Asia Democracy Research Network

Judicial Independence and Democracy in Asia: Country Cases

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In 2020, Asia Democracy Research Network (ADRN) selected an efficient system of checks and balances of the constitutional division of powers as the key element to assess the state of judicial freedoms in Asia.

Against this background, ADRN published this special report to evaluate the current state of the trends and trajectories of judicial powers in the region by studying the phenomenon and its impact within three different countries in Asia, as well as their key reforms in the near future.

The report investigates contemporary questions such as:

What are the key constitutional and legal provisions ensuring judicial independence?

What are key mechanisms to ensure judicial accountability?

Have the courts or judicial processes tuned themselves to modernization and technological transformations such as e-courts or online arbitration?

How can we evaluate the performance of judiciary on key parameters like upholding separation of powers? What are the major challenges to judicial independence in the country?

Drawing on a rich array of resources and data,

This report offers country-specific analyses, highlights areas of improvement, and suggests policy recommendations to strengthen the autonomy and effectiveness of the judiciary in their own countries and the larger Asia region.

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Executive Summary

As many democracies across the world are witnessing centralizing tendencies, authoritarianism, and steady erosion of liberal values, an independent and responsive judiciary is largely seen as the key pillar to stem such illiberal tendencies. Apart from acting as a check on executive excesses, an independent judiciary is expected to play a wider role as a custodian of public power, and protector of the people's sovereignty. In the context of Asia, the judicial branches in many new and established democracies have been performing extremely critical roles in institutionalizing and strengthening the democratization process. However, in recent years, the judicial institution has come under attacks, largely due to populist authoritarians who thrive on plebiscitary politics and centralizing. In this study series on the state of judiciary in Asia, three prominent democracies viz India, Sri Lanka and Philippines were picked up for a detailed scrutiny of trends and trajectories of judicial independence. The key aim of the series was to map the performances of the courts and related institutions vis-à-vis the executive onslaughts and illiberalism. The following is a summary of trends and challenges facing judiciaries in India, Sri Lanka and Philippines.

First, the most discernible feature of the judiciaries in three countries is their colonial roots and mixed system of jurisprudence. While India and Sri Lanka were ruled by the British colonialism for a considerable period and largely inherited British common law systems, Philippines with its Spanish and American colonial exposure uses a combination of Roman civil law and Anglo-Saxon jurisprudence.

Second, the judiciaries in all three countries have done well in terms of organizing elaborate institutional mechanisms and putting in place a formal rule of law system which acts as a check on executive powers. The core principles and mechanisms to ensure functional autonomy and powers to administer justice – process of appointments, promotions, transfer of judges, security of tenures, salaries and benefits, constitutional protection against arbitrary executive decisions – have been well laid out. The judicial branches in all three democracies enjoy widespread popular support and are viewed as institution of last resort. At the same time, they all face crisis of credibility in varying degrees on multiple fronts; long delay in the disposal of cases, increasing vacancies in courts, slow response to modernization and automation, endemic corruption and steady politicization of judicial systems. India is a case in point. While a staggering 36 million cases remain to be disposed, more than one-third of posts are vacant at higher courts. Whereas, both Sri Lanka and Philippines continue to face serious challenges to their autonomy due to executive interferences in higher judicial appointments and promotions.

Third, given their relatively shorter democratic existence particularly Sri Lanka and India, judiciaries in these countries have a mixed record. The initials decades of post-colonial rule witnessed a steady assertion of power and autonomy by the courts, charting out paths for new rights for disadvantaged and voiceless citizens as vividly seen in the case of India. However, when faced with strong executive with authoritarian tendencies, the judiciaries in both the countries have faltered. For instance, the Indian judiciary faced its worst situation during the premiership of Indira Gandhi in 1970s which saw brief suspension of democracy (1975-77) and the trampling of judicial independence. While the executive branch deployed every tactic to get the courts do its bidding, many judges found it profitable to switch the side to support many illiberal and unconstitutional measures. Yet, once the strong executive returned to the Centre in 2014, this saw considerable decline in judicial powers, largely its own falling.

Similar trajectory can be found in the case of Philippines. The judiciary which attended all round respect for its independence, integrity and using extensive powers on constitutional review during the pre-Marcos era saw visible decline during Marcos rule starting in 1972. Under President Duterte, the judicial independence has further declined. The controversial ouster of Chief Justice of the Supreme Court Maria Lourdes Sereno, a strong critic of President Duterte in 2018 marked further decline of judicial independence. With regard to Sri Lanka, the judicial independence has been characterized by inconsistencies and largely linked to the regime types. While the judiciary (drawing its powers from the Salisbury Constitution of 1947) in the initial decades of independence enjoyed considerable autonomy and exercised many constitutional powers, the 1972 and 1978 Constitutions which introduced Executive President had a direct bearing on judicial autonomy. In the recent decades particularly with the arrival of executive presidency and the rise of nationalist populist government, the judiciary has faced severe challenges to its autonomy and performance. The controversial impeachment of Chief Justice Shirani Bandaranaike in 2012 had a chilling effect on the independence of judiciary.

Fourth, notwithstanding relentless executive onslaughts to curtail the judicial powers, the constitutional courts in these countries have shown significant resilience and have fought back to reassert their autonomy. The Indian judiciary is a prime example how it has fought back against strong executive with authoritarian streaks. While the Supreme Court of India quickly recovered the temporary loss of its reputation and autonomy post-1975 emergency by taking a series of landmark judgements and expanding its powers via public interest litigation, it also made sure to insulate from executive interference by taking over the appointing powers. Judicial innovations like the Basic Structure doctrine, the collegium system of appointment, PIL among others have institutionalized judicial supremacy. The Lankan judiciary particularly the post-Bandaranaike episode has made efforts to regain its autonomy. The most vivid display of that was the Supreme Court's decision to set aside President Maithripala Sirisena's order to prematurely dissolve the parliament in 2018. The court also derecognized interim cabinet formed by President Sirisena.

In short, judiciaries in all three countries have their share of successes and failures in the face of relentless executive onslaughts to change the nature of distribution of powers in its favour. Despite relative decline in judicial powers in all three democracies, the judicial branch remains the strongest barrier to growing authoritarian tendencies.

Country Case 1: India

The Indian Judiciary at a Critical Crossroads: Major Issues and Challenges[1]

Niranjan Sahoo[2]
Observer Research Foundation

1. Introduction

The judiciary in India has come full circle since its inception in 1950, transforming from being the guardian and protector of the Constitution to an institution of last resort for millions of citizens engaging in activism on issues that often get little or no attention from authorities, and then again into an institution that performs the bidding of the executive branch in recent years. The judiciary, which has thus far played a stellar role as an institution of last resort when the executive and legislative branches fail to perform their constitutional roles, has in recent years been struggling to maintain its good reputation as an independent and activist judiciary.

With the rise of executive power at the center and the transformation of democratic politics marked by centralizing tendencies, authoritarianism, and coercive interventions, the judiciary, which is supposed to check such tendencies, particularly executive excesses, is increasingly buckling under pressure. This has consequences for personal liberty, constitutional protection of vulnerable groups, and public confidence in the judiciary itself. The long established constitutional "separation of powers" is under great stress today notwithstanding several landmark judgments by some individual judges in recent times. In addition, there are equally critical concerns with regard to reforms in terms of the manner that judges are appointed and the growing backlog, accountability, corruption, pendency, issues of access and affordability of justice for average citizens, and so on. In short, India's judiciary is in the spotlight today, albeit for many of the wrong reasons.

2. Structure and Composition

India has arguably the most powerful judiciary in the world.[3] Unlike the United States and other federal

[1] The author would like to acknowledge Jibran Khan, currently research intern at ORF and final year law student at Dr Ram Manohar Lohiya National Law University, Lucknow, India for providing excellent research support for this paper.
[2] a Senior Fellow with Observer Research Foundation (ORF)'s Governance and Politics Initiative.
[3] This was stated by a former Chief Justice of India Altamas Kabir in a speech in Sri Nagar. See http://articles.timesofindia.indiatimes.com/2013-06-17/india/40027178_1_indian-judicial-system-justice-kabir-cji)

countries, the judiciary in India is a single integrated system. The framers of the Constitution consciously opted for an integrated judicial system to "eliminate all diversities in remedial procedures."[4] Under this arrangement, the Supreme Court is the highest court of the land, followed by the High Courts at the state levels which cater to one or more states. Down the High Court, there are subordinate courts comprising the District Courts at the district level. Apart from this exist various quasi-judicial bodies such as Tribunals and Regulators to resolve disputes.[5] A key feature of the Indian Judicial System is that it follows a common law system. In a common law system, law is developed by judges through their decisions, orders, or judgments. Unlike the British legal system it originated from which is entirely based on the common law system, the Indian system incorporates the common law system along with statutory law and regulatory law.[6]

2.1. Independence

The makers of the Constitution were aware that many democratic ideals would remain meaningless if they were not backed by an independent and impartial judicial system (Austin 1966; 1999). No subordinate or agent of the government could be trusted to be just and fair in judging the merits of a conflict in which the government itself was a party. Thus, in a bid to establish complete independence of the judiciary, the Constitution makers erected a barrier that separates the executive from the judiciary. This has been ensured by laying down rigid qualifications for the appointment of judges, including their tenure security and other conditions of service. For instance, judges are appointed almost for life and their conditions of service cannot be altered to their disadvantage once they are appointed (Austin 1966; Pylee 1980). Similarly, their removal has been made extremely difficult, requiring a two-third majority vote of the Parliament.[7]

2.2. The Supreme Court

Established by Part V, Chapter IV of the Constitution, the Supreme Court (SC) is the highest court of the land, the highest court of appeal, and the guardian of the Constitution. Therefore, any law passed by this apex body is binding on all of the law courts in the country. By virtue of being the highest court of law, the SC controls and supervises the entire judicial edifice of the country to ensure the realization of high judicial standards (Pylee 1980). Articles 124 to 147 of the Constitution lay down the composition and jurisdiction of the SC. Essentially, it is an appellate court which takes up appeals against judgments of

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4 To explain the reasons behind having single integrated judiciary, B.R Ambedkar remarked during the constituent assembly debate that "The Indian federation, though a dual polity, has no dual judiciary at all. The High Courts and the Supreme Court constitute one single integrated judiciary having jurisdiction and providing remedies in all cases under the constitutional law, the civil law, or the criminal law. This is done to eliminate all diversities in remedial procedures." See CAD VII, p 36.

5 These include the Central Administrative Tribunal (CAT), the Armed Forces Tribunal (AFT), the Competition Appellate Tribunal (COMPAT), the Debt Recovery Tribunal (DRT), and the Telecom Disputes Settlement Appellate Tribunal (TDSAT).

6 For details, see http://www.silf.org.in/16/Indian-Judicial-System.htm.

7 A judge of the Supreme Court cannot be removed from office except by an order of the president passed after an address in each House of Parliament backed by a majority of total membership of that House and by a majority of not less than two-thirds of members present and voting, and presented to the president in the same. See Basu 2012.

the provincial High Courts (HC). It also takes writ petitions in cases of serious human rights violations or if a case involves a serious issue that requires urgent resolution (Mohanty 2009).

2.3. Composition

While the original constitution (1950) provisioned for a Chief Justice and seven other judges for the SC, the increasing workload over the years has also led to an increase in the number of SC judges. Now there are 30 judges apart from the Chief Justice. The Chief Justice is appointed by the President of India, largely on seniority basis. Other judges (including the High Court judges) are chosen by a collegium comprised of the Chief Justice and four senior judges of the Supreme Court. The collegium system was established by the Supreme Court in a series of judgments popularly known as the *Three Judges* cases.[8] In terms of composition, the SC has somewhat maintained regional and ethnic representation as it has good share of judges belonging to religious and ethnic minorities. For instance, Justice K.G. Balakrishnan, the first *Dalit* (historically oppressed community within the Hindu religion) was appointed Chief Justice of India in 2000.

2.4. Powers and Jurisdictions

As the highest court, the SC has been granted a wide range of powers and functions. The SC has original, appellate, and advisory jurisdictions to perform the role of defender of the Constitution. Below is a brief sketch of the various powers and functions exercised by the highest court.

2.5. Original Jurisdiction

Under Article 131, the original jurisdiction of the SC extends to any dispute arising between the Union and one or more states and between two or more states. Original jurisdiction, however, is restricted to questions of law or fact brought before the court by any party mentioned above. In this regard, cases or disputes primarily involving the enforcement of fundamental rights (Article 32) come under the ambit of original jurisdiction. Under Article 32 of the Constitution, the SC is empowered to issue orders, directions, or writs in the nature of *habeas corpus, mandamus,* prohibition*, quo warranto* and *certiorari* to enforce Fundamental Rights (Mohanty 2009). However, the SC does not have any original jurisdiction or power over disputes arising out of any treaty, agreement, covenant, or similar instrument which was agreed upon or executed before the commencement of the Constitution.

[8] Earlier, judges of the Supreme Court were appointed by the president in consultation with the Chief Justice. However, based on three judgments viz. *S.P. Gupta vs. Union of India* (1981), *Supreme Court Advocates-on Record Association vs Union of India* (1993) and *In Special Reference of 1998,* the court framed the principle of judicial independence by which no other branch of the state including the legislature and the executive would have any say in the appointment of judges. For details, see http://www.indiankanoon.org/doc/543658/.

2.6. Appellate Jurisdiction

The SC is the highest appellate court in the country, and by virtue of this, it can hear appeals against the judgment of the High Courts in both civil and criminal cases involving substantial questions of law which involve the interpretation of the Constitution (Article 132). This jurisdiction of the SC is intact both in cases where a High Court certifies and those in which it does not. If the court is satisfied that a case involves (criminal and civil) an interpretation of the Constitution, the SC can issue special leave to appeal (Pylee 1980). Apart from this, the Supreme Court has wide-ranging appellate jurisdiction over all courts and tribunals in the country. Under Article 136, the Court can use its discretion to grant special leave to appeal from any judgment, decree, sentence or order in any cause or matter passed by any court or tribunal in India (Mohanty 2009).

2.7. Advisory Jurisdiction

The Supreme Court's advisory jurisdiction is mainly on specific advice sought by the President of India from time to time. If any ambiguity arises regarding the interpretation of a clause of the Constitution or a certain constitutional problem arises, the president can refer the same to the SC for its expert opinion. The exact wording of Article 143 states "If at any time it appears to the president that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the SC upon it, he may refer the question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the president its opinion thereon." However, the opinion of the Court is not binding on the president (Basu 2012).

2.8. Miscellaneous Powers

Apart from the three key jurisdictions mentioned above, the SC has many miscellaneous powers. Notably, it is a court of records, meaning that the records of its decisions and proceedings are preserved and published. Further, the decisions of the SC are binding on all of the courts of the country. Importantly, the highest court has the power to review its own judgments or orders. More importantly, the SC is provided with the power of judicial review.[9] Apart from this, the SC is authorized to make rules regulating the practice and procedure of the Court with the approval of the president. Further, the Court has power to appoint *amicus curie* to argue the case of an accused who is unrepresented. Finally, the Court has the power to extend free legal aid to persons belonging to poorer sections (Austin 1999).

[9] The power of judicial review stems from a combined reading of Articles 13, 32, and 142 of the Constitution. For instance, Article 13(2) states that "The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void." For more clarity see Pylee 1980; Basu 2012.

3. Trajectories of Judicial Independence: A Quick Snapshot

3.1. The First Phase: A Positivist Court

The judiciary (meaning the higher courts) has evolved in different phases in its response to the legislative and executive branches of the government. The judiciary in its early years was understated yet potent, using the restricted confines of the judicial space to act as an effective check on legislative pronouncements. This check, exercised through the power of judicial review, was used judiciously by the judiciary in the early years. At least three key aspects of the early years of the judiciary stand out. First, it strictly adhered to the constitutional text. Second, it refused to support the lofty ideologies of the government of the day. Third, at the same time, it conceded that Parliament had the plenary power to amend the Constitution (Rajamani and Sengupta 2010). Thus, although the judiciary declared *zamindari* abolition illegal and a violation of the right to property in *Kameshwar Prasad vs. State of Bihar*, it refrained from using the provision of judicial review when Parliament quickly brought out the First Amendment to the Constitution which placed the provision (inserted Article 31B) out of the purview of judicial review. Similarly, in *State of Madras vs. Champakam Dorairajan*, the court struck down the government's decision to have reservations in educational institutions based on caste as a violation of the right to equality (Article 14), it did not oppose Parliament's right to bring a constitutional amendment to justify such affirmative action on the basis of caste.

The Court did follow a similar approach to the Seventeenth Amendment in 1964 that arose as a result of its verdict in the Sajjan Singh case.[10] In all of these, the Court seems to have followed a positivist interpretation of the Constitution in the first fifteen years of its functioning. To quote Rajamani and Sengupta (2010), "The Court kept its head above the hurly-burly of custodian politics. In the first fifteen years of India's independence, it was a controversial institution, its decisions generating fierce and bitterly contested public debates. This was no surprise given the matters it was called upon to adjudicate. Civil liberties, free speech, caste discrimination, and most notably land reforms were matters central to the ideals, aspirations, and lived realities of people in the new republic." It perceived itself as an institution discharging the function that the drafters of the Constitution had envisaged for it.

3.2. The Second Phase: Bending Backward

The second phase that began with the famous *Golak Nath*[11] verdict was rather tumultuous and politically charged. The judiciary at the time was perceived as an apolitical institution in character and essence, notwithstanding its dealing with many politically sensitive issues such as abolition of *zamindari*, reservation policy which often caused direct confrontation with Parliament. Regardless, it entered the political waters with its expansive interpretation of fundamental rights in *Golak Nath*. The SC in this case reconsidered the constitutionality of the Seventeenth Amendment and, by a majority verdict, declared the amendment illegal. Thus, it overruled the *Sankari Prasad* and *Sajjan Singh* cases, which it had avoided

[10] For details, https://indiankanoon.org/doc/1308308/
[11] For details, https://indiankanoon.org/doc/120358/

previously, confronting the Parliament. The Court held that the amending power of the Parliament was subject to fundamental rights tests. In short, with one stroke, the SC denied Parliament its legislative sovereignty and restored its power of judicial review even on matters related to the right to property. The court went farther in *R.C. Cooper vs. Union of India,*[12] when it struck down a much-touted bank nationalization scheme as illegal. This prepared a stage for direct confrontation between the judiciary and Parliament. To restore its supremacy, the Parliament passed the Twenty-fourth Amendment, which overturned *Golak Nath*.

