politically guided and failing to respond to enduring public demands for greater judicial independence and impartiality. For example, the appointment of five judges for the Supreme Court and 18 judges for High Courts in April 2019 was criticised by the legal fraternity as “a ‘horse-trading’ among the ruling Nepal Communist Party, the

³⁰⁵ Note 70.

opposition Nepali Congress and the Chief Justice”³⁰⁶. The members of the legal fraternity and general public I interviewed remarked that the existing structure of the Council allows politicians to easily influence decision-making, and suggested a need to revamp it before it jeopardised the judiciary. In an interview with national daily, the constitutional lawyer Dr. Chandra Kanta Gyawali remarked: “We cannot expect independent candidates presiding over court proceedings when the Judicial Council is so politically dominated.”³⁰⁷ One of my interviewees, Justice Star³⁰⁸ pointed:

We need to have a clear consensus whether to reform existing structure or introduce new modality. We need to have definite plan that overcomes this ongoing situation of chaos. Actually, we can learn largely from the models applied in other jurisdictions.

Similarly, Justice Earth³⁰⁹ remarked:

The political responsibility of the government is to ensure effectiveness of the system and provide the judiciary’s democratic legitimacy and accountability, but the risks government poses in politicizing the Judicial Council and destroying judicial independence, cannot be underestimated.

Conversely, Professor Purnaman Shakya (2017) defines this new arrangement as an opportunity to play “a role to check and balance the decision making process and not to dictate them as before” (p. 17). District Judge Nebula³¹⁰ also expressed similar views:

The reasoning behind the inclusion of majority of non-judicial members in the Judicial council represents the objective to promote greater accountability, competence and, most importantly, depoliticization of judicial governance. This may also address the wider public concern about judicial members potentially lacking adequate community perspective.

³⁰⁶ Tikaram Pradhan, 2019, “Legal and constitutional experts find fault with Judicial Council’s structure”, *Kathmandu Post*, 10 April 2019, Para. 4. See, <https://kathmandupost.com/national/2019/04/10/legal-and-constitutional-experts-find-fault-with-judicial-councils-structure>.

³⁰⁷ Para. 2, *Ibid.*

³⁰⁸ Note 11.

³⁰⁹ Note 39.

³¹⁰ Note 139.

However, neither the Constitution nor the legal framework is clear in specifying the power these members can exercise to strengthening judicial self-governance including appointing and disciplining judges. The Council has been embroiled in controversy for appointing judges with political affiliations. Advocate Venus³¹¹ pointed out:

Under current Constitution, the politicization of judicial appointments remains just as possible as during the Interim Constitution period. We have not seen any decision that has not landed in controversy. The appointment process has crossed all the limits of judicial values. We have been seeing judges doing more politics than judgement. The media reports about judges visiting political parties' office, which is just an example.

Justice Pluto,³¹² expressed similar views:

Political parties want to keep control on judges; they need to ensure that they have their representative in the judiciary. In order for the judiciary to be independent, it requires independent judges, not the judges who want to take the blessings of politicians after their appointments. So, the composition of the Council must be restructured to ensure its absolute autonomy.

In order to serve the principal purpose, “the council itself must be removed from the executive’s sphere of influence and empowered to act on its own” (Pimentel, 2010, p. 297). The majority of my respondents also believed that it is crucial to have the majority of judges as members of the Council so as to maximize judicial independence and minimize political interference. Justice Mercury³¹³ puts significant emphasis on making a clear distinction between “nominated to accomplish a task independently and appointed to work under the influence of a people or entity”. According to him,

Executive representation in the appointment of judges always has vested interest. It is their interest to protect their action against the law and the constitution. We have mechanism that checks the intrusion among the government’s branches, and to guarantee that none of the branch should have exceeding power. Therefore, executive representation in the Council is meaningless.

³¹¹ Note 90.

³¹² Note 52.

³¹³ Note 39.

One of the main goals for creating the Council was to “insulate the judiciary – especially the appointment process – from external political pressure” (Autheman & Elena, 2004, p. 8). In order to realise this goal, emerging international consensus requires “an independent body”³¹⁴ comprised of “substantial judicial representation”³¹⁵. Similarly, the Montreal Declaration requires an adequate consultation with the members of the judiciary, or with a body in which members of the judiciary and the legal profession participate.”³¹⁶ UN former Special Rapporteur on the Independence of Judges and Lawyers, suggests “a genuinely plural composition” in the Judicial Council which includes law makers, legal profession, jurists, law scholars and other stakeholders in a balanced way. According to the Special Rapporteur, Leandro Despouy,

If the body is composed primarily of political representatives, there is always a risk that these “independent bodies” might become merely formal or legal rubber-stamping organs behind which the Government exerts its influence indirectly.³¹⁷

8.3.3 Secretariat

Institutional independence of the Council has been further weakened by its administrative bureaucracy – the Secretariat. The Secretariat headed by the full-time secretary and other staff, was established by the first meeting held in December 1990. Its secretary is the Gazetted special class judicial service officer who works as an administrative chief for the secretariat and is appointed by the decision of the Minister of Council on the recommendation of the JSC.³¹⁸ This entity was created to facilitate the function of the Council, but failed to meticulously separate it from the executive. Although the secretary and the other officers of the Council are responsible to perform duties and hold power as mentioned in the Judicial Council Act,³¹⁹ they are appointed from amongst the staff of the Public Service Commission (PSC) by the Prime Minister. The secretary

³¹⁴ Agenda Item 14(c), Bangalore Principles, 1982.

³¹⁵ Article 9 and 11, Universal Charter of the Judge, 1999.

³¹⁶ Art 2.14(b), Montreal Declaration, 1983.

³¹⁷ Para. 28, Report of the Special Rapporteur on the Independence of Judges and Lawyers, UN Doc. A/HRC/11/41 (2009).

³¹⁸ Article 154, Constitution of Nepal, 2015.

³¹⁹ Section 36, Judicial Council Act, 2016.

performs the role for both the Council and the JSC, who in turn belongs to the PSC. Other staff members of the Council act as per the secretary's direction, control and supervision as required.

The actual functioning of the Secretariat does not contribute towards the independence of the Council; rather, it makes it vulnerable to executive influence. The secretary is a permanent staff of the JSC and serves the Council for short-term period only. While serving at the Council, s/he performs the duties in balanced approach. It poses a serious risk on accountability of the secretary. Technical staff have responsibilities to perform as required by the constitution and legislation, but the divided responsibilities of the secretary and their proximity to the Prime Minister's appointed civil servant is an inherent weakness. This institutional arrangement gives wide executive power that promotes dependency, and has raised further questions about the practical and perceived autonomy of the Council. Considering the existing constitutional ambiguity and inadequate safeguards to the Council, Law Professor Khanal remarked:

The idea on which the system is working is faulty, self-centric, and lusty. It has very less dedication to the prestige of the institution and entirely guided by the need to serve self-interest. (2018, p. 56)

8.4 Duties and Responsibilities of the Judicial Council

The Constitution delegates specific roles and responsibilities, and the Judicial Council Act and its Regulation further enables the Council to perform its function as illustrated in the following sections.

8.4.1 Selection, Appointment, Promotion and Removal of Judges

The Council has a significant responsibility to oversee selection and appointment of judges. The Chief Justice is authorised to appoint judges for all the three level of the courts on the recommendation of the Council. The current Constitution has added an additional responsibility to recommend judges to the Constitutional Bench.

