



[ADRN Online Seminar] Assessing the State of Judicial Freedoms in Asia: Exploring Some Critical Reform Areas

## The Maintenance of Judicial Integrity: The Importance of Judicial Independence in Protecting Justice for All

### I. Overview

**What reforms are necessary to maintain an efficient system of checks and balances of the constitutional division of powers in Asian democracies?**

Variances exist among the justice systems of Asian democracies. The judiciaries of Sri Lanka, the Philippines, and India, upon independence, have evolved in various ways. The formerly colonial systems of the judiciary have gone through many amendments and have influenced the judiciary's performance over the past years. How has the judiciary been able to respond to the powers of the executive branch and where does judicial independence stand today?

During this seminar, ADRN members from Sri Lanka, the Philippines, and India discussed the trends and trajectories of judicial powers in their countries and the key challenges faced by the judiciary, while addressing its constitutionally mandated responsibilities. The panelists further shared policy recommendations to strengthen the autonomy and effectiveness of the judiciary in their own countries and the larger Asian region.

### II. Different Forms of Justice Systems in Asian Democracies

#### The Philippines

- **A Three-Tiered Hierarchy:** The Philippines has one Supreme Court with 15 justices led by the Chief Justice. There is a three-tiered hierarchy of Courts in the Philippines – the first tier composed of a series of trial courts, the second tier composed of the appellate courts, and the third tier composed of the Supreme Court.

#### Sri Lanka

- **The Appellate Courts and the Courts of First Instance:** The Sri Lankan court system is composed of two courts – the appellate courts comprising the Supreme Court, the Court of Appeal, and Provincial High Courts. Then, there are the Courts of First Instance including High Courts, District Courts, and Magistrate's Courts established by the Judicature Act, No 2. 1978. The District Courts and Magistrate's Courts adjudicate primary jurisdiction over civil and criminal matters. In addition to that there are administrative tribunals and other tribunals that have judicial power over certain cases.



### India

- **A Single Integrated System:** Upon independence in 1947, India established a full judicial system. India follows a single integrated system in which the Supreme Court is the highest court of the land followed by the High Courts, District Courts, and tribunals. The judiciary appoints itself and the higher judiciary has a collegium system in which five senior judges appoint the judges of the Supreme Court and the high courts. The judiciary is provided with autonomy and immunity from executive interference and has expansive interpretative power.

### III. Judicial Independence in Asian Democracies

#### The Philippines

- **Judicial Independence Inferred from the 1987 Constitution:** While it remains obscure whether judicial independence is guaranteed under the most recent constitution of 1987, the independence of the justice system can be inferred from the concepts laid down in the decision of the Supreme Court – decisional or adjudicative independence and institutional independence of the Court.
- **The Four Pillars of Judicial Independence:** Judicial independence is maintained in the Philippines through four pillars. The first pillar involves depoliticizing the appointment process for judges. The Judicial and Bar Council (JBC) is a non-political, non-partisan, and a multi-sectoral body instituted to recommend a shortlist of three names for each vacant position in the judiciary after a process of rigorous vetting to the appointing authority (the President). The second pillar pertains to the administrative supervision of the lower courts. Prior to 1973, the Department of Justice had supervision and control over the lower courts. However, under the 1973 Constitution, the supervision of the lower courts and personnel shifted to the Supreme Court. While the centralization of management stands in favor for the maintenance of judicial independence, it also poses challenges in aptly running a huge bureaucracy with several Lower Courts and appellate courts. The third pillar is fiscal autonomy. In the current constitution, fiscal autonomy is assured via a provision stating that the judiciary should enjoy fiscal autonomy and that the budget may not be reduced by the legislature. Lastly, the justice system of the Philippines guarantees the security of tenure for the judges and justices. A judge can sit in the bench until he or she reaches the age of 70 and cannot be removed except for cause. For judges and justices of the appellate courts, the Supreme Court has recently promulgated a rule on the discipline of judges through the Judicial Integrity Board (JIB).

#### Sri Lanka

- **The 1978 Constitution and the Judicature Act as the Basis of Judicial Autonomy:** The constitution of 1978 and the Judicature Act provide the framework for judicial independence in Sri Lanka. The constitution laid the groundwork for the Judicial Service Commission (JSC), composed of the Chief Justice and other two Supreme Court judges and ensures that undue interference with the JSC is a punishable offense under the constitution. In addition to the JSC, the Sri Lanka Judges' Institute was created to serve as an institution that develops the career capabilities of judges through frequent seminars and training programs. The constitution introduced a number of measures to ensure that the Supreme Court and other courts function independently. The Supreme Court in particular enjoys greater independence over constitutional matters. For example, it had been able to uphold



democratic procedures in 2018 when the President decided to dissolve the parliament; the Supreme Court unanimously disapproved the president's decision and claimed that the presidential decision was unconstitutional.