The Twenty-fourth Amendment (along with the Twenty-fifth and Twenty-ninth Amendments) led to the Court delivering historic the *Keshavananda Bharti vs. State of Kerala*[13] judgment that saw the judiciary limiting Parliament's sovereign power to amend the Constitution. All thirteen judges on the bench of the Supreme Court held in a majority verdict (seven judges supported) that while the Parliament was supreme to amend the Constitution, under Article 368 it cannot alter the "basic structure" of the Constitution (Basu 2012; Austin 1999). This act of the judiciary, however, opened up space for further resistance and opposition from the Parliament, particularly the ruling congress government at the center. The government reacted very strongly by superseding three of the most senior judges to appoint Justice AN Ray as Chief Justice of India. The ensuing confrontation reached its peak in the *Raj Narain* case[14] involving the validity of Mrs. Indira Gandhi's election. The Allahabad High Court, which set aside Mrs. Gandhi's election, and subsequent Declaration of Emergency in June 1975, set the stage for the rapid marginalization of the judiciary. The national emergency and the supersession of judges, which led to the rapid politicization of the judiciary, actively contributed to the judicial surrender to the executive in the controversial *ADM Jabalpur vs. Shivkant Shukla*[15] that backed the government's act of suspending the right to life under Article 21 of the fundamental rights. The SC overturned the decisions of several High Courts that had declared the suspension of *habeas corpus* illegal and took a stand that supported the government's claims.

The judiciary, which fought all of these decades to defend and protect fundamental rights, maintained that "the right to life and personal liberty were bounties given to citizens by the state and hence could be withdrawn in times of emergency" (Rajamani and Sengupta 2010). Thus, with one judgment, the judiciary, which had assiduously nurtured a positivist, apolitical, and independent course, lost it to the diverse tactics of the executive branch. The executive exercised further supremacy with the Forty-second Amendment that took away most critical judicial powers, including the power of judicial review. The judiciary, which had earned accolades and respect in the previous decades, became prey to politicization, turned unpopular, and lost much of its acquired legitimacy (Rajamani and Sengupta 2010).

3.3. The Third Phase: Era of Judicial Supremacy

With the defeat of the ruling government in 1977 and the new Janata government claiming powers at the

[12] For details, https://indiankanoon.org/doc/513801/
[13] For details, https://indiankanoon.org/doc/257876/
[14] For details, https://indiankanoon.org/doc/936707/
[15] For details, https://indiankanoon.org/doc/1735815/

center, the situation suddenly became favorable for the judiciary to undo its mistakes and restore the lost ground that it had gradually ceded to the executive over the years. The judiciary, which was viewed to have abjectly surrendered to the government, attempted to repent by taking an activist course in many of its subsequent judgments. Post-emergency, the most immediate response from the judiciary was to quickly undo the damage it had done in the *Habeas Corpus* case (also known as *ADM Jabalpur*). In the famous *Maneka Gandhi vs. Union of India,*[16] the judiciary went on to widen the ambit of Article 21 by linking it to grounds of procedural and substantive fairness. In this case, the court opened up a new dimension of the right to life and personal liberty when it determined that Article 21 was not only a guarantee against the executive action unsupported by law, it also restricts lawmaking. It also struck down the key provisions of the Forty-second Amendment that had kept judicial review out of the ambit of constitutional amendments in *Minerva Mills*.[17] However, these verdicts were just the beginning of a new era for the judiciary that was still recovering from the shock of having bungled the emergency. In a gradual manner, the judiciary fashioned an era of judicial activism in the later decade through expansive interpretation of fundamental rights by creative use of a new instrument called public interest litigation (PIL). By actively embracing PIL, "the Supreme Court of India for the first time became the Supreme Courts for Indians (Baxi 1985; 2000)."

3.3.1. Public Interest Litigation (PIL) Expands Judicial Overreach

The Indian judiciary adopted PIL in the early 1980s to expand access to justice. PIL fostered judicial innovation and doctrinal creativity in a time when a post-emergency judiciary was looking out desperately to salvage its badly damaged image. The starting point of the PIL revolution was the landmark ruling in *S.P. Gupta vs. President of India and others*.[18] When delivering the judgment, Justice P.N. Bhagwati made it clear that "any member of the public acting *bona fide* and having sufficient interest in instituting an action for redressal of public wrong or public injury could move the court. The court will not insist on strict procedures when such a person moves a petition on behalf of another or a class of persons who have suffered legal wrong and they themselves cannot approach the court by reason of poverty, helplessness or social backwardness."[19] Beyond relaxing the *locus standi,* the judiciary went ahead and allowed public participation in the judicial process even as it recognized the rights of groups to participate in legal proceedings. In doing so, the judiciary granted workers, residents, and members of the general public the right to appeal in the courts against violations of their collective rights. For instance, the court in the *National Textile Workers Union vs. P.R. Ramakrshnan*[20] held that although the Companies Act did not provide for participation of workers in the winding up of proceedings of a company, they had a stake in the outcome of the action proposed to be taken. In another important case, *Sunil Batra vs. Delhi Administration,*[21] the Court relaxed the adversarial procedures to the extent that it

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16 For details, See https://indiankanoon.org/doc/1766147/
17 For details, https://indiankanoon.org/doc/1939993/
18 For details, https://indiankanoon.org/doc/1294854/
19 *Ibid*
20 For details, https://indiankanoon.org/doc/1569870/
21 For details, https://indiankanoon.org/doc/778810/

recognized the right of a prisoner to move the court complaining of alleged torture of another prisoner. In the same scope, the judiciary treated the letters written to it as writ petitions to expand access to justice (Sahoo 2002). The Court's active promotion of PIL encouraged thousands of public-spirited individuals, lawyers, citizen forums, and NGOs to file lawsuits on behalf of underprivileged and helpless individuals and groups. Hundreds of lawsuits were filed on all kinds of issues including human rights violations, women rights, child rights, bonded labor, environmental pollution, and even constitutional and governance issues.[22]

In every sense, PIL heralded an era of judicial activism[23] in India. This is not to deny the role of other instruments in aiding the activism of the court. Through PIL, the court creatively expanded substantive rights (i.e., the fundamental rights, especially Article 21) to cover unarticulated but implicit rights such as the right to live with human dignity, the right to livelihood, the right to education, the right to health and medical care for workers, and the right to a healthy environment (Baxi 2000; Rajamani and Sengupta 2010).

3.3.2. The Collegium System and Reassertion of the Judicial Power

This phase of judicial activism was also marked by the court tactfully using the opportunity of a succession of weak coalition governments at the center to put its stamp on judicial appointments. Apart from trying to maintain autonomy by insulating such appointments from executive interference, the decision was meant to further cement judicial dominance. The judiciary did this through a series of judgments (known as the *Three Judges* cases[24]). The first case was *S.P. Gupta v. Union of India* in 1981,[25] which arose after the President bypassed the consultation advice of the Chief Justice of India and listened to the Chief Justice of the Delhi High Court instead. This judgment was critiqued because it didn't recognize the independence of the Chief Justice. The second case came up in 1993 when the question arose through PIL whether the Chief Justice's views on appointment hold primacy. The second judgment held that the Chief Justice's views should hold primacy in appointments. The third case came up in 1998 about whether the president should only be limited to consultations with the Chief Justice, or whether other judges should be involved too. The Supreme Court held that this should lead to the creation of a collegium system where other judges are actively consulted on appointments.

Such a system of appointment (judges appointing themselves) was challenged during the National Democratic Alliance (NDA) government led by Narendra Modi in 2015. The new government passed legislation to set up the National Judicial Appointments Commission (NJAC) with the intention of making judicial appointments a collective affair. Seeing this as an executive attempt to snatch the power of

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22 For instance, thousands of people used PIL to petition the higher courts to compel the executive branch to do its duties or to prevent it from doing something forbidden by the law. In response, the court liberalized the traditional *mandamus* and directed the government agencies to perform their constitutional duties. For instance, the court directed the CBI to investigate cases of human rights violations, government hospitals to provide medical aid, municipalities to provide compensations to victims of negligence, etc. For details, see Sahoo 2003.

23 The term judicial activism originated in the US, specifically from the judgments of the Warren Court. The Warren Court took an activist stance to redefine individual rights and civil liberties vis-à-vis the Congress.

24 For details, https://indiankanoon.org/doc/1294854/

25 Case analysis by Vikas Kumar, *India Law Portal*, July 2, 2020. https://indianlawportal.co.in/s-p-gupta-v-uoi/

appointment, a five-member Supreme Court bench declared the new law unconstitutional. Thus, the judiciary stood its ground against possible executive interference in its own affairs.

3.4. The Fourth Phase: Towards an "Executive Court"

The end of the three-decade-long coalition government marked by the coming of a powerful central government led by Narendra Modi, a nationalist and populist leader with centralizing tendencies, has brought the judiciary-executive relationship to a new level. With full political majority, the central government has systematically been using all levers of state power to control and manage the judiciary in its favor. While the judiciary stood up to such executive interference in the case of the National Judicial Appointments Commission mentioned above, this was an exception. This is because the central government, particularly the law ministry, has used administrative and other pretexts to delay or nullify certain appointments made by the collegium comprising senior justices, and the Supreme Court has not shown the required leadership to stop such blatant interference into judicial autonomy. In fact, the Chief Justice of India in 2016, T.S. Thakur, made an emotional appeal to the central government to speed up the processing of the collegium recommendations as the delay was causing distress to the judiciary (Rajagopal, 2016). Apart from this, in a growing number of instances, the executive branch is interfering and using transfer options against individual judges who have spoken out or delivered judgments against the government.

Beyond interference in judicial appointments, the executive branch has been able to get judges (using post-retirement incentives or coercive tactics) to support its policies even when they violate constitutional principles. Recently, an investigative report by The Indian Express, an Indian daily newspaper, revealed that of the 10 recent judgments of the Supreme Court on free speech, six cases were in favor of the state.[26] In the four cases that went in favor of the petitioner, the government either supported the petitioner or had no objection. In short, the once "assertive" judiciary speaks "the language of executive and has become indistinguishable from the executive (Bhatia, 2020). Through its judgments and orders, the judiciary, far from failing to act as a check on an unbridled executive power, has become a facilitator of it.

4. Major Challenges

The judiciary reached the pinnacle of its power and independence in previous decades by delivering landmark judgments that led to the rapid expansion of personal liberties and rights of the vulnerable and neglected populations. Now, the judiciary is witnessing a rapid erosion to its powers and well-earned legitimacy, apart from acting as a check on state excesses. The major erosion in the judicial powers has coincided with the arrival of a strong executive at the center led by the right-wing Bharatiya Janata Party

[26] See the report by *The Indian Express*, August 22, 2020. https://indianexpress.com/article/india/10-free-speech-cases-this-year-in-supreme-court-6564796/

(BJP).[27] It should be mentioned that the judicial powers in India thrived during the period of successive coalition governments at the center characterized by an unstable and weak executive. However, the BJP government led by Narendra Modi broke that continuum when it achieved a single majority on its own in the 2014 general elections. The crises besetting the higher judiciary can be seen on many fronts, but most notably in defending the constitution and personal liberties.

4.1. Decline as a Constitutional Court

The judiciary, which took many important decisions interpreting the scope of Article 21 to expand civil liberties and protect the Constitution, has witnessed a sharp decline in this ability to pursue cases to uphold constitutional rights. Examples of the courts toeing the executive line and failing to check state excesses can be found in its failure to uphold the fundamental rights in a staggering number of cases since 2014.

In a series of cases involving serious legal and constitutional questions and state excesses such as the abrogation of Article 370,[28] which nullified statehood and special provisions accorded to India's only Muslim majority state (Jammu and Kashmir), the constitutional validity of the discriminatory Citizenship (Amendment) Act (CAA), the legality of the controversial political funding law (electoral bonds) and scores of habeas corpus petitions[29] involving the illegal detention of activists, democracy defenders, and political dissidents, the Supreme Court has delayed or sided with the executive branch. A weak and ineffectual judiciary has greatly facilitated and emboldened an already strong executive to threaten and usurp key constitutional principles governing India's democracy. Importantly, by failing on issues of Article 370, the Citizenship Act, the judiciary is increasingly ceasing to perform as a counter-majoritarian court.[30]

4.2. Growing Post-retirement Postings

A disturbing trend tarnishing the sterling reputation of the judiciary in recent years is the growing number of retired judges accepting plum posts offered by the government. The recent nomination of former Chief Justice Ranjan Gogoi (who handed down many important judgments favoring the government) soon after his retirement in 2020 to the upper House of Parliament has raised many eyebrows in the judicial and legal fraternities about propriety and potential *quid pro quo* behind such developments.[31] Of course,

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27 See an excellent assessment by A.P. Shah, The Supreme Court, then and now, *Economic and Political Weekly*, Vol.55, October 2020. https://www.epw.in/journal/2020/40/perspectives/supreme-court.html

28 Report by Shruti Mahajan, *Bar and Bench*, August 05, 2020. https://www.barandbench.com/columns/supreme-court-dealt-with-cases-abrogation-of-article-370-jammu-and-kashmir

29 Shreyas Narlas and Shruti Rajagopalan, Judicial Abrogation of Right and Liberties in Kashmir, *Article 14*, September 25, 2020. https://www.article-14.com/post/the-judicial-abrogation-of-rights-liberties-in-kashmir

30 A.P. Shah, "The only institution capable of stopping the death of democracy is aiding it," *The Wire*, September 18, 2020. https://thewire.in/law/supreme-court-rights-uapa-bjp-nda-master-of-roster

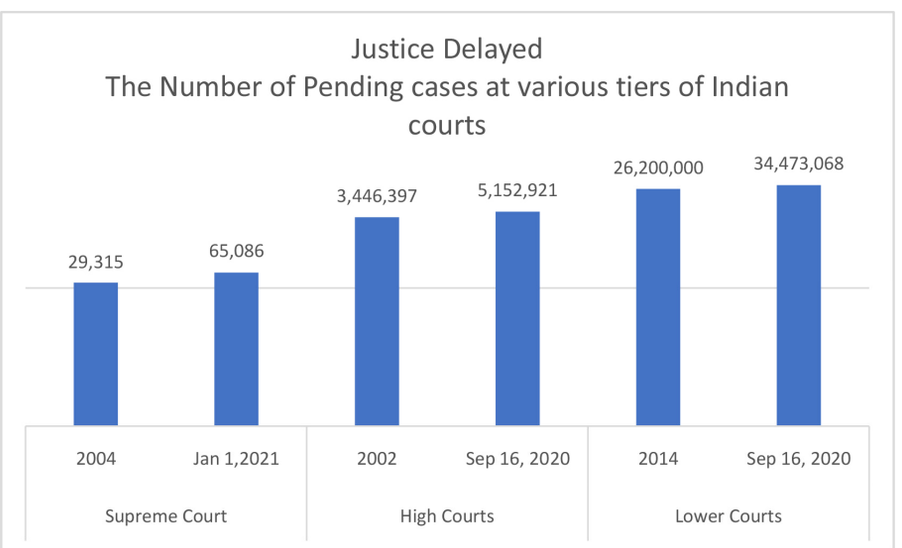
31 Editorial, *The Hindu,* March 19, 2020. https://www.thehindu.com/opinion/editorial/competitive-impropriety-the-hindu-editorial-on-ranjan-gogois-rajya-sabha-nomination/article31101933.ece

Justice Gogoi is not alone in this. There have been a growing number of cases where retired judges of the Supreme Court have been appointed as Governors and heads of task forces. In this regard, a significant research paper titled *Jobs for Justice(s): Corruption in the Supreme Court of India* by Madhav Aney, Shubhankar Dam, and Giovanni Ko reviewed a dataset of Supreme Court judgments between 1999 and 2014 involving various governments. The paper found that writing judgments "in favor of the government" had a "positive" association with the likelihood of a plum post-retirement job.[32] Thus, there are numerous ways in which the executive branch is trying to exercise control over the judiciary.

4.3. Growing Pendency of Cases

Beyond the visible decline of judicial power vis-à-vis the strong executive, the judiciary is engulfed in multiple internal challenges: a huge number of pending cases at all levels, a staggering number of vacancies, and an inadequate and outdated judicial infrastructure to deliver timely justice in a vast country with a very low level of legal literacy. The most challenging aspect to judicial legitimacy is the pendency of cases, which has increased significantly at all levels of the judicial hierarchy in the last decades. As of September 2020,[33] there are over 3.5 crore cases pending across the Supreme Court, the High Courts, and the subordinate courts. Of these, subordinate courts account for over 87.3 percent of pending cases (34,473,068), followed by 12.5 percent (5,152,921) before the 24 High Courts. In the High Courts, a staggering 8.3 lakh cases have been pending for over 10 years. This constitutes 19 percent of all pending High Court cases.

Figure 1. Pendency at Various Levels



Source: Law Ministry, GoI

[32] Madhav Aney, Shubhankar Dam and Giovanni Ko, *Ideas for India*, 2017. https://www.ideasforindia.in/topics/macroeconomics/the-politics-of-post-retirement-appointments-corruption-in-the-supreme-court.html

[33] Kaushik Deka, "On India's Judiciary: Bogged by a Backlog," *India Today*, January 3, 2021. https://www.indiatoday.in/magazine/nation/story/20210208-bogged-by-a-backlog-1763840-2021-01-30

Similarly, in the subordinate courts, over 24 lakh cases (8 percent) have been pending for over 10 years. The COVID-19 pandemic has resulted in a huge spike in these numbers. For instance, between February 1 and August 31, 2020, the Supreme Court saw a 3.6 percent increase in pending cases. The High Courts saw a staggering 12.4 percent increase in pendency between January 29 and September 20, 2020.[34] While there is no clear data on pending cases in the tribunals, the Law Commission (272nd) found that just five tribunals had as many as 350,000 cases as of July 2017. A recent McKinsey study[35] suggests that if the courts continue operating at their current rates, they would take more than 300 years to clear the judicial backlog.

