

Judicial Review and Good Governance in Nepal: A Critical Analysis

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Abstract

Judicial review and good governance are essential components of constitutional democracy and the rule of law. Judicial review enables courts to examine the legality and constitutionality of legislative, executive, and administrative actions, while good governance promotes transparency, accountability, participation, and adherence to legal principles. This study critically analyzes the role of judicial review in promoting good governance in Nepal under the Constitution of Nepal, 2015. The research adopts a doctrinal legal methodology based on the analysis of primary sources, including constitutional provisions, statutes, and landmark decisions of the Supreme Court of Nepal, as well as relevant secondary literature. The study finds that judicial review has significantly strengthened constitutional supremacy, the protection of fundamental rights, administrative accountability, transparency, and public interest litigation. However, challenges such as judicial delays, weak enforcement of judgments, institutional limitations, and concerns regarding judicial overreach continue to affect its effectiveness in ensuring good governance.

Keywords: Judicial Review, Good Governance, Rule of Law, Privacy, Public Interest Litigation.

Background

Judicial review is a fundamental mechanism for ensuring the supremacy of the Constitution and the protection of fundamental rights within a democratic system. It empowers courts to examine the legality of legislative and executive actions and to invalidate those that are inconsistent with constitutional provisions. The power of judicial review has a vital significance in the concept of a written constitution. The notion of the rule of law is enforced through judicial review. The American Supreme Court propounded the doctrine of Judicial Review.[†] In the context of Nepal,

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[†] Marbury v. Madison [1803] US SC case

judicial review has emerged as a crucial instrument for maintaining the rule of law, promoting accountability, and safeguarding democratic governance.

The concept of good governance, on the other hand, encompasses principles such as transparency, accountability, participation, responsiveness, and the rule of law. These principles are essential for ensuring that state power is exercised in a manner that serves the public interest and respects the rights of citizens. Judicial review plays a vital role in advancing these principles by providing a check on the arbitrary and unlawful actions of public authorities.* In this sense, judicial review and good governance are closely interconnected, as the former serves as a tool for realizing the latter. In Nepal, the Constitution of 2015 provides a strong foundation for judicial review by guaranteeing fundamental rights and empowering the judiciary, particularly the Supreme Court, to enforce these rights through constitutional remedies. Articles relating to the right to constitutional remedies and judicial powers enable the courts to review laws and executive decisions that violate constitutional norms. Over the years, the Supreme Court of Nepal has actively exercised its power of judicial review, particularly through public interest litigation, thereby expanding the scope of governance accountability and promoting transparency in public administration.

However, despite these constitutional and institutional developments, challenges remain in the effective exercise of judicial review in Nepal. Concerns have been raised regarding judicial overreach, inconsistency in decision-making, delays in adjudication, and limitations in the enforcement of court decisions.¹ These issues raise important questions about the balance between judicial activism and judicial restraint, as well as the overall impact of judicial review on governance practices.

Furthermore, the transition to a federal system has introduced new dimensions to governance in Nepal, requiring effective coordination among federal, provincial, and local governments. In this evolving context, the role of judicial review becomes even more significant in ensuring that all levels of government act within their constitutional boundaries and adhere to principles of good governance.

This study seeks to critically analyze the role of judicial review in promoting good governance in Nepal. It examines the constitutional and legal framework, evaluates key judicial decisions, and identifies challenges in the practical application of judicial review. By doing so, the study aims to assess whether judicial review in Nepal has effectively contributed to strengthening governance and upholding the rule of law.

* United Nations. (2012). Declaration of the High-level Meeting on the Rule of Law.

Objective of the Study

1. To critically analyze the constitutional and legal framework of judicial review in Nepal.
2. To evaluate key judicial decisions of the Supreme Court of Nepal.
3. To identify the key challenges hindering the effectiveness of judicial review in Nepal.

Literature Review

The relationship between judicial review and good governance has been widely discussed in constitutional law, political science, and governance studies. Scholars generally agree that judicial review functions as a mechanism for maintaining constitutional supremacy, protecting fundamental rights, and ensuring the accountability of public institutions. At the same time, debates continue regarding the extent of judicial activism and its implications for democratic governance. Montesquieu, in his classical work *The Spirit of the Laws*, emphasized the doctrine of the separation of powers as an essential foundation for preventing the arbitrary exercise of state authority. According to Montesquieu, the judiciary must function independently from the executive and legislative branches in order to maintain liberty and the rule of law. His theory later became the philosophical basis for the development of judicial review in modern constitutional democracies. The principle of checks and balances discussed in the book continues to influence constitutional systems, including Nepal's constitutional framework.

