

# ACCOUNTABILITY

## **Horizontal Accountability in Asia: Country Cases (II)**

July 2024



In 2022, Asia Democracy Research Network (ADRN) selected horizontal accountability by the ability of state institutions to hold the executive branch accountable, and vertical accountability through elections, parties and citizens' participation, as the requirements to accomplish robust and sustainable democracy in Asia.

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

The report investigates contemporary questions such as:

- What are the constitutional and legal institutional mechanisms that hold the executive government accountable?
- To what extent have the constitutional and legal mechanisms of horizontal accountability fulfilled their expected functions to constrain the actions of the executive members?
- What are the determinants of horizontal accountability performance?
- What should be done to improve the state of horizontal accountability performance?

Drawing on a rich array of resources and data, this report offers country-specific analyses, highlights areas of improvement, and suggests policy recommendations to fulfill methods of horizontal accountability in their own countries and the larger Asia region.

"Horizontal Accountability in Asia: Country Cases ( II )"

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Horizontal Accountability in Asia: Country Cases (II)

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## Country Case 8: Mongolia (II)

### Assessing Horizontal Accountability in Mongolia: Weak Judiciary Combatting Corruption

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#### 1. Introduction

Recent socio-economic and political shifts in Mongolia depict a concerning trajectory of undermining democratic values. The once-promised democratic system, deeply rooted in transparency, accountability, and justice, now appears under threat. Like many emerging democracies, Mongolia confronts a multitude of challenges. Central to these challenges is the delicate balance of institutional design and its operation, with horizontal accountability emerging as a pivotal concept. This principle ensures that state institutions keep each other in check, preventing power abuses and guaranteeing operations within legal bounds.

The country's legal foundation has witnessed considerable changes. Since 2000, the Mongolian Constitution — the bedrock of its democratic system — has undergone four amendments. Remarkably, three of these changes occurred between 2019 and 2023, spearheaded by the Mongolian People's Party and often carried out with limited public consultations. Historically, the robust Constitution of Mongolia has been celebrated as a pillar of democracy in Central Asia, ensuring a balanced distribution of power among the executive, legislative, and judiciary branches. However, recent sentiments indicate growing concerns. As reported in 2023, the individuals entrusted with upholding the Constitution now appear to be undermining it (Tumurtogoo 2023). The post-2019 amendments have generally curtailed presidential authority, bolstered executive power, and imperiled the foundational balance of power across the branches. While rationalized as measures to augment state policy ownership, ensure stability, and heighten accountability within the executive branch, these changes pose risks to the power balance between the executive, legislative, and judiciary branches.

In these times of declining public trust and legal changes, the debate surrounding the role and power of the judiciary and oversight institutions in Mongolia is prominent. On one side, there are increasing concerns about institutional inefficiency and potential biases among these institutions and a push to decentralize, reduce funding, and staffing of the judiciary and oversight bodies due to waning trust. Conversely, on the other side, there are arguments that robust and well-resourced judiciary and oversight institutions are foundational for maintaining checks and balances, especially in overseeing the executive branch. Empowering these bodies is crucial not just for governance but also for restoring public trust.

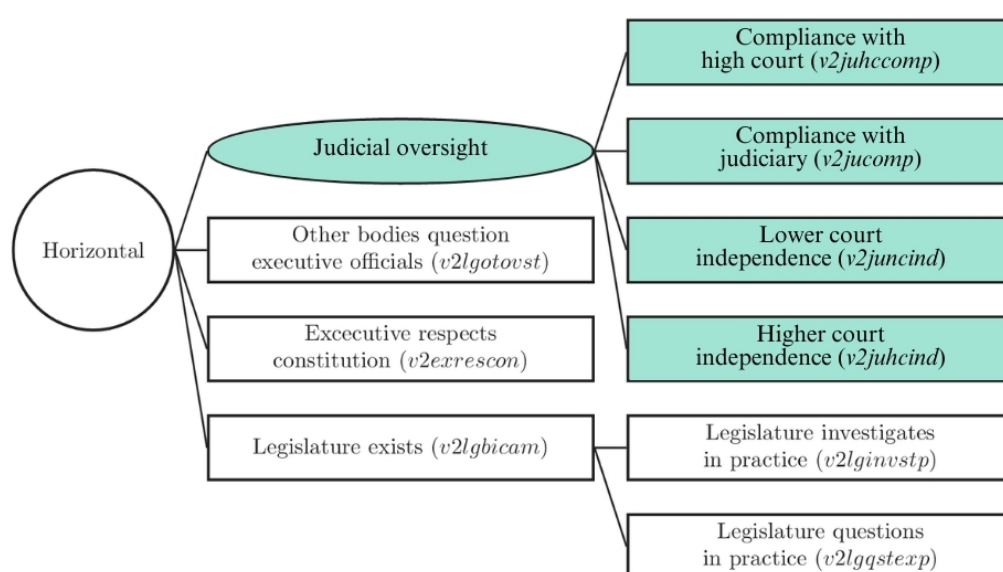
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These challenges are evident in the annual unveiling of corruption scandals involving substantial embezzlement of public funds that shake the foundation of Mongolian society. Therefore, the paper aims to assess the current situation of horizontal accountability in Mongolia by using Luhmann, Marquardt, and Mechkova's (2020) framework which defines horizontal accountability as the capacity of state institutions to hold the executive branch of the government accountable (Luhmann, Marquardt and Mechkova 2020). In doing so, the paper focuses on the judiciary's effectiveness in overseeing and combating corruption scandals within the government, in the case of Development Bank of Mongolia (DBM). The scope of the analysis of horizontal accountability in this paper is shown in Figure 1, which highlights the key variables of the framework analyzed in this paper.

**Figure 1. Horizontal Accountability Framework**



Source: Luhmann, Marquardt, and Mechkova 2020, p. 814

Note: Rectangles represent manifest variables; circles latent variables. Italics represent V-Dem codes. The highlighted variables are included in this paper.

The case of DBM is chosen as it provides a critical example of the complex interplay between political, legal, and economic factors in Mongolia's fight against corruption. As such, this paper contributes to the ongoing debate by examining the level of public trust in the judiciary, the independence and impartiality of the judiciary, institutional capacity, responsiveness in addressing corruption issues by the judiciary, transparency of information to the public and enforcement and corrections.

In answering the questions, the paper relies on the review of secondary and publicly accessible information sourced from various outlets, including media reports, the online data portal of the Judiciary, official websites of the Prosecutor General's Office, Judicial General Council, the Government of Mongolia, and published news articles. Furthermore, the paper examines opinions from international bodies, NGOs that have closely followed the selected corruption case and the commentary and analyses of experts and scholars. Public perception survey results as well as international indices were used to provide contextual and historical information about the Judiciary and horizontal accountability.

## 2. Corruption Scandal: The Case of the Development Bank of Mongolia

In recent years, Mongolia has been shaken by a series of high-profile corruption scandals, showing deep-rooted systemic issues within the nation's political and financial frameworks. Among the most notable cases are the exposure of a “60 billion tugrugs” bribery scheme, the SME fund embezzlement, the “Coal Mafia” scandal, and the extensive ongoing investigation into the Development Bank of Mongolia (DBM).

In 2017, the “60 billion tugrugs (MNT)” (25 million USD) deal ahead of the presidential election was exposed when voice recordings of high-level officials' plan to rearrange government positions for set bribery were released. In 2019, after the Speaker of Parliament was dismissed in relation to the MNT 60 billion case to sell key government offices in exchange for election financing, several ruling party members were sentenced to four-year imprisonment by the district court. However, at the appellate at Capital City Court, the decision was dismissed (Capital City Court of Civil Appeals 2019).

In 2018, an independent media source exposed the ‘Small and medium size enterprises fund embezzlement’ corruption scandal in 2018. The district-level courts also made decisions to prosecute affiliated officials in 2020. One former Member of Parliament was sentenced to two and a half years of imprisonment but was released on the grounds of ‘poor health.’

A new scandal called ‘Coal Mafia’ arose in December 2022. The scale and depth of the scandal were unprecedented, allegedly reaching MNT 40 trillion (more than one billion USD) (Tuguldur 2022).

The DBM case is a comprehensive investigation that revolves around allegations of financial misconduct and corruption within the DBM, a state-run financial institution with a mission to foster economic growth and development within Mongolia. Established in 2011 by the Mongolian People's Party (MPP), the DBM aimed to support priority sectors aligned with the country's development vision, increase value-added exports, and enhance economic competitiveness through mid and long-term loans and financial services (Government of Mongolia 2010).

The DBM operated under different political administrations, including the MPP between 2010-2012, the Democratic Party between 2012-2016, and once again under the MPP from 2016-2024. Initially conceived to promote national prosperity, the DBM's operations became embroiled in controversy, ultimately leading to one of Mongolia's most extensive and consequential legal investigations.

**Emergence of corruption scandals and contributing factors.** The DBM case emerged against the backdrop of shifting political power and an evolving financial landscape. The backdrop for the DBM case was set by political changes following the 2012 general election. During this election, the Democratic Party gained a majority, this shift in power had repercussions on the Bank's operations, as it coincided with a period of substantial fundraising efforts.<sup>3</sup> The DBM case traces its origins back to 2014 when corruption scandals first emerged, with the Independent Authority Against Corruption (IAAC) launching investigations, including one involving the former Minister of Economic Development.

The governance structure and management of DBM has been dependent on political affiliations (*Mongolian Economy* 2012-10-16). The composition of board members saw a high turnover in the 2016-2020 period. An important change occurred in 2017 when amendments increased the number of independent board members from three to four. Despite this adjustment, the final appointment process depended on political motives and affiliations, raising questions about the true independence of these members. In terms

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<sup>3</sup> The DBM successfully raised USD 1.5 billion through the issuance of Chinggis Bonds and secured approximately USD 1.3 billion through foreign loans and bond issues to support ambitious economic stimulus plans (World Bank 2014).



of executive management, there were several changes in leadership, with leaders affiliated with different political parties assuming the role of Chief Executive Officer (Munkhtsetseg 2022). These changes, along with 2017 legal amendments, introduced instability to the DBM's leadership structure, impacting the institution's ability to address challenges effectively.

Another critical element contributing to the financial misconduct within the DBM was its role in circumventing fiscal policy regulations. In 2013, the Fiscal Stability Law was introduced to control fiscal policy through specific rules. The Fiscal Stability Law mandated a structural budget deficit no larger than 2 percent of GDP and a debt-to-GDP ratio not exceeding 40 percent. However, the 2 percent deficit limit was immediately breached, leading the government to redirect expenditures through the DBM, removing them from the budget. This tactic undermined the Fiscal Stability Law's intent and contributed to economic overheating, with public debt reaching 55.2 percent of GDP in 2014 (Ministry of Finance internal figures cited in World Bank, December 2014).

Regarding loan decision-making by the DBM, there have been issues with transparency and adherence to rules. Projects implementing enterprises' selection lacked clarity, loans were granted without following proper procedures, credit risk data was prepared without research, and there was insufficient control over how loans were utilized. This led to politically influential individuals lobbying for loans and making lending decisions that did not follow the rules, resulting in cases of granting loans without collateral and illegal credit committee decisions. The majority of loan recipients were directly linked to politicians (arslan.mn 2022-02-09) and faced accusations of corruption and abuse of office.

**Inspections held by the Parliament and Government institutions.** The Parliament has formed working groups to investigate the case of DBM four times:

- **2015:** Only four years after the establishment of DBM, the Parliament formed a working group (Parliament of Mongolia 2015). This group investigated the selection and progress of projects and programs, loan utilization, cost-effectiveness calculations, and project implementation. However, there were no further concrete actions taken (*VIP76* 2015-11-26).
- **2018:** Another working group led by the then Deputy Minister of Justice started to investigate the DBM. The results of this investigation revealed violations, including unclear project selection processes, loans that did not comply with relevant laws and regulations, and a lack of credit risk assessment and budget studies. The mechanism for monitoring loan recipients' performance was also found to be compromised (Uyanga 2018).
- **2019:** The Prime Minister of Mongolia presented the report of an inspection into the activities of the DBM. He announced the intention to transfer the conclusions of this working group's findings, related to violations uncovered during the DBM inspection, to all enterprises and citizens who may have violated the law. This information was to be provided to the IAAC and other relevant law enforcement and control institutions (Government Media and Public Relations Department 2019).
- **2022:** Parliament's Order No. 20 led to the establishment of another working group, tasked with collecting and analyzing audit reports, and recommendations related to the projects financed by the DBM. The Parliament organized a milestone Public Hearing to conduct evidence analysis and review projects funded by the DBM, examining granted loans from the Development Bank (Parliament of Mongolia 2022). The results were presented at the 2023 spring session of Parliament.

**Investigative and court procedures.** Following the Public Hearing in 2022, the Development Bank case entered a crucial phase with investigations involving 80 individuals, four legal entities and 460 individual lawsuits (Amarjargal 2023). The state-run DBM has been grappling with a substantial bond repayment of approximately 800 million USD due by the close of 2023. By the beginning of 2022, the non-performing loans of the DBM had risen to USD 500 million (Adiya 2022).

It entailed the resolution of 425 complaints and requests, 198 court hearings for restraining orders on 47 enterprises and 61 individuals, and movement restrictions on 664 movable assets, 763 vehicles, 104 bank accounts, and 25 enterprise shares, all authorized by the Prosecutor (Prosecutor General's Office 2022a). Legal proceedings started on April 17, 2023, gaining public attention and scrutiny amid Mongolia's corruption scandals. These proceedings were live-streamed and were held in a theater-like setting, addressing power dynamics and public demands for accountability.

Several corruption cases, including the case of the DBM show that even today, there were no clear court decisions and prosecutions against the ruling party members and their affiliates involved in corruption scandals. The aftermath of each scandal typically sees a surge of public outrage, often culminating in mass protests and significant media scrutiny (Adiya 2022; Bayartsogt 2018; Bekmurzaev 2023; Dierkes 2022; Lkhaajav 2017). These widespread demands for accountability often go disregarded, with tangible results rarely materializing.

### 3. Horizontal Accountability Trends in Mongolia

#### 3.1. Horizontal Accountability Index in Mongolia

To illustrate the distribution and exercise of power within Mongolia's executive and judicial branches, the Constitue Project's Executive Power index and the Judicial Power index, and the V-Dem's Horizontal Accountability indices were used.

The Constitue Project focuses on the content of national constitutions and the formal institutional arrangements they establish. Its indicators for horizontal accountability, such as Executive Power, Legislative Power, Judicial Independence, and Judicial Power, are derived from constitutional provisions. These indicators measure the extent of powers and independence granted to the executive, legislature, and judiciary, based on the explicit text of constitutions. The assessment includes factors like the ability to issue decrees, initiate legislation, judicial review capabilities, and protections for judicial independence (Comparative Constitutions Project 2024a). An overview of Mongolia's horizontal accountability is provided below (Comparative Constitutions Project 2024b).

The Executive Power index measures the extent of lawmaking powers vested in the national executive, ranging from 0 to 7 based on seven critical aspects. In Mongolia, the executive has been attributed a score of 6, indicating a significant concentration of powers including the ability to initiate legislation, issue decrees, propose constitutional amendments, declare states of emergency, wield veto power, challenge the constitutionality of legislation, and dissolve the legislature. This score is notably higher than the global average of 4, suggesting a strong executive branch capable of influencing lawmaking and constitutional matters more extensively than in many other countries.

Legislative Power is assessed based on the degree of authority granted to the legislature, with a higher score indicating more power. Mongolia's legislative power score is 30%, which reflects a relatively limited scope of authority. This score is a mean of 32 binary elements, highlighting the nuances of legislative

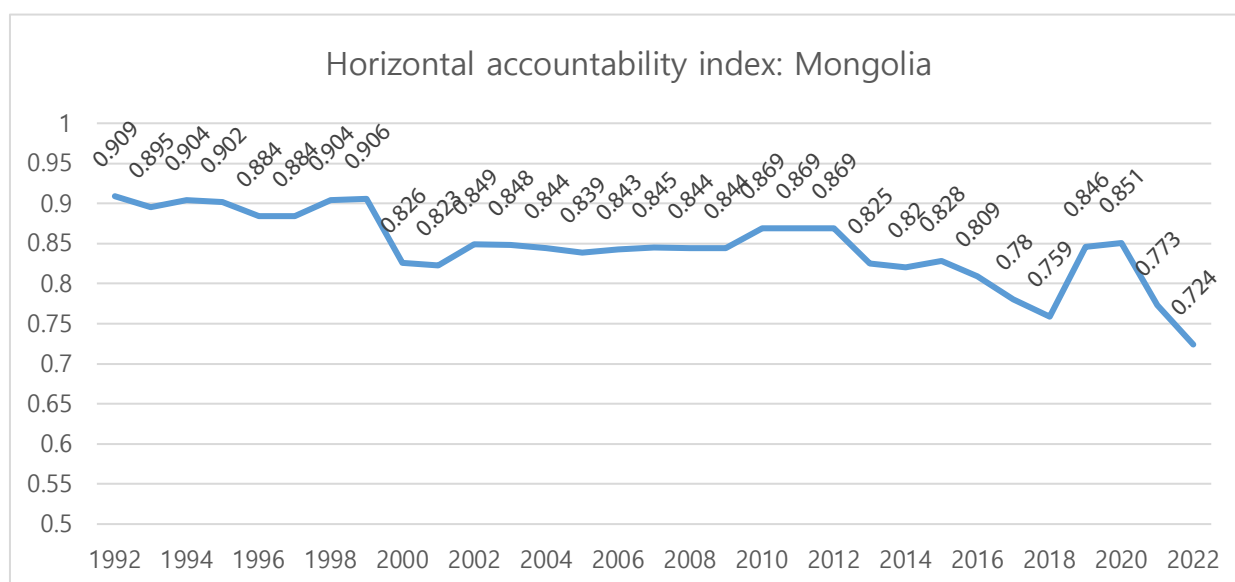
capabilities in terms of lawmaking, oversight, and other governmental functions. The specifics of these elements are crucial in understanding the exact limitations and capacities of the Mongolian legislature within the national governance framework.

Judicial Independence is critical for ensuring that the judiciary can function without undue influence from other branches of government. Mongolia scores 4 out of 6 in this index, surpassing the average score of 2 recorded in the Constitute Project. This higher score is indicative of constitutional mechanisms in place to protect judicial independence, including explicit statements of judicial independence, lifetime appointments for judges, a complex appointments process for the highest court, stringent removal protections, limitations on the reasons for removal, and protection against salary reductions. These features collectively contribute to a judiciary that can operate independently, enhancing the checks and balances within the Mongolian governance system.

Having outlined the formal constitutional frameworks and powers within Mongolia, it is essential to examine how these structures operate in practice. The Horizontal Accountability Index from the Varieties of Democracy (V-Dem) Project offers a broader approach based on expert surveys and encompasses both *de jure* (legal/formal) and *de facto* (practical/actual) dimensions of horizontal accountability. The index provides an empirical metric to measure the extent to which state entities in a country can hold one another accountable.

Analyzing the data for Mongolia from 1990 to 2022 reveals interesting trends and fluctuations that offer insights into the country's evolving governance structure and democratic practices. While the 1990s reflected a promising start in institutionalizing checks and balances, subsequent years presented a mix of challenges and recoveries. The most recent decline signals a potential need for renewed emphasis on bolstering mechanisms that ensure state entities remain accountable to one another.

**Figure 2. V-Dem Horizontal Accountability Index: Mongolia 1992-2022**



Source: V-Dem Country Graph dataset, 2023

- Initial surge (1990-1992): Beginning with a score of 0.686 in 1990, there is a sharp rise to 0.909 in 1992. This period corresponds with Mongolia's shift towards democracy, and the spike suggests rapid institutional reforms aimed at introducing checks and balances.
- Stability and marginal fluctuations (1993-1999): Post the initial surge, the index stabilizes in the high 0.8 to low 0.9 range. This period reflects a consolidation phase, with Mongolia striving to maintain a balance of power among its state institutions.
- Decline and relative stability (2000-2012): Starting in 2000 was a noticeable dip, which reached a low of 0.839 in 2005. This downward trajectory could indicate challenges in sustaining institutional checks, possibly due to political or economic factors. The index started oscillating in the mid 0.8 range with a slight rise to 0.869 by 2012, suggesting efforts to re-strengthen horizontal accountability mechanisms.
- Dips and peaks (2013-2020): This period is marked by significant fluctuations, from a dip to 0.825 in 2013 to a resurgence in 2019-2020. Such fluctuations indicate political changes and institutional reforms impacting the balance of power.
- Recent decline (2021-2022): A concerning decline has been observed in the last two years, with the index dropping to 0.724 in 2022, the lowest in the dataset. This drop suggests recent challenges or setbacks in ensuring horizontal accountability.

