

Judicial System Committee

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Members belonging to the CA Judicial System Committee had major disagreements over issues such as relationship between the legislative parliament and judiciary, forms of judiciary and provisions for appointing and dismissing and transferring judges. The Committee tried to garner consensus time and again but in vain since it found its members articulating their party ideologies rather than focusing on the core issues. That is why the Committee finally developed a concept paper that included all contradictory opinions and submitted it to the Speaker of the CA on 9 August 2009. Thereafter, on August 13, 14, 15, 16 and 17 Assembly meetings, a number of CA members discussed over the report.

When the UCPN (M) members of the Committee were about to submit a draft report that would principally be against the norms of independent judiciary, the Committee got into deep trouble. Such attempts of the UCPN (M) brought divisions not only among the Committee members but also in the Constituent Assembly and outside. Nepal Bar Association, through a press release, threatened to go into a nationwide protest if the Constituent Assembly decided to go against the independent judiciary. Thus the whole nation got divided into for and against the judicial system of federal Nepal. The UCPN (M) seems to be in favour of controlling the entire judiciary through a special parliamentary body. For this, they cited several ill practices that the judiciary in Nepal has committed in the past. Whereas the NC, UML and other parties argue that judiciary system needs to remain autonomous and independent.

It is believed that all three organs of the government, the legislative, the executive, and the judiciary, need to function in a check-and-balance manner. And each should function independently as well. Thus the UCPN (M) was blamed for speaking of democratic political norms only in principle but not practicing it. The opinions put by the UCPN (M) in the Committee for Determining Structure of the Legislative Body made many believe that they are determined to keep both the executive and the judiciary under the control of the legislative. In a way it wants to control everything through the legislative—a system practiced by the People's Congress in the People's Republic of China.

Ambivalence abounds. The UCPN (M), on the one hand, does not want to follow the parliamentary system but, on the other hand, wants to make the legislative parliament as a supreme body. This double standard of the UCPN (M) is often taken as strange, contradictory and unusual politics. The UCPN(M) on the one hand say that they "do not conform to the parliamentary system" but on the other hand they are found advocating a need for making legislative parliament as powerful as the British parliament, which is supposed to be powerful for anything except changing people's sexes. Similarly, the UCPN (M) advocates parliamentary supremacy but does not want to hear the word "parliament". On January 15, 2007 at a time of forming the interim parliament, the UCPN (M) insisted on calling the parliament the "Legislative" whereas Nepali Congress stood for the term "Parliament". This brought some debate. So the hybridised form of the parliamentary system was coined as the "Legislative-Parliament". How strange it must have sounded to the British! The UCPN (M) did not bother to understand that "parliament" and "legislative" both refer to the same thing. It

looks as if the UCPN(M) intends to defame the parliament by defining, as Lenin did through a maxim, that parliament is where you show goats' head and sell dog's meat.

Who Interprets the Constitution?

The report of the Committee states “except for the issues relating to the position and rights of national importance, subjects directly associated with country's politics, and issue in which law contradicts with the constitution, the right to interpret the constitution and federal law rest with the Supreme Court. But for this sub-clause, position of national importance shall mean Head of the State, or executive chief or the position endorsed by the legislative parliament”. This clearly shows that the UCPN (M) wants to keep the judiciary under control of a special committee of “people's parliament” as envisaged by them. However, it could be one of the problems of their “competitive politics” too. If they embrace the democratic system fully, they might face the question; what is the use of the ten-year long armed struggle? This question can even be so damaging as to be the end of their political career. On the other hand, they also face the danger of being labelled “traditional communists” if they do not endorse at least a few principles of democracy and global liberalism. Because of this fear, they seem to have fallen in the whirlwind of uncertainty. The chief cause of the complexity and restlessness of the UCPN (M) is the same uncertainty and lack of clarity.

Provisions such as controlling the judiciary by special committee of “people's parliament”, appointing the Chief Justice of the Supreme Court and other judges even from other disciplines and sending judges for research and investigative works for a certain time can make the entire judiciary system or body a puppet. Questions abound. How can judges, who are not supposed to take part in any parties and profit-oriented business, be expected to deliver fair justice to the people if they are mobilised in other disciplines? This is a profound question in justice delivery system. It is less likely to protect constitutionalism either. It is self-contradictory to restrict the judiciary by appointing, promoting and transferring the Chief Justice and other judges of the Federal Supreme Court by the special judicial committee formed under the federal legislative.

The judiciary, never the legislative, holds the right to interpret the country's statute. Nineteen members from NC and other parties expressed different opinions in this regard. They agreed that the judiciary should be kept as an independent body and judges should be appointed by one single mechanism from the centre across the country. If the judges are appointed only through this mechanism from the centre, there will be a possibility of creating uniformity in the judiciary, and it could help the nation to create the manpower needed for the Federal Supreme Court and to ease the process of transferring judges within the country a flexible system.

Thus, almost all UCPN (M) CA members seem to be repeating the same contradictory opinion doggedly. The members who contradict the UCPN (M) stance point out that there is always a possibility of instability and loss of reliability of the judiciary if the system of appointing Chief Justice out of the judicial body is endorsed. It appears that appointing the Chief Justice on the basis of seniority and experience from among the judges of the Federal Supreme Court is the only practical solution.

Proportional and Inclusive Issues

The Judicial System Committee has recommended that the Chief Justice must be appointed on the basis of inclusive and proportional representations. But question abounds. How can this modality function when the Chief Justice is always a single position? However, proportionalism and inclusiveness can be the modalities of appointing judges for the Federal Supreme Court. But it is unfortunate that the CA members could not reach a consensus on this issue too.

Promises the Parties Made

The political parties had already made their agenda about the judicial system of the federal Nepal public during the CA election. In their commitment letter, the UCPN (M) had stated to restructure the judiciary so that it could function independently. Moreover, during the insurgency period, the then CPN (Maoists) had run "people's court" in villages to punish their political opponents. The proposal submitted to the Committee by the UCPN (M) speaks for a judiciary system that is controlled by a special legislative parliament body. Moreover, it speaks for a provision that offers the option to appoint the Chief Justice even out of the judicial body. It states that the in-service judges can be assigned other responsibilities if the government wills so.

The NC and UML have not withdrawn from their commitments which they made to the people about the system of future judiciary during the CA election. These two parties had vowed to protect the democratic norms and values, rule of law and constitutional supremacy. Likewise, Madhesi People's Forum Party has also shown support for constitutional supremacy and rule of law.