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Preface

Access to justice and the functioning of an independent judiciary are two crucial factors in the protection and fulfilment of human rights. The normative framework of human rights is an important bridge that connects the ideas of democracy with that of sustainable development. Within the overall framework of democratic governance and a human rights-based approach to governance and development, access to justice and an independent judiciary constitute what we may call substantive democracy i.e., ideally a system of governance that ensures human rights for all. There are a number of factors that make democracy and democratic governance 'real', namely the rule of law; the effective separation of powers between the legislature, executive and judiciary; accountability and transparency of governance; the independence of the judiciary, and active National Human Rights Institutions. While these are indeed indispensable for an effective democracy, in reality, there is an increasing trend of subverting democracy, the elite capture of the state and undermining the institutions of democracy, including the judiciary.

One of the key challenges to democracy in South Asia is that electoral democracy—as a system of government—is superimposed on an undemocratic society divided on the basis of caste, creed and entrenched patriarchy. The undemocratic and often semi-feudal character of society affects all institutions of governance and government in many ways. The judiciary too is not free from such biases.

The second key challenge is the tendency to influence or subvert the independence of the judiciary by those in government—either in a direct or indirect manner. As this publication clearly indicates, there are a number of challenges to the independence and autonomy of the judiciary in almost all countries of South Asia, though to different degrees. In most of the countries, ordinary people find it challenging to get access to justice. This is due to the fact that the judicial process is often prolonged and poor people simply would not be able to bear the cost of expensive lawyers. Though there is a system of legal aid for those who may not be able to afford expensive lawyers, the system is often defective or defunct where it exists. In addition, an important area of concern is the accountability of the judiciary itself.
A weak judiciary without adequate capability, autonomy and accountability will be detrimental to the rule of law, access to justice and the protection and fulfilment of human rights. Hence, one of the most important aspects of advocacy for human rights and democracy is the effort to strengthen an independent judiciary and guarantee access to justice for all. It is in this context that this publication—based on detailed analysis and study—becomes very important for human rights advocacy in South Asia and beyond.

FORUM-ASIA is indeed happy to collaborate with the Law & Society Trust (LST) in Sri Lanka in this effort. We would like to express our deep appreciation and gratitude to all of our colleagues at the Law & Society Trust who worked hard to make this publication possible. We would also like to express our appreciation to all of the researchers who contributed the country studies to this publication. LST is an active member of FORUM-ASIA and we are proud to work together to strengthen the advocacy effort for access to justice in all countries of the South Asia region. FORUM-ASIA is already at the forefront of advocacy geared towards strengthening National Human Rights Institutions. With the publication of this important tome, we also commit ourselves to initiate advocacy for the strengthening of independent judiciaries, access to justice and accountable governance in order to ensure human rights for all.

John Samuel
Executive Director
FORUM-ASIA (Asian Forum for Human Rights and Development)
The South Asia Judicial Barometer: An Introduction

“*My dear, here we must run as fast as we can, just to stay in place. And if you wish to go anywhere you must run twice as fast as that.*”

Lewis Carroll, Alice in Wonderland

The court room is a place of great activity. In the entirety of the South Asia region, court rooms are replete with ceremonial trappings; judges in wigs and voluminous robes, lawyers in black and white, ostentatiously carrying piles of files and books, police and court criers, clerks and stenographers. In this melee of busy-ness, one often feels that just to keep up, the court must run at full speed—and yet the back log of cases and the laws delays are a continuing source of grievance to litigants. The open-mouthed wonder of Alice confronted with the juxtaposition that is Wonderland, thus provides a fitting and colourful description of the urgency and yet the lethargy that is the delivery of justice in South Asia.

The South Asia Judicial Barometer was conceived of as a way to challenge the juxtaposition of justice and injustice in South Asia's justice institutions. While other measures of rule of law do exist, a gap in the literature and in the advocacy around such literature, is that the thick, uneven layers of South Asia's diversity is often lost in the 'big picture'. For example, the World Rule of Law Index ranks Nepal as performing best in the South Asia region. Assessing 113 countries in the world on six indicators, the index ranks Nepal as the best performer in South Asia and 63 in the world. Other South Asian nations lag behind, with Afghanistan taking the lowest position. Maldives had not been surveyed in the index for 2016.

Although the assessment provides an excellent point of comparison, the uneven delivery of 'justice' within the broad assessment, the unequal access to justice among those to whom equality is formally guaranteed, often evade capture. Thus, a dearth of information was apparent to those of us who are interested in South Asia's individual narratives as a region, and the discursivities that are propagated therein.
In this context, a chance conversation, a shared coffee and finally, a shared partnership between the Law & Society Trust in Colombo and FORUM-ASIA in Geneva/Bangkok, led to the creation of a South Asia-wide qualitative assessment of the performance of the judiciary in six countries of South Asia.

Designed as a bi-yearly assessment, this maiden issue covers the countries of India, Pakistan, Bangladesh, Nepal, Bhutan and Sri Lanka. The countries of Maldives and Afghanistan have not been included in this assessment.

Each chapter attempts to draw a broad-brush picture of the judiciary in that jurisdiction. The formal arrangements of the courts are included in each chapter as a foundation for future writings around these formal arrangements. It also serves as a point of comparison across regions and for historical perspectives from the colonized to the non-colonized nations of South Asia. The permeating similarity in our justice systems is apparent from this comparison; the common laws' reach is long and deep in South Asia.

Each chapter also grapples with the social and economic issues that are particular to our countries. The manner in which the judiciary has responded over the years to pertinent socio-economic rights of our people is traced by each country chapter. These themes have included the judiciary’s treatment of minorities, gender-based discrimination and violence and human rights, such as the right to education and labour rights. Each chapter thus provides a historical and socio-economic analysis of jurisprudence as well as a political context to the judiciary as it is today—its gradual strengthening or waning, its gradual independence or dependence have been traced to provide a base for future periodical assessments of the judiciary’s approach to judging.

The chapter surveying India deals particularly with the issue of the independence of the judiciary. It traces the historical interferences in the appointment and transfer of judges, and traverses the developments up to the proposed legislative and constitutional amendments with regard to appointments. The tussle between the
executive and the judiciary in South Asia's largest democracy provides a fascinating insight into age old discourse on checks and balances between organs of government.

The chapter on Bangladesh's judiciary is similarly fascinating. It provides a birds-eye view of a number of thematic issues ranging from the formal arrangements of the judiciary to its response to disadvantaged communities, labour issues and national security. The importance of both independence and accountability is highlighted, and the attempts to weaken the judiciary through executive interferences appears to be a regional experience. The salutary role played by the judiciary in a volatile environment is also highlighted; especially its role in protecting civil liberties and socio-economic rights.

The Sri Lanka chapter highlights the political economic history of particularly the appellate courts of Sri Lanka and provides a birds' eye view of the architectural lay out of the present-day courts. It traces key case law from as far back as the 1950s, and assesses the rich tapestry that is the evolutionary history of the Supreme Court and appellate court. Emphasis on notable points in history where the judiciary has flexed its muscles and bolstered the rights of liberty, freedom and equality provide a fascinating insight into the waxing and waning of judicial independence and accountability. With the political climate providing space and independence to the new generation of judges, the ability of the judiciary to grapple with a rights-based discourse in Sri Lanka provides such an opportunity.

The briefing note on Pakistan provides a detailed description of the structure and arrangements of the judiciary vis-à-vis its court hierarchy and legislative basis. The descriptions provide fertile grounds for future research on power dynamics within these structures. Court hierarchies are common to both civil and common law countries, and in South Asia they are a colonial heritage that many nations share. A brief note on judicial responses to thematic concerns of the disadvantaged and minorities as well as on the ideological character of the courts similarly provide a sound base for those who wish to undertake a study of comparative experiences across the region.
In Nepal, the Constitutional arrangements influenced by the new Constitution of Nepal of 2015, makes it an interesting study of modern approaches to judicial arrangements. Despite its modernity, the structure of the judiciary evokes similar arrangements to its closest neighbours in South Asia. What is most interesting perhaps in the chapter is the engagement on judicial engagements on socio-economic cleavages. The chapter considers some of the landmark cases primarily by the appellate courts ranging from LGBTQI rights to caste based discrimination to rights of persons with disabilities. It also traverses some of the thornier issues of accountability and allegations of corruption and provides a glimpse into the complexities of this organ of government.

Bhutan is also a chapter that is similarly fascinating. The chapter traverses the formal arrangements for guarantees of justice, and reflects briefly on the very buildings within which the organs of justice are housed. The author also reflects on issues of protecting minority rights and the judiciaries’ engagement thereof. The chapter concludes that the judiciary has been progressing towards enhancement of access to justice.

Each of these chapters provide not only an analysis of present experiences but also provide a basis for future work. They provide opportunities for interdisciplinary engagements on the work of the courts—their political, economic and social milieu. To ignore these realities is to ask for a quixotic judiciary that is neither realistic nor possible. This publication has been a labour of love that has spanned six countries; it provides opportunities at a regional level to re-think justice and injustice and to re-centre the narrative in the citizen to whom all arms of government must eventually be accountable.

Dinushika Dissanayake
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INDEPENDENCE OF THE JUDICIARY: APPointments of Judges to the Supreme Court and High Courts of India

Seema Misra *
Reviewed by Ravi Nair ♦

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India is a democratic republic, with a written Constitution that sets out the governance structure of the country and lays down the functions and powers of the different constitutional bodies. The Constitution provides for separation of powers between the executive, judiciary and the legislature and a federal political structure. The Constitution vests the power of legislation at the centre with the Parliament, consisting of the Lok Sabha\(^1\) and the Rajya Sabha, and in the states, with the State Legislature. The executive at the centre is headed by the President, who functions as the nominal head with the aid and advice of the Prime Minister and his Council of Ministers. The Prime Minister is the leader of the political party that has a majority in the Lok Sabha, the house of the people, and forms the Government.

The Union Judiciary consists of the Supreme Court headed by the Chief Justice of India and, at the state level, there are High Courts headed by Chief Justices. The executive and the legislature are political institutions whereas the judiciary is the “expert” body. The Constitution delineates the powers and functions of the three organs, but there have been several instances where the three organs, in particular the executive and the judiciary, have tussled for supremacy and control. This tension is ongoing and is the main theme of this chapter.

Separation of powers, independence of judiciary, democracy, rule of law, judicial review and secularism are some of the key features of the basic structure of the Constitution. Parliament has the power under Article 368 to amend the Constitution but the basic structure cannot be altered, as it would amount to abrogating the Constitution. The Supreme Court has the power of judicial review of all amendments and laws passed by the legislature. The concept of the basic structure and the responsibility of the judiciary to uphold the Constitution has

\(^1\) The Lower House or the People's House, where members are elected by direct general elections.
emerged through judicial pronouncements and has gained general acceptance. The Supreme Court, in the *Minerva Mills case*, has best explained the role of the judiciary.

[The] judiciary is the interpreter of the Constitution and to the judiciary is assigned the delicate task to determine what is the power conferred on each branch of the government whether it is limited and if so what are the limits and whether any action of that branch transgresses such limits. It is for the judiciary to uphold the constitutional verdict and to enforce constitutional limitations. If there is one feature of our constitution which more than any other, is basic and fundamental to the maintenance of democracy and rule of law, it is the power of judicial review and it is unquestionably a part of the basic structure of the constitution.

The actions of the executive and the laws enacted by the legislature are subject to judicial review by the Supreme Court and herein lies the friction and tension between the different organs of the Government, especially the executive and the judiciary. The Prime Minister being the leader of the political party that has majority in Parliament, the executive can push through legislation to suit its interest. The power of the political executive emanates from having the mandate of the people to govern the country while the judiciary is the protector of the Constitution. The friction between the two organs comes to fore in the selection, appointment and transfer of judges of the Supreme Court and the High Courts, that is the Constitutional Courts. Who has the power to appoint judges and what is the procedure have been contentious issues as far back as the 1970s. It is in the interest of the executive that judges be appointed to the constitutional courts, who

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4 The Supreme Court of India is the highest court in the country. In general, each state in the country has a High Court. This is the framework provided in the Constitution of India.
are “favourable” in the process of judicial review and adjudicating cases in which the executive is a party or who are willing to support the ideology of the government in power. While safeguarding the independence of the judiciary, the Supreme Court has tried to retain primacy in the appointment of judges to the Constitutional Courts.

The selection, appointment to and transfer of judges of the Supreme Court and the High Courts are intrinsic to the independence of the judiciary, which is a basic feature of the Constitution. This chapter will discuss the relationship between the executive and the judiciary through the highly contentious issue of selection, appointment and transfer of judges of the Constitutional Courts. This issue has been the subject of numerous litigations and the most defining cases that have affirmed the law (as of now) are the cases known as the “Three Judges cases” and the NJAC judgment, which will be discussed in this chapter. The independence of the judiciary is vital as it is still perceived by the people as an institution of hope. But at the same time, people are demanding more transparency and accountability in the appointment of judges and the functioning of the judiciary as a whole and of the Constitutional Court in particular.

For an understanding of the issue of independence of the judiciary vis-à-vis the appointment of judges to the Constitutional Courts, this chapter will discuss the following:

• What the independence of the judiciary and related constitutional provisions entail.

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6 Supreme Court Advocates-on-Record Association and another vs. Union of India WP (Civil) 13 of 2015 decided on 16 October 2015, known as the National Judicial Appointments Commission (NJAC) case.
• The historical context wherein, in the 1970s, judges were transferred and superseded in what was seen as a means to get favourable judges in the Supreme Court and ensure judgmentssuiting vested interests.

• The present situation with the Supreme Court striking down the National Judicial Appointments Commission Act, No. 40 of 2014 and the Constitution (Ninety-Ninth Amendment) Act to amend the Constitution with regard to the appointment of judges as ultra vires to the Constitution, popularly known as the NJAC judgment. The judgment and comments of legal experts will be discussed.

• The post NJAC scenario and the ongoing stalemate in the selection and appointment of judges to the Constitutional Courts, between the executive and the judiciary over the formulation of the Memorandum of Procedure.

Independence of the Judiciary

The first Chief Justice of India, at the inaugural session of the Supreme Court of India on 28 January 1950, said, "...political considerations should not influence the appointments to the bench." He further noted, "The judiciary would be the third pillar in the Indian constitutional framework, to counterbalance the legislature and the executive; and its independence from the other two institutions was of particular importance. The constitutional process for 'appointment' of judges lay at the heart of the ideal of an independent judiciary."

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8 The Ninety-Ninth Amendment to the Constitution of India came into force on 13 April 2015 but was struck down by the Supreme Court on 16 October 2015.
10 Ibid.
The importance of an independent judiciary in ensuring the proper functioning of a democracy has been repeatedly emphasised by the Supreme Court and has not been questioned. Justice Pathak (as he then was) stated,1 "...that while the administration of justice drew its legal sanction from the Constitution, its credibility rested in the faith of the people. Indispensable to such faith, was the 'independence of the judiciary.' An independent and impartial judiciary, it was felt, gives character and content to the constitutional milieu."

There is a consensus amongst the executive and the judiciary that the independence of judiciary is an essential requisite of a democratic republic and one of the basic features of the Constitution of India.2 But there are differing opinions on what is required for the judiciary to be independent. Justice Venkataramiah3 was of the opinion that "the judiciary should be free from capricious or whimsical interference from outside, so that it could act, without fear and in consonance with judicial conscience."

Besides appointments, the other necessary elements for an independent judiciary are certainty of tenure, protection from removal from office except by a stringent process in the cases of judges found unfit to continue as members of the judiciary, protection of salaries and other privileges from interference by the executive and the legislature, immunity from scrutiny—either by the executive or the legislature—of the conduct of judges with respect to the discharge of judicial functions except in cases of alleged misbehaviour, and immunity from civil and criminal liability for acts committed in the discharge of duties.4 Judges are appointed to the Supreme Court under Article 124 and to the High Courts under Article 217 of the Constitution. Additional judges and acting judges for High Courts are appointed under Articles

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2 As stated by J. Chelameswar in the dissenting judgment in the NJAC case, see footnote 6.
3 In the First Judges case, see footnote 5.
4 See footnote 9.
224 and 224A. The transfer of High Court judges and Chief Justices, from one High Court to another, is made under Article 222 of the Constitution. The appointment of judges to the Supreme Court and High Court was considered an integral part of the independence of the judiciary even in Constituent Assembly debates at the time of drafting the Constitution, while referring to Article 124.¹⁵

It has been argued that the concept of the "independence of the judiciary" was not limited only to independence from executive pressure or influence, but that it was a much wider concept, which took within its sweep independence from many other pressures and prejudices. It has been said by the Supreme Court that the judicial service is not service in the sense of 'employment.' Judges are not employees. As members of the judiciary, they exercise the sovereign judicial power of the State. They are holders of public offices in the same way as members of the Council of Ministers and members of the legislature.¹⁶

It is argued that the common man is interested in access to justice and the quick resolution of disputes and not appointments of judges to the Supreme Court and High Court. But the value of an independent judge who grants or owes no one favours and does not need to be subservient in order to fulfil his/her ambition cannot be underscored, as s/he is the protector of rights and constitutional values.

**Historical Context**

To understand the context of the anxiety and the contentions between the executive and the judiciary, the historical background of the relationship needs to be discussed. Since the establishment of the Supreme Court, the practice followed is that the senior-most judge of

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the Supreme Court is appointed as the Chief Justice of India. In the past, the executive has abused its authority and departed from this rule and superseded judges to appoint favourites and more compliant judges. The confrontation between the judiciary and the executive when Ms Indira Gandhi was the Prime Minister from 1966 to 1977 is well documented. But little is known about the fact that the executive, on the death of the first Chief Justice of India (after the promulgation of the Constitution), sought to overlook Justice Patanjali Sastri, who was the senior most judge, but was forced to follow convention and appoint him Chief Justice of India (CJI) as all the six judges of the Supreme Court at that time threatened to resign.

During the period from 1967 to 1973, the Supreme Court in a series of cases struck down legislation and constitutional amendments passed by the legislature as being unconstitutional. The first among them was the famous Golaknath case, which held that the Parliament could not amend or alter fundamental rights. The Prime Minister, with the aim of controlling and cutting the judiciary down to size, used her majority in Parliament to pass constitutional amendments, which would curtail the power of the Supreme Court. The most significant of these was the Thirty-Ninth Amendment to the Constitution, which removed the election of the President, Vice President, Prime Minister and Speaker of the Lok Sabha from the purview of the courts. The other was the Forty-Second Amendment, which gave the Prime Minister sweeping powers and unrestrained power to Parliament to amend any part of the Constitution, without judicial review. These amendments were

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18 Relying on recorded texts in this behalf, by Granville Austin, George H Gadbois Jr. and M.C. Chagla as stated in para 48 of order on merits in the NJAC case.
19 Golaknath vs. State Of Punjab, (1967) SCR (2) 762.; Bank Nationalisation case: Rustom Cavasjee Cooper vs. Union Of India (1970 AIR 564, 1970 SCR (3) 530), and the Privy Purse case.
20 See footnote 19.
21 Enacted on 10 August, 1975.
challenged in the *Kesavananda Bharati case* and the Supreme Court, in a slim majority of 7:6, laid down the basic structure doctrine and held that Parliament could amend any part of the Constitution so long as it did not alter or amend the basic structure or essential features of the Constitution. This basic structure doctrine, which was laid down in the *Kesavananda Bharati case*, is said to have saved Indian democracy. The very next day, on 25 April 1973, All India Radio announced that the next Chief Justice would be A.N. Ray, superseding three senior judges of the Supreme Court. Justice A.N. Ray was the senior most judge who wrote the dissenting decision in the *Kesavananda Bharati* judgment. A shocking attempt was made by Ray, then Chief Justice of India, to review the *Kesavananda Bharati* decision by constituting another bench of thirteen judges. In a major embarrassment to the Chief Justice, it was revealed that no one had filed a review petition. The other judges strongly opposed this impropriety and the thirteen-judge bench was dissolved after two days of arguments.

Another supersession took place during the period of internal emergency declared by Prime Minister Indira Gandhi. The senior most judge, Justice H.R. Khanna, was superseded and Justice M.H. Beg was appointed as Chief Justice of India on 29 November 1977, as Justice Khanna had written the dissenting judgment in the now infamous *ADM Jabalpur case* or the *Habeas Corpus case*. This case is considered the lowest point of India's constitutional history as a five-judge bench of the Supreme Court held that the writ of *habeas corpus* would not be available to arbitrarily arrested and detained individuals during the Emergency. Justice H.R. Khanna was the lone dissenter, but paid the price by being superseded and not being appointed the Chief Justice of India.

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22 See footnote 2.
23 Datar, "The case that saved Indian Democracy."
25 An emergency had been declared and eight new judges had been appointed to the Supreme Court.
27 *ADM Jabalpur vs. Shivkant Shukla*, AIR 1976 SC 1207.
It has been argued that the internal emergency imposed by Prime Minister Indira Gandhi was a dark and unusual period in India’s political history during which the political executive tried to control the judiciary. Even though it was unlikely to occur again, there have been several instances since then, though not so glaring, to control the judiciary, which have not received the same publicity but still warrant concern. Out of fifty-three appointments of judges to some High Courts made in 1984-85, thirty twowere made on the recommendations of acting Chief Justices. It is believed that the senior most judges of some High Courts (from where the said thirty-two recommendations had originated), who initiated those recommendations as acting Chief Justices, were made permanent Chief Justices only after they agreed to recommend names suggested by the executive. Also, the Government headed by Prime Minister V.P. Singh (1989-1990) had stalled appointments of sixty-seven persons recommended by the Chief Justices of various High Courts, while constitutional functionaries freely traded charges against each other.28

In an interview to mark the 40\textsuperscript{th} anniversary of the imposition of the Emergency on 25 June 1975, Shri L.K. Advani, the veteran leader of the Bharatiya Janata Party (BJP)\textsuperscript{29} and Member of Parliament in the Lok Sabha, was of the opinion that forces that could crush democracy were now stronger than ever before. He asserted, “\textit{I do not think anything has been done that gives me the assurance that civil liberties will not be suspended or destroyed again. Not at all...}” and he also felt that the emergency could be imposed again.30

\textsuperscript{28}Quoted in Abhinav Chandrachud, “The Informal Constitution: Unwritten Criteria,” in \textit{Selecting Judges for the Supreme Court of India}, (Oxford: Oxford University Press, 2014), and referred to in para 150 of the \textit{NJAC judgment}, see footnote 6, on merits.

\textsuperscript{29}BJP is the ruling party today. During Emergency, members of this party belonged mainly to the Jan Sangh and were in the opposition during the Emergency. Most of them were jailed, including Shri Advani.

\textsuperscript{30}“Forces that can crush democracy are stronger ... I don't have the confidence it (Emergency) cannot happen again: BJP leader LK Advani,” \textit{Indian Express}, 25 June 2015, \url{http://indianexpress.com/article/india/india-others/forces-that-can-crush-democracy-are-stronger-i-dont-have-the-confidence-it-emergency-cannot-happen-again-lk-advani/}. This was also referred to in the \textit{NJAC judgment}, see footnote 6.
These experiences point out that when the political executive has an outright majority in the Parliament, it can abuse its authority to appoint judges who would do the bidding of the executive and thereby permit the executive to control the judiciary. It would also lead to judges trying to placate and appease the executive for personal gains and rewards.

The Three Judges Cases

The matter of the final deciding authority in the appointment of judges to the Supreme Court and the High Courts, and the transfer of judges from one High Court to another, has been the subject of three cases decided by the Constitution Bench \(^\text{11}\) of the Supreme Court. These are the precursors to the *NJAC judgment* and are popularly known as the *Three Judges Cases*. \(^\text{32}\) These cases involved the interpretation of Articles 124 and 217 of the Constitution and will be discussed in brief as the *Second* and the *Third Judges cases* that led to the "collegium system" of appointing judges to the High Court and Supreme Court, which continues till date.

First Judges Case

The *First Judges case*, also known as the *Judges Transfer case*, \(^\text{31}\) arose out of a letter from the Union Law Minister, dated 18 March 1981, which was addressed to the Governor of Punjab and to Chief Ministers of all other States, informing that one third of the judges of the High Court should, as far as possible, be from outside the State in which the High Court is situated. This letter also directed the Chief Ministers to

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\(^\text{11}\) A bench of judges of the Supreme Court set up to decide a case on a substantial question of law as to the interpretation of the Constitution under Article 145 of the Constitution. This is not a permanent bench or fixed number of judges.

\(^\text{32}\) See footnote 5.

\(^\text{31}\) S.P. Gupta vs. Union of India. AIR 1982 SC 149.
ask the Chief Justices of their states to obtain consent from the additional judges\(^3\) to be appointed as permanent judges in any other High Court other than their own.\(^4\) This led to eight writ petitions being filed in different High Courts seeking withdrawal of the said letter and the transfer of specific Chief Justices of the High Courts on the grounds that it was a direct attack on the “independence of the judiciary,” and an uninhibited assault on a vital/basic feature of the Constitution. These cases were transferred to the Supreme Court and heard together as they dealt with the same issue and point of constitutional interpretation. The Supreme Court, by a majority judgment, held that as per Articles 124 and 217 of the Constitution, the opinion of all the constitutional functionaries has to be sought but the opinion of the judiciary does not gain primacy. The appointing power is the executive, which is the Central Government. Though the letter from the Law Minister and transfer of judges was seen as an impingement on the independence of the judiciary and its ability to work in an impartial manner, Justice Bhagwati (as he then was)\(^5\) held that,

In regard to the appointment or non-appointment of a Judge to a High Court or the Supreme Court, after taking into account and giving due weight to, the opinions expressed, it was open to the Central Government to take its own decision ... The Central Government was not bound to act in accordance with the opinion of the Chief Justice of India, even though, his opinion was entitled to great weight.\(^6\)

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\(^3\) Article 224 of the Constitution provides for appointing additional judges for a period of two years. Additional judges are usually made permanent judges.