The Council plays an important role in administrating examinations and interviews to appropriately screen candidates for judges' selection. Legal provisions require

judicial appointment to be based on seniority, experience, knowledge of subject matter, efficiency, honesty, impartiality, professional and moral conduct, goodwill earned in public life, and contributions made to the sector of law and justice.³²⁰ However, the work of the Council is dubious. Adhikari and Bhandari (1997) argue that

Judicial appointment must be made strictly on merit basis after the independent views of the judiciary and the legal profession are taken into consideration. There is no reason to continue with patently anachronistic method of appointment. (p. 153)

The appointment process is distinct from the selection process; nevertheless, the latter must comply with the requirements of judicial independence. Likewise, the process of promotion and transfer also should comply with the existing standards. However, the senior judges of the High Courts are not being promoted on time due to the biasness of the Council and the Chief Justice (Khanal, 2018). According to Justice Mercury³²¹, the trend is against the established criteria and legal requirements:

The Council, in many instances, has recommended ineligible candidates. Many judicial staff are using their position of Supreme Court Registrar and Chief Registrar, Secretary of the Judicial Council and Attorney General as a stair to get appointed for Supreme Court Judge. Such practices are against the principles of independence of judiciary.

This practice has undermined the criteria set by the law to recommend judges based on seniority and has also demoralised senior and honest people serving the judiciary. A retired member of the Council in an interview³²² revealed that the Parliamentary Hearing Committee alters the names recommended by the Council based on seniority. On the other hand, based on a recommendation of the Council, the Chief Justice can transfer³²³ judges from one court to another, which indicates an extensive role of the former in making decisions related to judges' transfer.

³²⁰ Section 5 (b), Judicial Council Act, 2016.

³²¹ Note 129.

³²² Upendra Kesari Neupane, 2014, "Gradual Judicial Reforms Necessary", *New Spotlight Magazine*, 7 November 2014, p. 6.

³²³ Article 143 (2) and 150 (2), Constitution of Nepal, 2015.

The Chairperson of the Council is required to call meetings and update its agenda at least 48 hours before commencement. However, due to the failure of the Council to hold a meeting for three years, the positions of 10 permanent justices remained vacant in Supreme Court in 2014. This left only five serving justices including the Chief Justice to work in the Supreme Court, resulting in a massive backlog of 17,000 cases (Dahal, 2014). Five temporary³²⁴ judges of the Supreme Court who were endorsed twice by the Parliamentary hearing ended their terms because of the reluctance of the Council to make decisions (Kunwar, 2018). That time, the number of vacant judge positions exceeded the number of judges working in the Supreme Court. Expressing his frustration about the role of the Council, Justice Star³²⁵ said:

The reluctance of the Chief Justice to promote the justices who had been in their position for five years, distinguished themselves with some landmark rulings and contributed noticeably to reform the judiciary, not only impacted the work of the Supreme Court, but also forced one of the judges to commit suicide.

The Council, being a crucial entity to ensure the judicial performance, is always expected to act responsibly while making appointments. During constitution drafting process, the effective role of the Council was expected when ‘an independent judiciary’ was one of the most controversial issue, struggling to build consensus among political parties. However, the silence of the Council was harshly condemned, publicly and politically, questioning its legitimacy at that critical stage.

The role of the Council was severely criticised when on 12 December 2015, citing the new Constitution, it terminated the tenure of 26 ad-hoc judges serving in various Appellate Courts, and appointed the District Court judges as permanent judges (who were then serving as ‘additional judges’) even before the promulgation of the new Constitution (INSEC, 2016). The new Constitution³²⁶ neither mentions the mandatory retirement of Appellate Court judges after refashioning the Appellate Court into the High Courts, nor does it restrict the Council from appointing them as permanent judges for the High Courts. Instead of making the judicial transition (shift from Appellate Court to High Court) smoother, this action of the Council

³²⁴ The Interim Constitution, 2007 allows the apex court to appoint temporary judges based on necessity.

³²⁵ Note 11.

³²⁶ Article 300(5), Constitution of Nepal, 2015.

created more controversy (Bhandari, 2017), which reflects a clear negligence (Shrestha, 2018a) and incompetence in its performance.

There have been a series of anomalous appointments and removals of members of the Council and of judges, which continue to undermine confidence in the Council. One of these includes the appointment of 80 judges for the High Court at midnight at the residence of Chief Justice Sushila Karki, made in the absence of two members (a Supreme Court Senior Judge and the member of the Bar, who were not earlier informed of the Council's meeting) (Dahal, 2017). At this meeting, however, a member of opposition party was present, which is assumed to be on invitation.

The Bar and public prosecutors expressed disagreement with the judicial nomination process and boycotted the Supreme Court's benches unless their grievance was discussed between the Council, the Office of Attorney General (Ghimire, 2017b) and the Bar Association. Referring to this act of boycotting a harmful practice against the rule of law, advocate Sun³²⁷ commented:

Such unexpected response of the Bar and public prosecutors is harmful to the decorum of the judiciary. Such standoff between the Bar and the bench has weakened the performance of the Council and the independence of the judiciary for short-term gains.

In addition to recommending the appointment of judges for the various courts, Article 137 of the Constitution (2015) instructs the Council to recommend judges for the Constitutional Bench.³²⁸ The Chairperson of the Council, however, initially demonstrated lack of will to do so. In a petition³²⁹ filed in the Supreme Court seeking a directive to the Council to form the Bench, the same Chairperson who had been ready to call a meeting of the Council at midnight responded, "Formation of Constitutional Bench requires an appropriate time" (INSEC, 2017, p. 42); but the appropriate time never came, until the full court of the Supreme Court issued an order to the Council in March 2017 to constitute the Bench. When the directive was implemented on 27 April 2017, approximately 250 cases requiring constitutional interpretation were pending at the Supreme Court (*The Kathmandu*

³²⁷ Note 41.

³²⁸ The Chief Justice holds power to constitute a Constitutional Bench chaired by the Chief Justice and other four judges, as recommended by the Council.

³²⁹ *Madhav Kumar Basnet v. Judicial Council and others*, 6 March 2017.

Post, 2017, p. 1). The principle of speedy justice was overlooked, adding more pressure to an already overwhelmed Supreme Court.

Now the selection of the judges for the Bench has become a contentious issue due to the highly political nature of the cases coming under the jurisdiction of the Bench, and the Chief Justice's selective approach to choose judges for it. The decision³³⁰ of the Supreme Court expanded the roster of the Bench from five to 14 members, which gave leeway to the Chair to pick justices of his 'liking', as the legal provisions do not say explicitly whether the Chair needs to pick justices on the basis of seniority or on other criteria. Moreover, the role of the Council has been criticised by the Supreme Court report (2021), especially due to the undue influence of the politically powerful figures, which have rendered the formation of the bench an injudicious and ludicrous exercise.

The leadership of the Council is responsible for ensuring that the Council maintains its integrity and remains free from controversy. Senior Advocate Venus³³¹ relayed to me:

Chairperson of the Council has only one responsibility – strengthening the people's faith in the judicial system through fair appointment. As a leader of the judiciary, prudent moves targeted towards fulfilling responsibility assigned by the constitution and laws can bring long-term impact on the judicial process. The Chief Justice could have easily avoided 'self-created situation' if he had intended to do so.

