

## Constitutional Reform of the Judiciary in Nepal: Achievements, Disappointments and Emerging Issues

**Bidhya Chapagain**

Researcher, Advocate, Nepal

### Article Info.

#### Corresponding Author

**Bidhya Chapagain**

#### Email

bidhyac@gmail.com

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#### Orcid

<https://orcid.org/0000-0002-1915-2317>

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### Abstract

Nepal's seventy years of constitutional reform, aimed at fully separating powers between state institutions, began with optimism. These reforms primarily intended to transform the judiciary by incorporating the principle of separation of powers and empowering it to function independently from the executive and legislative branches. Over the past seven decades, Nepal has adopted six constitutions and is now implementing the seventh. However, the country's judicial history is marked by both accomplishments and disappointments. While successive constitutions express a commitment to the separation of powers and judicial independence, a practical realization has lagged, partly due to the absence of these principles as priorities in popular movements. Additionally, there appears to be a historical habit and discipline in Nepal that resists change through constitutional democracy. Systems for judicial review, along with institutional and strategic reforms to enhance the judiciary's performance, present a promising narrative of reform. Yet, the systematic assault on judicial independence, the institutionalized vulnerability of the judicial system, and the declining state of public access and trust reveal a more troubling story of judicial upheavals. The constitutional discourse in Nepal can be seen as a series of experiments. While these reforms have rhetorically committed to an independent judiciary, in practice, the constitutional provisions have lacked clarity and force, leaving the judiciary at a crossroads.

*Keywords:* constitutional changes, judiciary, supreme court, judicial reform

### Introduction

The political and constitutional changes that took place in Nepal in 1948 have yet to result in comprehensive institutional reforms that ensure the independence of the judiciary. Centuries of centralized authoritarianism, discriminatory social practices, and nearly seven decades of political struggle, including a decade-long internal armed conflict, have collectively led to significant transformations, culminating in the current federal

democratic republic. Understanding the impact of Nepal's tumultuous history on current legal and judicial reform efforts is crucial. Key periods, such as the struggle for democracy from 1948 to 1960, the absolute monarchy era from 1961 to 1989, the internal armed conflict spanning 1996 to 2006, and subsequent events like the King's coups in 2002 and 2005, the transition to a federal republic from 2008 to 2015, and the ongoing political instability have all undermined state institutions tasked with ensuring the rule of law and justice.

Efforts to reform Nepal's judiciary and increase access to justice often emphasize the constitution. However, historically, the constitution itself has weakened judicial legitimacy. Structural issues in all iterations of the Constitution have led to poor specificity and unclear directives on judicial independence and accountability. This has undercut the judiciary's legitimacy, adversely affecting both demand and supply of justice. Instead of safeguarding everyday access to justice, constitutional deficiencies have enabled courts, particularly the Supreme Court, to serve executive and political agendas (Chapagai & Karna, 2020; Shrestha, 2018b).

The constitutional positioning of the executive and political parties in Nepal can arguably be seen as a continuation of the legacy of the monarchs, who were considered "a source of law" and retained unilateral power, thereby attempting to keep the judiciary subordinate to their prerogatives (Pimentel, 2010). While measures for judicial independence and accountability are intrinsic to constitutional democracy, there appears to be a historical habit and discipline in Nepal that resists change through constitutional democracy. These entrenched practices among the government, courts, judiciary, and individual judges remain problematic and obstruct legal and judicial reform in Nepal.

This article examines the constitutional positioning of Nepal's judiciary through its various constitutional transformations, revealing the persistent lack of a definitive separation of powers and judicial independence. This entrenched habit of Nepali governance spans different eras, with historical attempts at judicial reform consistently hampered by the absence of constitutional guarantees for judicial independence. It explores institutional cultures within the judiciary during major constitutional and political transitions, focusing on judicial independence. Nepal's commitment to justice and judicial independence is not clearly articulated in its constitution, leading to persistent disappointment and failure in attaining these ideals. This narrative includes

case examples and the experiences of justice personnel, theorizing both successes and enduring disappointments in judicial reform. The article investigates historical constitutional reform, how the constitution has inhibited reform, and peculiarities in the constitutional reform process impacting the present-day judiciary, arguing that the lack of strong judicial independence assurances significantly undermines public trust.

### **A Historical Overview of Constitutional and Judicial Reform**

Nepal's history of constitutionalism and judicial reform dates back to the 1940s and even earlier, during the Kirat rule (900 BC – 300 AD). Subsequent dynasties based fairness, equality, and equity on Hindu religion, but judicial independence was not institutionalized, as the sovereign wielded unlimited authority over all branches of the government (Khanal, 1999). The judiciary remained subordinate to the executive until its formal separation in the 1940s. Nepal's judicial system has since evolved through significant reforms, encompassing three major transitions and seven constitutions, including two interim ones, from 1948 to 2015.

#### ***First Phase (1940 - 1990)***

In the late 1940s, there was a growing national concern for establishing democracy and democratizing Nepal's governance institutions. The end of British rule in India in 1947 spurred the modernization of the judicial system in Nepal. Political changes and constitutional developments in India propelled public demands for constitutional guarantees in Nepal (Malagodi, 2015, 2016). Although traces<sup>1</sup> of a modern judicial system appeared with the end of the Rana regime, a full transformation into an independent judicial institution became the rhetorical commitment of political parties and actors from the 1950s onward.

Surprisingly, the separation of the judiciary from other government branches gained political consensus with the new Constitution in 1948. Influenced by the British model, this explicit constitutional recognition created the judiciary as the third branch of government, granting the

Pradhan Nyayalaya (Apex Court) final authority for dispute resolution. However, the *Nepal Constitution Act 1948* did not meet expectations for constitutional protection of judicial independence (Shrestha, 2007), as the Rana rulers were reluctant to implement it (Joshi & Katuwal, 2014). This symbolic gesture, acknowledging popular dissatisfaction, “lasted only a few months until anti-Rana rebels joined the monarchy to overthrow the Rana system” (Pimentel, 2010, p. 287). Since then, judicial independence has remained controversial and a struggle between the judiciary, executive, and legislative branches.

