



# An Essential Balance: Federalism, Rule of Law, and the Judiciary in Nepal

*Since 2015, Nepal's new Constitution has driven significant changes and investments in executive and legislative structures across the country. Matching attention has not been given to the judicial branch. Continued failure to invest in the judicial branch of government undermines the transformational project embarked upon in 'Naya Nepal' (New Nepal). The judiciary must also claim its proper place in government in order to deliver on federalism's promise.*

The state transformation triggered by a new Constitution in 2015 and the arrival of fresh political leadership through nationwide elections in 2017 promised a more equal and inclusive Naya Nepal (New Nepal), in which political power is devolved from elite-captured Kathmandu institutions, where development is balanced across all regions of the country, where there is greater appreciation for religious and ethnic diversity, and in which there is increased peoples' participation, especially of historically marginalised groups, in governance.

Amidst this historic moment, there is broad acceptance that the ongoing transformation will have durable effects on the quality of the country's governance. Nonetheless, there is widespread anxiety that those currently in decision-making positions in each branch of government will shirk their awesome responsibility and prefer cosmetic adjustments over fundamental change.

The Constitution of Nepal covenants to bring government closer to citizens through the implementation of a polycentric federal structure, wherein federal, provincial, and local governments

are coequal. With 753 new heads of local government and seven new chief ministers as well as matching local and provincial assemblies comprising more than 35,000 elected representatives in place since 2017, the executive and legislative manifestations of government in *Naya Nepal* are now more visible to citizens than in the past.

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Less can be said, however, of the judicial manifestations of *Naya Nepal*. Cosmetic changes to court structure aside, minimal attention has thus far been given to the judiciary’s centrality in impelling constitutional values in the practice of government—

starting with the rule of law and access to justice—in contributing to the success of the ongoing governance transformation.

The provenance of this imbalance in attention to the rule of law and access to justice is neither mysterious nor casual. Neglect of the judiciary is quite usual in Nepal. While historically this lack of attention for the judiciary is symptomatic of the general preference to support institutions of representation as against support for institutions of restraint in transitional democracies, the undermining and sidelining over many years of Nepal’s judiciary is part of a sordid story of collusion by political parties across the spectrum to weaken, co-opt, and subordinate state institutions that are meant to deter impunity and constrain opportunism.

A quick and effective measure of this indifference is the steady decline in the already-meagre annual allocation of state resources for the judiciary, currently at its lowest levels of funding in years—a mere 0.34 percent of the government’s budget, down from 0.57 percent in 2015-16. In fact, in only three budgets in the country’s history (2011-12, 2014-15, and 2015-16) has judiciary-related expenditure exceeded 0.50 percent of overall government expenditure. The slight increase in the 2019-20 budget, in which judicial spending is projected to be 0.40 percent of federal government expenditure, provides little encouragement.<sup>1</sup> Continued failure to invest in this co-equal branch of government—the

apex institution to constrain unlawful action—undermines the transformational project embarked upon by the 2015 Constitution.

On the other hand, three years after the adoption of a new Constitution, it is also necessary for the judicial branch of government to consider its instrumentality in ensuring that rule of law and access to justice is better under federalism.

## **Constitutional Culture and the Rule of Law**

While much hope has been placed in the 2015 Constitution, it cannot in and of itself transform the country’s constitutional and political culture, which has been shaped over decades of perverse governance praxis—a culture that accepts collusion and impunity, crises and destabilization, and backroom deals and horse-trading as normal.

A new set of norms of how to do politics must be embraced. The rule of law, and buttressing it the judicial branch of government, sits at the heart of this reshaping of politics.

The rule of law is principally concerned with the principled exercise and accountability of governmental power. It requires adherence to the laws of the land, beginning with the Constitution, by **all**. Governments—elected representatives and appointed officials alike—must abide by the same set of rules as everyone else. There is no special pass for those in power. Sadly, the main threat to federalism in Nepal is the absence of the rule of law exemplified by ongoing abuse of the Constitution by those charged with protecting it.