8.4.2 Disciplinary Actions

The Constitution empowers the Council to proceed with disciplinary action against the judges for misconducts and failing to discharge their duties. The mechanism was created to separate disciplinary proceedings from the external interference as well as internal hierarchical interference (Autheman & Elena, 2004).

The most serious disciplinary action according to the Constitution – article 142 section 1(c) for High Court judges and article 149 section 6 (c) for District Court judges – is termination of judges by the Chief Justice; however, considering the

³³⁰ Ibid.

³³¹ Note 90.

Council's final authority to make decision, disciplinary action can entirely depend on the Council; this appears vague and manipulative. The use of the phrase 'cease to hold office' describes the 'decision' of the Council, rather than just an 'advice' or 'recommendation', as stipulated in article 153. This reflects an ambiguity and inconsistency between constitutional provisions, increasing the vulnerability of the system. This confusing role of the Chief Justice and the Council creates potential "conflict and a corresponding crisis, if and when the Chief Justice chooses to disregard the 'recommendations' or 'decisions'"(Pimentel, 2010, p. 283). This provision reflects a weak assurance in regard to disciplining the judges.

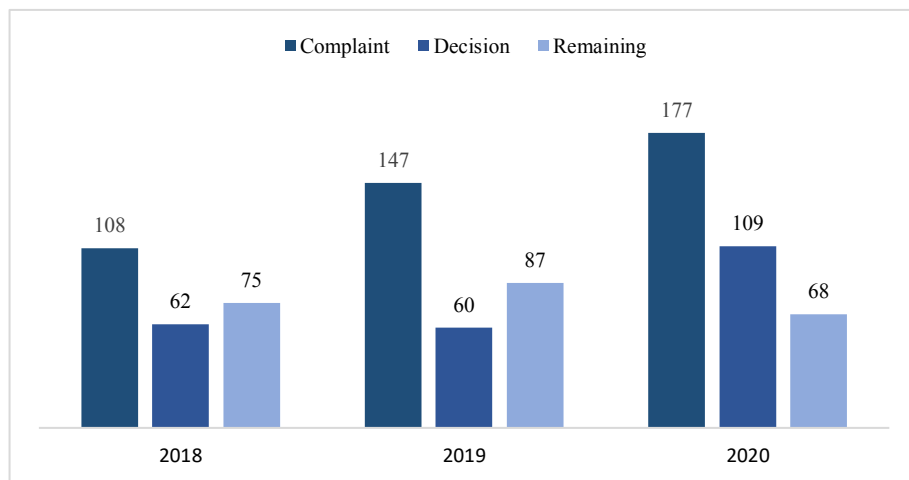
Despite this lack of textual support, in some situations the Council has asserted the power to admonish a judge, but the actions have been often selective. The actions taken against the judges lack predictability in inquiry procedures (Phuyal, 2009) and the decisions of the Council lack consistency. For example, out of seven judges of the High Court who delivered erroneous orders in the 33-kilo gold smuggling case in 2019, three faced serious punitive action that led to termination of their jobs; the Council did not find any evidence of wrongdoing against two, and decided to keep the case pending against another two judges as they retired while the investigation was on (Kamat, 2019). The decisions against the judges are considered as highly discretionary.

Even the judges who I interviewed questioned the motives and trustworthiness of the Council. For instance, some of them accused it of pushing incompetent and disreputable figures for vacant positions in the Supreme Court, and also of not taking any disciplinary action against several judges for their misconduct. Even the Chief Justice, who was known for his integrity and fair judgement, overlooked the Constitution and law while appointing 11 judges for the Supreme Court in 2016. The Council has positioned itself as defenceless in the face of such controversy and questioning from its legal fraternity.

A number of factors have raised questions on the effective execution of the mandate and jurisdiction of the Council: lengthy investigations procedures; actions taken against judges based on professional competence, but lacking predictability in inquiry procedures; inconsistency in decision making, frequent changes in the leadership; absence of an effective inquiry system due to the lack of power to hire

permanent staff, consultants or advisors; and lack of jurisdiction to look into the misappropriation of judicial funds (Phuyal, 2009). For instance, according to the Annual Report of the Council (2021), out of 109 complaints received against the judges, four District Court judges were issued warnings and one High Court judge was removed from the position. Data from the past three years shows that on average the Council has been able to make decisions on about 50 percent of the complaints received.

Figure 8.1: Status of Disciplinary Complaint and Actions (2018-2020)



Legal scholars (Chapagai & Karna, 2020; Karna & Yadav, 2017; Kunwar, 2018; Shakya, 2017) have often criticized the lack of transparency on selection and disciplinary actions as a threat to the Council itself and to the Judiciary. In relation to the transparency of disciplinary actions, investigation and hearings must be conducted confidentially. If one is accused of engaging in inappropriate activities, they should be given rational opportunity or choice to defend themselves before any disciplinary action is taken; the information should be circulated to the sitting judges, judicial staffs and the legal community. However, the Council has not realized its potential fully due to the prevalence of bias in its actions (Shrestha, 2018e). Advocate Aster³³² opines, “Except the documents that are required to be kept confidential as per the Judicial Council Act and the investigation procedures, the judicial council should ensure transparency by making all information available for the public.”

³³² Note 59.

Advocate Sunflower³³³ also noted similar views:

Clear illustration of a criteria for professional evaluation of judges' misconduct, making rule for disciplinary hearing and opening such hearing to public, unless the accused judge requests that they be closed, can potentially increase transparency and accountability.

Three³³⁴ reports commissioned in recent times to strengthen judicial performance mention the judicial failure to take action against those involved in corruption and irregularities. In April 2019, the press release of the Conference of Judges stated, "We are reviewing the existing set-up of the Judicial Council and developing a mechanism under the Chief Justice. The mechanism should have justices in majority"³³⁵. The proposal for 'judges to judge judges' cannot ensure fairness and impartiality in the selection and disciplining process for two main reasons:

- (i) The Council led by the Chief Justice, and the present practice does not envisage a review of the conduct and accountability of the Chief Justice; and
- (ii) The Council cannot be considered impartial to perform all processes involved in disciplinary actions – take complaints, conduct investigations, hear the case and make decisions.

The Supreme Court report (2021) also considers that "the Judicial Council cannot be assigned for both responsibilities to nominate a candidate for the appointment and take disciplinary measures" (p. 157-158). Instead, a separate judicial disciplinary committee could effectively handle disciplinary actions.

The constitutional confusion about the scope and the duties (recommending or appointing), together with its powers led to a discouraging and controversial performance. Overall, decisions of the Council have drawn more controversy than public satisfaction. Most of the time, not all five positions of the Council are filled,

³³³ Note 75.

³³⁴ The Supreme Court didn't accept the first report prepared by Justices Hari Aryal, Prakash Osti and late Bharat Raj Upreti in 2008/9. The second report, commissioned in coordination of Justice Ram Prasad Shrestha in 2010, was posted in the Supreme Court website, but later removed. The third and most recent one, prepared in July 2021 under the leadership of Justice Hari Krishna Karki is yet to be officially published.

³³⁵ Note 306.

which leaves the legitimacy of its recommendations open to question; the individual responsibility of each Council member for this ongoing controversy is an important consideration. Although the law provides for the Council to make decisions anonymously, decisions made in the absence of any of the members of the Council seem to be at odds with the legal and constitutional objectives of the Council.