With the ousting of the autocratic Rana regime in 1951, Nepal began experimenting with constitutionalism and democracy. The *Interim Constitution of 1951* established the judiciary as one of the main government branches. However, the formal separation of the judiciary and the acknowledgment of the Pradhan Nyayalaya as the highest judicial authority under Article 32<sup>2</sup> of the Constitution were more rhetorical than effective. It reaffirmed that all powers—lawmaking, administration, and interpretation—resided with the King, neglecting the judiciary's power of review. Consequently, the judiciary's fate was determined by a separate act of parliament, *but not guaranteed constitutionally*.

Although established by the Act of Parliament 1952, the power related to the establishment of the Pradhan Nyayalaya and the appointment, removal, and transfer of judicial personnel was vested in the King.<sup>3</sup> Despite the lack of constitutional assurance, the judiciary actively exercised writ jurisdiction under Section 30<sup>4</sup> of the *Pradhan Nyayalaya Act 1952*, voiding several government actions.<sup>5</sup> The King, dissatisfied with the judiciary's resistance to his prerogative (Shrestha, 2007), amended the Act in 1954, repealing Section 30 and the judicial review powers of the Pradhan Nyayalaya (Raut, 2014). This ongoing tussle between the King and the first Chief Justice of Nepal, Hari Prasad Pradhan, led to the repeal of the *Pradhan Nyayalaya Act 1952*, replaced by the *Supreme Court Act 1956*. This change aimed to remove the Chief Justice and

create a more favorable legal environment for the government, free from judicial review (Shrestha, 2007).

The 1959 Constitution recognized the separation of powers among the three branches of the state but lacked principles of checks and balances. It included provisions for the Supreme Court and subsidiary courts to safeguard citizens' rights. Judges endeavored to protect judicial independence from the executive and maintain the judiciary's integrity. However, the 1959 and 1962 Constitutions reinstated the King's discretionary power to appoint the Chief Justice and other judges and curtailed the Supreme Court's judicial review powers (Bhattarai, 2006). This included limiting judicial power and controlling appointments and terminations, rendering judicial independence secondary to monarchical power. The King strengthened his control over governance, abolished political parties, and established the panchayat system of local and regional government (Pimentel, 2010; Tripathi, 2016). The Constitution affirmed the King's power more strongly than previous versions, allowing him to suspend it during emergencies. Despite declaring constitutional supremacy, it positioned the monarch as a sacrosanct source of law (Shrestha, 2007), ensuring the King retained judicial oversight and authority. Any law incompatible with the Constitution was deemed void, but the King's authority overshadowed judicial independence.

Sir Ivor Jennings, one of the drafters of the Royal Constitution of 1959, admitted the unusual grant of “wide powers to the King” and criticized the Constitution as “undemocratic” (Malagodi, 2016). Malagodi interpreted the 1959 Constitution “as the progenitor of the 1962 Panchayat Constitution” (2016, p. 172), which compromised constitutional democracy under the guise of securing political stability in Nepal. During the three decades of Panchayat authoritarianism (1960–1990), the judiciary's growth and independence faced significant obstacles due to the monarch's direct rule and control over all three branches of government.

### ***Second Phase (1990–2006)***

After three decades of autocratic monarchy, Nepal underwent a democratic transition in 1990, following its first democratic movement. The new constitution aimed to establish a stable constitutional monarchy, parliamentary democracy, and an independent judiciary (Dhungel & Adhikari, 1998). The *Constitution of the Kingdom of Nepal 1990* delineated the separation of powers among the three branches, including provisions for checks and balances to ensure institutional accountability and responsiveness. However, it contained significant loopholes. While it confined the monarchy within constitutional limits and recognized the Nepali citizen as the ultimate sovereign, Article 127 granted the King considerable emergency powers, undermining the intent of the constitutional framework (Tripathi, 2016). The executive emergency powers established in the Constitution of 1959 remain evident in the text and implementation of the 1990 Constitution (Malagodi, 2016, p. 22). In this context, Surendra Bhandari (2012) noted that the 1990 Constitution aimed at power-sharing between the King and other political actors, reflecting the drafters' loyalty to the monarchy. Malagodi concluded that hereditary and draconian emergency powers became embedded in Nepal's constitutional culture (2016, p. 172).

The 1990 Constitution aimed to establish a competent, impartial, and independent judiciary, crucial for upholding constitutional and international human rights obligations. The Supreme Court became a powerful institution, acting as the final interpreter of statutes and their constitutionality. The Constitution guaranteed a structured three-tiered judicial system, detailing provisions for the appointment, tenure, and termination of judges. The Chief Justice was to be appointed by the King on the recommendation of the Constitutional Council<sup>6</sup>, while the Judicial Council<sup>7</sup> handled appointments for other judges across the Supreme Court, Appellate Courts, and District Courts. However, the composition of these councils did not ensure the independence of commissioners, leading to significant executive

and judicial influence. The appointment processes for the Chief Justice and other judges were seen as mechanisms that compromised judicial independence and accountability. These processes were criticized for being sources of patronage, resulting in the politicization of judges and low socio-cultural diversity within the judiciary (Malagodi, 2013, p. 214).

Since 1990, the Constitution has faced criticism for institutionalizing social exclusion and discrimination (Bhandari, 2012). It was faulted for preserving monarchical supremacy, emphasizing Hinduism in state regulation (Hutt, 2004), and failing to ensure broad public participation and inclusion (Bhandari, 2012a). In 1996, the Communist Party of Nepal (Maoist) launched the armed insurgency known as the People's War, demanding a new constitution by a Constituent Assembly (CA), the establishment of a federalist and secular state, and the abolition of the monarchy. The decade-long conflict, which resulted in 13,000 deaths, over 1,200 disappearances, more than 8,000 injuries, and widespread displacement, concluded with a 2006 peace agreement and the promise of a new CA-drafted constitution. The justice system suffered due to Maoist-established "people's courts", which, despite being unconstitutional and against rule of law principles, were used by rural people for their speed and lack of cost (Ghai & Cottrell, 2008). The 2006 Comprehensive Peace Agreement ended the decade-long conflict and initiated significant constitutional and structural governance changes.