\(^4\) The letter was controversial as it sought to make additional judges permanent only if they sought a transfer to another High Court which was not the High Court in their home states.

\(^5\) He later became the Chief Justice of the Supreme Court of India (1985-1986).

Second Judges case

A three-judge bench of the Supreme Court in the case Subhash Sharma vs. Union of India\textsuperscript{38}—which was a public interest litigation related to the filling up the vacancies of judges in the Supreme Court and several High Courts of the country—doubted the correctness of the majority view in the First Judges case and sent the case to be heard by a larger bench. In what is known as the Second Judges case,\textsuperscript{39} the Chief Justice of India constituted a nine-judge Constitution Bench to examine two questions. Firstly, whether the opinion of the Chief Justice of India in regard to the appointment of judges to the Supreme Court and to the High Courts, as well as the transfer of Chief Justices and judges of High Courts, was entitled to primacy. And secondly, whether the fixation of the judge-strength in High Courts\textsuperscript{40} was justiciable. By a majority of 7:2, a nine-judge bench of the Supreme Court, in the Second Judges case, overruled the judgment in the First Judges case. The majority held that the process of appointment of judges to the Supreme Court and the High Courts is an integrated 'participatory consultative process' for selecting the best and most suitable persons available for appointment; and all the constitutional functionaries must perform this duty collectively with a view primarily to reach an agreed decision so that the occasion of primacy does not arise. In the event of conflicting opinions by the constitutional functionaries, the opinion of the judiciary, 'symbolised' by the view of the Chief Justice of India, has primacy. No appointment of any judge to the Supreme Court or any High Court can be made, unless it is in conformity with the opinion of the Chief Justice of India. The opinion of the Chief Justice of India has not mere primacy, but is determinative in the matter of transfers of High Court judges/Chief Justices. The initiation of proposals for appointment in the case of the Supreme Court must be by the Chief Justice of India, and in the case of a High Court, by the Chief Justice of that High Court, and for transfer of a judge/Chief Justice of a High Court, the proposal

\textsuperscript{38} 1991 Supp (1) SCC 574.
\textsuperscript{39} Supreme Court Advocates-on-Record Association vs. Union of India (1993) 4 SCC 44.
\textsuperscript{40} The number of judges that each High Court must have.
Third Judges case

The Central Government, which is the Union of India, had doubts about the interpretation of the Second Judges case. Therefore, the President of India, in exercise of his powers under Article 143 of the Constitution, referred nine questions to the Supreme Court for its opinion. A nine-judge bench answered the reference unanimously and upheld the Second Judges case and the primacy of the judiciary in the appointment of judges to the constitutional courts. The Court further held that the expression "consultation with the Chief justice of India" in Article 217(1) of the Constitution of India requires consultation with a plurality of judges in the formation of the opinion of the Chief Justice of India. The sole, individual opinion of the Chief Justice of India does not constitute "consultation" within the meaning of the said Articles. The Chief Justice of India must make a recommendation to appoint a judge of the Supreme Court and to transfer a Chief Justice or puisne judge of a High Court in consultation with the four senior most puisne judges of the Supreme Court.

On the basis of the judgments in the Second and Third Judges cases, the Ministry of Law, Justice and Company Affairs, on 30 June 1999, drew up a 'Memorandum of Procedure for the Appointment of Judges and Chief Justices to the Higher Judiciary.' This led to the formalisation of the collegium system for the appointment and transfer of judges to the Constitutional Courts.

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41 As referred to in the NJAC judgment, para 17 of the Reference Order. See footnote 6.
42 This collegium would consist of the CJI and puisne judges of the Supreme Court.
43 In re Special Reference 1 of 1998 (1998) 7 SCC 739.

In May 2014, Narendra Modi was elected as the Prime Minister and his party, the Bharatiya Janta Party (BJP), won more than half of the seats in the Lok Sabha. It was after a gap of twenty years that a single political party had gained such a majority and control over the lower house of Parliament, making it easier for the Prime Minister to introduce and pass legislation.

On 11 August 2014, two bills were introduced in Parliament, one to amend Articles 124 and 217 of the Constitution pertaining to the appointment of judges to the Supreme Court and High Court; the transfer of High Court judges; to insert Articles 124A, 124B and 124C into the Constitution, and the other to form the National Judicial Appointments Commission. The constitutional amendment and the NJAC bill were passed unanimously and swiftly without much discussion by both houses of Parliament and ratified by all twenty eight of the State Legislatures. The Constitution (Ninety-Ninth Amendment) Act and the National Judicial Appointments Commission Act No. 40 of 2014 received assent by the President on 31 December 2016 and were notified on 13 April 2015 and brought into force.

By this constitutional amendment, the President ceased to “consult” with the Chief Justice of India (and the collegium) in matters

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of the appointment and transfer of judges to the Constitutional Courts but would now act on the recommendations made by the National Judicial Appointments Commission (NJAC). The NJAC provided for the setting up of a commission consisting of the Chief Justice of India, the two senior most judges of the Supreme Court after the Chief Justice of India, the Union Minister in charge of Law and Justice and two eminent persons who were to be nominated for a term of three years. A committee consisting of the Chief Justice of India, the Prime Minister and the Leader of the Opposition in the Lok Sabha would nominate the two eminent persons. One of nominated persons had to be from the Scheduled Castes or Scheduled Tribes community or a woman. The NJAC Act also mandates that any person nominated to be appointed as a judge of the Supreme Court or the Chief Justice or judge of the High Court cannot be appointed if any two persons do not agree to the proposal.

The Constitution (Ninety-Ninth Amendment) Act and the National Judicial Appointments Commission Act were challenged in the case of the Supreme Court Advocates-on-Record Association and another vs. Union of India before a five-judge bench. On 16 October 2016, the bench, with a ratio of 4:1, declared both the constitutional amendment and the NJAC Act unconstitutional and null and void, as they were in violation of the basic structure of the Constitution by subversion of the "independence of the judiciary" and "separation of powers." The collegium system was declared to be operative.

The arguments of the parties and the reasoning of the court need to be discussed in detail as it has long-term implications for the relationship between the judiciary and the executive. Both parties to the case were in agreement that an independent judiciary was a necessity

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50 A schedule or list of the state government declaring indigenous communities and those castes that have faced historical discrimination.
51 Veto power is set out in secs. 5(2) and 6(6) of the NJAC Act.
52 See footnote 6. There were a number of parties who intervened as petitioners and respondents.
in a democracy and interestingly both relied on Dr. B.R. Ambedkar's speech in the Constituent Assembly while discussing provisions related to the judiciary and appointment of judges to the higher judiciary during the drafting of the Constitution. Justice Chelameswar, in his dissenting opinion in the NJAC case, noted, "Fortunately there is no difference of opinion between the parties to this lis regarding the proposition that existence of an independent judiciary is an essential requisite of a democratic Republic. Nor is there any difference of opinion regarding the proposition that an independent judiciary is one of the basic features of the Constitution of India."

The Union of India, in its defence of the constitutional amendment and the NJAC Act, sought to refer the matter to a Constitution Bench as the Government placed reliance on the First Judges case and was of the view that the judgments of the Supreme Court in the Second and Third Judges cases need to be reviewed as the Second Judges case was not sustainable in law. The Union of India argued that the appointment of judges was irrelevant to the issue of independence of the judiciary and that the independence of judiciary emerged from the protection of the conditions of the incumbent's service, after the appointment had been made. It was also argued that in the Second Judges case, the judiciary had made serious inroads into the power of the President. The contention was that, as per Article 124 of the Constitution, the President had the power to appoint a judge to the Supreme Court in "consultation" with the Chief Justice of India and this had been interpreted to mean "concurrence." After hearing the issue at length, the Court declined the prayer for review and reference to a larger bench as the matter had been dealt with and determined on several occasions in no less than five cases. The Court held that the

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54 Samsher Singh vs. State of Punjab, (1974) 2 SCC 831 (five-judge bench); Union of India vs. Sankalchand Himatlal Sheth (1977) 4 SCC 193 (five-judge bench); the First Judges case, (seven-judge bench); the Second Judges case, (nine-judge bench) and the Third Judges case, (nine-judge bench).
Government of India should accept “consultation” with the Chief Justice of India and that the Supreme Court had read the term “consultation” as an expression, conveying primacy to the view expressed by the Chief Justice. The Court relied on the Constituent Assembly debates and stated it was satisfied that when the Constituent Assembly used the term “consultation,” its intent was to limit the participatory role of the political-executive in the matter of appointments of judges to the higher judiciary. According to the Supreme Court, if the real purpose sought to be achieved by the term “consultation” was to shield the selection and appointment of judges to the higher judiciary from executive and political involvement, certainly the term “consultation” was meant to be understood as something more than a mere “consultation.” The Court held that the Memorandum of Procedure for selection of Supreme Court judges provides for a similar participatory role for the judiciary and the political-executive.

After declining the prayer for reference to a larger bench, the Court then turned to determine the constitutional validity of the Constitution (Ninety-Ninth Amendment) Act 2014 and the NJAC Act. Shri Ram Jethmalani argued, on behalf of one of the Petitioners, that the constitutional amendment had to be examined in the light of Article 50, which talks about separation of powers between the judiciary and the executive. He submitted that the inclusion of the Union Minister in charge of Law and Justice as an ex officio Member of the NJAC had the effect of politicizing the process of appointment of judges to the higher judiciary. He also argued that there was sufficient circumstantial evidence to demonstrate that the present political establishment felt that the judiciary was an obstacle to the implementation of its policies and this was an attempt to subdue the judiciary. Another senior counsel argued that with the constitutional power of judicial review, the higher judiciary

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53 Reference order of the NJAC judgment, para 77.
56 A Senior Advocate and also a member of Parliament.
7 J. Khehar’s judgment in the NJAC case, paras 29 and 30.
58 Anil Diwan, Senior Advocate, representing the Bar Association of India.
restricted the legislature and the executive within the confines of their jurisdiction(s), which was the source of the tension and friction between the judiciary on the one hand, and the executive and legislature on the other. A case in point is the exposing of scams by the judiciary using the power of judicial review. It was also argued, on behalf of the petitioners, that the executive was a major litigant and stakeholder and should not have a role in appointments to the higher judiciary.

On behalf of the Respondents, it was argued that the Constitution (Ninety-Ninth Amendment) Act and the NJAC Act were passed by Parliament and all of the State Legislatures and that therefore it was the will of the nation. It was further argued that the mere participation of the executive does not impinge on the independence of the judiciary. It was also argued that the trend internationally is towards setting up Judicial Commissions and nowhere else in the world does the judiciary itself make appointments to the higher judiciary.

Putting the whole controversy into perspective, Justice Khehar held that when any question relating to the appointment of judges to the constitutional courts is raised, it would have to be ascertained whether the primacy of the judiciary exercised through the Chief Justice of India (based on the collective wisdom of a collegium of judges) had been breached or not. Only then would it be possible to conclude whether or not the “independence of the judiciary,” as an essential “basic feature” of the Constitution, had been preserved. Justice Khehar held that while interpreting Article 74 along with Articles 124, 217 and 222 of the Constitution in conjunction with the intent of the framers of the Constitution and the conventions adhered to by the political-executive authority in the matter of appointment and transfer of judges of the higher judiciary, the “primacy of the judiciary” was a constituent of the “independence of the judiciary,” which was a “basic feature” of the Constitution.

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"Justice Khehar’s judgment in the NJAC case, para 150."
The Supreme Court held that the participation of the Minister in charge of Law and Justice in the final process of selection impinges on the principles of independence of the judiciary and separation of powers, and would render the amended provision ultra vires. The Court said that even the participation of the Prime Minister and the Leader of the Opposition in the Lok Sabha in the selection of “eminent persons” would be a retrograde step and cannot be accepted. The Court also found there was no positive qualification stipulated for the two “eminent persons” nor even negative disqualification and therefore the choice of the two eminent persons would depend on the free will of the nominating authorities and that would not be just or appropriate. Since the two eminent persons comprise one-third of the composition of the NJAC and double that of the political executive component, the Court did not think that the issue of how they are nominated was a trivial matter. The extent of the vagueness and arbitrariness about who the two eminent persons would be was illustrated by the diametrically opposing interpretations of the Attorney General and the Senior Counsel who represented the State of Maharashtra. According to the Attorney General, the “eminent persons” had to be “lay persons” having no connection with the judiciary, or even to the profession of advocacy, and perhaps individuals who may not have any law-related academic qualification. In contrast, the Counsel for the State of Maharashtra was of the view that the “eminent persons” could only be the likes of eminent lawyers, jurists or even retired judges, essentially individuals who could be relied upon to have an insight into the workings of the judicial system. The judgment also noted that when the President of the Supreme Court Bar Association was asked if it would be proper to consider the inclusion of the President of the Supreme Court Bar Association and/or the Chairman of the Bar Council of India as ex officio members of the NJAC in place of the two “eminent persons,” his response was a spontaneous “Please don’t do that!”60 The Court found it difficult to appreciate the wisdom of Parliament, to introduce two laypersons in the process of selection and appointment

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60 Justice Khehar’s judgment on merit in the NJAC case, para 182.
of judges to the higher judiciary and to simultaneously vest with them a power of veto. The eminent persons had the power to reject the unanimous recommendation for the entire judicial component of the NJAC and the Court found that the vesting of such authority in the “eminent persons” is clearly unsustainable in the scheme of “independence of the judiciary.”

The Court was also apprehensive about section 5(1) of the NJAC Act, which laid down the condition that the senior judge being appointed as Chief Justice would only be appointed if he was “fit” to hold office and that the procedure to appoint the Chief Justice would be laid down by law by Parliament as stated in Article 124C, inserted by the Constitution (Ninety-Ninth Amendment) Act. The Court stated that the Parliament could purposefully define the term “fit” in a manner that could sub-serve the will of the executive. It was pointed out that even an ordinance could be issued without the necessity of following the procedure of enacting law to bring in a person preferred by the political-executive. It was contended that the criterion of fitness could be defined or redefined, as per the sweet will of the non-judicial authorities. The Court stated, “We are satisfied, that the term “fit” can be tailor-made to choose a candidate far below in the seniority list.” Similarly, the Court held other provisions of the NJAC to be vague and impinging on the independence of the judiciary.

The collegium and the scenario post-NJAC judgment

The collegium system for the appointment and transfer of judges to the Constitutional Courts set up after the Third Judges case in 1999 and the NJAC judgment to reinforce the collegium system have both come in for criticism from various quarters including sitting Supreme Court Judges and former Judges of the Supreme Court and High Courts. The collegium system for the appointment of judges to the higher judiciary has been justifiably criticised for being opaque and secretive.

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61 Justice Khehar’s judgment in the NJAC case, para 234.
about how and on what basis decisions are taken. This has led to a lot of speculation about why some judges were appointed to the Supreme Court and why others are not. Justice Ruma Pal, a retired judge of the Supreme Court, has said, “...the process of appointment of judges to the superior courts was possibly the best kept secret of the country.” While delivering a lecture in 2011, Justice Ruma Pal\(^2\) was even more damning when she stated “...consensus within the collegium is sometimes resolved through a trade-off resulting in dubious appointments with disastrous consequences for the litigants and the credibility of the judicial system. Besides, institutional independence has also been compromised by growing sycophancy and ‘lobbying’ within the system.”

This was reinforced when two Chief Justices of the High Court went public with their discontent on being overlooked for elevation to the Supreme Court and stated that they were victimised as they displeased the sitting Supreme Court judges and the ruling party. In 2013, after being overlooked for elevation to the Supreme Court by a collegium headed by Altamas Kabir, the then CJI, Chief Justice, Gujarat High Court, Bhaskar Bhattacharyya sent a letter to the President, Prime Minister and the CJI. He alleged that Justice Kabir impeded his elevation to the Supreme Court given that as a High Court collegium member he also opposed the appointment of CJI Kabir’s sister—a lawyer—to the bench.\(^3\) Justice U.L. Bhat, the former Chief Justice of the Gauhati High Court and the High Court of Madhya Pradesh, was considered


\(^3\) “Why was lawyer kin of then CJI made High Court judge, government asks Supreme Court.” Indian Express, 07 May 2015, accessed 19 December 2016, http://indianexpress.com/article/india/india-others/why-was-lawyer-kin-of-then-cji-made-high-court-judge-government-asks-supreme-court/.
one of the best High Court judges in the country but did not get elevated to the Supreme Court as he was “irreverent” and “opinionated” according to the collegium.64

The collegium system and the NJAC judgment have received brutal criticism from Justice A.P. Shah, former Chief Justice of the Delhi High Court. Talking about “Appointment of Judges: Balancing Transparency, Accountability and Independence” at the Justice Krishna Iyer Memorial Lecture,65 Justice Shah criticised the Second Judges case wherein the collegium system was mooted and has called the collegium system ad hoc and shrouded in secrecy. According to him, the NJAC judgment has to be reviewed, as it is not sound in law.

Another blow to the collegium system came when Justice Chelameshwar, who gave the lone dissenting judgment in the NJAC case, wrote to the Chief Justice of India sometime around the end of August or early September 2016, stating that he would not participate in the collegium system on the grounds of there being no proper system or transparency. He stated publicly that, “...the records are absolutely beyond the reach of any person including the judges of this Court who are not lucky enough to become the Chief Justice of India. Such a state of affairs does not either enhance the credibility of the institution or does good for the people of this country.”66

The collegium system of selection and appointment of judges to the higher judiciary was supported by many as a means of retaining the independence of the judiciary from the executive. But the collegium’s


recent recommendation of nine High Court judges to be named as Chief Justices in different High Courts and the elevation of some Chief Justices of High Courts to the Supreme Court are particularly significant. The exclusion of the names of Justice K.M. Joseph, Chief Justice of the Uttarakhand High Court, and Justice Jayant Patel, the senior most puisne judge of the Karnataka High Court, has come in for severe criticism. Senior Supreme Court Advocate Dushyant Dave has called Justice K.M. Joseph and Justice Jayant Patel the two most independent judges in the country and has said that "...both seem to be paying the price for their independent judgments in the President's Rule case in Uttarakhand and Ishrat Jahan's case in Gujarat. These judgments are unpalatable to the Narendra Modi government at the Centre."

Ram Jethmalani, a Senior Advocate and former Member of Parliament, has defended the collegium system, stating that it is the result of a judicial interpretation of the Constitution. Whatever be the faults of the collegium, he argues, today it represents a system which is consistent with the basic features of the Constitution, namely the supremacy of the judiciary and its freedom from any influence of the executive in the appointment process. It has to be acknowledged that the constitution of the NJAC leant itself to being manipulated and the method of selection of eminent persons was problematic. In the

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69 The Central Government of the BJP imposed President's rule in the state of Uttarakhand and dissolved the legislative assembly on 27 March 2016, but the Uttarakhand High Court vide in its judgment a month later revived the elected government of the Congress Party.

70 Ishrat Jahan was a nineteen-year-old Mumbai girl who was killed in a police "encounter" along with three others in Gujarat on 15 June 2004. The Gujarat police claimed it was a genuine encounter. The Gujarat High Court had ordered a Special Investigating Team to investigate the "encounter" on a case filed by Ishrat Jahan's mother.
submissions made by the Central Government in the *NJAC case*, three specific appointments to the Supreme Court were referred to as questionable. The Court was of the opinion that one example referred to the actions of a judge's comments on social media after he had retired and were irrelevant to the issue of the efficacy of the collegium system. The Court also opined that if the Government could only find three questionable cases in a span of twenty years, this was in itself enough to establish the system was not faulty.

Without doubt the functioning of the collegium has to become more transparent and accountable. In a country where the Right to Information Act71 has been in force for more than ten years and is applicable to almost all constitutional bodies, the citizens have a right to information regarding the appointment of judges. The former Chief Information Commissioner wrote to the CJI to ensure that all judicial vacancies are filled by a proper and transparent process.72 Though the criticism of the collegium system is justified, at the same time, there is the real and looming danger of the political executive trying to control the judiciary. This is apparent from the ongoing confrontation between the judiciary and the executive regarding the appointment of judges to the constitutional courts. This tension has heightened after the Supreme Court declared the *NJAC Act* unconstitutional on 6 October 2015.

The Chief Justice of India, on several occasions, has made allegations against the political executive for not appointing judges even though recommendations have been sent by the collegium, thereby paralysing the functioning of the judiciary. A number of High Courts in India are running at half their sanctioned strength. As of now, there


are about five hundred vacancies in the High Courts and seven vacancies in the Supreme Court.\textsuperscript{73} The first public confrontation between the judiciary and the political executive was at the Conference of Chief Ministers and Chief Justices of the High Court on 24 April 2016\textsuperscript{74} and at which the Prime Minister was also present. On this occasion, the Chief Justice lamented that the inaction of the executive on the need to increase the number of judges to 40,000 from the current 21,000. This, he said, is the reason the judiciary is unable to handle the “avalanche” of litigation. The Chief Justice broke down while asking the executive to take action. The Chief Justice said that a corollary to inviting investors in the “Make in India” campaign was the ability of the judicial system to deal with cases and disputes arising out of such investments. Interestingly, the response of the Prime Minister, who spoke after the Chief Justice, was that he would look into the matter. The Prime Minister further stated that one of the solutions to lessen the pendency of cases was to increase the working hours and days of the Supreme Court.

The next confrontation was during the hearing of a public litigation case on 28 October 2016, when the Chief Justice of India, in open court, accused the Government of not keeping its promise to file judicial vacancies and of trying to decimate the judiciary. The Chief Justice of India said that the Government was trying to starve the cause of justice by not appointing judges and locking courtrooms en masse: "In Karnataka High Court an entire floor of courts are locked as there are no judges." The CJI said that the Government had been sitting on recommendations for nine months. Eighteen judges were recommended for appointment to the Allahabad High Court but the Government only selected two. The Chief Justice said, “Our tolerant approach seems to be not working ... If you go on like this, we will re-convene a five-judge bench and


say that the government will not be allowed to scuttle judicial appointments till it frames a new MoP ... do you want that?"  

The Chief Justice of India, T.S. Thakur, again at a conference of the Central Administrative Tribunal on 26 November 2016 said, "500 judges' posts are vacant in the High Courts. They should be working today, but they are not. At present, there are several vacant courtrooms in India but no judges available." Relations between the judiciary and the Government have come to a head with the proposed new Memorandum of Procedure (MoP) for appointment of judges to the Supreme Court and High Courts, wherein the Government sought to put a veto clause on grounds of national security, which the Parliamentary Panel on Law and Justice has rejected. But the proposed MoP includes an institutional mechanism in relation to the Supreme Court and High Courts to vet candidates for the higher judiciary before such names are placed before the collegium for final recommendations. Since 22 March 2016, when the Government first shared the Memorandum of Procedure, the clause granting veto power to the Government to reject a name for elevation to the higher judiciary on the grounds of national security has been a contentious issue between the judiciary and the executive. This clause has been criticised for impinging on the primacy of the judiciary in appointments of judges to the higher judiciary. Concerns have also been raised as to the understanding of the word "national security" and how it can promote or exclude a political point of view. The

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latest in a series of confrontations and deadlocks between the judiciary and the executive came on 10 March 2017, when the five-judge collegium headed by the present Chief Justice of India, Justice J.S. Kehar, unanimously rejected the MoP recommended by the Central Government on several grounds, including the veto power given to the Government in the name of national security. The CJI was of the opinion that if the Government provides the collegium sufficient material to substantiate its claim that a particular appointment will compromise national security, the collegium will consider it but the Government cannot be given veto powers. The collegium also rejected the suggestion of a permanent secretariat to assist the collegium in vetting and screening candidates for elevation. The collegium also did not want to set up a fixed mechanism for the evaluation of a High Court judge’s merit and integrity in order to consider him for elevation to the Supreme Court.

From the above discussion, it is apparent that the distrust between the judiciary and the executive is at an all-time high and there is an urgent and critical need to break this impasse.

Conclusion

It appears that in the sixty-six years since the Constitution was adopted by the country, the relationship between the judiciary and the political executive has come a full circle and the dilemma faced by Dr. B.R. Ambedkar exists even today. During the Constituent Assembly debates, Dr. Ambedkar said,

Mr. President, Sir, I would just like to make a few observations in order to clear the position. Sir, there is no doubt that the House in general, has agreed that the independence of the

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80 Chairperson of the Constitutional drafting committee.
judiciary from the executive should be made as clear and definite as we could make it by law. At the same time, there is the fear that in the name of the independence of the judiciary, we might be creating, what my friend Mr. T.T. Krishnamachari very aptly called an “Imperium in Imperio.” We do not want to create an Imperium in Imperio, and at the same time, we want to give the judiciary ample independence so that it can act without fear or favour of the executive.81

81 Justice Khehar in the NJAC case, para 30.
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THE LAW AND THE SOCIETY AT A CROSSROADS:
AN INTRODUCTION TO THE EVOLUTION OF
THE JUDICIARY IN SRI LANKA

Law & Society Trust ♦

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Introduction

Sri Lanka's judiciary has operated in a context of state and non-state sponsored violence and impunity during the darkest periods of Sri Lanka's history. The brutal crushing of the JVP youth insurrections in 1972 and 1987 as well as the ethnic riots of July 1983 are examples of large-scale violence. These periods of violence have sometimes victimised 'wealthless masses' and, at other times, minority communities. Such upheavals were caused by ethnic and religious differences as well as palpable socio-economic cleavages. The judiciary has also operated during nearly thirty years of ethnic conflict, where the Liberation Tigers of Tamil Eelam (LTTE) waged war on one side and the State defended its territorial integrity on the other, which led to tragic consequences for all ethnic, religious, gender and caste groups in the country. Thus, the socio-political milieu that has directed the trajectory of the judiciary since pre-independence times is convoluted, complex and continues to pose serious challenges to the men and women on the bench. As Kishali Pinto-Jayawardena has pointed out, in Sri Lanka's history, the law itself has been an instrument of repression. Examples include several pieces of legislation that are now part of our law; such as the Official Language Act and the Citizenship Act.