8.5 Accountability, Transparency and Public Trust

While the autonomy of an independent council is important, accountability and transparency are core preconditions for the legitimacy of all state institutions. The issue of the accountability and transparency of the independent council arises because of their autonomy, which requires an answer to the question: “Who guards the guardian?” Garoupa and Ginsburg (2009, p.131). Literatures (Garoupa & Ginsburg, 2009; L. Hammergren, 2002; Malleson, 2004) claim both autonomy and accountability are prerequisites, and are desirable goals of such institutions. Critics argue that questioning accountability is important, but also express strong doubt on the excessive political control that the Council may suffer. There is need to oversee the Council to guard corruption and biasness, and to increase transparency and accountability for encouraging public participation, which will in turn contribute to increase public trust in the judicial system.

Concerns about how and to whom the Council members are accountable have been raised and discussed since the establishment of the Council. This issue was also raised repeatedly by my informants. For example, Justice Nova³³⁶ believed that “the success of every institution is grounded on the principles of accountability and responsibility, and the Council cannot be an exception to this.” But he thought the drafters of the Constitution were not serious about making this institution accountable and responsible.

Principally, none of the state institutions can remain detached from its probity and accountability, and neither of these can be restricted by the constitution (Thakur, 1998). In parliamentary democracy, public institutions are always guided by the principle of accountability, which ensures responsibility and independence on

³³⁶ Note 125.

decision-making; the lack of clear institutional accountability of the Council reflects that the body does not require to be accountable to anyone (Kunwar, 2018). Though the Council was established as an independent institution to select competent members for the judiciary, paradoxically it is stuck in constitutional complexities, allowing members to ignore their accountability. Legal scholar Thakur (1998), in analysing the effectiveness of the Council, observes the ‘multidimensional, but serious’ nature of the constitutionally designed accountability mechanisms of the Council. The Council comprises members representing different entities with different responsibilities, which make it quite confusing to determine and distribute responsibilities among them.

Since its establishment, a concern has been raised regarding the collective responsibility of the members. Because the decisions of the Council are collective, none of the members can be held individually responsible. The Federal Law Minister is accountable individually to the Prime Minister and to the Parliament. Judges are liable to the judiciary, but indirectly to the Executive and Parliament. In regard to the member of the Bar, the issue of accountability is confusing; the question can be raised of whether the member of the Bar in the Council represents an expert of the law or the member of the Bar (Shrestha, 2018b). Considering their appointment by the executive and the political status of the Bar, they are indirectly accountable to both the executive and the political parties. Consequently, each member is accountable to their respective institution, which often overrides their collective accountability as a member of the Council. But due to the variations in the representation and responsibilities of each member, the mechanism within the Council lacks clear policies and procedures for individual as well as collective accountability (Kunwar, 2018). The Council “works with a consensus model” (Phuyal, 2009, p. 201), meaning all members are required to have a shared agreement in each and every decision. Impartiality of each member influences the decision and therefore, the lack of perceived impartiality of even a single member can jeopardize the Council.

The Constitution imposes a four-year non-renewable term to members, except judges and the minister, whose tenures are limited by their term of office. This term limit reduces the likelihood of the Council being captured by vested interests of the members, and protects them from undue need to please the constituencies that

nominate and appoint them. Justice Pluto³³⁷ expressed his displeasure about the Council's concentration on appointing 'our people' rather than realizing the principles of competency and impartiality. He worried about "public scepticism on the role of the Council because of its monopoly and lack of sense of accountability". Judicial staff Lunar³³⁸ said:

There are instances when the judges recommended by the Council were held in the position of temporary judges of the Supreme Court for several years with parliamentary hearings conducted twice, but they retried as temporary judges due to Council's failure to hold the meetings. Why the judges who were known for professional competency and integrity were not considered efficient for the position? Why the position of judges in the Supreme Court remained vacant despite workload? Judicial Council needs to give answer to the public.

The Annual Report that the Council submits to the President,³³⁹ and the information shared on its website (which provides all basic details about its structure and functions along with its annual reports which include decisions on most matters) could be considered "a soft form of accountability" (Kosař, 2018, p. 1793) and an opportunity to justify the substantial existence and functions of the Council (Shrestha, 2018e) by increasing its transparency, even though it involves no specific effects on its actions. The transparency of the Council's decisions is important to maintaining public trust in the system, especially in relation to issues of political influence and perceptions of self-interest within the judiciary (Garoupa & Ginsburg, 2009). This imposes responsibility on the Council in several aspects: ensuring accountability for its decisions and informing the public and other institutions about its actions, both of which can strengthen public trust in the judiciary and the rule of law. Transparency entails the opportunity for the public to closely monitor and evaluate the actions of the Council, which in turn provides the latter with an opportunity to demonstrate its accountability to stakeholders and contribute to judicial independence (Pérez, 2018). But fundamental transparency problems with the Council are evident: selection of the judges, criteria for professional evaluation, complaint handling, investigation procedures and fairness of the disciplinary process are confidential, and only the statistics about any action

³³⁷ Note 52.

³³⁸ Note 161.

³³⁹ Section 38, Judicial Council Act, 2016.

taken is published through Council bulletins and annual reports. For this lack of adequate transparency, the level of public trust in the Council is extremely low (Kunwar, 2018; Shrestha, 2021; Shrestha, 2018a). Operational transparency is important to “put a potential check on their [fair] exercise of power” (Solomon, 2018, p. 46) and balance public trust.

The Council, according to Phuyal (2009) “should be the data bank of judicial information” (p. 201), which maintains the profile of judges appropriately. However, the Council has been dragged into controversy several times because of the failure to properly maintain and verify judges’ academic credentials and age. Records and files are not available for public inspection (Shakya, 2017). In addition, the Council has mandatory obligation to maintain record of the procedures for judicial selection and appointment, including the verification of integrity, capability and character of each judge nominated; however, all these processes are treated confidentially, which means even candidates cannot access them. The Council is inclined to work behind the bars, thus failing to fully uphold the principle of transparency and demonstrate its accountability. This has always gathered considerable attention by concerned stakeholders (Kunwar, 2018; Regmi, 1997; Shrestha, 2018c), and several arguments have been made regarding the importance of transparency and impartiality in performing its functions.

Research participants from both the demand and the supply side underscored problems with the Council and suggested that the role of the Council should be to manage the judiciary, promoting transparency and accountability on judicial performance. For instance, well-functional Council, as promised by the Constitution, can potentially improve the institutional performance that would allow positive perception of citizens towards the judges and courts, and enhance public confidence. “Excellent administration of the Council requires a high degree of independent, professional and ethical leadership of the Chief Justice. However, the political capture controls it to fulfil its interest, and as a result it has largely undermined public aspirations and confidence in the judicial system”, said advocate Daisy³⁴⁰. Without a considerable degree of independence, the Council can neither discharge its mandate nor contribute to open and democratic governance. Thus, the

³⁴⁰ Note 110.

Council substantially and visibly contributes to enhancing the quality of the judicial system.