4.4. Judicial Vacancies

One of the major factors behind the delay in disposal of cases is the huge number of judicial vacancies across courts in India. For instance, between 2006 and 2017, the number of vacancies in the High Courts increased from 16 percent to 37 percent, and in the subordinate courts from 19 percent to 25 percent. As of September 2020, High Courts have 396 vacancies against a sanctioned strength of 1,079 judges, and subordinate courts have 5,453 vacancies against a sanctioned strength of 22,704 judges. To put it another way, among large democracies, India has an abysmal judges-per-million-of-population-ratio. From a poorly 10.5 judges per million in 1987, the country has only added a mere 19.13 in 2019.[36] Thus, the inability to work on a full force often leads to a delay in decisions and pendency in cases. The collegium system, which allows the judiciary to become the sole authority to appoint judges for the higher judiciary, has not delivered in terms of filling up vacancies. Mired in its own lack of transparency and suffering from the executive branch using every administrative tool available to influence the appointment process, the collegium system has emerged as the single biggest reason for the growing vacancies in the higher judiciary.[37]

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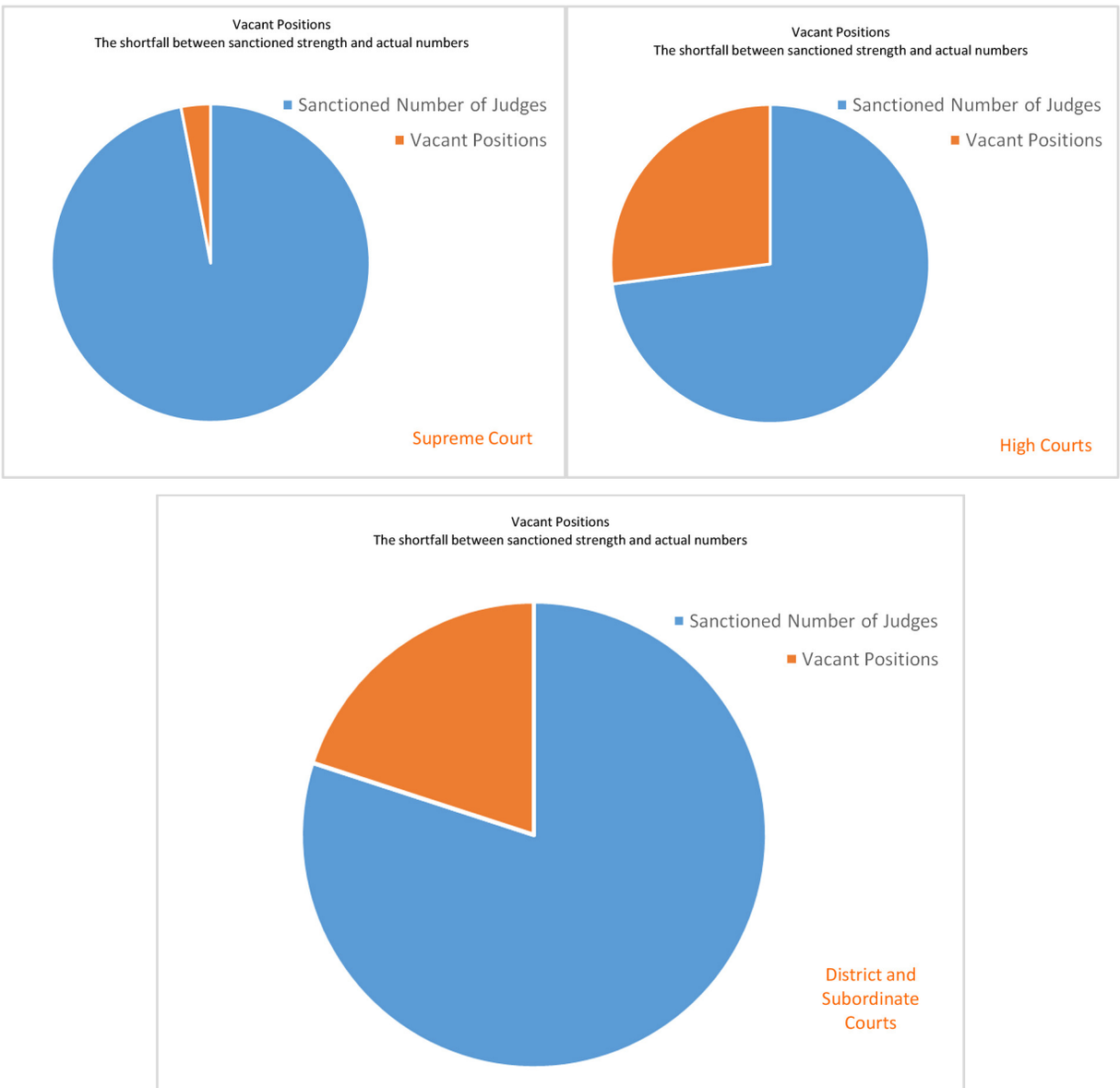
34 *Ibid*

35 The McKinsey Report, August, 2020. https://www.mckinsey.com/~/media/McKinsey/Featured%20Insights/India/Indias%20turning%20point%20An%20economic%20agenda%20to%20spur%20growth%20and%20jobs/MGI-Indias-turning-point-Executive-summary-August-2020-vFinal.pdf

36 Abhishek Singhvi, Challenges ahead for the Judiciary, *Hindustan Times*, December 30, 2020. https://www.hindustantimes.com/analysis/challenges-ahead-for-the-judiciary/story-F2sSCXwqby34DPmj6CkepI.html

37 Madan K. Lokur, "Why So Hard to Fill up the Judicial Vacancies in our Courts," *The Wire*, May 11, 2021. https://thewire.in/law/india-judge-vacancies-justice-delivery

Figure 2. Number of Vacant Judicial Positions



Source: Law Ministry, GoI.

4.5. Inadequate Judicial Infrastructure

While there are diverse factors, particularly low bench strength and poor investigation by law enforcement agencies, that influence the high number of pending cases in Indian courts, the key factor is a lack of critical judicial infrastructure. Examples include the poorly constructed courtrooms, slow digitization of courts, a lack of video conferencing and online citizen portals, and the lack of a digital register of cases/petitions. The recent India Justice Report[38] found the Indian judiciary lagging in many critical parameters as mentioned above. While the country claims to be a technology superpower, as many as 40 percent of jails in India do not have video-conferencing facilities.

[38] India Justice Report 2019, *Tata Trust*, https://www.tatatrusts.org/upload/pdf/overall-report-single.pdf

Notwithstanding its activist streak and far-reaching contributions in terms of expanding a new frontier of rights and justices via PIL, this critical constitutional instrument of last resort is in deep crisis today. Not only are the courts in India sitting on a mountain of litigation, judicial decisions are becoming inconsistent and often contradict each other.[39] Justice has become expensive and time consuming and remains far beyond the reach of average citizen, let alone the poorest and marginalized as the courts previously worked hard to achieve via PIL.

4.6. Corruption in Justice Delivery

Growing instances of corruption affect the judiciary as much other branches of the government. Once viewed as above corruption, the judicial branch these days often makes the news for corruption and favoritism. An influential Transparency International survey on judiciary (Global Corruption 2013 Borometer) found some 45 percent of surveyed Indian households felt the judiciary to be "extremely corrupt", while as many as 36 percent of households had paid a bribe to judialry.[40] This situation related to corruption has not improved in the recent years. According to CMS India Corruption Study 2018, corruption in the legal profession has gone up with bribes being sounght to get the next hearing date of choice among others. The CMS study estimated an annual Rs 534 crore bribes paid to access justice in India[41]. Several sensational cases of corruption and misuse of official positions by some judges have grabbed the attention of the press and the public, thereby sullying the image of judiciary in recent years.[42]

4.7. Lack of Access to Justice

The most important issue, however, is the issue of access to justice. For countless citizens, especially the poor and marginalized, access to justice remains a distant dream. Many special schemes such as Lok Adalat and free legal aid have remained symbolic in nature (Menon 2008). According to many reports and studies, the justice delivery system in India remains cumbersome, time-consuming, and costly for most citizens, let alone the poor.[43]

4.8. Slow Modernization

Last but not least, the judicial process has yet to embrace modern information technology in a big way. It is evident from global experiences that the application of communication technologies and automation of judicial processes are revolutionizing justice delivery process and the aspects of speed and efficiency. However, except for the higher courts to some extent, much of the judicial system continues to function with old and inefficient processes. In short, the judiciary is lacking both physical as well as knowledge

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39 For a coherent analysis on inconsistency, see Rajamani and Sengupta 2010; Mehta 2007.

40 See *Firstpost*, February 24, 2014. https://www.firstpost.com/india/judicial-accountability-who-will-judge-the-judges-in-india-1405511.html?

41 CMS-India Corruption Study 2018, https://www.cmsindia.org/sites/default/files/2019-05/CMS_ICS_2018_Report.pdf

42 *The Wire*, August 22, 2020. https://thewire.in/law/attorney-general-kk-venugopal-arun-mishra-prashant-bhushan

43 170 Report of the Law Commission of India; Second ARC report 2008.

infrastructure to meet the gargantuan expansion of the workload and public expectations.

4.9. Lack of Diversity

It took 39 years to get the first woman appointed as a Supreme Court judge in 1989. While the appointment of three women judges in one go recently generated a lot of headlines, women represent only 11 percent of total judges. The number of women at the high court level is not particularly encouraging either. According to government data, out of 677 sitting judges in the Supreme Court and high courts, there are only 81 women judges (12 percent). Further, the current Supreme Court has just one Muslim judge, and there not a single judge from tribal or LGBTQ communities.[44] This lack of representation and diversity reflects poorly on judicial leadership and its reputation in a highly diverse country.

5. The Way Forward

The above analysis of the diverse challenges facing India's judiciary finds that the current challenges are mostly of its own making, and demand urgent course correction if the judiciary wishes to salvage its lost reputation and autonomy. Of course, both the judiciary and the executive branches have taken note of the challenges facing the justice delivery system and resultant outcomes. Noting the severity of justice delivery bottlenecks, recently, Chief Justice of India N.V. Ramana noted that "The judicial system is facing difficult challenges like deficient infrastructure, a shortage of administrative staff, and a huge number of judicial vacancies. India needs a National Judicial Infrastructure Corporation. During my high court days, I've seen that women don't have toilets."[45] Sharing similar concerns, India's Law Minister Mr. Kiren Rijiju also sought to bring attention to the long pendency of cases and delays in justice delivery. To quote Mr. Rijiju's recent remarks, "And if that justice gets delayed, then it is a big question mark on all of us...so, we have to ensure that last mile person, the common man, must be given the priority when we talk about justice delivery mechanism in our country."[46]

In recent years, a series of steps have been initiated to address these structural challenges afflicting the efficiencies of the courts. The government has set up a number of commissions and committees to study and suggest remedial measures. The most recent have been the elaborate suggestions made by the Report of Second Administrative Commission and 170th Report of the Law Commission of India. Against a growing outcry about the dysfunctional justice system, the SC and several High Courts have initiated a

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44 Namita Bhandare, "In the Supreme Court, Representation Matters," *Hindustan Times*, September 3, 2021. https://www.hindustantimes.com/opinion/in-the-supreme-court-representation-matters-101630673359685-amp.html

45 Reported in *Times of India*, September 4, 2021. https://timesofindia.indiatimes.com/videos/news/judicial-system-of-india-facing-challenges-including-infrastructure-staff-cji-ramana/videoshow/85934833.cms

46 Reported in *Hindustan Times*, September 5, 2021. https://www.hindustantimes.com/india-news/case-pendency-has-become-a-challenge-says-law-minister-kiren-rijiju-101630779279498.html

number of initiatives to reduce pendency, expand infrastructure facilities, improve the governance process, and be more accessible to citizens. For instance, the SC set up a National Court Management Systems Scheme in May 2012 to address the issues of efficiency and governance. Under the scheme, a National Framework of Court Excellence was instituted which will set "measurable standards" of performance for courts addressing the issues of quality, responsiveness and timeliness.

Similarly, the Court has set up an e-committee to devise and implement a national policy on the computerization of judicial administration in order to expedite the delivery of justice in civil and criminal cases.[47] To address the pendency issue, the idea of Fast Track Courts are being pushed. This has yielded in reducing pendency of nearly 20 lakh criminal cases. In Tamil Nadu, Andhra Pradesh, and Gujarat, such courts have been proven to be quite effective in disposing cases involving minor offenses which are clogging India's criminal justice system. The Delhi High Court has recently started evening courts that are initially for cases under Section 138 of the Negotiable Instruments Act involving small amounts.[48] The most important development, however, is the allocation of substantial financial resources for the judiciary by the Thirteenth and Fourteenth Finance Commissions.

Finally, there have been slew of other proposals with huge promises doing the rounds on judicial reforms. The judiciary has proposed alternative methods of delivery of justice to dispose cases more rapidly through out-of-court settlements, and the Union government has also come out with several key bills on appointments, accountability, judicial conduct, and so on. In addition, there is a pending proposal for the Constitution of All India Judicial Services. Thus, a number of ideas and proposals are being raised and actively debated to reform the judiciary in India.

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47 See *The Indian Express* story, December 27, 2012, link: http://www.indianexpress.com/news/yearender-2012-judicial-reforms-flavour-of-2012/1050916/3

48 For details, see Chief Justice K.G. Balakrishnan's lecture at http://indiacurrentaffairs.org/judicial-reforms-in-india-addressed-by-k-g-balakrishnan-honble-mr-chief-justice-of-india/.

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Country Case 2: Philippines

Land Reform, Judicial Independence, and the Rule of Law: Whither Goes Mang Juan?

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1. The Ruminations of Mang Juan

Mang Juan[2] sits still, sipping his *kapeng barako*[3] at the break of dawn, in his hovel by the riverside. About six months prior, he would be up at dawn and head straight to his rice field of two hectares, which he cultivates with his eldest son. His farmland has been awarded to him by the government through the land reform program, and he has a title which shows that he is the owner of the property. Because of irrigation, he is able to plant two crops of paddy rice every year as well as tubers, and maintain a fishpond that supplements his daily meals. But all this is now past. The goons of a local politician swooped down on his farmland and forcibly evicted him, claiming that this politician is now the owner of the property, and that a pharmaceutical plant will be set up. *Mang Juan* filed a case in court to defend his property to no avail, and now he has been moved to a small house near the river, inaccessible to the roads leading to town.

He is thinking very hard of what to do. Even if his case is on appeal, he has lost the will to fight in court, not trusting the judicial system at all, and he is also frightened at the prospect of additional expenses. His daughter, who is a nurse in Canada, has invited him to emigrate and stay with her, saying that nothing will happen when local politicians are involved. But the prospect of cold winter nights daunts him. His eldest son has taken a job at a nearby factory and gives him essentials only. The local organizer of the Communist Party has approached him to join their cause, but he feels he is too old for that. He continues to sip his coffee and contemplates what kind of future he has now that he has been evicted from the land.

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[1] A policy and gender consultant, and a faculty of the Ateneo de Manila University School of Law.

[2] *Mang Juan* literally means Mr. John. In the Filipino context, Mang is a generally a salutation of respect for an elderly man. References to the person in this incident shall be shortened to Juan.

[3] *Kapeng barako* is a Filipino term for a local variety of coffee (Liberica) commonly grown in the rural areas of the Philippines.

2. Why Judicial Independence Matters

To Juan, the impartiality of the courts in enforcing his rights over the land is hugely important. His subsistence is at stake. Politically, the lack of independence of the judiciary erodes the trust and confidence of the public on the institution. The Canadian Judicial Council holds that "Judicial independence requires that a judge adjudicate without fear or favor, even in the face of a contrary view widely held by others, whether judicial colleagues, government, the public, the media, or interest groups (Canadian Judicial Council 2016)."

Along similar lines, the UN Office on Drugs and Crimes notes "Judicial independence is not an end in itself, or a way to secure the professional position of judges for their benefit, but rather a means to guarantee the **impartial exercise of judicial functions**, the respect for the rights of the litigants, allowing every person to have confidence in the justice system. **Impartiality**, therefore, is a consequence of judicial independence; it refers more specifically to the role of the judge in the judicial process and implies that judges must be above any interest in the case and free from any pressure(United Nations Office on Drugs and Crime 2020)." In other words, judicial independence is a tool that should be deployed in order to increase the trust and confidence of the public in the role of the judicial system.

This paper will provide a background on the judicial system of the Philippines and its relationship to the two other branches of government. It will also explore the various facets of judicial independence, how these facets play out in the Philippine context, and the various challenges to judicial independence in the country. Lastly, the paper will end with five key recommendations that seek to concretely strengthen judicial independence.

3. Historical Overview of the Judicial System and Judicial Independence

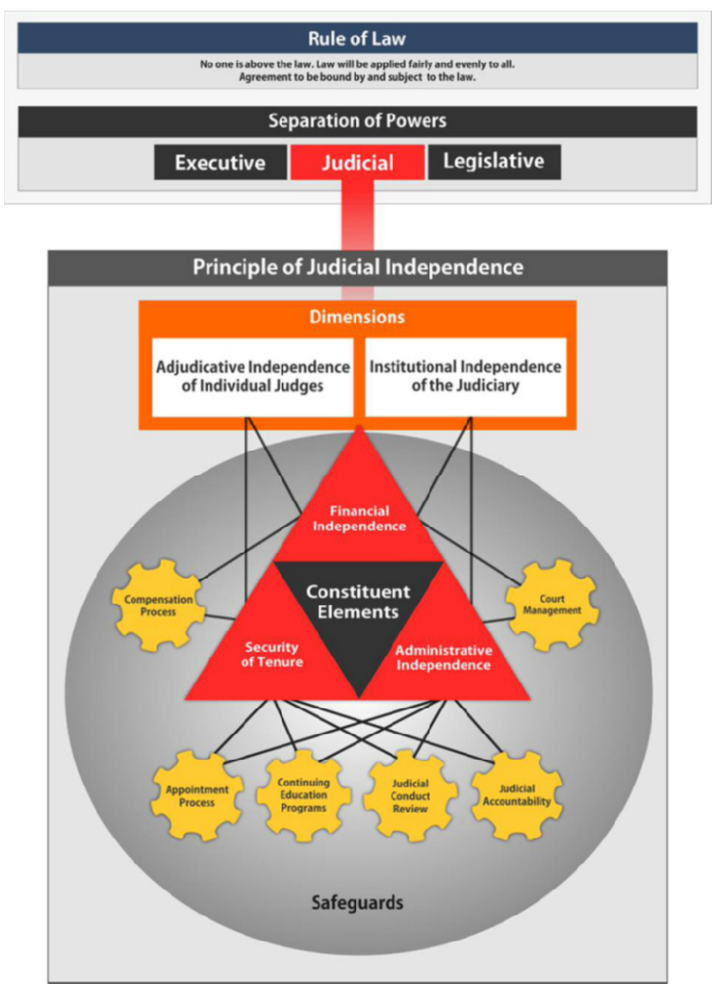
Since the Philippines secured its independence from American colonial rule in 1946, the basic structure of government has remained unchanged. The chief executive is the president. There are two houses in the legislature, the House of Representatives and the Senate. The judiciary is headed by the Chief Justice and the Supreme Court, with a system of appellate and trial courts spread out all over the country. This system of government relies on the principle of checks and balances to prevent any one branch of government from acquiring too much power. The judiciary exercises the power of judicial review to serve as a check on abuses of executive and legislative prerogatives, and to ensure compliance with the Constitution and the rule of law.

Although judicial independence as such is not an explicitly guaranteed right under the constitution, nevertheless the principle has been enshrined in case law and guides the political system. There are also some provisions in the Constitution, the law, and in regulations that support judicial independence. In one particular decision, the Supreme Court had the occasion to say:

Thus, judicial independence can be "broken down into two distinct concepts: decisional independence and institutional independence." Decisional independence "refers to a judge's ability to render decisions free from political or popular influence based solely on the individual facts and applicable law." On the other hand, institutional independence "describes the separation of the judicial branch from the executive and legislative branches of government." Simply put, institutional independence refers to the "collective independence of the judiciary as a body."[4]

These two unpacked concepts of judicial independence also resonate with the article of the Canadian Judicial Council on judicial independence cited above. The Council breaks down the concept of judicial independence into the **adjudicative independence** of the individual judge and the **institutional independence** of the judiciary. A copy of the diagram on judicial independence follows, and this article shall use this schematic to elaborate on the various aspects of judicial independence in the Philippines.