### ***Third Phase (2007 Onward)***

The *Interim Constitution of 2007* ended 240 years of monarchy and declared Nepal a republic. Serving as Nepal's constitution until the CA approved a new constitution in 2015, it marked the culmination of a 70-year quest for a constitution through an elected CA, despite a cumbersome and divisive process. Preserving the principles of separation of powers from the 1990 Constitution, it ensured a clear division between government branches and upheld judicial review to maintain judicial independence. However,

it concentrated power in the Prime Minister, compromising judicial independence and checks and balances. The executive gained control over judge appointments<sup>8</sup> and deployment<sup>9</sup> while introducing parliamentary hearings<sup>10</sup> for apex court judge selections, inspired by the American legal system. Judicial independence waned in the post-conflict phase under the *2007 Interim Constitution*, which mandated that the Chief Justice and other judges take an oath from the Prime Minister.<sup>11</sup> Consequently, government attacks on the judiciary became a frequent phenomenon.

This constitution retained the Constitutional Council and the Judicial Council<sup>12</sup>, modifying the composition of the latter to include a majority of members from the executive or political parties. This politicization has made the Judicial Council susceptible to political influence. The executive's involvement in these councils, particularly in recommending Supreme Court judges, has subordinated the judiciary to the executive and political parties. The appointment of judges has largely remained a source of privilege for the executive/political parties to reward its supporters.

The seventh Constitution of Nepal – *The Constitution of Nepal, 2015* –, endorsed by the second CA in September 2015, followed the failure of the first CA in 2012. This came after seventy years of political struggle for democracy and justice. However, it has not effectively transformed Nepal's governance from a unitary model to a federal one, falling short of fulfilling aspirations for democratic governance and judicial independence. Despite the Supreme Court's significant intervention<sup>13</sup> in 2011, the Constitution lacks explicit, binding provisions ensuring judicial independence according to international standards. Legal scholars Zhu and Kouroutakis (2019, p. 12) note that constitutional jurisdiction follows a diffuse model of constitutional review, diluting the Supreme Court's power to review the Constitution. Under this model, all courts, from the lowest to the highest, can review the constitutionality of statutes and administrative measures (Harding, 2017).

The *Constitution of Nepal, 2015*, significantly weakens provisions safeguarding judicial independence (Acharya, 2020; Shrestha, 2018b). While it acknowledges the centrality of judicial impartiality to democratic governance, it lacks assurances of both *institutional* and *individual* judicial independence, thereby subordinating the judiciary to the executive and legislative branches. Retaining provisions from the 2007 Interim Constitution, it allows significant political discretion in appointing Supreme Court and High Court judges and elevating judges from District to High Court and from High Court to the Supreme Court. Constitutional mechanisms for judicial accountability, such as parliamentary hearings and impeachment, are susceptible to political manipulation, incentivizing judges to align with government wishes.

Despite constitutional claims of independence, the judiciary has faced undue external interference rooted in sovereign control. The executive, wielding constitutional prerogatives, has repeatedly dismissed Chief Justices, forced their resignations, or reassigned them to other roles (Shrestha, 2007). This expansive use of executive prerogatives undermines the court's ability to function independently. Justice Kalyan Shrestha (2007) highlighted the significant difference between a judiciary established by ordinary law, and one created by the constitution, noting that formal constitutional guarantees ensure judicial independence through the separation of powers. This assurance protects both individual judges and the judiciary as an institution from adverse actions by other state organs (Shetreet, 2021). The instability of constitutional order and the historical failure to equally recognize all government branches stem from an unrealized capacity to establish democratic and independent institutions. Historically, the judiciary-executive relationship has reflected continuous distrust and judicial subordination. High degrees of executive and political dominance, and a lack of judicial accountability to the rule of law, have become entrenched even in federal Nepal. Judicial transformation history reveals a system undermined by autocracy that stripped the judiciary

of its independence and successive administrations that failed to strengthen its foundations.

### **Constitutional Reform of the Judiciary: Development, Accomplishments and Disappointments**

Nepal has undergone significant changes through seven constitutions, transitioning from absolute monarchy to republicanism, from a unitary system to a federal democratic system, and from a Hindu state to a secular state. These constitutional reforms have consistently impacted the judiciary, granting it a separate status with judicial review power. The judiciary has faced ongoing struggles to maintain independence, balancing judicial power and restraint against executive prerogatives, initially of the monarchy and now of other powerful political entities. This section analyzes seventy years of constitutional and judicial history, highlighting successful judicial reforms, areas needing further improvement, and emerging issues essential for the success of judicial reform in Nepal. It considers the establishment of the judiciary as an independent third branch of government and the power of judicial review, both significant achievements in Nepal's judicial reform. However, the practical implementation of separating powers between the judiciary and the other branches and safeguarding judicial independence remains a formidable challenge. It highlights a strong judicial tradition in protecting citizens' fundamental rights but reveals inadequate constitutional protection for judicial independence and excessive judicial entanglement with political parties and the executive. It indicates that the struggle for constitutional safeguards against political pressure jeopardizes judicial independence and undermines public access to and trust in justice.

#### ***Establishment of the Judicial Branch with the Power of Judicial Review***

Since the formal separation of the judiciary in 1948, the sector has grown noticeably, with reforms resulting in notable impacts. The establishment of Pradhan Nyayalaya was promising, but it lacked true independence, and the government's repeated obstruction limited the power of judicial

review. Despite the King's control and insufficient constitutional safeguards for judicial independence, a significant change during this period was the increased judicial autonomy and the substantial development of fundamental judicial principles.

Despite the constitutional affirmation of the King's unlimited control over all three branches of the state and efforts to subordinate the judiciary, the first Chief Justice independently ran the Supreme Court and delivered bold decisions that remain milestones of judicial independence in Nepal. This independence troubled the government, as the King and officials viewed judicial resolutions as interference with the executive (Ibid, p. 3). Despite the dangers, judges were always committed to securing people's rights. Under the dynamic leadership of the First Chief Justice, the judiciary defended its actions and utilized available legal tools to assert judicial autonomy. Judicial review has declared several executive actions ultra vires (Raut, 2014). Fearless decisions and impartial judicial leadership form the foundation of the modern judiciary, despite continual efforts to limit its independence. Key interpretations regarding constitutional powers and limitations (Shrestha, 2007, p. 12) and landmark jurisprudence based on the rule of law and justice have been developed. These trends have led to increasing confrontations between the judiciary and executive, with periodic attempts to control the bench.