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82The youth insurrections were largely rooted in widespread unemployment and frustration amongst the young.
83The 1983 riots played out sharply along ethnic lines.
Specifically vis-à-vis the judiciary, a good example is the original amendment proposed to the Interpretations Ordinance.\textsuperscript{87} The Amendment appears to have been brought forward in an attempt to curb the powers of the judiciary vis-à-vis its powers to issue specific performance orders against the State. Whilst the amendment was challenged before court, the end result of the amendment, which was eventually passed by Parliament, contributed to reducing the ability of the court to grant injunctions or make orders of 'specific performance' against the State.\textsuperscript{88}

The independence of the judiciary is of great importance in any attempt to establish a just world as we know it. Both in terms of the relationship between law and society, and in terms of the law and development discourse, an independent judiciary—which serves as a check and balance on the executive and the administration, (and increasingly the private sector)—assumes great importance. Whether that independent judiciary displays judicial temerity, judicial timidity or judicial transgressions of power is also of interest in this chapter.

The aim of this chapter is to contextualise the current position occupied by the judiciary in Sri Lanka vis-à-vis its independence, accountability and its ability to respond to issues of importance that are in the public interest. The chapter therefore attempts to traverse the development of Sri Lanka’s judicial apparatus from pre-colonial times to post-colonial realities.


\textsuperscript{87}Interpretations Ordinance (Amendment) Law No. 29 of 1974. This amendment was challenged in Sirisena vs. Kobbe kaduwa (1974) 80 NLR 1.

\textsuperscript{88}According to the amendment, Section 24(1), "Nothing in any enactment, whether passed before or after the commencement of this Ordinance, shall be deemed to confer on upon any court jurisdiction to grant injunctions or to make orders for specific performance against the state, a Minister or a Deputy Minister, upon any grounds whatsoever."
The following analysis presents a narration of contestations between the legislature and the judiciary, all of which had consequences with regard to language rights, citizenship and franchise, to name a few key milestones in our judicial history. Controversial judicial decisions, especially in the review of proposed legislation, have contributed to the root causes that eventually resulted in ethnic conflict and abject injustice on different occasions.89

This chapter is divided into two major sections. In the first section, we map out the socio-political context with respect to the origins and operation of the judiciary in Sri Lanka. We discuss the apparatus of the judiciary—from pre-colonial times to current times. We attempt in this section to draw out the positive and negative aspects of the judicial framework that reflect on the judicial mind-set.

In the second section, we discuss in detail the responses of the judiciary to major planks of rights in the last thirty years or so: for example, minorities, the larger fundamental rights framework, gender, economic, social and cultural rights, and labour. For each of these major planks, we select emblematic cases to illustrate what we see as the trend in adjudicating such rights-based cases.

The Role of the Judiciary in Society

In this chapter, several terms are used that warrant a theoretical anchor to support the call for an activist, transparent, independent and accountable judiciary.

At the same time, as an introductory chapter on the judiciary in Sri Lanka, it is not the intention of the authors to re-traverse the larger questions surrounding the ideal role that should be fulfilled by a

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89 Examples include the challenges to the Citizenship Acts in 1948 and 1949 and the Official Language Act. These pieces of legislation and challenges to the same are discussed further in Part 1 of this chapter.
judiciary. However, as a reference to the calls for reform that are made in this chapter, it is necessary to anchor the ideal benchmark of measure for the judiciary in the jurisprudence that exists on the subject. We are aspiring to a judiciary that is both accountable and independent. As Stephen Burbank puts it, a "...accountable judiciary without any independence is weak and feeble. An independent judiciary without any accountability is dangerous."90

The law must be both a constraint on the judiciary guaranteeing its accountability, and a champion protecting the independence of both the court as an institution, and the judge as an individual. We subscribe to Burbank's assertion that judicial independence is not an end in itself but rather a means to an end or several ends.91 We also consider Burbank's premise that "...it is a mistake to take the measure of a court's judicial independence (or accountability) exclusively from formal arrangements."92 Therefore, in this chapter we look to not only the formal arrangements for independence and accountability but also the practical outcomes of the court's decision-making—not only whether justice is done, but also whether justice is seen to be done.

Amongst the terms to which there is frequent reference are 'judicial independence' and 'judicial activism.' It is a necessary inference that judicial activism or exercise of weak discretion is required more often in "hard cases," where the applicable rule is unclear or unlegislated, as opposed to "soft cases," where the applicability of the law is beyond

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91 Ibid., 338.
92 Ibid., 339.
doubt or surmise. Even in soft cases, it is expected that judges will temper the application of "laws properly so called," based on the weight attached to principles by which he or she is guided.

In supporting our call for an independent, accountable and active judiciary, we have applied the theory of judicial discretion / Rights Thesis outlined by Ronald Dworkin in his important body of work on a theory of law (including 'judicial discretion') as the measure against which the judiciary is expected to fulfil its role. Dworkin largely rejects the positivist ideal of an adjudicator outlined by H.L.A. Hart. The Rights Thesis essentially defines a judge as one who, in hard cases, also applies the 'principles' (and not only laws, which are a subset of rules) by which society abides. Where a rule may not exist, the judge is obliged to apply principles, because it is a requirement of justice or fairness or some other dimension of morality, i.e., a moral standard commonly accepted. Of course discretion and the application of principles do not mean a carte blanche application of personal preferences or political ideologies; these principles must be one that "...fixes on some interest presented by the proponent of the right it describes, an interest alleged to be of such a character as to make irrelevant the fine discriminations of any argument of policy that might oppose it."

Hart's positivist school would claim that such application of principles would amount to judicial legislation. While Dworkin himself

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91 "Laws Properly So Called" is a phrase associated mainly with John Austin and his definition of rules of positive law. According to Austin, laws properly so called are rules of positive law that are clothed with legal sanction. See, Anthony Townsend Kronman, "Hart, Austin, and the Concept of Legal Sanctions," Yale Law School Faculty Scholarship Series Paper 1077, (1975), accessed 10 August 2017, http://digitalcommons.law.yale.edu/fss_papers/1077.


96 Ibid., 1310.
did not endorse judicial discretion that exceeds publicly endorsed principles and rights, he did allow for weak discretion by judges in hard cases. According to Dworkin, judges and courts have an obligation to apply principles (or weak discretion) in the event of hard cases. Dworkin also suggests that they are obliged to protect the rights of citizens against unjust rules/principles in order to uphold a principle of fairness. In our view, the positivist critiques of Dworkin's theory have been challenged through the progress in public interest litigation across the globe, including in Sri Lanka itself, although the debate continues to be of relevance. These critiques remain valid on certain points, but since the aim of this chapter is to assess the situation of the judiciary in Sri Lanka, the theoretical debate is not part of our focus.

We acknowledge, in this instance, the number of critiques of Dworkin's theory of rights vis-à-vis judicial discretion. However, for the purposes of this chapter, we apply his theory as an anchor to the assessment of the role played by the judiciary in Sri Lanka vis-à-vis the rights of citizens.

Limitations and Disclaimers

This chapter intends to provide a broad overview of the general trend of judicial independence in Sri Lanka and to contextualise the developments and regressions in judicial decision-making. While reference is made to several key areas of intervention, such as labour, gender and minority rights, this chapter does not intend to provide a comprehensive overview of all decision-making and judicial trends in these areas. The purpose of referring to these specific areas of importance is to draw out the general trend of the judiciary vis-à-vis specific areas of concern.

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Furthermore, the writers subscribe to a theory that calls for an activist judiciary, which is both independent and accountable. Whether the judiciary is a cloistered profession or whether it should review even state policy is hotly contested. We refer frequently to the Dworkinian Rights Thesis whenever questions of the role of the judiciary arise due to this reason. The ideal benchmark that is used throughout the chapter is a judiciary as hypothesised by Dworkin when spelling out his theory of adjudication.98

This chapter deals solely with the judiciary, although all the actors that make up the justice sector in Sri Lanka deserve similar reflection, particularly with respect to their efficacy and the role they play in the adjudicating mechanism.

Part 1

Colonial Legacies

Appraising the role of the judiciary in Sri Lanka would inevitably involve grappling with how efficaciously justice is administered. How democratic theory translates into practice in this country also has considerable connotations for judicial independence. A starting point for this appraisal would be to analyse how the framework of the judiciary in Sri Lanka best underpins these principles.

98 Dworkin's Theory of Adjudication, in summary, follows the older tradition of considering the bench and judges that occupy the bench, as a cloistered profession, invested with the task of applying the law and not 'making' law. His proposition was that a judge does not create new laws but 'only declares fresh applications of the ancient rule.' See Freeman, Lloyd's Introduction to Jurisprudence, 1255. Dworkin did not allow for judges to apply anything beyond the law—'there is no law beyond the law' as stated in Freeman, Lloyd's Introduction to Jurisprudence, 1270. According to Dworkin, judges can only apply a belief as long as there is a 'soundness in those convictions'; a judge cannot apply his own political views. A judge can only enforce 'existing political views' that are 'characteristically generated by principle.' For more, see Freeman, Lloyd's Introduction to Jurisprudence, 1270-1271.
The structure of the judiciary in contemporary Sri Lanka can be traced back to 1798, when the island was under the British. An overhaul of the court system under the Dutch was instituted with the introduction of English common law and institutions. The judiciary was created by way of an 1833 Charter of Justice, which provided for a "Supreme Court of the Island of Ceylon," a High Court of Appeal, five Provincial Courts and District Courts, which constituted the lower tier of the court structure.\(^9\) A study of the judiciary under colonial rule reveals that the court system and judges were reputedly independent and professional.\(^{100}\) The work of M.J.A. Cooray on the historical role of the judiciary in Sri Lanka notes that judges would not shy away from asserting their independence, even to the detriment of the government.\(^{101}\)

Independence from British rule did not result in a change of the courts' basic architecture except by way of the fact that, during the early post-colonial period, the Privy Council of England acted as a supervisory body for Sri Lankan courts. This system also embodied the colonial legacy of independence from political influence.\(^{102}\)

Perhaps one of the most enduring judgments of that era was the *In re Bracegirdle case*\(^{103}\) in which the judiciary acted as a sheer bulwark in the face of executive power. Mark Bracegirdle—one of the few of European descent who joined the cause of belaboured plantation workers—was a supporter of socialist thinkers like Dr. N.M. Perera and Colvin R. De Silva. His campaigning in support of estate workers' labour

\(^{103}\) *In Re Mark Bracegirdle* (1937) 39 NLR 193.
rights irked the colonial Government and plantation owners. Responding to the agitation of the planters, Governor Stubbs ordered the deportation of Bracegirdle from Ceylon. Bracegirdle was eventually arrested for violation of the order. Chief Justice Abrahams, although sitting on a wholly ‘English’ bench with no local judges, displayed what a modern liberal would call true judicial independence in dismissing the case against Bracegirdle and releasing him. The executive order was held to be invalid since the Supreme Court had previously held that such deportation orders were only valid if there was a threat to national security, such as by war or extreme civil disorder. For the Government at the time, an irritant such as Bracegirdle, who campaigned for workers, had to be deported. However, the Court held that the basis for the order of deportation failed to meet the criteria for a valid deportation order to be made, and thus the order was held to be invalid. However, when one considers some of the other emblematic cases during this era, Bracegirdle appears to be the exception rather than the rule.

Despite this success, other judgments of the period appear to show greater judicial restraint rather than temerity. In several judgments during the period from 1948 to 1970, judges appeared to show greater diffidence to ministerial decision-making. R.K.W. Goonesekere, in an insightful assessment of this period, points to a number of writ applications, where judges refrained from interfering with ministerial discretion. Some of these judgments include John Nadar vs. VandenDriesen, and Sudali Andy Asary vs. Vanden Driesen. Often used as an illustration of judicial independence is Queen vs. Liyanage, a case considered amongst the most significant of this era. This an attempt by the legislature to allow the Minister of Justice to nominate judges was deemed ultra vires the Constitution. On the other hand in

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105 Ibid., 5-6.
106 (1956) 58 NLR 85.
107 (1952) 54 NLR 66.
108 (1962) 64 NLR 419.
Mudanayake vs. Sivagnanasundaram (1951)\textsuperscript{109} and on appeal to the Privy Council in Kodakkanpillai vs. Mudanayake (1953),\textsuperscript{110} the Citizenship Act was challenged before the Supreme Court as unconstitutional.\textsuperscript{111} The case was lost on appeal to the Privy Council, but notably it was the then Supreme Court that originally rejected the argument of unconstitutionality. With the passing of the Ceylon Citizenship Act No. 18 of 1948 and other laws to support the goal of disenfranchisement,\textsuperscript{112} thousands of plantation workers of Indian origin lost their franchise and were effectively rendered stateless. The historical injustices inflicted on this group of citizens continues to haunt us, as citizenship was still being restored as late as 2003.\textsuperscript{113}

As Goonesekere points out, the Soulbury Constitution did not create a sovereign legislature. It was really in 1972, with the first autochthonous Republican Constitution, that judicial pronouncements on laws passed were virtually eliminated with the introduction of a special Constitutional Court.\textsuperscript{114} At the same time, the division between law making, policy making and the interpretation of laws was pronounced and rarely did judges venture into the realm of applying policy. Both Nihal Jayawickrama\textsuperscript{115} and Goonesekere acknowledge this rigid separation of powers in that era.

\textsuperscript{109} 53 NLR 25.  
\textsuperscript{110} 54 NLR 433.  
\textsuperscript{111} Based on Article 29(2) of the Ceylon Constitutional Order in Council 1946 (Soulbury Constitution).  
\textsuperscript{112} Indian and Pakistani Residents (Citizenship) Act No. 34 of 1949 and the Ceylon Parliamentary Elections (Amendment) Act No. 48 of 1949.  
\textsuperscript{113} Citizenship (Amendment) Act No. 16 of 2003.  
Thus, it is no surprise that the Citizenship Acts,\textsuperscript{116} which disenfranchised thousands of upcountry plantation communities, and the Official Language Act,\textsuperscript{117} which discriminated against minority languages, all came about during the three decades between 1940 to 1970, and challenges to both failed. The cases of Mudanayake vs. Sivagnanasundaram\textsuperscript{118} and Kodakkanpillai vs. Mudanayake cited before, are cases in point.

Thus, this era also provided opportunities for what Goonesekere calls judicial timidity\textsuperscript{119} to set the stage for far-reaching ethnic tensions in later years. In the case of Attorney General vs. Kodeeswaran,\textsuperscript{120} the Court avoided adjudicating on the issue of language discrimination, and instead ruled on whether or not a public servant could sue the Crown for wages. The impact of this display of judicial timidity is felt even today, almost fifty years later, as we still fail to effectively implement equal language policies across the public sector.

However, at the same time, in some instances, the courts have displayed much more boldness. Cases like The Queen vs. Theja Gunawardena Trial-at-Bar,\textsuperscript{121} Kodeeswaran discussed above, Senadheera\textsuperscript{122} (where the Court held that the Bribery Commission was a 'court' and its members must be appointed by the Judicial Services Commission) and the Aseerwatham case,\textsuperscript{123} where a requirement by the Ministry of Defence for foreign travel was declared 'unknown to law.' These cases have become emblematic of the vigour of the judiciary.

\textsuperscript{116} Citizenship Acts of 1948 and 1949.
\textsuperscript{117} Official Language Act (also called the Sinhala Only Act).
\textsuperscript{118} (1951) 53 NLR 25.
\textsuperscript{120} (1967) 70 NLR 121.
\textsuperscript{121} (1954), cited in Jayawickrama, "Reflections on the Making and Content of the 1972 Constitution: An Insider's Perspective," 46. Full citation of this case could not be located at the time of writing.
\textsuperscript{122} Senadheera vs. the Queen, (1961) 63 NLR 313.
Jayawickrama argues convincingly that the negotiations that led to the 1946 Constitution were predominantly based on safeguarding the interests of the minorities. The minority protection provisions of the 1943 Declaration strongly support this contention. This protectionism afforded by the Constitution could have been seized by the judiciary in cases like *Kodeswaran*, but the Supreme Court at the time appears to have avoided the issue.

It is argued by Goonesekere that some of the vigour shown by judges—after the administrative law changes that took place in English law in the late 1940s, 50s and 60s—led to the emergence of efforts by the legislature to curb such excesses. In Sri Lanka, the introduction of the amendment in 1974 to the Interpretations Ordinance is attributed in some way to a measure that was adopted to curb this type of judicial decision-making, and an attempt by the legislature to thwart such vigour.

Jayawickrama argues that in the 1960s, attempts were made by Parliament to reduce the powers of the judiciary that were constitutionally vested by the Soulbury Constitution. As we shall see, the 1978 Constitution introduced several provisions to increase legislative control of the judiciary. The 1978 Constitution also reduced the ability of the judiciary to assert itself in the face of "political issues" of decision-making.

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The Republican Constitutions

The First Republican Constitution

The 1970s in Sri Lanka was a period within which the political climate was characterised by left-leaning political philosophy. As such, the promulgation of the First Republican Constitution in 1972 encapsulated this political ideology. This was evidenced by the structural changes to the court system that came into being under the new constitution. A five-member 'Constitutional Court' appointed by the President for a five-year term was established. Appeals to the Privy Council in London were abolished. The Supreme Court and the Court of Appeal were abolished by way of an administration of justice law in 1973. Instead, a single Supreme Court, to which judicial appointments were made by the Cabinet of Ministers, was established.

This system had all the signs of a determination to trim judicial independence and the ability of judges to adjudicate on ministerial decision-making. The earlier Judicial Services Commission was replaced by a Judicial Services 'Advisory Board' and a 'Disciplinary Board,' which have been criticised as ineffective and politically subversive. Although a fundamental rights chapter was included, there was no enforcement procedure specifically provided. Radhika Coomaraswamy sums up the era in no uncertain terms when she says, "The 1972 Constitution also undervalued the judiciary as a co-equal arm of government."131

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129 Pinto-Jayawardena, "Subverted Justice and the Breakdown of the Rule of Law in Sri Lanka."
130 Ibid. Perhaps this is also why only one fundamental rights case had been filed under the provisions of the 1972 Constitution: Gunaratne vs. People's Bank (1986) 1 SLR 338. This case was filed as a declaratory action in the District Court where the Court held in favour of the Plaintiff. The Court of Appeal reversed the decision. However, the Supreme Court allowed the Plaintiff's appeal. See Jayampathy Wickramaratne, "Fundamental Rights under the 1972 Constitution," in The Sri Lanka Republic at 40: Reflections on Constitutional History, Theory and Practice 1, 766, accessed 21 August 2017, http://republicat40.org/wp-content/uploads/2013/01/Fundamental-Rights-in-the-1972-Constitution.pdf.
During this post-colonial time, as Pinto-Jayawardena comments, the British legacy of parliamentary democracy led to "...constitutionalism [being] perceived as the ideal condition of democracy,"\(^{132}\) although of course, the United Kingdom has never institutionalised a constitution in the manner that Sri Lanka has been belabouring to do for most of the last century.

The political ideology that held sway over the ruling party of the time also played a role. The Sirimavo Bandaranaike-led coalition government was essentially left of centre, socialist and antithetical to the agendas of their only serious opponent—the right wing United National Party (UNP). The hopes for a secular state by the minority communities were abandoned with the 1972 Constitution. Feelings of ethnic marginalisation were festering among the Tamils, the largest minority, in the wake of the Official Languages Bill of the 1950s and the failed pacts between Tamil and Sinhala leaders.\(^{133}\) Nevertheless, Sri Lanka was still a parliamentary democracy, with two almost equally powerful political parties between whom periodic elections were fairly contested.

Thus, with the 1972 Constitution, the National State Assembly became the supreme institution of state power,\(^{134}\) and the review of legislation was taken away from the Supreme Court to a Constitutional Court, whose powers were also very much limited. In fact, the National State Assembly could pass legislation, even if it was *ultra vires* the

\(^{132}\) Pinto-Jayawardena, “Subverted Justice and the Breakdown of the Rule of Law in Sri Lanka.”

\(^{133}\) The hope of minority leaders at the time can be seen in the speech of the Tamil Congress representative, V. Ananthasangare (Kilinochchi), when he said that the “minorities look upon the proposed Constituent Assembly with great hope, and I plead that nothing be done to destroy their hopes”; Proceedings of a meeting of members of the House of Representatives, 19 July 1970, (Colombo, Department of Government Printing): Col. 57, cited in Jayawickrama, “Reflections on the Making and Content of the 1972 Constitution: An Insider’s Perspective,” 63.

\(^{134}\) 1972 Constitution, art. 5.
Constitution, by a special majority.\textsuperscript{135} The Common Programme of the United Front (LSSP, SLFP and the Communist Party) in 1968, anticipating the next general election, offers insight into the thinking of the Left at the time. They envisioned a "Socialist Democracy,"\textsuperscript{136} securing fundamental rights and freedoms of all citizens, including their 'right to work and to personal property.'

In the midst of all the salutary efforts at constitution making, the first youth insurrection took place in April 1971 and was later brutally crushed, using the British-era laws for the suppression of civil disorder aimed at depriving the Queen of her sovereignty under the Penal Code.\textsuperscript{137} The issues of the 'wealthless masses,'\textsuperscript{138} a segment of the population that was instigated to rise up against the State, and the social and political milieu of the time must not therefore be ignored when one considers both the treatment of the judiciary and the conduct of the judiciary itself, in and under the 1972 Constitution.

Two of several reasons cited by the UNP for voting against the First Republican Constitution were that it (a) introduced "...control by a Cabinet of Ministers over the subordinate judiciary..." and (b) deprived "...the judiciary of the power to determine the constitutional propriety of laws ..."\textsuperscript{139} In fact, the First Republican Constitution deprived the courts of their

\textsuperscript{135} Jayawickrama suggests that Sirimavo Bandaranaike, the then Prime Minister, was averse to the concentration of power in the National State Assembly and communicated her sentiments in a carefully worded letter to the Minister of Constitutional Affairs, Colvin R. De Silva, dated 09 December 1970. See Jayawickrama, 72.

\textsuperscript{136} Jayawickrama also provides an interesting anecdote to S.W.R.D. Bandaranaike’s original conception of a socialist democracy as one which emanated from the welfare states of Northern Europe and not a Marxist conception of socialism. See, Jayawickrama, “Reflections on the Making and Content of the 1972 Constitution: An Insider’s Perspective,” 59.

\textsuperscript{137} Ibid., 78-79.

\textsuperscript{138} Ibid.

ability to review legislation—a power it had hitherto enjoyed. It warrants a note here, however, that even when it did have the power of legislative review, the courts rarely exercised this power to challenge some of the noxious pieces of legislation that led to violations of human rights. Two common examples are the large-scale disenfranchisement of citizens through the Citizenship Acts and the discrimination based on language through the Sinhala Only Act.

Jayawickrama concludes that despite the fundamental rights that were enshrined in the Constitution, in the next six years, until its repeal, such rights had little impact on the lives of Sri Lankans. In fact, during the period in which the 1972 Constitution was operational “...not one case on fundamental rights was decided by the Courts…”

The Constitutional Court, which was vested with judicial review of legislation, was seated in the premises of the National State Assembly itself. Those in power argued this was necessary to ensure the sovereignty of the legislature in law making. The possibility of pushing through an urgent review of a bill within 24 hours—bypassing public scrutiny in the national interest—was also introduced in 1972 and endured until the Nineteenth Amendment to the Constitution in 2015.

The judges of the Constitutional Court were not career judges; the thinking was that “…what has to be brought in is not only the legal expertise but proper attitudes.” In the end, those appointed to the

142 The Nineteenth Amendment to the Constitution removed the provision under which urgent bills could be brought. The time period between a bill being made public and it being placed on the order paper of Parliament (essentially the window in which it may be challenged before Court) was also increased by the Nineteenth Amendment from seven days to fourteen days.
Constitutional Court were a ‘curious mix’ of judges and non-judges.”144 This also led to the crisis where three judges of the Constitutional Court resigned before reaching a decision on the Press Council Bill. The Press Council Bill was the first reference to the Constitutional Court. From this crisis, the Court was re-constituted. However, Jayawickrema opines that by then the Court had “forfeited public credibility.”145 Perhaps due to this reason, the short experiment with a Constitutional Court ended abruptly, and the judges of the Constitutional Court were “…removed from their substantive judicial offices…”146 with the Second Republic Constitution.

Despite these setbacks, Goonesekere concludes—based on the judgments of that Court during the five years of its existence—that it acted with great independence and integrity.147 In the 1974 decision in Sirisena and Others vs. Kobbekaduwa, Minister of Agriculture and Lands,148 the full bench of the Supreme Court (by eight separate judgments and four dissenting) held that Section 24 of the Interpretations Ordinance, an amendment that was brought in reaction to increasing judicial activism (and to prevent such activism), was not applicable where the “…Act of the Minister is without jurisdiction, ultra vires or is in bad faith.”149

The Second Republican Constitution

The ideas about the judiciary espoused in the Second Republican Constitution in 1978 appear to be along the same lines of curbing, in some measure, the independence of the judiciary and limiting its ability to review legislation.

145 Ibid.
146 Ibid., 99.
147 Goonesekere, “Arm of the Law,” 3: “When the six volumes of the Decisions of the Constitutional Court are looked at, they will show that the court consisting of judges and former judges, took this new function seriously and acted with commendable independence and integrity.”
149 Sirisena and Others vs. Kobbekaduwa, Minister of Agriculture and Lands, Sharvananda, J., 185.
The 1978 Constitution or the Second Republican Constitution was promulgated by the United National Party. Nevertheless, the J.R. Jayewardene Constitution of 1978 and his policies on the judiciary stand in stark contrast to his sentiments expressed in 1970 when the then United Front government invited the UNP to attend a crucial meeting of members of the House of Representatives at Navarangahala, Royal Junior School, Colombo on 19 July 1970.