Similarly, Amartya Sen in *Development as Freedom* explains that development cannot be understood only in economic terms but must also include political freedoms, transparency, accountability, and institutional justice. Sen argues that good governance depends upon effective institutions capable of protecting citizens' rights and ensuring participation in public affairs. His analysis provides a broader theoretical understanding of how judicial institutions contribute to democratic governance and human development.

In the article "Brown v. Board of Education and the Interest-Convergence Dilemma", Derrick Bell examines the role of judicial review in advancing constitutional rights and social justice. Bell argues that courts can become instruments of progressive change when constitutional interpretation aligns with broader political and social interests. The article demonstrates how judicial review may influence governance by protecting equality and minority rights, thereby strengthening democratic legitimacy.

Likewise, K. S. Lamichane in the article "Judicial Review: Nepalese Constitutional Provision and Some Nepalese and Foreign Judicial Practices"¹¹ discusses the constitutional basis and practical application of judicial review in Nepal. The author explains the doctrines and principles used by courts while reviewing legislative and executive actions, including the doctrines of severability, basic structure, and legitimate expectation. Lamichane further

compares Nepalese practices with foreign jurisdictions and concludes that judicial review is essential for maintaining constitutionalism and the rule of law in Nepal.

Similarly, Madhab Kumar Basnet in “The Use of Principle of Legitimate Expectation in Nepal: A Comprehensive Study” analyzes the increasing use of the doctrine of legitimate expectation in Nepalese judicial practice. The article highlights how courts protect citizens against arbitrary administrative decisions and ensure procedural fairness. Basnet argues that the recognition of legitimate expectation strengthens transparency, accountability, and public trust in governance institutions.

The reviewed literature demonstrates that judicial review plays a significant role in promoting constitutionalism, accountability, transparency, and the protection of fundamental rights. The books provide the theoretical and philosophical foundations of judicial review and governance, while the articles offer practical and comparative perspectives, particularly in the Nepalese context. However, limited studies specifically examine the direct relationship between judicial review and good governance in Nepal after the promulgation of the Constitution of Nepal, 2015. Therefore, this study seeks to fill that gap by critically analyzing how judicial review contributes to good governance within Nepal’s evolving constitutional and federal framework.

Methodology

This study adopts a doctrinal method of legal research based on the analysis of primary and secondary legal sources. Primary sources include the Constitution of Nepal, relevant laws, and landmark decisions of the Supreme Court of Nepal relating to judicial review and good governance. Secondary sources such as books, journal articles, and research publications have also been consulted. The study uses an analytical and descriptive approach to examine the role of judicial review in promoting the rule of law, accountability, and good governance in Nepal.

Concept of Judicial Review

Judicial review refers to the power of the judiciary to examine the legality and constitutionality of legislative, executive, and administrative actions. It ensures that all state organs function within the limits of the Constitution and the law. The concept is closely connected with the doctrine of the separation of powers propounded by Montesquieu in *The Spirit of the Laws*, where he emphasized checks and balances among the legislative, executive, and judicial organs of the state. Judicial review later developed strongly in the United States through the landmark case of *Marbury v. Madison*, which established the authority of courts to invalidate unconstitutional laws.

Judicial review is different from an appeal because the court mainly examines the legality of the decision-making process rather than the merits of the decision itself. If a decision is found arbitrary, irrational, or contrary to law, the court may invalidate it and direct the concerned authority to reconsider the matter. Courts apply various constitutional principles such as natural justice, severability, and legitimate expectation while exercising judicial review. Therefore, judicial review serves as an important mechanism for ensuring the rule of law, accountability, and good governance in democratic states.

Principle of Judicial Review

Judicial review of legislative action is being done by using some basic principles of constitutional law. They are:

1. Doctrine of pith and substance.
2. Doctrine of colorable legislation.
3. Doctrine of severability.
4. Doctrine of liberal Interpretation.
5. Limitation of Stare Decisis.
6. Unconstitutionality.
7. Doctrine of Eclipse and Waiver.
8. Doctrine of Basic structure.