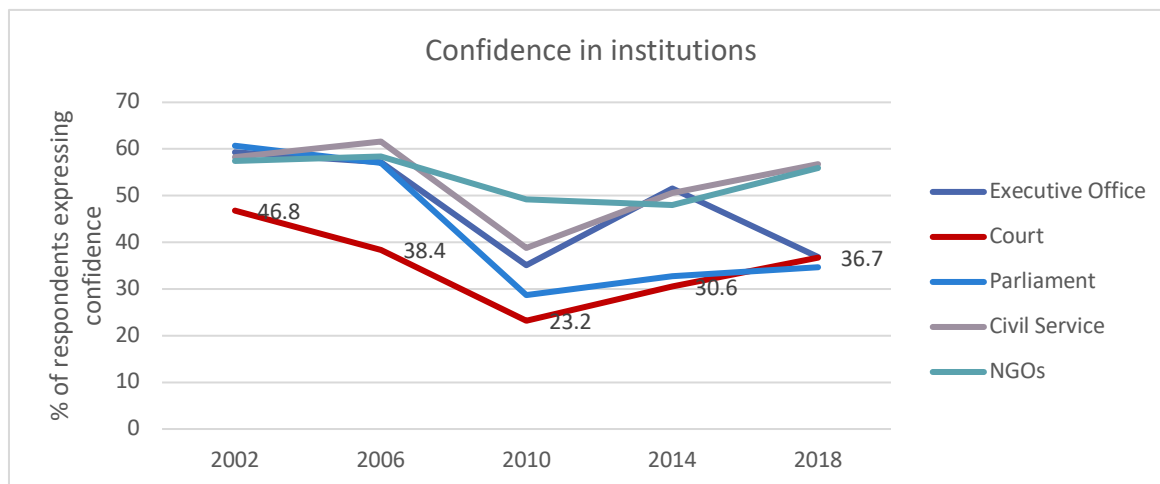
### 3.2. Public Trust in Institutions

While public perceptions do not directly measure the judiciary's capacity to hold the executive accountable, they can, especially when grounded in tangible events, offer valuable insights into its performance. The implications of these high-profile corruption scandals and the delayed and unclear court decisions have resulted in public distrust in the court. However, distrust in the judicial system has been high since the democratic transition more than three decades ago.

- According to a 1994 survey conducted by the Konrad Adenauer Foundation and the Academy of Sciences, court was the second most corrupt institution at *soum* levels (Mont 2002).
- In 2005, a public opinion survey conducted as part of the 'Judicial Reform Program' found that 90 percent of the respondents believed court decisions favor wealthier and more influential individuals over ordinary ones (Chimid 2006, p. 157).
- In 2008, the Open Society Foundation surveyed professionals in the judicial system and found that 54 percent of the participants believed 'conditions for impartiality and independence are not met in Mongolia' (White 2009). To the statement 'interference of other organs of the state and politicians is high,' 42 percent agreed and 38 percent said not sure. The research also collected anecdotal evidence from anonymous judges on how prominent political figures directly attempted to interfere in their decisions.
- The Asian Barometer Survey in 2018 found that the proportion of respondents saying they trust the courts was 36.7 percent, slightly higher than trust in parliament (34.7%) and much lower than trust in the president and prime minister (68.0%). Figure 3 shows that trust in courts has been lower than in other institutions (Asian Barometer Survey 2002, 2006, 2010, 2014, 2018).
- As the Sant Maral Foundation's public opinion surveys between 2007 and 2022 show, the proportion of respondents indicating trust in the courts is higher than those reported in the Asian Barometer

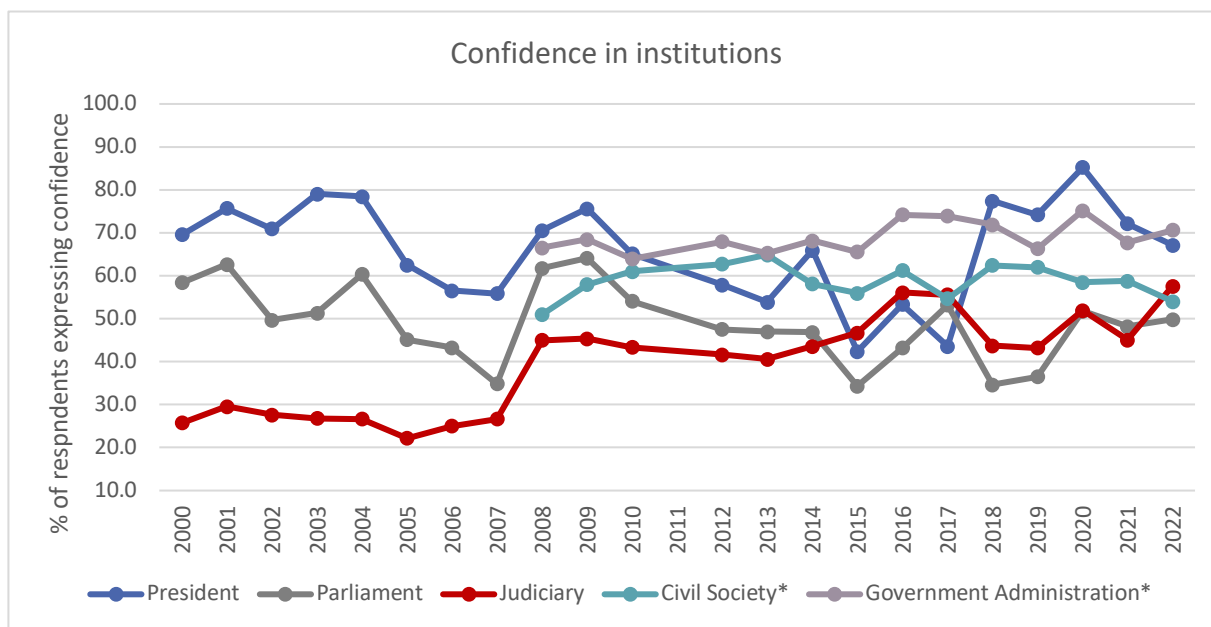
Survey mentioned above. However, a similar trend of lower levels of trust in the courts compared to other institutions is observable.

**Figure 3.** Proportion of respondents answering ‘trust or trust a lot’ in different institutions, Asian Barometer Survey, Mongolia 2002-2018



Source: Asian Barometer Survey, author's calculation

**Figure 4.** Confidence in institutions in Mongolia, 2000-2022



Source: Sant Maral Foundation, 1992-2022

Furthermore, according to a 2023 survey conducted among legal professionals, including judges, prosecutors, lawyers, attorney and academics, the majority of them believed that the confidence of citizens in the judiciary has declined in the last two years (Bayansuren 2023).

The low public trust in key horizontal accountability institutions such as the legislative and judicial branches, compared to the executive and civil service, might increase the risks of aggrandizement of the executive branch in Mongolia. This lack of acceptance of horizontal accountability institutions highlights the need for their strengthening to prevent democratic breakdowns. Recent examples of executive aggrandizement include the proposal to establish a Special Court for Corruption and Abuse of Power Cases by the executive (Oyun-Erdene 2023), which critics argue could undermine the judiciary's basic functions and be used as a tool to silence political opponents. This trend of the executive introducing laws as emergencies and making significant changes to the system further exacerbates concerns about executive dominance (Saruuldul 2023).

#### 4. The Judicial Branch's Independence and Performance

To assess the judicial branch's independence, we look at the factors that affect it, including legislation and structure of the judicial system, budget allocation, selection and dismissal procedure of judges, and ethical and disciplinary proceedings of the judges. The Constitution of Mongolia (1992) assures the structure and independence of the judicial system in Articles 48-55. Mongolia's three-tiered judiciary comprises the Supreme Court, *aimag* (provincial) and capital city courts, and *soum* and district courts. As stated in Article 48, courts operate based on specific laws, receive financing from the state budget, and the state guarantees their economic operations. The Law on Courts (2012) governed these institutions until the Law on the Judiciary superseded it in 2021.

**Table 1.** Overview of the Judicial Branch in Mongolia

Key capacity areas	Status
Legislation	<p><b>Constitution of Mongolia</b> (1992) stipulates the independence of the court and impartiality of judges.</p> <p><b>Laws:</b> The organization and operations of courts and the Judicial General Council are regulated by law. Law on the Judiciary (2021); Law on Judicial Administration; Law on the Legal Status of Judges; Law on the Legal Status of Citizens' Representatives in Court Trials; and Law on Mediation.</p>
Structure	<p><b>Three-tiered system:</b> Supreme court, provincial and capital city courts (appellate), and <i>soum/inter-soum</i> and district courts (first instance).</p> <p><b>Courts:</b> Courts of Ordinary Jurisdiction (civil and criminal cases); Administrative Court (administrative cases) and Constitutional Court (constitutional disputes and cases)</p>
Budget allocation (percent of total government expenditure)	<p>Courts are financed by the State. Between 2012-2022, on average 0.70 percent of the government expenditure was spent to finance the judicial sector. The highest was in 2015 reaching 0.85 percent and the lowest in 2018 at 0.62 percent.</p>

#### 4.1. Independence and Impartiality of the Judiciary

An understanding of the historical and legislative context is required to understand whether the judiciary branch has handled the Development Bank of Mongolia and other prominent corruption cases with independence and impartiality. Article 49.2 of the Constitution asserts, “Judges shall be impartial and bound only by the law. Interference in the judges’ duties by any individual or official—including the President, National Parliament members, Government officials, political party representatives, or members of other voluntary organizations—is prohibited.” The Judicial General Council plays a crucial role in safeguarding judicial independence, overseeing the selection of judges, and protecting judges’ constitutional rights (Article 49). However, the practical implementation of Article 49, beyond mere rhetoric, remains questionable.

While the Judicial General Council conducts preliminary selections and proposes candidates, Parliament nominates them. Ultimately, it is the President of Mongolia who appoints them. Some scholars posit that since the Judicial General Council conducts the initial presentations, this ensures a degree of independence for judges from political sway. However, opposing views, including those from the OSCE (Borkowski, Vogler and Sajo 2021), emphasize the President’s considerable influence over aspects such as court organization, judges’ statuses, appointments, and dismissals. Numerous international monitoring bodies have underscored the importance of improving Mongolia’s **judge selection and appointment procedures** to exclude political entities, particularly the President and Parliament. Yet, the modifications to the structure of the Judicial General Council and the judge selection process suggest enduring political sway. It is interesting to note that prior assessments of Mongolia’s judicial reform, including its independence, have highlighted both political party influence and the co-opting of donor-funded judicial reform initiatives by the country’s judicial elite (White 2009)).

The Judicial General Council’s autonomy has historically been in question. In 2019, legislative amendments granted the National Security Council, comprising the President, Prime Minister, and the Speaker of Parliament, authority over judge appointments and dismissals. These amendments led to the removal of 17 judges in June 2019. Many civil society organizations, including Transparency International, voiced their disapproval, highlighting significant threats to the rule of law (Transparency International 2019). Nonetheless, the reformed Law on Judiciary in 2021 provided clearer guidelines on judicial appointments and bolstered measures to ensure the judiciary’s independence (Bertelsmann Stiftung 2022). Ex-Member of Parliament Lundendorj, referencing the 1992 Constitution draft, noted that the UN Human Rights Council had cautioned about a nebulous Judicial General Council structure, warning of potential dominance by the ruling parliamentary party (Lundendorj 2021).

Over three decades, the Judicial General Council’s structure underwent five notable shifts as shown in Table 2.



**Table 2.** Key Characteristics of the Judicial General Council's Structure

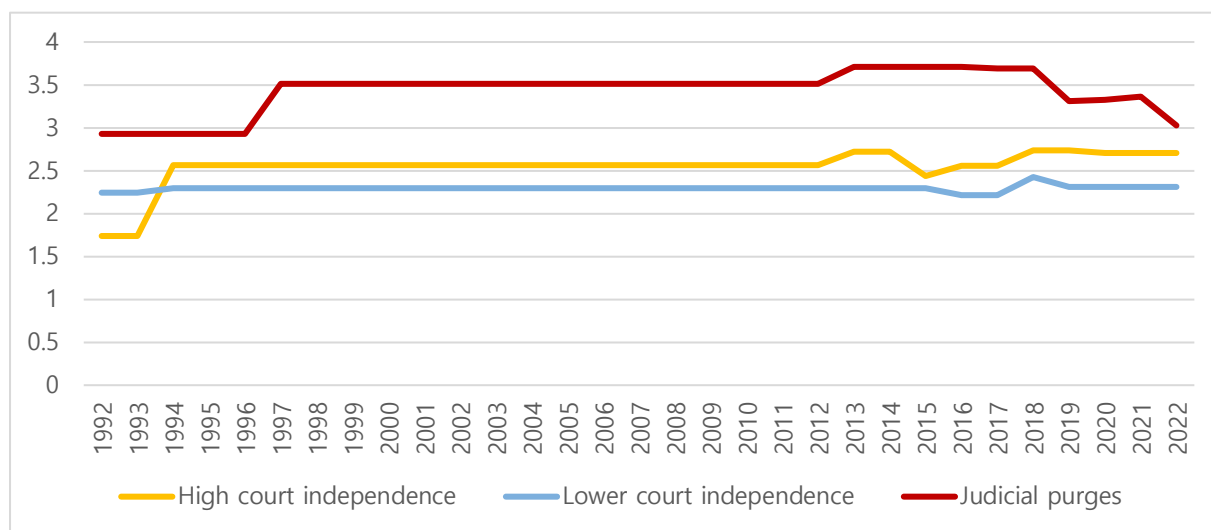
Period	Key characteristics of the Judicial General Council's structure
1992-1996	Dubbed the 'President- Judicial General Council' phase. The President appointed 10 out of the 12 council members, with the Council selecting its chair. These years marked a time of transition and political changes in Mongolia following the democratic revolution. The judiciary was not entirely stable during this period, and there were instances of judges being removed, some for political reasons.
1996-2002	A 'Ministry of Justice-President' hybrid era saw the Ministry of Justice's substantial role. Given the period's parliamentary instability, the Council experienced turbulence; the Judicial General Council Chair switched five times in six years, highlighting the Council's political susceptibility.
2002-2012	Termed the 'President – Self Governance of Judges' phase. Of 14 members, 57 percent were judges chosen by <i>aimag</i> /capital city judges' assemblies. During this phase, efforts were made to promote self-governance of judges, with a majority of members chosen by judges' assemblies.
2012-2020	Essentially evolved into an 'Extension of the President's Office'. All Judicial General Council members were presidential appointees, sidelining representatives from the Ministry of Justice and Parliament, which underscored the President's accruing power. A survey revealed 44 percent of 144 judges felt the president overly dominated the judicial system (Munkhsaikhan, Tsagaanbayar and Altansukh 2015).
2021 onwards	The 'Self Governance and Parliament' era commenced. A pivot toward parliamentary inclusion took place to mitigate the president's outsized role. Subsequent amendments mandated that half of the Judicial General Council members were to be chosen by the Judges' General Assembly and the rest by Parliament (Law on the Judiciary of Mongolia, Article 76.2, 2021). The OSCE's 2021 evaluation of this Law recommends excluding top executive officials and members of parliament from potential membership, a stipulation not yet incorporated, which might perpetuate concerns of undue executive and political influence on the Judiciary (Borkowski, Vogler and Sajo 2021).

Comparing the above shifts with relevant indicators from the V-Dem dataset provides an interesting indication<sup>4</sup>. “High court independence” and “Lower court independence” assess the judiciary autonomy, where a lower score (0) implies decisions primarily reflect government wishes while higher score (4) implies decisions never adopt the government's position. The “Judicial purges” indicator assesses judge removal, differentiating for justifiable reasons (such as evidence of corruption) or arbitrary reasons (often for political motives). Responses are categorized on a scale ranging from 0 (indicating a massive, arbitrary purge) to 4 (indicating that judges were not removed).

<sup>4</sup> It should be noted, the data presented here are illustrative and are not statistically rigorous due to their subjective nature, based on a limited number of expert evaluations.



**Figure 5. V-Dem Indicators on Judicial Purges, High Court Independence and Lower Court Independence (1992-2022)**



Source: V-Dem Country Graph dataset, 2023

During the early phase (1992-1996), the expert assessments pointed to notable judicial purges, indicating potential political interference. The high court and lower courts exhibited a moderate level of independence, aligning with the government's wishes to some extent. Subsequently, from 1996 to 2012, despite continued signs of judicial purges, there were slight improvements, possibly linked to efforts promoting self-governance. The expert assessments and scoring did not change much for this period. High court independence remained moderate, while lower court independence showed a slightly lower level.

The period from 2012 to 2020 witnessed a concentration of power in the hands of the President, with persistent political influence in judicial matters. Despite this, experts' views about high court independence improved marginally, while lower court independence remained relatively unchanged. In 2021 onwards, there is a hint of ongoing judicial purges during the transition to a new governance model. High court independence showed a trend toward greater autonomy, although it still usually reflected government wishes. Lower court independence also exhibited a minor improvement compared to previous years.

Overall, the scores for judicial purges have consistently been above 2.5, indicating that there have been limited but notable arbitrary removals of judges throughout the years. While there have been fluctuations, they generally fall within this range. High court independence scores have also exhibited minimal changes. The average scores remain close to 2.5, signifying that the high court has consistently made decisions that somewhat reflect government wishes, though not exclusively so. Similarly, lower court independence scores have shown little variation, averaging around 2.3. This suggests that experts believe lower court decisions have consistently aligned with government wishes to some extent.

In a 2023 survey of 193 judges in Mongolia, a distinction emerged between their confidence in the Judicial General Council's structural independence and its implementation effectiveness. A majority, 45 percent, affirmed **the Council's independence from political influence** including from the President, Parliament, and executive branch contrasting with a smaller faction, 17 percent, who were skeptical. However, when it came to the Council's role in upholding judicial independence, maintaining impartiality, and safeguarding judges' rights, the confidence levels dropped. Only 27 percent felt that the Council was

adequately performing its duties, while 33 percent expressed doubt, indicating concerns over the actual execution of its responsibilities (Bayansuren 2023).

The judges' concerns about the Council's practical actions, or lack thereof, in protecting the **judiciary's autonomy and upholding its independence** were expressed more specifically. According to the survey, there was a divided opinion on the independence and effectiveness of the disciplinary system for judges, with nearly equal numbers in agreement and disagreement (34% and 33%, respectively). Additionally, despite a majority acknowledging that appointments are made based on merit (56%), there was considerable skepticism (30%) about the integrity of the appointment process'. This split suggests doubts about the Council's enforcement of fair selection and disciplinary procedures, with fears that external factors may influence these critical processes.

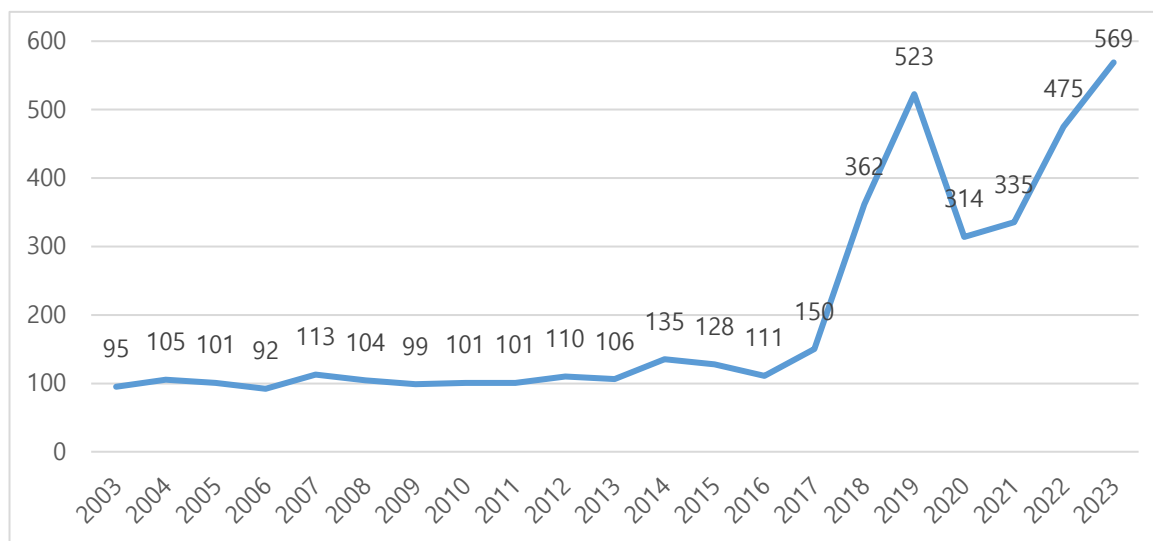
There was a prevailing concern over **the adequacy of protective measures for the judiciary**. With 44 percent of judges dissenting on the effectiveness of safety mechanisms for courts and judges, and an even greater number (35%) doubting the security provisions for their personal and family safety, it is clear that judges feel vulnerable. This indicates a significant apprehension about the Council's capacity to ensure a secure environment for judicial officers. Judges are witnessing a lack of proactive defense from the General Judiciary Council against baseless allegations made by influential figures or media. When courts and judges are criticized without merit by prominent politicians or journalists, there seems to be an absence of effective refutation or dissemination of accurate information to the public. This passivity contributes to a perception of the Council's ineffectiveness in safeguarding the judiciary's reputation.