At that time, in 1970, Jayewardene was quoted as having said that what is ‘most important’ is a Constitution that:

Enshrines the basic liberties of democracy, secures the fundamental rights and freedoms of all citizens, and recognizes the independence of the judiciary by vesting judicial power only in the judicature, free from political, legislative and executive control. Let us therefore enact a Constitution closer to our heart’s desire.\textsuperscript{150}

When it came to actually drafting a Constitution that was close to the heart of the ruling party, the salutary sentiments expressed above appear to have undergone an abrupt change after a period of only eight years.

The architecture of the judiciary of present day Sri Lanka is found in Chapter XV and XVI of the 1978 Constitution of Sri Lanka.\textsuperscript{151} The judiciary is headed by the Chief Justice, who is appointed, along


\textsuperscript{151} Article 105(1) establishes the system of courts for the administration of justice in the country as follows: “Article 105(1) establishes the system of courts for the administration of justice in Sri Lanka, recognizing also the High Court of the Republic of Sri Lanka and Courts of First Instance, tribunals or such institutions as Parliament may from time to time ordain and establish.”
with the other judges of the Supreme Court and the Court of Appeal, by the President and only upon the approval of the appointment by the Constitutional Council. Subsequent amendments to the Constitution led to several controversial appointments to the bench. However, the current constitutional arrangement for appointments made to the judiciary came about through the Nineteenth Amendment to the Constitution, which restored the procedure set out in the Seventeenth Amendment and repealed the Eighteenth Amendment.152

In addition to the safeguards introduced by the Seventeenth and Nineteenth Amendments to the appointment procedure of members of the judiciary, the independence of the judiciary is established through Article 111C of the Constitution. The provision states that every member of the judiciary is entitled to exercise and perform their powers and functions without being subject to any direction or other interference proceeding from any other person except a superior court, tribunal, institution or other person entitled under law to do so.153 Such unlawful interference is considered an offense with penal consequences. The fundamental rights jurisdiction is vested exclusively in the Supreme Court.

Furthermore, an independent Judicial Service Commission (hereinafter JSC) was re-established by the Second Republican Constitution (comprising Supreme Court judges headed by the Chief Justice). The JSC supervises the lower judiciary in relation to appointments, promotions, transfers, disciplinary control and dismissals.

The constitutional provisions relating to the judiciary offer some safeguards for the protection of the judicial office. For example, the judges of the superior courts hold office during good behaviour and

152 The Eighteenth Amendment to the Constitution had effectively allowed the President to make direct appointments to these positions. Currently under Article 26(1), the President shall appoint the Chief Justice and other judges of the Supreme Court and Court of Appeal, subject to the approval of the Constitutional Council.

could only be removed by way of an impeachment procedure\textsuperscript{154} instituted by Parliament on the grounds of proved misconduct or incompetence. The impeachment procedure is intended as a corollary to ensuring greater independence and accountability of the judiciary.

In essence, however, it also re-establishes some of the sentiments of Colvin R. De Silva (cited before) and of the sovereignty of the legislature, as well as a judiciary that is eventually accountable to the representatives of the people.\textsuperscript{155} This is a desirable check and balance—an omnipotent judiciary is as undesirable as an autocratic executive. The danger, of course, is that political convenience can also hold sway when judges stand in the way of unpopular executive or legislative decisions. The history of Sri Lanka’s impeachment processes initiated or attempted against three Chief Justices in a span of three decades illustrates this danger (although impeachment was carried out only against one).\textsuperscript{156}

The Experience of the Judiciary under the Constitution of 1978

While the safeguards introduced by the Seventeenth and Nineteenth Amendments to the Constitution represent, on paper, an institution that bodes well for an independent judiciary, current predicaments reveal that the Second Republican Constitution does not necessarily create a constitutional environment that is practically conducive for an independent and vibrant judiciary. According to Coomaraswamy, "...the question of an independent judiciary was an

\textsuperscript{154} At present, the existing framework for the impeachment of judges of the superior courts requires the framing of charges against the judge, the investigation of charges and an address of Parliament, based on a finding of misconduct or incapacity, which gives authorisation to the President to remove the impugned judge.

\textsuperscript{155} In applying Dworkin’s Rights Thesis, it is suggested that courts are eventually accountable to the people (and not accountable solely to the constitution from which the judiciary emanates).

\textsuperscript{156} Neville Samarakoon C.J, Sarath Silva C.J and Shirani Bandaranayake C.J.
important aspect of the rhetoric which surrounded the promulgation of the 1978 Constitution."\textsuperscript{157} Coomaraswamy comments that despite this rhetoric, the scope for judicial review guaranteed under the 1978 Constitution was 'very small' compared to other democracies, such as India or USA.\textsuperscript{158}

Pinto-Jayawardena goes so far as to conclude that our post-colonial constitutional documents evidence a "...deep-rooted reluctance to give practical effect to the rule of law and the idea of justice."\textsuperscript{159} With the creation of an Executive President, who held immunity of office, and was made omnipotent in every sense, as well as the limitation of seven days to challenge a bill (now fourteen days after the Nineteenth Amendment), the judiciary's ability to flex its muscles appeared to continue to be cribbed and cabined. In fact, even the manner in which the 1978 Constitution provided for the transition to the new Constitutional regime truncated any hope for an independent judiciary. For example, of the nineteen judges that were holding office, seven judges were not re-appointed under the new Constitution,\textsuperscript{160} which was a severe blow to the rule of law. Another example was the appointment of the aforementioned Chief Justice, Neville Samarakoon—an individual with alleged close personal connections to the President—which is cited by critics as a step that was taken to ensure that the 1978 Constitution had a smooth passage with no opposition from the judiciary.\textsuperscript{161} In the ensuing years, the break-down of the rule of law in the country resulted in unchecked, state-endorsed violations of human rights, to which the courts turned a blind eye. The appointment of judges

\textsuperscript{157} Coomaraswamy, \textit{Ideology and the Constitution: Essays on Constitutional Jurisprudence}, 34.
\textsuperscript{158} Ibid., 35.
\textsuperscript{159} Pinto-Jayawardena, "Subverted Justice and the Breakdown of the Rule of Law in Sri Lanka."
\textsuperscript{160} Pinto-Jayawardena, "Subverted Justice and the Breakdown of the Rule of Law in Sri Lanka."
to the Supreme Court caused controversy even in the early years under the 1978 Constitution.

The first juncture at which the Chief Justice clashed with the executive arose with the police locking and barring the Supreme Court and the Court of Appeal and refusing entry to judges who reported for work, on the back of a procedural difficulty in relation to taking the oath of allegiance under the Sixth Amendment. Other reports document the hurling of stones at judges' residences and vulgar abuse being used against them when unpopular decisions were delivered.

The consequences of these events perhaps spurred the then Chief Justice to deliver scathing criticism against the executive in the judgment of Visuvalingam vs. Liyanage. It is possible that this judgment, and the criticisms delivered in a speech made by Justice Neville Samarakoon in Colombo, resulted in what appeared to be a deliberate strategy by the then President, J.R. Jayawardene, to attempt to use the impeachment procedure to unseat the Chief Justice and demonstrate to all other judges that the executive arm of the Government held the ultimate weapon against any who stood in opposition. The impeachment attempt was unsuccessful, with Justice Samarakoon retiring in the interim. However, the select committee appointed to investigate the matter found that there was a 'serious breach of convention' although it found no 'proved misbehaviour.'

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162 Pinto-Jayawardena, "Subverted Justice and the breakdown of the rule of law in Sri Lanka".
163 Ibid.
164 (1983) 2 SLR 311.
165 Asian Human Rights Commission, "The Courts are Expected to Blindly Support the Executive."
166 Pinto-Jayawardena, "Subverted Justice and the Breakdown of the rule of law in Sri Lanka." At the time of writing, the writers were unable to peruse the original version of the reports by the two Parliamentary Select Committees; however, descriptive narration of the process is available in C.V. Vivekananthan, "Can another Second PSC play a better job?" Daily Mirror, 31 December 2012, Sri Lanka: Briefing to Committee Against Torture, https://www.pressreader.com/sri-lanka/daily-mirror-sri-lanka/20121231/282394101785886.
Sri Lanka has subsequently experienced many instances of what may be perceived as executive manipulation of judicial appointments, fuelled by the fact that under the 1972 and 1978 constitutions, political actors drove the appointments process for the judiciary and key public service posts. For example, the 1978 Constitution initially vested with the President the power to appoint judges to higher courts, until the Seventeenth and Nineteenth Amendments to the Constitution, which sought to inculcate greater independence into the appointments process by creating and re-establishing the Constitutional Council to oversee and approve the process.

Therefore, the 1978 Constitution, which sought to inculcate greater independence, in its almost forty years of operation, has resulted in the attempted impeachment of two Chief Justices, the full impeachment of one and the legitimacy of the appointment of one Chief Justice called into question despite his having presided over the judiciary for two years.167

As such, although the institution of the judiciary enjoyed greater judicial independence in terms of constitutional safeguards under the Second Republican Constitution, the attitude of authoritarian disregard towards its constitutional mandate resulted in the severe weakening of the judiciary.

In this socio-political context, we divide the remainder of the chapter into several parts. In Part 2, we discuss the procedural rules and legal provisions surrounding the judiciary, and their impact on the administration of justice, independence of the judiciary and consequentially on a liberal conception of the rule of law. In Part 3, we discuss the role of the judiciary in Sri Lanka, the developments in the 1990s when some judicial vigour was evident, and then the gradual

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displacement of judicial temerity with judicial timidity or a classical conservative approach to decisions. We do this through the lens of their reaction or non-reaction to social justice issues that confronted the Courts from time to time. Finally, in Part 4, we conclude by discussing the present-day trajectory of the judiciary and where it appears to be heading.

Part 2

Procedure, Mandate and Legal Provisions on the Judiciary and its Impact on the Administration of Justice and the Independence of the Judiciary

The provisions relating to the structure and organisation of the judiciary reveal further insights in relation to implications for the administration of justice. As the apex body of the judiciary, the mandate of the Supreme Court of Sri Lanka is constitutionally protected and the Court enjoys "...sole and exclusive jurisdiction..." to, inter alia, assess the legality of proposed legislation, serve as a court of last resort for the lower judiciary and hear fundamental rights cases.168 The limitation of forums for litigation related to the constitutionality of legislation and fundamental rights applications results in several practical difficulties.

With regard to the former, the concentration of constitutional jurisdiction in the Supreme Court serves to alienate the lower courts from adopting and fostering a "constitutional consciousness."169 Further, the powers and functions of the Supreme Court, in this respect, present an accompanying set of challenges. For example, when the Supreme Court is assessing the constitutionality of bills, including constitutional

168 1978 Constitution, art. 118.
amendments, challenges must be lodged within two weeks (fourteen days) of the Bill being on the Order Paper of Parliament. This is inherited from the first Republican Constitution, where similar limitations of temporality as well as forum (the Constitutional Court) hampered judicial review of legislation. Such a state of affairs constrains the efficacy of the courts as a check on executive overreach. As a result, it serves to weaken the ability of the judiciary to review legislation that may be un-constitutional once it is passed.

The Constitution also limits the sole jurisdiction for fundamental rights applications to the Supreme Court. The violation complained of must be a consequence of "executive and administrative action." This limitation of forums for the filing of fundamental rights cases burdens those victims of rights violations, as many lawyers specialising in fundamental rights law also reside in Colombo and litigants must travel to the city for consultations. This burden is further exacerbated by the time limit imposed on prospective litigants, which makes it necessary for a suit to be filed within one month of the alleged violation. The prospective litigants who are unaware of their remedies

170 1978 Constitution, art. 121(1).
171 Ibid., art. 126.
172 However, the mandate of the Human Rights Commission of Sri Lanka must also be referred to here as providing, in some sense, an alternative forum. The Supreme Court may refer any matter to the Human Rights Commission of Sri Lanka (HRCSL). See Section 10(e) of the Human Rights Commission of Sri Lanka Act No. 21 of 1996. Further, as per Section 10(a), the Human Rights Commission is mandated to "...inquire into and investigate, complaints regarding procedures, with a view to ensuring compliance with the provisions of the Constitution relating to fundamental rights and to promoting respect for, and observance of, fundamental rights." However, the HRCSL can only make recommendations to the government and does not carry the weight of a judicial decision by the Supreme Court on a violation of fundamental rights.
173 Note, however, that through interpretation, the time limit has been relaxed in some instances; for example, see Gamaethige vs. Sirwardena (1988) 1 SLR 384. Fernando, J held in that case: 'While the time limit is mandatory, in exceptional cases, on an application of the principle lex non cogitadimpossibilia, if there is no lapse, fault or delay on the part of the petitioner, this Court has a discretion to entertain an application made out of time.' Several other cases similarly recognise judicial discretion in specific circumstances.
or are ill-resourced to get access to them are left stranded due to these constitutional limitations, all of which have severe repercussions for access to justice.

The independence of the judiciary is also at risk due to political and practical influences. In the past, the executive has used its powers of appointment to influence the courts, and political influence has also filtered through the JSC, which is responsible for the appointment, transfer and discipline of judges in the lower courts.  

In this regard, the JSC has made public its own misgivings as to its independence. In a public statement, the JSC referred to attempts to influence its decisions by those in positions of power. Further, the JSC also lacks important procedural safeguards such as a scheme for the recruitment, promotion and the transfer of judges. This has resulted in a lack of accountability and transparency in the workings of the JSC, which was created to ensure that the independence of the judiciary is safeguarded and that public confidence is upheld in terms of the maintenance of the rule of law.

Furthermore, the administration of justice in Sri Lanka is characterised by delays and structural inefficiencies. This is evidenced

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174 1978 Constitution, art. 111H (1). See also, Pieris, "Towards an Independent and Accountable Judiciary in Sri Lanka."


by the backlog of cases in the Supreme Court and High Court due to
the lack of judges available and the lack of modern court management
erstructure.\textsuperscript{177} Efforts to reform the system by adopting efficient court
management systems—such as computerisation, new methods of court
and case management, recruitment of efficient and competent staff for
the administration of court work—are of urgent importance.\textsuperscript{178} In
addition, there are fears of political interference in the appointment of
judges.\textsuperscript{179}

As such, legal constraints, in terms of court administration,
judicial delays and the political interference in the judiciary, have
prevented the administration of substantive justice, and endangered the
independence of the judiciary. Sri Lanka’s progress towards ensuring
that the judiciary is engaged with the public and evokes public confidence
remains snail-paced. It is evident that reforms are long overdue.

The Role of the Judiciary in Sri Lanka

The process of understanding the role occupied by the judiciary
in Sri Lanka inevitably manifests several key questions. The judiciary, in
responding to the legal disputes that come before it, has played a
significant role in areas such as the protection of human rights,
promoting justice and democracy, and upholding the rule of law.\textsuperscript{180}
Taking our interpretation of the role of the judiciary through the lens

\textsuperscript{177} International Bar Association, “Sri Lanka: Failing to Protect the Rule of Law and the
Independence of the Judiciary,” 29.
\textsuperscript{178} These calls for reform have come from many quarters, including the International
Bar Association Report mentioned above.
\textsuperscript{179} International Bar Association, “Sri Lanka: Failing to Protect the Rule of Law and the
Independence of the Judiciary,” 33.
\textsuperscript{180} Decisions of the Court in several key fundamental rights cases include Bulankulama
and Six Others vs. Ministry of Industrial Development and Seven Others (Eppawala case)
(2000) 3 SLR 243 and Leeda Violet and Others vs. Vidanapathirana, OIC Police Station
Dickwella (1994) 3 SLR 377 (Leeda Violet case). Note that in Leeda Violet, the judgment
was delivered by Justice Sarath N. Silva who was also presiding in the more controversial
Singarasa judgment.
of a Dworkinian premise, the judiciary must aspire to be a dynamic institution responding not just to the specific legal issues that it is presented with, but also engaging with social, political and economic issues that underpin the disputes, applying not only laws but also principles. Thus, the norm applying function of the judiciary, when responding to the changing dictates of society, entrusts the institution with significant responsibility which, if disregarded, sees consequences rippling through the fabric of society.

Attempting to analyse the ideological and social character of the judiciary in Sri Lanka through the lens of specific socio-political and economic cleavages in society is an uphill task, especially when many aspects need to be considered. Of these, the time frame, within which particular judicial pronouncements in each of these areas have been delivered, is of significance. Certain judicial trends become evident as a result of the period within which the subject matter of the dispute was adjudicated and this, in turn, provides insights into the role of the judiciary during these periods.

To illustrate this point, it is pertinent, as a starting point, to examine the role of the judiciary since the promulgation of the 1978 Constitution. In the 1980s, a barrage of political pressure resulted in the judiciary's integrity being compromised when it upheld decisions of the Government that clearly flouted the supremacy of the Constitution. For example, when the United National Party, the ruling political party at the time, substituted a referendum for the general election that was then due, the Supreme Court backed the decision

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1 According to the Rights Thesis put forward by Ronald Dworkin.
despite it violating constitutional provisions relating to electoral laws.\footnote{Decisions of the Supreme Court on Parliamentary Bills 1978-1983, I, 151. Therefore, the Fourth Amendment to the Constitution permitted the extension of the life of Parliament for a six-year term until 1989. For a discussion on the consequences of this case, see Pinto-Jayawardena, "Subverted Justice and the Breakdown of the Rule of Law in Sri Lanka." See also, Bandaranaike vs. Weeraratne and others (1981) 1 SLR 10 at 14 and Ven. Dr.Omalpe Sobhitha Thero vs. Dayananda Disanayake, Elections Commission, SCFR 278/2005, S.C. Minutes, 26 August 2005, accessed 28 July 2017, http://www.island.lk/2005/08/27/news22.html.} Subsequently, in the Thirteenth Amendment case,\footnote{S.C. Application Nos. 7-47/87 (Spl) and SD 1&2/87 (Presidential Reference).} the Court did not give weighted consideration to important questions relating to the merits and demerits of devolution. These questions were of social and political significance at the time; yet, the Court ignored these issues and upheld that the amendments introduced did not compromise the unitary character of the State.

However, in the early 1990s, the judiciary demonstrated unusual potential as a positive force, intervening in order to resolve key social and political issues.\footnote{For a further discussion, see Pinto-Jayawardena, "Subverted Justice and the breakdown of the rule of law in Sri Lanka."} A good example is the change in judicial attitude to emergency regulations. In the case of Joseph Perera vs. The Attorney General, the Court struck down emergency regulations\footnote{(1992) 1 SLR 199. For a discussion, see Rohan Abeyratne, "Rethinking Judicial Independence in India and Sri Lanka," Asian Journal of Comparative Law 10, no. 1, (2010), 133.} on the basis that they violated freedom of expression. Due to widespread public acknowledgement that the abuses of the past could not continue, Pinto-Jayawardena opines that during this era, the judiciary did as much as it could, within a limited constitutional framework, to protect individual rights against abuse by the State.\footnote{Pinto-Jayawardena, "Subverted Justice and the breakdown of the rule of law in Sri Lanka."} As such, jurisprudence of this period was arguably progressive and contained well-sustained legal reasoning through the application of precedent and the law.
The trend of decision-making by the Supreme Court in this manner resulted in consequences in the appointment of the next Chief Justice, and may have been informed by the activism of the judiciary, which was possibly viewed as undue interference in the affairs of the government. The judge that was next in line on the basis of seniority, who was expected to be the candidate for the post of Chief Justice was overlooked and instead the President intervened to appoint a judge who was reportedly a close personal connection.

Subsequently, by the mid-1990s and especially so after the controversial appointment of Chief Justice Sarath Silva in 1999, the court began to show more reluctance to restrain the actions of the executive and legislature. According to Upul Jayasuriya, a senior lawyer, fundamental rights applications during this time largely decreased and wherever a fundamental rights application succeeded, compensation was minimal. In the Nallaratnam Singarasacase, the Court refused to revise or review its decision in the light of the persuasive recommendations by the United Nations Human Rights Committee (and Sri Lanka’s own human rights obligations) and legitimised the overriding of Sri Lanka’s human rights obligations by the Government.

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190 For a further discussion, see Pinto-Jayawardena, "Subverted Justice and the Breakdown of the Rule of Law in Sri Lanka." She mentions therein two cases where the compensation awarded was just Rs. 15,000 and Rs. 25,000 respectively, citing B.A.S. Surange Wijewardened [sic], S.C. (FR) 533/2002, S.C. Minutes, 27 May 2005, and Palitha Tissa Kumara, S.C. (FR) 211/2004, S.C. Minutes, 17 February 2006 [at foot note 15].
191 Singarasa vs. Attorney General.
192 The Singarasa case is a good example of such judicial de-activity and retrogressive decision-making.
During this period, public confidence in the ability of the judiciary to deliver on substantive issues of justice floundered. It appeared that political interference influenced transfers, disciplinary control and dismissal of lower court judges. As such, we may conclude based on the trend of decisions taken by the Court during this period that it resulted in the severe weakening of the public perception of the judiciary vis-à-vis its independence and accountability.

However, it would be unfair not to mention some of the more progressive decisions that emanated from the Supreme Court around this time. Notwithstanding the clear provisions in the Constitution that gives Buddhism the foremost place, the Supreme Court declared in two cases that Sri Lanka is a secular state. However, the Court at that


195 According to Article 9 of the 1978 Constitution, Sri Lanka shall give the foremost place to Buddhism and it is the duty of the State to protect and foster the Buddha Sasana. while assuring to all other religions their right to freedom of thought, conscience and religion (Article 10) and the right of the citizen to manifest his religion or belief through 'worship, observance, teaching or practice' in public or private, and in association with others or by himself (Article 14(1) (e)).

196 Alexandra Owens, "Using Legislation to Protect Against Unethical Conversions in Sri Lanka," Journal of Law and Religion XXVII, (2007): 347, refers to one case in point where secularism is declared by the Supreme Court, in rejecting an attempt by the Jathika Hela Urumaya (JHU) to amend the Constitution and declare Buddhism the State Religion. Vide Nineteenth Amendment to the Constitution, Supreme Court Determination No. 32/2004, S.C. Minutes 17 December 2004 (unreported, not available for perusal with the authors, cited in Owens, "Using Legislation to Protect Against Unethical Conversions in Sri Lanka") and In Kapuwatta Mohideen Jumma Mosque vs. OIC Weligama, S.C. Application No. 38/2005 (FR) S.C. Minutes 9 November 2007. In Kapuwatte, the Court again held in favour of secularism, holding against the right of loudspeaker broadcasting by a mosque. Sarath Silva C.J declared that “Sri Lanka is a secular state...” For a discussion of these two cases, see Abeyratne, "Rethinking Judicial Independence in India and Sri Lanka," 125.
In 2001, a bench presided over by the Chief Justice himself, dismissed a notice for his impeachment. Again in 2003, an impeachment motion was launched with the signature of over a hundred Members of Parliament. The impeachment notice delivered by the Cabinet of Ministers on the direction of the Prime Minister, was subsequent to an alleged clash in open court between the Chief Justice and the Attorney General, over an opinion sought by the President on the powers of the Minister of Defence. Newspaper reports at the time alleged that the clash in the courtroom appeared to reveal a distinct partiality on the part of the Chief Justice towards a decision that favoured the President.

Fredrika Jansz, reporting in the Sunday Leader, provided a detailed timeline of the planning, drafting and handing over of the impeachment motion. She also documented in the report how the President called a state of emergency while the Members of Parliament were signing the motion for handover to the Speaker. According to

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199 Jansz, "Case Against the Chief Justice."

200 The President called a State of Emergency on 06 November 2003. There was speculation at the time that the State of Emergency was called to derail the attempted impeachment of the Chief Justice. "This move appears to be intended as a display of her executive powers and possibly a postponement of the UNF attempt of the Chief Justice Sarath N. Silva" as stated in "Uproar among LTTE as President takes Tigers by surprise," The Island, 09 November 2003, accessed 17 May 2017, http://www.island.lk/2003/11/09/defenc01.html.
the President also assumed the responsibilities of three ministries\(^{201}\) in the midst of this legislative plotting in Parliament in order to impeach the Chief Justice.\(^{202}\) The motion for impeachment, although delivered to the Speaker of Parliament, never gained traction in the political chaos that ensued.

All hope that the judiciary would regain its legitimacy, as the political regime changed in 2005, was subsequently dashed with the judiciary's unprecedented endorsement of the legislature's unbridled power. A case in point is the passing of the Eighteenth Amendment to the Constitution, which came with the endorsement of the Supreme Court, and represented the final nail in the coffin of the judiciary. As discussed later, the Eighteenth Amendment, which effectively terminated constitutional guarantees related to the rule of law, marked a black day for the judiciary.

Although the incumbent regime seems to promise new hope with regard to the judiciary, it is evident that previous trends have inflicted far-reaching blows from which the institution may find it difficult to recover. Emblematic cases that extended the rights discourse became rare, which may have been a response to the changing tides of political will at the time. As such, over the years, these various contestations restricted the ability of the Sri Lankan judiciary to effectively function as an institution of immeasurable importance in the democratic system.


\(^{202}\) Janz, "Case Against the Chief Justice," where it was stated, "All the while the document was being signed, the office of the chief government whip was inundated with phone calls alleging the President was expected to prorogue parliament. Finally, came the information that Kumaratunga had taken over three ministries."
The Role of the Judiciary in Responding to Key Social, Political and Economic Cleavages in Sri Lanka

The previous discussion focused on extraneous considerations that influenced the judiciary in the development of jurisprudence. In light of these considerations, the following discussion is an attempt to analyse the nature and role of the judiciary in light of emblematic judgments in Sri Lanka’s judicial history and provide an understanding of the judiciary’s interaction with and contribution to key social, political and economic questions that materialised before it. At this juncture, a convenient starting point would be to analyse the role of the judiciary in terms of state-society relations.