- **A Safe System Maintaining the Security for Judges:** Additionally, the appointment process of judges is enshrined in the constitution; judges are appointed by superior courts and are conducted by the President with the approval of parliamentary counsel and the JSC. In addition, judges are protected with fixed tenure so they can serve until they reach their mandated retirement age. Otherwise, they can be impeached or removed due to serious judicial misconduct. The JSC conducts the transfer of charges for the lower courts according to their own formula but the procedures are not publicly available. The contempt of court is a punishable offense under the constitution and judges are immune for their judicial action.

### India

- **The Supremacy of the Supreme Court:** The Supreme Court is the highest court of appeal. The Appellate Court takes cases from the high courts and decides over largely on issues of human rights. The Supreme Court not only adjudicates any disputes between the Union and the states or the provincial governments, but also plays a major role in the nature of the habeas corpus, mandamus, prohibition, quo warranto, and certiorari to enforce fundamental rights and protecting those rights. Also, as the highest appellate body, the Supreme Court hears appeals against the judgement of the high courts, involving questions of the interpretation of the constitution.
- **Mechanisms to Ensure the Eligibility of and Welfare for Judges:** To ensure that the judiciary is autonomous, there are rigid qualifications for the appointment of judges. For the initial 50 years, India maintained a judicial system in which judges were largely appointed by the executive. However, this system was overturned due to executive interference and judicial politicizing. In addition, once judges are appointed, they cannot be easily impeached, indicating that judges enjoy a fair degree of independence. The Chief Justice of India is the highest authority appointed by the President of India with 30 other judges that are appointed by a collegium of the Chief Justice and 4 senior judges. Furthermore, salaries and pensions are drawn from the consolidated fund, which is separated from the budget. This grants the judiciary financial autonomy.

## IV. Challenges in Maintaining Judicial Independence

### The Philippines

- **The Lack of Transparency in the Conduct of the JBC:** While the JBC exists to ensure that those who are appointed are chosen based on merits, evaluation on the effectiveness of the council is largely absent. The proceedings were only recently open to the public; therefore, the public is not very aware of specifics of the process. Additionally, administrative supervision over the lower courts also poses grave challenge regarding the sustainability of the practice.
- **Centralization Paves Way for Inefficiency and Infringements on Welfare:** The Supreme Court's system of centralized bureaucracy easily paves way for inefficient management. It is especially difficult to get in touch with the central system in far-flung areas to make sure that their supply, salaries, reimbursements are given on time and that the staff would not be asked to shell out their own expenses for the court to function. In this regard, the Asian Development Bank piloted the



decentralization of the courts, calling for regionalized management. While this, unfortunately, had been not pursued, it would have been a good exercise to see how decentralization would improve the management or the administration of the courts. On top of that, a thorough evaluation of the performance of judge not only as an adjudicator, but also as a manager has not visibly taken place.

- **Potential Breaches of the Security of the Tenure of Judges:** Article XI: Accountability of Public Officers of the 1987 Constitution has been under scrutiny as its re-interpretations have turned the impeachment process into quo-warranto proceedings, going against the principle of checks and balances. Moreover, the stringent requirements that the Supreme Court imposed on the issuance of the statement of assets and liabilities, which is supposed to be easily accessible to the public also puts the security of the tenure of judges.

### Sri Lanka

- **Three Key Challenges to Judicial Independence in Sri Lanka:** While the constitution and other legal provisions provide structural independence of the judiciary, there are challenges to institutional independence, financial independence, and challenges to authority and reputation of the courts. Discretionary appointments, untransparent promotions, and proportional and procedural removals are three factors that mainly challenge the institutional independence of the judiciary. Additionally, in Sri Lanka there are currently no clear proper procedures that ensure that the judiciary budget or funds are provided to fulfill the growing needs of the judicial sector. Moreover, there have been a number of instances where the authority and reputation of the judiciary get challenged. For instance, the President has recently been able to exercise the constitutional ability to intervene into the judiciary in a number of direct and indirect ways, creating intrinsic links between the executive and the judiciary. In addition, the Parliamentary Sectoral Oversight Committee revealed that the Sri Lankan justice system has witnessed serious case delay; it takes almost 17 years to conclude cases of serious crimes.