The 1990 transformation of the Nepali judiciary fostered a more progressive and proactive approach to social, economic, cultural, and political issues. The 1990 Constitution (Article 88), Interim Constitution of 2007 (Article 107), and 2015 Constitution (Article 133) granted the Supreme Court exclusive jurisdiction to resolve constitutional validity questions and legal disputes. The Supreme Court has demonstrated commendable leadership as the custodian of the Constitution through exemplary judgments on gender equality, discrimination based on gender, caste, ethnicity, sexual orientation, economic rights, democratic rights, and access to justice. These decisions have led to new legislation, amendments

to existing laws, the repeal of discriminatory laws, and policies aligned with constitutional and international commitments. The Court has also banned certain social practices and created measures to improve access to legal remedies and awareness. The Supreme Court's response to public interest litigations has made the judiciary a rare public sphere for reasoned public policy standard setting. Jurisprudence and case laws illustrate the judiciary's role in ensuring citizens' fundamental rights. According to Malagodi, the adoption of a modified common-law system made the doctrine of *stare decisis* a cornerstone of Nepali law (2013b, p. 213), playing a pivotal role through binding precedents (Dhungel & Adhikari, 1998).

These exemplary judgments have been instrumental in securing the rights of poor and marginalized communities. They include decisions on forming transitional justice mechanisms, establishing a Fast-Track Court to expedite justice for victims of violence, and implementing policies for effective investigation of gender-based violence, such as confidential hearings in rape cases. However, the implementation of these decisions and the relationship between the executive, political parties, and the judiciary have often been subject to scrutiny. The judiciary relies on the executive to execute judgments, such as imprisonment, restraining orders, and fines. Effective enforcement requires executive and legislative support, but the judiciary has struggled to exercise its jurisdiction and deliver justice due to related challenges.

Despite establishing a Monitoring Division and Judgement Execution Directorate in 2007 and collaborating with the National Judicial Academy on execution guidelines, effective enforcement remains challenged. Issues include political and practical barriers needing legislative and procedural reforms, budgetary constraints, unclear judgments, delays in judgment writing, interference from other institutions, and a lack of human and economic resources (Chapagain & Shakya, 2014). Similarly, the 2023 annual report suggests the implementation of 44 decisions out

of 196 decisions on public interest litigation (PIL). In 2023, 168,808 cases were pending execution at the three levels of the court, and 28,741 cases were pending at the Supreme Court (Supreme Court, 2023). A Supreme Court report indicated that 40 percent of district court decisions and 90 percent of Supreme Court Public Interest Litigation (PIL) decisions were unimplemented in 2019.<sup>14</sup> The judiciary faces overwhelming challenges due to the significant time consumed by PILs and the increasing number of politically charged cases.

### ***The Paradox of the Judicial Reform: Position of the Judiciary within the Separation of Powers***

Despite significant developments, the judicial system, constitution, and certain legislations continue to hinder an independent judiciary. The jurisdiction and structure of the judiciary have been complicated since its formal separation. Continuous restructuring with each of the country's seven constitutional changes has not solidified the commitment to the ideal of separation of powers. Although these constitutions claim to be “the fundamental law of the land,” most have undermined conventional constitutional standards like fundamental rights, the rule of law, parliamentary supremacy, an independent justice system (Tripathi, 2007), and the principles of separation of powers. The 1962 Constitution, for instance, empowered the King in all government branches, rendering these principles entirely meaningless (Dhungel & Adhikari, 1998). Judicial independence was assured through separate legislation rather than the constitution, and a “special complaint department” controlled by the King<sup>15</sup> oversaw judicial decisions, diluting judicial power (Shrestha, 2007). Deficiencies in constitution drafting and realization have hindered the institutionalization of democratic governance, parliamentary supremacy, and the rule of law, affecting the constitutions of both the King's regime and ‘democratic Nepal’.

Over the past seventy years, numerous instances have violated the principles of separation of powers and the rule of law. These include the King's actions to abolish the constitutionally

guaranteed multi-party system and assert absolute monarchy power, and the government's failure to control the Maoists' so-called People's Courts. Additionally, the Maoist party's attorney threatened to reactivate these courts if lawsuits were filed against their cadres. In 2005, the King dissolved parliament and chaired the cabinet, further undermining constitutional principles. The establishment of a parallel constitutional anti-corruption body with both investigative and adjudicative powers, and the 2007 incident where two Chief Justices of the Supreme Court received the Prime Minister's oath of office, also reflect these violations. In 2008, the cabinet decided to allocate a budget to set up Supreme Court branches nationwide and appointed a former Supreme Court judge as vice-president, blurring the lines between the judiciary and executive. The 2013 appointment of the sitting Chief Justice as Chairman of the Council of Ministers was a stark example of undermining the constitutional provision restricting judiciary members from assuming executive roles. This appointment of Chief Justice Khilaraj Regmi<sup>16</sup> was condemned by the Nepal Bar Association as "a black day in the history of Nepali judiciary" (NBA, 2013, p. 1), a blatant breach of the separation of powers and a serious threat to judicial independence and the rule of law, disregarding judicial integrity.

Between 2008 and 2015, significant political disagreements over judicial powers, the independence of the judiciary, the separation of powers, and the rule of law hindered the drafting of the new Constitution. In 2013, for instance, the CA failed to promulgate the Constitution, disregarding core constitutional principles and values. There were contentious debates over judicial authority to interpret the new Constitution. The CA's Restructuring of the State and Distribution of State Power Committee recommended forming a Constitutional Court to resolve federal structure disputes. However, the judiciary and the Bar opposed this, arguing that the Constitutional Court would "split judicial power and dominate the Supreme Court" (Phuyal, 2014, p. 283), creating

jurisdictional issues, inconsistent judgments, and undermining Nepal's longstanding judicial history. Additionally, the CPN (M) proposed a Special Judicial Committee under the parliament to regulate the judicial system and oversee the constitution, intending to control institutional independence. Phuyal (2014) noted that the position of CPN (M) was radical and potentially aimed to erode the separation of powers between the legislative and judicial branches. The 2015 Constitution retained the Supreme Court as "the highest authority to interpret the constitution and law" but introduced a Constitutional Bench for federal disputes, causing widespread judicial disagreement. The Chief Justice's extensive powers to set the Bench and select judges, along with concerns about case impartiality, have generated public dissatisfaction with judicial performance.