The same survey conducted among various sectors within the legal community highlighted a picture of a judiciary at risk of undue influences and conflicts of interest. Law school faculty members pointed out that judges whose appointments stem from illegal acts or are influenced by authoritative figures lack guarantees of impartiality, "effectively becoming servants to those who secured their positions." Lawyers echoed these concerns, suggesting that the operations of the Judicial General Council and the handling of judges' cases are frequently subject to personal bias rather than legal principles, implying that the judiciary is susceptible to political manipulation. Meanwhile, prosecutors highlighted conflicts of interest within judicial institutions, which they believe create a worrisome dependence (Bayansuren 2023).

The findings presented in this section indicate a shared perspective across external experts and various legal professions, suggesting that Mongolia's judiciary has yet to achieve the level of autonomy necessary for an impartial and independent legal system capable of handling cases like those involving the DBM without undue influence.

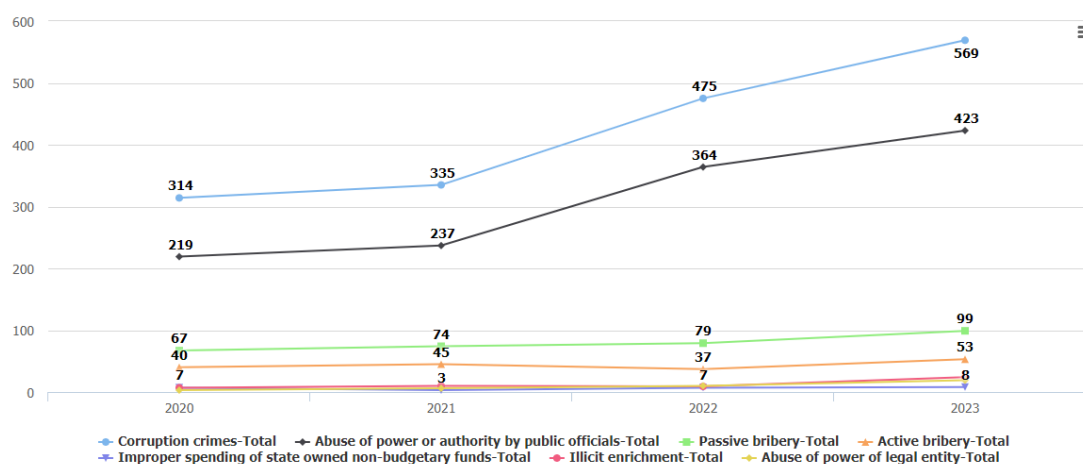
## 4.2. Reporting, Investigations and Court Decisions of Corruption Crimes

According to the IAAC's data reported on the National Statistics Office shows as of 2023, there were 569 recorded corruption-related crimes and 182 of these cases had court rulings in 2023 (IAAC/NSO 2024). As Figure 6 shows, there is a clear upward trend in the total number of corruption crimes, which have increased consistently each year from 314 in 2020 to 569 in 2023. This represents a substantial increase of over 81 percent across the four-year span. These increases in recorded crimes could indicate a growing recognition of corruption crimes or enhanced regulatory oversight. As a government official interpreted this increase in recorded corruption crimes, "this is due to the improvement in the detection of this type of crime, the increase in the transparency of government institutions, and the attitude of citizens not to put up with injustice" (Gansuld 2023).

**Figure 6. Recorded Corruption Crimes in Mongolia, Total (2003-2023)**

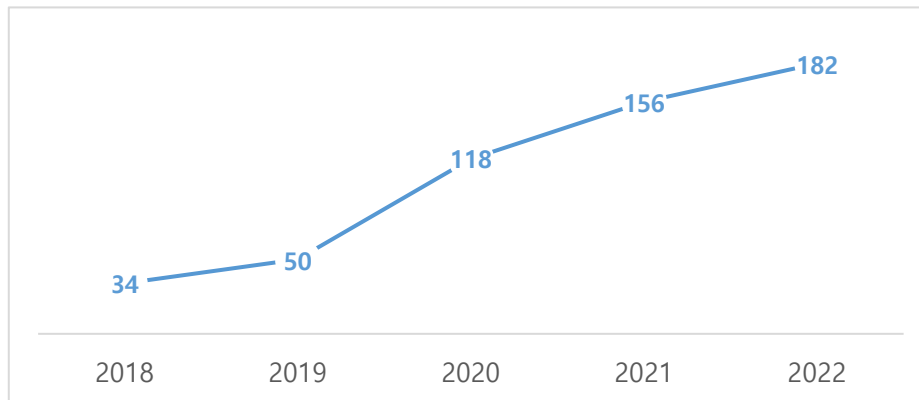
**Source:** Independent Agency Against Corruption, National Statistics Office, 2024

Furthermore, disaggregating the total number of recorded corruption crimes indicates the following. The most significant category of corruption crimes is the **abuse of power or authority by public officials**. This category has also seen a year-over-year increase, culminating in a peak of 423 cases in 2023. Both passive and active **bribery** have shown increases. Passive bribery, which involves receiving a bribe, has seen a rise from 67 cases in 2020 to 99 in 2023. Active bribery, which involves offering a bribe, initially increased from 2020 to 2021, dipped in 2022, but then rose again to 53 cases in 2023. The smallest category in terms of numbers was the **abuse of power** by legal entities, significantly growing from 3 cases in 2020 to 19 in 2023. There are lower incidences of improper spending of state-owned non-budgetary funds and illicit enrichment recorded, but both categories show an upward trajectory.

**Figure 7. Recorded Corruption Crimes, by Status of the Committed (2022-2023)**

**Source:** Independent Agency Against Corruption, National Statistics Office, 2024

**Figure 8. Number of Judicial Rulings on Corruption Crimes (2018-2022)**



Source: Judicial General Council, National Statistics Office, 2024

As reported for the first half of 2023 alone, the courts resolved 61 corruption cases involving 153 individuals, resulting in the transfer of 1.102 billion MNT to the state budget from fines imposed on those convicted of corruption and official crimes. Notably, 52.9 percent of those convicted were civil servants, with a majority (71.9%) falling within the age bracket of 31-50 years. The breakdown of convictions reveals a diverse range of sectors implicated in corruption. Among the 153 convicted, four were from political service, 33 from public administration service, 19 from special state service, 25 from public service (service delivery staff), 41 from the private sector, and 31 from other sectors (Judicial General Council, Press Release 2023, cited in Shuud.mn).

The Prosecutor General's Office provided additional insights into criminal activities for the same period. They monitored 276 cases of money laundering, indicting 45 and forwarding them to court. Additionally, 76.4 percent of corruption crimes were identified as abuses of authority and politically influential officials. The financial impact of these crimes was substantial, causing damages estimated at 3.6 trillion MNT. During the investigations, assets worth 235.1 billion MNT were seized, 9 billion MNT were confiscated, and 2.3 trillion MNT in damages were compensated (Batchimeg 2023).

**Responsiveness and timeliness.** In Mongolia, the procedural law outlines a timeframe of 90-180 days for dispute resolution. Alarming, approximately 26 percent of all cases, encompassing various dispute types, extend beyond the stipulated 6-month period (Judicial Research, Analysis, and Training Center, 2020). This protracted duration raises concerns about the efficiency and adaptability of the judicial process.

Corruption cases, in particular, face significant delays. A 2018 Transparency International assessment revealed that only 24 percent of corruption cases resulted in prosecution, while 76 percent were dropped by prosecutors. Some corruption-related disputes have languished in the court system for an astonishing 69 months (Transparency International 2019). These delays have sparked discussions about the need to establish a well-resourced and specialized anti-corruption court, as highlighted by some experts (Merkle 2018).

A survey involving 90 legal professionals, including attorneys, lawyers, prosecutors, law faculty members, and academics, yielded insights into the perceptions of speedy decision-making in court cases. Only 11 percent of respondents agreed that there had been improvements in the speedy resolution of court cases, while a significant 44 percent disagreed. Criticisms of ongoing court reforms centered on the extended processing times due to the high workload of the courts. Many cases experienced delays of up to four months or more, far exceeding the statutory 60-day period for holding hearings. The effectiveness of judicial reform

was called into question, with the focus on personnel reform rather than a more comprehensive solution. Quick action, especially in high-profile cases, was emphasized as a necessity (Bayansuren 2023).

**The degree of openness and transparency** in court proceedings is a crucial aspect of any judicial system. According to the same survey respondents, only 18 percent considered court proceedings to be fully open, while 56 percent perceived them as partially open, and 25 percent regarded them as neither open nor transparent (Bayansuren 2023).

In terms of **providing legal information to the public**, the top three preferred methods identified by legal professionals included improving the official website of the judiciary (42.2%), regular distribution of legal information through highly accessible social channels (39.2%) and summarizing court records of high-profile cases with professional commentary for public distribution (32.1%). Additionally, there was a suggestion for the Judiciary General Council to have a specially trained public relations judge (12.7%). Legal professionals stressed the importance of citizens obtaining accurate information from the official court website rather than relying on unofficial sources. They also emphasized the need to provide explanations for decisions in cases of public interest promptly (Bayansuren 2023).

**The case of the DBM.** Investigations into corruption cases related to the Development Bank have been ongoing for an extended period. These investigations have been extensive, complex, and led by a dedicated task force, involving multiple prosecutors and detectives. Three cases are interesting to illuminate the obstacles faced in court decisions involving the DBM.

First, in 2017, the case involving the former Executive Director of the Development Bank and the Chairman of the Board of Directors, the timeline of events reveals several significant aspects. The prosecutor's office spent approximately two months reviewing the case before transferring it to the court in December 2017. However, the case did not progress smoothly through the legal system. The initial two-month period spent by the Prosecutor General's Office on the case seems reasonable, but the subsequent delays and prolonged legal proceedings cast doubt on the ability of the judiciary to handle corruption cases promptly. The fact that the case was not resolved by the court and went through multiple stages, including appeals and reconsiderations, suggests potential legal challenges or complexities. This highlights the need for a robust legal framework and the expertise of legal professionals to navigate such cases effectively.

Second, the cases involving two former ministers and a Member of Parliament in 2018 reveals several postponements and challenges in the legal process, ultimately leading to the return of the case to the prosecutor. In September 2018, related criminal cases were transferred to the court. In January 2019, the case was scheduled to be heard but was postponed. In February 2019, the case was returned to the Prosecutor due to serious violations of legal procedures according to the Court. In September 2019, the IAAC reported that the case was "delayed by the court on the grounds that the statute of limitations had expired" (Enerel 2019). The case encountered procedural issues, including requests for new lawyers and the need for further review of case materials. These challenges contributed to delays and postponements, impacting the case's progression. The application of the statute of limitations, which set a five-year limit, had a critical influence on the case. The case was returned to the Prosecutor due to the expiration of the statute of limitations, raising questions about the adequacy of the legal framework for addressing long-standing corruption cases. The case's outcome, influenced by the statute of limitations and procedural issues, lead to public concerns about the legal system's ability to hold individuals accountable for corruption-related offenses, especially when significant time has passed.

Third, the Development Bank case involving 80 individuals and four legal entities took nearly 10 months for the prosecutor's office to prepare and submit an indictment. The investigations and court proceedings continued throughout 2022 and 2023 as follows:

- January 20, 2022: The Prosecutor General's Office received a case related to the DBM from the IAAC.
- As of March 2022, the prosecutor office was overseeing 29 inquiry cases and 12 investigation cases, involving a total of 74 enterprises receiving loans amounting to MNT 2,383 billion. They have submitted a proposal to the court for preventive measures against seven DBM officials and four company officials, leading to stringent custodial measures. Furthermore, a variety of assets, including hundreds of properties, vehicles, bank accounts, enterprise shares, and assets belonging to 61 individuals have been seized to compensate for state losses, with their movement restricted by prosecutors (Prosecutor General's Office 2022a).
- In November 2022, the Prosecutor General's Office announced that detectives from the IAAC and the General Police Department and prosecutors were investigating 43 cases related to DBM loans. They were assessing if lending activities followed the law and if officials fulfilled their duties. The investigation process involved reviewing and resolving 425 complaints and requests from case participants and their lawyers. In this extensive investigation, 62 individuals with specialized knowledge were appointed as experts to conduct financial analyses. These analyses took varying durations, ranging from two to 165 days, with an average of 23 days per analysis. In total, 1,429 days were dedicated to these 62 analyses (Gansuld 2023). Regarding the criticisms of the investigation's speed, several factors were mentioned including the case's complexity, wide scope, extensive evidence collection, and external enforcement actions (Prosecutor General's Office 2022b).
- January 25, 2023: The Capital Prosecutor's Office submitted the criminal case to the Sukhbaatar District Criminal Court of First Instance.
- April 17, 2023: Court proceedings involving the 80 individuals and four legal entities initiated by the Sukhbaatar District Criminal Court of First Instance. At the outset of the hearing, state prosecutors presented their recommendation for imposing criminal liability. Notably, the proceedings gained public attention and scrutiny due to the back-to-back corruption scandals in Mongolia. Civil court proceedings related to DBM non-performing loans were live-streamed via Facebook<sup>5</sup> and conducted in a theater-like setting. These proceedings were aimed at evaluating the exercise of power by the DBM's management and administration, reflecting the public's demand for accountability.
- June 26, 2023: The results of the prosecution related to the Development Bank case were disclosed, concluding that of the 80 defendants, 48 were found not guilty and 32 citizens and four legal entities found guilty. Notable decisions include the exoneration of four high level politicians including two current Members of Parliament and one ex-Prime Minister and one Minister who were initially accused of leveraging their political positions. For instance, charges related to an alleged overvaluation of a road construction project that led to state financial losses were not substantiated, and the loan was deemed to have been used for its intended purpose, with full repayment (Amarjargal 2023). In contrast, only one Member of Parliament was found guilty of accepting bribes and accumulating unjustified wealth. A former Chairman of the Board of Directors of the DBM was found guilty of accepting a bribe and engaging in discussions related to a specific event during a

<sup>5</sup> <https://www.facebook.com/watch/?v=183283124591058>



board meeting. Additionally, during a particular presidential term, a former deputy head of an office faced charges of document forgery (Amarjargal 2023).

The complexities of corruption crimes present a unique set of challenges for the judicial system. The nature of these crimes involves secrecy and is carried out with a high degree of sophistication, necessitating an extensive and resource-intensive investigative approach (Gansuld 2023). Recent trends indicate that corruption, economic, and official crimes are increasingly organized and transnational, involving multiple participants, typically influential people and professionals, and employ methods that effectively conceal their illegal activities (Duri 2021). As Gansuld, a prosecutor noted, investigations and proceedings of corruption are not straightforward and often span extensive periods, sometimes lasting from one to ten years. They require a comprehensive approach including the acquisition of expert opinions, international legal cooperation, thorough witness interviews, asset confiscation, and damage reparation (Gansuld 2023). From a judicial perspective, as highlighted by the Prosecutor General's Office, the workload involved in these investigations is substantial. With a limited number of detectives and prosecutors (60 at the IAAC and 15-16 at the Prosecutor General's Office) handling nationwide corruption investigations, each prosecutor is burdened with an average of 150 complaints and cases annually. This workload involves substantial documentation, prolonged court appearances, and the necessity to file numerous complaints and objections (Gansuld 2023).

In addition to the limitations mentioned, there has been a wave of general criticism about the Court proceedings' practices. The courtroom conduct has come under criticism for its alleged lack of professionalism. Witnesses and participants, notably the victims' representatives and lawyers, stand accused of treating defendants with disrespect and mockery. Such behavior has sparked concerns regarding the trial's fairness and integrity, leading to a questioning of the judicial process (Bat-Osor 2023). Others have pointed out that there have been no serious violations of the judicial process. The court gave sufficient opportunity to the participants of the case to speak, gave them adequate breaks, and did not require the defendants to stand up for a long time during the sentencing hearing (Bayaraa 2023).

Some legal experts and observers have pointed out significant issues in the application of the law. One notable instance involves the defendants being accused of actions connected to the 2014 lending process, a time period before the relevant legal amendments were introduced. This highlights a fundamental misunderstanding of legal principles by the prosecuting side (Bayaraa 2023). In addition, the use of Article 22.1 of the Criminal Code, concerning the misuse of power and position, has been compromised due its broad scope, blending various responsibilities from labor disciplinary to criminal, has rendered it a catch-all provision, diminishing its specific legal impact.

The trial has further ignited discussions on systemic Issues versus individual blame. The defendants in their statements have suggested that the Bank's decision-making process was a result of systemic operation, rather than individual misconduct. This perspective challenges the basis on which individuals are being held accountable, suggesting a need to look at institutional failures. As highlighted in a metaphor by a writer, "in this cage [of DBM case], both the accused crow and the oppressed innocent dove are included. But there are many pigeons" (Bayaraa 2023). For instance, the former Prime Minister N. Altankhuyag expressed "let me be the last Prime Minister who will be judged for the decisions of his entire cabinet" (*Eaglenews* 2023-06-21). He expressed concerns about the large number of people (80) being brought to court, considering it unfair and akin to playing with their destinies by spreading belief that a trial is being conducted against those accused of robbing the Development Bank. He cautioned that this situation sets a

precedent where anyone could be unfairly targeted and prosecuted under similar accusations (*Eaglenews* 2023-06-21).

Amidst these legal and procedural controversies, there is a growing perception that the trial is a politically motivated show, orchestrated in the lead-up to elections. This view undermines the trial's credibility, casting it as a spectacle rather than a pursuit of justice. The selective prosecution and apparent political bias in the trial have also been a point of contention. Critics argue that the trial targets certain individuals while conveniently ignoring others who enjoy political protection, indicating a lack of fairness and equal treatment under the law. Furthermore, key figures have been noted for their absence and alleged evasion from court hearings. This has raised suspicions of manipulation and a lack of accountability among the high-ranking officials involved (Bat-Osor 2023).

As of March 2024, the Capital's Criminal Court of Appeals has received 36 complaints from defendants and lawyers for cases related to the DBM, along with an objection from the prosecutor's office and a court date is yet to be scheduled (Tseesuren 2024). As these proceedings are ongoing, the public continues to await the enforcement of actual accountability within the country.

## 5. Conclusions

The assessment of horizontal accountability in Mongolia, particularly focusing on the judiciary's role in combating corruption scandals, in the case of Development Bank of Mongolia, highlights several critical points.

While the Constitution and subsequent legislative amendments assert the impartiality and independence of the judiciary, the practical application of these provisions suggests significant political influence. The judiciary's independence from political influence is vital for effectively scrutinizing and penalizing executive wrongdoings. However, the involvement of political figures in judicial appointments and the influence of historical and legislative contexts have raised concerns about the judiciary's impartiality. The Judicial General Council's evolving structure, with shifting political influences, highlights these concerns.

The judiciary's capacity to effectively execute its mandated responsibilities is hindered by several factors. The workload is excessive at the Capital city courts (appellate), and district courts (first instance). In addition, the workload of the prosecutor's office handles a vast number of cases annually, leading to delays and inefficiencies, particularly in corruption cases. These procedural delays, coupled with the complex nature of corruption crimes, impair the judiciary's responsiveness and timeliness. The current state indicates limitations in handling extensive and sophisticated corruption cases. The enforcement of sanctions and corrective measures appears inconsistent, further impacting the judiciary's effectiveness.

