



# The Independent Judiciary

Participatory Constitution Building in Nepal  
Booklet Series  
NO. 8



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# The Independent Judiciary

The judiciary plays a vital role in a democratic society.

- » It is the guardian of the constitution
- » It is the defender of right of all citizens to be governed in accordance with law.
- » It decides when governments have acted without authority and may order them to stop illegal acts.
- » It decides when governments have failed to fulfill their duties and may order them to act to fulfill them.
- » In disputes between the branches of government, the judiciary decides.
- » In disputes between citizens, the judiciary decides cases impartially, and enforces legal rights.

The main elements of an independent judiciary are usually set forth in the state constitution. Constitutions may establish the judicial powers, functions, structure, jurisdiction, and the means of appointing and removing judges. Some elements may be left to laws to be enacted later, after the constitution is proclaimed.

The judiciary in a democracy should be guided by four values, each of which applies to individual judges and to the judiciary as whole.

The Judiciary in a Democracy		
Guiding Values	For Individual Judges	For the Entire Judiciary
Independence	The individual judge must decide each case based solely on the law, without preference for any of the parties and without fear of reprisal. This is decisional independence	The judiciary must be protected from inappropriate measures from government in any matter that might influence its performance, including appointments, promotion, transfer, discipline and budget. This is institutional independence.
Accountability	The judge is accountable for his or her decisions through their publication in open court and for his or her unlawful acts through a disciplinary process.	Where the judiciary is given influence over the above matters, it should be accountable through fully transparent decision making. Where it spends public funds, it should be accountable to Parliament.

Guiding Values	For Individual Judges	For the Entire Judiciary
Effectiveness	The judge's decisions and management of the court room must meet high standards of professional competence.	It is the judges who should address the issues related to effectiveness of judges not the government, so that only effective judges will be considered for promotion.
Efficiency	Judges must work hard and most like everyone else handle their work efficiently.	It is the judges who should address the issues related to effectiveness of judges not the government, so that only effective judges will be considered for promotion.

In order to establish Nepal's judiciary, the Constituent Assembly (CA) will have to consider several issues:

1. What is an independent judiciary?
2. How is an independent judiciary established in a constitution?
3. How is an independent judicial system structured?
4. What are the powers of an independent judicial system?
5. How do you ensure the financial independence of the judiciary?
6. What is a judicial council?
7. What are some of the questions the CA will have to discuss concerning an independent judiciary?
8. What is Nepal's judicial history?

## 1. What is an independent judiciary?

An independent judiciary is able to make its decisions and operate as an institution free from outside influence, including from political parties, government agencies, and individuals.

An independent judiciary is also a branch of government that operates independently from the other branches of government – the executive and the legislature. This independence promotes an effective balance of power among the three branches. Constitutions help to ensure this independence by expressly identifying each branch's roles and responsibilities.

Establishing an unbiased judicial system shows citizens the government's intention to minimize political influence over the judiciary. Instead of being accountable to any political party or an ideology, the judiciary is accountable to the people through the constitution and the laws.



## 2. How is an independent judiciary established in a constitution?

The constitution helps to limit the power of the government over the individual.

The judiciary is the ultimate interpreter of the constitution and the laws. All government bodies must abide by the judiciary's decisions. These decisions and interpretations become precedents and examples for future actions.

The constitution must create a judiciary that has institutional and decisional independence. Institutional independence enables the judicial branch to conduct its administration without influence from other sources. For example, in an institutionally independent judiciary, decisions to hire and discipline judges, determine judicial salaries and budgets and to conduct performance reviews of judges are made in a politically neutral way. One way to do this is by giving many of these powers to the judges themselves through a Judicial Council.

Institutional independence leads to decisional independence. Decisional independence means that the judiciary decides cases solely based on the constitution and the laws of the land, without pressure from outside sources and without any outside influence.

Constitutions should also define the judiciary's relationship to other government branches and make clear that its powers cannot be improperly influenced by other parts of government. The judicial council (see issue 6, below) can help achieve this institutional independence.