Figure 1. Diagram on Judicial Independence in Canada (Canadian Judicial Council)



[4] Re: COA Opinion on the Computation of the Appraised Value of the Properties Purchased by the Retired Chief/Associate Justices of the Supreme Court, A.M. No. 11-7-10-SC (July 31, 2012) (Phil.), https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/55035.

4. An Overview of the Judiciary

The judiciary is the third branch of government in a three-tiered unitary system. Unlike other countries that have a federal and state judicial system, the Philippines has only one Supreme Court that acts as a constitutional court, with the power of judicial review. The Supreme Court also acts as the apex appellate court after certain cases have gone through the trial courts and appellate courts (such as the Court of Appeals).

4.1. The Three-Tiered Hierarchy of the Courts

The first tier in the judicial system is a series of trial courts, generally known as municipal trial courts, and regional trial courts, which are spread out all across major towns and cities. The trial courts also include Sharia Courts, which are found in the southern part of the country which enforces the Code of Muslim Personal and Family Law. The trial courts handle varied criminal and civil cases at the first instance, and then these cases get reviewed by the Court of Appeals or the Supreme Court by appeal. There are now 1,937 judges in the trial courts occupying authorized positions all over the country,[5] and the current case load based on the latest available figures is around 1,377,915 active cases in the system (pending as of the end of 2018 and new cases in 2019). This brings the national caseload to 711 cases per judge. This figure hides the uneven distribution of cases where in the urbanized cities, judges typically handle up to a thousand cases at any given time.

Table 1. Profile of the Caseload of the Philippine Judiciary

	Total Caseload for 2019	Total Disposals 2019	Total Pending Cases at the End of 2019
Trial Courts	1,377,915	724,872	653,043
Court of Appeals	34,159	13,002	21,157
Supreme Court	14,764	5,792	8,972

Source: Data from the "Judiciary Annual Report 2019"
(Manila: Supreme Court of the Philippines Public Information Office, 2020).

The second tier in the judicial system is composed of the appellate courts, which is the Court of Appeals (CA), the Court of Tax Appeals (CTA), and the Sandiganbayan (SB). The CA exercises general jurisdiction over appealed cases, while the SB handles graft cases involving private individuals and entities and government officials. Although technically the SB is a trial court, it is *sui generis*, created by the Constitution, and has a special mandate for graft cases.

The third tier of the judicial system is the Supreme Court, which exercises both an adjudicative and managerial function. It has general supervision over all lower courts and their personnel. The Supreme Court is composed of 15 magistrates headed by a Chief Justice. Aside from being an appellate court, the

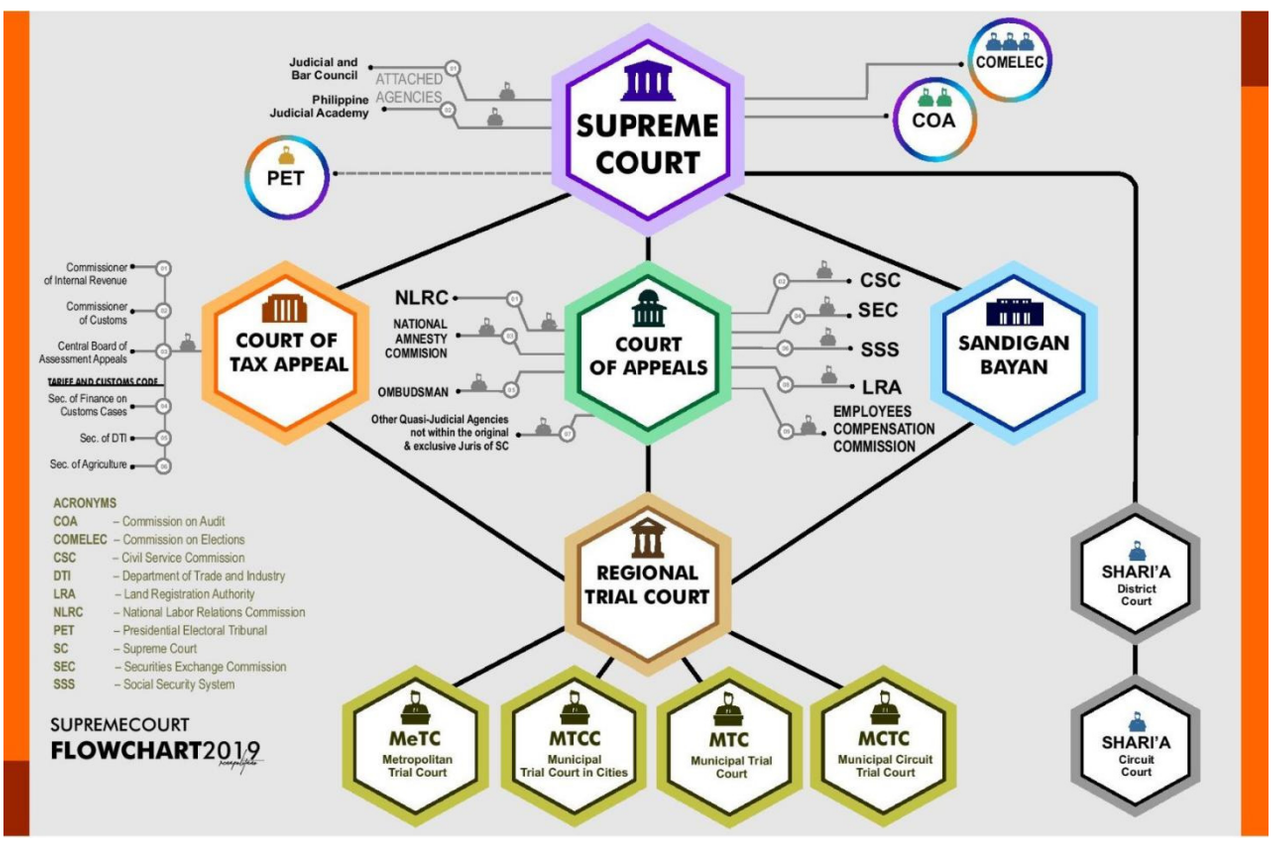
[5] "Total Number of Filled and Unfilled Courts," Supreme Court of the Philippines Office of the Court Administrator Court Management Office (unpublished report, 2019).

SC also exercises judicial review over the actions of the executive and legislative branches of government, assessing constitutional suits or grave abuses of discretion.

A schematic diagram of the three tiers of the judiciary taken from the webpage of the Council of ASEAN Chief Justices is found in the following table(Council of ASEAN Chief Justices 2019). The diagram aptly illustrates that cases decided by other offices within the executive branch of government that exercise quasi-judicial functions, like the Securities and Exchange Commission (SEC), the Land Registration Authority (LRA), and the National Labor Relations Commission (NLRC), can end up in the judicial system when appealed to the Court of Appeals. This is another important feature of judicial review.

The ability of the judiciary to manage their core business is very important for judicial independence. Ideally, the judiciary should have sufficient funds and personnel in order to manage their caseloads. Otherwise, it will be dependent on the executive branch or the local governments, which may compromise its independence.

Figure 2. Flow Chart of the Hierarchy of Philippine Courts



Source: Council of ASEAN Chief Justices (2019)

4.2. The Budget of the Judiciary as a Third Branch of Government

The other measure of the independence of the judiciary is the sufficiency of the funds provided by the national government. According to the UN Rapporteur on the Independence of Judges and Lawyers, the budget for the judiciary should be anywhere in the range of 2 to 6 percent of the national budget in

order to make its work effective and independent(Leandro Despouy, 2008).

The table below clearly indicates that the budget of the judiciary is consistently below the 2 percent threshold of the national budget of the government in 2019 and 2020. The budget of the judiciary constantly hovers in the 1 percent range, and in proportion to the national government budget, even experienced a drop from 1.07 to 1.00 percent between 2019 and 2020 (Republic of the Philippines Department of Budget and Management Budget Information and Training Service 2019).

Year	Budget for the Judiciary in PhP Billion	Budget of the National Government in PhP Billion	Percentage
2019	39.5	3,662	1.07%
2020	41.2	4,100	1.00%

This continuing under budgeting of the judiciary vis-à-vis the national government is a key concern for judicial independence and is one of the continuing challenges to the institution.

5. Key Constitutional Aspects of Judicial Independence

The current Constitution of the Republic of the Philippines is replete with provisions that seek to protect the independence of the judiciary, both at the institutional level and at the adjudicative level.

5.1. Depoliticizing the Appointment Process for Judges and Justices[6]

The 1987 Constitution introduced an innovation in order to make the appointment of justices and judges less political and more merit-based, which was the Judicial and Bar Council (JBC). The JBC is a multi-sectoral council composed of both political and non-political members whose mandate is to recommend to the appointing authority (the president) a shortlist of at least three names for each vacant position in the judiciary (judges and justices) after a process of rigorous vetting. The *ex officio* members of the JBC are the Chief Justice as the Chair, the Secretary of Justice, and the two Chairpersons of the Committee on Justice of the upper and lower houses. The regular members are representatives from the Integrated Bar of the Philippines, academia, the private sector, and ex-justices of the Supreme Court. The theory behind the JBC is to limit the discretion of the president in appointing judges and justices, and hopefully, institute a more merit and fitness-based approach to the selection of judges, rather than one based on political debts and loyalty.

[6] The term “judges” is usually designated for judicial officers belonging to the trial court level, while the term “justices” denotes judicial officers who sit in the appellate courts, including the Supreme Court.

5.2. Administrative Supervision over the Lower Courts

Prior to 1973, the Department of Justice had supervision and control over the lower courts, at that time called the Courts of First Instance and the Justices of the Peace.[7] Over time, this was perceived to be a diminution of the independence of the judiciary since the lower courts were beholden to the executive branch for their salaries.

That situation changed under the 1973 Constitution, where the supervision of the lower courts and personnel was shifted to the SC. This arrangement has persisted under the 1987 Constitution. The Office of the Court Administrator (OCA) was created to manage the lower court judges, which by the latest count now totals 2,409 all over the country. This arrangement is good for judicial independence, but also challenging. Deciding a case is one thing, but running a huge bureaucracy, with its lower courts and several appellate courts, can be daunting considering the demands to provide on-time delivery of salaries and wages, supplies and materials, refurbishment of courtrooms and the computers and internet connectivity that have become so necessary during the COVID-19 pandemic.

5.3. Fiscal Autonomy

Another new feature in the 1987 Constitution which strengthens institutional independence is fiscal autonomy. The 1987 Constitution states:

> *The Judiciary shall enjoy fiscal autonomy. Appropriations for the Judiciary may not be reduced by the legislature below the amount appropriated for the previous year and, after approval, shall be automatically and regularly released.*[8]

The concept of fiscal autonomy means that the budget of the judiciary for one year cannot fall below the amount appropriated the previous year. More importantly, unspent funds do not revert back to the National Treasury, but remain appropriated for the judiciary until they have been spent. The principle of fiscal autonomy is a hallmark of judicial independence because the executive branch cannot simply cripple the operations of the judiciary by giving it a very small budget. However, the challenge is how to spend the funds entrusted to the judiciary in a timely manner to meet the most urgent needs of the system.[9]

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[7] SEC. 6. *Bureaus and Offices under the Department of Justice*. -The Department of Justice shall have the direct executive control, direction, and supervision of the Bureau of Justice, the Board of Public Utility Commissioners, the Code Committee, the Courts of First Instance and inferior courts, the Philippine Library and Museum, and the Bureau of Prisons, and such others as may hereafter be assigned to it by law. An Act to Reorganize the Executive Departments of the Government of the Philippine Islands, Act No. 2666, (November 18, 1916) (Phil.).

[8] Const., (1987), art. VIII, §13 (Phil.).

[9] "At this point, it is likewise important to underscore that the reversion to the General Fund of unexpended balances of appropriations – savings included – pursuant to Section 28 Chapter IV, Book VI of the Administrative Code[22] does not apply to the Constitutional Fiscal Autonomy Group (CFAG), which include the Judiciary, Civil Service Commission, Commission on Audit, Commission on Elections, Commission on Human Rights, and the Office of the Ombudsman. The reason for this is that the fiscal autonomy enjoyed by the CFAG xxx.." The concept of fiscal autonomy has been discussed extensively in the case

5.4. Security of Tenure and the Discipline of Judges and Justices

A basic feature of the individual independence of judges is that once appointed, they enjoy security of tenure, up to the age of 70, and cannot be removed from office except for cause.[10] For judges and justices of the appellate courts, the SC has recently promulgated a rule on the discipline of judges through the Judicial Integrity Board (JIB) (Establishment of the Judicial Integrity Board (JIB) and the Corruption Prevention and Investigation, 2018). The only way to remove a justice from the SC is through impeachment, which is a political process involving the legislature.[11] The Constitution further provides that during their continuance in office, their salaries will not be diminished,[12] nor shall their security of tenure be affected by reorganization.[13]

5.5. Other Features of Judicial Practice that Promote Independence

Two other features of the current judicial system that promote the concept of judicial independence is the *continuing education* of judges (done through the Philippine Judicial Academy) and a dedicated office for *court administration* (done through the Office of the Court Administrator). The more learned the judges are on the various facets of the law, the better they are able to exercise their judicial discretion and apply these legal precepts to pending cases. The better equipped and paid the judges are, the lower their proclivity to accept contributions and donations from various sources, both legal and illegal. This therefore enables them to rule without fear or favor, even when local politicians have pending cases with the courts.

6. Judicial Independence and Judicial Accountability: Challenges in Practice

Judicial independence is an important concept in modern day democracy. It heralds the principle of separation of powers, and serves as a check on the possible abuse of executive and legislative action through judicial review. But if the judiciary is independent, are they free to do anything? To what standard should they also be held accountable in order to ensure proper behavior and fealty to the rule of law?

Judicial independence should also be balanced with judicial accountability. As the UN Office on Drugs and Crime states:

> *Even if judges are independent, they need to be accountable to society through transparent procedures. The notion that judges should be independent, in fact, does*

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of Maria Carolina P. Araullo, et al. v. Benigno Simeon C. Aquino III, et al., G.R. No. 209287 (February 3, 2015) (Phil.), https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/58859.

[10] Const., (1987), art. VIII, §11 (Phil.).

[11] Const., (1987), art. XI, §2. (Phil.).

[12] Const., (1987), art. VIII, §10 (Phil.).

[13] Const., (1987), art. VIII, §2 (Phil.).

not imply that they should be free to decide on the basis of their wishes, with no need for justification and no accountability. Rather, "a commitment to judicial independence is fully compatible, at least in the abstract, with a commitment to judicial accountability—that is, to mechanisms that can ensure that judges, being free from any influence, will, in fact, be guided by appropriate considerations in reaching decisions" (Vanberg 2008). Lack of accountability generally raises concerns in terms of the separation of powers: "the judiciary as a corporate body may have excessive control over its own composition, creating a self-protecting caste, or excessive power in interpreting the law, reshaping the legal framework according to values and views shared neither by the public, nor by the other branches of government" (Hack 2004, 9). Indeed, in practice, efforts to increase judicial independence can conflict with attempts to secure judicial accountability and a good balance must be reached and secured. This is not, of course, an easy task (United Nations Office on Drugs and Crime 2020).

6.1. The Judicial and Bar Council and Judicial Independence

The institution of the JBC was welcomed in the 1987 Constitution as a pathway to the independence of the judiciary. Conventional wisdom dictates that because the discretion of the president is now limited to three candidates who were chosen through a vetting process composed of a panel of regular members and *ex-officio* members, then the outcome must be good.

The model of the JBC in the country is a hybrid model, where the composition of the council is a mix of government officials (in this case, coming from the executive and the legislative branches of government) and independent professionals coming from the ranks of retired Supreme Court judges, the bar association, academia, and the private sector. The other prototype is the pure model, where the council or panel is selected from purely non-governmental members. In Canada, the Independent Advisory Board that nominates candidates for the Supreme Court of Canada comes from purely private individuals, although some may have held high positions in government.[14]

The author is not aware of any study that has rigorously studied the performance of the JBC as an institution that promotes judicial independence. This study could do an anonymous poll of sitting judges who are at the receiving end of the vetting process in the JBC and get their opinion on the performance of the council. One cannot assume that by setting up the institution, the purpose has already been achieved. Public administration simply does not work that way. In the absence of empirical evidence, we cannot make a judgment one way or the other. Accordingly, a study on the matter may be in order, considering that 34 years have passed since the council's establishment in 1987.

[14] "Members of the Advisory Board," Office of the Commissioner for Federal Judicial Affairs Canada, last modified September 24, 2018, https://www.fja-cmf.gc.ca/scc-csc/2021/biographies-eng.html.

6.2. Administrative Supervision over the Lower Courts

The shift since 1973 of the administrative supervision of the lower courts from the executive branch to the judiciary is also a hallmark of judicial independence, veering away from possible interference or horse trading between the executive (as the manager of the funds for the lower courts) and the judiciary. However, the shift poses its own set of challenges. The size of the judicial workforce in the lower courts, spread out across the major towns and cities of the country, has been increasing over the years. The number of authorized judge positions in the lower courts is now 2,719 as of December 2020, and on top of that, there are also the clerks of court and court staff that support the work of the judges. The SC has a centralized bureaucracy, unlike most of the departments in the executive branch that have a support office in each of the 17 administrative regions of the country. Each judge requires timely payment of salaries, maintenance of their courtrooms and offices, supplies and equipment for the issuance of orders and decisions, and other necessities.

A judge that has sufficient resources at his/her command, that has a comfortable hearing room with adequate staff, sufficient communication facilities that allow him/her to contact the litigants, the prosecutors, the jailers, and other stakeholders makes for a robust and independent judicial officer. However, my experience as a practitioner has revealed the poor courtroom facilities of judges in some areas—small cramped spaces which double as file storage areas and lack personnel, phones, and working air conditioning.

This situation has become more challenging during the COVID pandemic where the judges have to overcome the constraints of physical distancing and greatly diminished face-to-face contact among the actors in the courtroom, such as the court staff, prosecutors, public defenders, lawyers, and their clients. The other more problematic issue is how to ensure the attendance of detainees in the proceedings without potentially spreading the COVID-19 contagion to the other actors in the courtroom.[15] Video conferencing has been resorted to with mixed results depending on the availability of internet connectivity and the proper equipment in the courts.

In August 2001, the Asian Development Bank approved technical assistance (TA) of USD 1.2 million entitled *Strengthen the Independence of the Judiciary* (Elsie Louise P. Araneta 2021). The approach to judicial independence was to ensure fiscal autonomy and the strengthening of the internal administrative and financial organization of the judiciary. The overarching issue that the TA sought to address was the over centralization of the operations of the SC, especially how it dealt with the lower courts. The TA recommended setting up regional court administration offices that would handle the procurement, finances, personnel, and administrative aspects of court operations without depriving the JBC and the president the power to nominate and appoint judges. The SC even went as far as piloting the RCAO approach in Region 7 (Central Visayas), but after the retirement of then-Chief Justice Davide, the program was not continued. The issue of the decentralization of court operations is a continuing concern.

