

## **THE EXISTING STATUS OF JUDICIAL INDEPENDENCE IN NEPAL**

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### **ABSTRACT**

The administration of justice is one of the state's major tasks. According to Nepal's Constitution, the Judiciary is responsible for administering justice. The judiciary is a key institution supporting democracy and the rule of law. The Judiciary is responsible for upholding the rule of law by limiting the power of governmental organs to those granted by the Constitution and statutes. In a democratic state, the judiciary is the final resort for protecting people's rights. It promotes political stability and justice, resulting in a strong economy. The judiciary should be independent and responsible to the people and nation. Judicial independence indicates that it is apart from other governmental institutions, particularly the executive and legislative branches. It must be devoid of power, pressure, and other unnecessary elements. Judicial independence refers to the principle that the judiciary's decisions should be free of interference from private or political interests. Judicial independence refers to a judge's capacity to make decisions without being influenced by other factors. Nepal's Constitution designates the judiciary as the guardian of fundamental rights and the Constitution itself. The constitution's preamble emphasizes the importance of an independent judiciary, the rule of law, democratic ideals, and structural and functional independence. The constitution includes crucial measures that support an independent and accountable judiciary. This study has given emphasis on secondary sources of information relating to the concept of independent judiciary and its status in context of Nepal. This paper explores the topic of judicial independence in Nepal. This study incorporates a judicial perspective to the idea of judicial independence. It has also incorporated constitutional and legislative provisions regarding judicial independence.

### **KEYWORDS**

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**Independent Judiciary, Constitution, Rule of law, Fundamental Rights, Democracy, Transparency.**

**INTRODUCTION**

Any democracy needs the legislative, executive branch, and judiciary three strong, independent branches to operate effectively. The judiciary is regarded as the most delicate branch of the government out of the three. If all three of these powers were placed in the hands of a single person or organ, anarchy, tyranny, and dictatorship could occur. This has eventually impacted both the general population and those in opposition (Deshat and Sooch, 2009). To guarantee fundamental liberty and individual dignity, the Constitution must be endowed with 'Constitutionalism,' which envisions checks and balances on legislative and executive powers to prevent them from acting arbitrarily.

The separation of powers is essential for the proper functioning of the Constitution. Baron de Montesquieu pioneered the notion of 'Separation of Powers.' Separation of powers became a key feature of a confined constitutional system in the seventeenth century. (Kharel, 2070) This is one of the most defining features of any constitutionalism. Judicial independence is theoretically based on the separation of powers. All democratic countries recognize the need for judicial independence in promoting democracy. The impartial and autonomous judiciary not only defends an individual's rights, but also administers justice without fear or favor. Judges' independence and impartiality are dependent on their adherence to high ethical norms.

Judicial independence is the most fundamental feature of democracy. The judiciary must be acknowledged as an unbiased and independent instrument of the state. The primary goal of the judiciary is to interpret the constitution and other legislation enacted by the government. Interpretation requires fairness and accountability (Kunwar, 2007). Many international and regional treaties reference the notion of judicial independence. The United Nations made suggestions to define judicial independence in accordance with the Universal Declaration of Human Rights (1948) and the International Covenant on Civil and Political Rights (1966). The United Nations' Basic Principles on the Independence of the Judiciary require member states to ensure judicial independence through constitutional and legal provisions (Neupane, 2020). Legal experts from various groups, including judges and bar associations, have adopted guidelines and principles to achieve this goal. These initiatives have been undertaken at both international and regional levels.

However, the judiciary is constantly impacted by several forces and regularly challenged. The influence of political authorities in judicial appointments is the most contentious topic confronting the court today. Not only that, but the judiciary lacks the principles of competency, fair application of justice, and impartiality. The judges' ethics in making decisions in high-profile cases have always been questioned. Because of these issues, the public's trust in the judiciary has eroded.

**OBJECTIVES OF THE STUDY**

This study aims to provide a comprehensive understanding of judicial independence. The fundamental purpose of this research is to examine the current status of judicial independence in Nepal, also the concerns and obstacles that the judiciary faces in maintaining its independence. The study's key aims are as follows:

- Analyzing the concepts of judicial independence.
- To assess the major problems and challenges of judicial independence in Nepal.
- To analyze the status of judicial independence in Nepal.

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## **METHODOLOGY**

Research methodology as the process and way of resolving problems during study here secondary data and information have been used. Library sources serve as a repository of knowledge and information for analyzing and describing the subject. Qualitative material has been obtained from several sources, including books, journals, papers, research articles, and websites.