The 2015 Constitution altered the Supreme Court's mandate, reducing its extraordinary jurisdiction provided by the 1990 Constitution.<sup>17</sup> This change, based on a diffuse model of constitutional review, means the Supreme Court no longer holds exclusive power to interpret the Constitution. Instead, the Supreme Court, Constitutional Bench, and High Courts share jurisdiction over constitutional questions. The Supreme Court can hear appeals from High Courts, thus retaining jurisdiction and "elements of a Constitutional Court" (Zhu & Kouroutakis, 2019, p. 4). However, the Constitution established a Constitutional Bench within the Supreme Court with jurisdiction over constitutional issues, yet it lacks adequate rules to guide the Bench in departing from existing traditions (Adhikari, 2020a). The design, particularly the composition and jurisdiction of the Constitutional Bench, has led to disagreements between the Supreme Court and the Constitutional Bench.

The Constitution limited the principles of separation of powers and checks and balances while establishing judicial independence as a right to justice under Article 20 (9). It introduced an executive-controlled process for judicial appointments and removals. Although Article 133



allows for constitutional review, clause 4 restricts judicial oversight of the Federal Parliament's internal matters. The Constitution does not explicitly grant courts the power to address errors or jurisdictional excesses (Zhu & Kouroutakis, 2019). This ambiguity and lack of clarity about the separation of powers and institutional safeguards remain problematic.

The unprecedented upheavals in structure, jurisdiction, and independence have not lessened the ongoing tensions with the other branches of government. When the judiciary holds other branches accountable, these tensions increase, highlighting the inadequacy of checks and balances in the constitution, which offers insufficient protection and authority for the judiciary. The separation of powers doctrine in Nepal is weak because the agencies meant to control the abuse of power are not authorized to override political whims. Judicial appointments, removals, staffing, budgeting, and court management are controlled by the executive and legislative branches. This lack of comprehensive constitutional provisions fails to ensure judicial independence. Consequently, the judiciary lacks clear constitutional standards and a set of jurisprudence to guarantee its independence. Rhetorical attacks on judges and the judiciary demonstrate that Nepal's constitutional framework has not fully realized its promise to maintain a separation between the executive, legislative, and judicial branches based on principles of checks and balances.

#### ***Vulnerability of the Judicial Independence***

The judiciary holds an exceptional role in upholding the rule of law, democracy, and justice. Its relationship with other branches of government, both formal and informal, determines its effectiveness in safeguarding the Constitution. Despite the formal separation of powers, concerns persist about executive control and political interference in judicial appointments, as well as other hindrances to judicial processes. The vulnerability of the judiciary stems from the lack of constitutional safeguards, particularly regarding judicial appointments, tenure security,

and disciplinary measures (Adhikari, 2020b). This vulnerability has reduced the judiciary to a subordinate position, eroding its institutional and individual independence and posing serious challenges to the realization of constitutionalism and the rule of law.

The politicization of the judiciary, particularly through the appointment of judges with close personal ties and affiliations to political parties, has had a detrimental effect on political culture and the rule of law. The current appointment process, as outlined in the Constitution<sup>18</sup>, implies an indirect political legitimacy for Supreme Court members, which is crucial for maintaining their impartiality and independence from external influences. This politicization has not only impacted the appointment processes of judges across all court levels but has also compromised the judicial decision-making processes, tarnishing the public perception of the judiciary.

The constitution's shortcomings also affect institutions responsible for selecting and appointing judges, as well as the composition of the Judicial Council and Constitutional Council. The Constitution of 1990 aimed to ensure the judiciary's complete independence and provide effective checks against executive power. However, the current constitution has rendered this provision irrelevant (Acharya, 2020). The Judicial Council, with 60 percent of its members from the executive and political parties, including the Nepal Bar Association, which tends to appoint judges close to mainstream political parties (Khanal, 2019), has failed to maintain records<sup>19</sup> of judges, judiciary staff, and legal professionals. This has compromised the judiciary's independence and functioning.

Preferential treatment for less competent and dedicated individuals in the High Courts and Supreme Court has demoralized competent judges and diminished judicial confidence (Khanal, 2018). Some appointees displayed a lack of moral character and competency, previously considered unqualified for lower court appointments (Khanal, 2019). For instance, the appointment of Judge

Cholendra Shamsher Rana<sup>20</sup> as Chief Justice, five Supreme Court judges, and 18 High Court judges in 2019 highlights the judiciary's susceptibility to influence, undermining the democratic system. Disappointingly, newly appointed Appellate Court judges expressed gratitude to a CPN (UML) leader immediately after taking their oath.

The Interim Constitution enhanced “the executive's role in judicial appointments and created significant legislative space” (Dahal, 2018, p. 271). It introduced parliamentary hearings, establishing parliamentary supremacy over the judiciary, a mechanism retained by the 2015 Constitution. Intended to ensure judicial accountability, this process has devolved into a ritual for party quotas (Ghimire, 2018). Positioning the judiciary under the parliament is a key weakness of the hearing system. The Supreme Court's response to a petition<sup>21</sup> to scrap the constitutional provisions for parliamentary hearings reflects a nonchalant attitude toward protecting judicial dignity. Addressing the petition challenging the significance of parliamentary hearings in relation to the impeachment of judges, the court stated that the hearings are a regular check and balance between state organs and do not compromise judicial independence. Instead, they are intended to enhance the competency and accountability of judges. Bipin Adhikari stated that the constitution does not share power between the Judicial Council and parliament, nor is there a legal framework for parliamentary hearings, violating the separation of powers (Spotlight, 2014). The lack of regulatory legislation and a hearing committee after seven years of proclamation of the Constitution indicates that judicial competency and accountability to the public are not serious business for the parliament.

The independence of the judiciary is threatened by the Constitution's impeachment clause, which politicians have used to intimidate judges for political gain (Acharya, 2020). This clause has been wielded to pressure judges perceived as obstructing the executive or political parties. For example, an impeachment proposal against Chief Justice Sushila Karki, accused of

overstepping executive prerogatives, illustrates political domination. Similarly, the case against Supreme Court Judge Ananda Mohan Bhattarai shows how a few parliament members<sup>22</sup> can easily initiate impeachment proceedings<sup>23</sup> without reference to constitutional bodies or presenting factual or legal evidence. Highlighting this power, a CPN (UML) member after Chief Justice Cholendra Shamsher Rana's parliamentary hearing said, “Some may think that all the troubles end after completion of the hearing. But the parliament and constitution still remain alive” (Setopati, 2018, p. 3). These incidents underscore the executive and legislative branches exploiting constitutional loopholes to undermine judicial independence and increase judges' vulnerability.

