



# Constitutional Guarantees for Judicial Independence

**Dr Daisy**

**Day - 3**

# Structure of the Four Days Agenda

Day 1- Mutual Reinforcement of the Rule of Law and Judicial Independence

Day 2 – Comparative Federal Approaches to Judicial Independence

Day 3 – Constitutional Guarantees for Judicial Independence

Day 4 - Constitutional Guarantees in Federalism and Pathways for Reform in Myanmar Future

# Outlines (Day 3)

## Session 1 – Lecture (1 hour and 45 Minutes)

- What is Constitutional Guarantee?
- What are Constitutional Guarantees of Judicial Independence?
- Key Constitutional Guarantees of Judicial Independence
- Legal Protections in Theory, Challenges in Practice

## Session 2

- Group Work Discussion (30 minutes)
- Group Presentation (30 minutes)

# What is Constitutional Guarantee?

- A constitutional guarantee is
  - a promise made in the Constitution that establishes a right that cannot be taken away, such as the right to a fair trial.
- Fair trial is a protection that is built into the Constitution to ensure that
  - everyone is treated fairly and
  - equally under the law

# What is “Fair Trial”?

- ❖ A fair trial means that a person accused of a crime or involved in a legal dispute has the right to a legal process that is
  - Just,
  - Unbiased, and
  - Respects their legal rights
- ❖ Example:
  - If someone is arrested, they must be informed of their charges, allowed to defend themselves with a lawyer, and tried by an independent court—not punished arbitrarily

# What is “Due Process”?

- ❖ Due process is a broader legal principle that requires the government to follow fair procedures before depriving a person of life, liberty, or property
  - Procedural Due Process – Fair and proper legal steps must be followed (e.g. notice, hearing, opportunity to be heard)
  - Substantive Due Process – Laws themselves must be fair and not violate fundamental rights
- ❖ Example:
  - The government cannot take away someone’s property without a hearing, notice, and a chance to contest it. That’s procedural due process

## Continue....

- ❖ **Fair trial** = Right to a just court hearing
- ❖ **Due process** = Right to fair treatment by law, both in procedure and substance.

# What are Constitutional Guarantees of Judicial Independence?

- ❖ Constitutional Guarantees for Judicial Independence refer to
  - The legal and institutional protections enshrined in a country's constitution
- ❖ To ensure that the judiciary operates without improper influence from
  - the executive, legislature, private interests, or public opinion.
- ❖ These guarantees are crucial in upholding the rule of law, ensuring fair trials, and maintaining checks and balances in a democratic system

# Continue...

- ❖ Constitutional Guarantees for Judicial Independence are essential to uphold:
  - Rule of law
  - Accountability
  - Protection of rights
  - Ensure Fair Justice for all
- ❖ **Noted** : These guarantees must be respected in practice, not just written in theory