While criticizing the existing politicised role and structure of the Council, the legal and judicial fraternity, including former judges have suggested two clear propositions so that the institutional as well as individual independency can be ensured:

- i) Abolish the Council and establish a ‘colloquium system’³⁴¹ as in India, in the leadership of the Chief Justice and other judges (Neupane, 2014; Shrestha, 2018d; Shrestha, 2021).
- ii) Modify substantially the composition and mandate of the Council to ensure diversity in the membership so that the Council is not dominated by judges and politicians (Chapagai & Karna, 2020; KC, 2020; Kunwar, 2018; Pandit, 2019; Pimentel, 2010; Shrestha, 2021).

Given the reform of the governance system in the federal context in Nepal, it is crucial for the Council to restructure its composition and include representatives, for example Chief Judges of the High Courts or representatives from the Bar from each of the seven provinces. In addition, separation of mandate – nominating and disciplining – will bring substantial implications and results in judicial independence and accountability; most importantly, “a judicial self-governing body capable of protecting the system from external and internal dangers” (Kosař, 2018, p. 1739) is necessary. While transitioning into the structure of the Council, a focus on policies to maintain the independence, transparency and credibility will bring substantial reform in the judicial system.

8.6 Conclusion

The Council, with its constitutional status, must undergo the most important transformations of all institutions to improve judicial independence, and enhance judicial accountability and public trust. The mechanism was adopted in the pursuit

³⁴¹ Ninety-ninth Amendment to the Constitution of India, 1950 established the Collegium system in 1993 to ensure fairness in judicial appointment and transfer. Article 124 (2) and article 127 of the Constitution of Nepal, 2015 deal with the appointment of judges of the Supreme Court and the High Court respectively.

of multiple objectives, all relating to the underlying goal of ensuring a more institutionally and individually independent judiciary with the ability and will to administer justice effectively. Judicial stakeholders, including the public and judges had assumed that an effective Council would contribute to quality of justice, and subsequently, to higher level of public confidence in the judicial system. The Council was proposed as a solution before the objectives were adequately defined. It is crucial, therefore, that its structure and mandate reflect international best practices and standards to operate in a way that is compatible with the principles of the separation of powers and the independence of judiciary.

An adequate institutional competencies and integrity that support the goals of the judicial reform are important requirements in order to remove the external influences and enhance fairness. However, the Council has been notorious for its external political control and internal management, raising the spectre of insufficient judicial independence and accountability. The real problem is that the power is concentrated exclusively in the executive (during judicial appointment) and the Chief Justice (during disciplining), but cronyism and politicization between these two entities have perverted that power. It justifies the structure and mandates of the Council, and the influence of the Chief Justice and executive. The present structure of the Council is questionable to foster the goals of judicial reform. The flawed institutional designs of the Council, together with a lack of constitutionality and legal heft, can further add complications in the justice system.

The Council requires sufficient institutional safeguards so that it can demonstrate more accountability and less politicisation, and consequently lower public perception of corruption and irregularities. Arguably, this transformation will have the potential for creating publicly accountable institution and possibly also for promoting public confidence in the system. However, this requires genuine commitment and dedication of the Council to maintain the consistency and balance between independence and accountability.

“Three decades of existence, but unsatisfactory functioning” indicates that it is time to evaluate the scope to which the Council has been operating to fulfil the aspirations of the judicial system. The Council aims to enhance the public trust in the judicial system in the competence and fairness of their representatives, and

ensure that they are able and willing to criticize judicial weaknesses and offer remedies. If the guardians of the constitution and justice are not perceived as legitimate, the legitimacy and success of the constitution itself will be in jeopardy. Consequently, this will not promote public access and trust in the justice system.

Chapter 9

ACCESS TO JUSTICE, JUDICIAL INDEPENDENCE AND PUBLIC TRUST: UNFINISHED JUDICIAL REFORM IN NEPAL

This research is motivated by questions about the lack of public access to justice and what this entails. It also asks about the factors that work against fair and equal access to justice in Nepal, and looks for answers about how the Nepali judicial system might change to entail high levels of public access. This thesis has examined these questions in the context of law and development discourse and practice in Nepal, emphasising especially the nexus between access to justice and judicial independence, and the reform of the judicial system through constitutional transformations. It has reviewed these transformations along with the contributory factors to actual judicial reform, assessing whether they have increased access to justice and the judicial system. It ultimately argues that the independence of the judiciary remains critical for meaningful judicial reform in Nepal.

The study shows that institutional and individual independence is likely to enhance public access to and trust in the judicial system. The analysis draws attention to the seventy years of judicial reform undertakings in Nepal, and how these demonstrate more disappointments than accomplishments. These illustrations of failure point to areas that require urgent and serious attention. Despite major efforts to separate the judiciary from other branches of the government, the judicial system remains under the sway of political influence. A number of serious weaknesses in the constitution and in legislation have impeded the realization of the ideals of judicial independence. The changes introduced have not resulted in the kind of real reform that would ensure fair, equal and trustworthy judicial system.

The justice and development movement globally and in Nepal has been characterised over the years by a significant lack of understanding and conceptual clarity about the purpose of judicial reforms and a clear distinction between what ‘access to justice’ means in principle, and how people ‘perceive’ and ‘experience’ this access. The evidence gathered from this study demonstrates specific

deficiencies in the approach. Experience shows that seventy years of reform endeavours have overwhelmingly focused on the ‘supply-side’ technical, administrative and procedural changes to legal institutions and infrastructure, while the needs of the ‘demand-side’ remain largely unfocused and unaddressed. It demonstrates the absence of shared understanding on the concept of the rule of law, and an unresolved debate over goals and purpose, principally over procedural (thin) reform and substantive (thick) outcomes has led to ambiguity over goals, purpose and results of reform. These reform initiatives have supported less to increase public confidence on the judiciary and have not contributed expected returns on law and development: access to justice is still not certain and an independent judiciary has not yet been realised.

Findings here provide good reasons for the need to consider carefully the role and position of public trust in reform. Reforms that aim to improve public trust in the system will require additional support for the courts to sustain rule of law and justice in Nepal. ‘Judicial reform’ initiatives in Nepal are focused on ‘thin’ (procedural or instrumental) aspects rather than ‘thick’ ones that would focus on providing fair and equal opportunities, and the means for vulnerable and marginalised people to exercise substantive rights.

Analysis of literatures from a range of countries confirms that the trust deficiency in judicial system is not specific to Nepal. The decline in public trust is widespread and well-documented in countries that are fighting to establish democracy as well as in countries with established democracies. Public scepticism on appointments of judges in Australian High Courts; public reactions in United States of America for Supreme Court’s appointments being more political and partisan; politicized and corrupt judicial system in African countries; executive manipulations of judicial appointments in Latin American countries; and public concern about fairness and accountability in judicial systems in Asia is reflected in a more generalised ‘trust deficit’ across international jurisdictions, which is to say that a perceived lack of integrity and legitimacy are besetting judiciaries globally. This trust deficit and a declining respect for the judiciary, reduces the possibilities and inclinations for the people to turn to the law and justice institutions to find solutions to their problems. Ensuring responsiveness by forging the connection between the judicial system and

the people they serve, alongside changing the perceptions of fairness and equality, can potentially begin a process of restoring trust and confidence.

A key focus of this people-centred qualitative research was to discover how crucial judicial independence is as an inhibitor of access to justice, and how, in practice, the implementation of principles of justice shape the perceptions and experiences of justice for both demand and supply sides. The nexus of equality, fairness, access and integrity of the judicial system is an important axis for public trust and confidence. This thesis measures the nature and extent of what I have described as the ‘trust deficit’ through the perceptions of two cohorts of informants on the ‘demand and supply sides’ of justice. The expression by both sides of a widespread lack of trust and confidence in the system raised trust as an issue crucial to achieving meaningful judicial reform.