The level of public trust in the judiciary and the IAAC is a crucial indicator of their effectiveness. The findings suggest a need for improved transparency in decision-making and dissemination of legal information to foster public trust. Public perceptions provide valuable insights into the judiciary's performance. High-profile corruption scandals and delayed, unclear court decisions have contributed to public distrust in the judiciary. This distrust is not a recent phenomenon, as it has persisted since Mongolia's transition to democracy more than three decades ago. This occurs against the background of recent declines in various horizontal accountability indices and an increased incidence of recorded corruption crimes.

The Development Bank case serves as a critical example of the complex interplay between political, legal, and economic factors in Mongolia's fight against corruption. The case has gained significant public attention, leading to speculation about its political implications. Analysts have raised concerns that if politicians implicated in abusing their power and acquiring loans from the Development Bank are not held



accountable, it could lead to escalating problems, potentially threatening government stability. This situation leads to the question of whether the case was a strategically orchestrated political maneuver by the ruling party, aiming to influence public perception and political dynamics.

Recommendations to improve the state of horizontal accountability performance based on the findings of this case study include:

Given the constitutional amendments from 2019 to 2023, a comprehensive evaluation of these changes is crucial to understand their impact on the separation of powers and horizontal accountability. This review should take place over the next four years, allowing time to assess their effects on Mongolia's horizontal accountability.

It is essential to advance evidence-informed decision-making to foster regular accountability and avoid politicized proceedings. The implementation of systematic and efficient oversight mechanisms for the executive branch's operations, especially regarding significant financial activities associated with various state funds and state-owned entities such as the DBM, should be prioritized.

- Allowing extensive damages, including the misuse of public funds, to accumulate before initiating widespread investigations and court proceedings risks politicizing the judiciary and the IAAC in corruption cases. This approach not only undermines trust in these institutions but also opens the door for their misuse as political weapons against the opposition.
- National and international civil society organizations have highlighted the need for reforms to enhance transparency and accountability within state-owned enterprises – through regular, independent audits of government and financial institutions' operations, which would help maintain continuous oversight and accountability.
- Such audits, carried out by external entities, are essential not only for financial compliance but also for evaluating performance, addressing issues of transparency, and ensuring that loans and projects adhere to established procedures.
- To improve the effectiveness of these audits, it is important to involve civil society and independent observers more actively in the process.

It is vital to strengthen, not weaken, the judiciary and oversight bodies, including legislative branches:

- These efforts should include not only budget increases but also effective implementation of recent legal updates, such as the 2021 Law on Courts.
- Specific reforms can focus on guaranteeing a judiciary budget that meets its operational needs, minimize political interference, particularly in the selection and appointment of judges by strengthening the Judicial General Council's operations.
- Improving institutional capacity through specialized training for handling corruption cases, emphasizing investigative techniques and ethical considerations is crucial. Enhancing transparency in decision-making and improving the timeliness and responsiveness of the judiciary will also be key in ensuring effective executive accountability.
- Developing strategic plans to inform the public about judicial operations, fostering trust in judicial outcomes.

The prosecutorial independence and accountability must be increased along with significant reforms in the prosecutorial system.

- This includes reviewing procedural laws to eliminate bottlenecks in handling corruption cases

and advocating for the prosecutorial process to be more insulated from political influence.

- The prosecutor's office, critical in resolving disputes, has not seen substantial reforms for two decades (Mendsaikhan 2023) and faces challenges, including political influence, delays and complications in corruption case processing. Learning from other transitional democracies, increasing prosecutorial independence from the executive branch is essential (Parliamentarians for Global Action n.d.).
- This could involve legislative changes to ensure decisions are based on legal criteria, establishing an independent body to oversee prosecutorial appointments and actions, and adopting international best practices to improve transparency and accountability.
- Regular reviews of the prosecutor's office performance, with an emphasis on transparency and independence, will build public trust and contribute to a more accountable and effective justice system.

In the long term, to regain public trust, it is necessary to promote awareness of the judiciary and oversight institutions' importance in a democratic setting. Investing in education programs on civic responsibility and enhancing public understanding of accountability mechanisms can foster a culture of participation. Furthermore, making corruption proceedings transparent, including broadcasting trials and involving citizen representatives in the process, are crucial (Mendsaikhan 2023).

To protect horizontal accountability and democratic institutions, political leaders, including the Prime Minister and Members of Parliament, must embrace mindful speech and conduct. Their actions and words have the potential to severely impact the integrity of horizontal accountability institutions. The recent undermining of the judiciary by political figures highlights a troubling trend towards the gradual erosion of democratic norms. Such trends threaten the essential checks and balances that underpin democracy (Levitsky and Ziblatt 2018), potentially degrading the democratic culture that supports its foundational institutions and creating a less favorable environment for democratic principles to thrive.

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## Country Case 9: Nepal

### Horizontal Accountability in Nepal

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#### 1. Introduction

Accountability is a widely used word in the governance sector globally. The concept of accountability has especially taken rapid coverage within developing countries. In layman's terms, accountability is an act of answering and/or the responsibility to provide an answer. Conceptualizing the term accountability, it is the act of taking responsibility for the conduct or a decision from a responsible person towards the authority or the stakeholders that take a direct and indirect interest in the action. From a larger perspective, it escalates to the issues of power exercise in the governance mechanism of a state.

According to the research paper "Constraining Governments: New Indices of Vertical, Horizontal, and Diagonal Accountability" published by the Cambridge University Press, accountability is "de facto constraints on the government's use of political power through requirements for justification of its actions and potential sanctions by both citizens and oversight institutions." The definition emphasizes the power exercised by the government, which is watched closely by the people of the country or the oversight agencies in place.

This paper has tried to dig into the bits and pieces of the horizontal accountability status in Nepal concerning the constitutional provisions, the organs of the state, their construction, and the structure and interrelationship between them. Similarly, various institutions have been studied to explore their role in accountability action processes. Lastly, the paper has tried to identify gaps in horizontal accountability, the reasons behind the existing gaps, and possible recommendations to strengthen horizontal accountability in Nepal.

Nepal underwent a major political transition in the early 2000s, marked by a shift from an absolute monarchy to a federal democratic republic. This transition culminated in the adoption of a new constitution in 2015, which established a multi-level governance system consisting of federal, provincial, and local governments. According to the Constituent Project, the constitutional history of Nepal is very young compared to that of many Western nations. Indeed, the Constitution's age falls far below the average of the total years of constitutions in force globally. The transition from a monarchical constitution to a federal socialist republic constitution has not been without challenges, including political instability, weak governance systems, and social and economic inequalities. The constitutional practices being new in the Nepali geography, it has yet to witness turmoils and breaks amid its journey. The fact that India vastly inspires constitutionalism in Nepal suggests that there is no doubt that the constitutional issues in Nepal tend to follow the trend of India.

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The early days of the constitution and frequent changes in the exercise of power in Nepal have gradually developed its provisions and mechanisms over time. During the king's direct rule, various executive capabilities that, in the idealist context, should not be exercised existed. The chart provided by the Constituent Project shows that those exercises of power by the various organs of the state have been changed and are in place now. Similarly, the figure shows that the legislative powers have recently come into force with significance in their ideal job of validating the historical development of political practice in Nepal. Judicial practice in Nepal dates back to executive enforcement, while the palace largely controlled its functioning. However, there have been precedents in the history of the judiciary in Nepal where the unlawful and undemocratic moves of the head of the state have been condemned and rectified.

Despite these significant changes, the transition has been marked by political instability, with frequent changes in government and a lack of continuity in policymaking. This instability has also led to a lack of accountability and transparency, with little progress in addressing corruption and ensuring effective service delivery. Social and economic inequalities have also been persistent challenges in Nepal. The country's human development indicators remain among the lowest in South Asia, with high poverty levels, malnutrition, and illiteracy. Discrimination and marginalization of certain castes also continue to be a significant problem.

The implementation of the federal system has also been challenging, with disputes over the division of powers and resources between the federal, provincial, and local governments. There are concerns about the ability of local governments to deliver effective services, and resource allocation has been a contentious issue, with accusations that the federal government has not provided adequate resources to the provincial and local governments. One of the key challenges of governance in Nepal is the lack of capacity and resources of government institutions. Government institutions at all levels, including the federal, provincial, and local, suffer from a shortage of skilled personnel, inadequate budget, and inadequate infrastructure, resulting in ineffective service delivery, weak regulatory systems, and low administrative efficiency.

Corruption is another significant challenge facing governance in Nepal. Despite having laws and regulations to prevent corruption, there remains a lack of political will to enforce them. Corruption in Nepal is pervasive, with government officials and politicians often involved in corrupt activities, leading to a loss of public trust in the government and public institutions. Nepal has also faced significant challenges in terms of political stability. Since the Constitution's adoption in 2015, the country has faced multiple changes in government, including the resignation of two prime ministers, leading to a lack of continuity in governance, which has also impacted the implementation of policies and programs, leading to slow economic and social development.

As previously stated, in recent years, there have been efforts to address the governance challenges in Nepal. The government has initiated various reform programs to improve administrative efficiency, service delivery, and accountability. These programs include the Civil Service Reform Program, the Local Governance and Community Development Program, and the Economic Governance and Development Program. Additionally, civil society organizations (CSOs) are essential in strengthening governance in Nepal. However, there have been challenges in the operations of CSOs, including government interference and restrictions on their activities.

Another significant challenge facing governance in Nepal is the country's geography, with the rugged terrain making service delivery difficult, particularly in remote areas. The government has launched various initiatives to address this issue, including providing mobile services, extending road networks, and establishing satellite offices.



In Nepal, horizontal accountability mechanisms denote the systems of checks and balances among various government branches or agencies aimed at curbing power abuse. These mechanisms play a vital role in upholding the rule of law, fostering transparency, and safeguarding democratic ideals. Nepal's constitution and legal infrastructure institute several institutional mechanisms to uphold horizontal accountability, albeit their efficacy may differ.

## 2. Institutional Mechanism for Horizontal Accountability in Nepal

### 2.1. Constitutional Framework

The Constitution of Nepal, promulgated in 2015, incorporates various features intended to establish a federal democratic republic with inclusivity, social justice, and fundamental rights. Articles 4-7 establish Nepal as a federal democratic republic and divide the country into seven provinces with significant devolution of power to local governments. Article 4 declares Nepal as a secular state, ensuring religious freedom and equal treatment of all religions. It prohibits religious discrimination and promotes harmony and tolerance among religious communities. Similarly, Articles 18 and 42 explicitly cover inclusion and participation, ensuring representation and protection for marginalized communities such as Dalits, indigenous peoples, women, and minorities. Provisions for affirmative action and proportional representation promote their participation in governance and public life. Articles 16 to 48 guarantee a comprehensive list of fundamental rights, including the right to equality (Article 18), freedom of speech and expression (Article 19), right to information (Article 27), right to education (Article 31), and the right to social justice (Article 42). These rights protect the dignity, liberty, and well-being of all citizens.

Similarly, Articles 53-114 establish a system of separation of powers among the executive, legislative, and judicial branches of government. Each branch has distinct roles and responsibilities to prevent the concentration of power and ensure checks and balances.

Articles 83 to 108 outline the parliamentary system of governance with a bicameral legislature consisting of the House of Representatives (lower house) and the National Assembly (upper house). Article 97 establishes various parliamentary committees, including the Public Accounts Committee and the Development Committee, responsible for overseeing government expenditures, policies, and programs and ensuring transparency and accountability. In the federal parliament of Nepal, there are 16 thematic committees responsible for various aspects of governance and oversight. These committees are divided between the House of Representatives and the National Assembly, with two joint committees representing members from both houses. One of these joint committees is the Parliamentary Hearing Committee (PHC). In the House of Representatives, there are ten thematic committees covering areas such as finance, international relations, industry, commerce, law, justice, human rights, agriculture, cooperative and natural resources, women and social issues, state affairs, development, technology, education, and health, as well as public accounts. Each of these committees plays a crucial role in overseeing the activities and policies of different ministries, ensuring transparency, and promoting good governance.

Meanwhile, the National Assembly also has its own set of committees, including Sustainable Development and Good Governance, Statute Management, National Affairs and Coordination, and Government Assurance Committees, which focus on specific aspects of legislative and governance matters in Nepal. Article 86 specifies the responsibilities of the National Assembly, including scrutinizing bills passed by the House of Representatives, overseeing government activities, and ensuring accountability.

The majority party in the House of Representatives appoints the prime minister as the head of government. Article 53 establishes the accountability of the Council of Ministers to the Legislature-Parliament, requiring ministers to answer questions, participate in debates, and provide necessary information collectively and individually.

Articles 109-114 guarantee the independence of the judiciary and establish the Supreme Court as the highest judicial authority. The judiciary is empowered to interpret the Constitution, adjudicate disputes, and safeguard the rule of law.

Articles 238-265 establish several constitutional bodies to ensure accountability, transparency, and good governance. Most importantly, Article 293 sets the mandate that the chiefs and officials of the constitutional bodies must be accountable and responsible to the federal parliament. The committees of the House of Representatives may monitor and evaluate the functioning, including reports, of constitutional bodies, excluding those at the national level.<sup>2</sup>

### *Separation of Powers*

The principle of separation of powers is fundamental to Nepal's constitutional framework. Articles 53-118 have clear provisions for the separation of powers. It ensures that no single branch of government accumulates excessive power. The executive branch, led by the prime minister, is responsible for implementing laws; the legislative branch, consisting of the Parliament, is responsible for making laws; and the judiciary, including the Supreme Court, interprets laws and ensures their constitutionality. Articles 231 to 237 have transparent explanations of the power structure and the interrelationship between the levels of states.

Similarly, the 2015 Constitution of Nepal enshrines various provisions related to accountability to ensure transparency, integrity, and responsibility in governance. Article 27, the Right to Information (RTI), guarantees every citizen the right to demand information on any matter of public concern, subject to certain limitations as prescribed by law. Various articles of the constitution outline the oath or affirmation that the prime minister, ministers, and other public officials must take before assuming office, pledging to uphold and abide by the Constitution and laws and to discharge their duties with honesty and integrity. Article 298 has defined the functions, duties, and powers of the prime minister, including the responsibility to ensure the implementation of the Constitution and laws and to oversee the functions of the Council of Ministers. Part 7 exclusively delineates the functions, duties, and powers of ministers, which include ensuring the implementation of government policies, laws, and decisions and being collectively responsible to the Legislature-Parliament.

## 2.2. Oversight by Parliament

Nepal's Parliament plays a vital role in holding the executive body accountable. It exercises oversight through various means, including question sessions, parliamentary committees, and debates on government policies and actions. Committees such as the Public Accounts Committee scrutinize government expenditures, while other committees monitor specific sectors like health, education, and finance.

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<sup>2</sup> Constitution of Nepal 2015, Article 293

*Parliamentary Hearing Committee (PHC)*

Parliamentary hearings represent an imperative democratic process aimed at holding the executive body of the state accountable and responsible. This process involves the legislative body scrutinizing the competence, effectiveness, and integrity of the individuals recommended by the government for appointment to key public positions. Article 292, Section 1 of the Constitution of Nepal mandates parliamentary hearings for appointments in the positions such as the Chief Justice and Judges of the Supreme Court, members of the Judicial Council, chiefs and members of constitutional bodies appointed based on Constitutional Council recommendations, as well as ambassadors, as outlined in federal law.

Section 2 of the same Article spotlights that, for Section 1, a fifteen-member joint committee composed of members from both houses of the federal parliament must be formed in accordance with federal law. Additionally, Section 3 of the article states that no member of the joint committee under Section 2 is allowed to practice law in the Supreme Court during their term in the federal parliament.

Fifteen members comprise the committee, with three representing the National Assembly and 12 representing the House of Representatives (HoR). The members are chosen from the parliamentary parties with a clear division of the quota for their representation in the committee. The ratio of the total seats won by each political party determines their weightage for the size of their quota.

As specified by Article 292, Section 1 of the Constitution of Nepal, parliamentary hearings are conducted for the chief justice and judges of the Supreme Court, members of the Judicial Council, chiefs, and members of constitutional bodies appointed on the recommendation of the Constitutional Council under the Constitution and ambassadors, as specified in federal law per the federal parliament's joint sitting and joint committee.

Since political interest highly influences the formation of the committee, there have been instances where the formation of the committee has been delayed, thereby affecting the appointment of important officials.

*Public Account Committee (PAC)*

The Public Account Committee (PAC) is responsible for checking how the government manages its money and resources. Established in 1960, this committee is part of the government's efforts to ensure that processes are completed fairly and transparently.

The PAC has 27 members, and the Speaker of the House picks them with the House's approval. The prime minister is a member of this committee by default. The members of the committee choose their leader. This committee monitors the government's financial records and checks the reports made by the auditor general, who watches over how the government spends its money.

The Public Account Committee ensures that the government is spending its money correctly and that everything is open and fair, ensuring transparency and accountability at the state party. It mainly focuses on government organizations, including those receiving government funding or those responsible for managing public funds.

### *The Office of the Auditor General (OAG)*

The appointment of the first auditor general under the 1958 Constitution resulted in the creation of the Auditor General's Office in Nepal. Before that, an institution called "Kumari Chowk Adda" checked the government's financial records. Kumari Chowk likely started in 1769 after the unification of Nepal, and there might have even been an audit institution before that. The key members of the office of the Auditor General are the Prime Minister serving as the Chairman, the Chief Justice, and the Speaker of the Legislative Parliament are members, and three Ministers chosen by the Prime Minister also participate. The primary function of the office of the Auditor General is to audit the financial records of the government of Nepal and provide appropriate suggestions to strengthen public financial planning and expenditures.

The annual report of the Auditor General's Office shows that the total amount of irregularity identified was NRs (Nepalese rupees) 119 billion 777 million within the federal government offices, provincial government offices, local level offices, and other committees and institutions. The total audited amount was around NRs 7 trillion 138 billion 167.4 million (equivalent to USD 53.5 million) among 6,546 government entities. In addition to the irregularities of the federal and provincial government office, local level offices, and other committees & institutions, the cumulative amount of action to be taken concerning the audit backlogs, revenue arrears, and reimbursable foreign grants and loans has reached NRs 372 billion 451.3 million in this year.

Out of the total number of institutions functioning under the federal government offices that have reported disallowed expenditure, the prime ten ministries contribute to 95.12 percent of the total disallowed expenditure. Similarly, the total irregularity figure of the provincial government offices as compared to the audited figure has appeared at 2.30 percent, out of which the highest of 3.92 percent has been identified in Karnali Province, and the lowest of 1.23 percent has been recorded in Gandaki Province. The total irregularity of local levels compared to the audited figure has stood at 3.88 percent. According to the report, 540 local levels have less than 5 percent irregularity, 205 local levels have 5 to 15 percent irregularity and only 6 percent show more than 15 percent irregularity.

Despite the disallowed expenditures shown and flagged by the Office of Auditor General's records, no penalties or penalization have been brought into effect. Ethically, all the governments and government authorities with disallowed expenditures are subject to funding cuts by the federal government, while funding cuts are not in practice.

### *The Public Service Commission*

Article 242 of the Constitution governs the Public Service Commission in Nepal. According to this article, a chairman and four members comprise the commission. The president appoints these individuals based on the recommendation of the Constitutional Council. When making these appointments, at least half of the commission's members must have worked in government positions for twenty years or more. The remaining members should come from diverse fields like science, technology, art, literature, law, and public administration, or they should be individuals who have made significant contributions in areas such as research, teaching, or sociology that have positively impacted the country. The primary function of the commission is to set up the recruitment process for public services and manage the public service delivery, including policy actions.

### *The Election Commission*

The Election Commission in Nepal oversees elections, political parties, and election candidates. It was created after the 1950 revolution and officially established in 1951, with some changes to its rules over time. As outlined in Nepal's Constitution, six members comprise the Commission, who serve for six years. While it faced criticism for its handling of the 2008 Constituent Assembly Elections, it is generally recognized for effectively managing the elections.

As defined in the country's Constitution, the Election Commission of Nepal is a crucial institution responsible for managing elections in Nepal. The Constitution emphasizes key democratic principles like competitive multi-party politics, the right to vote for adults, and regular elections. Following these constitutional rules, the Commission oversees the organization of elections at various levels, including national, regional, and local, according to specific electoral systems.