Other Principles

1. Rule of Fair Hearing and Natural Justice.
2. Rule against Biasness.

Judicial Review in the United States

The doctrine of judicial review, in its modern sense, originated in the United States of America in the case of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).^{*} In this case, Chief Justice Marshall emphasized the judicial duty to pursue the constitution in cases where a statute is in conflict with the federal constitution. Justice Marshall further explained that the phraseology of the US Constitution confirms and strengthens the principle that a law repugnant to the constitution is void. All courts and the departments of the states should act under the constitution and its spirit.

^{*} ArtIII.S1.3 *Marbury v. Madison* and Judicial Review, Constitution Annotated, https://constitution.congress.gov/browse/essay/artIII-S1-3/ALDE_00013514/ (last visited Oct. 24, 2023)

Judicial review in the United States of America has become a very significant tool to scrutinize all kinds of state actions across the legislative, executive, and administrative branches and departments. Because of such power, the US Supreme Court has made very well-known pronouncements and invalidated state actions on the ground of due process. While overruling its earlier judgment of *Plessy v. Ferguson*, 163 U.S. 537 (1896), the United States Supreme Court in the case of *Brown v. Board of Education*, 347 U.S. 483 (1954)* invalidated segregation laws dividing whites and blacks, and held that separate educational facilities are discriminatory in nature. In another case, *Gideon v. Wainwright*, 372 U.S. 335 (1963)†, the Supreme Court forwarded its verdict concerning the need for a defense lawyer in criminal cases for a fair trial and free legal aid, and other fundamental rights concerning the silence of the accused person as in *Miranda v. Arizona*, 384 U.S. 436 (1966)‡.

It is known that judicial review started from the United States of America, and it is very closely related to checks and balances within the branches of the government to ensure the balance of power and that they remain within their limits. The US Supreme Court has jurisdiction to review laws, actions, or decisions made by Congress and the President of the federal government, or any court or agency of the state government, to determine whether they are constitutional or not; the doctrine of judicial review was established in 1803 in the case of *Marbury v. Madison*.

Judicial review takes a very vital place in the US system, even though the phrase "judicial review" is not mentioned in the Constitution. The court checks the legality and fairness of the actions taken by the government and other state agencies through its eyes of judicial review. All the actions of the executive and legislative branches of government are subject to review and possible invalidation by the judicial branch, except for torts and private contracts.

In the state criminal court case *Cohens v. Virginia* (1821)§ and in the case of *Cooper v. Aaron* (1958), the issue was about the jurisdiction of the Supreme Court: whether it has the power to declare an action taken by a state department unconstitutional. In the right-to-abortion related case *Roe v. Wade*, and on the issue of election advertisements for federal elections, *Citizens United v. Federal Election Commission* (2010), actions were declared unconstitutional. Likewise, in the case of *Obergefell v. Hodges* (2015), a majority decision of the Supreme Court held that banning same-sex marriage is unconstitutional and established the right to marriage as fundamental.

* Meyer, D.D.. (1989). *The Plessy Case: A Legal-Historical Interpretation*. University of Michigan Law School. Michigan Law Review.

† Derrick A. and Bell jr.. (1980). *BROWN v. BOARD OF EDUCATION AND THE INTEREST-CONVERGENCE DILEMMA*

‡ Administrative Office of the U.S. Courts. (n.d.). Facts and case summary - *Gideon v. Wainwright*. United States Courts.

<https://www.uscourts.gov/about-federal-courts/educational-resources/educational-activities/sixth-amendment-activities/gideon-v-wainwright/facts-and-case-summary-gideon-v-wainwright>.

§ Kamisar, Y. (2009). *Miranda v. Arizona case analysis*. University of Michigan Law School. Michigan Law Review.

In the course of the development of the American legal system, the court has played a very historic and noteworthy role in propounding new doctrines and principles in the area of law and justice. The above-discussed cases are very few and symbolic examples of judicial review in the US system. Many more doctrines and principles have been established in the long run of the judicial history of the United States.