## 3. How is an independent judicial system structured?

By considering the needs of citizens in developing an independent judicial system, states are able to develop a judiciary best suited to addressing citizens concerns. Constitutions usually establish the structure of the judiciary in a manner to best protect citizen rights. By outlining the structure of the court system within the constitution, states help to reinforce judicial independence. The constitution can create a judiciary that has important elements of self-administration.

Federal constitutions can establish all courts or they can simply establish the highest courts leaving it to the legislatures to establish lower courts later on. For example, the South African constitution lists numerous courts while the Slovakian Constitution only establishes a Supreme Court, permitting other courts to be established by law. Granting power to parliament to create lower courts as needed allows flexibility to adapt to changing situations in order to provide the public with the best possible access to justice.

Constitutions typically establish constitutional courts or supreme courts, or both. Constitutional courts typically hold jurisdiction over constitutional matters. By centralizing constitutional interpretation in one court, consistent interpretation of the constitution is maintained. Supreme courts, and other lower courts, hold jurisdiction over all other issues. In states with no constitutional courts, the supreme and lower courts hold jurisdiction over all issues, including constitutional issues.

Constitutions may also provide for the creation of courts other than the highest ones. Constitutions may grant power to legislatures to create courts as needed, such as administrative, bankruptcy, and criminal courts. Increasing the number of courts with the ability to address citizen claims provides greater access to justice for citizens. In states transitioning from conflict, increased and improved access to justice may contribute to strengthening overall state unity. The people's access to the justice system may also promote their confidence in governmental structure and function, leading to state stability.

Constitutions also lay out whether the judicial system will be a unitary or dual court system. In a unitary system, there is one court system that decides all cases. Unitary systems are less costly and easily organized but it is difficult to address federal/provincial issues in a unitary system. A dual system is usually utilized in federations as it provides the sub national units the ability to resolve local disputes.

## 4. What are the powers of the judiciary?

When determining the powers of the judiciary, it is important that the constitution how these powers will affect institutional and decisional independence. This independence is important for designing a court system that is accountable, effective, and efficient.

Constitutions often outline the powers of the judiciary. This helps to establish the guiding principles of the judiciary within the state. Constitutions often provide that the judiciary is responsible for several things. An independent judiciary is often responsible of protecting the constitution. An independent judiciary is often responsible for promoting a balanced and functioning legal system. Most importantly, an independent judiciary must safeguard the rights and interests of the people. By outlining the powers of a judiciary within a constitution, states place the interests of the people at the forefront of the judiciary while promoting independent judiciaries and building the citizens' confidence in government.

## 5. How do you ensure the financial independence of the judiciary?

It is common for politicians who are displeased with judicial decision to try to reduce the budgets of the judiciary.

Financial independence is important in establishing an independent judiciary. The financial independence of the judiciary is usually guaranteed in the constitution.

The judiciary may be allocated a fixed percentage of the state's annual budget. Or, the constitution may limit the government's ability to alter the judicial budget. For example, a constitution may include a provision that prevents decreases in the judicial budget.

Judicial budgets are generally prepared by, or reviewed by, at least two branches of government. This helps to discourage political influence and encourage transparency in the budget-making process. The executive or the judicial branch usually has the responsibility for preparing the budget, in collaboration with the other branch. The legislative branch is usually responsible for reviewing the judicial budget. A state's highest court of appeal may be granted the right to prepare and implement its own budget, further safeguarding judicial independence and preventing political influences. A judicial council (see issue 6, below) can also be tasked with preparing the budget.

## 6. What is a judicial council?

A constitution usually describes how judges will be selected. Several methods exist for choosing judges. Judges can be selected by the President. Judges can also be chosen by the Parliament. Judges are sometimes elected by the people. Finally, some states have utilized judicial councils to select judges.

A judicial council is an independent institution that helps to maintain the independence of the judiciary. Judicial councils oversee the regulation and administration of the judiciary. Judicial councils help to establish the institutional independence of the judiciary.