The case of alleged judicial misconduct of Chief Justice Cholendra Shamsher Rana, despite clear evidence of judicial irregularities and misconduct, is an example of the opposite. Although the ruling parties submitted an impeachment motion on February 11, 2022<sup>24</sup>, the Federal Parliament and political parties hesitated to act. Since the proposal's presentation on March 13, 2022, the opposition (CPN [UML]) has obstructed parliamentary meetings. The Supreme Court also declined to register a petition<sup>25</sup> demanding an immediate investigation, stating it was beyond its mandate<sup>26</sup>. However, on February 24, 2022, the court registered a writ petition challenging the impeachment motion and seeking to reinstate Rana. This situation reveals a strong nexus between judicial leadership and political parties, demonstrating that judicial reform is not a priority for either. Instead, in this context, the impeachment motion should have been viewed as an effort to protect judicial sanctity and restore public faith in the judiciary.

Nepal's judiciary lacks constitutional protection for self-governance including, financial autonomy, and staff management, leading to fiscal dependency and procedural delays. The executive determines appointments of judicial officers<sup>27</sup> and funding<sup>28</sup>, while the legislature allocates public funds. Consequently, the judiciary remains under substantial executive and legislative control on

administrative and financial matters, hindering its institutional independence.

### ***Judicial Irregularities and Misconducts***

The legitimacy of the judicial system relies on judicial authorities, including judges, to operate legally and ethically (Upadhyaya, 2002), maintaining substantive independence from external influence and practicing self-restraint (Shetreet, 2012). However, corruption and judicial misconduct are significant issues in Nepal's judiciary (Pimentel, 2010). The Supreme Court (2021) has acknowledged that these problems pose an immediate threat to ordinary citizens and hinder the rule of law in the country:

Corruption is virulent in the judiciary. Findings of previous reports, information received while commissioning this report and the facts reported in the media reveals systematic corruption in the judiciary in the protection of high-level authorities. Public has been raising concern about the role of Judicial Council and has been demanding fair and impartial investigation and necessary action by a mechanism that comprise experts who have earned public reputation on their professional fairness, integrity, competency and honesty. (p. 158)

Justice David Malcolm (2004) stated, “The role of a Chief Justice is one of leadership” (p. 150). As the spokesperson and leader of the judiciary, the Chief Justice interacts with the executive, legislature, and community. They are responsible for administering the judiciary, exercising judicial power independently, and maintaining the judiciary's independence. The Chief Justice has ultimate authority over workload distribution, bench formation, case allocation, and appointing independent judges through the Judicial Council. However, issues such as fixed benches, controversial decisions, disputes over judicial appointments, birth dates, and academic credentials have plunged the judiciary into chaos, increasing public distrust.

Judicial misconduct became chronic when

serious questions arose about Chief Justice Cholendra Shamsher Rana's professional integrity and commitment to judicial independence and the rule of law. His reluctance to end the discretion-based system of case allocation, as recommended by a high-level committee in 2021, and his attempt to preside over cases on the Constitutional Bench where he was a defendant, were seen as affronts to justice. Allegations included an implied deal with the executive to induct his brother-in-law into the cabinet and secure other appointments in constitutional bodies, and his failure to list important political cases until pressured to resign<sup>29</sup>. These controversies have sparked unprecedented concern and outrage in Nepali judiciary history. Under immense pressure from the public and the Bar, the Supreme Court amended its rules to implement a lottery system for case assignments until an automated system is established. While this method, based on 'fortune rather than competence,' emerged from a severe lack of trust, it doesn't resolve all allegations against the Chief Justice or address long-standing judicial misconduct issues. Nevertheless, it represents a significant shift from traditional common law practices and could serve as an example for other judiciaries.

The judiciary's politicization and lack of accountability have damaged its reputation, demoralized many judges, eroded public trust, and allowed judicial impunity to flourish. Daniel Meador in 1996 remarked: “The judges themselves can be potential threats to judicial independence by what they do” (ABA, 1997, p. 22). This is an apt descriptor of the Nepali judiciary.

The legacy of power once held by the King now seems to be continued by political parties and a judiciary accustomed to control from higher authorities. This legacy has led judges to overlook judicial values and engage in legal irregularities. All former Chief Justices<sup>30</sup> of the Supreme Court have denounced the prevalence of judicial irregularities and corruption upon their retirement (INSEC, 1999). The current situation reflects deep systemic issues. The Judicial Council's accountability mechanism, including disciplinary

procedures, has never been effectively applied and lacks a clear process for regular performance evaluation of the judges (Kunwar, 2018b). Though judicial ethics and a Code of Conduct were adopted by the Judicial Council in 2017, professional values are neither reflected nor strictly enforced (Ibid). Corruption and malpractice in the justice system distort the judiciary's image, involve public officials in corrupt practices, and create public distrust. This poses a serious threat to human rights, justice, the rule of law, and democracy.

### **Emerging Issues: Erosion of the Public Trust in the Judiciary**

Despite the judiciary's ongoing commitments to making the system “worthy of public trust” (Supreme Court, 2009, 2014, 2019) and its sincere efforts at reform, there is overwhelming evidence of a persistent lack of public trust in judicial competency and independence. This perceived lack of judicial independence in Nepal has serious implications for trust in democratic governance, with public trust at an all-time low (Chapagai & Karna, 2020; Karna & Yadav, 2017). In Nepal's legal system, sustaining public trust involves not only the judiciary but also the legislative and executive branches. For example, the executive must implement court decisions and ensure sufficient funding and competent human resources for the judiciary, while the legislative must facilitate the appointment of competent judicial candidates.

#### ***Political Inclination of the Judiciary***

The politicization of the judicial system and its role in regulating other government organs to ensure impartial access to justice are crucial for public trust (Gleeson, 2002; Roussey & Deffains, 2012; Uusitalo, 2019). Currently, the judiciary's actions extend beyond resolving disputes and applying the law; there is a noticeable tendency to engage in politics. Cases involving constitutional issues, which fall under the judiciary's jurisdiction, require judicial seriousness and sensitivity (Supreme Court, 2021). However, the trend of entertaining purely political cases has increased. Judges, who should not involve themselves in political disputes, are increasingly doing so, adversely affecting public

policy. For instance, during a 2021 Constitutional Bench hearing on the dissolution of parliament, two senior judges opted out, citing moral objections to sharing a bench with judges who had a 'conflict of interest,' while the other judges denied such conflicts. This incident highlights the growing judicial involvement in political matters.

