

Nepali Judiciary: Achievements and Challenges

– Kalyan Shrestha*

Even though nearly sixty years have been spent to get the most suitable constitution, Nepal seems to be in perennial transition. The impact of political instability is felt in every sector of the state including the judiciary. Every time the constitution is changed, the chapter on the Judiciary invariably gets tinkered, in most of the cases without bothering to consult the judiciary and sometimes even ignoring its views. The current Interim Constitution is no exception to this. Yet, the judiciary is continuously doing its best to nurture the rule of law and protect the rights of the people. The article takes a stock of its achievement, draws a snapshot of how it started from the scratch, where the very concept of the separation of power and the rule of law were not well entrenched and highlights its contribution. It also raises constitutional and legal issues created by recent "expeditions" and their impact on the independence and smooth functioning of the judiciary. Towards the end it makes a call to take a broader view and wider collaboration to address the numerous challenges facing the judiciary. The author very boldly states that even during dictatorial regimes the judiciary tried its best and "made significant headway towards upholding the rule of law in the light of its own experience and the aspiration of the people." The author while calling the judiciary to reform itself as, according to him, the current delivery does not match with the expectation of general public, also makes a humble plea to all "not to throw the baby with the bath water" in the name of reform. He asks for more understanding to the values of judicial independence and nature of the judicial process before making serious departures in the judicial system.

1. Introduction

In its bid to modernize and democratize, Nepal has been passing through various stages of transition since the first successful mass movement of 1950. Nepal has already made a long journey in its road to political resolution, yet stability has so far not been achieved. Various models of political systems have been put in place but without success. Most of the national resources have been spent either in search of a suitable alternative model or defending the existing ones. The impact of instability can be experienced in all the fields including the judicial system.

The basic thrive of the 1950 mass movement was to set up a democratic system based on a constitution drafted by the "constituent assembly", which has remained unaccomplished to date. Nepal experimented with many constitutions but all of them were issued by the King through the exercise of royal prerogatives and inherent state power. Many unique expeditions took place after the unveiling of the 1990 Constitution, but due to turbulent insurgency propelled by the Maoist group, this constitution, despite reluctance of

* Currently Justice at Supreme Court of Nepal, Hon. Justice Shrestha was the founding Executive Director of the National Judicial Academy, Kathmandu, Nepal.

the mainstream political parties and the King to change it, could not survive. Early this year, it was officially repealed to be replaced by the new Interim Constitution.

The Interim Constitution is unique in many respects. It was promulgated as an outcome of the agreement between the seven political parties (pro-parliamentary system) and the Maoist Party (rebellion). It was officially adopted by Parliament. It did away with all powers that were traditionally held by the monarch. It envisages an election for the constituent assembly to draft a new constitution. It recognizes that the Nepali state is in need of massive reconstruction, forging values such as federalism, inclusiveness, participatory process, multiparty system, political pluralism, sovereignty of the people, recognition and protection of human rights etc. Whereas many of the concepts such as federalism, state reconstruction etc. are yet to be clarified, it seems that the makers of the present Interim Constitution are overwhelmed by the expectations that the peremptory ideas incorporated by them are furthered in the constitutional change.

Interestingly, the political parties envisage political dialogue for the continued implementation of the Constitution, and give the impression that it has been a handmaid of politicians who could change it anytime they like without holding consultations with rest of the people. Some of the important underpinnings of the present Interim Constitution are the principle of separation of powers providing for check and balance between different constitutional organs and the rule of law. Certain departures have been made in the new constitution regarding the organization and management of the judiciary from the previous one. Though the Interim Constitution has demonstrated its commitment to uphold the independence of the judiciary and to maintain the principle of the rule of law, its sincerity and effectiveness will have to be zealously guarded in course of time. In the light of this constitutional development, it would be worthwhile to discuss the nature and importance of the judicial process, its achievements and challenges.

The Nepali judiciary is standing at the cross-road amidst the wave of political cross-currents and perennial transition. How far has the transition affected the judiciary or how will the judiciary be able to manage the transition; how is the current transition impinging upon the independence of the judiciary; how could the Bench, the Bar, the civil society and other justice sector actors save its independence; these are some of the burning questions that cry for answer. Retaining public trust through efficient discharge of its constitutionally entrusted responsibility has been the objective of the judiciary all along when we commenced the journey some 60 years back. How have we performed during this period; does our performance provide adequate rationale for us to stand up against all possible onslaught on its independence; or should we also gear up for modernizing the judiciary making us able to live up to the expectations of the people; these are some of the issues I have taken up for discussion in this article. A quick flash back may give one to understand that there are more challenges than achievement. But I do believe that unless we examine the environment within which the judiciary had to work during the period of political instability and objectively evaluate its achievements, we will be doing a sort of injustice to the institution which has withstood the test of time. It is in this context that the article recounts history but, in no way to discount the challenges that the judiciary is facing.

2. Impact of Political Instability in the Judicial System

Historically, the judiciary has been one institution which is hard hit in any event of political change. For example, the Interim Government Act, 1950 did not make any significant provision for the independent judiciary, which was later addressed through the promulgation of a separate Act called "Pradhan Nyayalaya Ain" in 1951. As soon as the Chief Court (Pradhan Nyayalaya) was organized under this Act, a series of conflicts surfaced mainly between the executive and judiciary. Judicial strictures or resolutions were taken as interference with the functioning of the executive. Many a times, the judiciary had to initiate contempt actions against high ranking officials of the government including the Home Minister. Once the then Chief Justice Hari Prasad Pradhan had to state the reason in defence of the judicial action to the effect that the 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.¹ Putting itself into peril, the judiciary has had to protect the freedoms of the people. Not even the King was happy with the judiciary as the latter resisted accepting his command to make a judicial review of the cases the King referred to the latter, already decided by it.

As the relationship between the judiciary and the executive continued to be under strain, the then government took such a revengeful action that it repealed the Chief Court Act (The Pradhan Nyayalaya Ain) and substituted it with the new Supreme Court Act in 1956. The whole idea behind doing so was to oust the then Chief Justice Hari Prasad Pradhan from office and create a legally favorable environment for the government. The chief justice always construed the governance system from the point of view of limited government and opined that even though a comprehensive constitution did not exist, it did not mean that there was no constitutional system at all. The Interim Government Act, known as Interim Constitution, the Chief Court Act, 1951 and the Personal Freedoms Act, 1949 combined together made up the constitutional law of the country. This opinion is in line with the British constitutional system. The difference between having a written and unwritten Constitution could however be practically felt. Had there been a well-written and comprehensive constitution which incorporated the provision of independent judiciary, it would not have been that easy to remove him by substituting the Chief Court Act by the Supreme Court Act. There is a material difference between a judiciary created by ordinary law and by the constitution.

