

## The Judiciary under the Interim Constitution

### Introduction

#### Main Points

- Basic system of justice remains – with addition of Constituent Assembly Court
- Are a good number of protections for independence of the judiciary
- Appointment mechanism weakened, especially as it affects Chief Justice (Constitutional Council)
- Important remedies before Supreme Court not available to non-citizens
- Highly centralised system (in hands of Supreme Court or even Chief Justice)
- Protection of independence of lower courts judges not strong
- No immunity from legal action for judges
- Judiciary has to make annual report to Prime Minister
- Military courts now subject to Supreme Court

The basic structure of the system is the same as under the 1990 Constitution, and many of the provisions are identical to those under that Constitution. There were weaknesses in that constitution in connection with the independence of the judiciary, and those weaknesses are retained or even compounded under the Interim Constitution. It also seems that the IC has some provisions favourable to the legal profession (this is not to suggest that those provisions are necessarily bad).

The legal system thus remains composed of the following tiers of courts:

- The Supreme Court (one court that sits in Kathmandu and comprises Chief Justice, up to 14 justices and if necessary ad hoc judges appointed for fixed terms)
- The Appellate Court hears appeals from District Courts (an earlier version of the IC would have given this court jurisdiction to deal with certain cases at first instance, rather like the High Courts in India, but this seems to have disappeared and the jurisdiction of the courts remains as it is under the 1990 Constitution – leaving it basically to statute)
- District Court – sitting throughout the country, again leaving details to statute
- Other tribunals and courts set up by statute

The Constitution, like that of 1990, is very uninformative about the jurisdiction of lower courts, and what types of cases may be appealed to the Supreme Court, or even to the Appellate Court. As in India, a great deal of attention is focussed on the Supreme Court: it is given a wide range of remedies, based on the prerogative writs of the English courts, to deal with almost any type of case. It supervises lower courts (which means?? That it may scrutinise lower court decisions but does not necessarily imply a right of appeal). It is the final authority for interpretation of the Constitution (a new provisions) – does this mean there is a right of appeal to that court in any case that involves such interpretation?

There is one new court: the Constituent Assembly Court, with the principal responsibility of dealing with disputes over the election to the CA though it also has jurisdiction to decide whether a member of the CA has become disqualified (Art. 66); this is a bit odd as it does not relate to elections which in Article 118 is its sole function. This court seems to be at the same level as the Supreme Court – it is not subject to the latter, and the latter may interpret any aspect of the Constitution except those aspects within the jurisdiction of the CA Court.

### **Independence of the judiciary**

The issue of greatest concern, however, is that of independence of the judiciary. The ‘tests’ of such independence are usually thought to be (though not all countries would respect all these, even those that do generally have reasonably independent judges):

- A system of appointment that should (i) be free of executive pressure (ii) encourage (if not guarantee) the appointment of competent judges
- Allowing judges to carry out their functions free from (i) pressure especially from the executive and (ii) temptation to be corrupt (iii).
- The factors that may conduce to independence in this second way might include: (i) freedom from fear of dismissal, (ii) reasonable remuneration, (iii) freedom from fear of having that remuneration cut as a penalty or being otherwise punished (as by being transferred to unpopular posting) for government-unfriendly decisions, (iv) immunity from criminal or civil suit for what they say or do in the course of their official work, (v) not being accountable to another branch of government, (vi) not being involved in work that might involve them in political controversy; (vii) not having the possibility of being enticed into making decisions favourable to certain parties in anticipation of post-judicial benefits, such as lucrative employment; finally (viii) that the administration of the system is independent.

The table at the end compares the IC on the basis of these criteria with the 1990 Constitution. In brief (the most serious issues are underlined):

1. Other courts can be created but there is no guarantee of independence of any of these (many constitutions have the same fault)
2. The Chief Justice is appointed on the recommendation of the Constitutional Council: a body that is effectively dominated entirely by the executive – even more so than under the 1990 Constitution
3. Other judges are appointed on advice of the Judicial Council, a body that is significantly less independent of the executive than under the 1990 Constitution
4. Qualifications required for appointment have been slightly relaxed (for those who have been in practice as lawyers); vague qualification about moral character has been added
5. Supreme Court Judges can be removed by a  $\frac{2}{3}$  majority of the Legislature; not an uncommon provision (and same as 1990 Constitution) but in the current situation there seems to be a risk that a removal could be stitched up by political consensus. Other judges are removed in accordance with a decision of the Judicial Council – which may be executive dominated. A few new grounds for removal have been added: physical or mental health (which is all right but