The public has persistently questioned judges' personal credibility, accountability, and the impact of political intervention in judicial appointments, external influences on decision-making, and judicial misconduct, including the controversial role of the Chief Justice (Adhikari, 2020b; Chapagai & Karna, 2020; Gyawali, 2020; Jamil, Dhakal, & Paudel, 2017; Nepal Law Society, 2002; Shakya, 2017; Tripathi, 2016). Efforts to reform the appointment system have led to significant disappointment (Acharya, 2020; Adhikari, 2020b; Gyawali, 2020; Shakya, 2017; Shrestha, 2018b; Tripathi, 2016). Additionally, the performance and integrity of judges and officials in the office are deemed inadequate (Chapagai & Karna, 2020; Karna, 2012; Shrestha, 2020, 2021). Before 1990, although the monarchy influenced the courts, judges were not politically divided. However, due to increased political influence in appointments, judges now often lean politically for personal and professional gains.

The Judicial Council controls the appointment process, which is “perceived to be prone to adopting recommendations more on political connections rather than on qualifications” (Kunwar, 2018a). The Nepal Bar Association has raised concerns about the experience, qualifications, and competence of some justices appointed to the Supreme Court and High Courts (NBA, 2019, 2020). The Supreme Court has acknowledged significant issues regarding judicial integrity in appointments and the lack of specific training for law graduates in judicial posts (Supreme Court, 2015, 2021). Political executives, who play a crucial role in appointing judges, must consider public trust and confidence in the judiciary, while the judicial institution must be wary of political interference in judicial matters, including appointments. Although the involvement of other government branches does not inherently threaten judicial independence, this requires a

genuine commitment to supporting the process. However, this is challenging when most judges in the Supreme Court and High Courts are politically aligned and loyal to political parties rather than the rule of law. Political interference in the judiciary and the judiciary's political inclinations highlight the 'nexus' between politics and the justice system.

### ***Judicial Criticism and Media Trial***

In recent years, the judiciary has faced severe criticism from the executive, legislative branches, the public, and the media for its decisions in specific cases and issues of judicial misconduct. Public confidence has been further affected by how judicial activities are reported in the media. The public largely relies on media reports to form perceptions about the performance of state institutions, including the judiciary. The media act as proxies for the public, providing insight into justice principles and other judicial matters. Courts are subject to media scrutiny and commentary, which plays a crucial role in maintaining public trust (Campbell & Lee, 2001). However, the increasing media involvement in sub judice cases, particularly criminal and high-profile political cases, has raised concerns about protecting judicial independence and accountability (Acharya, 2020).

The media has often been accused of conducting trials of suspects and passing 'verdicts' that influence court decisions and public perception. For instance, during the Constitutional Bench's hearing on the dissolution of parliament in January 2021, media reports highlighted public criticism, opinions from political leaders, and press statements from four former Chief Justices declaring the dissolution unconstitutional. These reports were seen as attempts to influence the court's decision. Surya Dhungel (2021) described the critiques from major judicial stakeholders, including former Justices and Chief Justices, on the sub judice case at the Supreme Court as "most unusual and constitutionally questionable" (p. 2). The way court-related incidents are reported in the media has undermined judicial decision-making and independence.

The lack of commitment to uphold judicial values is detrimental to judicial reform. The

widespread lack of public trust poses a significant threat to constitutionalism and the rule of law. Judicial competence and adherence to values are essential for maintaining the highest levels of public trust in the judiciary, as "the independence and impartiality of the judiciary are not private rights of judges; they are rights of citizens" (Gleeson, 2002, p. 19). Public trust in the judiciary encourages compliance with laws and cooperation with the judicial system "when the institution and the public share the same values" (Gregoire & Nedim, 2021, p. 20). Supreme Court Justice Ananda Mohan Bhattarai, on June 1, 2021, while addressing the composition of the Constitutional Bench, noted that the judicial power is founded on public trust. Justice delivered by an untrusted judge cannot be deemed trustworthy. Achieving justice requires more than just a fair outcome; the entire judicial process must be fair and impartial.

### **Conclusion**

Nepal's seventy years of constitutional reform aimed at fully separating powers between state institutions began with optimism. These efforts sought to improve the judiciary and its performance, with the lofty goals of creating and maintaining justice and achieving broader development objectives. Principally, constitutional reforms primarily aimed to transform the judiciary by incorporating the principle of separation of powers and empowering it to function independently from the executive and legislative branches. However, Nepal's judicial history is marked by numerous accomplishments and disappointments.

While the constitutions are committed to promoting institutional independence, they are constrained by their jurisdiction concerning judicial review and the strength of constitutional amendments. Notably, judicial independence from the executive has never become a national agenda for various pro-democracy movements. The heavy involvement of the government in the judiciary, even during periods of multiparty democracy and the republic, reflects the legacy of the autocratic regime. Continued external control has paralyzed the judicial reform process and hindered the independent functioning of the judiciary. Loopholes in judicial appointment provisions, manipulation of

constitutional ambiguities, and lack of individual accountability significantly undermine judicial independence in Nepal. These issues will persist unless and until executive and political influences on the judiciary are eliminated.

Judges themselves play a crucial role in shaping public perception. They are responsible for the consequences (NBA, 2019) because the public expects them to uphold a high level of professionalism, integrity, and fairness (Supreme Court, 2021). Unlike compliance issues, which are relatively straightforward to implement and monitor, addressing the challenges posed by judges who habitually and intentionally breach judicial codes of conduct and professional ethics, delay decisions, or present biased interpretations of the law is much more complex. Reforming judicial behavior and attitudes remains a significant challenge for judicial reformers in Nepal.

Overall, the Nepali judicial system fails to meet the basic conditions required to ensure independence and public trust. Numerous problems, including threats to judicial competency, impartiality, and integrity, have surfaced. The decline in public trust stems from controversial actions by judicial leadership that contravene the constitution and principles of the rule of law. The judiciary's independence has been circumscribed by the "supreme authority" – formerly the King, and now political parties. This has become ingrained in the culture of the executive and habitual for the judiciary over seven decades.