Chief Justice Hari Prasad Pradhan had led the judiciary at such a time when the constitution in the form of a codified text did not exist, the concept of limited government based on the norms of a written constitution was yet to be set out, the basic ideas of the rule of law were yet to be pronounced and the idea of rights and writs were not well entrenched. Adopting such norms was crucial in the process of modernization of the Nepali legal system. The Hari Prasad Pradhan court was, thus, instrumental in laying the basic foundations of the rule of law in Nepal.

¹ HARI BANSH TRIPATHI, FUNDAMENTAL RIGHTS AND JUDICIAL REVIEW IN NEPAL: EVOLUTION AND EXPERIMENTS 33 (Pairavi Prakashan, Kathmandu, 2000).

After Chief Justice Hari Prasad Pradhan was unceremoniously sacked in 1956, there were other occasions where the chief justices were either sacked or forced to resign or transferred to assume other responsibilities. For instance, Chief Justice Aniruddra Prasad Singh was transferred to the Election Commission, Chief Justice Bhagvati Prasad Singh was asked to resign following a protocol issue during his visit to Australia; Chief Justice Dhanendra Bahadur Singh was asked to resign following the promulgation of the new constitution i.e. Constitution of the Kingdom of Nepal, 1990. Other Chief Justices also have had to face the threats of premature retirement under one pretext or the other.

Judicial independence has been jealously watched by the political elites, most of the time with a sense of competition than cooperation. The political leaderships wanted that justices owed allegiance to them. They always wanted to make sure that the judicial response either confirm or be in harmony with their political moves. In this process, either the judicial structure or its jurisdiction used to be revisited. The tenure of judges and their conditions of service were changed. Changes were made in the modes of appointments, often making provision of reappointment. Politically motivated expeditions were more discernible than the genuine desire for reforms. Whereas reforms are always warranted in order to put the rule of law in good repair, measures taken were seldom commensurate to the reform exigencies. Rather, sometimes amendments were made that brought about negative implications. For instance, during the Panchayat period, the tenure of Supreme Court justices was reduced to ten years through the 2nd Amendment to the Constitution of Nepal in 1973. In the 1990 Constitution, the position of additional justices at the Supreme Court was removed, but the position of *ad hoc* judges was created. There was no material difference between them in term of qualifications and conditions of service except that sitting additional justices were removed by the operation of law.

Recent political developments seem to be more skeptical to the role of the judiciary. Some new areas of interventions were envisaged in terms of the relationship between the judiciary and other organs. The reinstated House of Representatives required the judiciary to keep working in line with their Political Declaration. They declared that their "Declaration" stands above the constitution. Hence, the House of Representatives asked the Supreme Court justices and other judges to take a fresh oath before the House, failing which they would be disqualified to serve as a judge. This bid, however, was aborted following the understanding reached between the judiciary and legislature preceded by the resistance of the Supreme Court justices. But with the promulgation of the new Interim Constitution, again, a new oath was required to be taken by all judges including the Chief Justice. Ironically, even before the Prime Minister took his own oath of office, he administered the oath to the Chief Justice. Unusually, for the first time, judges had to take the "oath of secrecy" also. There are many curious provisions in the new Interim Constitution of 2007 which will be discussed in due place. A question is sometimes asked by the concerned sector as to whether the judiciary would be able to ensure compliance with the constitutional norms by all including the political community. A new situation has emerged in terms of the adjustment of the role or relationship between the political forces and the judiciary. The effects of political transition have been spreading rapidly to the judicial sector also. At this critical juncture, therefore, the judiciary will have to assess its

philosophical imperatives, its importance in ensuring respect for the rule of law, its achievements and challenges in the light of the recent developments.

3. Importance of Independent Judiciary

Judicial functions are always subject to public scrutiny. Reform of the judiciary is always relevant to make sure that its performance is commensurate with its expected roles. In order to perform such roles, the structural and functional independence of the judiciary have unique importance. They need to be maintained at all times, be it a normal time or transition. The transitional justice basically does not depart from the ordinary system of justice. It is, moreover, a management strategy to share the burden successfully in the light of newly emerging situations and exigencies. Otherwise, once the fabric of justice is broken, it will take longer time to revive. During the transitional period, organs of the state will have to be proactive and deliver services more promptly and efficiently than before. The judicial process should not be an impediment in itself. It should rather be a partner and facilitator in the management of transition in a smooth manner. Other organs must not be scared because of the judicial interventions.

It would be worthwhile to recall Alexander Hamilton who explained in Federalist 78 in support of the proposed US Constitution in 1788. He said, "the judiciary from the nature of its functions will always be the least dangerous branch... the judiciary... has no influence over either the sword or the purse; no distinction either of the strength or the wealth of the society and can take no active resolution whatever. It may truly be said to have neither force nor will but merely judgment." It will rather help to maintain the sanctity of the authority of the state by restoring values on which the state will be founded.

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 whole idea of the written constitutional government with provisions such as the right to justice the right against torture etc. will be futile if the justice system is not made robust. 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.

Madam Justice Claire L'Heureux Dube, former Justice of the Supreme Court of Canada emphasized that judicial services like health care should be free in an ideal society in order that all may seek justice before the courts or other forums, whatever be the state of their financial resources. This idea is important in the sense that the right to justice with which alone freedoms can better be protected, should remain unencumbered. Freedom, not only peace and order, depends upon impartial enforcement of the rule of law of which courts are the ultimate guardians.

Special regard must be made to maintain peace and security in society, which can be achieved only by the rule of law. "Peace and order exist when there is general conformity with *a priori* rules, breach of which result in penalties, nullifications or other disadvantages imposed by the state. If a miscreant goes unpunished by the state, the victim will take the remedy into his own hands, so will the unpaid creditor, the wronged

spouse, the injured and the disgruntled citizen. In order to achieve peace and order the government must provide laws that broadly speaking tend to diminish injustice and a mechanism to redress injustice by application of those laws.² Our hope for sustainable peace will vanish once we allow the rule of law to crumble in the name of conflict or transition. It is like missing a torchlight amidst deep darkness.

It is the hallmarks of a free society that disputes are resolved according to law by courts whose authority depends not so much upon force available to the state but upon popular (if not universal) acceptance of the authority of their decisions.³ Hence popular respect for the administration of justice by the courts is essential for peace, order and good government in a free society based on the rule of law.⁴ As the rule of law can never be a second priority in any society based on constitutional government, the judicial organization cannot be of secondary importance. Judicial roles become more important during transition because there will be no other institutions left which will be able to offer guardianship to the fundamentals of governance system, since it occupies a center stage in the resolution of disputes. With innovative approaches, diligence, mediational practices and genuine desire for accommodating the interests of the people, the judiciary can make headway towards resolutions, at a time when political forces might utterly lack consensus on issues that are important for reconciliation and sustainable peace through resolution of disputes.