Judicial independence free from political influence and interference, public trust and confidence, judicial competency and judicial values are shown to be intrinsic elements of the goals of reform showcased in the chapters of this study.

9.1 Dynamics of Access to Justice and Judicial Independence in Nepal

The recent history of Nepal has been focused on consolidating democratic practices and the rule of law. However, within these processes of transformation, the link between the rule of law and judicial independence has been persistently overlooked. An examination of reforms illustrates an enduring story of a failure to substantially reform institutions and their capacity and strength to maintain judicial independence and promote rule of law. Analysis suggests that judicial reform initiatives in Nepal are largely experimental, influenced more by the political environment of the country than by public demands and judicial requirements. While experimenting with constitutionalism in the name of increasing public access, the judiciary has experienced unprecedented upheavals in relation to its structure, jurisdiction and autonomy.

Justice is denied in Nepal because of a multi-dimensional complex of overlapping perceptions and experiences that relate to access, trust and confidence in the independence of the judicial and its ability to deliver justice. The major argument

of this thesis is that the lack of public trust and access in the judicial system is due to the considerable lack of independence and accountability of the Nepali judiciary, which is an effect of two major issues.

First, the Nepali judiciary is vulnerable to external influence and interference from executive, legislative and political power. The vulnerability to this interference is not helped by the lack of constitutional provisions which grants extensive powers to the executive in the administration of the judicial system. In addition, several gaps and loopholes in legislation allow for the manipulation of those constitutional provisions and laws as discussed in chapter 7 and 8 in relation to the judicial independence and the administration of judicial system. In the absence of sufficiently robust constitutional standards and a strong legal framework for interpreting those standards, judicial independence is far from protected. Former Chief Justice Kalyan Shrestha highlights this as the important “material difference between a judiciary created by ordinary law and by the constitution” (Shrestha, 2007, p. 3). In the face of apparent constitutional protection, the principle of institutional and individual independence is systematically violated, and the goal of judicial reform remains unrealised in Nepal.

The most controversial occurrence in the judicial history of Nepal is the judicial appointment process, which in effect is the strategic attempt by the executive, the legislative and the political parties to control the judiciary. The executive profoundly influences the Judicial Council and enjoys substantial power in the administration of the judiciary, including decisions regarding the appointment of judges, their promotion, transfer, removal and discipline. Moreover, constitutional provisions are often articulated vaguely in specifying the powers of the Judicial Council, allowing the Chief Justice and the executive to exercise discretion. This politicization of the process and judicial dependency on political parties have eroded the independence of the judiciary and have taken a toll on public trust and confidence in the judiciary.

Thus, the insufficiently incorporated normative principles of judicial independence cannot reasonably increase public trust and access to the system. The public cannot be reasonably assured that the either the judiciary or a judge operating under those conditions has the ability to perform in an independent manner in judicial decision-

making. Although the executive has specific controls, its privileges have tended to undermine judicial independence. A more fitting approach for the executive would be to cooperate with legal and judicial actors so as to secure independence for both the judges as an individual and the judiciary as an institution.

Similarly, controlling the resources (human and financial) of an institution is one of the most deliberate ways of regulating it. The full control of the executive over the budget and administration of judicial staff, and the power of the legislative in judicial appointment and impeachment processes, undermine the independence of the judges in exercising their duties freely and impartially.

Second, the lack of judicial accountability to judicial values has impacted the functioning and decision making of the judiciary, leading to incompetency, favouritism, nepotism and corruption. These behaviours demonstrate the lack of desire to support an independent and accountable judiciary. This is illustrated by abuse of authority and power in judicial selection and appointment; allocation of cases and schedule hearings; selectiveness of the Judicial Council in disciplining misconduct and punishing judges; and directly interfering in their performance. Moreover, factors such as corruption, bribes and other irregularities such as ‘bench fixing’ and ‘bench shopping’ are prevalent and problematic. These behaviours can be controlled more effectively if the vulnerability of the judiciary to the influence of the other two branches of the government and political parties is addressed. Political influence over judicial accountability is the major contributing factor in the erosion of judicial independence in Nepal.

At the highest level, the Supreme Court justices appear to rely on instructions given by the ‘supreme authority’ – the executive. At the local level, administrators exercise sweeping investigatory, prosecutorial, and adjudicative powers in an apparent effort to promote political conformity and discourage dissent. The history of the judicial system reveals that the distinct separation of powers among law making, law enforcement and judicial powers of the state for the rule of law and justice have not been realized. Measures to safeguard the independence of the judiciary are also not in place. Evidence and analysis suggest that reform of the judicial system has stalled due to nepotism, corruption and political patronage,

which can only be reformed through overhauling the entire process of appointment and disciplining.

The marked decline in public trust in the judicial branch stems from the controversial actions of the executive, legislative and the judiciary against the provisions of the constitution and principles of rule of law. The result shows a decrease in public trust due to increased vulnerability of the Nepali judiciary to external interference, the influence of political elites in judicial matters, and the inclination of judiciary, judges and judicial actors to undue external and internal influence. One significant aspect of the judicial system of Nepal, which is often raised and requires investigation, is the perception of the lack of separation of powers between politics and the law (political parties and judges). Thus, the independence of the judiciary has been thwarted by the interventions and influence of the executive, legislative and political parties during both authoritarian and ‘democratic’ governments. For example, the principle of independence of the judiciary is circumscribed by the ‘supreme authority’: the king during royal regime, and political parties in federal republic Nepal.

The lack of prioritisation of judicial reform suggests that the judicial system has always been overshadowed by political rather than law reform agendas. For example, despite wider public criticism and evidence of the involvement of the Chief Justice in a number of anomalies, neither the executive, the legislative, the ruling alliance, nor the opposition parties have shown willingness to end them. The strength of the judicial institution lies in a perception by the public that the judicial institution is not subservient to the executive and legislative branch of the government. The public perceptions and experience of the judicial actors demonstrate mounting public disappointment and frustration with the judicial system, coupled with a lack of trust. The drastically low levels of public trust in the judiciary is attributable in large part to the lack of institutional and individual independence of judges. This nexus between public trust and judicial independence is at a critical stage in Nepal and is the most urgently required reform. While these areas require technical solutions, they also require political and institutional will, and it is in the realm of politics that impediments to reform reside. The question of “who guards the guardians?” has remained both unanswered and unanswerable in relation to judicial reforms in Nepal today.

9.2 Relevance and Contribution of this Research

This research focuses on judicial reform that enables publicly trusted access to an independent and fair judicial system. The relationship between trust and justice is important. A pervasive lack of trust in the competency of judges and ensuring their adherence to judicial values are major challenges for successful judicial reform. In the context of Nepal, issues of the political interference in judicial appointments, bias in decision-making, and lack of judicial ethical standards are all closely linked with the link between trust and justice. Judicial competence (the *ability* of judges and judiciaries) and greater accountability (the *values* of judges and judiciaries) are two influential factors in relation to trust and confidence in the judiciary. However, the constitutional history and developments of Nepal, as outlined in this thesis, have served to erode these principles and weaken judicial legitimacy. These reform initiatives have resulted in low levels of public confidence in the judiciary and have therefore not contributed the expected returns on law and development endeavours. Access to justice is still not certain and an independent judiciary has not yet been realised.