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## Endnotes

1. After visiting Europe in 1853, Prime Minister Jung Bahadur Rana developed Nepal's legal arrangements, consolidating and codifying various provisions into the Ain (Code) of Nepal. Inspired by the French Napoleonic Code and English written laws, the Ain was primarily a collection of Hindu dogmas and customary laws. This codification set the stage for Nepal's constitutional development by bringing everyone under a unified legal framework. These reforms laid the groundwork for modern legal structures in Nepal, marking an early effort to systematize the legal system and establish a foundation for future constitutional governance.
2. Article 32 (2) of the Interim Constitution 1951 notes that the composition, powers and functions of the Pradhan Nyayalaya shall be as determined by separate law. The Pradhan Nyayalaya Act 1952 was enacted to regulate the apex court and judicial functions.
3. According to Section 6 and 7 of the Pradhan Nyayalaya Act 1952, the King appoints five judges including the Chief Justice, on the recommendation of the Minister of Council.
4. Section 30 provides power to the Judiciary to issue orders to settle disputes.
5. While exercising writ jurisdiction, the full bench of the Pradhan Nyayalaya declared laws and governments actions incompatible to the section 30 of the Pradhan Nyayalaya Act 1952. See, *Bisheshwor P. Koirala v. Commissioner Magistrate*, NLR 2016 BS (1959) at 123 and *Bed Krishna Shrestha v. Department of Industries, Commerce Food & Civil Supply*, NKP 2016 (1959) at 234.
6. According to Article 117 of the Constitution of Nepal 1990, the Constitutional Council constituted the Prime Minister (Chairperson), the Minister of Justice (member), a judge of the Supreme Court (member), the speaker of the House of Representatives (member), the chairman of the National Assembly (member), and the Leader of the Opposition in the House of Representatives (member).
7. According to Article 93 of the Constitution of Nepal 1990, the Judicial Council comprised of the Chief Justice (Chairperson), the Minister of Justice (member), the two senior-most judges of the Supreme Court (member), and one distinguished jurist to be nominated by the King on the recommendation of the Council of Ministers (member).
8. Article 103 of the Interim Constitution 2007 requires the appointment of the Chief Justice on the recommendation of the Constitutional Council, and of other judges of the Supreme Court on the recommendation of Judicial Council. The Executive has control over both the mechanisms.
9. Article 106, *Ibid*.
10. Article 155 (1), *Ibid*.
11. Article 162 (2), *Ibid*.
12. According to the article 113 of the Interim Constitution 2007, the Judicial Council consists of: the Chief Justice (Chairperson), the Minister of Justice (member), a senior advocate, or an advocate appointed by the Chief Justice on the recommendation of the Nepal Bar Association (member), a person nominated by the Prime Minister from amongst the jurists (member), and the senior-judge of the Supreme Court (member).
13. *Bharatmani Jungam & others v. Office of the President & others*, Writ No. 68-ws-0014. The Tenth Amendment to the Interim Constitution that extended the length of the CA was questioned at the Supreme Court. The Supreme Court on the writ petition interpreted such extensions as the violation of the constitutional provision related to the principle of periodic elections.
14. According to the annual reports of the Supreme Court, 46 PILs were filed in the fiscal year 2017/18. Similarly, 36 PILs were filed in 2018/19 and 96 PILs in the fiscal year 2019/20.
15. One of the employers of this committee, Trilok Pratap Rana, later became Chief Justice of the Supreme Court. This department was

- abolished after the promulgation of the Constitution in 1990.
16. After the failure of the first CA in 2012, to clear constitutional hurdles for formation of a new election government, four major political parties signed an 11-point agreement whereby sitting Chief Justice Khil Raj Regmi would restrain from performing in his regular duties as Chief Justice of the Supreme Court while exercising the powers of the Prime Minister under the Interim Constitution 2007, in holding an election of the CA. While he took the executive post, he stepped down from the post of Chief Justice but did not resign for about a year. A senior judge, next in row, served as acting Chief Justice until February 2014. The agreement also provided that the Chief Justice would resume his duties as Chief Justice.
  17. Article 116 (1) of the Constitution of the Kingdom of Nepal 1990.
  18. According to Article 129 (2) the President appoints the Chief Justice on the recommendation of the Constitutional Council and the other Judges of the Supreme Court on the recommendation of Judicial Council.
  19. Chief Justice Cholendra Shamsher Rana during his tenure as High Court Judge was directed by the judicial council to punish a political leader who was engaged in corruption. Similarly, Chief Justice Gopal Prasad Parajuli and Deepak Kumar Joshi furnished fake academic certificates and citizenship certificates.
  20. Chief Justice appointed despite receiving nine complaints against him over his rulings on corruption cases, during his tenure as the judge of Special Court.
  21. Subodhman Napit v. Prime Minister and others, 2010.
  22. Under Article 101 of the 2015 Constitution, three members of the parliament submitted a complaint before the impeachment committee requesting it to begin an impeachment process against a Supreme Court Judge, Ananda Mohan Bhattarai.
  23. The Impeachment Committee rightfully refused the impeachment motion against Judge Ananda Mohan Bhattarai. In relation to the impeachment motion against Justice Sushila Karki, two ruling parties withdrew the impeachment motion due to the Supreme Court interim order against it, and the pressure from the UN Special Rapporteur on the Independence of Judges and Lawyers, Diego García-Sayán.
  24. At the time of finalization of this thesis in June 2022, the Parliament had not made any decision on the Impeachment proposal. Justice Rana stepped down from his position in February 2022 and senior-most judge is serving as an acting Chief Justice.
  25. Madhav Kumar Basnet v. Supreme Court, 16 January 2022.
  26. Para 10, Ibid.
  27. Article 154, The Constitution of Nepal, 2015.
  28. Article 118 (f), Ibid.
  29. In October 2021, 18 out of 19 judges went on strike for a week, boycotting hearings and calling for Chief Justice Rana's resignation. They passed a resolution demanding the use of a lottery system to assign cases, bringing the judicial system to a standstill.
  30. Former Chief Justice Bishwo Nath Upadhyaya said that “no Judges and even Chief Judges can be said non-corrupt”. Judge Krishna Jung Rayamajhi resigned citing ‘unnatural practices’ in the appointment of judges and Chief Justice. See INSEC Human Rights Yearbook, 2008, 2011, 2012.
  32. Opinion of Justice Deepak Karki and Ananda Mohan Bhattarai: Justice delivered by untrusted judges cannot be trustworthy, Himalkhabar, 2 June 2021, see: <https://himalkhabar.com/news/124025>.