The politicians view that in the post-conflict scenario political issues are to be resolved with priority, and the legal issues should not come in the way. But lasting peace and resolution of conflict would be unthinkable without handling the rule of law related issues hand-in-hand with the political issues. For the politicians, the judicial system might seem as less instrumental or credible to their road-to-peace, but it may often be a difference in perception only.

The problems of judicial independence are generally embedded in a country's history, culture, and philosophical understandings. Society expects certain roles of the judiciary, which is critical in fostering independence. The judiciaries in transition often have struggled to free themselves from transitional domination by elites, political parties or the executive, which is not an easy job at all. The perception of the legislature or the executive about the judiciary or the perception of the judiciary about itself sometimes creates friction. The operation of courts becomes difficult in countries where courts are looked upon as suspects. In some cases, the judiciary has been linked to pre-democratic regimes or monarchical or aristocratic powers. Even in these situations, the judiciary will have to make sure that it effectively plays its due role as an integral part of limited government.

Basically, the conflict between the legislature or the executive and the Judiciary arises when there is a competition for power. While the judiciary inherently retains its power to interpret the provisions of the constitution and the law, this power is by no means unlimited. The constitution itself provides several checks on the judiciary to maintain the system of separated powers such as pardon, withdrawal of the cases, reduction of judicial sentences, enforcement of judgments, impeachment of judges etc. Further, the legislature

² The Hon. Sir. Gerard Brenman, Chief Justice of Australia, *Why be a Judge?* (Judges Conference, Dunedin, 1996), p. 2.

³ *Id.*

⁴ *Id.*

can effectively nullify a court's interpretation of a statute simply by passing a new law or amending a certain provision. It can react to a court's constitutional interpretation by introducing a constitutional amendment. The judges, too, are aware of such external checks. They are mindful of self-imposed limitations as well.

The legislators in the post conflict scenario seemed to believe that they, in fact, represent the entire sovereign people, and hence supreme. But in a society where a written constitution is adopted, such an idea of legislative superiority cannot be appreciated. In fact, written constitution itself is the sovereign. A separate judicial branch would be designed under the written constitution to guarantee democratic freedom by preventing the concentration of power in government. A written constitutional system will promote a constitutional government, which also requires that majority rule be balanced with minority rights.

In the post conflict situation, minority rights or the rights of the indigenous community have been one of the most potent issues. In order that lasting peace can be built, these issues must be addressed holistically and equitably. Whereas political issues have to be dealt with by the political forces, the role of the judiciary in protecting the rights of the minorities and the indigenous communities is nonetheless important. By the very nature of the judicial function and the responsibility entrusted with the judiciary to maintain the delicate balance between the three major organs of the state through the use of the power of judicial review of the acts of other organs, the judiciary will have to maintain the supremacy of the constitution.

Susan Sullivan Lagon succinctly opines- "the counter-majoritarian nature of the judiciary is actually an advantage rather than a flaw. Limits on governmental power and guarantees of individual rights would be meaningless without some institutional means of curbing the power of the majority. The judiciary is the perfect vehicle for protecting minority rights while the other two branches are more responsive to the majority. Unlike other office holders, the judges have no constituents; they represent the constitution and derive their authority from it."

The political powers that have emerged from the mass movement have to exhibit that in the process of political resolution they pursue the interest of all communities, and the voices of all including political parties big or small will be heard. Otherwise, their political resolution may not be enduring, and would be confronted with the problem of legitimacy and acceptability.

The alliance of eight political parties has enjoyed all the authority of state and decided upon the forms and substance of the constitution. Informal consultations within the alliance have been preponderant over the formal authority of the state organs. Such an exercise may derogate the authority of constitutional functionaries. Further, those who are not given access to such deliberative process may not find good reasons to adhere to the resolutions that the alliance passes. What is absent in the current political process is the participation of the concerned sectors. The present Interim Constitution has touched upon many important areas relating to the judiciary. The latter publicly demonstrated some of its concerns. But these concerns were totally ignored even after being communicated to the Prime Minister. The makers of the present constitution prescribed in the constitution that

the judiciary will consider the mandates of the mass movement⁵ while administering justice. Whereas the expression "the mandates of the mass movements" is political in nature and legally imprecise, even so, the expectations from the judiciary have been that judges should have ideological orientation and adhere to them. To ask the judges to have certain ideological orientation may be one way of allowing them to be swayed by extraneous considerations other than the law itself, which may not be always a right thing to do. The constitution being the basis of the rule of law should be the only Dharma for the judges. Periodic demands on the part of the political forces requiring judges to show allegiance in certain ways would not ultimately help in maintaining the rule of law and stability in the society.

What is important is that the judiciary can be expected to discharge its duties in accordance with the constitution and the laws made under it in an independent and impartial manner. Here, may be reminded what George Washington once said: "The true administration of justice is the firmest pillar of good government. If the operation is left to the political organs of the government, judicial independence will be in jeopardy." It will mean its failure to restrain any branch of government to impinge upon individual rights. If the judiciary cannot be relied upon to decide cases impartially according to the law and, not based on external pressures and influences, its role is distorted.

The relevance of the judiciary in the present time has been more expanded than before. In the countries in transition to democratic governance the judiciary faces an even greater challenge. It has to serve as a focal point when political and economic forces struggle to define the shape of the society. It has to encourage fair competition and economic growth in the light of globalization of economic activities, and hence, resolve increasingly, national and international commercial disputes with a higher level of consumer satisfaction. The judiciary of the day will be judged from the standpoint of how effectively it has been able to contribute to the equitable and stable balance of power within the government, how far it has been a key to countering public and private corruption, reducing political manipulation and increasing public confidence in the integrity of the government. But it will be unrealistic to think that the judiciary can carry the burden of resolving these complex problems without the cooperation of other organs and the community. It can play the leadership role only when it completes its own evolution and begins the task of confronting multitude of problems before it.

The judiciary should find a special position to be effective in managing the transition, in order that the sense of justice prevails in its bid to resolve the conflict for enduring peace. Managing a justice system in the situation of transition is not an easy task. The judiciary plays an important role in the transitional justice initiatives such as reconciliation, rehabilitation, reconstruction, and in ensuring respect for human rights, combating impunity, building sense of confidence in the rule of law enhancing effectiveness of the state institutions.