Judicial Review in India

India follows the principle of constitutional supremacy and expressly recognizes judicial review as a basic feature of its Constitution. Indian courts have extensively exercised judicial review, particularly against administrative and executive excesses, in order to protect fundamental rights and maintain constitutional governance. Dr. B.R. Ambedkar regarded writ jurisdiction as an effective mechanism for providing quick relief against violations of fundamental rights. In *A.K. Gopalan v. State of Madras*, the Supreme Court held that the Constitution is supreme and every law must conform to constitutional requirements. Similarly, in *S.S. Bola v. B.D. Sardana*, the Court emphasized that judicial review is essential for preserving federalism, liberty, equality, and constitutionalism. governance.* The Court further declared in *Subhash Sharma v. Union of India* that judicial review is a basic feature of the Indian Constitution and is necessary for the effective protection of fundamental rights.†

The Indian judiciary has also developed important constitutional doctrines through judicial review. Under Article 13 and Article 226 of the Indian Constitution, courts have the authority to review the constitutional validity of legislative and administrative actions. In *I.C. Golaknath v. State of Punjab*, the Supreme Court held that Parliament cannot amend fundamental rights guaranteed by the Constitution.‡ Later, in *Kesavananda Bharati v. State of Kerala*, the Court introduced the “basic structure doctrine,” allowing constitutional amendments only if the basic structure of the Constitution remains unaffected.§ Likewise, in *State of Rajasthan v. Union of India*, the Court held that even a proclamation of emergency is subject to judicial review if it is found mala fide, irrational, or unconstitutional.** These decisions demonstrate the significant role of judicial review in strengthening constitutionalism, accountability, and the rule of law in India.

Concept of Good Governance

The concept of good governance refers to the effective, accountable, and transparent exercise of power in managing a state’s economic, social, and political resources for the benefit of its

* *S.S. Bola v. B.D. Sardana*, (1997) 8 SCC 522

† *Subhash Sharma v. Union of India*, AIR 1991 SC 631.

‡ *I.C. Golaknath v. State of Punjab*, AIR 1967 SC 1643.

§ *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.

** *State of Rajasthan v. Union of India*, AIR 1977 SC 1361

citizens. It emphasizes not merely the existence of governmental authority but the manner in which such authority is exercised in accordance with the rule of law and the public interest. In the 1990s, the World Bank became the first international institution to adopt the concept of good governance into lending arrangements for developing countries and introduced the idea to the general public. In its 1992 report entitled *Governance and Development*, the notion of good governance was defined as the way in which power is used to regulate the economic and social resources of a country for development.* The modern articulation of good governance has been significantly shaped by institutions such as the United Nations and the World Bank.†

The key principles, including participation, transparency, accountability, and efficiency, have been elaborated by bodies like the United Nations Development Programme, the Organisation for Economic Co-operation and Development, and the Asian Development Bank.‡ These principles collectively aim to ensure that governance systems are democratic, inclusive, and responsive to public needs. Development, in contemporary understanding, is a multidimensional concept that goes beyond traditional notions of economic growth. Earlier approaches equated development with increases in national income; however, modern Theories, particularly those advanced by Amartya Sen, conceptualize development as the expansion of human capabilities and freedoms. This approach was further strengthened by Mahbub ul Haq through the introduction of the human development paradigm. Institutions like the United Nations Development Programme have operationalized this idea through the Human Development Index (HDI). Additionally, scholars such as Douglass North and Joseph Stiglitz emphasize the role of institutions, equity, and social justice in shaping development outcomes Theories, particularly those advanced by Amartya Sen, conceptualize development as the expansion of human capabilities and freedoms. This approach was further strengthened by Mahbub ul Haq through the introduction of the human development paradigm. Institutions like the United Nations Development Programme have operationalized this idea through the Human Development Index (HDI). Additionally, scholars such as Douglass North and Joseph Stiglitz emphasize the role of institutions, equity, and social justice in shaping development outcomes.

The relationship between good governance and development is both intrinsic and mutually reinforcing. Effective governance provides the institutional framework necessary for equitable and sustainable development by ensuring the efficient allocation of resources, reducing corruption, and promoting accountability. Conversely, weak governance structures often result in inequality, inefficiency, and underdevelopment. Global initiatives such as the Sustainable Development Goals (SDGs) adopted by the United Nations highlight governance as a central

* United Cities and Local Governments Asia Pacific. (2021, November 18). Good governance: Definition and characteristics. <https://uclg-aspac.org/good-governance-definition-and-characteristics/>.