### *Office of Attorney General*

The attorney general is the legal representative and advocate of the government of Nepal. The attorney general is appointed based on the provisions of the Constitution of Nepal, Code of Civil Criminal Procedure-2017, Rules of Civil Criminal Procedure, 2018, and Regulations on Government Attorneys, 2020. Under the guidance of four superintendents appointed by the attorney general, the office operates with four distinct departments:

**Department of Office and Manpower Management:** This department oversees various functions, including human resource management, international relations, assessment training, district administration, internal administration, economic administration, registration and library branches. Its responsibilities encompass managing the Attorney General's Office, personnel management, offering essential training to office staff, and overseeing internal administrative matters.

**Department of Planning and Monitoring:** Within this department, there are divisions such as planning research and monitoring, information technology, research, annual reports and publications, strategic planning implementation and monitoring, physical administration, as well as government lawyers and dialogue branches. This department plays a pivotal role in shaping the functions of the Attorney General's Office, coordinating physical infrastructure development, monitoring office activities, implementing strategic plans, and publishing annual reports detailing all office activities.

**Human Rights Protection, Legal Opinion, and Good Governance Department:** This department is responsible for human rights preservation, monitoring good governance and judicial principles, managing legal opinions, maintaining legal opinion records, monitoring judicial theories, protecting victims and witnesses, and overseeing custody matters. Its primary functions include monitoring and safeguarding human rights in custody situations, providing necessary guidance, offering legal training as required by various offices, and ensuring victim protection.

**Issue Management Department:** This department is responsible for prosecution monitoring and evaluation, issue management, appellate processes, issue handling, retailing, and records and collection branches. Its responsibilities encompass monitoring and assessing government lawyer prosecutions, case management, appeals to the Supreme Court, issue resolution, and the registration of various applications. Additionally, the Criminal Sciences Research Center, led by the additional attorney general, conducts legal and justice sector research.

In addition to these departments is the High Government Law Office, which operates in accordance with Article 5 of the Justice Administration Act, 2073. This office collaborates closely with the High Courts and their legal practitioners to ensure adherence to Nepal's government representation and regulations. Currently, the High Government Lawyers Office comprises 18 officers led by senior members of the Nepal Justice Service Government Lawyers' Group. These officers serve as public prosecutors and authorized representatives, and the office also employs staff at various other levels to carry out its functions.

### 2.3. Oversight by the Judiciary

The preamble of the Constitution clearly states the three organs of the state of Nepal, which have an "impartial, independent and competent" judiciary system in place. The judiciary acts as a check on both the executive and legislative branches through the power of judicial review. The Supreme Court of Nepal has the authority to interpret the Constitution and laws, ensuring their conformity with constitutional principles. It can also strike down laws or executive actions deemed unconstitutional, thereby preventing abuse of power.

The judiciary is organized as a unitary arrangement, with the provision of the Supreme Court, High Court, and District Courts. The Supreme Court has a Constitutional Bench under constitutional remedy, which investigates inter-governmental jurisdictional disputes. The Supreme Court is the highest court in the country. It oversees all other courts and has the ultimate authority to interpret Nepal's Constitution and laws to ensure justice. The Supreme Court also supervises and guides lower courts and other institutions involved in the justice system. It has the power to review and make decisions on various legal matters, including issues related to fundamental rights. The Supreme Court is composed of a maximum of twenty judges, including the chief justice.

Each province in Nepal has its own High Court, respectively. There are seven High Courts in the seven provinces of Nepal, along with nine High Court benches and two temporary High Court benches. High Courts can handle cases of contempt of court, where individuals obstruct the legal process or disregard court orders. High Courts also exercise special powers to protect fundamental rights and enforce legal rights. High Courts have both regular and appellate (review) jurisdiction.

There are District Courts in all 77 districts in Nepal. These courts handle various cases, including criminal and civil matters involving government and private parties. District Courts also hear appeals from local-level judicial bodies. At the local level, a Judicial Committee exists comprising the deputy mayor or vice chairperson of local governments as the head and two members from the elected representatives. The jurisdiction of the committee has been confined to non-criminal cases.

#### *Judicial Review*

Judicial review is founded on the principle that the Constitution serves as the primary law, directing state entities to adhere strictly to its provisions and the concept of limited government. Therefore, judicial review instills the Constitution with a legal essence. Essentially, judicial review grants the judiciary the authority to invalidate legislation if it exceeds the legislature's jurisdiction as outlined in the distribution of powers or violates fundamental rights or any essential provisions of the Constitution. In the context of Nepal, Article 1 explicitly establishes constitutional supremacy, asserting that any law contradicting the Constitution would be nullified. Judicial review, therefore, represents the imposition of judicial restraint upon the legislative and executive branches of government.



Judicial review is essentially a legal process whereby a judge assesses the legality of decisions or actions taken by a public entity. In Nepal, the Constitution of the Kingdom of Nepal, 1990, established judicial review (JR) as an integral part of the Constitution, which was considered unamendable. The 2015 Constitution of Nepal continues this provision through Article 133. Similarly, Article 144 of the Constitution grants High Courts the authority of JR. The essence of the JR system primarily hinges on the independence of the judiciary. Profoundly, judicial independence is upheld by the JR system, making it a foundational element of constitutionalism and the rule of law. Article 133 of the Constitution explains that any Nepali citizen can initiate a writ petition in the Supreme Court (SC) to challenge legislative acts and administrative actions, seeking their nullification to the extent of inconsistency with the Constitution.

The Nepalese constitution explicitly includes provisions for Public Interest Litigation (PIL), representing a highly evolved form of judicial activism that is not present in the constitutions of many developed and powerful nations.

#### *Role of the Judicial system in promoting democracy and federalism*

In a significant decision, Nepal's Supreme Court ruled on February 23<sup>rd</sup>, 2021, that then Prime Minister K.P. Sharma Oli's move to dissolve parliament was against the Constitution of Nepal. The Court found that the attempt at parliament dissolution was made without considering available options in the Constitution and would cost the people money to hold new elections. Because of this ruling, all the decisions made by the government regarding political appointments and other matters have been canceled because they were not legally valid. The Court also ordered parliament to be reconvened within 13 days, by March 8<sup>th</sup>, 2021. Parliament was reinstated, and the verdict of the Supreme Court established precedence in the country, which has held high the Constitution, democracy, and federalism.

## 2.4. Ombudsman Institutions

Nepal's Constitution of 2015 envisioned 13 constitutional commissions. These commissions have been formed in order to empower and protect the rights of marginalized communities, backward communities, and other disadvantaged. With the executive, judiciary, and legislative being on equal par in terms of their functional independence and autonomy to perform checks and balances, the 13 commissions, which can work in close collaboration with civil society to democratize society, are yet to reach the people and check the government but are limited to their jurisdiction with recommendation power and no executive role. The 13 commissions include the Commission for the Investigation of Abuse of Authority (CIAA), Auditor General, Public Service Commission Election Commission, National Human Rights Commission, and National Natural Resources and Fiscal Commission. However, the National Women Commission, National Dalit Commission, National Inclusion Commission, Indigenous Nationalities Commission, Madhesi Commission, Tharu Commission, and Muslim Commission are subject to review every ten years.

The Commission for the Investigation of Abuse of Authority (CIAA) is responsible for investigating and prosecuting corruption cases within the government and public sector. This agency helps ensure accountability by holding officials accountable for misusing their powers or engaging in corrupt practices. The Commission for Investigation of Abuse of Authority (CIAA) is an important regulatory organ of the state. Its main job is to fight corruption by investigating cases where people in government positions and public services misuse their authority. This commission is considered independent and abides by the

Constitution of Nepal. The Constitution, specifically Articles 97 and 98, provides the grounds for the setup of this commission as a vital part of the government's efforts to control corruption. This commission works in different ways, like investigating those involved in corruption, preventing corruption in the first place, promoting ethical behavior, and improving the capabilities of institutions.

One chief commissioner and four other commissioners make up the Commission. The president appoints them based on the recommendation of the Constitutional Council. These commissioners serve for six years and can stay in their roles until they turn 65. They can also be reappointed on a need basis. Just like Supreme Court judges, they can be dispensed similarly.

The Secretary of the Government of Nepal is in charge of the Commission's administration. The Commission has 12 different divisions, including ones for investigations, handling appeals and legal matters, evaluating properties, implementing decisions, managing human resources, testing technical aspects, planning policies, and handling international relations, in addition to a division related to police matters.

### *Relationship Between the Commission and Other Bodies*

According to the constitutional and legal provisions, various bodies have been directly or indirectly interrelated and performing their functions to control corruption and maintain good governance in the country. The major agencies that have the closest working relationship with the Commission for Investigation of Abuse of Authority for corruption control are the Supreme Court, Special Court, State Order and Good Governance Committee of the House of Representatives, Office of the Prime Minister, and Council of Ministers, National Vigilance Center, and Office of the Special Public Prosecutor.

In addition, correspondence and details are exchanged by the Commission with the ministries of the federal government and the provincial government, the National Library, the Department of Revenue Investigation, the Department of Money Laundering Investigation, Nepal Rastra Bank, the Financial Information Unit, Nepal Police, etc. According to the Constitution of Nepal, if an investigation by the Commission finds that a person holding a public position has committed corruption, a case can be filed in the relevant court against that person or another person involved in that act. According to that provision, the Commission investigates the complaint and registers the case in a special court if it is found to be a corruption offense. In this regard, there is a provision that the special public prosecutor's office will conduct the debate. If necessary, the Commission will file an appeal or review petition in the Supreme Court.

In accordance with the constitutional provision for the committee of the House of Representatives to monitor constitutional bodies, the State Order and Good Governance Committee of the Federal Parliament House of Representatives monitors the activities of the Commission. The committee discusses the implementation of the suggestions given through the Commission's annual report. Likewise, in order to make the efforts of corruption control dynamic and effective and to solve the problems seen in the promotion of good governance and morals, the committee has discussions and interactions with the related agencies and also gives necessary decisions/instructions. According to the provisions of the Prevention of Corruption Act, 2059 B.S, the National Vigilance Center monitors and sends a report to the Commission on whether persons holding public office have submitted/not submitted their property details to the relevant agencies within sixty days of the end of every financial year.

People holding public positions who do not disclose the property details mentioned in the received report have been fined by the Commission under the law. In connection with the investigation of corruption-



related acts by persons holding public positions, the Commission obtains necessary information and details from various agencies of the Government of Nepal.

According to the request of the Commission, the ministries of the government of Nepal, and the civil library, the Commission receives the necessary details from the agencies that keep records and details, such as the Revenue Investigation Department, the Asset Laundering Investigation Department, and Nepal Rastra Bank. Similarly, if the Commission receives a complaint found to be under the jurisdiction of other agencies, the Commission will send it in writing to the relevant agency for necessary action. Such agencies include relevant ministries/departments/offices, universities, the Money Laundering Investigation Department, the Revenue Investigation Department, Nepal Police, and other regulatory agencies.

### 3. Gaps in Horizontal Accountability Mechanisms

At the center of Nepali federalism are constitutional and legal institutional horizontal mechanisms. The gaps between their expected effects and their actual performance across various domains over time are significant, as these gaps contribute to challenges in achieving robust checks and balances within the government, leading to grave and irreversible damage to society and prosperity. Below are the practical gaps in the horizontal accountability mechanisms at the implementation level in Nepal.

#### 3.1. Political Interference and Instability

The present Constitution of Nepal is an outcome of a couple of decade-long crises and a struggle for power and identity; however, it has not been able to refrain from policy-level corruption, leaving loopholes for politicians to play against while pursuing and exercising power. A constitutional crisis, corruption, and political polarization, all significantly impacting the development pace of Nepal, mark its current political situation.

Political interference and weak constitutional provisions regarding the executive domain of the state directly impact the government's accountability towards other state organs. The federal parliament of Nepal and the provincial assemblies of each of Nepal's seven provinces, all of whom are directly elected, comprise the electoral college that indirectly elects the president, which leaves decisive control to the political parties over the appointment of the president. The president's role is to protect the constitution, though the ceremonial nature of the exercise of power limits their role. Similarly, the prime minister-head of the executive body has been entitled to more power. The collusion of the prime minister and the president can bring unimaginable changes to the legislative and judicial mechanisms through ordinance. The failure to secure a directly elected prime minister in the constitutional provision has created ample platforms for the political parties to play.

Appearing deeply ingrained in Nepali leaders are impatience and a desire for power. Since the inception of the country's first elected government under BP Koirala in 1959, Nepal has witnessed the rise of over 40 administrations. Governmental leadership has transitioned 41 times, encompassing re-elections and re-appointments of the same prime ministers under altered legal or political frameworks. It would be inaccurate to attribute this solely to the failure of political parties or the multi-party system, as even during the Panchayat era (direct monarchy), Nepal's governments struggled to maintain stability. Furthermore, Nepali citizens have consistently bestowed certain political parties with clear majorities, yet none have managed to complete their full term in office. The provision of government formation through coalition is a major setback in contributing to the instability in Nepal.

The political appointment of the head of the judiciary through the constitutional commission provides a platform for the political leaders to exercise their influence and political standing in the legislative. Similarly, the appointment of the head of the army is yet another example of the loop in the constitutional provisions, as this has led to favoring by the heads of those institutions to the political parties and leaders in crucial political, executive, and other matters.

The control of the political parties over their parliamentarians in the house is another major drawback of Nepali political culture and power dynamics. The practice of the whip system significantly influences their ability to decide and vote for the correct legislation. Similarly, the parliamentary committees remain dysfunctional for longer periods, directly influencing parliament's law-making process. The practice of partition through consensus building during the member selection creates a biased committee.

In addition, the politicization of bigger crimes channeling the investigation through the formation of high-level committees provides a different direction to the actual investigation that needs to be carried out. In the recent cases of gold smuggling, it is speculated that the investigation through the high-level committee and its time-consuming procedures provided escape holes for the big fish. Despite the understanding that the Nepal Police and/or the Crime Investigation Bureau should handle criminal cases, the actual criminals fled. Being an ombudsman institution, the CIAA has a crucial role in confirming the accountability mechanism in Nepal, while the constitution has been unable to keep it from political influence. The political appointment of the head of the CIAA plays a major role in setting the platform for the politicians to impact. The anti-graft body's success is limited to 33 percent when prosecuting cases without proper investigation. The CIAA has also received criticism for only convicting low-level employees holding public positions while the high-ranking officials often manage to go scot-free. Statistics show that only 33 percent of corruption cases registered by the commission in special courts have been resolved.

### 3.2. Weak Parliamentary Oversight

Parliament in Nepal is tasked with providing oversight, while factors such as party politics, lack of resources, and inadequate capacity limit its effectiveness. The party's decisions heavily influence the parliamentary functions of the parliamentarians. Parliamentary committees often face challenges conducting thorough inquiries and holding the executive branch accountable due to partisan interests and lack of expertise. As a result, executive actions may go unchecked, leading to potential abuses of power.

### 3.3. Limited Enforcement of Anti-Corruption Measures

Nepal has an anti-corruption agency in place, the Commission for the Investigation of Abuse of Authority (CIAA); however, limited resources, political interference, and a culture of impunity hinder its effectiveness in combating corruption. High-profile corruption cases often face delays or are subject to political influence, leading to skepticism about the government's commitment to accountability. In a recent event, the newly appointed commissioner of the CIAA already has multiple active corruption charges. This appointment directly influences the charges, and the commissioner is likely to be provided with a clean sheet. Similarly, the newly appointed home minister is already surrounded by passport issues on falsified information. He is also allegedly linked to fraud and corruption over the cooperative fund. The appointment of such a person in such an influential position will make a visible impact on the investigation process. The charges and allegations against him are anticipated to be cleared or dissolved. The appointment of the CIAA

commissioner and the home minister is a political strategy to gain power for coalitions. While this action directly impacts a large-scale corruption investigation and creates a void structure in the status of governance and the rule of law in Nepal, it also contributes to the formation of the government.

#### *World Justice Project “Rule of Law Index”*

The World Justice Project (WJP) is an independent organization with the mission to promote the rule of law around the world. Each year, the WJP releases a report evaluating the rule of law in different countries based on a comprehensive set of indicators. In the most recent report, Nepal was ranked 105 out of 126 countries.

The report evaluates countries based on eight factors: constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, and criminal justice. Nepal’s performance on these factors varied widely. One of the areas where Nepal performed poorly was corruption. The report found that corruption was a significant problem in Nepal, particularly in the public sector. The lack of effective measures to combat corruption was a major factor contributing to this issue. Nepal also scored poorly in the area of civil justice. The report found that the country’s court system was slow, inefficient, and lacked independence. There were also concerns about access to justice, particularly for marginalized and disadvantaged groups.

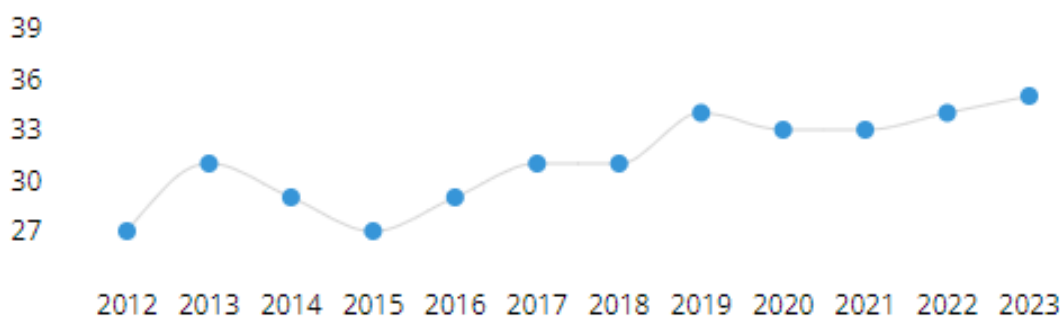
On the other hand, Nepal scored relatively well in the area of fundamental rights. The country has a constitutional commitment to protecting fundamental rights and vibrant civil society advocates for these rights. However, there were concerns about how these rights were implemented and enforced, particularly for marginalized groups. Nepal’s performance on the other indicators was mixed. The country scored relatively well in the area of order and security, but there were concerns about the excessive use of force by law enforcement agencies. Nepal also scored relatively well in the area of regulatory enforcement, but there were concerns about the lack of effective regulation in some areas.

Overall, the WJP report highlighted several areas where Nepal needs to improve the rule of law. In particular, the country needs to take more effective measures to combat corruption and improve the efficiency and independence of its court system. There is also a need to improve access to justice and ensure that the fundamental rights of all citizens are effectively protected, including marginalized and disadvantaged groups. To address these issues, the Nepali government and civil society need to work together to implement reforms that promote the rule of law, which could include measures to strengthen the judiciary’s independence, improve the effectiveness of law enforcement agencies, and promote greater transparency and accountability in the government. There is also a need to increase public awareness of the importance of the rule of law and to build greater public support for these reforms.

#### *Corruption Perception Index*

As of the 2023 Corruption Perception Index (CPI) produced by Transparency International, Nepal ranks 108<sup>th</sup> out of 180 countries with a score of 35 out of 100. This ranking places Nepal in the lower-middle range in terms of perceived corruption. While it’s important to note that Nepal has made progress compared to previous years, there is still much work to be done to combat corruption effectively.

Figure 1. CPI scores of Nepal since 2012

**Score changes 2012 - 2023**

Source: CPI 2023

Nepal's score of 35 on the 2023 Corruption Perceptions Index, compared to that of Denmark with a score of 90, indicates that corruption remains a significant challenge for Nepal. While Nepal has made progress compared to previous years, there is still more to be done to combat corruption effectively. Addressing corruption is not only a moral obligation but also essential for economic development, political stability, and building trust in government institutions.

It is crucial to strengthen institutions, enact and enforce anti-corruption legislation, promote transparency, and engage civil society to combat corruption in Nepal. International cooperation and the use of technology can also play pivotal roles in the fight against corruption. Nepal must prioritize these efforts to improve its CPI ranking, enhance its citizens' quality of life, and foster a more transparent and accountable society.

#### 4. Underlying Causes of Gaps in the Horizontal Accountability in Nepal

Despite the appropriate constitutional measures and institutional mechanisms, the discrepancies between institutional norms of horizontal accountability mechanisms and the political realities of their performance in Nepal are attributed to several interconnected factors deeply rooted in Nepal's political culture and practices for various reasons.