⁵ NEP. INTERIM CONST., 2007, art. 100(2).

4. Judicial Contribution

Obviously, the most basic and the most important function of the judiciary is the resolution of disputes according to law. The Nepali judiciary has started its modernization process with the promulgation of the first Interim Constitution, 1950 and the Pradhan Nyalaya Ain (The Chief Court Act). Until then the justice system was traditionally organized. Judges used to be appointed by the government without following any appropriate criteria that were suitable to the needs of the independent judiciary. Judges would learn the craft of judging while on the job. Their independence and impartiality were not secured. The Rana Prime Ministers used to hold the highest judicial power. They could make or unmake any law. Any judgments rendered by the courts could be confirmed or reversed by them.

Starting a journey from that point and reaching to the present position, where the judiciary is serving as the chief arbiter of justice under the supremacy of the constitution is not a small achievement. During the initial period of its modernization process, the judiciary had to try hard to understand by itself and to make others understand the basic philosophy of the rule of law in society. As the country did not have the history of independent judiciary, it had to struggle for creating conditions for the working of the independent judiciary. In order to transform from the traditional to modern justice system, and to be in line with the norms of contemporary judiciaries across the region, the judiciary had to take many radical steps. For example, there were no constitutional foundations suitable for the independent judiciary. There was nothing like an organized Bar. The legal profession had no respectable position in society. Legal education was not organized. The laws were parochial. The service conditions of judges and court officials were terribly unsatisfactory. The preconditions necessary for an independent and impartial court were absent. Marching from this point, the then Pradhan Nyayalaya, later substituted by the Supreme Court took, a leadership role to lay the foundations upon which the modern judiciary stands. Several constitutions and more importantly the 1990 Constitution and the present constitution made definite provisions regarding the security of tenure and other service conditions of judges. Today, the Bar is organized and the right to legal counsel has found constitutional recognition. The nominee of the Bar participates as a member in the Judicial Council which is responsible for the appointment of the judges as well as for taking disciplinary actions against them. The Attorney General as a chief government legal advisor is the constitutional body and enjoys the authority to decide whether or not to prosecute. The appointment, dismissal and other conditions of service of the judges are constitutionally defined and protected. Hence, substantial ground works necessary for the independent judiciary have been completed.

Regarding the contribution of the judiciary, it is always a subjective evaluation. As has been mentioned earlier, the nature of judicial process has been definite, but its working and the necessary environment for its smooth functioning have been influenced by the political upheavals. The influence of political cross currents is more pronounced during the constitutional change.

The most notable contribution of the judiciary is found in its endeavor to uphold the rule of law. People believe that their freedom depends upon impartial enforcement of

the rule of law, and that courts are the ultimate guardians of their freedoms. People know that the judges are not infallible, even so, they believe that impartial and fearless courts determined to exercise their proper powers are their final defense against tyranny.

Now the constitution vests the judicial power in the judiciary which dispenses justice according to the constitution, laws and recognized judicial principles. This power emanates from the sovereignty of the people as expressed in the constitution. It may be submitted that in the same way as the Parliament enjoys sovereignty in making laws, the courts enjoy sovereignty in interpreting and applying the law. In the past, the Constitution of 1962 recognized the King as the fountain of all powers including the judicial power. He used to give periodic commands to the Supreme Court to review its own judgments though he did not sit in the seat of justice. The power of the King was taken as a major barrier to the independence of the judiciary. The 1990 Constitution did away with this, and internalized and entrenched the values of independent judiciary. As elsewhere, Nepali legal community pays deep respect to the famous provision of the *Magna Carta* of 1215 of England which guarantees that "no person shall be taken or imprisoned or dispossessed or outlawed or exiled or in anyway destroyed except by the lawful judgments of his peers and the law of the land." The preamble of the present constitution bestows itself upon the foundation the rule of law, equality, freedom, comity and human rights.

Many significant exercises made by the courts have been in the area of protection of fundamental rights. When Nepal entered the era of written constitution, the idea of fundamental rights was still nebulous, and so was the law of writs. When fundamental rights were recognized in the constitution, the responsibility of the courts suddenly increased as they were required to protect the rights by issuing appropriate writs. Since Nepal always remained an independent nation, she did not have the experience of implementing the laws of writs.

Nepal made a limited but indirect importation of the values of the English legal system through India in the form of cultural goods. However limited it may be, the impact of the English legal system has been of a lasting nature. To date, the law of remedies, particularly writs are understood according to the common law practice. Law of writs can be taken as one of the areas where the common law has deeply influenced system of justice.

Almost all constitutions of Nepal unveiled after 1950 have vested writ jurisdiction with the Supreme Court. The Supreme Court at all times, under different constitutions, has been exercising this extraordinary jurisdiction. The highest court has been a synonym to writs court. Various writs have been issued to defend and maintain the supremacy of the constitution, to settle disputes between the parties, to contain the organs of the state within their legitimate bounds, to implement laws to bridge the gaps of law, and above all, to protect the people from the tyranny of the government.

This jurisdiction has been often times problematic too. In the initial years after the mass movement of 1950 the then Executive was not happy with the exercise of writ jurisdiction by the Pradhan Nyayalaya (Supreme Court) and, hence, was taken away later by amending the Pradhan Nyayalaya Ain in 1953.

The writ jurisdiction has been exercised to define the limitations of different organs under the constitution. The Court contended in *Sarbagyaratna Tuladhar v. Rastriya*

*Panchayat*⁶ [Legislature in the Panchayat System] that it holds the power of interpretation of the constitution, and thus can see the limits of privileges of the legislature. The legislature cannot interfere with the constitutional jurisdiction of the court.

The Panchayat period (1960-1990) did not remain significant from the point of view of judicial review of legislations. The constitution of 1962 known as the Panchayat Constitution declared that it is the fundamental law of the land, and any law inconsistent with it is void. But as the constitution gave the monarch a sacrosanct position, and as he was considered a source of all laws under whose name the laws would be promulgated, there existed a judicial psyche not to annual any legislation unconstitutional. There were some constitutional provisions which would authorize the executive power holders to issue rules, but their expediency, legality and legitimacy would not be open to test. A rather ridiculous scenario which emerged then is that some rules were more fundamental than the fundamental law of the land itself.