### India

- **The Indian Judiciary Endures Amid Pressures Exerted by the Executive:** During the first 15 years upon the establishment of the judicial system, the executive and the judiciary engaged in healthy competition; while the government sought to abolish land rights or the right to property, the judiciary stood by constitutional principles, thereby preventing the executive assert extensive constitutional power. However, the majoritarian government led by Indira Gandhi challenged the autonomy of the judiciary during the 1960s. Amid a major face-off between the executive and the judiciary, the parliament tried to politicize the judiciary, appointing judges who were pro-government to create an “executive judiciary.” Upon the demise of the Emergency Declaration, the Janata government brought the judiciary back to the table and the judiciary tried to reassert itself. During the 80s, the Indian judiciary used innovative tools, such as the Public Interest Litigation (PIL). Against the backdrop of several weak coalition governments, India witnessed a judicial revolution.
- **The Emergence of the BJP and the Erosion of Judiciary Power:** The power of the judiciary prevailed on many domains until 2014. However, upon the rise of the Bharatiya Janata Party, the political majority has tried to control the judiciary by interfering with the appointment, transfer, and promotion process. The judiciary today is working under pressure and has taken crucial judgements in favor of the government. Furthermore, there are 35 million cases pending at all levels of the judiciary. There are also staggering vacancies at all levels, raises issues about inadequate judicial infrastructure and the slow adaptation of technology such as e-filing cases and online portals.



- **The Damaged Reputation of the Supreme Court:** However, the most fundamental problem is that the Supreme Court has failed to defend the constitution. The rule of law is collapsing in many parts and the judiciary, especially the higher judiciaries, is actually acting as mute spectators.

### V. Policy Recommendations to Strengthen Judicial Independence

#### The Philippines

- **Three Recommendations to Strengthen Judicial Independence:** The JBC should provide an evaluation of how they have been performing and their input on the whole judicial process. Atty. Ma. Sandoval additionally recommends a look into the fiscal autonomy and fund utilization of the courts. Lastly, the judicial system must strengthen administrative supervision by adopting mechanisms that regionalize supervision in order for the administration of justice to be properly served. This will alleviate the difficulties of the lower courts ensuring that administrative needs in urgent need in the courts are available.

#### Sri Lanka

- **A Pressing Need to Address Challenges to Information Access and Improve Judicial Welfare:** In 2016, the Sri Lankan parliament passed the Right to Information Act in 2016, requiring all government institutions to practically disclose their public information to encourage the JSC to disclose public information relating to the appointment, promotion, and removal of charges. In this regard, the establishment of a public portal which allows the public to raise their concerns relating to judicial misconduct would ensure greater independence of the judiciary. There is increasing need for the Ministry of Justice to develop a portal to provide realistic and up-to-date information about judicial proceedings. Additionally, media guidelines on how to report judicial proceedings in a way that does not harm the independence and integrity of judges should be clearly outlined. In addition, Supun Jayawardena suggested the establishment of an independent commission or committee on judicial salaries and conditions of service to ensure that judges get adequate salary revisions and revision of pension indexes. Moreover, in order to ensure speedy case hearings and disposal, there should be a mechanism that streamlines the use of legal technology and provides judges more human and material resources to strengthen their capabilities.

#### India

- **India's Attempts to Reverse the Judiciary's Decline:** India has taken a number of steps to set up commissions and committees to suggest remedial measures. While there is a Second Administrative Reform Commission, which took a very detailed study on the judicial process and suggested course corrections, changes are being made at a very slow pace. Moreover, the Supreme Court has set up a National Court Management Systems scheme to address the issue of efficiency and governance and set up an E-committee to speed up the process in civil and criminal cases. While judicial recovery seems afar, the justice system is showing some resilience, especially during the COVID-19 pandemic by protecting people whose civil liberties have been violated by the state and taking note of the widespread violation by the executive. ■



## Speakers, Discussants, and Moderator Biographies

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- **Atty. Maria Cleofe Gettie C. Sandoval** is a lawyer by profession and her work experience covers civil society and government. Currently, she is a Policy and Gender Consultant of various government and non-government agencies and a member of the Ateneo de Manila University College of Law Faculty. She served as the National Anti-Poverty Commission of the Republic of Philippines' Director of the Sectoral Policy Unit from 2001-2003, and the Undersecretary for Programs at the Office of the Presidential Adviser on the Peace Process's from 2011-2016. She has performed work involving skills on policy and technical or operations level.
  
- **Niranjan Sahoo** is a Senior Fellow with ORF's Governance and Politics Initiative. With years of expertise in governance and public policy, he now anchors studies and programmes on democracy, human rights, federalism, electoral reforms (particularly issues related to political funding), and cross-cutting issues of exclusion, insurgencies, affirmative action and inclusion. A recipient of the Asia Fellowship (2009) and a former Sir Ratan Tata Fellow, he currently serves as the South Asia member for the Carnegie Rising Democracies Network, where he debates and writes on democracy, foreign policy, human rights and other related issues.
  
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