As previously discussed, there is a scarcity of academic literatures on access to justice and judicial reform in Nepal. The few available literatures on this subject have presented their results in the form of technical reports and surveys, focusing more on ‘thin’ or instrumental aspects of judicial reform rather than ‘thick’ or substantive ones. This is probably because reform in Nepal has paid relatively little attention to understanding the local context and diverse community needs, due to a tendency to focus more on the national level institutions of the supply side and less on the demand side of the justice chain.

The global experience of judicial reform clearly demonstrates the absence of shared understandings of the concept of the rule of law, and reform remains mired in an unresolved debate about its goals and purpose. Ambiguity over goals, purpose and results of reform are played out in debates about whether transformation should be focused principally on procedural (thin) reform or substantive (thick) outcomes? Experience shows that seventy years of reform endeavours in Nepal have overwhelmingly focused on the ‘supply-side’ technical, administrative and procedural changes to legal institutions and infrastructure. The needs of the

‘demand-side’ remain largely unattended to and unaddressed. Focus on the supply side yields visible results, although investment is high. In fact, ideas replicated from different contexts (one of the features of early Law and Development approaches) focused overwhelmingly on ‘thin’ aspects and the supply side and lacked any indigenous content and design. Consequently, they have been ineffective in addressing community demands, and such results challenge the whole idea of ‘rule of law and justice’. This lack of a common conception and aspirational vision for Nepal’s judicial system, leaves Nepali people still without access to a fair judicial system.

There is a large quantity of academic literature available on the independence of the judiciary in other contexts, such as the power of judicial review and activism. However, the topic of access to justice and judicial reform remains neglected. The most relevant technical report (Supreme Court, 2021) uncovers that the judiciary is less likely to exercise independence from the executive due to political representation on its appointing body – the Judicial Council. Other literature briefly touches on gaps in the present constitution as a major factor inhibiting judicial independence.

My focus on constitutional reform and the Nepali judiciary explores constitutionalism and the democratization processes that triggered several upheavals impacting the judicial reform, justice and rule of law in the country. The demand and supply side narratives illustrated here reflect public interfaces with the law and disclose the deep-rooted lack of fairness and equality in the judicial system.

This research contributes theoretically, empirically and methodologically to existing literature.

9.2.1 Theoretical Contribution

This research is a people-centred, qualitative study that generated data from the demand side and supply side of justice. The emphasis of this empirical study is twofold. Firstly, the study investigates the values and perceptions that stimulate judicial reform with the aim to understand the nexus between access to justice and judicial independence as brought about by the reform. Secondly, the research studies the process and content of the reform in order to identify and understand

transformations in the normative arrangements brought about by these elements. Therefore, this research provides a theoretical basis for understanding the nexus between judicial reform and access to justice and the independence of judiciary.

The use of a human-centred approach, particularly the use of judicial fairness and equality as a context to examine the understanding, perceptions and experiences of the demand and supply sides of justice, contributes to a people-driven approach that gives primacy to their needs, focusing on legal frameworks and procedures. A distinct feature of my research is that it provides an analytical interpretation of constitutionalism and judicial reform in Nepal, revealing the complexities of accessing the judicial system and highlighting the elements that impact the relationships between the two sides of justice. Sen (1999, 2009), Gopal (2009) and Armytage (2012) focus on the human dimensions of justice, and these paradigms facilitated my explorations of this relationship. Drawing on Bradford et al. (2017), Govier (1993, 1997, 1998), Luhmann (1988) and Tyler (1990) framework on the trust dimensions of competency and values, I examined the meaning of access and trust in the justice system in the everyday context of Nepal. All frameworks put people at the centre. This signals prospects for reforming the judicial system and the opportunity to consider a more just future for the Nepali judiciary as an independent, accountable and legitimate judiciary.

This research also emphasises the disparity that often exists between access to justice and judicial independence, or between law on the books and law in practice – that is, the Nepali paradox of constitutional protection to judicial independence. In addition, this research contributes new and original knowledge on everyday trust and access to justice in this important social, judicial and scholarly field. It constitutes a significant milestone both academically and professionally for the Nepali judicial sector; no systematic analytical project has been undertaken on ‘justice and development’ as discussed in this thesis. By analysing access to justice endeavours pertaining to justice, development and judicial reform, this thesis provides a key resource for more closely understanding judicial reform in Nepal.

9.2.2 Empirical Contribution

Apart from its theoretical and conceptual contributions to law and development, this study also contributes to the existing body of empirical literature on trust and access to the judicial system, independence of the judiciary, and to the field of judicial reform in Nepal more broadly. This empirical contribution derives from engagement with the demand and supply sides of justice endeavouring to hear from key stakeholders about how reforms to date have contributed, or not, to genuine access of the public to an independent judiciary. It proposes a distinctive view from both sides of justice, at a time when legal and judicial reform and constitutional transformation, is revealed to have affected prospects for institutional and individual independence of the judiciary, and on public access to the system.

This exploratory research has aimed to provide further understanding about the contribution that empirical qualitative research can make to judicial reform in Nepal and elsewhere. As the strength of an empirical study “bears a close resemblance to the routine ways in which people make sense of the world in everyday life” (Hammersley & Atkinson, 1995, p. 2), I discovered the real challenge of trust in the judicial system from both the perspectives of the demand side and experience of the supply side. The strong emphasis of my research participants on the importance of trust and public trust influenced my study. Exploring the initiatives that have been undertaken to bridge the gaps between the demand and supply sides of justice, I was motivated to understand the relationship between access to justice, judicial independence and the judicial reform initiatives, and the collective contribution of these to level of public trust.

Through this study, it has been established that transformations stemming from judicial reform processes departed far beyond the judicial system, impacting relationships in the form of trust between demand, supply, and the judicial system as a whole. Considering this context, this effort contributes to the empirical literature on the phenomena and special results of judicial reform efforts on judicial institutions and the community, including the relationship of trust. It also adds value to the academic literature on the critical examination of the practices and procedures underlying public trust and confidence in judicial reform in Nepal.

The study was carried out at a time of heightened public demand for fair and equal access to the judicial system, and in the context of the struggle to reform it to ensure a clear demarcation between the judiciary and other branches of the government to protect the individual as well as institutional independence of the judiciary. It, therefore, provides an insight into the demand and supply sides' understanding of not only their access to the judicial system and their relationship with it, but also the various elements and means that they are subject to influence, construct and constrain by. It uncovers the existing challenges that both sides are confronting in Nepal with regards to ensuring fair and equal justice. This contributes to the understanding of justice in terms of how demand and supply side consider access to justice and experience it. It contributes to knowledge in relation to public access to justice through an independent and trusted judicial system and offers the consideration of significant reform to the constitution as a solution to these issues. It also reveals the structural tension that exists between the executive and the legislative in relation to the institutional, organisational and human dimension of judicial reform. This emphasises the need to go beyond the improvement of constitutional and legal provisions to challenge the deep-rooted issues in the system – lack of judicial competency, accountability and integrity.