In recent years, emblematic judgments related to constitutional governance and other legal and political issues reveal that—in its exercise to translate democratic principles and values into practice—the judiciary’s role in influencing law (and at times also policy) in relation to government and administration is unique. In a democratic system, the judiciary, in principle, "...stands between citizen and citizen and the citizen and power of the State in the vindication of legal rights."203 As such, ideally, the judiciary embodies political impartiality, integrity and independence. However, in reality, existing constraints that emanate from the current constitutional structure and the exercise of political power impact the role of the judiciary in its capacity to engage with conflicts that arise as a result of clashes between the executive, the legislature and the judiciary.

An illustrative example is the impeachment of the 43rd Chief Justice of Sri Lanka, which was a turning point in the judicial history of Sri Lanka, as it exemplified the seeming subservience of the judiciary to the executive. Here, the Court justified the impeachment of the Chief Justice on the grounds that the judiciary was accountable to Parliament:

It is significant that the legislative, executive and judicial power of the People is vested either on Parliament or the President, both being elected by the People so as to maintain accountability and transparency and the courts and other like tribunals and institutions which are not elected by the People, are accountable and responsible to the People through Parliament.204

The decision marked a black day in terms of the integrity and independence of the noble institution.

The Eighteenth Amendment to the Constitution (Special Determination)205 case is another example where deference to the executive seems to have been the outcome. The proposed amendment to the Constitution abolished the Constitutional Council and restored the unfettered powers of the President to make key appointments to public service institutions such as the judiciary, including the Chief Justice and judges of the Supreme Court and members of the JSC. It also removed the two-term limit on the Presidency. The case raised fundamental questions relating to the separation of powers and interference with the exercise of judicial power. For example, even where the two-term limit was challenged as being in contravention to the manner in which the executive power of the people should be exercised, the Court justified the amendment. The Court argued that removing the term limit enhanced the franchise of the people granted to them through Article 4(e) of the Constitution since voters would be given a wide choice of candidates, including a president who had been elected twice by them.

When analysing the judiciary's role in the judicial review of bills, the jurisprudence is inconsistent and it cannot be said that the capacity of the judiciary to engage with procedural and substantive


205 Eighteenth Amendment to the Constitution (Special Determination), S.C. (Special Determination) No. 01/2010, S.C. Minutes 31 August 2010.
questions of law remains robust and advanced. However, some judgments are evidence of progressive judicial activism. For example, the *Divineguma Bill determination*\(^{206}\) was one such situation where the judiciary took a bold stance against the undermining of key governance issues, such as national policy and devolution of power. The Bill sought to provide for the planning and implementation of national policy on matters such as poverty alleviation and food security, which are powers allocated to the Provincial Councils as per the Ninth Schedule of the Constitution. The Court held that the Bill had been placed on the Order Paper of Parliament in violation of Article 154(G)(3), which provides for restrictions regarding the enacting of laws by the centre over the subjects that are specifically devolved to the Provincial Councils. The Court further strengthened this judicial reasoning by articulating the larger political purposes that underpin the enactment of the Thirteenth Amendment to the Constitution.\(^{207}\)

The judiciary of Sri Lanka paid a heavy price for this show of independence and guardianship of the rule of law. The impeachment motion against the Chief Justice followed almost immediately after and the political and legal consequences that ensued led to a constitutional crisis.

These cases reveal the myriad responses of the judiciary to issues of law and policy that affected the public interest. The judiciary—although capable of being a beacon of hope in terms of shaping and, in turn, being shaped by key issues of governance and the rule of law in society—has also undergone periods of darkness whereby the independence and integrity of the institution have been severely threatened. In such situations, the judiciary compromised its independence and deferred to the will of the executive.

\(^{206}\) *Divineguma Bill determination*, S.C. (Special Determination) No. 1, 2 and 3 of 2012, S.C. Minutes 01 January 2013.

The Judiciary and Fundamental Rights Jurisprudence

The Sri Lankan judiciary’s adjudication of fundamental rights cases reveals varied trends, which have ramifications for democratic values and the rule of law. For example, over the last decade or so, the Sri Lankan judiciary has experienced a regressive trend, whereby the Supreme Court upheld technical objections when faced with substantive questions of law and policy. This trend is to the detriment of substantive justice in the areas of protecting fundamental rights and the rule of law. An interesting rhetoric in this respect is found in the case of Professor Serosha Mandika Wijeyaratne vs. Minister of Higher Education and Others where the Court, quoting an Indian judgment, held that,

...if there is one principle which runs through the fabric of the Constitution, it is the principle of the Rule of Law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the Rule of Law meaningful and effective.

Despite acknowledging the significance of the judiciary’s role in balancing between the interests of the state and the public, the Court dismissed the fundamental rights case on a preliminary objection related to the time limit that is imposed through Article 126 of the Constitution in order to invoke the jurisdiction of the Court.

Although the constitutionally mandated time limit presents significant practical difficulties for litigants seeking remedies for fundamental rights violations, the rate at which the cases are dismissed on this basis has been alarming. This trend is particularly unfortunate considering the existence of judicial precedent where the Court

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permitted the one-month rule to be relaxed. For example, in the 80s and early 90s, due to the prevalence of a multitude of extrajudicial executions and enforced disappearances, the Court allowed time for detainees to gain access to lawyers and follow the necessary procedural steps, despite being in detention centres. Attorneys were permitted to file petitions despite the period of one month having elapsed.\footnote{Kishali Pinto-Jayawardena, "The Rule of Law in Decline in Sri Lanka: Study on the Prevalence, Determinants and Causes of Torture and Other Forms of Cruel, Inhuman and Degrading Treatment," (Copenhagen: Rehabilitation and Research Centre for Torture Victims, 2009), 167, accessed 07 March 2017, http://material.ahrchk.net/srilanka/AHRC-FST-024-2009-CIDTP.pdf.} These cases reveal that the Court has, in the past, recognised the practical difficulties faced by litigants in adhering to procedure and circumvented such technical rules in the interests of justice. Furthermore, the Court has previously demonstrated that it is quite capable of expanding on procedural rules\footnote{The rule related to the time bar has been relaxed in certain cases after taking into consideration the practical barriers faced by litigants when filing fundamental rights petitions. The scope of locus standi has been expanded to include dependents of deceased victims, non-governmental organizations and persons acting in the public interest. The definition of 'executive and administrative' action has been broadly interpreted to include corporations and actions carried out under the colour of authority of the State. Actions as well as violations and applications have been considered individually as well as collectively.} in general. With the potential for such liberality clearly illustrated by these examples, the fact that the Supreme Court has restricted itself to technical objections is regrettable.

It was a matter of time before the Supreme Court's propensity for upholding technicalities gave way to further complications, as evidenced by its recent decision in Noble Resources International Pte. Ltd. vs. Hon. Ranjith Siyambalapitiya et al.\footnote{Noble Resources International Pte. Ltd. vs. Hon. RanjithSiyambalapitiya et al., S.C. FR No. 394/2015, S.C. Minutes 24 June 2016.} The Noble case is historic in that it upholds a preliminary objection raised by the Attorney General on behalf of the State, but also gives due consideration to the merits of the case. The Court held that it would be a "travesty of justice" if a Petitioner
whose fundamental rights had been "...infringed or threatened to be infringed" was denied a remedy due to the upholding of a preliminary objection. In this case, although the Court ruled that the Petitioner had no locus, it nevertheless creatively interpreted jurisdiction to allow for the issue to be argued before the Court, holding that it was in the public interest.

The problematic aspect of the case is that it presents a contradiction; a preliminary objection of jurisdiction was upheld but a directive against the Respondent was ordered in the public interest. In this situation, the Court agreed with the Respondent's contention that the Petitioner was not a "person" as it was not a company incorporated in Sri Lanka and therefore did not have standing. This may result in the unfortunate interpretation that public interest is attached to the body of the Petitioner and not to the nature of the issue or claim, i.e., the interest of a group or community. As such, although the judiciary has exhibited an expansion of its jurisdictional scope by considering the merits of the case, this technical paradox circumvents effective judicial interpretation relating to a substantive issue of public interest.

The jurisprudence of the last few decades is peppered with examples of judicial activism in the substantive scope of fundamental rights jurisdiction. The judiciary has creatively engaged with the current Bill of Rights in the Constitution and broadened the scope of many of them. For example, the right to freedom of expression to include the freedom to dissent, the right to peaceful protest, the right to vote, the right to information, the rights of listeners and readers of media.

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216 Mediwake vs. Dissanayake (2001) 1 SLR 177.
218 Viswalingam and Others vs. Liyanage and Others (1983) 2 SLR 311; Viswalingam and Others vs. Liyanage (1984) 2 SLR 123.
and the freedom of the media.\textsuperscript{219} The right to be free from torture has been interpreted to include sexual violence.\textsuperscript{220}

Liberal interpretations of the right to equality before the law and of the right not to be discriminated against have resulted in the recognition of due process requirements and other principles such as, \textit{inter alia}, rules of natural justice and upholding the rule of law. In the last five years, the right to equality has been propounded in relation to access to education and due process in the context of the employer-employee relationship in the public service. A trend that can be observed from the jurisprudence related to the right to equality is that it has been determined in isolation to systemic failures and a broader understanding of the substantive scope of the right.\textsuperscript{221} For example, petitions that seek judicial remedies due to the violation of the right to equality in relation to access to education mostly arise out of structural inequalities within the school system.

The Judiciary and Gender Rights

A cursory analysis of the jurisprudence of the past five years, relating to the prohibition of discrimination under Article 12(2), reveals that there are no significant judgments from which the nature of judicial engagement in this area can be gleaned.\textsuperscript{222} Some fundamental rights cases that have been filed raise important considerations for gender rights. In 2013, a female migrant filed a fundamental rights petition, alleging that her right to substantive equality was violated, against the Sri Lanka Bureau of Foreign Employment, which had issued a circular

\textsuperscript{219} Fernando vs. SLBC (1996) 1 SLR 157.


\textsuperscript{221} Samararatne, “Recent Trends in Sri Lanka’s Fundamental Rights Jurisdiction,” 236.

\textsuperscript{222} Seneviratne vs. University Grants Commission (1978-79-80) 1 SLR 170, at 211 and Ramupillai vs. Festus Perera, (1991) 1 SLR 11 in which the Court examined the right to equality, prohibition of discrimination and affirmative action at length, remain exceptions to the generally paltry jurisprudence.
requiring all prospective female migrant workers to acquire permission from, among others, their spouse.\textsuperscript{223} The Supreme Court dismissed the application and held that the requirement was for the protection of women and children, and reflected the culture and traditions of Sri Lankan society.\textsuperscript{224}

Another example is the unreported case of S.C. Ref. 30/2008, in which the Supreme Court held\textsuperscript{225} that although the issue of consent is immaterial for the offence of statutory rape, the Court may consider consent when deciding the sentence for statutory rape. At the same time, women's groups\textsuperscript{226} alleged that as a consequence of this decision, there was a widespread trend of granting of suspended sentences in statutory rape cases across the island.\textsuperscript{227} Other cases like the famous Kamal Addararatchi case\textsuperscript{228} resulted in the Court considering the absence of evidence of injuries on the prosecutrix in determining whether there was consent.


\textsuperscript{226} Women & Media Collective (WMC), "The Sri Lanka Shadow Report to the Committee on the Elimination of All Forms of Discrimination Against Women."

\textsuperscript{227} It is unlikely that this situation has been reversed even now, due to the absence of precedence which could be used to justify a correction.

\textsuperscript{228} Addara Aratchige Gunemira Kamal alias Kamal Addararatchi vs. The Republic, High Court Case 7710/96, Court of Appeal Case 90/97, Supreme Court Leave to Appeal 30/2001.
This type of case law reveals, in part, signs of patriarchy and a failure on the part of the judiciary to embrace the full concept of formal equality in the field of gender rights, which in turn prevents an understanding of substantive equality. Even more perplexing is the Court's disregard, in this instance, for existing progressive domestic jurisprudence on the right to equality and Sri Lanka's obligations under CEDAW (Convention on the Elimination of Discrimination against Women) to guarantee both de jure and de facto equality to women. However, gender discriminatory legislation, such as the Vagrancy Ordinance and several provisions of the Penal Code that criminalise same-sex relationships, continue to strain the ability of the judiciary to respond to human rights principles that are widely accepted internationally.

The continuing role assigned to women to be primary caregivers—with no corresponding obligation on fathers of infants or minor children, to similarly be a caregiver and refrain from migratory employment—is a further indictment on the patriarchal attitude that is embedded in such decision-making, both by the executive and the judiciary.

In this regard, the 2010 cases where the Supreme Court adjudicated on the constitutionality of the Local Authorities (Special Provisions) Bill and the Local Authorities Elections (Amendment) Bill\(^2\) are significant. The special determination on the proposed amendment to the Local Authorities Elections Law introduced a voluntary quota of twenty-five percent for women and youth in nomination lists. It was argued by the Petitioners that the proposed amendment was vague, in violation of the obligations under CEDAW and therefore inconsistent with Article 12(4) of the Constitution, which recognises affirmative action for women. The Court, however, took a regressive turn by rejecting the arguments of the Petitioners and concluded as follows:

\(^2\) Local Authorities (Special Provisions) Bill and Local Authorities Elections (Amendment) Bill, Special Determination No. 02/2010 S.C. Minutes 16 November 2010.
Article 12(4) of the Constitution is not a weapon, but only a shield for the State in order to justify any kind of departure from the mainstream purely to encourage the advancement of women, children or disabled persons. Accordingly, Article 12(4) cannot be used to authorize affirmative action on behalf of women, children and disabled persons.230

Similar views were taken back in 1990, when the Court, in Ramuppillai vs. Festus Perera, Minister of Public Administration, Provincial Councils and Home Affairs and Others,231 held similarly that the equality clause of Article 12 attaches to the individual and not to the group to which s/he may belong, and therefore affirmative action based on ethnicity in that case was rejected as inimical to the right to equality.

In the case highlighted above, the Court disregarded the larger social problem of the lack of participation of women in Sri Lankan politics and the need for affirmative action for marginalised groups in society. In the area of gender rights, the Sri Lankan judiciary has much left to deliver. Several laws—including customary laws such as the Muslim Marriage and Divorce Act232 (in the personal laws) and the Penal Code233 as well as the Vagrants Ordinance234 (in the general law)—are highly patriarchal in operation and structurally discriminate against women. In interpreting such laws, the ability of the judiciary is inherently limited. However, the application of principles of gender justice, especially in cases where judicial discretion is provided for (such as in sentencing policies), is essential if gender justice is to be guaranteed.

232 Muslim Marriage and Divorce Act No. 13 of 1951 (as amended).
233 Penal Code Ordinance No. 2 of 1883 (as amended).
234 Vagrants Ordinance No. 4 of 1841 (as amended).
The Judiciary and Economic, Social and Cultural Rights

In some instances, the Sri Lankan Supreme Court has exhibited progressive judicial creativity by recognising rights not expressly provided for in the Constitution, such as the right to access to education and environmental rights. Rights such as the former are not judicially enforceable under the Constitution and constitute economic, social and cultural rights. Although these rights are not justiciable according to the Bill of Rights, the courts have decided in favour of environmental rights and other socio-economic rights within the existing Bill of Rights.

The jurisprudence of the Court reveals that due to several variables such as judicial attitudes, foresight, receptivity to international law in the interpretation of domestic law and civil society activism, a modest judicial culture has developed, which seeks to recognise and enforce economic, social and cultural rights. An example of this judicial movement is where the Supreme Court recognised that the right to education was an aspect of the right to equality in the renowned Z Score case. In supporting this argument, the Court refers to the right to education as described in the Universal Declaration on Human Rights (UDHR) as well as the obligation to eradicate illiteracy under the Directive Principles of State Policy as follows:

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Although there is no specific provision dealing with the right to Education in our Constitution as such in the Universal Declaration of Human Rights, the said right has been accepted and acknowledged by our Courts through the provisions embodied in Article 12(1) Constitution. In doing so, the Supreme Court has not only considered that the right to education should be accepted as a fundamental right, but also had accepted the value of such Education...

This judgment demonstrates that the judiciary has adopted an approach that is progressive and also socially relevant, especially since the Constitution itself does not prioritise economic, social and cultural rights in the same manner as civil and political rights.

The case of Gerald Perera vs. OIC, Wattala Police Station, made reference to the International Covenant on Economic Social and Cultural Rights (ICESCR). In this case, the Court upheld the allegation of torture by the petitioner. Additionally, the award of compensation took into account the costs incurred by the petitioner at a private hospital. Referring to Article 12 of the ICESCR, which recognises the right to the highest attainable standard of healthcare, the Court observed that a citizen must have the freedom to choose between state and private healthcare services. Here, the Court recognised the right to choose a particular type of healthcare and enumerated the State's liability to meet the costs that were incurred as a result of a violation of fundamental rights by an agent of the State. The Court awarded Rs. 800,000 as compensation.

Encountering such judicial attitudes shows that Sri Lanka's judiciary possesses the potential to be 'activist'; however, consistency across decisions remains elusive and ever dependent on the different

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239 Ibid.
variables that were mentioned above. Moreover, the advancements made in these determinations are far from significant in reference to the standards envisaged by the ICESCR.

One example is a recent order made by the Supreme Court in response to a fundamental rights petition filed by a mother on behalf of her child. The child had been denied access to primary education due to the stigmatisation that occurred from allegations that the child's father, who had passed away, succumbed to HIV/AIDS. While the case was being litigated, a private school offered to admit the child. The Court terminated the case after the offer was accepted by the mother of the child. The Court observed,

...in terms of Art 27(2)(h) of the Constitution, it is one of the Directive Principles of State Policy to ensure the right to universal and equal access to education at all levels. The Court also wishes to place on record that the State should ensure that the human rights of the people living with HIV/AIDS are promoted, protected and respected and measures to be taken to eliminate discrimination against them.

In this matter, the Court was confronted with an opportunity to definitively rule on the right to education and the right to health. However, since the matter was settled out of Court by the parties, the Court satisfied itself by expounding only on the general duty of the State to protect, promote and respect the rights of persons living with HIV/AIDS. It is our view that this opportunity could have been seized on by the Supreme Court to rule more definitively on these economic and social rights and set a precedent that is hitherto missing from our law books.

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Public Interest Litigation and the Sri Lankan Judiciary

The concept of public interest litigation is not new to the judiciary of Sri Lanka and has been recognised and developed by the courts as cases brought 'in the public interest.' There have been significant jurisprudential developments243 relating to public interest litigation, with the Court making orders on the basis of public interest. In the case of Wijesiri vs. Siriwardena244 the test of sufficient interest was applied to assess whether the Petitioner was coming before the Court in the public interest. In the Environmental Foundation Ltd. vs. Ratnasiri Wickramanayake,245 the Court held as follows:

However, there are decisions both here and abroad which have expanded the principle of locus standi to include an applicant who can show a genuine interest in the matter complained of, and that he comes before court as a public-spirited person, concerned to see that the law is obeying the interest of all.

Other cases in this vein include Centre for Policy Alternatives vs. Commissioner of Elections,246 Kithsiri Gunaratne vs. Commissioner of Motor Traffic247 and several others. Case law that relaxed the standing rules before the Court vis-à-vis fundamental rights jurisdiction includes Sriyani Silva vs. Iddamalgoda248 and Somawathie vs. Weerasinghe.249

244 (1982) 1 SLR 171.
249 (1990) 2 SLR 121.
Thus, the courts have expanded on the rules of standing in order to accommodate petitioners who sought to challenge executive or administrative action on the basis that they affected the rights of the collective. On the other hand, the courts have in some instances declined to recognise public interest, instead holding that public interest “...really involves a question of standing...” In Bulankulama, the Court established that fundamental rights litigation is an effective means to hold the Government accountable as the trustee of Sri Lanka’s natural resources for future generations. It was observed that,

[S]uch collective rights provide the context in which the alleged infringement or imminent infringement of the petitioner’s fundamental rights ought to be considered. It is in that connection that the confident expectation (trust) that the executive will act in accordance with the law and accountability, in the best interest of the people in Sri Lanka, including the petitioners, and future generations of Sri Lankans, become relevant.

In that particular case, instead of extending locus standi to allow petitioners to come before the Court in the public interest, the Court held that the Petitioners, as individual citizens, have the standing before the Court under fundamental rights jurisdiction.

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20 Bulankulama vs. Secretary Min of Industrial Development (2000) 3 SLR 243, where the Court says "Learned counsel for the 5th and 7th respondents submitted that, being an alleged 'public interest litigation' matter, it should not be entertained under provisions of the Constitution and should be rejected. I must confess surprise, for the question of 'public interest litigation' really involves questions of Standing and whether there is a certain kind of recognized cause of action. The Court is concerned in the instant case with the complaints of individual petitioners. On the question of standing, in my view, the petitioners, as individual citizens, have a constitutional right given by Article 17 read with Article 12 and 14 and Article 126 to be before this court. They are not disqualified because it so happens that their rights are linked to the collective rights of the citizenry of Sri Lanka – rights they share with the people of Sri Lanka. Moreover, in the circumstances of the instant case, such collective rights provide the context in which the alleged infringement or imminent infringement of the petitioners' fundamental rights ought to be considered. It is in that connection that the confident expectation (trust) that the executive will act in accordance with the law and accountably, in the best interests of the people of Sri Lanka, including the petitioners, and future generations of Sri Lanka, becomes relevant."

Public Trust Doctrine and the Judiciary

The Public Trust Doctrine has also been used by the courts to include the protection of natural resources, which is a significant development in the area of environmental justice. While we do not intend to dwell too long on the Public Trust Doctrine,252 we refer to the case below in order to illustrate the ability of the Court to use this Doctrine.

The role of the judiciary in terms of the Public Trust Doctrine was articulated in the case of Heather Mundy and Others vs. Central Environmental Authority and Others253 as follows:

...[T]his Court itself has long recognized and applied the public trust doctrine: that powers vested in public authorities are not absolute or unfettered but are held in trust for the public, to be exercised for the purposes for which they have been conferred, and that their exercise is subject to judicial review by reference to those purposes... Besides, executive power is also necessarily subject to the fundamental rights in general, and to Article 12(1) in particular which guarantees equality before the law and the equal protection of the law...254

The Public Trust Doctrine was relied on by the Supreme Court in several other cases as well. Chief among these are a number of cases where the issues involved ranged from privatisation of a state entity to the lease of government land for private purposes.255 While the Doctrine

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254 Ibid., Fernando, J.
is not settled law as yet in Sri Lanka, it has been utilised by the Courts in several landmark cases and may in fact be an additional ground of review of government action.256

Tensions between State Policy, Public Interest and Judicial Intervention

Judicial activism in the face of complex policy decisions may not always return efficient results. A case in point is that of Ven. Thiniyawala Palitha Thero and Others vs. A.H.M. Fowzie (Hedging case),257 where judicial intervention into the policy-making process, while unprecedented, was counter-productive. The Supreme Court granted leave to proceed on the alleged infringement of the fundamental rights guaranteed by Article 12(1) of the Constitution.

The subject matter of the case involved the Ceylon Petroleum Corporation's activities in terms of certain "hedging agreements" that were entered into with several banks in order to protect the Corporation from unexpected increases in the world's oil prices. The Corporation had entered into such agreements without any limitations to its liability in the event that oil prices plummeted. Eventually, when world oil prices decreased, this resulted in the incurrence of substantial losses to the Corporation. The Court issued interim orders requiring the suspension of the hedging agreements in the public interest. The Court also issued interim orders to the effect that domestic oil prices were "...excessive in terms of current world market prices and that the Government and fiscal levies imposed cannot be rationally related to the object of taxation considering that petrol is an essential item which affects the cost of living, commerce and business activities."258 In this way, the Court directed the Government to ensure that domestic oil prices corresponded with world prices. However, the

Government did not comply with the Court's directives, leading to confusion as to the actual domestic price of petrol.

This example of judicial activism—in a matter that involved complex policy decisions relating to resource allocation and taxation—is telling, particularly since the Court embarked into territory that was uncharted. As such, it produced counter-productive results.

The Judiciary and Labour Law

The judiciary's engagement with labour law has increased in frequency. As a result, several judicial trends can be gleaned by analysing the available jurisprudence in this regard. It is important to understand that labour law involves various aspects of workers' rights, the first aspect being that of trade union action.

Interestingly, the cases reveal that the Government and the courts have used the law as a tool to repress trade union action, despite the fact that the trade union rights of workers are constitutionally guaranteed. Against a backdrop where both trade union action and the rights of workers in this respect are regarded with a level of unease and uncertainty, the recent decision in *Ceylon Electricity Board Accountants Association vs Hon. Patali Champika Ranawaka*\(^{259}\) is pertinent and captures the vagaries of the current judicial attitude towards trade union action. The fundamental question that the case centred on was that of the issue of *locus standi* or standing.

The case was dismissed based on the contention that the Petitioner, in this case being the Ceylon Electricity Board (CEB) Accountants' Association, lacked standing due to the wording within Article 126 of the Constitution. Although it was argued that the word "person" within Article 126 should be interpreted to include an unincorporated body such as a trade union, given the existence of

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judicial precedent in this regard, the Court held that trade unions could not institute action on behalf of workers. An interesting contrast to the position taken in this case is that of the Noble case,\textsuperscript{260} which is expounded elsewhere in this discussion. The case took place merely a few months after the decision was delivered in the CEB case and here too, the issue of standing was at the centre of deliberations. The inability to maintain judicial consistency in matters of socio-economic significance is telling in relation to protecting the rights of ordinary citizens.

