Chapter 2

2.1 State and Human Rights

Judiciary
Nepal’s Constitution (2015) and other national and international laws determine the authorities, rights and duties of courts and other judicial bodies. This chapter discusses decisions, orders and proceedings by courts and other judicial bodies on cases related to Human Rights and the overall effectiveness of judicial organs in terms of efficiency, effectiveness, independence and impartiality.

Article 46 of the Constitution makes the Judiciary (including courts and judicial bodies) responsible for preventing violations of fundamental rights and Human Rights and protecting and promoting the rights guaranteed in national and international laws and conventions. In democracies, the Judiciary provides redress for violations of fundamental rights and Human Rights and safeguards the notion of the Rule of Law. In the past six decades, Nepal’s Supreme Court has decided dozens of cases and petitions on violations of fundamental rights and Human Rights and those judgments now serve as guiding principles and precedents.

Nepal’s constitution guarantees fundamental rights and freedoms, and also authorizes courts and other judicial organs authority to hear disputes and provide justice that is binding on all parties. In addition, Nepal has a constitutionally mandated National Human Rights Institution with authority to investigate, monitor and recommend sanctions for promotion and protection of human rights.

Article 133 (1and 2) of the Constitution provides citizens the right to file petitions at the Supreme Court or any other judicial body in situations where unreasonable restrictions have been placed on the exercise of fundamental rights. The judiciary also has the authority to review the actions and decisions of the legislature and executive that are against of the Constitution and laws. Independence, autonomy and transparency of the judiciary is not only the matter for courts and legal professionals but are also essential conditions for preventing violation of Human Rights in accordance with provisions in the Constitution and international instruments to which Nepal is a party.

This chapter analyses decision taken by the Supreme Court and other judicial organs in relation to protection and promotion of Human Rights between 29 December 2018 to 31 December 2019. It also reviews decisions and statements of the executive and other stakeholders in relation to maintaining the independence and autonomy of Supreme Court and other courts. This chapter also includes reviews of the public debate following the appointment of judges, and the state of access to justice, independence and integrity of judicial bodies, and caseloads and cases decided in 2019.

2. Analysis of Supreme Court Decisions

2.1 Right to a Fair Hearing

The Supreme Court has elaborately interpreted the right to a fair hearing for individuals accused of crime in three writs. This includes the rights to seek and provide information, defend against evidence presented against him/her and in relation to any charge, and the requirement to presume all charged of crimes to be innocent until proven guilty, in accordance with the principle of a fair trial.

2.2 Right to Freedom

On the protection of Right to Freedom in Article 17 of the Constitution, the

1. Constitution of Nepal 2015, Article 126 (2)
2. NKP 2075, Decision No10111, Advocate Jay Shanker Jha ‘Rupesh’ Vs Ministry of Home Affairs, p.1846; NKP 2075, Decision No 10084, Ganesh Panjijyar Vs Judicial Council, secretariat of Judicial council, p.1609; NKP, Decision No 10089 Yagya Prasad Pandey Vs Nepal Government office of Prime Minister and council of Ministers, p.1670
Supreme Court has provided elaborate principles for guiding decisions on habeas corpus writs in several decisions. One decision on freedom related to a case involving detention by the Customs Department, where the court ruled that the department did not have the authority to detain an individual for investigation without reasonable evidence and legal basis, unless there was reasonable possibility of destruction of evidence or the law required the detention for investigation, as last resort. The court decided another case establishing limits to the associated rights of investigating agencies for detaining suspects, and said that objective and reasonable evidence needs to be assured even in the exercise of the discretionary authority of detention. The Supreme Court decided several cases discouraging the re-arrest of supporters and members of the CPN (Biplav) declared illegal by the executive and groups engaged in underground activities after their release by courts. It also warned government employees that repeated restrictions on the people’s Right to Freedom would warrant the legal responsibilities that are applicable for such behavior. In another case related to repeat re-arrests, the court ruled the behavior of government officials responsible as inappropriate and unaccountable.