† World Bank. (1992). *Governance and development*. World Bank; United Nations. (2000). *Report of the Secretary-General on good governance*. United Nations.

‡ United Nations Development Programme. (1997). *Governance for sustainable human development*. UNDP; Organisation for Economic Co-operation and Development. (2015). *Principles of good governance*. OECD Publishing; Asian Development Bank. (1995). *Governance: Sound development management*. ADB.

pillar of development. Furthermore, international organizations like the International Monetary Fund and Transparency International stress that transparency and anti-corruption measures are essential for achieving sustainable development outcomes.

Principles of Good Governance

The concept of good governance has eight principles. They are:⁴³

- **Participation:** Participation in the concept of good governance provides an opportunity for everyone to voice their opinions through institutions or representatives. In addition, everyone, without exception, has the right to freedom of association and expression.
- **Rule of law:** To implement good governance, the legal framework in the country must be enforced impartially, especially concerning human rights law.
- **Transparency:** Transparency means that every policy taken and implemented by the government must be carried out under existing regulations. In addition, there must be a guarantee that any information related to the policy can be accessed by everyone, especially those who are directly affected by the policy.
- **Responsiveness:** Good governance requires institutions and processes to serve all stakeholders within a reasonable timeframe.
- **Consensus-oriented:** This principle relates to the decision-making process. When decisions cannot accommodate everyone's wishes, they must, at a minimum, be acceptable to all and cause no harm.
- **Equity and inclusiveness:** Good governance ensures justice for the community, providing everyone with an equal opportunity to maintain and improve their welfare.
- **Effectiveness and efficiency:** All decision-making processes and institutions must be able to produce outcomes that meet community needs, ensuring that resources are utilized optimally by the government.
- **Accountability:** All institutions involved in good governance bear full responsibility to the public to improve the quality of society.

Judicial Review and Good Governance in Nepal: An Analytical Perspective

Judicial review serves as a cornerstone for promoting good governance by ensuring that the exercise of public power remains within constitutional limits. Judicial review in Nepal has evolved as a powerful constitutional mechanism to promote good governance by ensuring legality, accountability, and adherence to constitutional norms. The Supreme Court of Nepal, through its proactive jurisprudence, has significantly influenced governance practices by checking arbitrary state action and reinforcing the rule of law. The relationship between judicial review and good governance is particularly evident in cases where the Court has intervened to uphold constitutional supremacy, transparency, and the protection of fundamental rights.

One of the most significant contributions of judicial review to good governance in Nepal is the expansion of public interest litigation (PIL). In *Advocate Prakash Mani Sharma v. His Majesty's Government, Office of the Council of Ministers et al.*, the Supreme Court recognized that any individual may file a petition in matters involving public interest and concern. This development significantly enhanced access to justice and enabled judicial scrutiny of governance practices affecting the public at large. By broadening access to courts, the judiciary strengthened participatory governance, transparency, and accountability.

Similarly, in *Gopal Krishna Siwakoti v. His Majesty's Government of Nepal*, the Supreme Court emphasized the importance of transparency and accountability in public administration.[1] The Court recognized that governance must be exercised in a manner consistent with constitutional principles and held that arbitrary actions by public authorities are subject to judicial scrutiny. This case highlights how judicial review acts as a safeguard against the misuse of executive power and contributes to the establishment of responsible governance.

In the case of *Advocate Balkrishna Neupane v. President Ram Baran Yadav and Others*, the Supreme Court addressed the constitutional validity of administering the oath of office in a language other than Nepali.[2] The Court's intervention in this politically sensitive matter reflects its role in ensuring constitutional compliance in executive actions. By emphasizing adherence to constitutional provisions, the judiciary reinforced the principles of legality and institutional accountability, which are the main components of good governance.

Similarly, in *Suman Adhikari v. Prime Minister and Office of the Council of Ministers*, the Supreme Court exercised judicial review to declare certain provisions of the Truth and Reconciliation Commission Act ultra vires to the Constitution.[3] This landmark decision highlights the judiciary's crucial role in transitional justice and demonstrates its commitment to protecting victims' rights and preventing impunity. The case significantly contributed to strengthening the rule of law and ensuring that legislative measures conform to constitutional standards.