- ideally there should be a guarantee that at least 2 doctors certify) and a worrying one for lower court judges: deviation of justice!
6. As under the 1990 Constitution there can be temporary appointments to the bench at all levels; this is unsatisfactory – though occurs in many countries including India and UK
  7. Salaries are fixed by law and there is no guarantee that they are at a level high enough to discourage corruption (most constitutions are the same); they cannot be reduced which is a good provision, though not new.
  8. Lower court judges can be transferred only on the recommendation of the Judicial Council; this would be good protection against using the transfer as a punishment, but make-up of Council undermines it
  9. There seems, surprisingly, to be no immunity from civil or criminal action for judges – which opens them to the risk of being sued for remarks made or actions taken, or even criminally prosecuted.
  10. Separation of powers, and the principle that no branch of government is subordinate to any other, were features of the 1990 Constitution. These are largely preserved in the IC, with one worrying inroad. The protective provisions include charging the remuneration of Supreme Court judges to the Consolidated Fund (means they are not subject to detailed annual vote - or debate – in the legislature) – though this does not apply to judges at lower levels even though they may equally make decisions that government does not favour. Secondly the legislature may not discuss any case in court, nor may they discuss the conduct of any judge – except on a formal motion for removal.

The inroad that seems to have been made is the new requirement for an annual report of the judiciary to be made to the Prime Minister and to include not only statistics, information about important precedents, but also critical comments made by higher court judges about lower ones. Though the judiciary like any other government agency ought to report annually, there are some implications or at least overtones about this that give rise to concern: reporting to the PM who is head of government seems to suggest some accountability to government (why not to the Minister of Justice?); what is the purpose of requiring the judiciary to draw attention to remarks made about judges? To enable the activation of the procedure for removal for “deviation of justice”?

11. The use of judges for non-judicial work has given rise to concern in some countries – where they may be used to chair highly controversial inquiries (this is done frequently in the UK). In the 1990 there was a provision – retained in the IC – that judges can do only judicial work, but this was intended to complete the separation of the lower judiciary from the civil service. Judges could still be assigned to carry out inquires, research, teaching etc. And they still can. The IC retains the more worrying provision, also from the 1990 Constitution, that lower court judges may be used for “election works”; apparently such use has become common. Some countries may find it

unexceptionable (Supreme Courts in many countries constitute an Election Commission) but in other countries it seems curious.<sup>1</sup>

12. Supreme Court judges cannot be appointed to any government post after retirement (except to the Human Rights Commission) nor can they practice before any court. This provision is new; on the whole it is desirable, but it seems a bit restrictive since the judges retire at 65. It is not necessarily more desirable that they go into private business! The prohibition on practice in court is desirable though not so much relevant to independence of the judiciary from the executive, as to the risk of judges being overawed by being addressed by their eminent seniors (introduced at the request of the lawyer-members of the drafting commission?).
13. There are two new provisions giving powers to the Chief Justice which have some worrying potential – especially in view of the risk that the CJ may be less than entirely independent (see point 2 above):
  - a. The Chief Justice may transfer a case from one court to another at the same level if he believes that the “dispensation of justice” is likely otherwise to be adversely affected; and
  - b. The Chief Justice may issue “instructions” to the Supreme Court and other courts to make the administration of justice effective.

These may sound like harmless efficiency measures, but they indicate a highly centralised judiciary, and could be used to influence the outcome of decisions. As in the 1990 Constitution the Supreme Court has the responsibility to supervise the lower courts, but this seems to give power to the Chief Justice individually.

### **A few other points to note about the IC**

As in the 1990 Constitution the constitutional right to seek constitutional review of legislation and even to go to the court directly to invoke the writ jurisdiction is restricted to citizens. This has been a serious problem in a country where citizenship has been so contested – and even if everyone genuinely entitled has such citizenship is still discriminatory against non-citizens. And a person who wished to claim citizenship could not go to the Supreme Court!

The judges are required “following the concept, norms and values of the independent judiciary, and bearing in mind the aspiration of the people's movement and democracy, the judiciary of Nepal [to] be committed to this Constitution”.

Secondly “except on the matters which fall under the jurisdiction of the Constituent Assembly Court, the Supreme Court shall have the final power to interpret this Constitution and other prevailing laws”; this states the obvious in the system that applies in Nepal, and probably adds nothing to the other provisions on the powers of the Court (but in the light of practices in some socialist countries, including the PRC where the Standing Committee of the National People's Congress is the final authority for interpretation, is interesting).

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<sup>1</sup> On this whole topic see Dhungel et al, *Commentary on the Nepalese Constitution* (Kathmandu: DeLF, 1998) pp. 597-8.