##### 4.1. Political Culture and Power Dynamics

The political culture, centric to power concentration, often undermines the effective functioning of accountability mechanisms. Elite political centers prioritize their interests over institutional integrity and accountability, which leads to the manipulation or sabotage of checks and balances. The history of Nepal has witnessed rough power transitions, establishing monarchy to power at times. Meanwhile, the palace has always played a divide-and-rule strategy, weakening the ideal politics. Thus, the political culture has not been ethical; instead, it has always concentrated on reaching power. Hence, a tiny group of people have been reshuffling in the key positions, and their misuse of authority to strengthen their positions has a grave impact on the development of the Nepali political culture.

## 4.2. Weak Institutional Capacity

Many institutions in Nepal, including parliament, the judiciary, and anti-corruption agencies, suffer from inadequate resources, capacity, and expertise. Weak institutional capacity hampers their ability to fulfill their mandates effectively and independently, making them rely on external influence and political pressure. Because the federalism of Nepal is in the infant stage, it lacks a strong parliamentary culture and a firm base since its inception in 2007. The parliament has failed numerous times in terms of its ineffectiveness. The parliament was ineffective during its dissolution despite its capacity to save itself.

## 4.3. Legal Ambiguities and Enforcement Challenges

As mentioned above, Nepali politics lack a strong and ethical political culture, and policy corruption has resulted due to the partisan interest of the political parties. The ambiguity in the legal framework, loopholes in legislation, and irregularity in enforcement mechanisms create opportunities for government officials to evade accountability. Weak enforcement of laws and regulations, coupled with limited oversight and backed by political interest in the incidences of corruption, allows abuse of power to go unchecked and strengthens a culture of impunity. Recent examples of high-level committees participating in gold smuggling investigations and land acquisition allegations are evidence of the enforcement challenges due to political interest.

## 5. Conclusion

Constitutionalism, its implementation, and the rule of law are young for Nepal, while major setbacks have already appeared within a short time. Reflecting upon the existing horizontal mechanisms, constitutional framework, existing gaps, and the measures taken globally to address the current issues, there are concrete recommendations for addressing the gaps and challenges in horizontal accountability.

The short-term remedies include capacity strengthening of parliamentary committees to conduct rigorous oversight of the executive branch, including regular hearings, inquiries, and reports on government actions. A regular operation of the House of Representatives can significantly contribute to the effectiveness of the same. Similarly, the independence of the judiciary by keeping the appointment of chief and supreme court judges from the political interest, introducing measures to protect judges from political interference, providing adequate resources for courts, and expediting the resolution of cases to enhance public trust in the judicial system will significantly contribute to strengthening the role of the judiciary in accountability measures.

At the institutional level, the appointment of the commissioner of the CIAA, should be made more rigorous and through multi-layer screening. Prioritizing the enforcement of anti-corruption laws and empowering the CIAA with sufficient resources, more investigative powers, and autonomy to investigate and prosecute corruption cases swiftly will be an ideal context for the CIAA to confirm the horizontal accountability between the institutions. Similarly, dedicated figures can take the initiative to develop political culture and promote ethical leadership within government institutions by holding public officials accountable for their actions, fostering a culture of integrity, and ensuring transparency in decision-making processes. The decision-making at government institutions can also be made transparent through cross-platform verification of the decisions and their implementations.

In the long run, the ultimate remedies can be achieved through the amendment of the constitution, a legal framework controlling policy corruption, and a strong penalty system. Further, comprehensive constitutional reforms strengthen the separation of powers, bringing more clarity to the institutional roles and responsibilities and enhancing authority-level checks and balances between branches of government. The reformation of legal frameworks, including utilizing key policies to address loopholes, inconsistencies, and weaknesses in the legal system, and measures to streamline legal procedures, enhance enforcement mechanisms, and ensure access to justice for all citizens.

Similarly, building the capacity of government institutions, including parliament, the judiciary, and the anti-graft commission, through training programs, exposures, recruitment of qualified personnel with a definitive set of qualifications, and integration of processes and opening access to the public sphere on the information will be essentials in the horizontal mechanism. Further, introducing electoral reforms to enhance the integrity and fairness of the electoral process, including measures to regulate campaign financing, increase transparency in political party funding, and promote electoral accountability, will be a longer process but with substantive improvements. The parliamentary development fund should be brought to a halt and eliminated since these kinds of loose funds create opportunities for lawmakers to engage in implementation or execution-level activities where corruption is likely to take place, reducing their engagement in the law-making process and jeopardizing their functional roles.

Promoting civic education can bring transformation over the generations while it will contribute to developing nationalism and shaping the political culture gradually. Including anti-corruption topics in the curriculum, mass-level awareness programs to educate citizens about their rights and responsibilities, and emphasizing the importance of holding government officials accountable are tiny actions with more significant impact over time.

Finally, the legislative and judiciary branches play critical roles in the governance system in Nepal in counteracting executive aggrandizement and upholding checks and balances functions. The legislature possesses the authority to scrutinize the actions of the executive branch through various parliamentary processes. Utilizing the mandate provided by the people through elections and the constitution, the legislative body can ensure the executive is held accountable for its decisions and policies, ultimately preventing executive aggrandizement. Similarly, by creating distances between the political parties and various parliamentary committees, the parliament can control the allocation and expenditure of public funds through the budgetary process. Through scrutinizing fiscal plans and appropriations, parliament can limit the executive's ability to unlawfully and/or unethically expand its power.

In 2018, the government of Nepal proposed an ordinance to amend the National Human Rights Commission Act, granting the government greater control over the appointment and functioning of the NHRC. However, Parliament, acting as a check on executive power, rejected the ordinance, citing concerns about potential encroachment on the NHRC's independence and autonomy.

Lastly, ensuring the independence of the judiciary, especially the Supreme Court, will empower the same in reviewing the constitutionality of laws, executive actions, and their decisions. Through judicial review, the judiciary can strike down laws or executive orders that violate the Constitution, thereby limiting executive aggrandizement.



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# Country Case 10: The Philippines

## Horizontal Accountability at Risk: Executive Aggrandizement in the Philippines

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### 1. Introduction

The Philippines had an authoritarian regime from 1972 to 1986 under President Ferdinand Marcos Sr. This was the pinnacle of executive aggrandizement in post-independence politics in the country. During that period, Marcos exercised executive, legislative, and judicial functions simultaneously without hindrance. This form of governance was pursued under the veil of constitutional authoritarianism. It was a rhetorical justification for the exercise of authoritarian rule through the emergency powers granted to the President under the martial law provisions of the 1935 Constitution (Navera 2018). The 1986 EDSA people's power revolution enabled the return of democracy. The new Constitution, which was ratified in 1987, contained stringent procedures that bar a sitting President from declaring martial law in a discretionary manner. A set of mechanisms provided for the promotion of horizontal accountability, particularly through the strengthening of the legislature and the judiciary in a democratic system of checks and balances. Oversight agencies that conduct financial audits of government spending, check corruption among public officials, and investigate human rights violations by state actors, were also established to provide institutional limits on executive authority.

The safeguards offered by the 1987 Constitution have been threatened by streaks of authoritarian populism. It is important to assess the capacity of state institutions, including the legislative and judicial branches of government and other oversight agencies, to check the rebirth of executive aggrandizement, albeit under a system of formal democracy. In the 2023 Democracy Report by the Varieties of Democracy (V-Dem) Institute, the Philippines was classified as an electoral autocracy alongside India, Nigeria, Pakistan, Russia, and Turkey (Papada et al. 2023, 12), indicating a disturbing deviation from the type of democracy envisioned during the inception of the 1987 Constitution.

This study examined the state of horizontal accountability in the Philippines and its associated risks by looking into the following sectors of government: first, the efficacy of the Congress of the Philippines in exercising legislative oversight over the executive branch in the implementation of public policies and programs; second, the independence of the Supreme Court in using judicial power to sanction unlawful decisions by the executive; and third, the capacity of such oversight agencies as the Office of the Ombudsman, Commission on Audit (COA), and Commission on Human Rights (CHR), to hold the executive

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accountable. It generated a nuanced picture of the state of horizontal accountability in the Philippines and provided policy recommendations to strengthen horizontal accountability mechanisms and check executive aggrandizement.

This research utilized the following methods for data collection. First, it conducted a desk review of books, journal articles, policy reports, and conference proceedings to understand how Philippine mechanisms of horizontal accountability and attempts at executive aggrandizement have evolved since the demise of the authoritarian regime in 1986. Second, it looked into three relevant constitutional indices as collated by the Comparative Constitutions Project (Elkins and Ginsburg 2022; Elkins, Ginsburg and Melton, n.d.) and the Horizontal Accountability Index by the V-Dem Institute (Lührmann, Marquardt, and Mechkova 2020; *V-Dem Codebook* 2023; *V-Dem Dataset* 2023) to assess the state of horizontal accountability and executive aggrandizement in the Philippines over time. The historical sketch would provide the context to support the trends seen in the constitutional indices which provide snapshots on the evolving levels of horizontal accountability and executive aggrandizement in the country since 1986. The two datasets give a fuller picture by implicating the factors of such evolving levels.

This paper is divided into five sections. The first section discussed the concept of horizontal accountability and executive aggrandizement. The second section explained the empirical measures and indicators of horizontal accountability. The third section elucidated the history of horizontal accountability in the Philippines since 1986. The fourth session examined the data from the empirical indicators to reveal the current state of horizontal accountability and executive aggrandizement in the country. The fifth section contained recommendations on strengthening the horizontal accountability and democracy in the Philippines.

Even with the constitutional safeguards at hand, the Philippines have never been known to achieve true democracy, in large part due to its inability to effectively implement these safeguards and other similar guarantees. More than three decades since the incumbent constitution was ratified, and yet the issues of corruption and human rights violations, whether grand or petty, remain persistent in Philippine governance. Some may even echo the claims that the Philippines is a “changeless land” (see Timberman 1991). At the same time, this study contributes to the wider literature by investigating whether the current state of horizontal accountability and executive aggrandizement changed significantly due to recent changes in administrations.

## 2. Horizontal Accountability and Executive Aggrandizement

Horizontal accountability is defined as the relational network of accountability among co-equal sectors of government, usually between the co-equal executive branch on one hand, and the legislature and judiciary on the other (O'Donnell 1998; Lührmann, Marquardt, and Mechkova 2020; Bovens 2005, 196-200). Horizontal accountability is operationalized through formal rules and institutions through which oversight over government actions can be carried out (Slater and Arugay 2018, 93). This is differentiated from *vertical* accountability, which measures the citizenry's ability to hold its government accountable through the electoral process, the political party system, and other forms and institutions of public political participation (O'Donnell 1998, 112; Lührmann, Marquardt, and Mechkova 2020). This is also different from *diagonal* accountability, the ability of non-state actors such as civil society and media to hold the government accountable through investigation, information dissemination, and other activities towards the provision and amplification of information regarding the government and its activities (O'Donnell 1998, 112; Lührmann, Marquardt, and Mechkova 2020). As such, much attention is given to the executive

branch since it is the one branch empowered with and responsible for executing laws, policies, and agendas (Lührmann, Marquardt and Mechkova 2020, 812; see also O'Donnell 1998 and Bovens 2021). In democracies functioning appropriately, some democratic erosion can occur, but not to the point of breakage if the accountability mechanisms work together to keep incumbents in check and pressure them out of any moves toward further erosion (Laebens and Lührmann 2021). There is evidence, meanwhile, to suggest that a model that hybridizes horizontal and vertical accountability best describes democratic governance, as both forms of accountability have been perceived to be present across government actors (Reddick, Demir, and Perlman 2020).

It must be remembered that all forms of accountability have ancient and modern roots. Perhaps sensibly, accountability comes historically through the modern discipline of accounting and the more ancient practice of bookkeeping (Bovens 2005; Hayne and Salterio 2014 in Bovens, Schillesman, and Goodin 2014, 2). What is significant here is that accounting and bookkeeping revolve around accounts, interpreted in two ways: as the count of items or objects of importance such as resources, possessions, debts, promises, and agreements, and as the contexts and stories behind the count, particularly on how those objects were acquired or received, kept or exchanged, and lost or given. By obligation, accountants and bookkeepers are tasked to record the accounts entrusted to them accurately so that all those who use such accounts could decide what to do with it next. Such a practice goes back to the dawn of civilization, where systems of records keeping evolved into the written language so as not just to record counts of materials such as grain and sheep but also of stories and histories (Diamond 1999, in Bovens, Schillesman, and Goodin 2014, 3). The modern English conceptualization of accountability, meanwhile, started with the Domesday Book, the 1085 census of England upon William the Conqueror's ascension to the English throne (Dubnick 2007, in Bovens, Schillesman, and Goodin 2014, 3). All these instances point to how record-keeping evolved into storytelling and then into social power relations. And since representative democracy, as a system of governance, assumes the citizenry as the ultimate sovereign rather than the government, the top echelon of which consists of elected representatives of the citizenry anyway, it stands to reason that one of the government's primary purposes is to accurately take hold of the public accounts.

Executive aggrandizement, meanwhile, is the use of political power by nominally democratically elected incumbents, almost exclusively national executives, to concentrate power and weaken all forms of opposition against them (Bermeo 2016, 10-11; Croissant 2020). Four main objectives define executive aggrandizement: 1) the recompense of political allies; 2) the punishment of political enemies, critics, and dissidents; 3) the curtailment of the independent news media and civil and political liberties; and (4) the degradation of constitutional checks and balances and the rule of law (Croissant 2020). It is usually undertaken through institutional changes achieved via legal and constitutional avenues such as parliaments, referenda, and existing judiciaries, giving these consolidating undertakings a veneer of democratic mandate and legitimacy (Bermeo 2016, 10-11). Deep-seated institutional malfunctions and attacks on institutional capacity could lead to significant executive aggrandizement and, perhaps, even new authoritarianism (Froomkin and Shapiro 2021), with weak party systems being a prominent example of such institutional malfunction (Ufen 2022). Further support for executive aggrandizement is popular support, especially from individuals and groups that belong to either social sectors that have greatly benefited from the system or those from predominant social groups (Schafer 2021). Executive aggrandizement, then, flies in the face of democracy, particularly in its continued requirement for checks and balances and overall accountability in the government. Horizontal, vertical, and diagonal accountability are all necessary to maintain genuine democracy, which, by design and definition, is always polarizing and contentious. This applies to traditional

issues such as socioeconomic divides and ideological differences, as well as modern concerns regarding the use, misuse, and abuse of the powers of elected officials (Slater and Arugay 2018). These mechanisms have been observed to be usually the first one to be undermined and broken down when a country moves towards autocratic rule (Sato et al. 2022).

Global trends are pointing to an emerging pattern of democratic regression. Bermeo (2016) already noticed that the emerging patterns of de-democratization were trending towards more gradual methods such as executive aggrandizement and strategic electoral manipulation. Chu et al. (2020) observed a more worrying trend, as the “retreat of the third wave of democratization” between 2005 and 2016 was more severe when looking at popular surveys than what expert surveys suggested, demonstrating a sense of dissatisfaction with democratic process and subsequent support to populist leadership. Diamond (2020) further supported this stance, where democratic backsliding has been seen more widely across the world, even in the supposed mature democracies among the G20 countries. Albertus and Grossman (2021) found variations of the same patterns of executive aggrandizement and democratic erosion in Argentina, Brazil, Mexico, and even the United States, which coincides with the worldwide rise of populism across the world since 2016, characterized by the purported ideological division between the supposedly pure people of the country and its corrupt elites (Guriev and Papaioannou 2022).

It does not mean, however, that de-democratization would be unstoppable; as Croissant and Kim (2020) noted, South Korea and Taiwan have variously curtailed attempts towards de-democratization and executive aggrandizement despite the persisting authoritarian tendencies through their struggles for democracy. Such patterns also do not indicate Presidentialism as an inherently perilous system to adopt, as Bünte and Thompson (2018) would emphasize in their analysis of Southeast Asian Presidential systems, but rather in the challenges to these systems by opportunistic and transgressive politicians trying to maximize pressure.

### 3. Measures of Horizontal Accountability

The strength of horizontal accountability, and thus the risks and realities of executive aggrandizement in each country, has been measured in several ways. One such method, established and drawn from the Comparative Constitutions Project (Elkins and Ginsburg 2022), compares the formal rules of government by looking at the text of constitutions around the world since 1789 (although the unwritten constitution of the United Kingdom is listed as the oldest in data with an adoption year of 1215). The three indicators that are of interest are as follows (Elkins, Ginsburg, and Melton n.d.):

1. **Executive Power:** an additive index from 0 to 7 that captures the presence or absence of seven important aspects of executive lawmaking: (1) the power to initiate legislation; (2) the power to issue decrees; (3) the power to initiate constitutional amendments; (4) the power to declare states of emergency; (5) veto power; (6) the power to challenge the constitutionality of legislation; and (7) the power to dissolve the legislature.
2. **Legislative Power:** an index that captures the formal degree of power assigned to the legislature by the constitution, based on the mean from a set of 32 binary variables based on a survey developed by M. Steven Fish and Mathew Kroenig in *The Handbook of National Legislatures: A Global Survey* (Cambridge University Press 2009); and
3. **Judicial Independence:** an additive index ranging from 0-6 that captures the constitutional presence or absence of six features thought to enhance judicial independence: (1) explicit statements of



judicial independence; (2) judicial lifetime appointments; (3) involvement of either a judicial council or two (or more) actors in appointments to the highest court; (4) limitations on the removal of judges; (5) limitations on the causes for judicial removal; and (6) protections on judicial salaries.

These three indicators relate directly to the formal checks and balances between the executive on one hand, and the legislative and judicial branches on the other.

Another empirical measure of horizontal accountability is the *horizontal accountability index* developed by the V-Dem Institute (Lührmann, Marquardt, and Mechkova 2020; V-Dem Codebook 2023; V-Dem Database 2023). This index “capture[s] the extent to which the judiciary, the legislature and other oversight agencies hold the government to account by modeling each of these factors as separate hierarchical nodes,” and considers the legislature, the judiciary, and specific oversight agencies such as ombudsmen, prosecutors, and comptrollers general as the “key agents” of accountability for inclusion into the index (*V-Dem Codebook* 2023, 291). The index is composed of eight indicators derived from the wider Varieties of Democracy project, and these indicators are as follows (Lührmann, Marquardt, and Mechkova 2020; *V-Dem Codebook* 2023):

1. ***Executive respects constitution:*** Do members of the executive (the head of state, the head of government, and cabinet ministers) respect the constitution? (0-4; 0=Never, 4=Always)
2. ***Legislature bicameral:*** How many chambers does the legislature contain? (0 to 2)
3. ***Legislature investigates in practice:*** If the executive were engaged in unconstitutional, illegal, or unethical activity, how likely is it that a legislative body (perhaps a whole chamber, perhaps a committee, whether aligned with government or opposition) would investigate that would result in a decision or report that is unfavorable to the executive? (0-4; 0=Extremely unlikely, 4=Certain or nearly certain)
4. ***Legislature questions officials in practice:*** In practice, does the legislature routinely question executive branch officials? (0-1; 0=Never to rarely; 1=Routinely)
5. ***Compliance with the high court:*** How often would you say the government complies with important decisions of the high court with which it disagrees? (0-4; 0=Never, 4=Always)
6. ***Compliance with the judiciary:*** How often would you say the government complies with important decisions by other courts with which it disagrees? (0-4; 0=Never, 4=Always)
7. ***High court independence:*** When the high court in the judicial system is ruling in cases that are salient to the government, how often would you say that it makes decisions that merely reflect government wishes regardless of its sincere view of the legal record? (0-4; 0=Always, 4=Never)
8. ***Lower court independence:*** When judges not on the high court are ruling in cases that are salient to the government, how often would you say that their decisions merely reflect government wishes regardless of their sincere view of the legal record? (0-4; 0=Always, 4=Never)
9. ***Executive oversight:*** If executive branch officials were engaged in unconstitutional, illegal, or unethical activity, how likely is it that a body other than the legislature, such as a comptroller general, general prosecutor, or ombudsman, would question or investigate them and issue an unfavorable decision or report? (0-4; 0=Extremely unlikely, 4=Certain or nearly certain)

The eight indicators could be grouped into the following: Indicator 1 as the *Executive* node, which tackles the character of the executive itself; Indicators 2 to 4 compose the *Legislative* node which captures the powers and characteristics of the legislature that impacts largely on the actions of the executive; Indicators 5 through 8 denotes the *Judicial* node which focuses on the judiciary’s role and character; and Indicator 9 provides the *Oversight* node which captures for the other oversight bodies (see *V-Dem Codebook* 2023, 291-292).