Another aspect of labour law that is pertinent for discussion is that of the right to work within the public service, which is not explicitly recognised in the Sri Lankan Constitution.\textsuperscript{261} The courts have skilfully used the right to equality to enforce this right within spheres where the State is the employer. As such, several obligations of the State as an employer have been developed by the judiciary through Article 12 of the Constitution. The courts have recognised, in cases such as Perera vs. Public Service Commission\textsuperscript{262} and Liyanage vs. Director General of Irrigation,\textsuperscript{263} the duty to ensure that classifications for the purpose of recruitment are reasonable and that there is adherence without discrimination to such classifications. Other obligations include the duty to provide a fair hearing in disciplinary inquiries and the duty to provide reasons for decisions taken as an employer.\textsuperscript{264} The courts have extended these obligations to the private sector through the Commissioner of Labour, who is an agent of the State and is obliged to respect the right to equality in decision-making.\textsuperscript{265}

\textsuperscript{260} Noble Resources International Pte. Ltd. vs. Hon. Ranjith Siyambalapitiya et al.
\textsuperscript{261} Gomez, Harinett and Samaratne, "Constitutionalizing Economic and Social Rights in Sri Lanka," 25.
\textsuperscript{265} Thiranagama vs. Madihewa, Commissioner-General of Labour (2003) 1 SLR 238.
The courts have also developed comprehensive jurisprudence on the rights of workers in the private sector and have judicially enforced them under "just and equitable" considerations. In addition, a high threshold for the employer has been established in cases relating to termination of employment. However, outliers in terms of judicial consistency do materialise, especially when the courts take contradictory positions to those intended by legislative policy.

These trends reveal that the courts have grappled with substantive issues of justice in the field of labour. However, judicial inconsistency and a lack of discernment characterise the adjudication of key issues in the area of labour law. Overall, this does not bode well in terms of the judiciary's role in ensuring the protection of rights.

The Judiciary and Minority Rights

Tensions between ethnic groups in Sri Lanka have a long history and the judiciary's role in protecting ethnic minority interests can be traced to colonial times. During the period preceding independence, the minorities sought to ensure better representation of their interests within a legislature that was dominated by the Sinhalese, who formed the majority ethnic group. The post-independence period saw tensions between ethnicities arising as a result of policies of the State in the areas of language, citizenship, employment and security, which were detrimental to the interests of the minorities. The jurisprudence arising out of this period is riddled with inconsistency, and fundamental flaws pervaded the judicial protection of minority rights. Furthermore, the nature of the judicial response cannot be divorced from the political realities of the day.

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The judicial response to language rights of minorities will be analysed in relation to the early case of *Kodeswaran vs. The Attorney General*\(^{167}\) mentioned previously. The case was an example of judicial restraint and timidity. The failure to recognise the language rights of the Tamil community is recognised as an additional factor that "...increased the tide of Majoritarian nationalism..."\(^{268}\)

Similarly, the case of *Adiyapathan vs. Attorney General*,\(^{269}\) which was litigated under the present Constitution, raised the question of language rights. The Petitioner was a Tamil who was entitled to receive his provident fund benefits and had received a cheque in Sinhala as part of the communication informing him of his dues. The Petitioner demanded that the cheque be sent in Tamil. The case raised the question of whether the Petitioner's rights under Article 22(2) (a) had been violated. The Court dismissed the application and held that the cheque did not come within the scope of official communication covered by Article 22 and subsequently was not entitled to relief under Article 126. The Court could have held that this was a violation of a fundamental right of a minority citizen. Instead, the Court deprived itself of the opportunity to take a proactive role in asserting minority rights and thereby define a public policy framework for pluralism and multiculturalism.

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\(^{167}\) *Kodeswaran vs. the Attorney General* (1969) 72 NLR 337. In this case, a Tamil clerk in government service was notified by a government circular that he was not eligible for a promotion because he did not possess the required level of proficiency in Sinhala. The circular was issued pursuant to the Official Language Act and it was argued that the Act was a violation of Article 29 of the Soulbury Constitution, which protected minority rights. It was also argued that the Act was in breach of a fundamental term of the contract between the Plaintiff and the State, which was entered into before the promulgation of the Act. The Plaintiff claimed that he was otherwise eligible for the promotion and that his increments had been unfairly withheld.


\(^{269}\) (1978-79-80) 1 SLR 60.
In the area of citizenship rights, early decisions were adjudicated under the Soulbury Constitution. The cases arose during the period within which the Citizenship Act and the Ceylon (Parliamentary Elections) Amendment270 were enacted and both Acts were challenged in the cases of Mudanayake vs. Sivagnanasunderam271 and Kodakkanpillai vs. Mudanayake272 on the grounds that they contravened Section 29 of the Constitution. The Acts resulted in a large number of Indian Tamils being disenfranchised due to stringent requirements with regard to proof of birth in Ceylon. The Supreme Court rejected the contention that the legislation was ultra vires and held that the language of the provisions was free from ambiguity. The motive behind and the practical effect in terms of social and political consequences of the Acts were ignored. This reveals the narrow approach of the courts in interpreting a constitutional provision and such an approach cannot be said to have been taken purely due to the exercise of mechanical consideration and application of the law. The political realities that underpin such decisions seep through the cracks and in this situation, it has been surmised that the decision was a carefully planned move to alter the balance of representation in the legislature.273 Once again, in a case where the judiciary could have played an affirmative role in upholding minority rights, it instead resorted to subservience to the will of political forces and, in doing so, deprived Sri Lankan society of a political solution to its ethnic tensions.

Lastly, the jurisprudence reveals that since independence, the subservience of the Sri Lankan judiciary to the bill of rights in the context of public security is characterised by judicial restraint. This has been attributed to sensitivity to political contentions, subjugation to political

271 Mudanayake vs. Sivagnanasunderam(1951) 53 NLR 25.
272 Kodakkanpillai vs. Mudanayake(1953) 53 NLR 433.
will and the suppression of individual rights. Only a scant number of cases—during the latter part of the 1980s and the early part of the 1990s—show judicial activism by way of the protection of individual rights in the face of serious abuses of power by an inherently national security state.

The Ganesan Nimalaruban case is emblematic of the judiciary’s surrender to public security concerns in the post-war era and as recently as 2013. The case involved two Tamil political prisoners who died in state custody. Both were severely beaten by the Special Task Force (STF) of the Police following their involvement in a hostage-taking incident at the Vavuniya Prison. They were protesting against the arbitrary transfer of prisoners from Vavuniya to Anuradhapura, where they believed their security was at serious risk. Both succumbed to the injuries they had sustained as a result of the assault. Following the incident, none of the STF officers were prosecuted and the families of the two deceased detainees were left without justice. Nimalaruban’s parents filed a fundamental rights petition (dated 03 August 2012) before the Supreme Court. The case was dismissed without reasons. As such, there is no official record of the proceedings before Court. However, the case drew public attention due to the startling remarks that came from the bench, which included reprimanding the parents of the deceased for filing the

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petition and even pronouncing that prison authorities should use some force when quelling a riot. The implications of such rhetoric by the judiciary are that it is reluctant to check the executive and uphold individual rights in light of public security considerations.

There have also been instances throughout judicial history where the judiciary has actively suppressed individual rights of minorities as well. The Amirthalingam Trial-At-Bar and the Tissainayagam cases are emblematic in this respect. With regard to the former, the Court adopted a purposive interpretation of the provisions of the Constitution to enable, rather than check, the executive’s unconstitutional actions. In the latter case, which is unreported, the High Court sentenced Tissainayagam to twenty years of rigorous imprisonment, for arousing ‘communal feelings’ by writing and publishing articles that criticised the Government’s treatment of Sri Lankan Tamil civilians affected by the war, and for raising funds for a magazine in which the articles were published in furtherance of terrorism.

279 Amirthalingam Trial-At-Bar, High Court Trial-at-Bar No. 1 of 1976, S.C. Application No. 658 of 1976 and S.C. Application No. 650 of 1976; the case involved the arrest of Amirthalingam, along with other Tamil political leaders, under the prevailing Emergency Regulations of the time. The arrest was due to the dissemination of leaflets on the contents of the Vaddukoddai Resolution passed by the Tamil United Liberation Front in 1976, which expressed the intention to work towards the establishment of a separate state. This case resulted in the Court considering (among other issues) the question of whether the Emergency Regulations under which the accused was arrested and tried were valid. In a remarkable judgment in the High Court, the Regulations were deemed invalid. The State challenged this decision before the Supreme Court. Both judges of the Supreme Court were willing to go beyond the letter of the law, i.e., the Constitution, in order to deem the regulations valid. For a discussion, see Guneratne, Pinto-Jayawardena and Gunatilleke, “The Judicial Mind in Sri Lanka: Responding to the Protection of Minority Rights,” 182-191.
The case had many judicial discrepancies such as the acceptance of a confession into evidence, which was proved to have been tampered with, the disregard of discrepancies in the prosecution's case, such as being unable to summon witnesses who could prove that the articles incited ethnic disharmony, and the dismissal of evidence of four witnesses on the basis that they held the same political views as the accused. The judge arrived at the decision on her own judgment and on the evidence of a defence witness who admitted, on cross examination, that the articles were factually incorrect. Tissainayagam appealed the ruling and was granted bail pending the outcome of the appeal. Eventually, the Government announced that on account of World Press Freedom Day, Tissainayagam would be pardoned by the President. However, he was never officially pardoned and eventually left Sri Lanka.

The case is a stark example of the judiciary's systemic failures and deference to the executive in relation to the latter's persistent public security legislation and regulations. The continued assaults by the executive and legislature on the independence of the judiciary over three or four decades are largely to blame for these developments.

Such cases are some examples, amongst many, of the judiciary's response when minorities were victimised under public security legislation. The general trend that can be observed from such cases in relation to this particular area is that the judiciary undermined its independence and transformed into an extension of the arm of the Government in pursuing its political aims. Due to compromising itself in this manner, and failing to uphold the rights of minorities, the judiciary contributed towards the loss of public confidence in the institution.

Conclusion

This chapter attempts to provide an overview of the trajectory of the judicial mind in Sri Lanka from the early 1950s to the present day. In doing so, it measured the activism and independence of the judiciary, as well as its accountability, against different rights issues that confronted our nation at different times.
In the years following the Soulbury Constitution, the judiciary displayed essentially legal-positivist characteristics: cautious, applying the law as it is and rarely showing signs of applying principles that may not have been codified as law. In some instances like Bracegirdle, the Court was firm in applying the letter of the law in defence of the liberty of the citizen. However, in other instances, the Court was less likely to oppose the State, and in the challenges to the Citizenship Acts and the Official Language Act, the Supreme Court was unwilling or unable to intervene to protect minority rights.

Under the First Republican Constitution in 1972, the powers of the judiciary began to be trimmed through the law. The ability of the Supreme Court to review legislation was taken away and granted to a Constitutional Court. The Constitutional Court itself faced turbulence in its functioning and was not continued after the First Republican Constitution. Although fundamental rights were guaranteed, there was no specific mechanism for their enforcement. Only one fundamental rights case was filed during the six years of this Constitution's operation.²⁸¹

The Second Republican Constitution in 1978 introduced a much more robust Bill of Rights. Although the Supreme Court was given the right to review proposed legislation, the ability to review bills was severely restricted; review had to be within seven days of such bills being gazetted (before being placed on the order paper of Parliament).²⁸² The Executive President became omnipotent, and under this Constitution there were three attempts to impeach the Chief Justice.²⁸³ The functional independence of the judiciary was guaranteed on the face of the 1978 Constitution. For example, the President appointed judges to the

²⁸¹ Gunaratne vs. People's Bank (1986) 1 SLR 338.
²⁸² Note that the Nineteenth Amendment to the Constitution in 2015 amended this provision and allowed for a longer period of fourteen days for such challenges. The Nineteenth Amendment also removed the provision for Urgent Bills.
²⁸³ Neville Samarakoon, C.J.; Sarath N. Silva, C.J.; and Shirani Bandaranaike, C.J.
Supreme Court only upon the recommendation of the Constitutional Council. Moreover, the appointment, transfer, disciplinary control and dismissal of lower court judges were powers vested with an independent Judicial Services Commission. However, the political reality meant that on several occasions there appeared to be political interference within the judiciary. Therefore, the independence of the judiciary was severely under threat, with political interference becoming palpably apparent under the 1978 Constitution.

We thereafter assessed the trend of decision-making with special reference to the Superior Courts on a number of thematic areas. In relation to fundamental rights jurisprudence, the 1990s witnessed an increasingly activist judiciary. In the context of the brutal crushing of the 1987 youth insurrection and widespread disappearances, torture and extra-judicial killings, the courts were applying principles of justice beyond the black letter of the law; for example, the courts extended the time limit for fundamental rights petitions to be presented to them.

In other cases, the Court applied international standards of human rights and recognised the ability of a spouse of a victim of torture to sue the State on behalf of herself and her child. On the other hand, the courts have on numerous occasions preferred to apply technicalities in the face of challenges to administrative and executive action. Such approaches to decision-making led to the cabining of the rights discourse to the strict letter of the law, without application of internationally accepted standards and principles.

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284 For example, see Pieris, “Towards an Independent and Accountable Judiciary in Sri Lanka” and International Bar Association, “Sri Lanka: Failing to Protect the Rule of Law and the Independence of the Judiciary.”


286 Sriyani Silva vs. Iddamalagoda.

287 Noble Resources International Pte. Ltd. vs. Hon. Ranjith Siyambalapitiya.

288 See, for example, the decision in Singarasa.
The response of the judiciary to gender rights has similarly seen little progress. For example, when confronted with discriminatory permission requirements for female migrant workers, the Court preferred to interpret the discriminatory policy document as executive action for the protection of women and children.\(^{289}\) In another instance, affirmative action to improve female participation in politics was also similarly rejected.\(^{290}\) These instances provide an insight into the opportunities for the judiciary to expand their approach to gender justice and gender sensitive decision-making vis-à-vis seminal cases relating to the rights of women.

It is noted that the Constitution of Sri Lanka does not recognise justiciable economic, social and cultural rights although the directive principles of state policy do recognise the importance of such rights. Despite this limitation, we note that the courts have ruled definitively on the right to health and environmental rights in a laudable manner. However, opportunities to rule on the larger right to education have been missed.

With regard to public interest litigation, and in the absence of specific constitutional language on the same, the courts have relaxed the rules of standing to allow for public interest petitions to be presented before court.

The Public Trust Doctrine has also been applied by various courts at different times, particularly in cases involving environmental issues.\(^{291}\) On the other hand, with regard to labour rights and minority rights, it appears that the courts have been selective in their application of a rights-based approach to judicial decision-making. In labour-related issues, the court was unwilling to recognise the *locus standi* of a trade union, which appeared on behalf of its members.\(^{292}\) However, in another instance that

\(^{289}\) Samath, "Migrant Worker Challenges Govt. over Restrictive Rule."
\(^{291}\) Heather Mundy and Others vs. Central Environmental Authority and Others.
\(^{292}\) Ceylon Electricity Board Accountants Association vs. Hon. Patali Champika Ranawaka.
involved investor confidence, the Court was willing to adjudicate on merits although the petitioner in that case did not have *locus standi* either.293

Similarly, in relation to minority rights, the courts traditionally displayed unwillingness to intervene when an abject injustice was challenged before them. The two major examples we have highlighted are the challenges to the Citizenship Acts294 and the challenges to the Official Language Act.295 We have also discussed more recent cases such as that of *Tissanayagam* and *Ganesan Nimalaruban*, where this alarming trend continued.

In this overview, we attempt to place judicial decisions within the larger social and political context of the time. The schematic provisioning by successive governments in Sri Lanka for economic and social rights—such as *Samurdhi*, free education and free healthcare—have resulted in Sri Lanka showing high average social indicators in the region. However, at the same time, successive governments have also been whittling away at the powers of the judiciary. In some instances, when the judiciary flexed its muscles (for example the *Divineguma case* and the *Z Score case*296), swift efforts to limit the independence of the judiciary appear to have followed.297

The judiciary itself has lost opportune moments to decisively engage with the violations of rights. We have cited numerous examples of how the judiciary could have intervened to protect the rights of minorities, workers and female migrant workers. In some cases, the judiciary has chosen to apply a technicality or to interpret the law in a technical and cautious manner.

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293 *Noble Resources International Pte. Ltd. vs. Hon. Ranjith Siyambalapitiya.*
294 *Mudanayake vs. Sivagnanasundaram*, and *Kodakkanpillaivs. Mudanayake.*
295 *Kodeswaran vs. The Attorney General.*
296 *V.B. Kavirathne et al vs. Commissioner General of Examinations et al.*
297 The impeachment of Shirani Bandaranayake commenced soon after the decisions in these cases were delivered.
In our view, the last two years have provided significant space for the judiciary to vigorously engage with the rights discourse in the everyday workings of the courts. The Nineteenth Amendment to the Constitution restored several of the functional mechanisms guaranteeing judicial independence; for example, restoring the Constitutional Council for recommendations on appointments to the higher judiciary and increasing the time limit for review of bills. Whilst the time is right, the window of opportunity may also be fast closing. We conclude that the ebb and flow of political will has left its mark on the judiciary of Sri Lanka. The last sixty years or so have seen progressive decision-making intended to protect constitutional rights and principles. At the same time, on numerous occasions, the judiciary have refused to engage with principles that warrant application, which has resulted in injustices to litigants and, in some instances, to the public interest. Therefore, the importance of ensuring the independence of the judiciary coupled with accountability and transparency by the judiciary itself is apparent. We conclude that it is for this generation of judges to delve into the historical makings of our superior courts and to emulate their predecessors who clearly demonstrated a commitment to salutary principles contained in both our laws and the international obligations that we are committed to as a people.
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113. Somawathie vs. Weerasinghe (1990) 2 SLR 121.


115. Sudali Andy Asary vs. Vanden Driesen (1952) 54 NLR 66.


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THE JUDICIARY IN BANGLADESH: A BASTION FOR RIGHTS, AN INSTITUTION FACING CHALLENGES

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Introduction

The Preamble to the Constitution of Bangladesh proclaims that the fundamental aim of the State is to realise—through the democratic process—a socialist society, which is free from exploitation, and one in which the rule of law, fundamental human rights, freedom, equality and justice is secured for all citizens.

Unless there is an effective mechanism for the enforcement of the provisions envisaged in the Constitution through an independent judiciary, constitutional provisions will be no more than moral precepts, yielding no results. The road to achieving an independent judiciary has been pitted with many challenges, and the realization of an effectively independent and capable judiciary continues to be a struggle. The aim of this chapter is two-fold. First, we aim to present an overview of the judicial framework of Bangladesh and the journey towards its independence through judicial interventions, along with an analysis of some leading cases, particularly in relation to the appointment procedure, removal and code of conduct of judges. Second, we aim to analyse the monolithic characteristics of the judiciary and its approach towards establishing social, economic and individual rights, citing judicial observations from a rights perspective. This chapter focuses on some of the significant achievements of, and through, the Bangladesh judiciary, and some major challenges it has faced and is still facing as an institution.

Constitutional and Legal Framework of the Judiciary in Bangladesh

The Constitution ensures separation of powers among the legislative, executive and judicial organs of the State. A system of checks and balances between the three institutions of the State is recognized by the Supreme Court of Bangladesh as the essence of the notion of separation of powers. Independence of the judiciary, free from any interference from the executive organs, has been designated in the Constitution as one of the 'fundamental principles of state policy.' The Fourth Schedule to the Constitution further states, "The provisions of Chapters II and VI (which relate to subordinate courts) shall be implemented as soon as is practicable, and until such implementation, the matters provided for in that Chapter shall (subject to any other provision made by law) be regulated in the manner in which they were regulated immediately before the commencement of this Constitution." As a matter of fact, while the process for the realisation of judicial independence has, in theory, been based on express constitutional provisions, the process has been steered by a progressive approach adopted by the judiciary in interpreting the provisions.

Institutional Structure and Composition of the Judiciary in the Constitutional Realm

The Supreme Court of Bangladesh comprises two Divisions, the Appellate Division and the High Court Division, headed by the Chief Justice of Bangladesh, and comprising such number of other judges as the President may deem necessary to appoint to each Division after consultation with the Chief Justice. The Constitution provides for qualifications for the appointment of judges to the Supreme Court as well as qualifications required to be Additional Judges of the Supreme Court. Article 115 of the Constitution provides that "... appointments of persons to offices in the judicial service or as magistrates exercising judicial

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301 Bangladesh Constitution, art. 22, which provides, "The State shall ensure the separation of the judiciary from the executive organs of the State."
302 Ibid., Fourth Schedule, para. 6(6).
303 Ibid., arts. 94(1), (2) and 95(1).
304 Ibid., arts. 95(2) and 97.
functions shall be made by the President in accordance with rules made by him in that behalf."³⁰⁵ The Constitution provides that the Chief Justice and the other judges of the Supreme Court, subordinate judicial officers and magistrates shall be independent in the exercise of their judicial functions.³⁰⁶ It also contains provisions relating to the removal of a judge from his/her office for reasons specified in the Constitution.³⁰⁷ The

³⁰⁴ The original Article 115 of the Constitution of 1972 stands as follows: “Appointments to subordinate courts: 115. (1) “Appointments of persons to offices in the judicial service or as magistrates exercising judicial functions shall be made by the President-
(a) in case of district judges, on the recommendation of the Supreme Court; and
(b) in the case of any other person, in accordance with rules made by the President in that behalf after consulting the appropriate public service commission and the Supreme Court.
(2) A person shall not be eligible for appointment as a district judge unless he-
(a) is at the time of his appointment in the service of the Republic and has, for not less than seven years, held judicial office in that service; or
(b) has for not less than ten years been an advocate.”

³⁰⁵ Bangladesh Constitution, arts. 94(4) and 116A.
³⁰⁶ Ibid., art. 96, prior to the Sixteenth Amendment (assented on 22 September 2014) reads as follows:
“(1) Subject to the other provisions of this article, a Judge shall hold office until he attains the age of sixty-seven years.
(2) A Judge shall not be removed from his office except in accordance with the following provisions of this article. (3) There shall be a Supreme Judicial Council, in this article referred to as the Council, which shall consist of the Chief Justice of Bangladesh, and the two next senior Judges:
Provided that if, at any time, the Council is inquiring into the capacity or conduct of a Judge who is a member of the Council, or a member of the Council is absent or is unable to act due to illness or other cause, the judge who is next in seniority to those who are members of the Council shall act as such member.
(4) The function of the Council shall be—
(a) to prescribe a Code of Conduct to be observed by the Judges; and
(b) to inquire into the incapacity or conduct of a Judge or of any other functionary who is not removable from his office except in like manner as a Judge.
(5) Where upon any information received from the Council or from any other source, the President has reason to apprehend that a Judge—
(a) may have ceased to be capable of properly performing the functions of his office by reason of physical or mental incapacity, or
(b) may have been guilty of gross misconduct, the President may direct the Council to inquire into the matter and report its finding.
(6) If, after making inquiry, the Council reports to the President that in its opinion the Judge has ceased to be capable of performing the functions of his office or has been guilty of gross misconduct, the President shall, by order, remove the Judge from office.
(7) For the purpose of an inquiry under this article, the Council shall regulate its procedure and shall have, in respect of issue and execution of processes, the same power as the Supreme Court.
(8) A judge may resign his office by writing under his hand addressed to the President.”
President is required to exercise his power of posting, promoting, granting of leave and disciplining of persons in judicial service and of magistrates exercising judicial functions in consultation with the Chief Justice as per Article 116 of the Constitution. These provisions in Part VI of the original Constitution, introduced in 1972, have been amended on a number of occasions changing their original nature, and recently, most of the provisions have been restored in their original form (as they were in 1972) as a result of the Fifth Amendment case.\textsuperscript{508}

The constitutional provision regarding separation of the judiciary from the executive organs of the State is incorporated as a "\textit{...fundamental principle of state policy...}"\textsuperscript{309} and thus, not strictly enforceable. As successive governments had disregarded this provision since the inception of the Constitution, the Supreme Court intervened in the case of Secretary, Ministry of Finance, Government of Bangladesh vs. Mr. Md. Masdar Hossain and Others\textsuperscript{310} to ensure that the constitutional promise materialized. In its decision, the Appellate Division directed

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\textsuperscript{509} Bangladesh Constitution, art. 22 (under Part II: Fundamental Principles of State Policy).