During the Panchayat period, the court had to limit its role to regular adjudication. Even within this closed environment, the judiciary had issued writs of various natures including habeas corpus and certiorari. Students unions were allowed to operate, newspaper censorships were reviewed and detainees were ensured fair trial. Even so, the failures of the judiciary came to surface on many fronts. During this period, the need for reforms in the judicial system as a whole was underlined and a Royal Commission was constituted for recommending measures for the reform of the judicial system. The report addressed many issues that were relevant to the smooth functioning of the independent judiciary. It discussed about the level of public trust in the judiciary and suggested many measures for massively overhauling the judicial system ranging from the restructuring of the tiers and jurisdictions of the courts, conditions of service of the judicial personnel, reforms in laws, reforms in the appointment procedure etc. It took, however, years to implement the report.

Even though, the decisions of the Supreme Court would be final according to the constitution of 1960 particularly because the King could issue commands to the Supreme Court to review the decisions given by it, and at times repeatedly, it led to perpetual uncertainty. A Judicial Committee was set up by the constitution itself to look into such petitions and recommend the King for the judicial review. Practically, on occasions, decisions of the Supreme Court were, in fact, reversed also. In addition, a Special Petition Department (Bishesh Jaheri Bibhag) was set up at the Royal Palace to receive petitions from the people. This department used to separately make submission to the latter where upon the King used to issue commands to various courts and other offices to do certain acts.

There might be some people who still see the relevance of such a mechanism to facilitate the review of the decisions of the Supreme Court. But the uncertainty created by frequent review and revision was more precarious than the chances of correcting the fallibility of the judges. The present Interim Constitution has made some unique arrangements regarding the review procedure of the cases decided by the Supreme Court. Until now, the same bench which decided the case would make review under certain

⁶ NKP 168 (SC 2035 BS)

conditions laid down by law. But now, a new bench consisting of judges other than those who participated in the earlier bench will hear the review petition. That has virtually transformed the review jurisdiction into an appeal, which is in contradiction to the basic idea of review. As a matter of fact when other judges make the fresh hearing it is not a review hearing. How will this provision work in actuality is yet to be seen in practice. Yet, the danger attached with it is the lack of finality and certainty even at the Supreme Court level. Many additional judges may be required to handle the flood of causes created by the new provision and due to cumbersome lengthy hearing procedure the review might entail.

In rest of the matters, the Panchayat period is marked by judicial efforts in evolving the judicial process in the ordinary course of action and developing jurisprudence in many areas of law. Many important interpretations were made in regard to the powers and limitations of the constitutional functionaries. Various types of judicial remedies were identified and evolved. The due process issues were more significantly dealt with and a fairly good amount of judicial principles were enunciated, many of which are considered as lamp posts even to date.

The Nepali judiciary entered a new era following the successful mass-movement of 1990. The Constitution of the Kingdom of Nepal made provisions for the reorganization of the judiciary.

The constitution termed "independent and competent" judiciary as its basic feature. The judicial sovereignty was vested in the judiciary itself. The constitution gave wide ranging powers to the judiciary regarding the protection of fundamental and legal rights. A very creative and powerful jurisdiction over public interest matters was created for the Supreme Court and which was quite broader in scope compared to the power of the courts in many other jurisdictions. With this, the Supreme Court did not remain merely a reactive court to wait for the real cases for resolution. Instead, it could consider matters that were important for the implementation of the constitution or to give remedy to the public in matters of public importance.

This jurisdiction has given important avenue for the court to reflect upon issues more creativity. Many important judgments have been already delivered by the Supreme Court which gave interpretations on various articles of the constitution such as the power and positions of the King, the Prime Minister, the Parliament and of itself, their limitations, the manners in which they could be exercised. All have been interpreted by the court on different occasions.

During the post 1990 period, The House of Representatives was dissolved more than once on the recommendation of different Prime Ministers, and each time the action was examined by the court. Many times, the Supreme Court had to enter to political questions in the guise of legal issue as well. And more often than not, it has fallen into controversy for its political orientation also. Though at times the court has voiced that purely political questions is not justiceable, often legal questions having political consequence have come to the court which it has found difficult to avoid. In fact, it is not always possible for the Supreme Court to completely dissociate itself from legal issues that have political consequence. Its own understanding or philosophy on the issue, its capacity to manage them from the judicial standard, the political culture of the day, its standard

practices, norms and values, all should be taken together to evaluate the performance of the judiciary.

The judiciary under the Constitution of the Kingdom of Nepal, 1990 and the present one in a continuum occupy unique and important place in the entire judicial history. No other judiciary had enjoyed so much authority under the constitution in this country than the present one. It has aroused the hopes of the people and hence more responsibilities for itself. Then at times, it has also frustrated for reasons of its own and others.

Practically, the judiciary in the post 1990 period had the occasion to test the application of almost all tender points of the constitution, be it the citizenship or dissolution of parliament, or the authority to conclude treaty and their domestic applicability, executive privilege to inquire into any action, the necessity doctrine, the autonomy of the constitutional bodies, the enforceability of the directive principles, the power of the King etc. It had to touch upon all civil and political rights as well as economic, social and cultural rights. The court made important headway in matters such as human rights, gender equality, environmental rights, corruption control, rights of the child, and civil service issues. The proactive and creative contributions of judges are discernible in many areas. On some occasions, constitutionality of various statutory provisions have been examined and declared *ultra vires*. While at others, directives have been issued to reform the law or implement it in the light of contemporary legal development particularly from international human right laws.

Unfortunately the 1990 Constitution could not be taken to its natural directions. In the final years, it had to witness unprecedented upheavals in terms of its acceptability and implementation. The King seized the executive power from the elected Prime Minister, and under his own chairmanship, formed the cabinet by invoking Art. 127 which were meant for clearing up the problems as a last resort measure relating to the implementation of the constitution rather than creating any opportunity for him. Unfortunately, the King took this contingency as an opportunity for himself to rule. The King neither followed the due process which was a condition precedent to the exercise of Article 127, nor was the Article exercised for the purpose it was stipulated.

A Royal Commission without any constitutional back up was constituted in the name of inquiring into corrupt practices and abuses of authority by the members of the previous governments, but, in fact, that was basically motivated by political vendetta. Consequently, the then Prime Minister Mr. Sher Bahadur Deuba and many other senior leaders were sent behind the bar. The implications of royal takeover were manifold. The very limits of constitutional monarchy were exceeded, Parliament was already dissolved. Personal freedoms of the people were jeopardized and security forces were exceedingly relied upon. Consequently, they exceeded their limits and abused the human rights of the people. The Royal adventure boiled up the situation which ultimately ignited the rebellion mood in the people.