# Key Constitutional Guarantees of Judicial Independence

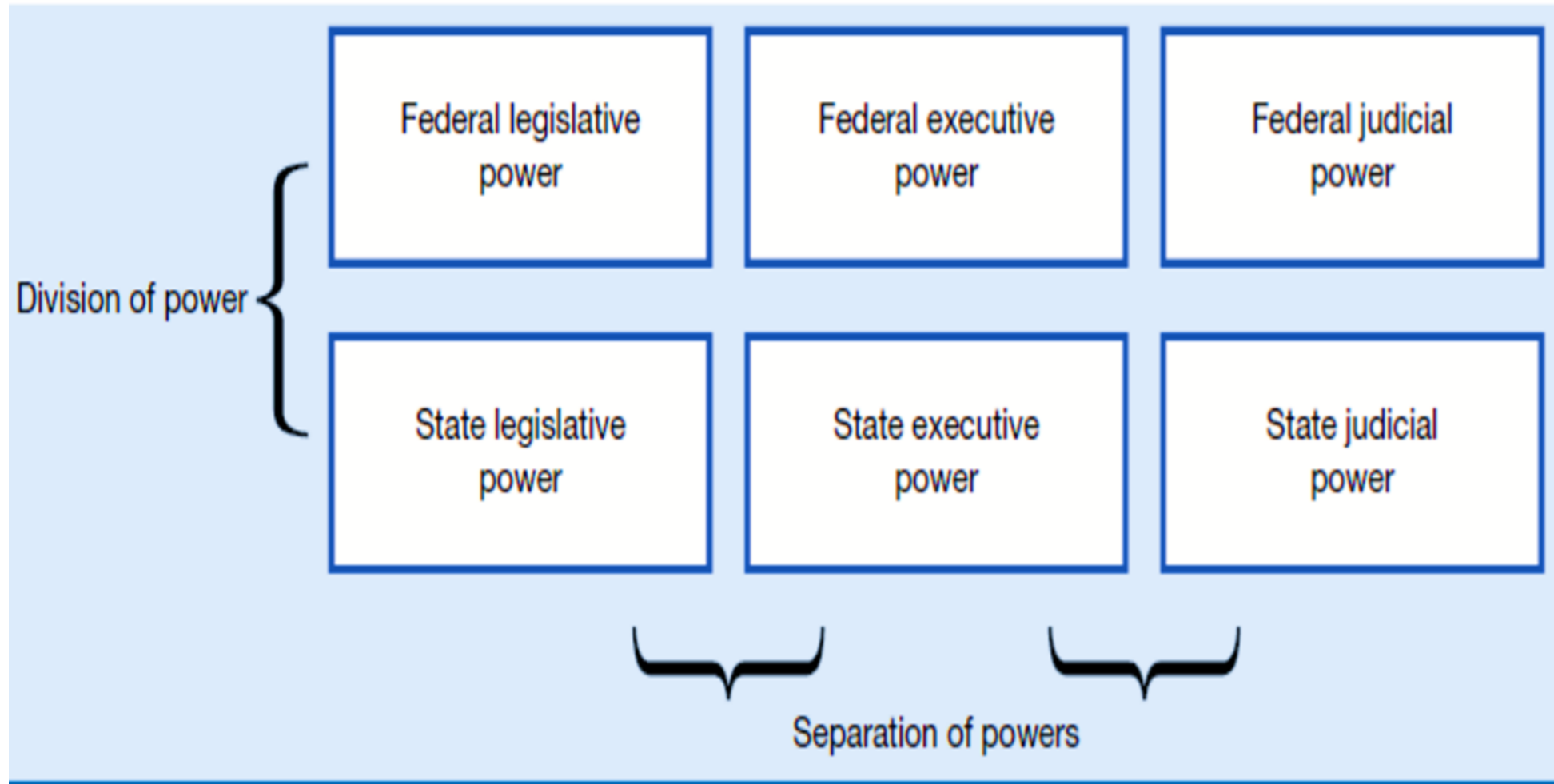
- ❖ Separation of Powers & Division of Powers
- ❖ Security of Tenure for Judges
- ❖ Financial Independence (protected salaries and budgets)
- ❖ Transparent and Merit-Based Appointment Process
- ❖ Immunity for Judicial Acts
- ❖ Prohibition of External Influence
- ❖ Constitutional Role of the Judiciary

# Separation of Powers & Division of Powers

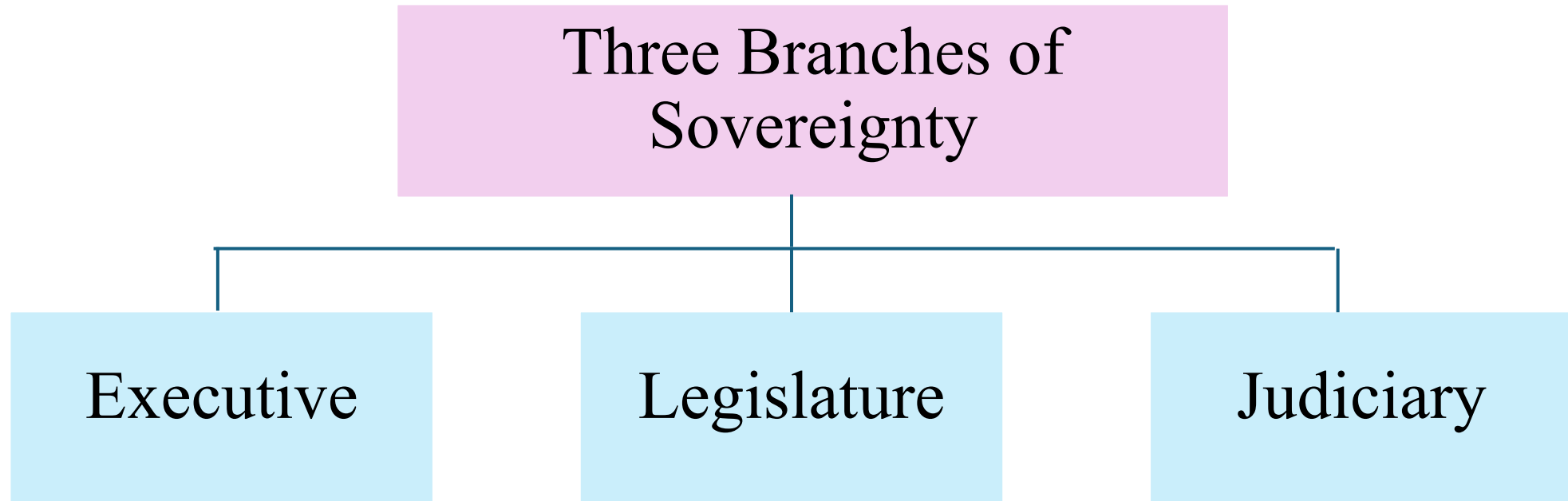
- ❖ The Constitution divides sovereign power among the executive, legislature, and judiciary, ensuring that the judiciary operates independently and does not take instructions from other branches
- ❖ Example:
  - U.S. Constitution (Articles I–III) separates powers among Congress (legislature), the President (executive), and the Judiciary (Article III)
  - Myanmar 2008 Constitution, Section 11(a): “The three branches of the sovereign power, legislative, executive and judiciary are separated..”