2.4 Right to a Clean Environment

The Constitution of Nepal guarantees the right of citizens to live in a clean environment and the Supreme Court has interpreted what this could mean in terms of a dignified life in a related writ. The court interpreted this right as one that those affected could seek legal redress. In two other writs related to encroachment of the Fewa Lake in Pokhara, the Supreme Court ruled that every citizen had a right to be concerned with the state of the environment and involve themselves in its protection building on the principle of intergenerational equity. It also said that it was the state’s responsibility to ensure that the environment was protected as it was key to safeguard citizens’ dignified lives. The two decisions included principles on the importance of conserving both natural and biological diversity. Another decision by the court was related to sustainable management of solid waste. In yet another writ, the court ruled that industrial production (in this case by cement factories) should be environment-friendly and ordered appropriate measures to ensure that production was pollution free.

3. NKP 2075 Decision No 10108, Bijaya Raj Tuladhar Vs Kathmandu District Court, Habeus Corpus, 1809
4. NKP 2075, Decision No 10104, Habeus Corpus, Mangal Singh Vs. Tribhuvan Airport, Custom office, p.1783
5. NKP 2076, Decision No 10170, Habeus Corpus, Narendra B.K and others Vs Ministry of Home Affairs, p.71
6. NKP 2076, Decision No 1022, Habeus Corpus, Modan Bahadur Karki Vs Office of the Council of Ministers, p.566
7. NKP 2076, Decision No 0172, Habeus Corpus, Mahendra Khadka Vs Nepal Government, Ministry of Home Affairs, p.869
8. NKP 2076, Decision No 10085, Dharam bahadur Lamichhane VS Ministry of Physical infrastructure and Transport, p. 1615
9. NKP 2076 Decision No 10086, Advocate Khagendra Subedi and others vs Office of Prime Minister and Council of ministers, p.1626; NKP 2075 Decision No 10087, Advocate Bhagawati Pahari and others vs Office of Prime Minister and council of ministers, p.1646
10. NKP 2075, Decision No 10125, Advocate Kanchan Krishna Neupane Vs Council of Ministers, p.1960
11. Ibid no 20
2.5 Right to Freedom of Foreign Citizens

Nepal’s Constitution has some rights that can be exercised only by citizens and others that can also be exercised by residents. Deciding a case related to freedom of expression under Article 17 (2), where a Canadian citizen was the defendant, the court ruled that this right applied only to Nepali citizens, and fell short of executing the provision of Article 19 of the International Covenant on Civil and Political Rights (ICCPR) to which Nepal is a state party. This decision has also raised questions related to the provision of Nepal Treaty Act 1990 [Section 9 (2)] and leaves rooms for additional interpretation by the court.

2.6 Freedom of Opinion and Expression

The Supreme Court has ruled that the Constitution has protected and guaranteed the right to free expression but ruled that the right was not absolute but relative to other provisions and recommended respecting the restrictions in the Constitution. The same decision also elaborated the right related to press freedom adding that restrictions in the related Article and should be interpreted not as there for controlling the press but to ensure professional discipline and accountability to the public interest. This is another decision that could be elaborated further by the court in terms of Nepal’s international commitment to assuring civil and political rights.

2.7 Right to Identity and Citizenship

The Constitution has recognized the Right to Citizenship as national identity and identification as citizens and also as a means for the state to identify citizens for providing them rights to education, doing business and the exercise of other basic rights. It also ordered the executive to enact a law to facilitate the distribution of citizenship certificates.

2.8 Right to Religion and Culture

The Supreme Court decided a writ petition recognizing religious and cultural practices and the need for their protection. It added that harm to such sites, including Guthis (trusts) and associated norms and values, would result in losses to the nation, and ordered the conservation and protection of one disputed site at Sohrakutte in Kathmandu.

2.9 Child Rights

Responding to a petition related to criminal offenses by children, the Supreme Court has decided that the liability of minors shall be different from that applicable to adults. It added the sanctions for children committing criminal offenses, delayed in accordance with law, should not be applicable after the child enters adulthood, and should be struck off the records.

2.10 Right Relating to Labor

Responding to a writ petition relating to the working hours of transport
workers, the Court ruled that it should be in accordance with the Labor Act and similar to those applicable to other industrial workers and that no one should be required to work for over 8 hours every day. The Court also pointed out that long work hours in the transportation sector could endanger the lives of passengers, and ordered proper management of work hours in the transportation industry.