A judicial council can be comprised of individuals from a variety of backgrounds, from judges and lawyers to businessmen and government employees. These members can be elected to the judicial council, appointed by the executive or parliament, or a combination of elected and appointed. To ensure independence of the judiciary, states usually provide for the election by judges of the majority of the members of a judicial council. The chief justice or president of the highest court is usually a member of the judicial council.

The powers and functions of judicial councils are typically designed to promote transparency in the selection and evaluation of judges. Judges are usually appointed or recommended by judicial councils to their judgeships. Other functions performed by judicial councils include performing administrative tasks, managing the judiciary's daily operations, regulating the conduct of members, preparing the judiciary's budget, and training judges and judicial branch staff.

## 7. What are some of the questions the CA will have to discuss concerning an independent judiciary?

In order to lay out the appropriate constitutional language to establish an independent judiciary, the CA will have to carefully consider several questions:

- » Should there be an independent judicial council? What should be its powers? How will its independence be assured?
- » What are the levels of the judiciary?
- » Should there be a unitary or dual judicial system?
- » What powers should the judiciary have?
- » What qualifications should judges have?
- » How should the judges be appointed at the national and provincial levels?
- » How is the conduct of judges monitored?
- » What are the roles, responsibilities, and term limits of judges?
- » How can a judge be removed?
- » How can access to the courts be increased?
- » How can access to the courts be made easier for citizens?
- » What powers should be held by each level of court?
- » How will federal courts interact with provincial courts?
- » How will courts be financed?
- » What should be the role of lower court in the protection of fundamental and human rights?
- » What remedies should be adopted to ensure the access of the weak and underprivileged groups of the society?
- » Should there be a separate constitutional court?

## 8. What is Nepal's judicial history?

Before 1951, Nepal's executive, legislative and judicial powers were vested in one person – the King. The promulgation of Nepal's first constitution – the Government of Nepal Act, 1948 – carried a provision relating to the judiciary. However, this constitution failed to specify the powers of the judiciary. The same thing happened under the next constitution, the Nepal Interim Government Act. This constitution had a provision of establishing an Apex Court (Pradhan Nyayalaya). However, this constitution also failed to mention the powers and functions of the Apex court, or anything about any other courts. Instead, the legislature was provided with the authority to make necessary provisions for other courts.

The 1959 Constitution included several elements of the principle of separation of power, and had provisions of judicial review of the activities of the executive and

legislative bodies. It is unclear whether any of these provisions were implemented or effective.

In 1962, the panchayat system imposed a ban on political parties. This political system denied the basic norms and values of democratic governance, pluralism, and the rule of law. The king was vested with all the power. Separation of powers did not exist in this system. The supremacy of the Supreme Court was not established and limitations were placed on the court's power of judicial review.

The 1990 Constitution created a powerful judiciary for the first time in the history of the country. The Constitution presented the Supreme Court as the ultimate interpreter of the constitution and the protector of fundamental rights. In order to protect judicial independence, a provision was made which provided for the removal of Supreme Court judges through the process of impeachment. Similarly, a constitutional provision was also made to form the Judicial Council to recommend the appointment, transfer and promotion of the judges. A three-tiered court system was created consisting of district courts, appellate courts, and the Supreme Court. The constitution provided the Supreme Court with extra-ordinary power to issue any order with regard to the dispensation of full justice. The court system under the Interim Constitution is similar to that under the 1990 constitution.

## Issues to be discussed in the Constituent Assembly

The following are some alternatives that the CA can think about when designing an independent judiciary.

Alternates	Strengths	Challenges
A judicial council to manage the judiciary	» Helps to ensure that judges are protected by interference from politicians or others.	» If the judiciary is largely managed by judges, they must have additional resources that they do not now have and be accountable in a way that they are not now.
The executive manages the judiciary	» Is seen by some to help ensure judicial accountability by giving some control to elected politicians.	» Makes it easy for politicians to influence the judiciary through control over appointments, promotion, transfer, discipline and other measures.