At this juncture, ex. Prime Minister Mr. Sher Bahadur Deuba and other leaders submitted petition before the Supreme Court against the functioning of the Royal Commission. The Supreme Court constituted a five member Constitution Bench to hear this

case. The court had a historic moment to pay its highest esteem to the supremacy of the constitution and proscribe any adventure that went against the principle of constitution. In its historic judgment the court left no stone unturned to say to the effect that the sovereignty of the country resided in the Nepali people, and hence they were the only source of the state power. Since there already existed a constitutional body to investigate into corruption and the abuse of authority, the establishment of the Royal Commission was not warranted.

The judgment rejected all the premises of the royal takeover, and legitimized the causes and concerns of the dissident political community. The court had to protect the leaders and other people from the oppressive measures of the government. The entire judiciary had to issue hundreds of writs of habeas corpus every now and then to release the illegally detained leaders and other people who were particularly detained with a view to restrain them from participating in the mass movement. It helped the movement to keep its momentum. The mass movement ended up with the proclamation of the King to reinstate the dissolved House of Representatives and he returned back all powers he had seized from the people. Since then, a new political process has started. The government is now run by the alliance of major political parties with a mandate to hold election for the constituent assembly for drafting a new constitution.

Ironically, we have now a new Interim Constitution which demands fresh allegiance from the judges.⁷ The courts are asked to apply the constitution and laws in accordance with the "spirit of the mass movement." As the institution of Head of the State is in a limbo, a new arrangement has been made regarding various actions relating to the judiciary. For example, the Chief Justice will be appointed by the Prime Minister at the recommendation of the Constitutional Council, where politicians are in majority. The Chief Justice is required to take an oath before the Prime Minister. The Supreme Court will have to submit the annual report to the Prime Minister. The Chief Justice and the Justices of the Supreme Court can be deputed to such works other than the judicial deemed fit by the cabinet in consultation with the Judicial Council. The composition of the Judicial Council has been redesigned in such a way that majority held hitherto by the members of the judiciary in it has been reversed.⁸ The implications of aforementioned provisions in the maintenance of independence of the judiciary and the rule of law, and their relation with the smooth transformation from transition to sustainable peace must be impartially examined.

Over the years, the singular contribution of the judiciary, if I may say so, can be seen in terms of its commitment to the rule of law. By this, the judiciary did not mean to defend the oppressive measures of the government, but to protect the people from their wrath. The judiciary has, though not infallibly, zealously guarded personal freedoms of the people at all times, good or bad.

The protection of human rights by applying the international standards at the domestic level is a commendable judicial exercise. The judiciary has been consistently contributing to the progressive development of jurisprudence in many areas not only by way of interpretations of statutes but also through directives issued to the government to

⁷ See NEP. INTERIM CONST., 2007, art. 162(2). Under this article all judges were required to take a new oath of allegiance to the constitution otherwise judge would lose their job instantly. No reason is given why they were required to do so.

⁸ *Id.*, art., 100(1), 103(1), 109, 110, 113.

review, reform and enact necessary laws, as part of the latter's responsibility under the constitution. This function has been complementary to the law making function of the legislature and the executive. It has stood as a final arbiter in the constitutional set up; an arbiter generally received not only by virtue of the legal authority, but also by the popular acceptability of its decision. Although, of course, not infallible, the judiciary has resolutely shown its willingness and capacity to serve as a final defense against tyranny.

5. Challenges

The judiciary like any other organization works under certain environment. The political climate that is required for the smooth functioning of an independent judiciary did not remain as conducive as it should have been in the entire modern political history of Nepal except during a brief period of one and half decade of the implementation of the Constitution of the Kingdom of Nepal 1990. Even under that constitution, during the concluding years it tended to be affected by the royal takeover. It has run through many vicissitudes trying always to adjust with the political changes, yet without compromising its basic values or services.

Despite its efforts to maintain its Dharma as an independent and impartial dispenser of justice, it has encountered the problems of arrears, delay, eroding quality and above all mounting consumer dissatisfaction. Some problems are its own and others are created by external factors, which must be holistically resolved. In order to be able to deliver the services as expected, the judiciary will have to specifically deal with some of the issues which otherwise would render its efforts futile and tarnish its image.

The judges need to revisit themselves why they become judges. There might be a time in history where judges were revered and invested with an aura of infallibility. It happened so because people did not properly understand the judiciary or they were not used to question the social or state institutions.⁹

5.1 Interaction with Society and Limitations of Judges

Now, judging is not what it used to be. The judges are more criticized now. They face more difficult tasks than ever before. To be a judge is not to gain personal acclaim nor is it an easy life style. In order to maintain impartiality, a judge recuses from a social situation to avoid possible embarrassment in the discharge of his/her duties. This self-ordained seclusion which leads to loneliness in life is not that easy to bear. Though the judges would work with factual judgment on evidence, their affiliations are sometimes misconstrued in a way that is prejudicial to the nature of their work. It becomes especially inconvenient when a judge is deputed to non-judicial work by the government.

A judge is always expected to maintain self-restraint, and so, allowed to exercise his or her discretion to determine whether a particular relationship affects his/her work. But who will take the responsibility when the government deposes a certain judge to a non-judicial function under some pretext? This is particularly so in view of the new

⁹ *Supra* note 3.

constitutional provision which allows the government to depute even Chief Justice to a certain non-judicial work. There is even a possibility that the power could be used as an attempt to displace him/her or to disturb the independence of the judiciary.

5. 2 Criticism of Judges

The dispiriting criticisms not based on fact often dishearten the judges either to refrain from performing the way they used to or change the course, or to mediate between those who gave such impressions. Only a few judges either have the skills or inclination to maintain a relationship with the media which preserves judicial dignity and appropriate reticence while communicating an insight into the works of the courts.¹⁰ It is true that judges have to respect criticisms even against them, but restraint has to be maintained by the media or the public so that they do not destroy the confidence of the public in the administration of justice. If public scrutiny of judges is used as the plaything of controversy to destroy public confidence in the administration of justice according to law, an enormous disservice would be done to the society. All should be reminded that if the criticism erodes the confidence, it also erodes the power of the judiciary to protect the very right to constructive criticism.

5. 3 Self Restraint

To be a judge in a society which is so divided, so disturbed, and so confused, which is suffering from illiteracy, poverty and underdevelopment is full of challenges and responsibilities. A judge foregoes all the delights of intellectual life including the demands of family life, recreational activities or other extra-curricular activities. What would, I believe, bound a judge to remain with the judiciary is the "inner satisfaction." The satisfaction of judicial life necessarily flows from an inner conviction of service to the society, from the satisfaction of the aspirations of litigants, of the profession, of the public and most importantly, of oneself, and from the mutual esteem of judicial colleagues.¹¹

To gain such a satisfaction, a judge will have to evoke many things such as skills and qualities of the highest order, unquestioned integrity, humane understanding, and knowledge of the law, social awareness, wisdom, patience and industrious character which is by no means easy to achieve. The pain of leading a lonely life will remain exasperating. Despite all such inconveniences a judge will have to have self direction and drive. No expression of satisfaction can satisfy the judge unless his/her own standards are satisfied. This awareness will have to be seriously embedded in the mind of a judge. The entire judicial community and the public at large should encourage them to uphold such values.