2.11 Right to Education, Food and Shelter
The Supreme Court said that is the responsibility of the state to ensure citizens their basic rights to education, food and shelter while responding to a writ petition seeking protection of people living along the Rapti River who were affected by heavy rains and flooding.

2.12 Right to Social Justice and Inclusion
The Supreme Court upheld inclusion in response to a writ petition by a disabled student who had passed the medical entrance exam but had been denied of an opportunity to enroll following the Tribhuwan University’s decision to enroll another student under the inclusion quota on the pretext of inadequacy of qualifications of the said student. The court ruled that it was binding on the state to abide by the inclusion quota for the student with disability.

2.13 Right Relating to a Decent Living Standard
The Court upheld a writ petition seeking annulment of the Alcohol Act for failing to recognize and respect public health, public interest and consumer rights protected by law. The Court said that the said law was inadequate for addressing the needs of public health, public interest, consumer’s right and right to compensation and also for monitoring and regulating such activities, among others and directed the government to make the necessary amendments to ensure the aforesaid.

2.14 Right to Education
In response to another writ the Supreme Court ruled that an educational institution could not bar a qualified student (who had passed the entrance test) to enroll for not having a citizenship or any other technicality. The ruling elaborated that the right to acquire citizenship and education were different issues, and that not having a citizenship certificate was not reason enough to bar an individual from the Right to Education.

2.15 Right relating to Senior Citizens
The Supreme Court has elaborated Article 41 of the Constitution that grants senior citizens special rights and protection from the state as a fundamental right. Deciding a writ, the court elaborated that it was the responsibility of present generation to ensure that senior citizens were cared for and respected for the services they provided to the country and families, and that they were enabled to exercise all rights guaranteed the constitution.

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19. NKP 2075, Decision No 10129, Certiorari/ Mandamus, Advocate Tulsi Simkhada Vs Council of Ministers, p. 2001
20. NKP, 2075, Decision No 10130, Mandamus, Advocate Ramkumar Dixit Vs Council of Ministers, p. 2014
21. NKP 2076, Decision No 10171, Certiorari/ Mandamus, Jitendra Yadav Vs Ministry of Education, Tribhuwan University, p.142
22. NKP 10186, Mandamus, Advocate Bishnu Prasad Pokharel Vs Council of Ministers, P. 204
23. NKP 2076, Jestha Decision No 10115, Certiorari/ Mandamus, Om Prakash shah Vs Nepal Government, Tribhuwan University, p.293
24. NKP 2076, Decision No 10237, Mandamus, Nityananda Pandey Vs Nepal Government, p.725
3. Independence of the Judiciary and Judicial Appointments

Judges were appointed to vacant positions in the Supreme Court and High Courts in 2019 and appointments of some candidates from the Nepal Bar Association were questioned and debated (also in media) in terms of their qualifications, independence and commitment to the profession, work performance and their political affiliations or proximities, and family connections. The recommendations for appointments in the Supreme Court for some advocates were among those that were singled out as having been influenced by a number of factors including relations with a former chief justice, with a political leader and minister, and affiliation with a particular political party.25

Section 11 of the Judicial Council Act disqualifies a person who participates in politics from holding the position of a judge. But disregard of this provision in appointments has eroded respect and trust in the judiciary, while also undermining respect that is accorded to the position.26 One of the appointments discussed above, had resulted in a writ petition at the Supreme Court filed by a Senior Advocate seeking annulment of the appointment of Justice Manoj Kumar Sharma. The Supreme Court quashed the petition.

The UN basic principles relating to independent judiciaries (1985) set the standards of judicial independence. Article 1, 2 and 3 of the said principles require all organs of the state to respect the independence of the judiciary and grant it the space and freedom to work free of political and other influences. The same principle bars the politicization of judicial appointment.28

Much of the public debate following the appointment of judges in 2019 pointed to the increasing political influence in judicial appointments raising questions on the capacity of the institution to independently adjudicate cases involving members and leaders of major political parties, particularly the ruling party. The slots that have been filled at the Supreme Court by political parties and the executive so far, suggest a clear line of succession from among the judges for appointment as Chief Justice of the Supreme Court for another 16 years (up to 2036). The appointment that were made on the basis of political proximities has resulted in the risk of compromise of judicial independence and increased the likelihood of justice being used to further certain political interests. Many commentators have said that misuse of parliamentary vetting of judicial appointments and the influence of the executive in the appointment of judges has begun to erode the impartiality and independence of the judiciary and that this could unsettle the very foundations of Nepal’s democracy.