Alternates	Strengths	Challenges
Unitary judicial system (Unitary tribunal of federation and province)	<ul style="list-style-type: none"> <li>» It is easy to organize.</li> <li>» It is less costly.</li> <li>» There will not be many disputes over jurisdiction.</li> <li>» It would be easy to implement court's decisions.</li> </ul>	<ul style="list-style-type: none"> <li>» Regional issues may not be adequately addressed.</li> <li>» It may not be so appropriate for the federal system</li> <li>» It may not be appropriate to resolve complex constitutional disputes.</li> </ul>
Dual judiciary (Separate judiciary of federation and province)	<ul style="list-style-type: none"> <li>» Powers of the federal and provincial courts are clearly divided.</li> <li>» Serious constitutional disputes may be properly resolved.</li> <li>» Effective role could be played to strengthen the federal system.</li> </ul>	<ul style="list-style-type: none"> <li>» Costly.</li> <li>» Complex.</li> <li>» Difficulties in the division of jurisdiction.</li> <li>» Disputes regarding the division of scope of authority</li> <li>» Justice delivery may be delayed due to the increase in levels and jurisdiction of law courts.</li> </ul>
A Separate Constitutional Court	<ul style="list-style-type: none"> <li>» It would be easy to have judicial resolution of constitutional matters.</li> <li>» It will be easy to establish constitutional supremacy.</li> <li>» It will be easy to put the state agencies within the scope of the constitution.</li> <li>» It will be easy to run the federal system.</li> </ul>	<ul style="list-style-type: none"> <li>» It can be costly to implement.</li> <li>» Disputes over jurisdiction with other courts may arise.</li> <li>» Can be complex and complicated.</li> </ul>
Single tribunal to hear general or constitutional disputes	<ul style="list-style-type: none"> <li>» Less costly.</li> <li>» Nepal has long experience of this system.</li> <li>» Lack of complexity.</li> </ul>	<ul style="list-style-type: none"> <li>» Constitutional issues may not get adequate importance.</li> <li>» Decisions on complex constitutional issues could be made without adequate expertise.</li> <li>» The process of constitutional development could be hampered in the absence of proper interpretation of the constitution.</li> </ul>

## About this booklet series

This series of papers is intended to provide a basic background for Constituent Assembly members and the interested public on issues related to the constitution building process. They are not position papers, proposals or intend to preempt any constitutional outcome in any other way. They are the result of a cooperative effort of Nepali and international constitutional experts, coordinated by UNDP's Support to Participatory Constitution Building in Nepal project.

These papers are living documents, and feedback and comments are strongly encouraged. The more they will lead to informed, engaged and constructive discussion and exchanges, the more will their objective be attained. As comments are received further versions of this document or additional issues may be prepared.

In translating them into some of Nepal's major national languages, all effort has been made to achieve a high level of quality standards and the correct terminology, which will be understood by a majority of the speakers of those languages. However, future debates within the various linguistic communities on the proper and correct use of terms can be expected. CCD did not want to preempt that discussion in any way, but rather sought to maximize the reach and inclusiveness of this effort by including those languages.

This booklet is part of a series of documents to be developed by the Centre for Constitutional Dialogue (CCD) on themes relevant to the constitution building process in Nepal.

The objective of this series is to engage Constituent Assembly members as well as the interested public with key constitutional concepts and issues. Each document is available in the major languages used in Nepal – Nepali, Maithili, Bhojpuri, Tharu, Magar, Tamang, Newar and English. Each document is also available in audio format as well as online.

In the first phase it is envisaged that the publication series will include the following themes: State and Religion, Federal System, Human Rights in the Constitution, Rights of Indigenous Peoples, Minority Rights, Systems of Government, Independent Judiciary, Local Self-Governance, Diversity and Social Inclusion, and Participatory Constitution Making Process.

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