The provision about an annual report of the judiciary, apart from the independence implications, imposes a quite unrealistic burden – particularly when it requires a report on implementation of decisions.

The rule of law is strengthened by the removal of the provision in the 1990 Constitution excluding the military courts from supervision by the Courts.

The Supreme Court may (but there must be a law setting out the parameters) review its own decisions. This may be a good thing in the case of criminal convictions on which serious doubt is later case; but in such a case the Court ought to be allowed to review final convictions of lower court, too. Generally it is doubtful whether a final court ought to be able to change its own decision in particular cases (though it was famously done by the House of Lords in the Pinochet case). In fact there is law, which grants the power restrictively???

Finally, there was a provision in the 1990 Constitution for the King to refer questions of interpretation of the Constitution or a law to the Supreme Court for their opinion. This has been removed (and, unlike some ‘royal’ powers, not given to the Prime Minister).

**Appendix: Comparative Table on Independence of Judiciary**

<b>Independence indicator</b>	<b>IC</b>	<b>1990 Constitution</b>
Special courts	Can be created but not for trial of particular case	Same
Appointed by whom?	Chief Justice appointed on advice of Constitutional Council; other Supreme Court judges on advice of Judicial Council; other judges on advice of Judicial Council	Same as IC
Who is on Constitutional Council?	Prime Minister Chairman; Chief Justice; Speaker of the House of Representatives; Chairman of the National Assembly; Leader of the Opposition in the House of Representatives and for recommendation of Chief Justice, includes Minister of Justice and a Judge of the Supreme Court.	Prime Minister; Chief Justice; Speaker; 3 Ministers appointed by the PM (and Minister of Justice)
Who is on Judicial Council?	Chief Justice; Minister of Justice; 1 advocate on recommendation of Bar Association; most senior S Ct judges; one jurist (appointed by Prime Minister)	Chief Justice; Minister of Justice; 2 senior S Ct judges, one jurist (appointed by King)
Criteria for appointment	District Judge: must have been practising advocate for a number of years ( <u>and have passed exam set by Judicial Council</u> ), or in judicial service. Appellate Judge: Bachelor Degree in law and either has worked as a District Judge or as first class officer in Judicial Service at least 7 years; or practised law for at least 10 years; or taught law or conducted research etc for at least 10 years. Supreme Court: Judge of an Appellate Court or equivalent in judicial service for 7 years, or officer first class or above of the judicial service for 12 years, or practised law or been distinguished jurist etc. for 15 years. For Appellate/District Court: <u>capacity, experience.</u>	Similar – but items underlined in previous column are new. Length of experience in practice were longer under 1990 Constitution.

	<u>dedication and contribution to justice, reputation in public life, high moral character.</u>	
Fear of dismissal	Supreme Court judges can be removed by vote of two-thirds of members of Legislature-Parliament Grounds: incompetence, misbehaviour, failure to discharge the duties of his/her office in good faith, <u>physical or mental condition</u> Appellate/District Judge: Decision of Judicial Council for incompetence, misbehaviour or failure to discharge the duties of his/her office in good faith, <u>incapacity due to physical or mental condition, or deviation to justice [sic].</u>	Similar (House of Representatives)  Grounds: similar but underlined words are new  Appellate/District Judge: similar but words highlighted are new
Temporary appointments?	Are possible (ad hoc in the case of Supreme Court; “Additional Judges” in case of other courts)	Same
Remuneration	No mention of amount – to be fixed by law	Same
Protection of remuneration	Must not be reduced	Same
Risk of being transferred	CJ can transfer Appellate/District judges on recommendation of Judicial Council	Same
Immunity from suit	Not provided?	Same
Not being accountable to other branches of government	Remuneration of CJ and S Ct judges chargeable on Consolidated Fund (means not subject to annual vote - or debate – in legislature). <u>Supreme Court must make annual report to PM who lays it before the Legislature.</u> No discussion in Legislature on any case in court, or about anything done by a Judge in course of judicial duties	Same – but the provision on Annual Report is new.
Not being involved in controversial roles	Limits on other types of work: but may be assigned to judicial inquiry, to legal or judicial investigation or research, or to any other work of national concern. Judges below S Ct may also be assigned to “election work”	Same
Post-retirement temptations	Ex- Chief Justice or Supreme Court Judge not eligible for appointment in Government Service, except to Human Rights Commission, and can’t practice law before any office or court.	No equivalent
Independent administration	No real provision for this; CJ (who may not be independent) as wide powers, including to <u>shift cases, give directions</u> , though transfer of judges, discipline etc is in hands of Judicial Council (but see above)	Similar – but provisions giving highlighted powers are new.