Judicial independence has been compromised by political appointments to both the Judicial Council and the courts. Candidates with known political leanings have been appointed to different courts. A newspaper article has said that every appointment since 22 April 2014 has been the result of a compromise where established standards have been flouted.29

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26. Ibid no 37
27. Tika Prasad Pradhan, Supreme Court quashes writ petition challenging Sharma’ appointment of a judge in Supreme Court of Nepal, the Kathmandu post, 8 May, 2019.
29. Ibid no 46
The recommendation for appointment of judges made by the Judicial Council on 2 April 2019, in addition to the discussions above, had also failed to uphold the inclusion requirements (including representation of women, Dalits, etc.). All judges appointed to the Supreme Court in 2019 were Brahmins.

The independence of Judiciary an “absolute right” in democracies. Article 14 (a), ICCPR, 1966 provides for a “competent, independent and impartial judicial tribunal” that is monitored by the Human Rights Committee that has interpreted the principle to be an exceptional and absolute right. The same language is included in the Universal Declaration of Human Rights, 1948, suggesting that independence and impartiality are not only matters of national concerns but also something that defines Nepal’s democracy internationally. One interpretation of independence and impartiality was provided by the Human Rights Committee that said judges should not be prejudiced about the matter before them and should not act guided by interests of one party.

4. Reforms in the Judiciary

The Access to Justice Commission at the Supreme Court (established 26 July 2015) prepared an annual workplan in 2019. Its objective is to ensure access to justice for people of marginalized communities and from areas without judicial institutions. This initiative is part of the strategic plan of the Supreme Court that also includes other undertakings such as reviewing legal charges for the poor, simplification of the judicial processes, and making legal assistance provided by the court more effective. The Commission has adopted a number of pathways for attaining its objectives, including building awareness of marginalized groups including women, Dalits, and the poor about their rights and responsibilities, enhancing their capacity to secure services from judicial mechanisms, recommending policy changes where required, among others.

In 2019, the Commission carried out orientation programs on judicial procedures for coordinators of the judicial committees of local governments and trained 197 participants in 14 districts. It also carried out orientations of prison officials and administrators on the rights of prisoners and printed information and notices in the Braille script for visually impaired people. The Commission has continued publishing information booklets in the Bhojpuri language and booklets for informing people of minority communities on their legal rights and redress mechanisms. Another booklet details the Rights of Women and redress as provided by the civil and criminal codes. In addition, in 2019 the Supreme Court introduced a breastfeeding room in its premises.

That said, there also are initiatives announced by the Commission that remained to be fully implemented. These include preparing a legal basis for the

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30. Fourth paragraph in preamble, the constitution of Nepal, 2072; Article 38, the right to women, the Constitutional of Nepal, 2072; Article 40, The constitution of Nepal, 2072
31. Article 14(a), ICCPR, 1966
34. SC, Access to Justice Commission, 2075/076 issued
35. Annual Work Plan of Access to Justice Commission, 2075, Publisher-Supreme Court, Access to Justice Commission
36. Ibid No 68, Page No. 5
37. Ibid no 68, Page no 6

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commission itself, awareness programs for people from marginalized communities, effective communication of the free legal aid program, counselling for victims of crimes, institutionalizing pro-bono legal services, among others.