## **IMPORTANCE OF JUDICIAL INDEPENDENCE**

Judicial independence is strongly linked to human rights. It is a crucial feature of democratic society. Judicial independence is essential for upholding rule of law and protecting basic rights and freedoms. Only unbiased and competent judiciary safeguards the public's sentiments and beliefs regarding the judiciary. In Nepal, all citizens have the constitutional right to an independent judiciary (Tirkey, 2021). An independent judiciary is essential for preserving the rule of law, as it allows judges to make decisions based only on the law and facts. To ensure a fair and independent judiciary, judges must be free to make decisions without external intervention. They must also be recognized as a separate and equal branch of government, responsible for self-governance and accountable to the public. This is the only way to preserve the public's faith in the courts. The judiciary is the most attentive of the three governmental organs, dealing directly with public cases and concerns (Campbell and Lee, 2012). It protects the weak from the mighty, the minority from the majority, the destitute from the wealthy, and even people from government excesses. Therefore, it is even more vital to develop independence inside the judiciary.

An independent judiciary upholds the supremacy of the Constitution. An independent judicial system is necessary to prevent unwarranted interference in judicial issues by courts and personnel (Pimental, 2011). Judicial independence secures people's rights and promotes a strong judiciary by limiting legislative and executive interference. All Nepalese citizens have the constitutional right to an independent and impartial judiciary (Jeffery and Timalisina, 2011). Maintaining independence is crucial for the written constitution's principles, including the right to justice and freedom from torture. Judicial independence is crucial for maintaining trust and upholding constitutional and international standards.

### **Requirements of Judicial Independence**

To maintain judicial independence and accountability, the following are key requirements.

#### **Independent and Transparent appointment**

Judges and other members of the judiciary must be appointed using a merit-based process. Appointing a candidate based only on competence and merit should be avoided, instead of relying on personal connections (Jhu and Kouroutakis, 2019). It is advisable to propose individuals of strong moral character, transparency, and independence from outside influences to mitigate judicial prejudice and preserve independence within the judiciary.

### **Administrative independence.**

To maintain judicial independence inside the judiciary, appropriate administrative independence must be maintained. The court is responsible for overseeing the litigation process and the cases that the judges will consider (Gyawali, 2022). A well-known Canadian jurist stated as follows in this context: Maintaining the independence of the judiciary as a whole and that of individual judges is the primary responsibility of the

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judiciary. Serving as a barrier between the executive and individual judges is the responsibility of the chief judge and other administrative officers. Maintaining their independence and the independence of their court requires vigilance on the part of all judges, but especially those who have administrative responsibilities. The government must be maintained, just as they must maintain all others.

Security of Tenure.; The judges once appointed are entitled to serve on the bench until their age of retirement. Proper judicial independence and accountability should be taken into consideration by the judges during their period in office.

### **Financial security.**

The judges must be paid sufficiently so that they should not depend on any other institutions and factors to manage their expenses. The financial security should be guaranteed in order to preserve judicial transparency and integrity.

## **CHALLENGES OF NEPALESE JUDICIARY**

The following are the challenges that the judiciary faces in sustaining judicial independence and accountability in Nepal.

### **Corruption**

In a civilized society, corruption is like a sickness that, if not detected early enough, might destabilize the country's administration, with disastrous repercussions. Corruption is prevalent at all levels of government, from the lowest levels of service to the highest layers of bureaucracy (Shrestha, 2007). Unfortunately, it looks to have made its way into the upper judiciary to a significant degree. The public has been incensed by a series of frauds involving higher court members engaged in bribery, corruption, favoritism, and abuse of power. What startled the broader public came as no surprise to many informed individuals.

In Nepal, the judiciary is the sole institution that is unaccountable. It has unique constitutional protection and powerful tools for suppressing opponents, such as contempt of court. In the recent past, the judiciary has performed well (Kunwar, 2009). The bench has advanced to the point where it is considered a last choice for individuals seeking justice. However, this is only one side of the tale; the other is less so. There are various instances in which it appears that the court system is not functioning fairly. Corrupt practices also exist in the judiciary. Corruption continues to plague Nepal's courts. In recent years, the problem has grown much larger. This situation is exacerbated by the appointment of inept judges. The judiciary, which is meant to be the most sensitive and accountable arm of the state, has recently become unaccountable. Nepal's judiciary has officially recognized the continuous practice of corruption. The unreasonable delays in the resolution of high-profile cases demonstrate that irregularities and corruption are at their peak.

### **THE INFLUENCE OF MEDIA**

The media has also presented another challenge to the judiciary in terms of maintaining judicial independence and accountability. In the name of free expression, the media has twisted the way news is distributed to the general population. The media frequently publishes illusionary and less real news. As a result, public faith in the

court steadily declines. Thus, the media has also had a significant impact on judicial independence and accountability.