The rule of law demands public justification for the exercise of public power, as argued by John E. Finn and others.<sup>2</sup> This process of public justification must be championed by the judicial branch as the institutional expression of its own authority and to

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which other public actors and citizens must learn to conform as well. In the setting of the courthouse, the branches of government must exchange reasons to justify the legitimate exercise of power,

and governments must be able to defend their actions. The judicial process thus contributes to a constitutional culture in which the arbitrary exercise of power is expressly discouraged.

It is in this sense that the rule of law may be talked about as a value. And it is in this sense that the rule of law is a critical, missing feature from Nepal’s constitutional culture; which the judicial branch of government must salvage, nurture, and return to public service.

### **An irreplaceable role for the judiciary**

Nepal’s judiciary has an irreplaceable role to play in instilling a commitment to the rule of law and encouraging a new way of doing politics in the service of justice for all. The question is: can this role be more public beyond the confines of courtrooms in Kathmandu and the provinces?

In addition to requiring a proper and substantive account from other branches of government can the judicial branch of government be instrumental in shaping norms and values in *Naya Nepal*? Some of the challenges and opportunities for the judiciary to embrace a constitutional guardianship role are worth discussion.

The judiciary’s formal and informal relationship to other branches of government shape its ability to play an instrumental role in constitutional guardianship. While historically Nepal’s judiciary has, with a few notable exceptions, been cautious to confront or overrule executive government actions, more recent diffidence suggests additional losses in stature as well

as in autonomy *vis-à-vis* the executive and legislative branches.

As suggested earlier, successive governments of all political stripes have colluded in shackling the judiciary and relegating it to subservient status. To wit, judicial sackings, impeachments, forced retirements, and politicised appointments are some of the methods used. Moreover, there is a consistent pattern of governments and politicians impugning and defying court orders.

On the other hand, leaders and functionaries of the judicial branch have invited opprobrium on several occasions, leading to public criticism on par with and sometimes exceeding that levelled at executive and legislative branches.

This then is the existential dilemma for the judiciary: **how to regain public trust** not only as an institution of restraint on government but also as a trusted guardian of justice in *Naya Nepal*.

### **Constitutional Guardianship**

While the Constitution of Nepal covenants to bring government closer to citizens through the implementation of a polycentric federal structure, serious concerns can be raised of obduracy and procrastination on the part of the federal government to meaningfully devolve power.

The future of intergovernmental relations will be shaped by the ability of the federation’s 761 governments to converse as coequals. Legitimate and credible dispute resolution will be critical for constitutionally-mandated cooperation and coordination among and between governments to materialise in real terms.

The Constitution creates several institutions to support and supervise intergovernmental relations. At the national level these include the Inter-Provincial Council, which brings the provinces and federation together to settle ‘political’ disputes, the National

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Natural Resource and Fiscal Commission, the constitutionally-mandated authority to oversee the allocation of the country’s resources derived from revenues and royalties, and the Constitutional Bench of the Supreme Court.

The Constitutional Bench is tasked with interpreting the Constitution, particularly for settling intergovernmental disputes and providing clarity and coherence to federated governance. However, internal politics have prevented the Bench from properly functioning, and the limited number of cases that it has adjudicated are legacy cases arising prior to 2015.

Almost four years after the adoption of the 2015 Constitution, the Court has yet to embrace one of its most important roles—**framing and shaping the course of constitutional federalism**, particularly regarding intergovernmental relations. This has contributed to the ongoing legal and jurisdictional paralysis that continues to significantly hamper the

effective functioning of the provincial and local governments.

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In many instances, the Constitution’s schedules, which delineate the division of constitutional power among the governments, are significantly ambiguous in effect. Disaster management, for example, is listed as both an exclusive responsibility of local government and as

a concurrent power of the federation, provinces, and local governments.<sup>3</sup> Whereas effects of disaster are manifested locally, the incoherence in disaster management begins with ambiguous delineation of responsibility in the law. Another practical consequence of such ambiguity is seen in the ongoing dispute between Province Two and Kathmandu over the establishment and governance of police forces.<sup>4</sup> The dispute is only likely to fester and grow across all provinces absent legal clarity on who does what in a federation.