5. Caseload of courts and justice delivery

The caseloads at courts remained high like the previous years, reflecting the inability of the courts to address petitions in a timely manner resulting delayed justice. In 2017/2018 (2074/2075) there were 355,499 cases and petitions at all courts, including 93,470 cases and petitions in 2019 carried over from 2017/2018 (2074/75). (This number does not include cases and petitions filed between mid-July to mid-December 2019. Of this, the courts decided 70.66 per cent of the cases. Of the remaining 104,316 cases and petitions, 74,283 were registered within a year, 12,227 were registered 12-18 months earlier, 5102 from 15 months to 24 months ago, and 12,704 cases and petitions had remained waiting for clearance for over two years. 38

The resolution of case and petition rate at the Supreme Court was 30.74 per cent. There were 34,922 cases registered at the Supreme Court in 2018/2019 of which 10,742 had been cleared. The apex court performance in terms of clearing cases was much lower compared to other courts (70.66%). The rate of resolution of cases at the High Courts was better in comparison. They cleared 44,488 cases which was 74.06 per cent of 60,070 cases and petitions. The resolution rate of District Courts was highest at 76.27 per cent. These courts cleared 272,711 cases and petitions in 2018/2019.

The clearance of cases and petitions at the Supreme Court fell short of its third strategic plan (ending 2018/19) target for both cases and writs (52.22%), and petitions and reports (80.04%). This raises questions about efficiency given that this has happened despite the appointments made to all the vacant positions at the Supreme Court in the past two years. The efficiencies of both the High Courts and District Courts were higher compared to the apex court despite the poor infrastructure and fewer human resources available at the lower courts.

6. Implementation of Court Decisions

Implementation of decisions and judgments of judicial bodies provide indication of the quality and effectiveness. Following the Decision Implementation Special Campaign Directive, 2061 (2004) by Supreme Court, so far 33.49 per cent of the target has been realized of what was required in terms of criminal cases. The cumulative total of penalties ordered by courts since then is slightly over 156112 years of which about 33.5 per cent was realized by 2019. 39 Similarly, in terms of the cumulative fines imposed so far, 24.78 per cent of over Rs. 1582 million had been recovered. Overall, implementation of decisions had slightly improved in 2018/19 compared to the previous fiscal year.

7. Conclusions

The Supreme Court began implementing the fourth Five Year Strategic Plan-2019 on 15 June 2019. The objective of the plan is to make quality justice delivery robust, simple and effective by ensuring ease of access. 40 The introduction of strategic plans have resulted in overall improvements in the case clearance rates and also in terms of focus on matters related to human rights. There were some initiatives towards rights-oriented justice including treatment of children accused

38. Annual Report 2075/2076 of Supreme Court of Nepal, Published by Supreme Court, Nepal
39. Ibid no 81
40. Ibid no 81
of crimes, introduction of childcare centers and establishment of a commission to work on increasing access to justice, reconciliation, additional human resources and infrastructure, among others.

However, there also remain questions relating to the principle of separation of power of the three pillars of democracy, the Legislature, Executive and the Judiciary. The Judiciary for all practical purposes remained under control of the executive in terms of its budget, human resources and other matters as indicated Supreme Court reports, and public pronouncements of judges and legal professionals at conferences and through public platforms. There has also been increasing discussion among legal professionals and judicial administrators of the need to dissociate appointments to judiciary bodies from both the legislature (that vets’ recommendations of the Judicial Council and judges) and the Executive, with the latter playing only a facilitating role, if required.

Appointment of judges and officials of the Judicial Council, an agency that regulates the Judiciary, largely along political lines and proximities to the executive remained controversial following some appointments that were made in 2019. Critics said political influence and proximity to the Executive were the determining factors in the appointments. The principle of inclusion in the Constitution was also largely ignored while making the appointments leading to continued erosion in public trust regarding the independence, impartiality and capability of the Judiciary. There was no explanation provided on the selection of individuals appointed in 2019 as judges from any quarter, leading to accusations in media about the intentions of the executive and powerful political parties to have a subservient judiciary. The debate in the Federal Parliament (that at the time had a two-thirds majority) about possible impeachment of judges following decisions that were not conducive to political interests has added to doubts of the ability of judicial officers to exercise independence and impartiality in taking decisions to protect rule of law and the protection of human rights.

The efforts of organs of the Executive mandated to enforce sanctions of the courts and remained weak throughout 2019 as result of which, those with court orders for incarceration were not brought to justice for political or other reasons. This contrasted with repeat re-arrests by police of individuals whose release had been ordered following habeas corpus hearings. The inadequate separation of power between the Judiciary and Executive was evident in the compulsion of the justice system to rely entirely on the government for resources, which also limited its ability to implement its strategic plan effectively and administer justice without fear or favors.