9.2.3 Methodological Contribution

The use of a people-centred qualitative method and immersion in the Nepali context for two and half months of field study reflects the need to recognise, understand and unfold the particularities of a context, including the perceptions and experiences of the demand and supply side of justice, to assess the level of achievement of the goals of judicial reform. This was greatly facilitated by participants' observation, semi-structured interviews, focus group discussions and real-life stories, and narratives which are generally unstructured techniques of empirical data collection. The selection of these tools and techniques is more appropriate to understand participants' real-life experiences in their own environment and at their own pace; to provide first-hand information, a detailed description and justification of a phenomenon; and to ensure reliability and consistency. Based upon its exploratory and qualitative findings, people-centred design enables the research to question the fundamental elements of a system so as

to have greater impact for the benefit of the people and institutions. Thus, participants and their voices are central throughout the research process. This method offers a valuable approach to studying social context and behaviour. In this regard, the significance of empirical enquiry in legal and judicial reform is often related and connected to its potentiality to bring together a diverse range of experiences, perspectives, views and voices.

I provided a theoretical discussion concerning the content and foundations of empirical research as a form of interdisciplinarity. I presented various arguments about the application of the qualitative method in legal and judicial research, and an explanation of the techniques and application of this method in the study. Despite major differences between the people-centred method and the judicial ways of working, both share the common purpose of placing people at the centre to bring a positive difference to them and to the system they are embedded in. Both follow systematic participatory approach to problem-solving, centering human experiences to advance their overall wellbeing. It is anticipated that such challenges and the strategies to overcome them will be useful to other qualitative researchers to engage with the demand and supply side of justice, and to gain a broader understanding of the conception of trust and justice. The original findings presented in this study, therefore, provide a diverse range of knowledge, experience, perception, and literature. This leads me to consider future opportunities and other related avenues for scholarly exploration.

9.3 Areas for Future Research

Whilst the outcomes of this research make a significant and hopefully interesting contribution to knowledge in terms of a critical analysis of the law and development in Nepal, there are several areas of research that require further consideration.

Firstly, while this research reiterated existing criticisms that reform efforts lack broad consensus on content and purpose, it argues that years of undertakings, setbacks and issues emerging from the law and development experiences in Nepal have lacked a systematic effort to clarify goals, and have thus been articulated ambiguously. Judicial reform-related partnership would certainly be effective and could make for modest progress if it takes into account the context, purpose, and a

suitable approach which can be owned or designed locally. Within the current context of the law and development discourse in Nepal, the first required step would be a critical empirical discussion of law and development initiatives, to identify specific areas of success and failures. Discourse constructed on a carefully designed theoretical and conceptual framework that reflects the concerns of the public could bring clarity and consensus to the goal of reform.

Secondly, seven consecutive constitutions in seventy years and the associated constitutional and judicial reforms together have not resulted in the separation of powers, independence of judiciary and public access and trust to judicial system in Nepal. Indeed, it might be claimed that the unstable constitutional and reform processes have, over seventy years, impeded the democratic recognition of the centrality of separation from the executive, and the establishment of a robust independent and accountable judiciary. Each constitution transformed, but never strengthened the constitutional safeguards for the judiciary, thereby creating challenges for it to maintain its performance, independence, public access, and trust in the system. This explains a lack of clear and consistent understanding that the independence of judiciary is in the interest of executive, legislative and political parties, because history shows that the judiciary has never been a priority for them, despite their interference to fulfil their political interest. Further exploration in the Nepali context to analyse the reasons behind the reluctance of political actors to support judicial independence might find answers that are missing in this thesis.

Thirdly, this research focused on the lack of public access and low level of trust in the Nepali judicial system, due to dearth of judicial independence and accountability. It analysed the constitutional and legal provisions concerning the independence of judiciary, and the available measures aimed to ensuring judicial accountability. This research discussed systematic corruption and misconduct in the court system as key elements affecting judicial accountability. However, it did not address judges' behaviour, which has an influence on individual and institutional accountability as well as on public trust. Court-sponsored user surveys to measure the level of trust, which is lacking in Nepal, could identify significant factors to enhance public trust and confidence in the courts and the judicial system. This could help courts design and adopt strategic approaches to building and maintaining public trust for the benefit of the wider polity. Further exploration is

needed to improve better understanding and consensus on these issues to achieve the larger goal of judicial reform.

9.4 Pathway to Fair and Equal Justice

This people-centred qualitative research has presented a number of insights into the challenges and obstacles of judicial reform in Nepal. It is clear that judicial independence and accountability cannot be separated from the goal of the reform if the latter aims to bring substantive impact on public access to justice. The public continues to want to trust in the law and to demand fairness in access to justice because this is what is promised by the law. For public trust in the law to be restored, the creation of accessible systems that recognise the particularities of the public through increased responsiveness, impartiality, competency, reliability and accountability is required of the system. Overall, what the public aspires to and what they are seeking is broader reform in the judicial system, and a pathway to fair and equal access to justice through an independent and accountable judicial system.

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B. Constitutions, legislations and international agreements

B.1 Nepali constitutions and legislations

Administration of Justice (re-organization) Act, 1960
Administration of Justice (Reforms) Act, 1975
Administration of Justice Act, 1991
Administration of justice Act, 2016
Conduct of Business of Legislature-Parliament Rules, 2014
Constituent Assembly Court Act, 2007
Constituent Assembly Court Act, 2007
Constitution of Nepal, 1962
Constitution of Nepal, 2015
Constitution of the Kingdom of Nepal, 1959
Constitution of the Kingdom of Nepal, 1990
Constitutional Council Act, 2007
High Court and District Act, 2016
Interim Constitution of Nepal, 1951
Judicial Council (procedure) Rule, 1999
Judicial Council Act, 1990
Judicial Council Act, 2016
Legal Aid Act, 1997
National Judicial Academy Act, 2004
Nepal Interim Constitution, 2007
Nepal Interim Government Act, 1951
Pradhan Nyayalaya Act, 1952
Remuneration, Facilities and Conditions of Service of Judges of the High Court
and District, Act 2016
Summary Procedure Act, 1972
Supreme Court (Constitutional Bench Operation) Regulations, 2015
Supreme Court Act, 1957
The Nepal Government Act, 1948

B.2 Indian constitution

Constitution of India, 1950

B.3 International covenants, declarations, principles

Bangalore Principles of Judicial Conduct, 2002

Beijing Statement of Principles of the Independence of the Judiciary in the
LAWASIA Region, 1997

Charter of the United Nations, 1945

Commentary on The Bangalore Principles of Judicial Conduct, 2007

Convention on the Elimination of All Forms of Discrimination against Women,
1979

Convention on the Rights of Persons with Disabilities, 2006

Convention on the Rights of the Child, 1989

IBA New Delhi Code of Minimum Standards of Judicial Independence, 1982

International Convention for the Protection of All Persons from Enforced
Disappearance, 2006

International Convention on the Protection of the Rights of All Migrant Workers
and Members of Their Families, 1990

International Covenant on Civil and Political Rights, 1966

International Covenant on Economic, Social and Cultural Rights, 1966

Kyiv Recommendations on Judicial Independence in Eastern Europe, South
Caucasus and Central Asia, 2010

Manila Declaration for a 21st Century Independent Judiciary, 2005

Tokyo Principles, 1982

UN Basic Principles on the Independence of the Judiciary, 1985

Universal Declaration of Human Rights, 1948

Universal Declaration on the Independence of Justice, 1983