❖ What is Separation of Powers?

❖ What is Division of Powers?



# Separation of Powers (Horizontal Power Sharing)



Purpose : -Prevent power concentration  
-Ensure checks and balances

Example : USA – President, Congress, Supreme Court

# Division of Powers (Vertical Power Sharing)

## ❖ Between Central and Subnational Units

- **Exclusive** - Reserved only for the federal or state governments (e.g., defense, currency, education)
- **Concurrent** - Shared between both levels, but federal law usually prevails in case of conflict and
- **Residual powers** - Powers not mentioned explicitly; in some federations, these go to the central government (e.g., Canada), while in others (e.g. US) they go to the states

## ❖ Example :

- India: Union List, State List, Concurrent List
- Myanmar context : Current lack of clear vertical division

# Continue...

❖ The constitution clearly states which powers belong to the union and which belong to the states

❖ **Example** – India : The Indian Constitution includes three lists:

- Union List (e.g., defense, foreign affairs),
- State List (e.g., police, public health),
- Concurrent List (e.g., education, criminal law)

❖ In case of conflict, Union law prevails

# Separation & Division of Powers

## ❖ Separation of Powers (Horizontal):

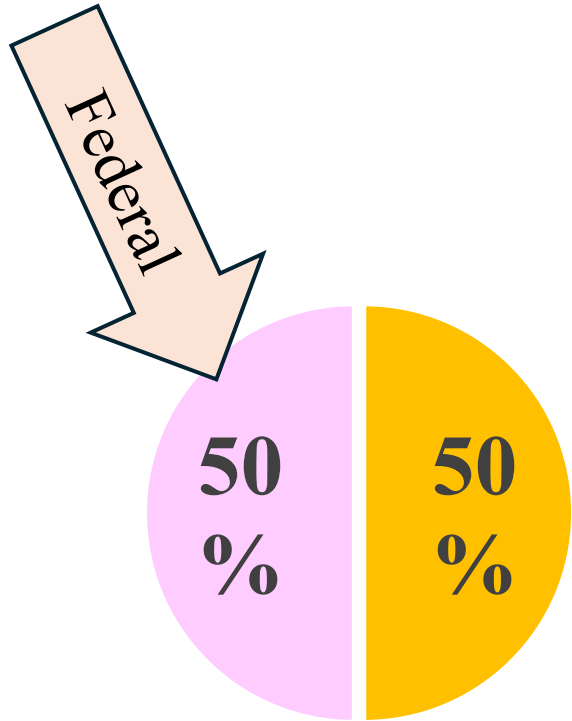
- Legislative,
- Executive,
- Judiciary

## ❖ Division of Powers (Vertical):

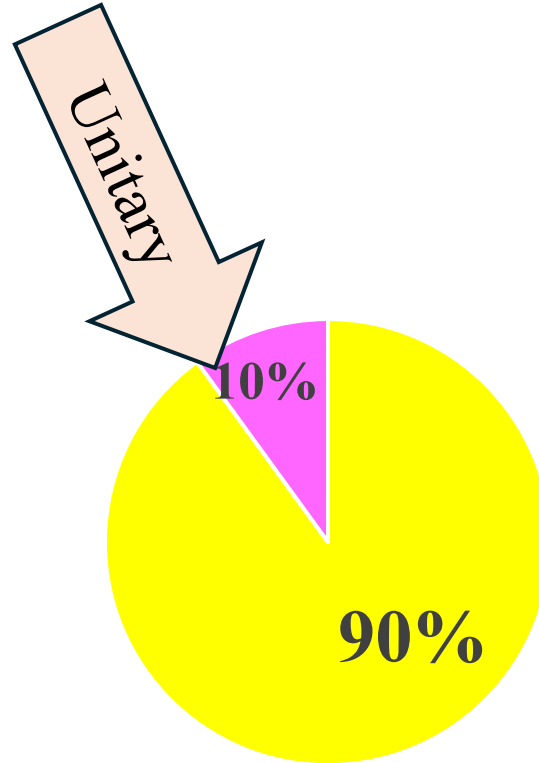
- Central vs State within same function

**\*\*\*Both are essential for sustainable federalism**

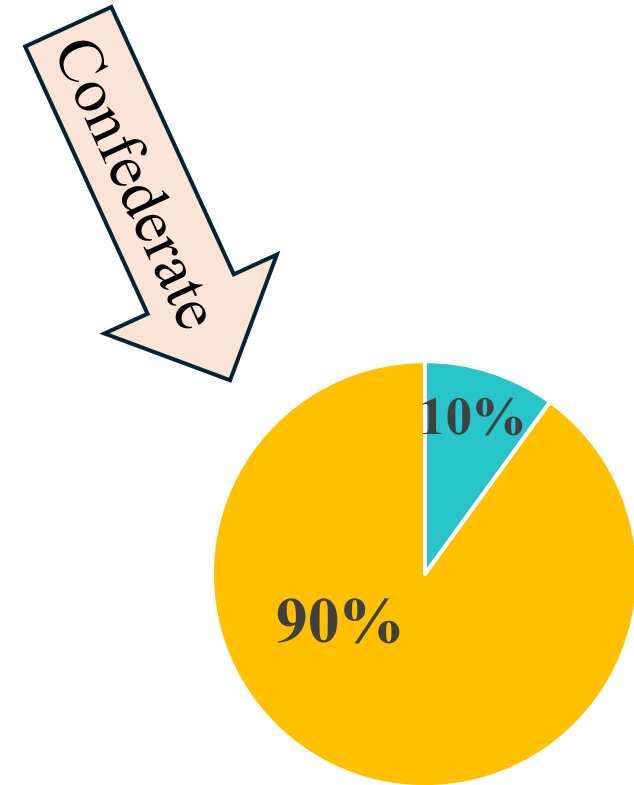
# Division of Power in Federal, Unitary Confederate State



■ Central Level  
■ States Level



■ Central Level  
■ States Level



■ Central Level  
■ States Level