5. 4 Need of Judicial Reform

We envision our judiciary to be independent, impartial, competent, transparent, accessible, participatory and representative of the diversity that exists in the society. For this, necessary conditions at the constitutional, legal, institutional and managerial level have to be created. The Strategy Plan of the Judiciary is being implemented by the Supreme Court

¹⁰ *Id.*

¹¹ *Id.*, p. 9.

to address this imperative in a certain manner. Though judicial reforms are to be primarily initiated from within the judiciary, it is not necessarily an internal process. All the justice sector actors must concurrently initiate reform agenda for themselves, and an overall target should be set and achieved through their joint and several efforts. Whatever has been done so far is far little than what is necessary. A time has now come to draw attention of all constitutional and public functionaries towards the needs of the judiciary.

5. 5 Public Confidence

The judiciary has to be mindful of its image. The confidence of the people in it as a justice dispenser remains central to how far it has been well performing or how far it requires its own reform. Public confidence in it depends on various factors.

Basically manifest adherence to the basic elements of the judicial method, impartiality, procedural fairness, the pursuit of justice in the application of law and exposure to public scrutiny will determine whether judges have commanded the confidence of the community they serve. Occasional research and report indicate that our judicial services are yet to reach to the needful in a manner that they should have reached. The level of consumer satisfaction is not as expected. Our performance rating has not been satisfactory both at the national as well as international level. Such a rating will affect not only the overall investment climate, but also overall credibility of the entire polity. Therefore, enhanced confidence should be the outcome of the whole reform process.

To enhance public confidence in the judiciary, community understanding of the nature of judicial works and their requisite support, judicial commitment to deliver its services to the best of its capacity, its structure, process, resources, management, all have to be complementary to transform the vision of the judiciary into a living reality.

5. 6 Checks on Judicial Power

The community for which the judiciary serves must understand that judicial power is by no means unlimited. There are numerous checks on its authority- constitutional, statutory or customary. The constitution also provides several checks on the judiciary to maintain the system of separated powers. Public hearings, pardon, revival of judicial sentences, enforcement capacity or enforceability all directly or indirectly affect the confidence in the judiciary. To attribute all the failings to the judiciary which are created by the external factors will not be a fair assessment. A balance sheet must be issued on the accounts of failures and successes of the judiciary stating the reasons therefore.

5. 7 Modes of Appointment of Judges

All along, one of the common concerns regarding the independence of the judiciary has been about the appointment of judges. There are various models regarding the appointment of judges in the world. There is no single formula which can be whipped off for all situations. In the UK, the appointment is made by the cabinet on the basis of merits. But that system could not be popular in other jurisdictions for the reason that it lacked democratic representation and transparency. The election of judges was taken as an

alternative method to the executive appointment. That process was highly politicized and could not ensure meritorious selection.

The provision of a council to recommend for appointment has been more popular these days. The appointment through the council is seen as a step forward in maintaining judicial independence. But rarely have those countries with Judicial Councils marked completely satisfactorily. The Councils neither have been able to check the politicization of appointments nor have they ensured merit based selection. Due to high politicization of the council in Venezuela, the council itself was abandoned.

Unless merit based selection is ensured, good candidates will not come forward. It is believed that once a system is established which ensures merit based selection, the appointees act more independently because they know they were selected on merit.

5. 8 Performance Evaluations

The court will have to make sure that a judge possesses all qualities relevant for being a fair and impartial judge. Criteria should be appropriate and the procedure adopted for the selection must also be fair and transparent. But this alone does not suffice. To ensure that, many issues relating to judges such as the security of tenure, performance evaluation on certain reasonable grounds, expeditious handling of complaints, disciplinary actions and continuing education programs and implementation of code of ethics are important areas to be considered. Regarding performance evaluation definite criteria need to be developed. No consensus exists on how relevant factors such as seniority, efficiency, quality of decision-making and the number of cases disposed should be assessed. Neither seniority nor quantitative indicators, nor speed at the expense of qualitative indicators and justice can be preferred. The present judiciary seems to be oblivious of this need. Disciplinary actions should be expedient. Complaints must be timely and responsibly handled. Transparency in this process should be maintained. At the same time, steps need to be taken to guard against unhappy litigants using the process to harass judges who decided against them. Complaints on merits of decisions should be excluded as far as possible.

5. 9 Administrative and Financial Autonomy

There are virtually two models regarding the structure of the judiciary:

1. The judiciary dependent on the executive department for administration and budgetary functions.
2. The judiciary as a separate branch having same degree of self-government and budgetary control over its operation as the executive branch acts over its operation.

Europe follows the first model. But it is all set to embrace policies where the responsibility of judicial administration and budget is transferred from the executive to the judiciary itself. The US adopts the second model. The US Congress created the Administrative Office of the US courts. The federal judiciary manages its own funds and operations. It also develops its own budget request which is submitted to the Office of Management and Budget (OMB) by law. The OMB must include the judiciary's proposed

budget in the submission of the President's budget to Congress without change, although OMB is permitted to comment on it.¹²

The provision of adequate budget has a direct and indirect causal link with the independence of judiciary. In the absence of necessary budget, quality judges and other human resources cannot be attracted or retained. The likelihood of corruption can hardly be diminished. The judicial processes including oral proceedings cannot be correctly recorded and physical working environment cannot be created. Actually, inadequate budgeting undermines respect for the judiciary both in the eye of judge and in the eye of the public. Based on the experience of different jurisdictions, around 1% of the total budget is normally allocated for the judiciary. For example, the Philippines allocates slightly over 1 percent, Romania 1.73 percent, Costa Rica 1.5 percent, Pakistan 0.8 percent at the provincial level and less than that at the central level. The Nepali judiciary receives a less than 1 percent [0.64 in FY 2063/64]. Whereas it deems always correct to allocate adequate budget for the judiciary, the latter must ensure improved performance and greater independence to justify that. Judiciaries do not seem to have proper judicial management and ability to present its financial needs.