These types of legal uncertainty have stymied lawmaking at the subnational level. Apprehensive

about their legislation being nullified by the courts or contradicted at the federal level, most local assemblies have restricted themselves to passing procedural laws only. One elected local representative recently stated: “Initially, we were very excited to make laws. Later we realized that our laws could be overruled by the court or even by the federal or provincial governments. Now we are confused, as we have to be very careful.”<sup>5</sup>

The Constitutional Bench can provide decisive guidance in Nepal’s federation—supplying, for example, a constitutionally robust mechanism for subnational

governments to debate and contest laws that harm their constituents’ interest. Moreover, the formal resolution of disputes by the Bench will require governments—and in particular the federal government—to publicly justify the direction in which they are steering the federation.

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For federalism to work, Nepal’s judiciary and, perhaps more importantly, the Constitutional Bench will have to help inculcate a culture of learning. The task of helping to navigate the complex jurisprudential issues that will arise in the newly federated system of governance will not be easy. And, like the rest of the country, the judiciary does not have institutional memory of federal governance. Judges, like functionaries of the executive and legislative branches, have to learn on the job without the benefit of prior experience or preparation.

Fortunately, there are quite a few respectable judges who are well equipped to lead, if only they choose to meet this historic moment with the confidence, courage, and creativity needed to take on the role of constitutional guardianship, leading the way back to a culture that is based on the **principled exercise and accountability of governmental power**, i.e., the rule of law.

### **Structural challenges: new and old**

The organisational infrastructure of the court system is of critical importance for the success of Nepal’s new constitutional order. Importantly, it is in the

lower courts that people come face-to-face with the judicial branch of government. Indeed, lower courts provide the ordinary and routine forms of justice that most directly affect daily life. Therefore, it is critical that subnational courts are not forgotten in considering the judiciary's irreplaceable role in instilling a commitment to the rule of law and encouraging a new way of doing politics.

Nepal's network of 77 District Courts, the lowest of the three-tier court hierarchy, is the gateway for virtually all of the country's litigation—85,000 new cases in 2017-18—over which District Courts oversaw final resolution to 60 percent.<sup>6</sup> Yet, both in resource allocation and in public imagination, these courts are the most neglected. It is remarkable that a mere 241 judges are stationed to discharge the District Courts' enormous workload.

While in the name of bringing government closer to citizens the 2015 Constitution has caused wholesale change to the executive and legislative branches of government, the court structure has not undergone significant revision—except to add two District Courts for a total of 77, and to refashion 16 Appellate Courts as seven High Courts with their 11 Benches extended across respective provinces.

As regards jurisdiction, subordinate courts now have slightly enlarged purview. For the first time, provincial High Courts will be able to hear public interest litigation,<sup>7</sup> hopefully lessening some of the Supreme Court's caseload burden. Meanwhile, District Courts now supervise all justice institutions—judicial and quasi-judicial—below the district level.<sup>8</sup> In addition, the District Courts have increased authority to oversee criminal offences punishable by more than one-year imprisonment, many of which were previously adjudicated by quasi-judicial bodies like the District Administration Office.<sup>9</sup> District Courts also have new jurisdiction over some civil matters, previously supervised by the district executive.<sup>10</sup> As the judiciary assumes these new responsibilities it is imperative that it delivers a justice dividend to citizens.