# Principles Supporting Federal Judicial Authority

## Judicial Independence:

- Fixed tenure, salary protection, removal mechanisms
- **USA** (Article III), **India** (Art. 124(4)), **Nepal** (Art. 129)

## Rule of Law:

- All authorities including military must be subject to law
- **Germany**: Art. 20(3), **India**: Basic structure doctrine

# Security of Tenure

- ❖ Once installed in office, judges should hold their office for a reasonable period, subject to their good conduct
- ❖ They should not be liable to removal on the whim of particular governments or individuals
- ❖ They usually remain in position for many years
- ❖ Dismissal of judges
  - Superior Courts are liable to dismissal on grounds of misbehavior
  - This can be done only after a vote of both Houses of Parliament (20<sup>th</sup> and 21<sup>st</sup> centuries- has not actually happened)/ a formal process (like impeachment)

# Continue...

## ❖ Example:

- India Constitution, Article 124(4): Supreme Court judges can only be removed by a vote of Parliament on grounds of proven misbehavior or incapacity
- Myanmar Constitution, Section 312–313: Judges may only be removed under specific legal conditions

# Financial Independence

- ❖ Judges' salaries, pensions and court budgets are fixed and not subject to arbitrary reduction by the executive or legislature
- ❖ Prevents financial pressure or punishment from the executive
- ❖ **Example:**
  - Many constitutions provide that judges' salaries cannot be changed to their disadvantage while in office

## Continue...

### ❖ Example:

- **Canada** Constitution Act, 1867 (Section 100): Judicial salaries are fixed and paid by the federal government to prevent manipulation
- **India** Constitution, Article 125: Salaries of judges are charged on the Consolidated Fund of India and cannot be reduced during their term.