\textsuperscript{310} Secretary, Ministry of Finance, Government of Bangladesh vs. Mr. Md. Masdar Hossain and Others, 20 (2000) BLD (AD) 141, accessed 12 February 2017, https://shamimsufi.files.wordpress.com/2013/05/secretary-ministry-of-finance-vs-md-masdar-hossain-and-others-52-dlr-ad-82.pdf. The petitioner Masdar Hossain, including 218 persons in judicial service, contended that the subordinate courts were part of the judiciary and therefore, persons in judicial service could not be included within the Bangladesh Civil Service (Reorganization) Order 1980, nor could they be controlled as though they were a part of the Bangladesh Civil Service as defined by the Bangladesh Civil Service Rules 1981 ('the BCS Rules'). The High Court Division held in favour of the petitioners. After the Government appealed against this decision and lost, the Appellate Division affirmed the High Court's judgment. In the \textit{Masdar Hossain case}, the Supreme Court reiterated the principle of independence of the judiciary, and elaborated on the constitutional position and practice regarding the separation of the judiciary from the executive.
the Government to implement twelve directives, including the formation of a separate Judicial Service Commission consisting of senior Supreme Court judges for the appointment, promotion and transfer of members of the lower judiciary; framing of rules for posting, promotion, grant of leave etc. consistent with Article 116; establishment of a Judicial Pay Commission; and framing of rules to ensure essential conditions of judicial independence, namely, (i) security of tenure, (ii) security of salary and other benefits and (iii) institutional independence from the Parliament and the executive. It also directed the Government to amend the Code of Criminal Procedure and adopt new rules for the selection and discipline of members of the judiciary. The Masdar Hossain case laid the foundation for institutional developments in the judiciary.311

Amendments to Constitutional Provisions Affecting the Judiciary

The Constitution has been amended sixteen times since its adoption in 1972. Some of these amendments had the effect of altering the fundamental fabric of the judiciary as envisaged originally in the Constitution. The Constitution (Fourth Amendment) Act of 1975 drastically changed the original character of the Constitution of Bangladesh. The constitutional provisions that were amended included provisions relating to the judiciary under Part VI of the Constitution. Article 95(1) was substituted by way of deleting the most significant words, i.e., after consultation with the Chief Justice in case of appointment of judges

311: Following the Masdar Hossain judgment, successive governments have passed and enacted various laws, rules, regulations and orders relating to the judiciary, including, (1) Bangladesh Judicial Service Commission Rules, 2007; (2) Bangladesh Judicial Service (Pay Commission) Rules 2007; (3) Bangladesh Judicial Service Commission (Construction of Service, Appointments in the Service and Suspension, Removal & Dismissal from the Service) Rules, 2007; (4) Bangladesh Judicial Service (Posting, Promotion, Grant of Leave, Control, Discipline and other Condition of Service) Rules, 2007; (5) Probationer Assistance Judges Training and Departmental Examination Order, 2008; and (6) The Judicial Magistracy and Metropolitan Magistracy Courts (Assistant Officer and Staff) Recruitment Rules, 2008.
by the President. Similarly, Articles 98, 102, 109, 115, 116 and 116A were amended in a manner that did not reflect respect for the principle of judicial independence as laid out in the original Constitution of 1972.\footnote{Bangladesh Constitution, Appendix VI, The Constitution (Fourth Amendment) Act, 1975, Act No. II of 1975, 93-100.} A military-led Government passed the Constitution (Fifth Amendment) Act of 1979.\footnote{Ibid., Appendix VII, the Constitution (Fifth Amendment) Act, 1979 (Act No. I of 1979), 104. This amendment was subsequently declared to be ultra vires the Constitution in Khondhker Delawar Hossain, Secretary, BNP and Another vs. Bangladesh Italian Marble Works and Others, 62 (2010) DLR (AD) 298, accessed 09 October 2017, www.supremecourt.gov.bd/resources/documents/325431C.P%20Nos.%201044%20and%201045%20of%202009%20(5th%20Amendment).pdf} It amended the Fourth Schedule to the Constitution, ratifying and validating all the Proclamations and Proclamation Orders and the amendments, modifications and omissions made in the Constitution. The Fifth Amendment was passed when the Constitution was not even fully restored.\footnote{Islam, Constitutional Law of Bangladesh, 26.} The Fifth Amendment purported to provide that no court, including the Supreme Court or any tribunal or authority, would have any power to call into question or declare void any Proclamation or any Martial Law Regulation or Order.\footnote{Ibid., 25.}

Parliament passed the Constitution (Seventh Amendment) Act of 1986\footnote{Bangladesh Constitution, Appendix IX, The Constitution (Seventh Amendment) Act, 1986 (Act No. I of 1986), 106-107.} after withdrawal of Martial Law.\footnote{In 1982, the then Chief of the Army, Hussain Muhammad Ershad, proclaimed Martial Law assuming all powers as the Chief Martial Law Administrator and subsequently issued the Proclamation (First Amendment) Order, 1982 providing that a Chief Justice shall retire on reaching the age of sixty-two or completing three years as Chief Justice, whichever came first.} This purported to amend the Fourth Schedule to the Constitution ratifying and confirming the
Martial Law Proclamation of 1982. It further raised the age of retirement of the judges of the Supreme Court to sixty-five years from sixty-two years.318

The Constitution (Eighth Amendment) Act of 1988, among others, amended Article 100 of the Constitution to set up six ‘permanent benches’ of the High Court Division outside Dhaka. A challenge to this amendment led the judiciary to pronounce one of its landmark judgments in Anwar Hossain Chowdhury etc. vs. Bangladesh and Others,319 more popularly known as the Eighth Amendment case. The Court set aside the amendment in relation to setting up permanent benches on the grounds that it would be contrary to the basic structure of the Constitution.320

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318 The Seventh Amendment was declared void by the High Court Division on the grounds of destroying the basic structure of the Constitution and fraud on the Constitution, among others. Furthermore, the amendment has been found to be unconstitutional. Accordingly, the Appellate Division maintained the High Court Division’s declaration of invalidity of the Seventh Amendment in Siddique Ahmed vs. Bangladesh 63 (2011) DLR (HCD) 565, accessed 09 October 2017, www.supremecourt.gov.bd/resources/documents/270095_WritPetitionNo7thAmendment.pdf and Siddique Ahmed vs. Bangladesh, 65 (2013) DLR (AD) 8, accessed 09 October 2017, http://www.supremecourt.gov.bd/resources/documents/563864_CA48.pdf. See also Islam, Constitutional Law of Bangladesh, 28 and 545-546.


320 Anwar Hossain Chowdhury etc. vs. Bangladesh and Others, paras. 365, 377 and 443. While signifying the importance of the independence of the judiciary, the Appellate Division in its judgment observed, “Independence of the Judiciary, a basic structure of the Constitution, is also likely to be jeopardized or affected by some of the other provisions in the Constitution. Mode of their appointment and removal, security of tenure particularly, fixed age for retirement and prohibition against employment in the service of the Republic after retirement or removal are matters of great importance in connection with the independence of Judges. Selection of a person for appointment as a Judge in disregard to the question of his competence and his earlier performance as an Advocate or a Judicial Officer may bring in “spineless Judges” in the words of President Roosevelt; such a person can hardly be an independent Judge.”
The Constitution (Fourteenth Amendment) Act of 2004 amended, among others, Article 96(1), again raising the retirement age of Supreme Court judges, this time from sixty-five years to sixty-seven years. Questioning this particular change, the then opposition political parties alleged that the change had been made with a political motive, to enable a particular Chief Justice, otherwise on the verge of retirement, to become the Chief Adviser of the next non-party caretaker government, which would conduct the following general elections.

Through the Fifteenth Amendment, the Constitution revived many of the features of the original Constitution adopted in 1972. It gave rise to fierce political controversy as it also abolished the non-party caretaker form of government system, earlier incorporated in the Constitution by the Thirteenth Amendment to the Constitution. In 2011, the Appellate Division of the Supreme Court declared the caretaker government system to be ultra vires the Constitution, stating it was against the principle of democracy, which is a basic feature of the Constitution.

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324 Islam, Constitutional Law of Bangladesh, 31-32. The Constitution (Thirteenth Amendment) Act, 1996 was passed providing for a non-party caretaker government that would act as an interim government for holding the general election of members of the Parliament. The non-party caretaker government, comprising a Chief Adviser and not more than ten other advisers, all appointed by the President through consultation with the major political parties, would be collectively responsible to the President. The Chief Adviser of such a government would enter office after Parliament had been dissolved or had stood dissolved by reason of expiration of its term. The caretaker government would, in turn, stand dissolved on the date on which the new Prime Minister entered office after constitution of the new Parliament. See also Bangladesh Constitution, Appendix XV, The Constitution (Thirteenth Amendment) Act, 1996 (Act No. I of 1996), 128.
The Constitution (Sixteenth Amendment) Act replaced the provisions regarding the Supreme Judicial Council with provisions that empower Parliament to remove judges of the Supreme Court. According to the amended provisions, the President shall order removal of the accused judge upon a resolution passed by a two-thirds majority of the total members of the Parliament. It further provides that the Parliament may, by law, regulate the procedure to pass the resolution in the Parliament and to conduct an inquiry into allegations against a judge.

Judicial Decisions and Observations on the Independence of the Judiciary

The Supreme Court has, in a number of cases, dealt with questions relating to the appointment and removal of judges, code of conduct for judges and other matters relating to the independence of the judiciary. In the absence of a statutory framework for the appointment and removal of judges of the Supreme Court, the nature of the process of "consultation" with the Chief Justice in appointing judges of the Supreme Court has been a major point of contention.

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326 Advocate Asaduzzaman Siddiqui and Others vs. Bangladesh and Others, (Writ Petition No. 9989 of 2014), judgment delivered on 05 May 2016, accessed 12 February 2017, http://www.supremecourt.gov.bd/resources/documents/783957 WP9989of 2014Final.pdf. According to the Constitution (Sixteenth Amendment) Act, 2014, Article 96 of the Constitution has been amended in relation to the power and procedure of the removal of the judges of the Supreme Court of Bangladesh. The Sixteenth Amendment gave the power of judging the judges of the Supreme Court of Bangladesh to the Parliament. The power of judging is, no doubt, a judicial power. The Sixteenth Amendment empowers a Member of Parliament to bring a motion against any judge in any case and discuss it therein. Through the Sixteenth Amendment, the power of removal of the judges of the Supreme Court has been shifted to the legislature, which is a separate independent organ of the State in the scheme of the Constitution.


In the original Constitution of 1972, the requirement of consultation was a part of Article 95 of the Constitution, which was omitted by the Fourth Amendment in 1975, and then reinstated in 2011 by the Fifteenth Amendment.
between the judiciary and the executive. Controversies arose when successive governments chose to abrogate the process of consultation while appointing Supreme Court judges.

The process of consultation is intended to exclude any kind of unwarranted and unfettered exercise of power by the executive in appointing judges. The procedure for consultation with the Chief Justice in respect of appointing judges empowered the judiciary to exercise its own judicial mind and expertise while selecting names for the position of judges. The Supreme Court is empowered to uphold the control and discipline of persons employed in the judicial service and magistrates exercising judicial functions. Therefore, ensuring independence of the higher judiciary paves the way for ensuring independence of the lower judiciary and the magistracy.

Appointment of the Chief Justice and other judges to the Appellate Division

According to Article 48(3) of the Constitution, the President is not required to act on the advice of the Prime Minister while appointing the Chief Justice of Bangladesh. Article 95 provides the procedure for appointment and qualifications of Chief Justice and other judges of the

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329 Islam, Constitutional Law of Bangladesh, 88.
330 Article 48(3) of the Bangladesh Constitution provides, "In the exercise of all his functions, save only that of appointing the Prime Minister pursuant to clause (3) of Article 56 and the Chief Justice pursuant to clause (1) of article 95, the President shall act in accordance with the advice of the Prime Minister..." So, the President acts in accordance with the advice of the Prime Minister in appointing the puisne judges. See also Islam, Constitutional Law of Bangladesh, 578-579.
The appointment of the Chief Justice of Bangladesh was first challenged in the case of Hassan MS Azim and Three Others vs. Bangladesh by several Supreme Court lawyers. While summarily disposing of the application, (i.e., without issuing any rule), the Court observed that the President is obliged to act in accordance with the advice of the Prime Minister in case of appointment of judges to the Supreme Court, but there is no such obligation in the case of the appointment of the Chief Justice, as the President alone has the authority to appoint the Chief Justice. However, the Court observed that while appointing judges or the Chief Justice, the President may consider taking an opinion from persons, including a commission or committee set up under the Constitution, and may take advice or assistance from others in choosing the right person for the post of Chief Justice. The Court observed that reference of this issue to a commission made for the purpose of scrutinizing the ability of judges for appointment as Chief Justice would

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31 Article 95 of the Bangladesh Constitution provides: (1) The Chief Justice and other Judges shall be appointed by the President, and other Judges shall be appointed by the President after consultation with the Chief Justice. [Italics added to highlight the amendment in 2011]. (2) A person shall not be qualified for appointment as a Judge unless he is a citizen of Bangladesh and has, for not less than ten years, been an advocate of the Supreme Court; or has, for not less than ten years, held judicial office in the territory of Bangladesh; or has such other qualifications as may be prescribed by law for appointment as a Judge of the Supreme Court. (3) In this article, “Supreme Court” includes a court which at any time before the commencement of this Constitution exercised jurisdiction as a High Court in the territory now forming part of Bangladesh.

32 Hassan MS Azim and Three Others vs. Bangladesh, 16 (2011) BLC (HCD) 800, para. 2. The petitioners in reference to Article 97, contended that it is an established constitutional convention that the senior-most judge of the Supreme Court is to be appointed as the Chief Justice of Bangladesh. Any deviation from the prescribed method will undermine the independence of judiciary and will raise questions among the public regarding its impartiality.

33 Hassan MS Azim and Three Others vs. Bangladesh, 16 (2011) BLC (HCD) 800, para. 13.
lead to transparency in the appointment system. The Court further observed that if the selection is made by an independent constitutional body and finally decided by the President, political interference would be minimised.334

The principle of seniority is not always followed in appointing judges to the Appellate Division. On several occasions in the past, senior judges of the High Court were bypassed in the appointment of judges to the Appellate Division. According to the views of many commentators, such supersession of High Court judges has been more due to political considerations than on the basis of merit.335

334 Hassan MS Azim and Three Others vs. Bangladesh, at paras. 19-21. See also, Dr. Zahidul Islam Biswas, "Do We Have an Independent Judiciary?", Forum 6, no. 9, (2012): 12-15, accessed 01 October 2016, http://archive.thedailystar.net/forum/2012/September/do.html. Repeated controversies have occurred in consecutive regimes over the appointment of the Chief Justices of Bangladesh subsequent to the restoration of the Parliamentary government in 1991. However, in the recent past, in particular from 2010 to 2012, the principle has been repeatedly circumvented with four of the last six appointments seeing the senior-most judge of the Appellate Division being superseded. The appointment of the former Chief Justice, Justice ABM KhairulHaque, as the 19th Chief Justice of Bangladesh by the President in September 2010, was alleged to have involved supersession of two more senior judges of the Appellate Division, namely Justice Shah Abu NayeemMominur Rahman and Justice Abdul Motin. Both the superseded judges had abstained (by taking leave) from judicial work in protest against such blatant supersession and there was no question about the competency of these two superseded judges. While on leave, Justice Motin retired from the judiciary in frustration. The Supreme Court Bar Association, then headed by members affiliated with the leading opposition parties, condemned the selection. Similar controversies arose in the appointment of the following Chief Justice of Bangladesh, Justice Muzammel Hossain on 18 May 2011. In the case of this appointment, Justice Shah Abu NayeemMominur Rahman was again superseded and he resigned eventually. That was the first and so far the only instance of a resignation in the face of supersession in the appointment of the Chief Justice.

Appointment of judges to the High Court Division

Over the last decade, the frequent appointments of judges to the High Court Division have given rise to controversies. More than four decades after the adoption of the Constitution, there is still no specific legislation setting out either the qualifications or the criteria for the appointment of judges to the Supreme Court. All governments since independence appear to have found it convenient not to have a statutory framework for the appointment of judges, as this allows the executive to make such appointments on the basis of its own considerations, which may not be conducive to an independent and meritorious judiciary. It has proved tempting to all political parties that have been in power to date, to install individuals in the judiciary who would be loyal to their appointers and susceptible to pressure exerted on them in matters involving sensitive political issues or other interests of the ruling power.

Despite continuous demands from civil society and a section of the legal profession that has retained objectivity, the Government has yet to enact a law to ensure consistency and the use of objective criteria in judicial appointments. The Fifteenth Amendment brought back the requirement for prior consultation by the President with the Chief Justice. However, even after this amendment, the appointment of several judges to the High Court, apparently with the consent of the Chief Justice, has given rise to questions in the media and among the public as to whether or not the Chief Justice was actually consulted.336

The Law Commission put forward a number of recommendations in 2012 to enact a law allowing the appointment of legal experts from different professions as Supreme Court judges. According to a newspaper report, the Government drafted a new set of guidelines specifying the academic qualifications required for a candidate for judicial appointment. Regrettably, none of the recommendations of the Law Commission were adopted in the new set of guidelines for the appointment of High Court judges.

While emphasizing the need for independence of the judiciary in a democratic polity, the High Court Division outlined twelve norms

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- A person should not be qualified to be a judge unless he/she has, for not less than ten years, been a Supreme Court advocate or held judicial office in the country. Mere enrolment as a lawyer of the Supreme Court should not be acceptable. The lawyer must practice regularly and have a record of a minimum number of successful cases.
- A lawyer considered for the position of a Supreme Court judge should have experience of conducting cases in the Appellate Division for at least two years.
- In respect of the current practice of selecting District judges as High Court judges, at least three years' experience could be made mandatory for this without any constitutional amendment. Academic results of District judges should also be examined.
- Not only practical experience but also in-depth knowledge and understanding of the theory, explanation and use of law, and perfect perception of justice are required to conduct judicial work.
- This knowledge and understanding can also be achieved without a person having to work as a judge and lawyer.
- Alongside persons with excellent academic career in law, university professors or researchers who are at least 45-years old and have worked in reputed institutions can be appointed as Supreme Court judges. This exception will ensure quality of Supreme Court judges.

and processes for the appointment of judges in *Idrisur Rahman and Others vs. Bangladesh*.\(^{139}\) When the case went before the Appellate Division, it was asserted that there is a continuous and unbroken convention of consultation with the Chief Justice of Bangladesh regarding the appointment of judges.\(^{340}\) Nevertheless, as there are no standard guidelines for appointments, the executive has scope to interfere. Any manner of arbitrary exercise of discretionary powers is excluded in the presence of guidelines and norms of general application.\(^{341}\) In hearing an appeal against the High Court’s judgment regarding appointments/confirmation of *ad hoc* judges,\(^{342}\) the apex court differed with the observations of the High Court Division in Writ Petition No. 3228 of 2003\(^{343}\) that there should be a collegium of judges and that the Chief Justice of Bangladesh would be required to consult with them on his recommendation for the candidates for appointment as judges. The apex court, however, agreed with the observations of the High Court that there is no bar for the Chief Justice to discuss with his/her colleagues the legal acumen of any person nominated for appointment as a judge and, in fact, the Chief Justice does, in practice, hold discussions with colleagues before recommending names of candidates for appointment as judges.\(^{344}\)


\(^{340}\) *Bangladesh, represented by the Secretary, Ministry of Justice and Parliamentary Affairs and Others vs. Md. Idrisur Rahman and Others*, (Civil Petitioner for Leave to Appeal Nos. 2221, 2222, 2046 and 2056 of 2008), 17 (2009) BLT (AD) 231.

\(^{341}\) *Idrisur Rahman and Others vs. Bangladesh*, (Writ Petition Nos. 1543, 2975 and 3217 of 2003), 61 (2009) DLR (HCD) 523, para 94.

\(^{342}\) A Civil Petition was filed against the order dated 17 July 2008 passed by the High Court Division in *Idrisur Rahman and Others vs. Bangladesh* being Writ Petition No. 1543 of 2003 heard analogously with Writ Petition Nos. 2975 and 3217 of 2003.


\(^{344}\) *Bangladesh, represented by the Secretary, Ministry of Justice and Parliamentary Affairs and Others vs. Md. Idrisur Rahman and Others*, (Civil Petitioner for Leave to Appeal Nos. 2221, 2222, 2046 and 2056 of 2008), 17 (2009) BLT (AD) 231, para 8.
Tenure of judges

As noted above, Article 96(1) of the Constitution, following the Fourteenth Amendment in 2004, provides that a judge shall hold office till the age of sixty-seven years. Prior to this amendment, and according to the original provision in the Constitution, the retirement age for a judge of the Supreme Court was sixty-two years. This was changed by the Second Proclamation (Seventh Amendment) Order 1976, which created a separate Supreme Court and High Court (instead of the original Supreme Court comprising the Appellate Division and the High Court Division), and increased the retirement age for Supreme Court judges to sixty-five years while retaining that of High Court judges at sixty-two years.345 This resulted in the appointment of two separate Chief Justices, one for the Supreme Court and another for the High Court.346 The Second Proclamation (Tenth Amendment) Order of 1977 re-established the Supreme Court as comprising the Appellate Division and the High Court Division, restoring the retirement age of sixty-two years for all Supreme Court judges. As a consequence of these changes Supreme Court judges who were scheduled to retire at the age of sixty-five years, overnight became subject to earlier retirement. Several sitting judges of the then Supreme Court, including the former Chief Justice of the Supreme Court, Justice Kemaluddin Hossain, had to retire immediately, when they would otherwise have been due to retire at the age of sixty-five years.347

The Seventh Amendment to the Constitution in 1986 revised the retirement age to sixty-five years. The next change to the retirement age occurred through the Fourteenth Amendment, which was enacted

345 Bangladesh Constitution, Appendix XXII, Second Proclamation (Seventh Amendment) Order 1976, 191.
346 The then Chief Justice of Supreme Court was Justice Syed A.B. Mahmud Husain and the Chief Justice of High Court was Justice Ruhul Islam, as of 07 December 1976.
347 Section 2(7)(c) of the Second Proclamation (Thirteenth Amendment) Order 1977 provides: “A person holding office as Chief Justice or Judge or Additional Judge of the Supreme Court or Chief Justice or Judge or Additional Judge of the High Court immediately before the commencement of the Second Proclamation (Tenth Amendment) Order, 1977 ...shall, if [he] has attained the age of sixty-two years on the date of such commencement, stand retired on that date.”
on 16 May 2004. The retirement age of Supreme Court judges was increased from sixty-five years to sixty-seven years. The leading opposition party then was the Awami League, and they, along with other opposition parties, alleged that the ruling alliance had amended the Constitution with a partisan design to ensure that its own man became the chief of the next caretaker government, and was thereby able to manipulate the upcoming election. The leader of the opposition at the time, Sheikh Hasina, termed the amendment contradictory to the fundamental spirit of the Constitution. Deputy Opposition Leader Abdul Hamid (now the President of Bangladesh) alleged that it was part of a conspiracy by the Government.348

Removal of judges and code of conduct for judges

The discipline and integrity of judges holding their respective offices is another vital aspect in ensuring independence of the judiciary. Instances of disciplinary action against judges are few and far between. During a period of martial law, stretching from 1982 to 1986, two judges of the Supreme Court were removed from office by the military government.349 In 2003, the Supreme Judicial Council conducted their first ever inquiry into the alleged misconduct of an additional judge of the High Court Division. He was charged with receiving bribes to fix bail for an accused in a case involving cruelty against a woman. In 2004, the President finally removed him in accordance with the report of the Supreme Judicial Council.350 In 2007, in a case involving allegations

against a sitting High Court judge of tampering with his LL.B certificate, the Supreme Judicial Council was formed to inquire into the allegation. However, the accused judge resigned from his office before he was due to appear before the Council.\textsuperscript{351}

In a recent incident, Members of Parliament demanded the removal of Justice A.H.M. Shamsuddin Chowdhury. The row started when the then Speaker, Abdul Hamid (the current President of Bangladesh), made a statement that people might stand against the judiciary if they were aggrieved by any verdict of the Court. Justice Chowdhury, in response to the statement, said that the comment was tantamount to sedition. On 18 June 2013, Speaker Abdul Hamid ruled in Parliament that the Chief Justice should initiate steps to address this matter, and that Parliament would support his decision. However, the validity of the ruling by the Speaker was challenged in a petition filed before the High Court Division. The High Court disposed of the matter by holding that the Speaker's ruling was ineffective. The matter thereafter went to the Appellate Division, which disposed of it with several observations.\textsuperscript{352} To the best of the knowledge of the authors, the written judgment setting out the observations has yet to be signed and published.

\textsuperscript{351} Abdul MannanBhuyean, "Accountability of the Supreme Court Judges of Bangladesh," \textit{Journal of Mainstream Law Reports}, 13 MLR (2008), 21-28. In the case of Justice Faisal Mahmud Faizee, the approval to form the Supreme Judicial Council came after the then Chief Justice Md. Ruhul Amin sent a letter to the President, on 12 March 2007, seeking his permission for its formation. A Presidential order was sent to the Supreme Court via the Ministry of Law, Justice and Parliamentary Affairs to conduct the enquiry. On 28 March 2007, the Supreme Judicial Council started its probe into controversial High Court Judge Faizee's alleged certificate scandal. The Supreme Judicial Council was in the primary stages of investigating the allegation that he had kept an estimated 180 cases pending during his controversial tenure as a High Court judge, when Faizee resigned on the night of 11 July 2007, 72 hours before he was scheduled to appear before the Supreme Judicial Council. Thus, the Supreme Judicial Council failed to create any precedent for the future.

After the Sixteenth Amendment in 2014, the power relating to the removal of Supreme Court judges had been vested in Parliament. The procedure by which Parliament would initiate and conduct proceedings against a judge was to be set out in a separate legislation. In 2015, the constitutionality of this amendment was challenged before the High Court, and the High Court struck down the Sixteenth Amendment. The Court declared the Sixteenth Amendment contrary to the principle of separation of powers among the three organs of the State and inconsistent with judicial independence as guaranteed by the Constitution. The Government had filed an appeal against the High Court judgment, and the 7-member bench of the Appellate Division, by a unanimous judgment, dismissed the Government’s appeal. The judgment has sparked a bitter and raucous row between the judiciary and the ruling party. The Government has declared that it would file a petition for review of the judgment, although the period for filing a review petition has lapsed.

In 2000, the then Supreme Judicial Council prepared and issued a 14-point Code of Conduct for Supreme Court judges, which prescribed stringent standards. Any breach of this Code of Conduct might be considered ‘misconduct’ by a judge. However, there is no clear indication

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353 After the Sixteenth Amendment to the Constitution, Article 96 reads as follows: (2) A Judge shall not be removed from his office except by an order of the President passed pursuant to a resolution of Parliament supported by a majority of not less than two-thirds of the total number of Members of Parliament, on the grounds of proved misbehaviour or incapacity. (3) Parliament may by law regulate the procedure in relation to a resolution under clause (2) and for investigation and proof of the misbehaviour or incapacity of a judge. (4) A Judge may resign his office by writing under his hand addressed to the President.