The constitutional indices by the Constituent Project have been chosen to depict the formal rules of horizontal accountability since these clearly and succinctly depict those rules. Admittedly, these are limited, as it only looks at the formally written rules, not the realities on the ground. However, these indicators would point towards the idealized arrangement which can be then compared with the actual practice and situation in the country. It would also be limited in that there would be a single data point for each of these indices for the case at hand, since the current Constitution was chosen as the starting point of this chapter's coverage, and since the Constitution has yet to receive any amendments or revisions since its adoption in 1987. To supplement this, an analysis of the relevant provisions of the constitution, and therefore the relevant institutions, would be cited.

V-Dem Institute's index, meanwhile, has been chosen to quantitatively depict the actual situation of horizontal accountability in the Philippines. This should supplement further the constitutional indices in assessing the current system of horizontal accountability in the Philippines by providing a summative indication of the system. However, the index alone would not be sufficient to describe in detail such a system, especially over time. Thus, included in the analysis are the eight indicators that determine this index, as those paint the issues that constitute the concerns on horizontal accountability in the country. With these indices, data, and the history of horizontal accountability, and current performance of the mechanisms in the country, a clearer picture of the current state of Philippine horizontal accountability could be seen.

#### 4. The Current Philippine Legal and Constitutional Mechanisms

Before anything else, it is necessary to lay out the current mechanisms of horizontal accountability, all of which starts with the Constitution. The current Constitution defines the Philippine government as a Presidential system, with the separation of legislative, executive, and judicial powers to the Congress (Art. VI), the President (Art. VII), and the Supreme Court and the lower courts of justice (Art. VIII), respectively. Starting with Congress, aside from the power of general legislation, it has the power of impeachment, as provided by Article XI, Section 2 of the Constitution. The particular provision removes any erring impeachable official, such as the President, Vice President, members of the Supreme Court, members of constitutional commissions, and the Ombudsman, upon the filing of the Articles of Impeachment by the House of Representatives and a conviction verdict by the Senate. Meanwhile, Article VI, Section 18 provides for the composition of the Commission of Appointments as "the President of the Senate, as ex officio Chairman, twelve Senators and twelve Members of the House of Representatives," giving Congress the power to check and confirm appointments to government positions made by the President. Likewise, Article VII, Section 18 did provide for the suspension of the writ of habeas corpus or the imposition of martial law in cases of invasion or rebellion but clarifies that neither the Congress nor the courts could not be overridden, with the former being able to decide whether to extend or revoke either imposition. Taxation and the national budget are also under the purview of Congress, though the President may veto any line item in the annual appropriations or propose some budget for consideration (Art. VI, Secs. 24, 25, 27(2) and 28). Finally, a bill vetoed by the President may, upon transiting his objections to the originating house, be overturned by two-thirds of the Congress voting separately and would become law (Art. VI., Sec. 27(1)).

The Supreme Court, likewise, plays a crucial role in safeguarding democracy through the judicialization of politics, ensuring basic human rights against any arbitrary action from the government, such as extrajudicial killings (Orosa 2012). This is especially apparent in the definition of the *judicial power* as found in Article VIII, Section 1:

*Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.*

The Supreme Court also has “original jurisdiction ... over petitions for certiorari, prohibition, mandamus, quo warranto, and habeas corpus” (Art. VIII, Sec. 5(1)), as well as review and decide on “the constitutionality or validity of any treaty, international or executive agreement, law, presidential decree, proclamation, order, instruction, ordinance, or regulation” (Art. VIII, Sec. 5(2a)). The Judiciary also enjoys fiscal autonomy, with its appropriations to be never decreased, and to be “automatically and regularly released” (Art. VIII, Sec. 3).

Although not featured in the constitutional indices, it is important to note the presence of constitutionally established and mandated oversight bodies. Article IX of the Constitution is wholly dedicated to the three Constitutional Commissions it thus establishes — the Civil Service Commission (CSC), the Commission on Elections (COMELEC), and the Commission on Audit (COA) — the last of which has the greatest relevance to horizontal accountability. As the name suggests, COA is given through Article IX.D., Section 2(1):

*the power, authority, and duty to examine, audit, and settle all accounts pertaining to the revenue and receipts of, and expenditures or uses of funds and property, owned or held in trust by, or pertaining to, the Government, or any of its subdivisions, agencies, or instrumentalities, including government-owned and controlled corporations.*

Furthermore, no entity or subsidiary of the government could be exempted from COA’s auditing and jurisdiction (Art. IX.D, Sec. 3).

Aside from the Constitutional Commissions, the Ombudsman, and the Commission of Human Rights (CHR) form part of the system of horizontal accountability in the Philippines. Starting with the Ombudsman, it is established and organized through Article XI, Sections 5 to 14 of the Constitution and Republic Act No. 6770, otherwise known as The Ombudsman Act of 1989. Article XI, Section 13 delineates the various mandates of the Ombudsman, particularly in investigating and prosecuting any government official accused of any crime, especially graft and corruption. The particular provision particularly points to the following powers, functions, and duties:

1. *Investigate on its own, or on complaint by any person, any act or omission of any public official, employee, office, or agency, when such act or omission appears to be illegal, unjust, improper, or inefficient.*
2. *Direct, upon complaint or at its own instance, any public official or employee of the Government, or any subdivision, agency, or instrumentality thereof, as well as of any government-owned or controlled corporation with original charter, to perform and expedite any act or duty required by law, or to stop, prevent, and correct any abuse or impropriety in the performance of duties.*
3. *Direct the officer concerned to take appropriate action against a public official or employee at fault, and recommend his removal, suspension, demotion, fine, censure, or prosecution, and ensure compliance therewith.*
4. *Direct the officer concerned, in any appropriate case, and subject to such limitations as may be provided by law, to furnish it with copies of documents relating to contracts or transactions entered by his office involving the disbursement or use of public funds or properties and report any irregularity to the Commission on Audit for appropriate action.*

The Ombudsman is assisted by several Deputies and the Office of the Special Prosecutor (Art. XI, Secs. 7 & 8). The Ombudsman may not be prevented by any court from an investigation unless *prima facie* evidence can be presented pointing to such an investigation as outside the Ombudsman's jurisdiction, while only the Supreme Court may hear any appeal or application for remedy against a particular decision or finding, and only on "pure question of law" (RA 6770, Sec. 14).

The CHR, meanwhile, is provided by Article XIII, Sections 17 through 19, and is mandated to investigate all forms of human rights violations involving civil and political rights (Art. XIII, Sec. 18). Part of the CHR's powers and functions is to "[monitor] the Philippine Government's compliance with international treaty obligations on human rights" (Art. XIII, Sec. 18(7)). Annual appropriations for the CHR are also to be automatically and regularly released (Art. XIII, Sec. 17(4)).

## 5. A Historical Sketch of Philippine Horizontal Accountability

Looking at the recent history of the Philippines, then, the issue of horizontal accountability and executive aggrandizement in the country has never been considered novel, and the associated risks persist despite the return to democracy in 1987. For example, Slater and Arugay (2018) argued that the EDSA People Power Revolution of 1986 never curbed the control of the national oligarchy, nor did it result in reduced socioeconomic inequality (98). Meanwhile, Lorch (2021) noted that despite the progress made since 1987, civil society in the Philippines remained easily captured by the political elite, a phenomenon similarly observed in Bangladesh and Thailand.

The Duterte presidency is the epitome of the recurrent populist and executive-aggrandizing governance in the Philippines since his populist rhetoric, supported by long-standing democratic deficiencies, enabled him to assume the Philippine presidency and enact the erosion of independent institutions and the marginalization of political critics and opponents. It does not help that, as noted by Dulay et al. (2022), the historical memory of the Martial Law era has been positive, especially for those who lived through it, fostering a sense of nostalgia that further justifies democratic backsliding in the Philippines. Aside from the Martial Law nostalgia, there has been a concerted apologia and historical revisionism for authoritarian rule. This has been bolstered by the apparent lack of consequences for all the perpetrators involved, hindering the chances not only for full transitional justice but also for further democratization. Lessons from past experiences have been distorted and subverted as a result (Tugade 2020). Political party institutionalization remains weak in the Philippines; thus, personalism, clientelism, and idiosyncratic executive policies remain mainstream, just as in Indonesia and Thailand (Ufen 2022). Other governance issues also persist in the country, such as personalistic and patronage politics, political violence, electoral manipulation, and corruption. These factors collectively contribute to the further erosion of the country's democracy and its institutions. So much so that the conservative hope for the 2022 General Elections was for the incoming administration to initiate the reform process to be carried over by succeeding administrations (Buendia 2022). Teehankee and Calimbahin (2020) summarize these various concerns as the confluence of state, societal and economic institutions and forces conspiring, whether willingly or inadvertently, to further a defective democracy in the country.

Duterte's presidency is considered a watershed moment for Filipino democracy because it pulled the country further from democracy. Within the first few months of the Duterte presidency, Timberman (2016) noted that despite Duterte's promises to tackle criminality, constitutional change, and poverty, he was worryingly disrespectful of democratic politics and governance. Thompson (2016) also reported on Duterte's

determination to launch an all-out violent war on drugs. It is not surprising then that Dressel and Bonoan (2019) were able to chronicle how the first half of the Duterte administration alone was filled with episodes and machinations aimed at dismantling the liberal democratic order in the country, from attacks on the CHR and the Ombudsman to attacks aimed at journalists and media networks critical of his administration, and generally to the notion of the rule of law itself. Pernia (2019) further relates Duterte's populism and his indifference towards, as well as violation of human rights as a candid reflection of Filipino "authoritarian culture and illiberal values" (56).

This is not to say that the Philippines has not seen some progress in terms of its democratization, but hindsight indicates that these efforts were insufficient to prevent such a backslide. The Benigno Aquino III Administration (2010-2016) leaned toward democratization; however, its failure to fully address the profound and persistent democratic challenges, including poor levels of political participation, institutionalization and governance, and recurrent abuses of power, has led to Duterte utilizing these challenges for his populist rhetoric of grievances (Bautista Fernandez 2021, 186-194). Indeed, there were hopes that the younger Aquino's Administration would usher in an era of true democracy in the Philippines, but even then, the threats posed by oligarchic structures and dysfunctional institutions were already apparent (Dressel 2011). Furthermore, there has been pushback against Duterte and his executive aggrandizement, especially considering his human rights abuses and silencing of critics. However, Duterte's high opinion ratings, his domination of the Filipino social media landscape, and his allies' sweep of the midterm legislative elections in 2019 gave much legitimacy to the administration, making arguments by the democratic opposition of Duterte appear undemocratic; and therefore, marking the opposition as relatively weak, *per se* (Thompson 2021). This has directly resulted, for example, to the rising influence of China in domestic affairs, as Duterte and his allies used its access to China's 'alternative credit, overseas development policy, and pragmatism in working with illiberal elites' to be able to undermine the systems of checks and balances in the country (Arugay and Baquisal 2023, 33). Resistance has remained, as recent events have shown that multiple mechanisms of accountability, including the Senate early in the administration's term, were mobilized to investigate allegations of corruption and other controversies in the Duterte administration. This resulted in the petering out of the administration's War on Drugs and the associated extrajudicial killings by the latter years of his Presidential term (Iglesias 2023).

Still, the constellation of political institutions within the Philippine political system, supposedly responsible for preventing executive aggrandizement and overreach, were found to be rather ineffective. Rose-Ackerman, Desierto, and Volosin (2011) highlight the presence of hyper-Presidentialism, the argumentation and policy action of national executives to expand their powers and freedom to act through their distortion and subversion of constitutional checks and balances on the executive, in the Philippines, as well as Argentina. Likewise, Medina-Guce and Galindes (2018) point out that executive aggrandizement was the result of undue hyper-Presidentialism, the political symbiosis between the presidency and the Philippine Congress, the general inability of the constitutionally mandated institutions to credibly mitigate executive power, and the executive's complicated relationship with traditional and social media.

The COVID-19 pandemic became an opportunity for further executive aggrandizement, specifically through its use as an excuse to further expand executive power. Archegas (2021) notes that Duterte had sought every legal and constitutional avenue to concentrate power further, aided by the Constitution and pre-existing legislation on national emergencies and crises. Dulay, Hicken, and Holmes (2022) also noted that Duterte maintained strong support throughout his presidency despite his handling of the pandemic, partly through ethno-populist support from most of the Filipino population. This did not come as a surprise, as

Magno and Teehankee (2022) would stress that the pandemic opened further opportunities for executive aggrandizement despite the struggles the government faced in responding to the pandemic, such as its woes in the economy as the result of the lockdowns it instituted as its first response and its laggard roll-out of vaccines. Indeed, as Atienza (2020) pointed out, the speedy approval of the Republic Act No. 11469, also known as the *Bayanihan to Heal as One Act of 2020*, gave the President additional emergency powers ostensibly to respond to the pandemic, and the lack of deliberate oversight measures by Congress indicates a further breakdown of the separation of powers and the expansion of executive ones in the face of emergencies (4). Duterte ‘is not shy about his disregard for horizontal accountability, whether during or before the pandemic. On one occasion, he reacted dejectedly to a judicial request for relief from quarantine restrictions imposed on Filipinos returning from overseas, going so far as to announce his refusal to work with the Judiciary if he perceived their actions as interfering with his functions as President. Prior to the pandemic, he also announced his intentions to dissolve Congress (Kenny and Holmes 2022, 168). Furthermore, the *Anti-Terror Act of 2020* was passed in the early months of the pandemic, giving the armed forces and the police, and thus ultimately the President, further leeway “to surveil suspects and their networks and to detain individuals for questioning without charge” and padding further their already extensive roles and powers in implementing the programs and policies in response to the pandemic, particularly with the enforcement of community quarantines and curfews (Kenny and Holmes 2022, 168).

Executive aggrandizement is just one of the facets of democratic backsliding in the Philippines. Medina-Guce and Galindes (2018) point out that aside from executive aggrandizement and over-assertion through hyper-Presidentialism, these facets include the further weakening of the political party system, the fragmentation of civil society, hyperpolarization, and institutionalized impunity and arbitrariness (6 and 19-43). Arguably then, the prognosis and prospects of the current state of horizontal accountability and executive aggrandizement in the Philippines are already complicated at best. Teehankee and Calimbahin (2020) already presented two possible scenarios given the Duterte presidency in their writing: Duterte’s full-on restoration of Marcos-style authoritarianism or the exploitation of the current electoral system to ensure the victory of his proxy candidate (122). The plausibility of these scenarios is not surprising at all, given that the 1986 People Power Revolution was more a confluence of actors opposing the Marcos dictatorship rather than a genuine attempt to create a liberal constitutional order based on widely shared goals and values. This resulted in an inherently flawed system ripe to be exploited by unrestrained populist aspirations as embodied by Duterte (Davis 2017, 151). Furthermore, there are genuine fears that the election of Ferdinand “Bongbong” Marcos Jr., son of the very dictator that was toppled in 1986, would institutionalize the unprecedented violence, disinformation, and authoritarian tendencies unleashed by Duterte, especially considering his alliance with Duterte that was solidified by the election of Marcos’ running mate and Duterte’s daughter Sara into the Vice Presidency (see Arugay and Baquiasal 2022; Iglesias 2022). But the following questions remain: How is horizontal accountability in the Philippines currently faring? Has executive aggrandizement become more entrenched in the Philippine political system? And has the country slipped further away from democracy?

## 6. Current State of Horizontal Accountability

Having seen a historical sketch of horizontal accountability in the Philippines since 1987, this chapter now turns towards the analysis of the indices pertaining to the current system and state of horizontal accountability in the country. Looking quickly and initially at the constitutional indices for the Philippines, it



seemed that the Constitution had been built with the lessons from the previous dictatorship in mind. Table 1 shows the extent of executive power, legislative power, and judicial independence indicated in the Constitution as expressed through the indices. Looking at the raw numbers of the indices, executive power has been greatly constrained, at least constitutionally, especially by the legislature, whose 11 features far outnumber those of executive power, of which only three were recorded. Even judicial independence has numerically more features.

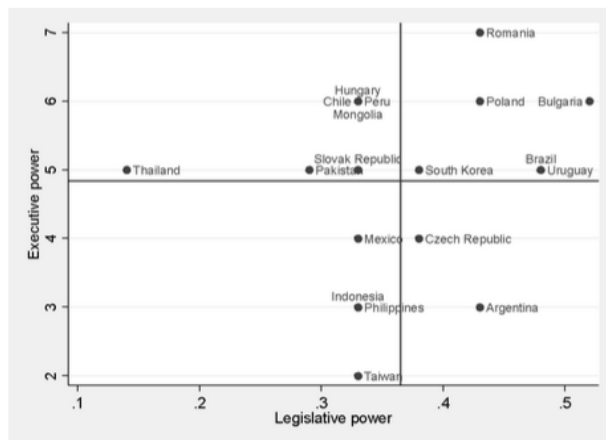
**Table 1.** Constitutional Indices for the Philippines since 1987

Index	Executive Power	Legislative Power	Judicial Independence
Score	3 (/7)	0.34 (11/32)	4 (/6)

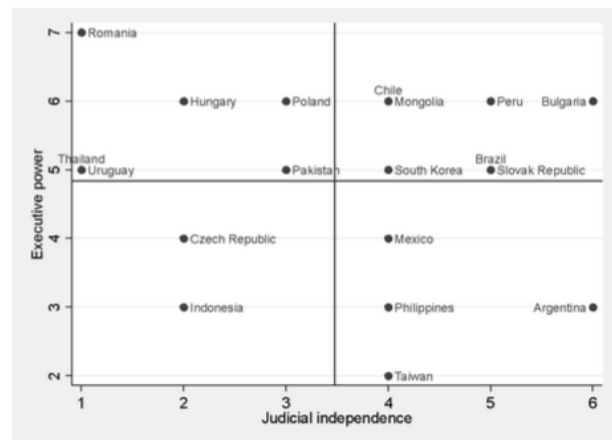
Source: Elkins, Ginsburg and Melton n.d.

A closer look at the provisions of the Constitution, should indicate how much constraints the Presidency has received, and how the Congress and the judiciary has been bolstered in its oversight. Of the seven features of executive power, the Constitution provides only for the power of veto (Art. VI, Sec. 27) and the power to declare states of emergency (Art. VI, Sec. 23 and Art. VII, Sec. 18). The power to issue decrees has been recognized as belonging to the President, within the context of the permissible challenges to the constitutionality of those decrees under the current Constitution (Art. VIII, Secs. 4 and 5). This is construed as continued admission of the Presidential decrees made under the Marcos regime into law, insofar as those are consistent with the current Constitution. The Congress of the Philippines, meanwhile, has received effective monopoly in initiating general legislation (Art. VI, Sec. 1), excepting “the extent reserved to the people by the provision on initiative and referendum” (Art. VI, Sec. 1, provided by Art. VI, Sec. 32). The House of Representatives has explicit jurisdiction over the proposition of all bills of public finance, such as appropriation, revenue or tariff bills, bills authorizing increase of the public debt, bills of local application, and private bills, with the Senate merely concurring or proposing amendments (Art. VI, Sec. 24). Further tellingly, there are no provisions for the dissolution of Congress especially by the President, and the President is mandated to “address the Congress at the opening of its regular session” (Art. VII, Sec. 23) which leads to the annual State of the Nation Address. Finally, the Judiciary has been particularly given fiscal autonomy and, by extension, salaries in the Judiciary (Art. VIII, Sec. 3). Likewise, the Supreme Court has been given further independence through the involvement of the Judicial and Bar Council in the appointment of its member Justices (Art. VIII, Sec. 9), impeachment as the sole mechanism for removal of any Justice (Art. VIII, Sec. 11 and Art. XI, Sec. 3), and explicit limitations for the reasons for the removal of its member Justices (Art. VIII, Sec. 11 and Art. XI, Sec. 3). The Judiciary, in general, has also been given further protection by its explicit power to “determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government” aside from its powers of general jurisprudence and cassation (Art. VIII, Sec 1).

**Figure 1.** Graph of Executive Power and Legislative Power Indices of Selected Countries Including the Philippines as of 2022



**Figure 2.** Graph of Executive Power and Judicial Power Indices of Selected Countries Including the Philippines as of 20



Source: Data from Elkins, Ginsburg and Melton, n.d.