[15] The high levels of transmission of COVID-19 in jails was a major issue in the early days of the pandemic, and continues to be a concern to date.

6.3. The Security of Tenure of Judges

Judges and justices enjoy security of tenure until the age of 70. This rule has been very much honored within the judiciary over the past years. However, security of tenure should not be equated with sloppy work or, more importantly, with unethical or improper behavior. The fact that the tenure of judges is secure, and their salaries are also secure, need not be an excuse for underperformance and violations of judicial ethics.

The performance of judges is an important aspect of their work, and also secures the independence of the judiciary. Well-performing judges should be rewarded, especially with promotions to the higher echelons of the judiciary, while poorly performing judges should be called to task. Lower court judges are required to submit monthly reports on their disposal of cases, which also includes information on the aging of cases. The only legal time standard for deciding on cases for lower court judges is the three-month period found in the Constitution[16] wherein a judge is mandated to issue a decision, and the three-month period is calculated from the time that the case is submitted for decision (meaning both parties have rested their case and submitted their evidence). However, there is no time standard for the completion of the hearing of civil cases, and it has only been recent that time standards on the continuous trial of criminal cases have been imposed.[17] Under this rule, regular criminal cases need to finish the trial stage in six months.

There is no publicly available record or document that provides information on how these monthly reports on accomplishments and the compliance with the continuous trial system impact the overall performance evaluation of the judges, and whether this information is being used to reward judges with promotions or citations. This author proposes that the information culled from the monthly reports be processed accordingly and fed back to judges internally so that they know their comparative performance relative to other judges.

The other aspect of the performance evaluation system of the lower courts is the multi-dimensional role of a judge. S/he not only decides on cases and clears his/her backlogs, but also manages court staff, the internal processes of the courts, and the various stakeholders who appear in the courtroom such as the parties and their lawyers, prosecutors, public defenders, social workers, detention officials, and the corrections officials. This author proposes that the performance evaluation of judges not only consider their ability to decide on cases, but also take into account and provide metrics for the multi-dimensional aspects of the role of a judge. By so doing, judges maintain awareness of their various roles, and also cognizant of the need to improve on their management of said roles. With these measures, hopefully security of tenure does not equate to poor performance, but rather excellent performance.

The other face of security of tenure is the disciplining of judges for infractions of the code of judicial conduct and other administrative offenses. In July 7, 2020, the Judicial Integrity Board and the Corruption Prevention and Investigation Office were created, with jurisdiction over the justices of the

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16 Const., (1987), art. VIII, §15 (Phil.).

17 Revised Guidelines for Continuous Trial of Criminal Cases, A.M. 15-06-10-SC (effective Sept. 1, 2017) (Phil.), https://sc.judiciary.gov.ph/1480/.

Court of Appeals and the judges of the lower courts, the officials in the Office of the Court Administrator, and other court personnel. Offenses are classified as serious, less serious, and light, and are punishable by dismissal from the service, forfeiture of benefits, fines, censure, and reprimand (for light offenses). The rules spell out clear procedures for the prosecution of these offenses, and also the organization of the board. Serious offenses include bribery, dishonesty, borrowing money or property from lawyers and litigants, and knowingly rendering an unjust verdict.

The discipline of judges due to violations of the code of judicial conduct is not new in the judiciary. The establishment of the JIB now streamlines the process, making jurisdiction much clearer, and establishes a separate office to attend to these matters full time. This move makes the concept of judicial accountability more balanced with the concept of judicial independence.

6.4. The Security of Tenure of Justices of the Supreme Court

The jurisdiction of the JIB only goes as high up as the justices of the Court of Appeals, since the disciplining of justices of the Supreme Court is limited by the Constitution to a process of impeachment. The pertinent provision of the 1987 Constitution reads as follows:

> **ARTICLE XI ACCOUNTABILITY OF PUBLIC OFFICERS**
> *Section 2. The President, the Vice-President, the Members of the Supreme Court, the Members of the Constitutional Commissions, and the Ombudsman may be removed from office on* ***impeachment*** *for, and conviction of, culpable violation of the Constitution, treason, bribery, graft and corruption, other high crimes, or betrayal of public trust. All other public officers and employees may be removed from office as provided by law, but not by impeachment.*

However, this legal principle was recently re-interpreted when then-Chief Justice of the Supreme Court Maria Lourdes Sereno was declared ineligible in her position through a *quo warranto* petition.[18] The saga of the ousting of Chief Justice Sereno actually began by following the process of impeachment, when Atty. Larry Gadon filed an impeachment complaint in the House of Representatives with the endorsement of several members of the House. However, in the middle of the process of reviewing the impeachment complaint and prior to it becoming an actual case to be heard by the Senate, another case was filed by the Solicitor General, this time a *quo warranto* proceeding with the Supreme Court.

The filing of the *quo warranto* petition with the SC drew a very sharp public reaction. The Integrated Bar came out with a strong statement and reiterated the position that the only legal way to remove a member of the High Court was impeachment. The move to oust a sitting Chief Justice via a *quo warranto* petition, to be decided upon by her peers, was simply a mind-boggling proposition and

[18] Republic of the Philippines v. Maria Lourdes Sereno, G.R. No. 237428, (2018), https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/64003. Basically, a *quo warranto* petition seeks judicial recourse in order to determine whether or not a person is holding public office lawfully.

went against the very essence of the principle of checks and balances.

After an acrimonious series of hearings, the SC finally decided, on a very split vote of 8 to 6, to grant the *quo warranto* petition and declare the siting Chief Justice ineligible to hold her office as a justice of the court. In other words, they disqualified her to sit as Chief Justice. This resulted in the ousting of then-Chief Justice Sereno from her post.

The saga of the ouster of Justice Sereno from the Court is not complete without taking into account the strongly worded statement coming from the president himself. His exact words are worth quoting for this paper: "I am putting you on notice that I am now your enemy, and you have to be out of the Supreme Court (Marcelo 2018)." Three months later, the Chief Justice was out of the Supreme Court. Many have perceived this case, the author included, as being a case of executive overreach—a case where the SC bent over backwards to accommodate the wishes of the president to remove a sitting Chief Justice. This is a serious case wherein judicial independence has been highly influenced by the executive branch of government.

A reading of the main opinion and the dissenting opinions reveals strong arguments on both sides. It is not the aim of this paper to dissect the labyrinth of judicial reasoning on this case. However, one thing is clear: the case has effectively re-interpreted the Constitution to mean that *quo warranto* is also an available means aside from impeachment to effectively remove a sitting justice by declaring him or her ineligible for the position for not having passed certain pre-qualifications. The decision itself has weakened judicial independence by allowing the writ of *quo warranto* to become an additional mode of removing a sitting justice of the SC.

One could argue that the Supreme Court is indeed supreme in their judgment, and that what they say is the law, and that is how the allocation of political power works in a constitutional democracy. Others would opine that this decision was in fact a true display of judicial independence. That is true, but the other concept of judicial accountability comes into play. Fealty to the Constitution and the rule of law is the anchor upon which judicial independence must also be measured, and at the end of the day, scholars, the media, and other public stakeholders should be free to debate the pros and cons of this decision (as is the object of this paper). In the meantime, this case law stands, and should be respected until such time that the Court itself reverses its position and declares *quo warranto* no longer a way to question whether or not a sitting justice meets the qualifications for the position.

6.5. Transparency in the Judiciary: The Issue of SALNs

Another sensitive issue that illustrates the link between judicial independence and accountability is the matter of the public disclosure of the Statement of Assets, Liabilities and Net Worth (SALN) of members of the judiciary, and in particular, that of the justices of the Supreme Court. The SALN is a requirement under Republic Act 6713 (Code of Conduct and Ethical Standards for Public Officials and Employees) and mandates the disclosure of certain personal information in order to promote transparency and accountability in the civil service. The pertinent provision of the law is as follows:

Section 8. Statements and Disclosure. - Public officials and employees have an obligation to accomplish and submit declarations under oath of, and the public has the right to know, their assets, liabilities, net worth and financial and business interests including those of their spouses and of unmarried children under eighteen (18) years of age living in their households.

The two documents shall contain information on the following:

(a) real property, its improvements, acquisition costs, assessed value and current fair market value;
(b) personal property and acquisition cost;
(c) all other assets such as investments, cash on hand or in banks, stocks, bonds, and the like;
(d) liabilities, and;
(e) all business interests and financial connections.

The justices of the Supreme Court shall file the SALN with the Clerk of Court, and lower court judges shall file their disclosure with the Office of the Court Administrator. The statement should be filed within 30 days of the assumption of office, and also annually on or before the 30th of April.

The law further states in Sec. 8C:

(C) Accessibility of documents. –
(1) Any and all statements filed under this Act, shall be made available for inspection at reasonable hours.
(2) Such statements shall be made available for copying or reproduction after ten (10) working days from the time they are filed as required by law.
(3) Any person requesting a copy of a statement shall be required to pay a reasonable fee to cover the cost of reproduction and mailing of such statement, as well as the cost of certification.
(4) Any statement filed under this Act shall be available to the public for a period of ten (10) years after receipt of the statement. After such period, the statement may be destroyed unless needed in an ongoing investigation.

RA 6713 seems pretty clear: the SALN should be filed regularly, and will be publicly available for scrutiny. The law does not provide any other conditionalities for the disclosure of this information. However, the Supreme Court, invoking the independence of the judiciary in order to balance the public's right to know vis-à-vis judicial independence, ruled in a particular case as follows:

"In essence, it is the consensus of the Justices of the above-mentioned courts and the various judges' associations that while the Constitution holds dear the right of the people to have access to matters of concern, the Constitution also holds sacred the independence of the Judiciary. Thus, although no direct opposition to the disclosure of SALN and other personal documents is being expressed, it is the uniform position of the said magistrates and the various judges' associations that the disclosure must be made in accord with the guidelines set by the Court and under such circumstances that would not undermine the independence of the Judiciary."[19]

A closer reading of the decision of the Court, based on several requests for the disclosure of their SALNs, offered this particular line of reasoning:

"While the Court expressed its willingness to have the Clerk of Court furnish copies of the SALN of any of its members, it however, noted that requests for SALNs must be made under circumstances that must not endanger, diminish or destroy the independence, and objectivity of the members of the Judiciary in the performance of their judicial functions, or expose them to revenge for adverse decisions, kidnapping, extortion, blackmail or other untoward incidents."

Staunch advocates of the right to information have argued that this rule puts the judicial magistrates in a class of their own, which is not the same standard that applies to the president, the members of the cabinet, or local chief executives such as governors and mayors. They too could be exposed to many risks by disclosing their properties and business connections, but that is precisely the burden of public office. Hiding behind a cloak of secrecy is not acceptable.

The Court ended the case with guidelines on how to secure the SALN of a judge or justice of the Supreme Court, which is quoted in full for the purposes of comparison with other jurisdictions:

"1. All requests shall be filed with the Office of the Clerk of Court of the Supreme Court, the Court of Appeals, the Sandiganbayan, the Court of Tax Appeals; for the lower courts, with the Office of the Court Administrator; and for attached agencies, with their respective heads of offices.
2. Requests shall cover only copies of the latest SALN, PDS and CV of the members, officials and employees of the Judiciary, and may cover only previous

[19] Re: Request for Copy f 2008 Statement of Assets, Liabilities and Net Worth (SALN) and Personal Data Sheet or Curriculum Vitae of the Justices of the Supreme Court and Officers and Employees of the Judiciary, A.M. No. 09-8-6-SC (June 13, 2012) (Phil.) and Re: Request of Philippine Center for Investigative Journalism (PCIJ) for the 2008 Statement of Assets, Liabilities and Net Worth (SALN) and Personal Data Sheets of the Court of Appeals Justices, A.M. No. 09-8-07-CA (June 13, 2012), https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/54826.

records if so specifically requested and considered as justified, as determined by the officials mentioned in par. 1 above, under the terms of these guidelines and the Implementing Rules and Regulations of R.A. No. 6713.

3. In the case of requests for copies of SALN of the Justices of the Supreme Court, the Court of Appeals, the Sandiganbayan and the Court of Tax Appeals, the authority to disclose shall be made by the Court En Banc.

4. Every request shall explain the requesting party's specific purpose and their individual interests sought to be served; shall state the commitment that the request shall only be for the stated purpose; and shall be submitted in a duly accomplished request form secured from the SC website. The use of the information secured shall only be for the stated purpose.

5. In the case of requesting individuals other than members of the media, their interests should go beyond pure or mere curiosity.

6. In the case of the members of the media, the request shall additionally be supported by proof under oath of their media affiliation and by a similar certification of the accreditation of their respective organizations as legitimate media practitioners.

7. The requesting party, whether as individuals or as members of the media, must have no derogatory record of having misused any requested information previously furnished to them.

The requesting parties shall complete their requests in accordance with these guidelines. The custodians of these documents (the respective Clerks of Court of the Supreme Court, Court of Appeals, Sandiganbayan, and Court of Tax Appeals for the Justices; and the Court Administrator for the Judges of various trial courts) shall preliminarily determine if the requests are not covered by the limitations and prohibitions provided in R.A. No. 6713 and its implementing rules and regulations, and in accordance with the aforecited guidelines. ***Thereafter, the Clerk of Court shall refer the matter pertaining to Justices to the Court En Banc[20] for final determination.***

It is indeed a delicate balance between judicial independence and the right of the people to information on matters of public concern. This right is actually included in the Bill of Rights and is very explicit:

Section 7. The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents and papers pertaining to official acts, transactions, or decisions, as well as to government research data

[20] The term *en banc* means that the decision-making process will involve all of the current members of the Supreme Court (usually a majority of 8 justices out of the total 15).

> *used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law.*[21]

This author believes that the right to information takes precedence over judicial independence, since the right to judicial independence is not even an explicit right, and can only be inferred from various provisions which protect judicial security of tenure, fiscal autonomy, administrative supervision of courts, and non-diminution of their budget. From this perspective, one can argue that the more explicit right was uppermost in the minds of the framers of the Constitution and should be accorded higher respect in the hierarchy of constitutional values. Moreover, RA 6713 does not exempt the judiciary, or any office for that matter, from any procedure which limits people's access to the SALNs (since the Constitution allows for limitations as may be required by law). The limitations placed on the access to judicial SALNs is a rule that has been imposed by the Supreme Court and provides a bad precedent, for example, to politicians who may also insulate the disclosure of their SALNs to "people with evil intentions."

Currently, however, these restrictions imposed by the Court remain unchallenged, and if a case is brought to court, it will most likely lose because of the precedent through fiat that the Court has already decreed. This balance between judicial independence and accountability, between fealty to the Constitution and the rule of law, will be a continuing concern in the years to come.

6.6. Continuing Assessment of Judicial Compensation and the Local Government Code

One of the hallmarks of an independent judiciary is the payment of adequate compensation in order to minimize the temptation of judges to accept bribes. In recent memory, one of the key pieces of legislation that improved the salaries of the judges was Republic Act 9227, entitled *An Act Granting Additional Compensation in the Form of Special Allowances for Justices, Judges and All Other Positions in the Judiciary* (October 23, 2003). In the Declaration of Policy, the law states:

> *SECTION 1. Declaration of Policy. – It is hereby declared a policy of the State to adopt measures to guarantee the independence of the Judiciary as mandated by the Constitution and public policy, and to ensure impartial administration of justice, as well as an effective and efficient system worthy of public trust and confidence.*

The passage of RA 9227 was the culmination of a long advocacy campaign by judges to improve the salaries of their officials due to the erosion of their salaries over time (which was fixed by the executive branch of government). The law practically doubled the salaries of the judges through increments of 25 percent over a period of four years.

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[21] Const., (1987), art. III, §7 (Phil.).

The law has been effective in raising the salaries of judges, but does not solve the long term need of the judges to have adequate compensation in order to maintain the independence of the judiciary. This need for regular reviews to ensure adequate compensation should also be viewed together with a provision in the local government code which allows the support of the local government units to local judges and prosecutors, to wit:

> *SECTION. 447. - Powers, Duties, Functions and Compensation. - (a) The Sangguniang Bayan, as the legislative body of the municipality, shall enact ordinances, approve resolutions and appropriate funds for the general welfare of the municipality and its inhabitants pursuant to section 16 of this Code and in the proper exercise of the corporate powers of the municipality as provided for under section 22 of this Code, and shall:*
>
> *(1) Approve ordinances and pass resolutions necessary for an efficient and effective municipal government, and in this connection shall:*
>
> *(xi)* ***When the finances of the municipal government allow, provide for additional allowances and other benefits to judges, prosecutors,*** *public elementary and high school teachers, and other national government officials stationed in or assigned to the municipality.*[22]

Similar provisions can be found in the code that allow the cities and provinces to do the same— provide support to judges and prosecutors.

The author is not aware of any systematic studies on the extent of the support that has been provided to judges, but anecdotal evidence shows that judges sometimes lobby to be appointed to cities that have a generous allowance policy for judges. Many local governments also provide for the buildings, utilities, and communications expenses of courts. Local government officials not only provide allowances to judges, but also sometimes to temporary staff and even travel expenses for the attendance of conventions of the association of judges.

There is a very obvious conflict of interest in these scenarios and possible impairment of judicial independence. We need to have a two-pronged approach to this problem: the establishment of a judicial compensation commission to conduct periodic reviews of the salary of judges, and the repeal of this section of the local government code.

A good approach to the regular review of judicial compensation is the Judicial Compensation and Benefits Commission of Canada. “The Judicial Compensation and Benefits Commission was established under s. 26 of the Judges Act to inquire, at least every four years, into the adequacy of the salaries and other amounts payable to federally-appointed judges under the Act, and into the adequacy of judges’ benefits generally (Canada Judicial Compensation and Benefits Commission 2020).” The commission is composed of three members, one of which is nominated by the Attorney General, another from the

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[22] Local Government Code of 1991, Rep. Act No. 7160, §447 (Phil.).

judiciary, and the third is appointed by the two members and is the Chair of the commission.

Having an independent commission study the adequacy of the compensation of judges and justices is a preliminary step in the final repeal of the pernicious provisions of the local government code that threaten to impair the independence of the judiciary. The SC could requisition an independent study on how this commission could be set up, either within the judicial system or perhaps through legislation for the long-term interest and independence of the judiciary.

6.7. Fiscal Autonomy and the Full Utilization of Funds

The principle of fiscal autonomy has been discussed in the previous section. However, fiscal autonomy is a pyrrhic concept if the funds do not flow adequately and in a timely manner to those who need them the most—the judges and the court personnel who face the litigating public on a daily basis. It is this public that will eventually form an opinion on whether they can trust the judicial system to help them fairly and expeditiously resolve violations of their legal rights.