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Critical access to justice issues have also been inherited from the previous governance setup. For example, the geographical inaccessibility of the District Courts, which remain the lowest court in judicial hierarchy and sit at now-obsolete district headquarters, are one of the key reasons why only a fraction of disputes tends to be registered with the proper court and judicial authority.<sup>11</sup>

The judiciary's absence in municipal government is glaring and hardly addressed by the creation of a so-called judicial committee in each of the 753 municipalities. While these bodies have a mandate to adjudicate and mediate certain cases at the local level,<sup>12</sup> their three members are drawn from the local elected executive-legislature.<sup>13</sup> Despite the enthusiasm of committee members to try cases in a judicial manner, these committees cannot be considered local courts.

Mindful conceptualisation of the roles and responsibilities of different justice sector institutions at the local level is required, and the judicial branch's reflections on these would be timely in guiding other branches of government. This is especially the case with regard to the above-mentioned judicial committees, about which inconsistent visions are projected in the Constitution as well as the Local Government Operations Act of 2017—the federal framework legislation that presently guides local government operations. This is also the case with the option provided for in the Constitution allowing the creation of local courts as required. Costly adjustments could result from the judicial branch's reluctance to provide guidance on constitutional provisions for accessing justice below District Courts.

It is necessary that these issues, and more, are engaged in order to guide the creation of a coherent and coordinated system for accessing justice locally—one that builds community and citizen trust in the entire justice sector and positions the judiciary in its rightful place in government. In that sense, the lowest rungs of the judicial branch carry the greatest burden in making justice more accessible to more people. Much work, therefore,

remains to be done to ensure that the promise of bringing **all** of government—legislative, executive and judiciary—closer to the people is fulfilled. A fit-to-purpose justice system is required.

## Towards a fit-to-purpose system

Renewed commitments to judicial independence headlined the annual National Conference of Judges held in April 2019. However, aside from the hot-button topic of judicial appointments that dominated discussion, only a few creative ideas emerged from the conference. Perhaps the most federally relevant idea to emerge related to empowering provincial courts to settle disputes between provinces and municipalities. Ideas such as this, while nascent, indicate that the judiciary may be willing to look for ways to be more responsive to the needs of the changed governance context.

With a recently-appointed Chief Justice at the helm for the next few years and remaining vacancies filled, Nepal's Supreme Court is drafting its fourth strategic plan with more stable leadership and better prepared justices than ever before. The plan should drive the judiciary's institutional vision, direction, and contribution to democratic government in Nepal over the next five years.

Previous strategic plans have focused on court administration, caseload management, infrastructural and modernization needs, and training programs. These remain necessary going forward but will be insufficient to fulfil the difficult role of rethinking and reworking access to justice in a federal context. This will require deep institutional introspection and principled action to assert autonomy while exercising guardianship of the rule of law.

Policymakers have many opportunities to support the judiciary to step into its important but unfulfilled role in federal Nepal. However, doing so will require a recalibrated approach that maintains the essential balance among branches of government. Policymakers cannot continue to focus on institutions of representation—the legislative and executive branches—at the expense of investment in

institutions of restraint—those tasked with upholding the rule of law, including the judicial branch.

The judiciary must be supported and held accountable in promoting a political culture based on the rule of law. To begin with this will require supporting processes that encourage public justification by the judiciary at all levels. This also necessitates further scrutiny of the present structures underpinning judicial integrity and competence, including with regard to mechanisms and arrangements for judicial appointments, judicial capacity and judicial performance, as well as judicial discipline and corruption. Moreover, stakeholders with an interest in the promotion of the rule of law—in academia, the media, the legal profession, and civil society—should be encouraged and brought together to prompt dialogue that promotes the Court's role in guarding the Constitution.

Systemic access to justice issues must be addressed. First and foremost, policymakers should prioritise access to justice at the local level. Collaborative and coordinated work among justice sector actors is a benchmark for effective justice delivery. Practical

and efficient procedures, that are citizen-focused and simple to navigate must be developed to form a coherent and coordinated fit-to-purpose system for locally accessing justice. This includes thoughtful consideration of the interaction between local judicial committees, existing mediation centres, district courts, prosecutors, law enforcement agencies (local, provincial, and federal), and legal aid providers. Jurisdictional gaps between local judicial committees and district courts, if any, in law and in practice needs to be identified

and filled. Other ideas, like special courts and magistrates to handle local and context-specific cases, could also be considered. It is imperative that a Common Justice Sector Strategy is developed as part of the Supreme Court's fourth strategic plan.