Figure 1 and Figure 2 graphically illustrate the differences between the executive power index on one hand, and the legislative power and judicial independence on the other in select countries including the Philippines. Both figures show how much further legislative power and judicial independence have been in comparison with executive power. Although the scales involved are not exactly aligned, the figures above demonstrate the extent to which the current constitutional system leans more towards the powers of Congress and the independence of the Judiciary over the powers of the Presidency.

At the same time, these figures underscore the extent to which the Philippine constitutional system of horizontal accountability differs from that of other countries. It can be inferred that the Philippines ‘does not have a particularly strong executive power, legislative power, and judicial independence compared to other countries. There are countries that have stronger indices such as Bulgaria and South Korea for two or even all three indices. Some countries have similar systems, such as that of Indonesia, which has the same index scores for executive power and legislative power, but a substantially lower score for judicial independence. Taiwan, meanwhile, has the same legislative power and judicial independence scores, but a substantially lower index score for executive power.

These observations in the constitutional indices appear to confirm the commitment of the Constitution and its framers to apply the lessons from the previous authoritarian regime, particularly by inculcating more mechanisms of horizontal accountability into the government to prevent its recurrence. At the same time, it is possible to create a horizontal accountability system despite maximizing executive power, legislative power, and judicial independence, such as seen in Bulgaria and South Korea for example. But these so far describe the *formal* system of accountability. How about the actual practice?

Looking now at the horizontal accountability index and indicators, particularly over the years since 1987, the analysis seems to confirm the previous prognosis of the mixed state of horizontal accountability that was formed in the earlier historical sketch. Table 2 shows the index and indicator scores for the Philippines since 1987. The years selected denoted the changes of administration, including the adoption of the current Constitution in 1987, resignation of Joseph Estrada and subsequent succession of Gloria Arroyo due to the EDSA II in 2001, and Arroyo’s election to the Presidency in 2004. The more obvious observation is that all the indicators except for *Legislature bicameral* (which is a constant 2 since the Congress has neither been disestablished or reorganized into chambers since 1987) in 2022 have fallen below the annual national average.



**Table 2.** Horizontal Accountability Index for the Philippines in Selected Years and Average Between 1987 and 2022

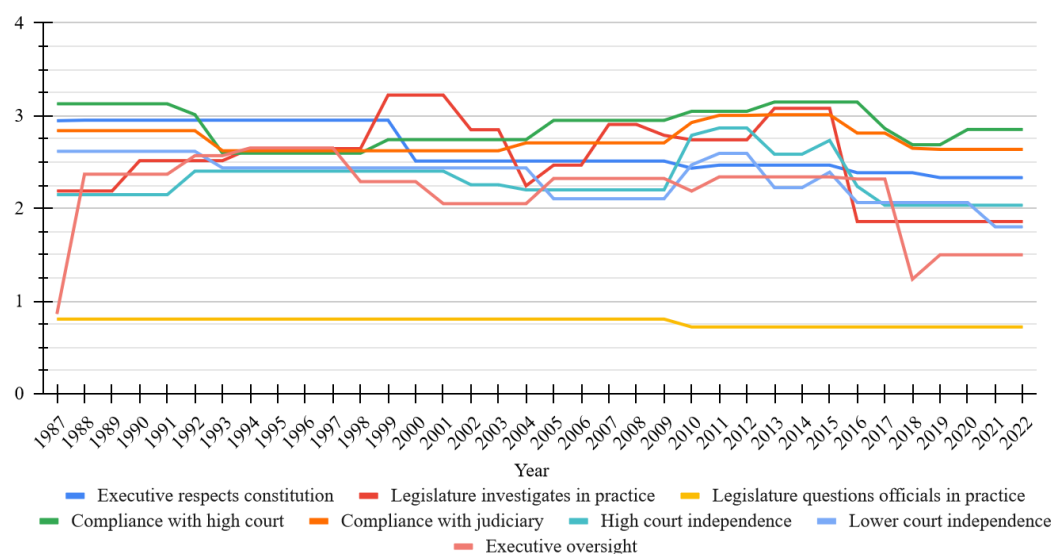
Year	Horizontal Accountability Index	Executive	Legislative			Judiciary				Oversight
		Executive respects constitution	Legislature bicameral	Legislature investigates in practice	Legislature questions officials in practice	Compliance with high court	Compliance with judiciary	High court ind.	Lower court ind.	Executive oversight
1987	0.658	2.947	2	2.189	0.806	3.130	2.840	2.149	2.617	0.861
1992	0.808	2.953	2	2.516	0.806	3.013	2.840	2.403	2.617	2.570
1998	0.792	2.953	2	2.646	0.806	2.597	2.623	2.403	2.438	2.290
2001	0.822	2.512	2	3.224	0.806	2.743	2.623	2.403	2.438	2.052
2004	0.724	2.512	2	2.245	0.806	2.743	2.708	2.201	2.438	2.052
2010	0.781	2.435	2	2.741	0.721	3.049	2.928	2.790	2.471	2.188
2016	0.681	2.386	2	1.859	0.721	3.149	2.814	2.239	2.064	2.318
2022	0.609	2.333	2	1.859	0.721	2.853	2.638	2.035	1.802	1.500
AVE 87-22	0.761	2.632	2	2.542	0.775	2.889	2.748	2.316	2.331	2.182

Note: Selected years reflect administration changes from the adoption of the 1987 Constitution to the present day.

Source: V-Dem Dataset 2023.

Some of the indicators have dipped further from the national average than the others. The *Legislative investigates in practice* index saw a 0.953-point decrease from the average, while *Lower court independence* went down 0.529 points, and *Executive oversight* declined by 0.682 index points. Reading through the numbers, it implies that as of this writing, the President has been somehow less inclined to respect the Constitution, the Congress less engaged in questioning and investigating the Executive Office, compliance to the courts slightly lower, judicial independence had increasingly been impinged, and executive oversight greatly reduced to somewhat unlikely. It is unsurprising then that the horizontal accountability index has declined from the average of 0.761 to 0.609, a slump of 0.152 points.

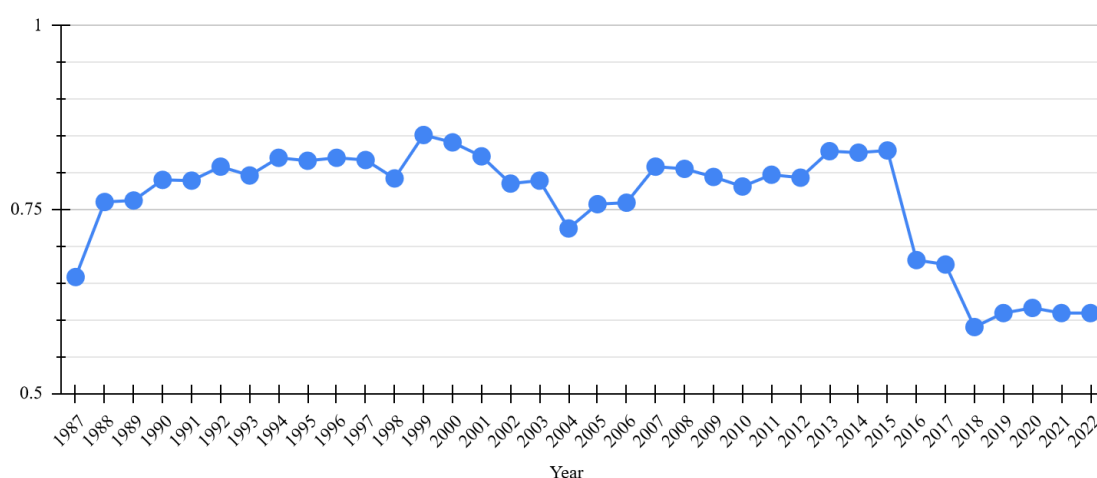
**Figure 3.** Horizontal Accountability Indicators for the Philippines, 1987-2022



Data from V-Dem Dataset 2023

Figure 3 illustrates the trends of the non-constant horizontal accountability indicators for the Philippines between 1987 to 2022. The trend seems to be steadily downward across the board. The years 2016 to 2019 saw significant drops in indicator scores, especially on *Executive respects constitution*, *Legislature investigates in practice*, *High court independence*, and *Executive oversight*, which has not been recovered since. Arguably, then, the annual trend for the Philippines and the declines noticed from the average to the scores for 2022 have mirrored each other. Looking back at the historical sketch, 2016 to 2022 precisely covers the Duterte administration, virtually confirming most, if not all, of the observations on the challenges to horizontal accountability observed earlier. It is not surprising to observe that after maintaining somewhat stable scores for the horizontal accountability index since 1988, there was a relatively sharp decline in 2016, followed by a further decrease in 2018, from which it has yet to recover. Figure 4 below illustrates this trend.

**Figure 4.** Horizontal Accountability Index for the Philippines, 1987-2022



Data from V-Dem Dataset 2023

Such a trend of declining horizontal accountability would no longer be surprising if one considers the current performance of the varying institutions supposedly involved in horizontal accountability. Congress, as noted earlier, is in a close symbiotic relationship with the presidency, making it critically ineffective in curbing executive expansion, perhaps even to the point of consenting to it (Medina-Guce and Galindes 2018). Symbiosis and hyper-Presidentialism result from a political power structure that positions the President as the key distributor of national patronage and influence for members of Congress, especially those of the House of Representatives who must somehow give back to their respective local constituencies (Relacion and Magalzo 2014, Medina-Guce and Galindes 2018; Thompson 2018). The most obvious indicators of this symbiosis are the transience of Filipino political parties and the movement of most members of Congress toward the President's political party, which leads to low levels of accountability (Case 2011; Thompson 2018).

Meanwhile, the Supreme Court could have been a crucial actor in constraining the Executive Office but is instead “embroiled with and is constrained by the broader political struggle among elites and other social forces,” making the function and efficacy of the Court closely contingent on the levels of democratization and public support to the judiciary (Deinla 2014, 151). A closer examination of the Supreme Court's judicial behavior, however, suggests a more positive picture. It notes that despite the general disposition of the Court towards deference to the administration in office and some presence of political allegiances among individual justices, a substantial portion of the votes on politically salient cases has been

against the sitting administration (Escresa and Garoupa 2012; Pellegrina, Escresa, and Garoupa 2014). This has since been broken down quite substantially during the Duterte Administration, however, as executive influence became stronger as exemplified by the scandalous ouster of two Chief Justices (Björn, Inoue, and Bonoan 2023).

As for the oversight bodies, results are described, charitably, as mixed, and inconsistent. It was noted that the Ombudsman and COA, as public accountability, and anti-corruption agencies, have been constrained in their performance due to the legal, regulatory, and operational overlaps and deficiencies in these agencies resulting in inconsistent application of anti-corruption legislation and significant episodes of grand corruption involving the presidency (Batalla 2015; Batalla 2020). With regards to the Ombudsman, it was found to be lacking in political independence, public accessibility and process expedition, investigatory powers, revisory jurisdiction, and the ability to exert policy influence (Medalla 2023). As for the CHR, it was argued to have adequate protection capacity and stable mandates, bolstered by its proactivity and advocacy, but hampered considerably by Duterte's violative rhetoric on human rights and the resulting limitations in operational and financial support to the CHR (Netipatalachoochote, Colombi Ciacchi, and Holzhacker 2020).

## 7. Discussion and Conclusions

The system of horizontal accountability in the Philippines was built on the lessons of the 1986 People Power Revolution that put an end to the dictatorship. The system of government was returned to the presidential form to instill a greater system of checks and balances among the three branches of government. Numerous safeguards, provided through both provisions and institutions, had been put in place to ensure accountability in government. These safeguards include the clarification of legislative and judicial powers, to the establishment of the COA, the Ombudsman, and the CHR. Through these institutional design decisions, it was hoped not only that horizontal accountability could be achieved, but also prevent the return of authoritarianism.

From all the results above, however, horizontal accountability has declined considerably in the Philippines since the return of democracy in 1987. The history of horizontal accountability in the Philippines since the adoption of the 1987 Constitution had been mixed at best and had recently gone worse due to the rise in populist authoritarian tendencies unleashed by Duterte during his term as President. Meanwhile, the constitutional indices indicate the attempt by the Constitution to prevent another dictatorship from ever arising again and institutionalize horizontal accountability. Commendable as the attempt may be, the realities of Philippine politics, particularly its oligarchic character, the institutional and operational weakness of state and party systems, and the Filipino predilection to authoritarian and illiberal values and tendencies, have rendered this attempt nearly and mostly in vain. This is reflected in the sharp decline in the horizontal accountability index and virtually all its indicators.

Those political realities also explain why horizontal accountability has never been perfected in the Philippines. At best, the President would, intentionally or otherwise, violate the Constitution to achieve its political goals and ambitions. At worst, the President would only pay lip service and proceed to systematically erode the institutions of state, especially those mandated to routinely restrain the Executive. Members of Congress are deeply embedded and engaged in the patterns of personalism and clientelism in the country, especially towards the President of the day. Such is their engagement and embeddedness that they are willing to leave the President largely unquestioned and seldom investigated to an unhealthy degree. At the same time, the Judiciary and the oversight bodies are usually constrained not just by their institutional

and operational overlaps and deficiencies, but also by the bold actions of the President and their allies in Congress which titter at the edge of constitutionality. The COA, the Ombudsman, and the CHR are each hampered and thus lacking in performance, being unable to fully perform due to political, institutional, and logistical issues and challenges.

All these point towards a rather bleak prognosis: that the Philippines have seen the rise in executive aggrandizement and would continue to do so if everything else remains the same, edging ever closer to full authoritarianism. It is already made clear that the Philippine's political history and culture show a tendency towards oligarchic authoritarianism, with political power usually being concentrated to an elite cadre of actors, families, and clans with the resources, both legitimate and illicit, to keep that power amongst themselves. These have been bolstered in the recent years by the Duterte presidency, particularly with the cycle of violence, provocation of accountability, and evasion from culpability, thus furthering the democratic backsliding of the country, as well as the election of his newly found ally Bongbong Marcos (Iglesias 2022). There seems to be some slight chance of hope here as recently, the younger Marcos admitted that there have been some abuses in his predecessor's drug war, though it may not be so much as Marcos laid the blame for those abuses in an inordinate focus on drug law enforcement and on rampant criminality (Esmael 2023). Further proving such hope to be a false flag is that Marcos promised in his Presidential electoral campaign in 2021 that his intention of non-cooperation with the International Criminal Court (ICC) in going after Duterte for the alleged crimes in the drug war, and instead vowed to focus more on rehabilitation (Buan 2021a, in Iglesias 2022, 181).

The gaps between what was idealized in the Constitution and the actual state of affairs confirms the prevailing notion that what was restored in 1987 was merely the formal institutions of democracy and not its substance, resulting to a hyper-presidential government controlled effectively by the oligarchy (see Rose-Ackerman, Desierto, and Volosin 2011; Medina-Guce and Galindes 2018; Slater and Arugay 2018; Teehankee and Calimbahin 2020). The country walks on the precarious edge of authoritarianism, while at the same time remaining within the formal system of democracy to keep appearances and appease the rest together with the distribution of patronage. Disturbing what has been perfected over the decades may end up throwing away all the advantages the oligarchy currently holds. At any rate, the result is that the people continue to suffer from the lack of social, economic, and political opportunities for participation. At best it is something like the current situation: the President simply pays lip service to the prosperity and justice for all while dispensing advantages to their oligarchic allies. At worst is a full-on dictatorial regime, where the President can do whatever he wants with impunity, subjecting everyone, even the oligarchs themselves, arbitrarily to any and every harm one might think of — from confiscation of wealth and property to torture, forced disappearances, and even extrajudicial executions. This makes life unbearable for all but the President and perhaps his cronies. The Marcos dictatorship is of the latter scenario, made somewhat worse by making its actions covered by the veneer of legality. Without a substantial system of horizontal accountability, as is the case here in the Philippines, the country would forever be prone to personal, arbitrary rule — the very antithesis of democracy and the very thing the current system was supposed to prevent.

## 8. Recommendations

Certainly, there are still ways to bring back the country from the brink of authoritarianism. Many of the old prescriptions towards greater democratization still applies to strengthening horizontal accountability in the Philippines: a complete reform of the country's party system, the inculcation of inclusivity in democratic

processes for each and every citizen, the reinforcement of the oversight institutions through appropriate funding, training, and recruitment; the adoption of integrated approaches on government oversight; and the consistent, uncompromising, and unwavering application of the rule of law to each and every citizen and resident of the Philippines (Batalla 2020; Teehankee and Calimbahin 2020; Tugade 2020; Magno and Teehankee 2022; Ufen 2022). Further deterrence against corruption includes regular salary revisions in the civil service, the consolidation of anti-corruption efforts under a single agency, the strengthening of investigatory powers and processes, and continuous public education on political accountability (Batalla 2020, 71-72). Perhaps the most ambitious solution yet is to dismantle the deep-seeded and entrenched oligarchic structures that caused the rather unchecked, symbiotic relationship between the President and the Congress (Teehankee and Calimbahin 2020). Nothing short of a total transformation of the Filipino social and political institutions would be necessary to instill true horizontal accountability in the country's governance framework, especially considering how interconnected and interrelated it is with the other issues and challenges of governance in the Philippines.

Despite the difficulties noted above, the oversight bodies such as the Ombudsman, COA, and CHR have remained vigilant and proactive in their duties on horizontal accountability. The CHR's unwavering service to human rights remained throughout the Duterte administration despite the President and his allies' attacks and undermining efforts. However, these should be supported by other forms and institutions of accountability in the Philippines, and efforts to strengthen those should also be supported. Multiple mechanisms of accountability came in to de-escalate Duterte's War on Drugs, not just the Senate but also international institutions such as the ICC and United Nations Human Rights Council, and their effects, though not immediate, were effective in the long run (Iglesias 2023). Medina-Guce and Galindes (2018) have also identified several solutions for at least the Ombudsman and CHR. With regards to the Ombudsman, there is a need to clarify its powers, duties, and especially jurisdiction, as well as capacitate it to perform those powers and duties (*Ibid.*, 27-28). A far more long-term solution for the Ombudsman is the reimagining of its role within the national government as an investigator, critic, and reformer, especially considering the already substantial powers already given to it (Medalla 2023). As for the CHR, prosecutorial powers must be given to the Commission to truly fulfill its role as the guardian of human rights in the Philippines (Medina-Guce and Galindes 2018, 28).

Meanwhile, there are several areas that could be explored to further elucidate issues in accountability and its various mechanisms. One is to investigate more closely each of the relevant institutions in horizontal accountability, the Congress, the Ombudsman, COA, CHR, and even the President, by perhaps breaking down the indicators relevant to each into sub-indicators. Studies on the sub-indicators of horizontal accountability may reveal deeper and richer descriptions of horizontal accountability that consider recent and future evolving pathways and outcomes. There is evidence to suggest that a hybrid model of responsibility has been perceived to be a better reflection of the accountability systems in democracies (see Reddick, Demir, and Perlman 2020). Such indicates the equal necessity of the three forms of accountability in the public sphere, but baselines for each form must be established first. It would also be interesting to develop further the constitutional indices with relation to horizontal accountability by using those to compare countries more systematically, including the Philippines. The fact that there is evidence towards a global trend of democratic backsliding should warrant such investigations and indices. Finally, there could be space for a long-term project that investigates each type of accountability by developing a more comprehensive index for each, capturing both formal and actual states of horizontal, vertical, and diagonal accountability for every country in a time series that extends into the future. Such an endeavor could be from the combined efforts of the

Comparative Constitutions Project and the V-Dem Institute. Although it is acknowledged here that there would be different scales among the three forms, there would be ways to normalize data points to enable better comparison and integration.

If anything, history reveals the constant struggle for freedom and accountability. For the Philippines, it has been translated into a continuing contest between democratic aspirations and oligarchic and authoritarian tendencies. A thorough and thoughtful discussion on issues of horizontal accountability forms part of the larger continuing discourse on how to strengthen Philippine democracy over the long haul.

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# ADRN

Asia Democracy Research Network (ADRN) is an independent network of democracy research institutions across Asia. It analyzes challenges and tasks facing democracy in the region and expands the scope of action-oriented, policy-driven research that supports the advocacy activities of Asian civil society organizations in promoting, consolidating, and deepening democracy.

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