In the 2019 Annual Audit Report of the Commission on Audit, the constitutional agency tasked with oversight of government spending, the following observation was made regarding the low absorptive capacity of the SC on its infrastructure projects:

> *"Out of the 48 infrastructure projects on the Halls of Justice nationwide for CY (Calendar Year) 2016 to 2019, 39 projects or 81.25 percent were not constructed/repaired, five projects or 10.42 percent were not yet completed since CY 2016, and four projects or 8.33 percent were completed but went beyond the scheduled dates of completion. The causes were due to inadequate planning, slow procurement activities, lack of coordination with LGUs concerned/Department of Public Works and Highways (DPWH) and lack of technical personnel, resulting in idle/unutilized funds of PhP 3.902 billion, denoting a low absorptive capacity of the agency in the efficient and effective utilization of its budgets for infrastructure projects funded under the General Appropriations Acts (GAAs) (Paragraph No. 364)* (Republic of the Philippines Commission on Audit 2019).

Another observation was made by the COA in the same 2019 audit report that now pertains to the ICT program of the judiciary:

> *"Funds totaling PhP 3.515 billion representing 77.52 percent of the total allotment of the PhP 4.534 billion received by the SCP (Supreme Court of the Philippines) from the DBM (Department of Budget and Management) from CYs 2010-2019 for the agency's Enterprise Information System Plan (EISP), remained idle or unutilized as at year end due to non-procurement of the 30 projects costing PhP 3.265 billion out of 38 EISP projects, hence resulted in non-implementation of the projects,*

denoting a low absorptive capacity of the agency in the efficient and effective utilization of its budgets for the projects, as funded under the GAAs (Paragraph No. 395).”

The independence of the judiciary is truly measured not by whether it has fiscal autonomy, but by whether the fiscal autonomy it enjoys is efficiently and effectively utilized to benefit the judges and court personnel spread out all over the country. These two observations in the COA report of 2019 identify the gaps in the efficient management of the funds. When the air-conditioning unit of the courtroom in some far-away province breaks down and the procurement systems in the Court are not robust enough to replace the item quickly, considering the stream of litigants flowing in and out of the courtroom daily, one cannot blame the judge for asking the Mayor of the town or city for some support or donation in order to alleviate the immediate problem s/he faces. The challenge for the Supreme Court is not so much fiscal autonomy, which is already guaranteed under the Constitution, but rather the capacity to deliver timely logistics and support to the judicial frontliners.

The observation of the COA on the amount of unutilized funds for the ICT program of the Court becomes more important due to the need for video conferencing which is now becoming more the norm under the COVID-19 pandemic. Clearly, the transfer of the supervision of the lower courts to the SC and the introduction of fiscal autonomy for the judiciary is just one piece of the puzzle in judicial independence; the other aspect of this puzzle is a robust capacity to deliver goods and services to the people who need them the most.

7. Five Recommendations to Strengthen Judicial Independence and Accountability

7.1. Evaluating the Efficacy of the Judicial and Bar Council

The JBC has been in existence for the past 34 years, and the author is not aware of any scientific study on how the institution has effectively insulated the appointments process from politics, thus achieving the goal of judicial independence and promoting integrity and professionalism in the service. A study should be made in order to improve the practice.

7.2. Strengthening the Management Capacity of the SC

The underutilization of the funds of the SC for its ICT program and for the construction, rehabilitation and maintenance of the courthouses is very concerning. We do not want to see the vicious cycle of the Department of Budget and Management urging the reduction of the funds of the judiciary because of its poor absorptive capacity. The author suggests a revisit of the principles of decentralization as contained in the ADB technical assistance program, and also strengthening of the Office of the Halls of Justice to fast track the construction or refurbishment of courthouses. Other measures suggested by the COA in its full audit report may also be considered.

7.3. Improving the Performance Evaluation Metrics of Judges

The information on court performance at the individual level of the judge is already there. This information just has to be analyzed carefully and serve as one of the inputs to the overall performance of the judges. The author also recommends using the multi-dimensional metrics of judicial performance as a manager of the court processes and of the many stakeholders that appear in court. In this way, security of tenure does not become an excuse for sloppy performance. Superb performance should enhance security of tenure as a judge moves up the career ladder based on both merit and fitness.

7.4. Revisiting the Issue of SALN Disclosure in the Judiciary

The requirement that the disclosure of the SALNs of judges and justice has to be approved by the SC *en banc* practically guarantees a slow process of disclosure of the SALNs due to the heavy workload of the Court. One can even argue that this requirement practically renders nugatory the right of the people to be informed of matters of public concern, and the injunction under RA 6713 to fully disclose the SALNs of all government officials, including the members of the judiciary. If the SC is really serious about respecting the right to information, then the delegation of the approval process to a person or committee lower than the *en banc* could be considered. This way, the approval process could be faster. In addition, the publication of the requests for SALN disclosures and information on when and how such requests have been handled will go a long way towards dispelling the perception that the SC is hiding information that the public is entitled to see.

7.5. Establishing a Continuing Review of Judicial Compensation

The creation of an office that will continually review the level of judicial compensation is an important facet of judicial independence. This removes the *ad hoc* nature of the review of judicial salaries and emoluments, and the element of surprise and unpreparedness inherent in an *ad hoc* process. The best administrative arrangement will have to be studied, including the scope of work and its authorization (legislation, executive order, court circular, or others). However, the core principle remains solid and will strongly support judicial independence.

8. Conclusion: The Epilogue of Mang Juan

After much discussion within the family, Mang Juan decides to migrate to Canada and join his daughter (who has now married another Filipino nurse and will soon have his first grandchild). The prospect of taking care of his grandchild is a pleasant one, and since his daughter is gainfully employed, then he has no worries about living comfortably in Vancouver. He also discovered that the weather in British Columbia is not as bad as in Ontario. As his plane departs, he looks out the window and wonders whether he can claim back the land which gave him life for many years. He no longer has much trust in the judicial system after the judge exhibited partiality to the local politician. However, he still has one

small glimmer of hope that perhaps, only perhaps, on appeal, that justice may be served. ■

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Country Case 3: Sri Lanka

Sri Lanka: Two Paths to Judicial Independence

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1. Introduction

Judicial independence is simply understood as the judiciary administering justice separately from other branches of government. To achieve this end, institutional and operational arrangements, such as (i) procedures and qualifications for the appointment of judges; (ii) security of tenure until mandatory retirement age or the expiry of term; (iii) conditions governing the promotion, transfer, suspension, and cessation of judges' functions; and (iv) the financial security of judges and justice institutions should be guaranteed (UNHRC 1985).

With the evolution of democratic values, the judiciary has taken on a wider role as a key institution that serves as a custodian of public power and a protector of the people's sovereignty. Thus, the judiciary is expected to safeguard human rights and function as the sole arbiter of legal disputes (Swart 2019). Therefore, both positive and negative duties are cast on political and non-political actors to respect and promote judicial independence and integrity.

This article examines the Sri Lankan court system through the lens of judicial independence in six sections. First, it introduces the court structure of Sri Lanka. Second, it traces the historic reception of traditions of judicial independence. Third, it explores the current institutional and operational measures for protecting judicial independence. Fourth, it analyzes challenges to judicial independence in Sri Lanka and their consequences. Fifth, it provides a brief account of Sri Lanka's judicial performance on advancing democratic values, fundamental rights, and willingness to modernize through technological transformation. Finally, it identifies areas for improvement for laws and institutions with the goal of enhancing the independence of the judiciary.

2. Overview of the Court Structure in Sri Lanka

Sri Lanka has a mixed legal system comprising Roman-Dutch Law (RDL), English Common Law, and personal laws. The administration of justice is carried out through an adversarial system. The current court structure is as follows:

ⅰ. Appellate courts comprising the Supreme Court (SC), the Court of Appeal (CA), and Provincial High Courts, which are established under the Constitution.

ⅱ. Courts of First Instance, including High Courts, District Courts, and Magistrate's Courts, which are established by the Judicature Act, No. 2 of 1978.

The SC is the highest and final court of civil and criminal appellate jurisdiction in Sri Lanka. The SC also holds sole and exclusive jurisdiction over constitutional interpretation, determining the constitutionality of bills, protection of fundamental rights, matters relating to elections, and breaches of parliamentary privileges.

The CA has the appellate jurisdiction to correct all errors in fact or in law committed by the High Court or by any Court of First Instance. The CA also has jurisdiction to issue writs and injunctions against administrative actions.

The High Courts exercise original criminal jurisdiction to hear, try and determine an offense wholly or partly committed in Sri Lanka. The High Courts also have the authority to adjudicate habeas corpus applications.

Magistrate Courts exercise original criminal jurisdiction and District Courts exercise original civil jurisdiction.

Apart from the aforementioned courts, other tribunals perform functions of a quasi-judicial nature. These include Boards of Quazis and Labor Tribunals. Their decisions are subject to judicial review by appellate courts by way of writs or appeals.

3. Historical Review

When the Portuguese colonized Ceylon in 1505, the local kingdoms had a multi-tiered judicial system based on local laws and customs, such as Buddhist doctrines and Indian cultural practices (Cooray 2008). This judicial system remained largely free of foreign influence (Cooray 2008) until the Dutch occupation of Ceylon in 1656 (Cooray 1975). The Dutch colonists introduced RDL to Ceylon and established formal courts in Galle, Colombo, and Jaffna.

The British colonized Ceylon in 1796 and selectively introduced English law to certain areas of the law through statutes and judicial activism (Cooray 2003, 31). RDL continued to be the residuary law, which was applied when there was a lacuna in the law (ibid.). Under the British, the administration of justice was entrusted to a hierarchy of courts including the SC, CA, the five provincial courts, and the district courts. While the British initially maintained the courts set up during the Dutch period, through Governor North’s Proclamation in 1799 and the Charter of Justice in 1833, the British gradually introduced a unified system of courts for the entire island (Cooray 2003, 11). The inheritance of English common law principles enhanced the colonial courts’ reputation for independence and professionalism (Cooray 2005). In a prominent case, *in re Mark Antony Lyster Bracegirdle* (Sparrow 2020), the SC

overturned a decision made by the Governor-General and declared that executive power is not absolute and must be subject to judicial scrutiny.

The courts continued colonial traditions of judicial independence after the country gained independence in 1948. The Soulbury Constitution of 1947 contained provisions on the separation between the executive and the judiciary. SC judges were appointed by the Governor-General and were entitled to serve without a reduction of salary until retirement (Cooray 1982). The Soulbury Constitution also introduced a Judicial Service Commission to Sri Lanka to serve as an independent regulator of appointments, transfers, and disciplinary matters of lower court judges. Through these measures, highly qualified judges with lengthy judicial experience served in the courts (International Crisis Group 2009).

The 1972 Constitution, however, undermined the separation of the judiciary from the legislature (National State Assembly) and the executive. The president was empowered to appoint and promote all judges in superior courts without taking seniority or merit into consideration (Arts. 54 and 122), while the Minister of Justice was given broader powers including overseeing the transfer of judges (International Crisis Group 2009). A separate five-bench Constitutional Court was also established (Jayawickrama 2015) to issue rulings at the request of the Attorney General or the speaker of the National State Assembly (S.L. Const. 1972 Arts. 53-54). Further, the legislature could remove judges for misconduct (Arts. 124-129).

The current 1978 constitution continues to vest the executive president with broad powers that could be used to influence the judiciary. These developments caused a decline in judicial independence and increased the potential for political influence, as will be discussed below.

4. Judicial Independence in Sri Lanka

A framework for protecting judicial independence and integrity is provided under the Constitution of 1978 and the Judicature Act. The constitution also provides for the creation of the Judicial Service Commission (JSC), a specialized institution vested with powers of administration over the Courts of First Instance. Under the twentieth Amendment to the Constitution,[1] the JSC comprises three judges of the SC. The Chief Justice is the ex-officio chairperson, and the other two judges are appointed by the president. Interference with the decisions or members of the JSC is a punishable offense, and members of the JSC are granted immunity for acts done in good faith in the performance of their duties (S.L. Const. Art. 111(K), 111 (L)).

In addition to the JSC, the Sri Lanka Judges' Institute (SLJI) was established in 1985 to develop the professional expertise, knowledge, and skills of judicial officers (SLJI Act No. 46 1985). The SLJI has a Board of Management comprising the Chief Justice and two judges of the Supreme Court who are appointed by the president (SLJI Act, section 3).

[1] The twentieth Amendment, which is the latest amendment to the Constitution of Sri Lanka, is a drastic shift from the nineteenth Amendment. Under the twentieth Amendment, powers that were held by Parliament and independent institutions were effectively vested in the executive president, thereby undermining the separation of powers and checks and balances.

4.1. Measures to Protect Institutional Independence

Judicial independence in Sri Lanka is ensured through key safeguards relating to six areas: 1) appointment and promotion, 2) security of tenure, 3) removal or suspension from office, 4) transfers, 5) salaries and benefits, and 6) protection from suit and contempt.

4.1.1. Appointment/promotion of judges

The current constitution, following the twentieth Amendment, vests the president with the power to appoint judges to the SC and the CA upon the observations of the Parliamentary Council (S.L. Const. Art. 107(1)). These appointments are constrained only by stipulated age limits and the number of available vacancies. The president is also empowered to appoint judges to the High Court on the recommendation of the JSC and the Attorney General (Art. 111(2)A). Appointments/promotions of Magistrate's Court and District Court judges are made by the JSC through an established procedure that factors the performance and seniority of judicial officers (Art. 111(H)(1)). The detailed schemes for these promotions, however, are not publicly available.

4.1.2. Security of Tenure

Article 107(5) of the Sri Lankan Constitution provides fixed tenures for superior court judges. Tenures of the High Court and other lower court judges are also prescribed by law.[2]

4.1.3. Removal or Suspension from Office

Judges of the SC and the CA cannot be removed except in cases of proven misbehavior or incapacity (Art. 107(2)). An order from the president for the removal of a judge must be supported by a resolution passed by a majority of the Parliament (S.L. Const. Art. 107(3), Parliamentary Standing Order 84). Judges of the High Court can be removed by the president on the recommendation of the JSC (Art. 111). The JSC is vested with the power to institute disciplinary action against and, if necessary, remove lower court judges (Art. 112).

4.1.4. Transfers

The power to transfer judges of the High Court, District Court, and the Magistrate's Court, as well as other officers of the judicial service including members of the Land Acquisition Board of Review and Boards of Quazis, is vested solely with the JSC.

4.1.5. Salaries and Benefits

The salaries and pensions of SC and CA judges are paid from the Consolidated Fund (Art. 108(1)) and

[2] Section 6(3) of the Judicature Act provides the retirement age for High Court judges at 61 years. As per section 7 of the Judicature Act, the age of retirement of all other judges and magistrates shall be as provided by rules made under the Public and Judicial Officers (Retirement) Ordinance, No. 11 of 1910.

cannot be reduced. Furthermore, any salary increments must be approved by Parliament (Art. 108(2)). The same rule applies to allowances afforded to the JSC. The salaries of judges in the Courts of First Instance can be increased by the cabinet of ministers. For instance, in 2017, the cabinet approved a considerable pay hike for all judges (Department of Government Information 2017).

4.1.6. Protection from Suit and Contempt

Judges are vested with a degree of immunity from suit for acts performed in their judicial capacity, and interference with the judiciary is a punishable offense (Art. 111(C)). Sri Lankan courts have varying powers to punish acts of contempt of court and to prevent unwarranted attacks that undermine the authority of courts (Art. 105).

5. Challenges to Judicial Independence

In the recent past, several political and administrative interventions have presented serious challenges to the independence of the judiciary. These challenges affect three features of the judiciary: 1) institutional independence; 2) financial independence; and 3) the authority and reputation of the courts.

5.1. Challenges to Institutional Independence

The institutional independence of the judiciary is maintained by the implementation of transparent administration processes. However, discretionary appointments and a lack of clear procedures on promotion and removal have posed a threat to the institutional independence of the judiciary.

5.1.1. Appointments

When appointing judges to the superior courts, under the twentieth Amendment to the Constitution, the president is required to seek the observations of the Parliamentary Council, but is not bound by such observations. As such, the president effectively has complete discretion over the appointments of judges to the superior courts. The president's direct and sole discretion over such appointments was only restricted during the operation of the Constitutional Council under the seventeenth and nineteenth Amendments (i.e., from 2001 to 2005 and 2015 to 2020).

These circumstances spurred the trend of appointments to the superior courts based on the discretion of the executive rather than meritocracy and seniority. For instance, Chief Justice Sarath N. Silva, Chief Justice Mohan Peiris, and incumbent Chief Justice Jayantha Jayasuriya were directly elevated from the post of Attorney General over senior judges with longer judicial experience. Chief Justice G.P.S. de Silva, Chief Justice Asoka de Silva, Chief Justice Kanagasabapathy Sripavan, and Chief Justice Priyasath Dep were originally officers of the Attorney General's Department and were later elevated to the superior courts. In fact, in the recent past, only two of Sri Lanka's Chief Justices, Chief Justice Parinda Ranasinghe and Chief Justice Nalin Perera, were career judges commencing their service from the Courts

of First Instance *(see Table 1: Chief Justices Appointed under the 1978 Constitution)*.

Table 1. Chief Justices Appointed under the 1978 Constitution

Chief Justice	Tenure in Office	Notes
Neville Samarakoon QC	1978 - 1984	Member of the private Bar before appointment as Chief Justice
Suppiah Sharvananda	1984 - 1988	Member of the private Bar before appointment as Supreme Court Judge; later elevated to Chief Justice
Parinda Ranasinghe	1988 - 1991	Career judge
Herbert Thambiah	1991 - 1991	Member of the private Bar before appointment as Court of Appeal Judge; later elevated to Supreme Court Judge and Chief Justice
G. P. S. de Silva	1991 - 1999	Officer of the Attorney General's Department before appointment as Court of Appeal Judge; later elevated to Supreme Court Judge and Chief Justice
Sarath N. Silva	1999 - 2009	Attorney General before direct appointment as Chief Justice
Asoka de Silva	2009 - 2011	Officer of the Attorney General's department before appointment as Court of Appeal Judge, and later elevated to Supreme Court Judge and Chief Justice
Shirani Bandaranaike	2011 - 2013	Dean of the Faculty of Law, University of Colombo before appointment as Supreme Court Judge and later Chief Justice
Mohan Peiris	2013 - 2015	Attorney General before direct appointment as Chief Justice
Shirani Bandaranayake	28 January 2015 - 29 January 2015	
Kanagasabapathy Sripavan	2015 - 2017	Officer of the Attorney General's Department until appointment as Court of Appeal Judge, thereafter elevated to the Supreme Court and Chief Justice
Priyasath Dep	2017 - 2018	Officer of the Attorney General's Department until appointment a Supreme Court Judge and later Chief Justice
Nalin Perera	2018 - 2019	Career judge
Jayantha Jayasuriya	2019 - present	Attorney General before direct appointment as Chief Justice

Sources: Attorney General's Department, "History of the Office of Attorney General in Sri Lanka," http://www.attorneygeneral.gov.lk/index.php/history; and Jayawickrama, Nihal. "The Judiciary Under the 1978 Constitution." In *Reforming Sri Lankan Presidentialism: Provenance, Problems and Prospects,* edited by Asanga Welikala, 119-223. Colombo: Centre for Policy Alternatives, 2015.