There is also opportunity to support the Supreme Court's Access to Justice Commission, which was established in 2015. While the Commission has been engaged in capacity building, legal awareness, judicial outreach, and research, it still has its own capacity needs, including identification of policy

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gaps and areas for reform in the new federal context, development of guidelines and policies on access to justice related issues, and engaging district-based and new local government-based justice sector actors.

Continued failure to invest in the judicial branch of government undermines the transformation hoped for in *Naya Nepal*. Indeed, as the country embarks on its ambitious new governance project,

it is critical that the judiciary claims its proper place in government in order to deliver on federalism's promise. It is vital that the judiciary sees itself as a trusted partner of both state and society, with its functionaries embracing their role as **justices of the people** and not just of the court. Only then will a constitutional culture shaped by the rule of law translate into access to justice in federal Nepal.

- 1 Budgetary figures are taken from the relevant budget speeches, which are archived on the Ministry of Finance's website. See Honorable Finance Minister Dr. Yuba Raj Khatiwada, *Budget Speech of Fiscal Year 2018/19*, unofficial trans., May 29, 2018, [https://mof.gov.np/uploads/document/file/speech\\_english\\_20180715091610.pdf](https://mof.gov.np/uploads/document/file/speech_english_20180715091610.pdf); Honorable Finance Minister Krishna Bahadur Mahara, *Budget Speech of Fiscal Year 2017/18*, unofficial trans., May 29, 2017, [https://www.mof.gov.np/uploads/document/file/Budget\\_Speech\\_207475\\_20170530011441.pdf](https://www.mof.gov.np/uploads/document/file/Budget_Speech_207475_20170530011441.pdf); Honorable Finance Minister Dr. Yuba Raj Khatiwada, *Arthik barsha 2076/77ko bajet batkavya* [Budget Speech of Fiscal Year 2019/20], May 29, 2019, <https://mof.gov.np/en/2019/05/29/news/news/1716/>
- 2 John E. Finn, "The Rule of Law and Judicial Independence in Newly Democratic Regimes," *The Good Society* 13 no. 2 (2004).
- 3 See *Constitution of Nepal 2015* schs 8 and 9.
- 4 See "Explainer: Here's all you need to know about Province 2 police law controversy," *Onlinekhabar*, October 25, 2018, <http://english.onlinekhabar.com/explainer-heres-all-you-need-to-know-about-province-2-police-law-controversy.html>.
- 5 Democracy Resource Center Nepal, *Findings on Functioning of Local and Provincial Governments in Nepal* (Kathmandu: DRCN: 16 August 2018), 17, [http://democracyresource.org/wp-content/uploads/2018/09/DRCN\\_OPPG\\_FINAL-REPORT\\_ENG\\_16082018.pdf](http://democracyresource.org/wp-content/uploads/2018/09/DRCN_OPPG_FINAL-REPORT_ENG_16082018.pdf)
- 6 Supreme Court of Nepal, *Barshik Prativedan 2074/75* [Annual Report 2074/75] (Kathmandu: Supreme Court of Nepal, 2018), <http://www.supremecourt.gov.np/web/assets/downloads/annual/An7475.pdf>.
- 7 *Constitution of Nepal 2015* art 144(1)
- 8 *Ibid* art 148(2).
- 9 *Ibid* art 152(2).
- 10 See *National Civil (Code) Act 2017*.
- 11 Krishna Man Pradhan, "The third branch," *The Kathmandu Post*, October 22, 2018, <https://kathmandupost.ekantipur.com/news/2018-10-22/the-third-branch.html>.
- 12 See *Local Government (Operations) Act 2017* art 47.
- 13 *Constitution of Nepal 2015* art 217.

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