### **Political Intervention**

Political intervention in judge appointments has a significant impact on Nepal's judiciary. There have been several examples of political parties appointing judges based on personal relationships and party allegiance. The political influence in appointing judges to the High and Supreme Courts has long been controversial. The Judicial Council's suggestion of eighty judges for seven High Courts has long been challenged by the public. The powerful and those with political influence were given a chance over those who were qualified.

### **Pressure on Appointments**

In a comparable manner political influence on the appointment of Supreme Court judges exists in practice. Previously, by succumbing to political pressure, former Chief Justice Kalyan Shrestha failed to maintain the judiciary's integrity (Dahal 2016). The Nepalese judiciary has a history of political influence in the nomination of High and Supreme Court judges.

### **Inclusiveness within the judiciary**

Another difficulty facing the Nepalese judiciary is a lack of inclusivity among its members and personnel. Most appointments are political. The individual of the dominant party is always preferred first; hence inclusivity is lacking. The correct representation of all ethnicities and castes is completely overlooked (Joshi and Katwal, 2014). Judges and other members are selected preferentially, and those who appoint them are given priority when deciding matters. This is why the judiciary lacks appropriate independence. Similarly, the Brahmin/Chhetri population is far larger than that of other castes. In the judicial sector, which employs 4908 people, Brahman/Chhetri is the main caste (77.6%), Hindu is the dominant religion (98.3%), and male is the dominant gender (86.1%). Brahman/Chhetris make up 87.1% of judges, 87.6% of gazetted officials, 82.1% of non-gazetted workers, and 66.6% of staff in other services or classless jobs. The Janajati group comes next, accounting for 9.4% of total judges, 9.3% of gazetted officials, 11.2% of non-gazetted workers, and 21.3% of other services (Acharya, 2015). Janajati is the second biggest group in the judicial sector, yet they account for less than one-fifth of all Brahmin/Chhetri. The other groupings are represented minimally.

### **Implementation of judicial decisions**

Various directions, orientation programs, and training have been issued and implemented to ensure the proper implementation of judicial rulings, but no major progress has been observed. The National Judicial Academy (NJA) has also provided extensive training for the correct implementation of judgments. The absence of actual application of the ruling has been the most serious issue or danger to judicial accountability.

#### **Equal Access to Justice**

People across the country are grappling with the issue of equitable access to justice. Discrimination is evident between the affluent and the poor, women and men, disadvantaged groups, and those with influence (Bhattari, 2023). The underprivileged populations are not treated fairly. They are controlled and constantly pushed

backward. Because of the absence of equitable access to justice, the courts' accountability is seen ineffective.

Lack of coordination between formal and informal justice delivery institutions.

Though informal justice-providing bodies have reduced caseloads and the time it takes to obtain justice, coordination between the two has yet to be realized. The marginalized group is dominated by the dominant group in the local legal system (Chhetri, 2021). The informal justice dispensing agencies lack the necessary means to counter repression committed by the strong against the less powerful. This remains the responsibility of the court in issue.

### **Incompetence in keeping the power of checks and balances.**

Tyranny occurs when power is concentrated in one body. However, even after differentiating the functions, when an authority wields public power, the body's total and sole discretion in subjects falling within its area of influence may be abused. As a result, the idea of the separation of powers is only a theoretical concept that cannot be completely implemented (Bhattari, 2020). On the other hand, unfettered authority without democratic accountability leads to widespread corruption. Corruption in Nepal is always in the spotlight, and its roots are spreading to the court as well (Giri, 2023). Checks and balances are another notion that works with separation of powers. This concept states that no organ should be granted unfettered authority. To maintain balance, one organ's power must be regulated and restricted by the other two. Instead of providing independent strengths, each organ utilizes the abilities of other organs. This approach allows the Constitution to be more flexible than the theory of separation of powers. However, overstepping creates issues (Bhaattari, 2011). Judicial review is critical in the setting of political separation of powers. According to the notion of checks and balances, the court has the authority to keep a check on the laws enacted by the legislature, which gave rise to judicial review. However, the accountability of judges is lacking. A judge is not accountable to anyone, including another judge (Bhatta, 2008). The Constitution is supreme, but the extent of that supremacy must be determined by a court. As a result, the notion of public accountability in the judicial system is critical, because without accountability, the concept and claim of independence lose its meaning. The court, as a watchdog, must also be observed since check and balance is the foundation of every democratic system.