5. 10 Relationship with the Bar

The relation of the judiciary with the Bar and other actors of the justice system must be maintained in a spirit of mutual cooperation and understanding. Time and again, hostile expeditions have come to surface against the judiciary for political reasons. At a time when the judiciary is put under attack due to fragile political scenario, the relation happens to be even more important. The members of the Bar are the natural allies of the judiciary, but if they join the political band wagon, tension between the Bar and Bench will be compounded. The judiciary is prone to loose its strength when divisions are created between the Bench and the Bar. The impact can be experienced in term of the overall derogation of the rule of law. The impact will not be limited to the ordinary people but the entire Bar and the judiciary itself.

5. 11 Developing Judicial Capacity and Attitudes

Judging these days is more challenging. Each day a new issue emerges. To address that, a judge must acquire new knowledge, skills and capacity. Without looking into professional development, mere willingness to uphold integrity cannot bring about any result. It is often believed that judges who do not respect themselves as professionals are less likely to withstand corruption and other outside pressures. Pressure works when resistance is weakened. Training should be a continuous process, and should be linked up with the performance. Over the years, training needs of the judges have been emphasized, and a number of trainings have been imparted. To what extent it has materially impacted their performance is yet to be accessed. The National Judicial Academy and the employer

¹² US Agency for International Development, Washington D.C., *Guidance for Promoting Judicial Independence and Impartiality* 2002, p. 24).

organizations must undertake periodic evaluations, and pursue appropriate training policy which can make trainings effective to bring about desired results.

5. 12 Managerial Capacity

The judiciary is rated in terms of its orientation to the principles it is supposed to protect. But much depends upon its capacity to bring its knowledge into practice. A court system needs strong managerial capacity at every level such as securing and disbursement of budget, personnel management, court operations, physical planning, public relations record management, execution of judgment, information management and strategic planning. To date, there is nothing like a judicial management which as a separate discipline is implemented. Not even a single person is trained specifically in it. The handling of managerial issues in a non-professional manner can never bring the desired effects.

5. 13 Enforcement of Judicial Decision

One of the most serious challenges facing by the Nepali judiciary is the enforcement of judicial decisions. Most of the criminal sentences are not executed. The situation is more worrying where the accused has been on bail and the decision goes against him. The enforcement of judicial decisions is left with the judiciary itself which is practically never a perfect idea. In civil matters, as the parties themselves do take personal interests, implementation of the judgments by the courts might be relatively better. But since the implementation of decisions in criminal cases require the use of information network, security coordination and continuous surveillance, court system with its traditional management capacity cannot handle it. The executive by no means can absolve itself from its responsibility to implement the judicial decisions, which otherwise can create a security problem for the maintenance of law and order.

The judiciary will lose credibility, even where it has worked honestly and fairly, if its decisions are not implemented. The problem becomes complicated when the decision is against the government, or if a decision cannot be implemented without the cooperation of the government. It is seen that a good number of decisions are not complied with by the government, particularly in the area of environment and public interest matters.¹³ In that situation, a judge will be in a dilemma as to whether he/she has to make a correct decision and face the consequence of non-compliance and invite attacks on his/her own power, or make a decision that avoids controversy. The danger of inability of courts to compel compliance is that it may discourage judges from making hard and often unpopular decisions. It is submitted that the executive branch should comply with the judicial decisions and take full charge of their implementation.

5. 14 Effectiveness of the Judiciary

The effectiveness of the judiciary depends on its independence, efficiency and integrity reflected in her decisions. Not only that cases need to be processed efficiently, they also need to be decided impartially. The judiciary might have a good name in deciding cases

¹³ See Status of the Directive Orders Issued by the Supreme Court (Findings of the Study Research Report 2063 BS), National Judicial Academy, Kathmandu, Nepal

fairly, but if it fails to reduce the bulk of its case loads in a timely manner, its effectiveness is lost. When cases languish for unreasonably longer time they invariably deny the rights of the concerned people. The judiciary need not only be fair and impartial, it also needs to be effective.

5. 15 Accountability

So much has been written regarding the independence and impartiality of the judiciary. Yet, there is still a reverberating interest to see the judiciary performing in an accountable manner. The judiciary is not left free to act according to its whims and fancies. It has to be accountable to public for both its decisions and operations. If its decisions go too far from public sentiments, a correction will be called for by way of a legislative amendment. Its operational impropriety will be more distinctly questioned. There is a consensus about the need for an effective and accountable mechanism, but designing it in such a manner that does not prejudice the judicial independence or impartiality is a complicated job. The difference between independence and accountability must be properly understood. "Independence addresses freeing the judiciary from prior control of its decisions, on the other hand, accountability focuses on having mechanisms in place by which the judiciary as an independent body is required to explain its operation after the fact.

6. Conclusions

The judiciary does not work in a vacuum. It influences the public and, in turn, gets influenced by them. The understanding of the people about the judicial process, readiness to cooperate with it, and the confidence they have in it definitely help it to implement the rule of law and protect its independence. If the people become indifferent, the judiciary will be either unaccountable or weak. Currently, a scary trend of taking laws into hand with a rebellious mindset is witnessed. Such a trend is the very antithesis of the rule of law. When victims have to vindicate the wrongs by taking laws in their hands, the foundations of the rule of law will be effectively ruined. When lawlessness looms around, the cause of justice will ruin by itself. A bonafide mission cannot be achieved in a mischievous way. While the judiciary can be criticized hundred times for its failures, it cannot be abandoned like a baby with the bath water in the name of its failures. In order that the norms and values reflected in laws are respected, people must join their hands to consolidate the strength of the judiciary. The hands that strengthen the judiciary will strengthen the authority and confidence of the polity itself. The judiciary must be ready to discharge its responsibility with a genuine sense of accountability. Judicial independence can operate properly only when the judges are learned in the law and comport themselves with integrity and impartiality.

Starting from the foundation of archaic law and dictatorial regime, and without any external support, the Nepali judiciary has made a significant headway towards upholding the rule of law in the light of its own experience and the aspirations of Nepali people, though often times it had to pass through troubled water due to political conflicts. To my mind it must move ahead consolidating its achievements. It cannot miss directions

while navigating across the sea. Its directions must be clear. It must be able to assure that all in the boat will be taken safely to the bank. A sense of trust in the judiciary and belongingness among all state actors in the judicial process can be the only safe way to navigate the judicial boat across the troubled water of the present kind. Ironically, the Nepali political elites seem to have underrated the contributions made by the judiciary without having due regard to what stages it had been forced to pass through and with what amount of resources it was asked to meet the challenges ahead of it. The contributions of an institution like the judiciary cannot be seen in terms of physical development though there are always visible links between physical development and the judicial functions. What the judiciary nurtures is the values and the norms of behaviour. A sense of security and the confidence in the mind of the people are instrumental to sustaining peace in society. The utility and the potential of the judicial services in doing so cannot be overemphasized.