Judicial review has also been instrumental in promoting environmental governance. In *Advocate Prakash Mani Sharma v. Government of Nepal and Others*, the Court addressed issues relating to environmental protection and the conservation of natural resources in the Godawari area.[4] By recognizing environmental rights as part of broader constitutional guarantees, the Court expanded the scope of good governance to include sustainable development and ecological accountability.

The case of *Rajiv Parajuli v. Corruption Control Royal Commission* is particularly significant in defining the scope of judicial review in relation to the separation of powers.[5] The Supreme Court examined the limits of executive authority and reaffirmed that all state organs are subject to constitutional scrutiny. This decision underscores the judiciary's role in maintaining

institutional balance and preventing the abuse of power, thereby strengthening democratic governance.

In addition, the Court has contributed to the development of procedural fairness and administrative accountability. In *Rina Bajracharya v. Royal Nepal Airlines Corporation*, the Supreme Court emphasized the need for fairness in administrative decision-making processes. This case illustrates how judicial review ensures that public institutions act transparently and respect due process, which are essential elements of good governance.

Likewise, in *Bivek Chaudhary v. Ministry of Physical Infrastructure and Transport*, the Supreme Court strictly restricted the publication of citizenship numbers in the results of the license exam published by the transportation department, protecting the right to privacy by recognizing it as an integral aspect of personal liberty. This interpretation of the Court shows that not all individual information held by a public body is meant for publication.

Collectively, these cases demonstrate that judicial review in Nepal extends beyond mere constitutional interpretation to actively shaping governance standards. The Supreme Court has addressed a wide range of issues, including constitutional compliance, transitional justice, environmental protection, administrative fairness, and fundamental rights. Through these interventions, the judiciary has played a pivotal role in promoting transparency, accountability, and inclusiveness in governance.

The jurisprudence of the Supreme Court of Nepal reflects a dynamic and evolving approach to judicial review, one that actively contributes to the promotion of good governance. While the judiciary has made significant strides in strengthening constitutionalism and accountability, sustained efforts are required to address institutional challenges and ensure the effective implementation of judicial decisions. Only then can judicial review fully realize its potential as a cornerstone of good governance in Nepal.

Conclusion

Judicial review has become a vital constitutional mechanism for promoting good governance, protecting fundamental rights, and upholding the rule of law in Nepal. Through its constitutional oversight, the Supreme Court of Nepal has strengthened accountability, transparency, administrative fairness, public interest litigation, and constitutional supremacy. Although challenges such as judicial delays, weak enforcement of judgments, institutional limitations, and concerns regarding judicial overreach persist, judicial review continues to serve as an effective safeguard against arbitrary state action. Strengthening judicial independence and enforcement mechanisms is therefore essential to enhancing its contribution to democratic governance and constitutionalism in Nepal.

Recommendation

- **Strengthen the Enforcement of Judicial Decisions:** Effective mechanisms should be developed to ensure the timely and full implementation of Supreme Court judgments by government agencies and public authorities.
- **Reduce Judicial Delays:** The judiciary should adopt streamlined case management systems, optimize procedural rules, and enhance human resource capacity to minimize backlog and ensure the timely delivery of justice.

Judicial reforms, including case management systems, increased judicial resources, and technological innovations, should be adopted to minimize delays in constitutional and public interest cases.

- **Enhance Judicial Independence:** Institutional, financial, and administrative independence of the judiciary should be further strengthened to ensure the impartial exercise of judicial review without external influence.
- **Promote Constitutional Awareness among Public Authorities:** Government officials at federal, provincial, and local levels should receive regular training on constitutional principles, the rule of law, and compliance with judicial decisions.
- **Maintain a Balance between Judicial Activism and Judicial Restraint:** Courts should exercise judicial review carefully to protect constitutional values while respecting the constitutional functions of the legislative and executive branches.
- **Expand Access to Justice through Public Interest Litigation:** Legal and procedural barriers affecting access to constitutional remedies should be reduced to enable greater public participation in governance accountability.
- **Strengthen Judicial Capacity in Emerging Governance Issues:** Specialized judicial training on federalism, environmental governance, digital privacy, and administrative law should be enhanced to address evolving governance challenges effectively.

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