### **Current Status of Judiciary in Nepal**

Nepal has previously implemented a federal system to run governmental functions; nonetheless, Nepal's judiciary remains unitary. It violates the globally acknowledged notion of federalism. The judiciary can only be truly federalized if provincial governments participate in the judicial council. Nepal's judiciary is run centrally (Kumar and Tripathi, 2021). Federalism encourages the rule of law, democracy, and unity in diversity. Thus, to properly reflect the difficulties of every area of the state, federalization should be implemented in the court on the same basis. To really adopt federalism, the three branches of government must be handled equally and held accountable to all citizens. The Nepalese judiciary has had various ups and downs in recent decades. The situation at Nepal's Supreme Court threatens the independence and integrity of the court, according to the International Commission of Jurists (ICJ), Human Rights Watch, and Amnesty International (AI) (Lamichhane, 2021). It is critical to safeguard human rights and the rule of law, and to address the problem in a way that preserves and strengthens the court's credibility, efficiency, integrity, and independence. The current judiciary is heavily influenced by political parties. The issue lies with the appointment of judges themselves. Poor rule of law and the involvement of political parties have undermined the judiciary's accountability and independence



at its peak.

In such circumstances, many lawyers recently stood up to Chief Justice Cholendra Shumsher Rana, requesting his resignation from the judiciary for a variety of reasons that violate the rule of law and the integrity of the judiciary. The supreme court justices, ex-judges, and attorneys from the Supreme Court Bar Association and the Nepal Bar Association all joined forces against the top justice (Silwal, 2020). Chief Justice Rana was accused of pursuing a seat in Cabinet and constitutional bodies, failing to uphold judicial integrity, and issuing contentious decisions. Rana failed to lead, clear up the mess in the judiciary, and sought to do irreversible harm, thus they demanded the Chief Justice's resignation to restore judicial integrity and independence. Along with all the complaints against the top justice, the public wants a lottery system in which cases are resolved by Supreme Court justices. On December 1, 2021, the lottery system was finally implemented in Nepal. The benches are constituted by a lottery, and the judges are responsible for hearing the cases assigned to them. Rana failed to lead, clean up the mess in the judiciary, and attempted to do irrevocable harm, thus they demanded the Chief Justice's resignation to restore judicial integrity and independence (Bhatta, 2021). Along with all the accusations against the chief justice, the public wants a lottery system in which cases are decided by Supreme Court judges. Nepal officially introduced its lottery system on December 1, 2021. The benches are formed by a lottery, and the judges oversee hearing the cases allocated to them.

Such conflicts occur often in Nepal's courts. Because of the absence of proper and systematic application of the rule of law, every judge has the right to face numerous conflicts from the past to the present. The scandals surrounding Nepal's chief justices have brought attention to the country's deep-rooted problems, and many believe it is time to move beyond witch-hunting and address the structural concerns that have plagued the court. Therefore, for the reintroduction of judicial independence and accountability, the rule of law should be considered while choosing judges. The political influence in the appointment process must be eliminated.

## CONCLUSION

Judicial independence is a fundamental part of democracy and the rule of law. Without independence, justice cannot be delivered. The judiciary shall not be influenced, threatened, or interfered with by any external authority. The Supreme Court has been instrumental in advancing and safeguarding human rights, establishing fundamental principles via its rulings on globally recognized rights. Without an independent judiciary, individuals cannot get justice. An independent, fair, and responsible court can safeguard the rights of minorities and indigenous populations. The independent judiciary can keep the delicate balance between the three primary departments of government. The judiciary faces significant challenges, including political influence in judge appointments, corruption, backlog of cases, inclusiveness, access to justice concerns, and challenges in enforcing decisions. A democratic society relies heavily on the independence of its court.

Prior to the Kingdom of Nepal's 2047 Constitution, there was no provision for an independent judiciary. The judiciary has always been affected by either the executive or legislative branches. However, the Nepalese Supreme Court has issued several historic rulings regarding judicial independence. The Kingdom of Nepal's 2047 Constitution establishes the judiciary's independence. There are contradicting laws regarding an independent judiciary, such as ad hoc judges, financial autonomy, and Bantipatra's judicial review of the king. This clause also appears in the Interim Constitution. Some new elements were included in Nepal's Interim Constitution, such as parliamentary hearings prior to the nomination of the chief judge and Supreme Court justice, as well as an oath clause. The identical article is incorporated in Nepal's constitution (2072). In recent years, the judiciary has received substantial criticism for these shortcomings. There's always room for

improvement. The judiciary's independence and accountability are reflected in its historic verdicts. To ensure judicial independence, rigorous rules must be established and implemented. Nepal works to ensure the independence of the judiciary by addressing all aspects of this idea. Poor court performance and corruption charges have damaged public faith, limiting access to justice for the poor and disadvantaged. This has required more judicial scrutiny. The judges should be held more responsible and make a bigger effort.

Thus, the independence of the judiciary is the heart of democracy. It promotes fair and timely justice, protects basic rights, and upholds the constitution. Tampering with the court or judges is strictly prohibited, whether directly or indirectly. This liberty should apply to ongoing court procedures and the assignment of cases to certain judges. Judicial independence cannot be accomplished completely. However, it can be strengthened by isolating the judiciary from other government departments.

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