The number of judges who have been directly appointed to the superior courts from the Attorney General's Department is disproportionately higher than the number of career judges, members of the private Bar, and academics who have received appointments. Furthermore, the composition of the current benches of the Supreme Court and the Court of Appeal demonstrates that the gender gap in the judicial sector is also relatively high. However, it is notable that a higher proportion of the Court of Appeal

justices are appointed from the pool of career justices despite the president regaining the discretionary power under the twentieth Amendment to nominate superior court judges *(see Table 2: List of sitting judges of the Supreme Court; and Table 3: List of sitting judges of the Court of Appeal).*

Under the current constitutional scheme, the executive president has indirect influence over appointments to Courts of First Instance. Such indirect influence is a result of the power of the president to appoint members of the JSC, which recommends appointments to High Courts and makes appointments to the Magistrate's and District Courts.

Table 2. List of Sitting Judges of the Supreme Court of Sri Lanka

Supreme Court Justice	Gender	Year of Appointment	Notes
Chief Justice Jayantha Jayasuriya, PC	Male	2019	Attorney General before being directly appointed as Chief Justice
Buwaneka Aluwihare PC	Male	2013	Officer of the Attorney General's Department before being appointed to the Supreme Court
Priyantha Jayawardena PC	Male	2014	Member of the private Bar before being appointed to the Supreme Court
Wijith Malalgoda	Male	2017	Officer of the Attorney General's Department before being appointed to the Court of Appeal in 2014
Murdhu Fernando	Female	2018	Officer of the Attorney General's Department before being appointed to the Supreme Court
Sithampbarampillai Thurairaja	Male	2019	Officer of the Attorney General's Department before being appointed to the Court of Appeal in 2016
Prithi Pathman Surasena	Male	2019	Officer of the Attorney General's Department before being appointed to the High Court
Gamini Amarasekera	Male	2019	Career judge
A.L. Shiran Gooneratne	Male	2020	Officer of the Attorney General's Department before being appointed to the High Court
Yasantha Kodagoda PC	Male	2020	Officer of the Attorney General's Department before being appointed to the Court of Appeal in 2019
A.H.M.D.Nawaz	Male	2020	Officer of the Attorney General's Department before being appointed to the Court of Appeal in 2014
Janak De Silva	Male	2020	Officer of the Attorney General's Department before being appointed to the Court of Appeal in 2017
Kumuduni Wickremasinghe	Female	2020	Officer of the Attorney General's Department before being appointed to the High Court
A.A.U. Wengappuli	Male	2020	Officer of the Attorney General's Department before being appointed to the High Court
Lalith Dehideniya	Male	2020	Career judge

Supreme Court Justice	Gender	Year of Appointment	Notes
Mahinda Samayawardhena	Male	2020	Career judge
Arjuna Obeysekera	Male	2021	Officer of the Attorney General's Department before being appointed to the Court of Appeal in 2018

Table 3. List of Sitting Judges of the Court of Appeal

Court of Appeal Justice	Gender	Year of Appointment	Notes
President of the Court of Appeal K. Priyantha Fernando	Male	2021	Served as a High Court Judge before being elevated to the Court of Appeal
Nishshanka Bandula Karunarathna	Male	2019	Served as a High Court Judge before being elevated to the Court of Appeal
Sampath Abeykoon	Male	2020	Served as a High Court Judge before being elevated to the Court of Appeal
Neil Iddawala	Male	2020	Commenced judicial career as a Magistrate and later served as Deputy Secretary General of the Parliament before being appointed to the Court of Appeal
Rathnapriya Gurusinghe	Male	2020	Served as a High Court Judge before being elevated to the Court of Appeal
Dr. Ruwan Fernando	Male	2020	Served as a High Court Judge before being elevated to the Court of Appeal
Sampath Wijeratne	Male	2020	Served as a High Court Judge before being elevated to the Court of Appeal
Devika Abeyratne	Female	2020	Served as a High Court Judge before being elevated to the Court of Appeal
P. Kumararatnam	Male	2020	Officer of the Attorney General's Department before being directly appointed to the Court of Appeal
Sobhitha Rajakaruna	Male	2020	Officer of the Attorney General's Department before being directly appointed to the Court of Appeal
Dhammika Ganepola	Male	2020	Served as a High Court Judge before being elevated to the Court of Appeal
K.K.A.V. Swarnadhipathi	Female	2020	Served as a High Court Judge before being elevated to the Court of Appeal
S.U.B. Karalliyadde	Male	2020	Served as a High Court Judge before being elevated to the Court of Appeal
Mayadunne Corea	Male	2020	Officer of the Attorney General's Department before being directly appointed to the Court of Appeal

Court of Appeal Justice	Gender	Year of Appointment	Notes
Menaka Wijesundera	Female	2021	Served as a High Court Judge before being elevated to the Court of Appeal
D.N. Samarakoon	Male	2021	Served as a High Court Judge before being elevated to the Court of Appeal
T. Sashi Mahendran	Male	2021	Served as a High Court Judge before being elevated to the Court of Appeal
M. Prasantha De Silva	Male	2021	Served as a High Court Judge before being elevated to the Court of Appeal
M. T. Mohammed Laffar	Male	2021	Served as a High Court Judge before being elevated to the Court of Appeal
Pradeep Kirthisinghe	Male	2021	Served as a High Court Judge before being elevated to the Court of Appeal

5.1.2. Disciplinary Action and Removal

Since the 1978 Constitution of Sri Lanka was adopted, impeachment proceedings have been instituted against three superior court judges in four instances. All four impeachment proceedings were against chief justices, namely Chief Justice Nevil Samarakone QC (1984), Chief Justice Sarath Nanda Silva (2001 and 2004), and Chief Justice Doctor Shirani Bandaranaike (2012).

The impeachment process against Chief Justice Nevil Samarakone QC was a response to a politically controversial public speech delivered by the chief justice. In an unprecedented move, the government at the time summoned Chief Justice Samarakone before Parliament, but soon realized that the procedural rules to conduct impeachment proceedings, as required by the Constitution, had not been promulgated as yet (Jayawickrama 2015). Chief Justice Samarakone was also set to reach his mandatory age of retirement shortly. In these circumstances specific parliamentary standing orders were adopted overnight to enable the government to swiftly initiate the impeachment process. Based on these standing orders, the Speaker of Parliament appointed a Parliamentary Select Committee (PSC) chaired by Prime Minister Premadasa, to inquire into the conduct of the chief justice and make appropriate recommendations. The select committee reported that the impugned speech by Chief Justice Samarakone was not befitting the holder of the office of chief justice and recommended that appropriate disciplinary measures be considered. This was followed by the passing of a resolution by fifty-seven ruling party parliamentarians against the Chief Justice, culminating in the appointing of another PSC to carry out impeachment proceedings. However, before the PSC concluded proceedings, the Chief Justice reached his mandatory age of retirement (Jayawickrama 2015, 178).

Impeachment proceedings were initiated against Chief Justice Sarath Nanda Silva on two occasions. However, on both occasions, the impeachment proceedings were unsuccessful largely due to intervention by the president. In 2001, when a resolution was brought to Parliament seeking to form a PSC to inquire into a complaint of misbehavior against the chief justice, President Kumaratunga prorogued Parliament. The act of proroguing Parliament automatically terminated the efforts to pass the resolution. In 2004, fresh impeachment proceedings against Chief Justice Silva were almost commenced on the grounds of

misconduct, with the then-prime minister making preparations to constitute a tribunal comprised of judges from Commonwealth nations to inquire into the allegations. However, in February 2004, President Kumaratunga dissolved Parliament and called a general election, thereby terminating the impeachment proceedings (Jayawickrama 2015, 197).

The most controversial impeachment process in Sri Lankan history was the impeachment of Chief Justice Dr. Bandaranayake in November 2012. The impeachment of Chief Justice Dr. Bandaranayake was seen in large part as a politically motivated response to the Supreme Court's Special Determination of the "Divineguma" bill (International Crisis Group 2013). The decision in this case, signed by Chief Justice Dr. Bandaranayake, temporarily blocked legislation that established a new government department that would usurp many provincial powers and bring heavily funded government programs under the control of the economic development ministry, headed by the then-president's brother, Basil Rajapaksa.

The impeachment motion was signed by 117 parliamentarians from the ruling party. The impeachment was heard by an eleven member PSC, of which seven were members of the ruling party. After the hearing's conclusion, the PSC informed Parliament that Chief Justice Bandaranayke had been found guilty of professional misconduct warranting removal from office. Despite the CA nullifying the PSC ruling (Aneez 2013), a motion for dismissal was passed by Parliament and ratified by President Rajapaksa.[3] This incident garnered much international criticism, including condemnation of the procedure on the removal of superior court judges contained in the 1993 parliamentary standing orders (International Commission of Jurists 2013).

In 2018, the parliamentary standing orders were revised to introduce safeguards that ensure impartiality in the procedure to remove superior court judges for misconduct. However, neither the procedure adopted for disciplinary action against lower court judges nor the details of such actions have been made publicly available. Recently, the JSC declined to provide information about the nature of complaints received against Quazi judges in response to a right to information request (Zahid v. Judicial Service Commission). This lack of transparency makes it impossible to determine if such procedures are indeed fair and proportional.

5.1.3. Promotions

Post-1978, promotions in the judiciary appear to be influenced by political factors. For example, when the office of chief justice laid vacant in 1988, the most senior judge, Justice Raja Wanasundera, was passed over (Jayawickrama 2017). It was widely speculated that the decision to pass over Justice Wanasundera was primarily influenced by his dissenting judgment in the Special Determination of the politically controversial thirteenth Amendment bill (Jayawickrama 2017). Further, in 1999, upon the retirement of Chief Justice G.P.S. de Silva, President Kumaratunge appointed Attorney General Sarath N. Silva, superseding five senior judges, including judges with over a decade of experience in the SC (Jayawickrama 2017). More recently, President of the CA Justice Sriskandarajah, who presided over the bench that quashed the proceedings of the PSC that recommended Chief Justice Dr. Bandaranayake's

[3] Chief Justice Bandaranayke was later reinstated in 2015.

removal, was repeatedly superseded by his junior colleagues for promotion to the SC (Jayasuriya 2014).

There does not appear be a detailed procedure with respect to the promotion of judges in the Courts of First Instance, which are carried out by the JSC. The lack of a detailed procedure has led to speculation that political factors influence routine promotions of judges in the Courts of First Instance. For instance, repeated allegations were made against former Chief Justice Sarath Nanda Silva, in his capacity as ex-officio chairperson of the JSC, of discrimination against judges who delivered judgments that were contrary to the views held by the chief (International Crisis Group 2009, 14-15). In August 2021, controversy arose relating to a webinar organized by the Judges Training Institutes (JTI) titled "Matters relating to judicial proceedings in the context of the COVID-19." According to a letter circulated in the media, the JSC informed magistrates that "failure to participate in this webinar will be taken into consideration when recommendations are made for promotions, annual salary increments, foreign training, and appointment to High Court" (The Morning 2021), effectively compelling magistrates to attend the webinar. News reports claim that at said webinar, the magistrates had been instructed to use certain provisions in the Criminal Procedure Code to control protestors and public gatherings in light of the COVID-19 pandemic (The Morning 2021; News First 2021). This webinar was therefore perceived as an affront to the magistrates' independent exercise of judicial power, as well the freedom of association of the public of Sri Lanka. In response to this controversy, the Bar Association of Sri Lanka (BASL) and several magistrates who participated in the event expressed serious concerns about the ramifications of influencing the independence of the magistrates through compulsion and threats to their career prospects (The Morning 2021).

5.2. Challenges to Financial Independence

There is a need for adequate budgetary allocations and timely revisions to meet the growing demands of the Sri Lankan judicial system (Sectoral Oversight Committee 2017). In 2016, the UN Special Rapporteur on the independence of judges and lawyers highlighted the need for remuneration for Sri Lankan judges to include privileges that ensure decent living standards for judges and their immediate families (UNHRC 2017). However, neither the procedure adopted for regular salary revisions nor the details of such a mechanism are publicly available.

5.3. Other Factors that Undermine the Authority and Reputation of the Courts

Other systemic issues have significantly impacted the authority and reputation of courts in the eyes of the public. Erosion of public trust and confidence in the judiciary can have serious repercussions on the rule of law and public order.

5.3.1. Presidential Power to Assign other Duties to Sitting Judges and Confer Post-retirement Benefits

The president is constitutionally authorized to assign any other appropriate duties or functions (under any written law) to a superior court judge. Moreover, a judge of the superior courts is required to obtain the

written consent of the president to engage in "any other office or accept any position of profit." Successive presidents have used these provisions to appoint sitting judges to Presidential Commissions of Inquiry. For instance, President Sirisena appointed SC Justice Prasanna Jayawardena to the Commission of Inquiry on the Treasury Bonds in 2017, and President Gotabaya Rajapaksa appointed SC Justice Janak De Silva and CA Justice Bandula Karunaratne to the Commission of Inquiry on the Easter Sunday Attacks in 2020. Several retired and sitting judges in Sri Lanka have also been nominated by the president to serve in the apex courts in Fiji (Menon 2019). There is a lack of transparency in nominating judges for such posts, and as such, they appear to be discretionary. Such benefits may influence judges, which could potentially compromise their independence.

5.3.2. Law Delays

In recent history, the Sri Lankan judiciary has attracted criticism due to excessive delays in serving justice. In 2017, a parliamentary report revealed that it takes the courts nearly seventeen years to conclude a case of a serious crime—approximately ten years between the commission of the crime and judgment, and seven more years for the appeal process (Sectoral Oversight Committee 2017). Technological improvements that can reduce bureaucracy and expedite proceedings, such as e-filing and virtual hearings, were only very recently introduced during the COVID-19 pandemic *(see Table 4: District and Magistrate Court Backlogs)*.

Table 4. 2019 District and Magistrate's Court Cases

Court	No. of Cases Pending at the Beginning of 2019	No. of Cases Instituted during 2019	No. of Cases Disposed of during 2019	No. of Cases Pending at the End of 2019
Magistrate's Court	464,011	840,717	838,972	464,098
District Court	206,837	97,469	75,219	229,087

Source: Judicial Service Commission Secretariat, *Annual Performance Report of the JSC - 2019.*

5.3.3. Intimidation and Slander by Politicians and Media

It is the duty of the citizenry, including politicians, to respect judicial decisions and refrain from any act or omission that frustrates the proper execution of such decisions. In Sri Lanka, political actors use two specific ways to express disrespect or sometimes dilute the public importance of judicial decisions: (i) the use of state power and resources to defeat the purpose of the decision; and (ii) the intimidation of judges through slander or baseless allegations.

The use of state power and resources to defeat the purpose of judicial decisions has become a norm under the executive presidency. There are numerous instances where the respective governments endorse illegal acts committed by public officers and grant presidential pardons for political allies who were the culprits in high-profile cases (Lelwala 2020).

Politicians often endorse the illegal acts of public officers in order to ensure that public officers comply with political directives without fear of legal sanctions. For instance, in 1983, President

Jayewardene promoted a police officer to the rank of Assistant Superintendent of Police just four days after the Supreme Court declared that the said police officer assaulted a group of citizens at an anti-government protest and thereby infringed their fundamental rights (Ratnasara Thero v. Udugampola, 1983). In the recent past, former Secretary to the President Lalith Weeratunga and former Telecommunications Regulatory Commission Director General Anusha Pelpita were also elevated to senior government positions immediately after they were acquitted by the Court of Appeal that previously convicted the individuals for the illegal distribution of "Sil" cloth to temples island-wide parallel to the presidential election campaign of the former President/incumbent Prime Minister Mahinda Rajapaksa (Daily FT 2020).

Presidential pardons are another tool used by the executive to undermine the authority of the judiciary. In the recent past, presidents have granted highly controversial pardons which have contributed to an erosion of public confidence in the judicial system. Incumbent President Gotabaya Rajapaksa released former minister and close political ally Duminda Silva, who was serving a death sentence imposed by a High Court Trial-at-Bar and affirmed by a five-member bench of the Supreme Court (Vithanalage Anura Thushara De Mel v. The Attorney General, 2016). President Rajapaksa also granted a pardon to former army officer Suni Ratnayake, who was sentenced to death for the Mirusivil Massacre, an emblematic incident of military abuse during armed conflict (Ladduwahetty 2021). Former President Maithripala Sirisena granted two such controversial presidential pardons during his tenure. In May 2019, he pardoned the secretary general of the radical Sinhala-Buddhist group Bodu Bala Sena, Venerable Galagoda Aththe Gnanasara Thera, who was serving a six-year prison sentence for contempt of court (Galagodaaththe Gnanasara v. Hon. Attorney General). Close to the end of his tenure, President Sirisena provided yet another controversial presidential pardon to a convict in the Royal Park murder case (Jayamaha V. Attorney General). The pardoning of Mary Juliet Monica Fernando, the wife of a former Minister of Parliament, is another example of a controversial pardon. She was sentenced to death for a double murder in 2005. Subsequently, on International Women's Day in March 2009, former President Mahinda Rajapaksa granted her a presidential pardon (Lelwala 2021). Although the power to pardon is theoretically vested in the executive as a check on the powers of the judiciary, the use of such power in furtherance of political interests severely erodes the authority and reputation of the Sri Lankan judiciary.

Although investigative journalism is credited with exposing some deficiencies of the judiciary (Iven 2021), reporting on judicial proceedings should not be partial or slanderous of judicial officials or parties. However, certain media institutions have a reputation for heavily reporting judicial proceedings in a manner that is prejudicial to certain parties or that casts the judiciary as biased. These unproven allegations are varied and have included professional misconduct, religious extremism, sexual misconduct, and cases of foreign interference. In most instances, the perpetrators of unethical reporting on court proceedings face no consequences. However, two notable instances where commenting on court proceedings led to convictions of contempt of court were against opposition politicians (Sunday Times 2021).

6. The Performance of the Judiciary on Key Parameters

This section briefly analyzes the recent performance of the judiciary with respect to key judicial pronouncements over the last three years that 1) upheld democracy and the Constitution; 2) safeguarded individual liberty and the rights of minorities/vulnerable groups; 3) indicated a willingness to modernize through technological transformation; and 4) indicated preparedness for emergency responses.