# Transparent and Merit-Based Appointment Process

- ❖ The constitution may establish an independent judicial commission or set clear procedures for appointments and promotions
- ❖ Reduces political patronage and ensures qualified, impartial judges
- ❖ Examples
  - **US** - federal judges are appointed by the President and confirmed by the Senate
  - **India** - Judges are appointed by the President based on recommendations from a **collegium of senior judges**

## Immunity for Judicial Acts

- ❖ Judges cannot be prosecuted or sued for decisions made in the course of their duties (except in cases of corruption or misconduct)
- ❖ Protects judges from personal retaliation for their rulings
- ❖ Examples:
  - **U.S. law:** Judges have absolute immunity for judicial acts, even if the decision is unpopular or later overturned
  - **Myanmar 2008 Constitution, Section 319:** Judges must not be penalized for acts done in performance of their judicial duties (implied immunity)

# Prohibition of External Influence

- ❖ Constitutional provisions prohibit any form of interference or influence over judges from political actors, interest groups, or the public
- ❖ Maintains impartiality and legal objectivity
- ❖ Example:
  - ❖ European Convention on Human Rights, Article 6: Right to an independent and impartial tribunal
  - ❖ Philippines Constitution, Article VIII, Section 1: Judicial power includes the duty to settle actual controversies independently

# Constitutional Role of the Judiciary

- ❖ The constitution defines the judiciary's authority to review laws, interpret the constitution, and check the actions of the executive and legislature
- ❖ Enables the judiciary to act as a guardian of the constitution and fundamental rights
- ❖ Example:
  - ❖ Germany's Basic Law, Article 92: Judicial power is exercised by independent courts
  - ❖ Myanmar Constitution, Section 293: Judiciary is responsible for administering justice independently in accordance with the law

# Legal Protections in Theory, Challenges in Practice

- ❖ Even when constitutional guarantees judicial independence, real-world implementation may fall short due to various structural and political weaknesses
- ❖ Examples of four major challenges are
  - Political Interference in Judicial Appointments and Removal
  - Undue influence through budget control
  - Cultural or informal pressures
  - Weak enforcement of constitutional provisions

# Political Interference in Appointments and Removals

- ❖ **Theoretical Protection** : Federal constitutions often mandate independent or merit-based judicial appointments and secure removal procedures
- ❖ **Challenge in Practice** : Appointments may still be influenced by political loyalty or pressure, and removal processes may be misused to target dissenting judges

# Political Interference in Appointments and Removals

## ❖ Examples:

- **India** : Article 124 ensures removal of Supreme Court judges only by Parliament on grounds of “proved misbehavior or incapacity”
- **Challenge**: In practice, the executive has been criticized for attempting to influence judicial appointments through the collegium system, lacking transparency
- **Pakistan** : Though the Constitution provides security of tenure, executive interference in judicial appointments has historically led to crises (e.g., dismissal of Chief Justice Iftikhar Chaudhry in 2007)

# Undue Influence Through Budget Control

- ❖ **Theoretical Protection** : Many federal constitutions secure financial independence of the judiciary by protecting judicial salaries and budget allocations
- ❖ **Challenge in Practice** : Executives may delay or control budget disbursement, pressuring the judiciary indirectly
  - **Philippines** : Article VIII, Section 3 of the Constitution guarantees fiscal autonomy
  - **Challenge**: In practice, budget delays or underfunding have been used to reduce judicial capacity

# Cultural or Informal Pressures

- ❖ **Theoretical Protection:** Laws may exist to protect impartial decision-making.
- ❖ **Challenge in Practice:** In federal societies with strong local identities, judges may face **community, religious, or political pressure**—especially in sensitive ethnic or political cases
  - **India:** In communal violence or politically sensitive cases, judges may face informal pressure from dominant groups in certain states
  - **Ethiopia:** Though the federal constitution guarantees judicial independence, ethnic federalism often leads to ethno-political pressures on regional courts, which align with dominant ethnic parties

# Weak Enforcement of Constitutional Provisions

- ❖ **Theoretical Protection** : Constitutions may clearly state the independence of the judiciary
- ❖ **Challenge in Practice** : If enforcement bodies are weak or politicized, violations go unpunished, and independence becomes symbolic
  - **Myanmar (2008 Constitution)** : **Section 22** guarantees independence, but in practice the judiciary is subordinate to the military and influenced by the executive (especially in politically sensitive or security cases)
  - **Russia** : The Constitution affirms judicial independence, but courts are widely seen as serving state interests, especially in cases involving opposition figures

# Mechanism for Ensuring Judicial Independence

Constitutional Provisions

Judicial Review

Judicial Councils and Commissions

Financial Independence

Ethical Standards and Conduct Codes

Public Access and Transparency

Training and Education



**DO YOU  
HAVE  
ANY  
QUESTIONS  
?**

# Group Discussion