6.1. Judicial Record on Safeguarding Democracy and the Constitution

In the recent past, the apex courts have displayed a mixed record in terms of safeguarding democracy and the Constitution. In 2018, the SC and the CA set aside proclamations by former President Maithripala Sirisena to prematurely dissolve Parliament, arbitrarily appoint a new cabinet, and call for a snap election, which sparked a "constitutional coup." In the Supreme Court, a seven-judge bench declared that the proclamation of the president was unconstitutional and held that the president could not dissolve Parliament until four and half years had elapsed, as provided for by the Constitution (Sampanthan v. Attorney General). Simultaneously, and pursuant to a writ application filed by 122 parliamentarians of the ruling coalition at the time, the CA had issued an interim injunction precluding the interim cabinet arbitrarily appointed by President Sirisena from functioning until the Supreme Court made a final determination on the legality of the president's proclamation (CA Writ Application 363/2018). Both of these decisions reasserted the principle that all public authorities and functionaries, including the executive president, must function according to the law and the Constitution (Gomez 2019). These decisions by the superior courts were commended for safeguarding the tenure of Parliament and thereby the sovereignty of the people through the restriction of powers historically held by the executive president.

After the change of government in 2019, petitions were submitted to the SC with respect to reviewing the constitutionality of two critical pieces of legislation. The first of these was the bill of the twentieth Amendment to the Constitution, against which thirty-nine petitions were filed in the SC. The bill sought to vest the executive president with broad powers and reduce several checks and balances. Despite the far-reaching implications of the bill owing to several clauses inconsistent with the Constitution, the SC determined that only four clauses of the bill required the approval of the people via a referendum, while the remaining clauses could be passed with a two-thirds majority in Parliament. It was noteworthy, however, that a clause in the bill seeking to vest the president with immunity from infringements of the people's fundamental rights was determined to require approval through a referendum, as the people's entitlement to seek relief against infringements of their fundamental rights was declared absolute and a direct expression of the peoples' sovereignty (The Island 2021).

The second bill was the Port City Economic Commission Bill, which sought to establish a special regulatory body with vast powers to control the economic and commercial affairs within the Port City in Colombo. The bill was met with strong opposition, with nineteen petitions being respectively filed in the SC against it. Pursuant to comprehensive submissions made on behalf of and against the bill, the SC determined that if the bill was enacted in its original form, it would effectively undermine the sovereignty of the people and the country's territorial integrity. It was further determined that several clauses usurped

legislative power from the parliament and violated the fundamental rights of the people. The SC determined that thirty-five clauses of the bill were inconsistent with the Constitution, with nine clauses requiring approval through a referendum and the remaining twenty-six clauses requiring a two-thirds majority in Parliament.

Both bills were subsequently enacted after being amended to comply with the SC determinations. Nevertheless, the passage of these bills has received much criticism with respect to their implications for the separation of powers and the system of checks and balances.

6.2. Safeguarding Individual Liberty and the Rights of Minorities/Vulnerable Groups

In terms of upholding rights and liberty, the SC made several pronouncements condemning torture and deaths in custody, upholding the rights of persons with disabilities, denouncing corporal punishment as a justifiable mode of chastisement, upholding freedom from environmental degradation, and calling for the enhancement of due process.[4]

However, the Sri Lankan judiciary has shown less inclination to be progressive in their approach to safeguarding minority rights. In December 2020, the SC dismissed a number of petitions filed against a health directive that authorized the cremation of all COVID-19 victims, regardless of their religious beliefs or last wishes. This health directive was challenged on the basis that it undermined the freedom of minority groups, particularly the Muslim community, to manifest their religious beliefs through the disposal of their remains according to their beliefs. This decision of the SC, which was delivered without evaluating the merits of the petitions, was highly criticized as enabling the executive to undermine the fundamental rights of minorities.

Past decisions of the SC that have undermined the rights and protections afforded to minorities reveal two judicial trends: i) deference to restrictions based on perceived public security concerns, or ii) consideration of perceived political threats.

The first trend envisages the courts' hesitation to challenge or strictly scrutinize the restriction or suppression of individual rights or intervene when fundamental freedoms have been infringed (for example, the cases of Amirthalingam 1976, Tissainayagam 2008, De Saram 2002 and Navasivayam 1987) in light of public security. However, in some instances (such as the cases of Padmanathan 1999, Weerawansa 2001 and Machchavallavan 2005) the judiciary has shown its willingness to grant relief and acknowledge the injustice caused to individuals, although systemic injustices caused to the minority community in concern were not strictly dealt with by the court in these cases.

The second trend envisages instances where the judiciary appeared to have been influenced by

[4] Nandasenage Lalantha Anurdha v. Inspector of Police, Anuradhapura, SC (FR) Application 396/2013, SC Minutes of June 29, 2020; Rathnayake Tharanga Lakmali v. Niroshan Abeykoon, SC (FR) Application 577/2010, SC Minutes of December 17, 2019; Dr Ajith Perera v. Minister of Social Services and Social Welfare, SC (FR) Application 273/2018, SC Minutes of April 18, 2019; H.W. Karunapala and Others v. J.P.K. Siriwardhana, SC (FR) 97/2017, SC Minutes of February 12, 2021; Ravindra Gunawardena Kariyawasam v. Central Environmental Authority, SC (FR) Application 141/2015, SC Minutes of April 4, 2019; Landage Ishara Anjali v. Waruni Bogahawatte, SC (FR) Application 677/2012, SC Minutes of June 12, 2019; Hondamuni Chandima v. Inspector Malaweera, Ambalangoda Police Station, SC (FR) 242/2010, SC Minutes of April 30, 2021.

perceived political threats or repercussions to the state. For instance, the charges behind the journalist Tissainayagam, who was sentenced to twenty years imprisonment under the PTA, were based on the firm belief that he was funded by the LTTE (Guneratne, Jayawardena, and Gunatilleke 2014). In a separate incident where students of the University of Jaffna were arrested, it was alleged that the accused persons were supported by the Tamil Diaspora, which placed the case at a "higher threat level," and thus they were indicted for more severe charges (Guneratne, Jayawardena, and Gunatilleke 2014, 270-271).

6.3. Willingness to Modernize through Technological Transformation

Sri Lanka has been slow to adopt technological tools to improve case management and improve accessibility to the justice sector. The slow adoption of technology by the justice sector was observed despite major delays in case disposal by the courts of Sri Lanka. The Ministry of Justice has taken steps such as increasing the number of cadre positions in the Attorney General's Department, increasing the number of Judicial Officers, and building new courthouses as a means to modernize the court system (Ministry of Justice 2019).

Against this backdrop, many researchers reveal that "justice sector delays are partly attributable to the traditional nature of record keeping, such as handwritten notes and files, which remain in a hard copy format during the investigation and the trial" (Silva 2019). Currently, these manual methods give limited accessibility and transferability across the actors in the justice administration. Better use of digital technology would help save time and make the procedures more transparent and accessible to both lawyers and litigants.

Presently, Sri Lankan courts provide minimum digital facilities through their web portals. For instance, the recent Supreme Court rules enable lawyers to make written submissions through e-filing methods, and allow petitioners to file fundamental rights petitions through the Supreme Court website (Widanage and Indathissa, 2019). In addition, the public was provided digital access to the latest judgments, circulars, and notices through the Supreme Court and the Court of Appeal websites.

A court automation project is the latest initiative by the Ministry of Justice and will be implemented from the end of 2021. The project will be conducted in three phases with the aim of digitizing all of the courts in the country (Perera 2021). Owing to the current COVID-19 situation, the Ministry has already initiated short digitization tasks to fill the urgent needs in the system. Thereby, as of May 2021, thirty-five video conference facilities that include twenty-three courthouses and twelve prisons have been set up across the country (Perera 2021). Currently, these digitalization processes mainly focus on the courts. There still appears to be no cohesive strategy to gradually adopt technological advancements across key agencies such as the Sri Lanka Police, the Judicial Medical Officer, and other governmental departments (Silva 2019).

6.4. Preparedness for Emergency Responses including the COVID-19 Pandemic

With the unprecedented challenge presented by the COVID-19 pandemic, the Sri Lankan judiciary has adopted numerous measures to ensure the continued administration of justice. Both appellate courts and

the Courts of First Instance adopted measures to respond to the challenges presented by COVID-19 restrictions. However, prevailing delays due to the postponement of cases, lack of guidelines, and a lack of facilities in which to conduct virtual hearings and discretionary determination of cases to be heard on an urgent basis all become factors that undermined the right to a fair hearing during judicial proceedings (Verité Research 2021).

6.4.1. The Appellate Courts

Amidst the first and second COVID-19 waves, both SC and CA proceedings were suspended for a prolonged period of time. The courts have taken interim measures to hear urgent matters while rescheduling all other cases. In April 2020, the apex courts adopted a number of measures to recommence its operations. These measures include scheduling and calling cases on a staggered basis, allocating specific time slots for cases, and limiting attendance in court to only counsel/attorneys-at-law (Supreme Court 2020). In October 2020, the Supreme Court also introduced pre-hearings to streamline cases that were to be fixed for argument and created a designated court for calling/mention matters. With effect from February 15 and March 1, 2021 respectively, the Supreme Court (Extraordinary Gazette No. 2212/54 2021) and the Court of Appeal (Extraordinary Gazette No. 2216/8 2021) adopted electronic filing and urgent digital virtual hearings rules that would be applicable in the event of inability to hold conventional physical hearings due to any reason prejudicial to national security, public safety, or the order and security within court precincts. It was through these rules that, for the first time, the apex courts of Sri Lanka formally approved the use of remote technology to conduct hearings during public health emergencies.

6.4.2. The Courts of First Instance and The Tribunals

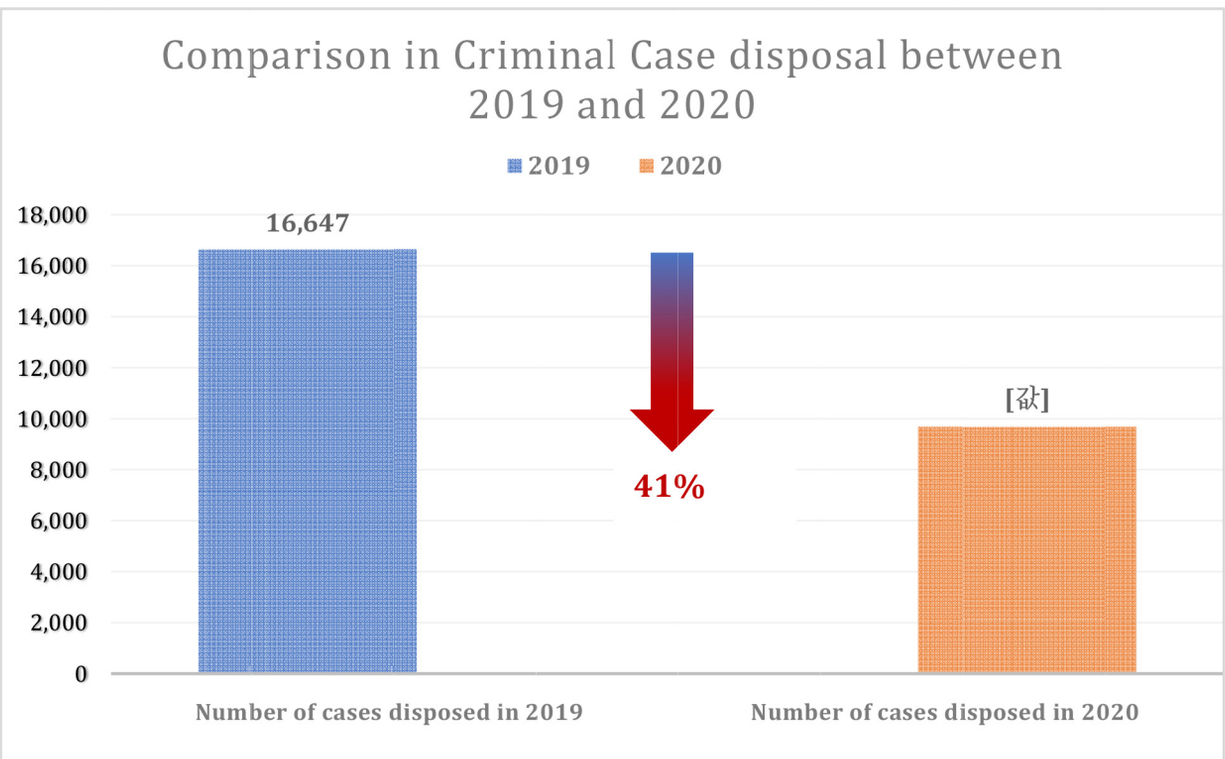
Between March and May 2020, the JSC issued several circulars containing directions and instructions on how the courts were to proceed in light of the COVID-19 restrictions (JSC Secretariat 2020). The circulars were initially issued on a short-term basis and later were extended with revisions in accordance with the changing circumstances. These circulars sought to suspend regular hearings and limit hearings for urgent cases such as bail applications during lockdown periods. Importantly, magistrates were encouraged to use virtual means such as Skype to conduct online hearings of bail and remand applications (JSC/SEC COR: 1 2020). Thus, in May 2020, Sri Lankan courts used video conferencing technology to conduct bail hearings for the first time (Newsfirst.lk 2020). In November 2020, a process to e-file at the High Court was also introduced (Sunday Times 2020). The procedure provided the parties with the ability to opt for virtual hearings of bail applications.

The JSC also issued strict timeframes for rescheduling bail application hearings, and judges were required to strictly adhere to the conditions prescribed in the circulars (circular bearing No. JSC/SEC COR: 4 2020). The purpose behind this was to reduce the number of persons languishing in remand custody. Similar circulars were issued by the JSC during the second and third waves of COVID-19.

Notably, it took the apex court almost one year from the day on which Sri Lanka experienced its first lockdown to set up procedures for virtual hearings. In addition, it is clear that the other measures

introduced by superior and lower courts have mostly been implemented on an ad hoc basis to hear urgent and exceptional cases while rescheduling others at the discretion of the judge. The general aim of these measures is to suspend court proceedings rather than to encourage courts to explore practical solutions to conduct and continue hearings safely. Consequently, the number of criminal cases that were disposed of in 2020 was significantly lower than the number of cases disposed of in 2019 *(see Table 5 for the comparison in criminal case disposal between 2019 and 2020)*. This will contribute to the existing backlog of cases exacerbating further delays in the future.

Table 5. Comparison in Criminal Case Disposal between 2019 and 2020



Sources: Verité Research, "Due Process and Preparedness for Public Emergencies: Lessons for Sri Lanka, From the COVID -19 Pandemic," June 2021. See also "AG's Dept concludes 16,647 criminal cases in 2019," Daily News, January 1, 2020; "AG Concludes Action regarding 9688 Criminal Cases," NewsFirst.lk, November 24, 2020.

7. Conclusion and Areas for Improvement

7.1. Conclusion

The legal and administrative framework of the Sri Lankan courts system, includes safeguards that are intended to ensure and protect the independence of the judiciary. However, several gaps and weaknesses in these safeguards have made the judiciary vulnerable to political influence. Structural issues and gaps in capacity that prevail in the justice sector have also undermined the efficiency and authority of the judiciary. These challenges have continued to impact the judiciary's capacity in fulfilling its role as the final mediator of disputes and the ultimate protector of legal rights and interests of the people of Sri

Lanka.

7.2. Areas for Improvement

As stated before, the independence of the Sri Lankan judiciary is undermined by gaps and weaknesses in institutional safeguards, as well as deficiencies in capacity and efficiency. Thus, protecting and strengthening the independence of the judiciary necessitates reforms in institutional frameworks, financial autonomy, and technical capacity. To this end, this sections identifies a number of measures that can be adopted by the Sri Lankan justice sector for the purposes of protecting and strengthening the independence of the judiciary. These measures are divided into two categories: 1) core measures; and 2) auxiliary measures.

7.2.1. Core Measures

The measures categorized as core measures are the measures that deal with institutional safeguards that are critical in safeguarding the judiciary from political and external influences. These measures can broadly be divided as measures to enhance 'institutional independence' and measures to enhance 'financial independence'.

7.2.1.1. Measures to Improve Institutional Independence

A central issue that prevents justice sector reform in Sri Lanka is the lack of transparency in the justice sector. Considering that improved transparency can drive discourses on the gaps and weaknesses in judicial independence in Sri Lanka. Thus, internal and external measures to improve transparency are required.

(i) Internal measures to promote judicial independence

In order to enhance transparency, the JSC should be encouraged to proactively disclose (in keeping with the Right to Information Act of 2016) the processes for judicial appointments, transfers, promotions, and removals publicly accessible. The JSC should also consider establishing a transparent mechanism that would enable the public to file their grievances and complaints on judicial misconduct. Finally, feasible options should be explored in the possibility of diversifying JSC membership to include experienced judges, practitioners, and academics.

(ii) External measures to promote judicial independence

The Ministry of Justice (MOJ) is a key stakeholder in the Sri Lankan justice sector. The MOJ is responsible for the formulation and implementation of policies, plans, and programs necessary for the efficient administration of justice in Sri Lanka. Therefore, utilizing this administrative body to improve the following areas would contribute towards promoting judicial independence in Sri Lanka. These measures are as follows:

ⅰ. Improving communication and online visibility to enhance engagement with the public through maintaining up-to-date official websites and social media accounts that regularly and transparently disclose updates on caseloads, court improvements, and other developments.

ⅱ. Issuing media guidelines about reporting on ongoing judicial proceedings. This would focus on maintaining accurate and unbiased information about ongoing trials and verdicts to the press.

7.2.1.2. Measures to Improve Financial Independence

In the past, the revision of the salaries of judges have been stagnant for. Thus, the formation of an independent committee tasked with making recommendations on salary revisions, should be considered. Such a committee can be entrusted with the duty of regularly reviewing the salaries and conditions of service of judges, and make due recommendations to parliament to provide salary increments and other financial benefits when necessary.

7.2.2. Auxiliary Measures

Since improving the capacity of the judiciary is also necessary to ensure and protect the independence of the judiciary, taking auxiliary measures that aim to develop technical capacity and efficiency is essential.

ⅰ. Streamline the use of legal technology in the administration of justice.

Sri Lanka has not fully introduced legal technology in the administration of justice. Sri Lanka's predominant reliance on physical and manual processes in the administration of justice has resulted in slow case disposals and excessive delays in delivering justice, which has eroded public confidence. The Covid-19 pandemic further demonstrated that it is vital that judiciaries fully adopt and implement digital infrastructure to enable virtual measures such as e-filings and virtual hearings, to address the circumstances where conventional in-person hearings are not feasible. Therefore, the adoption and implementation of legal technology must be prioritized by the justice sector, with a view to using digital solutions to challenges created by physical/manual processes.

ⅱ. Introduce the necessary processes to provide technical, research, and logistical capacity to the judges, by providing human and material resources.

At present, judges are severely overburdened with high case rolls and insufficient resources. In order to administer justice in manner than is cost-efficient for both the judiciary and litigants, judges should be provided with support staff and other logistical facilities, including access to academic resources and repositories. The specific needs of specific classes of judges, based on their current workload and resources, should be independently analyzed. Based on these needs, schemes should be adopted to provide overburdened judges was qualified support staff. The requirement for qualified support staff can be sustained by creating a judicial administrative service, that serves to provide administrative and research assistants to judges. Such measures are likely to assist judges in

effectively managing their professional responsibilities, including the conclusion of cases in a timely and efficient manner, thereby promoting judges' independent thinking. ■

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