354 Advocate Asaduzzaman Siddiqui and Others vs. Bangladesh and others, (Writ Petition No. 9989 of 2014), judgment delivered on 05 May 2016.


in the Code as to the nature of misconduct that might be considered ‘gross misconduct’ and may result in disciplinary measures against judges under the newly amended Article 96 of the Constitution. Article 96 does not define what constitutes ‘gross misconduct’ either. Further, the initiation of disciplinary proceedings against a Supreme Court judge depends solely on the executive, since the President is bound to act in compliance with the advice of the Prime Minister according to Article 48(3) of the Constitution. Thus, the existing system is not free from interference.37

The Appellate Division in Idrisur Rahman vs. Syed Shahidur Rahman and Others38 laid down a 40-point Code of Conduct for judges to follow while holding office. The Court held that for violation of any provision of this Code, a judge shall be held liable for gross misconduct. According to the Code of Conduct, judges are obligated to maintain the honour, dignity and integrity of their office with an object to maintain public confidence in the judiciary. However, in order to maintain the supremacy of the judiciary as the guardian of the Constitution, the legislature and the executive must act in aid of the Supreme Court.

Judicial Approach to Social, Economic and Political Issues

The judiciary has been promoting social change through rights-friendly interpretations of the Constitution aimed at implementation of economic and social rights. The increasingly positive attitude of the judiciary towards public interest

litigation, overcoming earlier inhibitions which had constrained the role of the judiciary, has enabled the judiciary to play a dynamic role in facilitating and promoting social change.

Dr. Kamal Hossain \(^3\)

The guardianship of the Constitution is entrusted to the Supreme Court, which is empowered to exercise judicial review and to enforce fundamental rights under Article 102(1) of the Constitution. The High Court Division of the Supreme Court has original jurisdiction over matters concerning fundamental rights and judicial review. So, the Supreme Court can not only review State actions in case of infringement of any provision of the Constitution or the existing law of the land, but it can also strike down any law inconsistent with the fundamental rights enshrined in Part III. \(^3\) In consonance with Article 102(1), the judiciary uses a wider margin of appreciation in interpreting socio-economic rights, with the object of imposing an obligation on all constitutional organs to spare no effort in their respective spheres to realize this goal. \(^3\)

The rise in public interest litigation and the positive role increasingly assumed by the judiciary is, in part, the outcome of the reluctance demonstrated by other organs in discharging their roles. The judiciary's sensitivity to socio-economic concerns is evident from instances of judicial activism where the courts have issued a number of directions for implementation of constitutional rights set out in Part II (which, according to Article 8(2) of the Constitution are not “judicially enforceable”) and Part III of the Constitution.

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\(^3\) Islam, Constitutional Law of Bangladesh, 22.

\(^3\) The Preamble of the Constitution encompasses a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured. Part II and III of the Constitution of Bangladesh provide provisions pertaining to the “Fundamental Principles of State Policy” and “Fundamental Rights.”
Article 102(1) of the Constitution provides the opportunity for the judiciary to ensure socio-economic justice to citizens by interpreting laws in conformity with the fundamental principles and rights enshrined in the Constitution. Judicial review is used as a tool by the courts to fill a legislative vacuum and reaffirms public confidence in the rule of law.\(^{362}\) Article 26 of the Constitution makes all laws inconsistent with fundamental rights void to the extent of such inconsistency. The judiciary guards against enactment of any law that infringes fundamental rights.\(^ {363}\) The judiciary's approach to and role in enforcing the socio-economic rights of individuals can be discerned from the hundreds of writ petitions filed and moved every year before the Supreme Court for protection or enforcement of fundamental rights or judicial review of administrative or legislative action pertaining to those rights. The judiciary endeavours to dispense justice in the protection of rights, liberties and freedoms of the people as well as to secure socio-economic rights.\(^ {364}\)

Minority rights

The Constitution of 1972 did not contain any express provision relating to the rights of minorities. It only provided for affirmative action in favour of women, children and for the advancement of any disadvantaged groups.\(^ {365}\) However, by subsequent amendments to the Constitution (incorporated in Part II), provisions have been inserted

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\(^{363}\) Article 44(1) of the Constitution also guarantees the right to move before the High Court Division of the Supreme Court for the protection of fundamental human rights of citizens.


\(^{365}\) Bangladesh Constitution, arts. 28 and 29.
expressly identifying certain minorities. Article 23A of the Constitution confers protection to the culture of "...tribes, minor races, ethnic sects and communities."366

The indigenous communities367 in the Chittagong Hill Tracts ("CHT") have had grievances against the ruling power since before independence. The Kaptai Dam constructed in the 1960s for a hydroelectricity plant caused hundreds of thousands of indigenous people to abandon their ancestral lands and homesteads. Following independence in 1971, there was a general expectation amongst the indigenous peoples that their status as indigenous peoples and the special nature and legal status of their customary rights would be entrenched in the Constitution to be adopted for independent Bangladesh. The Constitution, which was adopted in 1972, did not reflect that expectation. Furthermore, due to deliberate settlement in the 1970s and 1980s of plain-landers in the CHT under martial law by successive regimes, the habitats, livelihoods and more generally, the customary existence of the indigenous peoples of the CHT, came under threat. The general dissatisfaction exacerbated by these events turned into an armed conflict, which continued for two decades.

In 1997, the then Government entered into the Chittagong Hill Tract Accord with the Parbatya Chattagram Jana Samhati Samiti (PCJSS), which was at that time, the only political organization of indigenous people of the CHT, to end the conflict.368 Subsequent to the signing of

366 Article 23A was inserted by the Constitution (Fifteenth Amendment) Act, 2011 (Act XIV of 2011), section 14. Article 23A states, "The State shall take steps to protect and develop the unique local culture and tradition of tribes, minor races, ethnic sects and communities."
367 There are 11 (eleven) multilingual indigenous peoples living in the Chittagong Hill Tracts consisting of Chakma, Marma, Tripura, Mro, Bawm, Pangkuh, Khyang, Khumi, Chak, Lushai and Tanchangya.
368 The Peace Accord was signed and executed to facilitate the public interest in general, especially the people living in the Chittagong Hill Tracts in order to bring peace and harmony in that region of Bangladesh so that the tribal and non-tribal people of Bangladesh living in the said area could co-exist there. It was also done to give effect to constitutional mandates for the advancement of backward sections of the population and establishment of efficient local government institutions.
the Accord, a number of laws were enacted and amended on the basis of the constitutional mandate for equality, non-discrimination and advancement of backward sections of citizens, among others.\textsuperscript{369}

However, the Accord and subsequent legislation were challenged before the Supreme Court in 2000 and 2007 on the grounds of violation of various provisions of the Constitution.\textsuperscript{370} The process of promoting rights of the indigenous communities suffered a setback when the High Court declared that various provisions of the legislations were \textit{ultra vires} of the Constitution.\textsuperscript{371}


\textsuperscript{371} After the hearing, the High Court passed the judgment and order dated 12 April 2010 and 13 April 2010, finding merit in part in Writ Petition No. 2669 of 2000. Accordingly, in light of this Court’s findings and observations, the rule was made absolute in part. However, the rule nisi as issued in Writ Petition No. 6451 of 2007 was also discharged. Further, Section 6 (Umo) of the Hill District Council Acts (Act Nos. 9, 10 and 11 of 1998) as amending Section 4 of the 1989 and Sections 28 of the Rangamati Hill District Council Act, 1998 (Act No. 9 of 1998) and the Khagrachari Hill District Council Act, 1998 (Act No. 10 of 1998) and section 27 of the Bandarban Hill District Council Act, 1998 (Act No. 11 of 1998), as amending sections 32(2) and 62(1) of the Hill District Council Acts, 1989 and the Hill District Council Acts as amended by Section 11 of the 1998 Act! were declared unconstitutional. The Court further observed that, (1) the Regional Council Act “is \textit{nothing but a mere colourable piece of legislation}”; (2) the Regional Council Act is \textit{ultra vires} of the Constitution as the “\textit{said Act purports to create a territorial unit without legal or constitutional sanction}” and that the “\textit{Regional Council has the potential to eventually claim the status of a federating unit for the Chittagong Hill Tracts, thereby destroying the very fabric of a unitary Republic}”; (3) Sections 40 and 41 of the Regional Council Act, 1998 appear to be deliberate in their formulation to further the underlying cause of the Regional Council Act to erode the unitarity [sic] of the State; (4) Section 6 of the impugned Hill District Council Acts (which provides for the respective Circle Chiefs to issue a certificate regarding residency, on the basis of a certificate issued by the respective Mauza Headman/the Union Parishad Chairman/Pourashava Chairman) infringes the petitioner’s right of franchise; and (5) Special measures of tribal population laid down in Section 32(2), i.e., Appointment of officers and employees of the council and Section 62(1), i.e., Appointment of the District Police of the Hill District Council Acts are in contravention of Articles 27, 28(1), 29 and 31 of the Constitution.
The Government argued that the Accord of 1997 was signed and the said Hill District Acts enacted by Parliament in order to restore peace and harmony in the region so that long overdue special measures could be taken for a historically disadvantaged section of citizens, as provided for in Article 28(4) of the Constitution, read with the Preamble and other provisions thereof. The Hill District Council Acts and the Regional Council Act are specifically intended to address this historical disadvantage and exclusion and to further the process of inclusion of the disadvantaged “tribal people” of the region. The impugned Hill District Council Acts and the Regional Council Act reaffirm the unitariness of the Republic and the Constitutional aspirations of “...rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, for all citizens.” The Regional Council as one of the writ respondents argued, among others, that the provisions of the Acts have a remedial and protective purpose intended to ensure the rights of a historically disadvantaged and marginalized community of the CHT. Article 28(4) of the Constitution of Bangladesh empowers the State to take special measures such as the declaration of the CHT as a ‘tribal-populated area’ for the advancement of tribal people, who are recognized as a ‘backward section’ of citizens in terms of having historically faced limited access to education, health, shelter and other basic needs. The Regional Council is a statutory public authority created within the broader scheme of “special measures” for the advancement of a historically disadvantaged section of citizens, as provided for in Articles 28(4) and 29(3) of the Constitution, read with the Preamble and other provisions of the Constitution. The Government and the Chittagong Hill Tracts Regional Council subsequently filed two appeals,

372 The preamble to all of the Acts contain statements in identical language reaffirming full and unwavering allegiance to the sovereignty and territorial integrity of the Republic.
373 Paragraph 13 of the Concise Statement filed by the appellant in Government of Bangladesh and Others vs. Md. Badiuzzaman (Civil Appeal No. 94 of 2011).
374 Submissions of the Regional Council as one of the respondents in Chittagong Hill Tracts Regional Council, represented by its Chairman vs. Md. Badiuzzaman (Civil Appeal No. 95 of 2011).
now pending hearing before the Appellate Division, against the judgment passed by the High Court.375

In the meantime, the Appellate Division, in a separate matter, has passed a judgment376 where the status of the CHT as a special region inhabited by indigenous peoples has been recognized. The Appellate Division has also recognized in the judgment, the need for special treatment of the rights of the indigenous communities within the framework of the Constitution.

While emphasizing the role of the judiciary in promoting social justice pertaining to the minorities, the Appellate Division has made the following observation, among others:377

Our judiciary always plays a pivotal role to strengthen and promote social justice, and the protection of indigenous people is one of the basic principles for promoting social justice. To that end in view, it is the duty of this Court to see that the indigenous people enjoy the rights and protections guaranteed to them under the Constitution and the laws. There is no doubt that the citizens of three hill districts are backward people. These provisions embody the concept of making special provisions for the weaker backward section of the citizens by taking such measures as are necessary for removal of economic inequalities and rectifying discriminations resulting from State actions between unequal in society. This may be achieved by special laws or by direct regulation of transactions by forbidding certain transactions. It also means that those who have been

373 Government of Bangladesh and Others vs. Md. Badiuzzaman (Civil Appeal No. 94 of 2011) and Chittagong Hill Tracts Regional Council, represented by its Chairman vs. Md. Badiuzzaman (Civil Appeal No. 95 of 2011).
375 Wagachara Tea Estate Ltd. vs. Muhammad Abu Taher and Others, 38 and 46.
deprived [of] their property by unconstitutional actions should be restored...their property. The State is under obligation to provide the facilities and opportunities for their economic empowerment, as it is their fundamental right.

Religious rights and the rights of disadvantaged communities

The Constitution, on the one hand, includes secularism as one of the fundamental principles of state policy, but on the other, recognizes Islam as the “state religion.” This ambivalence subverts the idea of Bangladesh as an independent, secular nation state, as envisioned by its founders.

As one of the foundational principles, secularism was originally incorporated into the Constitution. The Martial Law government in 1977 removed the principle of secularism, replacing it with “faith in Almighty Allah” as a fundamental principle. The subsequent Eighth Amendment in 1988, passed by the Parliament under a presidential form of government (led by a General-turned President), inserted into the Constitution the concept of “state religion” and declared Islam as the state religion. Although the Fifteenth Amendment, in 2011, restored secularism as a fundamental principle of state policy and inserted provisions in the Constitution against communalism, abuse of religion for political purposes and discrimination on the basis of religion, it retained the inclusion of Islam as the “state religion.”

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377 Bangladesh Constitution, arts. 2A and 12.
380 Bangladesh Constitution, Article 12, amended by the Fifteenth Amendment, provides as follows:

"The principle of secularism shall be realised by the elimination of:
(a) communalism in all its forms;
(b) the granting by the State of political status in favour of any religion;
(c) the abuse of religion for political purposes;
(d) any discrimination against, or persecution of, persons practising a particular religion."
While emphasizing the importance of the concept of secularism, the High Court observed in the writ petition challenges the Fifth Amendment that secularism means equality of all its citizens regardless of caste, creed or religion without any prejudice on the part of the State, and that the State must ensure protection of all kinds of religious communities, followers of all faiths and even an atheist who does not follow any religion or faith.

In a case involving the challenge of inclusion of a "state religion," the High Court adopted a narrow technical approach to dismiss the matter summarily. This decision was disappointing and may have been influenced by the current political environment, in which the incumbents prefer to placate Islamic organizations, so as to remain in power, without having to deal with the difficult issue of the abolition of the so-called state religion.

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M. Muneruzzaman, "HC rejects 1988 writ petition challenging state religion," New Age, 29 March 2016, accessed 29 January 2017, http://archive.newagebd.net/215812/hc-rejects-1988-writ-petition-challenging-state-religion/ On 28 March 2016, the High Court rejected a writ petition filed twenty-eight years ago challenging the legality of Article 2A of the Constitution that declared Islam as the state religion. A three-judge High Court Bench comprising Justice Naima Haider, Justice Quazi Reza-Ul-Haque and Justice MdAshraful Kamal, rejected the petition on the ground that the petitioner had no legal right to file the petition stating, "Our finding is that the petitioner does not have the locus standi and that is why the petition is summarily rejected." The Court heard the petition for two minutes before the presiding judge. Justice Naima Haider pronounced the three-word verdict, "Rule is discharged." The original ruling was issued on 08 June 2011, asking the Government to explain the legality of the insertion of Article 2A into the Constitution by the Eighth Amendment in 1988. The rule was issued twenty-three years after the writ petition was filed by fifteen eminent citizens. In a supplementary ruling issued on 01 December 2011, another bench asked the Government to explain the legality of the retention of Article 2A in the Constitution under the Fifteenth Amendment to the Constitution made on 03 July 2011. The supplementary ruling came up for hearing following a supplementary petition that stated that the Parliament passed the Fifteenth Amendment to the Constitution reinstating Islam as the state religion on 30 June 2011, while the question of legality of state religion was still pending with the High Court.
In effect, both the judiciary and the executive adopted a narrow margin of appreciation while dealing with the provisions relating to religion as they remained silent on how these two different notions could or could not co-exist.383

In assessing the place of religion within the ambit of the Constitution, the Court observed that restrictions may be imposed on the right to religion by law for the sake of public order or morality. However, such restrictions must be reasonable and what is reasonable may depend on the facts and circumstances under which such restrictions may be imposed.384 385

In a case regarding the imposition of extra-judicial punishments in the name of execution of a fatwa383 in 2001, the High Court held that all kinds of fatwas are unauthorized and illegal. The Court held that while a fatwa means a legal opinion of a lawful authority, the legal system of Bangladesh empowers only the courts to decide all questions relating to Muslim laws and other laws as in force.386

Subsequently, appeals were filed in the Appellate Division against the High Court judgment. The Appellate Division in its judgment allowed the appeals in part, holding that (a) a fatwa on religious grounds

385 It was common, particularly in rural areas, to inflict physical punishment and social proscription in the name of a fatwa pronounced by religious clerics and supported by the local elite.
could only be issued by educated persons, and must be voluntarily accepted by the person upon whom it is issued. Coercion or undue influence of any kind being used to pressure an individual in to accepting a fatwa was prohibited; (b) no person could pronounce a fatwa violating the rights, reputation and dignity of any person; and (c) no physical or mental punishment could be imposed or inflicted on any person in pursuance of a fatwa.  

Although the Constitution promises equal rights to all citizens, thousands of Harijans, Dalits and other members of excluded communities are treated as 'untouchables'. Article 28(1) of the Constitution guarantees equal rights for all citizens and prohibits discrimination by the State on the grounds of religion, race, caste, sex or place of birth. In order to protect the rights of Dalits, Harijans and other excluded communities, two organizations—International Dalit Solidarity Network (IDSN) and Bangladesh Dalit and Excluded Rights Movement (BDERM)—submitted a draft anti-discrimination law to the Bangladesh Law Commission, which was subsequently submitted to the Ministry of Law. In 2016, a discussion held by the Bangladesh Harijan Unity Council and the Bangladesh Dalit Council to mark the International Day for the Elimination of Racial Discrimination, resulted in a 10-point list of demands, including immediate enactment of an anti-discrimination law, allocation of a quota for Dalits and Harijans in education and services, budgetary allocations and implementation of the ruling party’s commitments in their election manifesto for the

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amelioration of Dalits and Harijans, housing and civic services, social protection schemes and social safety nets, and representation in government.  

Freedom of expression

As is evident from the number of cases that came before the judiciary, freedom of expression in Bangladesh is now one of the most contentious issues. The right to freedom of speech and expression is not limited to print and electronic media but also includes online speech and social media. In 2010, a writ petition was moved before the High Court challenging the blocking of the social networking website Facebook by the Government and challenging Section 46 read with Section 57 of the Information and Communications Technology Act, 2006 ("the ICT Act"). It was argued that these provisions in the ICT Act confer unfettered discretionary powers to law enforcement agencies. The Court directed the Government to show cause as to why Sections 46 and 57 of the ICT Act, 2006 should not be held to be declared ultra vires the Constitution, and to be in violation of the fundamental right to freedom of expression.  

In 2016, this writ petition came up for a hearing before the High Court, but was not disposed of due to certain changes in the constitution of the bench concerned, and is still pending hearing. Several other writ petitions were filed challenging the legality of Section 57 of the ICT Act. The High Court Division initially issued rules in these writ petitions asking the Government for reasons why Section 57 of the ICT Act should

391 Arafat Hossen Khan and others vs. Bangladesh and others, (Writ Petition No. 4719 of 2010). The writ petition was filed on 06 June 2010. The Government lifted the ban on Facebook after several hours around midnight on the same day it was blocked. The High Court issued the rule on 26 July 2010 after modification of the initial prayer of the petition. The writ petition is now pending before a Division Bench of the High Court.
not be declared *ultra vires* the Constitution. However, subsequently, on 30 August 2016, the High Court rejected a petition challenging the legality of Section 57 of the ICT Act.\(^{392}\)

In 2013, Parliament enacted amendments to the existing ICT Act, particularly to Section 57, which is in direct violation of Articles 39 (freedom of thought and conscience, and of speech) and 43 (protection of home and correspondence) of the Constitution. The amendment sets a minimum sentence of a seven-year jail term for these offences and increases the maximum to fourteen years, as opposed to the original ten years.

The amendment obstructs due process, increases criminal penalties and allows for arbitrary arrest and detention of suspected offenders. Beginning in 2010, on a number of occasions, the provisions

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\(^{391}\) "HC rejects writ challenging sec 57 of the ICT Act," *The Independent*, 02 September 2015, accessed 29 January 2017, [http://www.theindependentbd.com/post/14133](http://www.theindependentbd.com/post/14133). In another writ petition filed by eleven eminent citizens, the High Court on 01 September 2015 issued a rule upon the Government to explain why Section 57 of the ICT Act, 2006 would not be declared unconstitutional. The Court issued the rule considering the recent verdict of the Supreme Court of India which had struck down Section 66A of the Indian Information Technology Act, 2000 finding it contradictory to Article 19 of the Indian Constitution which guarantees freedom of expression. The Court said that Section 57 of the ICT Act of Bangladesh and Section 66A of the Indian IT Act were similar. Article 39 of the Bangladesh Constitution is also similar to that of Article 19 of the Indian Constitution. The Court said that it would scrutinize whether or not Section 57 of the ICT Act is in conflict with any provision of the Constitution guaranteeing fundamental rights of the citizens. The Deputy Attorney General appearing for the Government, argued that a Division Bench of the High Court was scheduled to pass its order on a separate writ petition challenging the same section of the law and another Bench rejected a similar writ petition on the Section 57 of ICT Act. Barrister Jyotirmoy Barua appearing for the writ petitioners, argued that Section 66A of the Indian IT Act, 2000 clearly spelt out the offences, while Section 57 of the ICT Act of Bangladesh left the matter vague and did not clarify what information would be considered offensive. He further pointed out that the ICT law gave ample powers to the police to arrest an accused without bail, while the same offences under the Penal Code carried lesser sentences and the cases had to be filed with courts. See also M. Moneruzzaman, "Section 57 of ICT Act: HC asks govt to explain legality," *New Age*, 02 September 2015, accessed 18 April 2017, [http://archive.newagebd.net/153843/section-57-of-ict-act-hc-asks-govt-to-explain-legality/](http://archive.newagebd.net/153843/section-57-of-ict-act-hc-asks-govt-to-explain-legality/).
of the ICT Act of 2006, and Section 57 in particular, have been misused by law enforcement agencies to justify arbitrary arrests and detention.\(^{393}\)

In 2015, the debate over Section 57 and the demand for its repeal intensified when it made possible the arrest of veteran journalist ProbirSikdar, who stood accused of allegedly defaming a government minister. In the Daily Star news article on 22 August 2015, various eminent rights activists condemned the arrest and stated that Section 57 of the ICT Act of 2006 was so vague that law enforcers could interpret it as they wished to arrest anyone, at any time.\(^{394}\)

In 2013, the Bangladesh Telecommunication Regulatory Commission (BTRC) imposed restrictions on international social media and communication applications such as Facebook and YouTube, and individual blogs without any prior justification. In March 2013, the Government formed an official committee to identify bloggers who had allegedly demeaned the spirit of Islam. The Committee participated in discussions with clerics to produce a list of bloggers and Facebook users they alleged had published blasphemous content. The BTRC subsequently directed domestic blog-hosting platforms to close the accounts of just four bloggers it identified as

\(^{393}\) "Freedom of Expression in Bangladesh: 2014," country report published by ARTICLE 19, accessed 10 February 2017, https://www.article19.org/data/files/medialibrary/37943/Bangladesh-FoE-Country-Report-2014.pdf. It is reported that “criminalisation of online expression continues with the application of Section 57 of the Information, Communications Technology Act, 2006 (as amended in 2013). 6.10 percent of violations comprised of arrests (13) by the law enforcement agencies under the ICT Act 2006.” It was further stated in the report that “expressions have been penalized on grounds of being “hurtful to the image of the state or person” or “hurtful to religious sentiments,” which is deeply problematic as the law itself does not provide any guidance as to what constitute these grounds, leaving it widely open to arbitrary application by law enforcement agencies. This trend of arbitrary use promotes a culture of fear and shrinks the space for online expression, tacitly forcing online activists, users and bloggers to resort to self-censorship when expressing their opinions."

"anti-religious elements." The owners of the host platforms reported that officials never cited any court orders or legal explanations in their communications.395

Labour rights

The ready-made garments (RMG) industry in Bangladesh is the second largest in the world and occupies a key role in the country's economy. About five million workers are employed in this sector, spread over about five thousand factories of different sizes. Despite the crucial contribution made by the RMG sector to the country's economy, working conditions in the industry, the rights of workers and industrial relations remain causes for concern. This became starkly apparent in the wake of a number of catastrophes, such as the Spectrum factory collapse in 2005, the Tazreen Fashions fire in 2012 and the Rana Plaza collapse in 2013. The fire and collapse in 2016 of the Tampaco factory, a packaging facility, was the most recent workplace accident to end in tragedy. In these incidents, a total of nearly two thousand workers lost their lives. In addition, violations of the right to organize, bargain collectively and to establish a common platform for dialogue at the workplace are common. In all cases, non-compliance with the existing legislation is a major cause.396

Through a number of cases, the judiciary has acted as a catalyst in ensuring and promoting workers' rights, particularly in the RMG sector.


In *ASK, BLAST and Others vs. Bangladesh and Others,* which concerned the fire at KTS Garments, the High Court directed the authorities concerned to investigate and submit a report detailing the causes of the incident and the safety measures adopted. The Court also directed the garment authorities to ensure medical treatment was made available to victims of the fire and demanded a report of the amount of compensation paid to them.

In *ASK, BLAST and Others vs. Bangladesh and Others,* which concerned the fire incident in Tazreen Garments, the High Court Division issued a number of directions, including: (i) to submit a list of garment factories across the country and report whether factory authorities had complied with the relevant laws designed to prevent accidental fires from taking lives, (ii) explain steps taken to implement the High Court directives issued in 2001 in Writ Petition No. 6070 of 1997 intended to ensure the safety and security of garment workers and form an inspection committee to monitor the garments authorities, and (iii) state detailed steps taken regarding compensation for the workers killed and injured and measures for treatment of the injured workers. In 2013, the High Court directed the Government to increase the compensation and extend it to the families of the missing workers, whose DNA could be traced. The Court further ordered the Government and the Bangladesh Garments Manufacturers and Exporters Association (BGMEA) to pay compensation. As per the recommendations made by the Government and the BGMEA, each of the victim's family was to get 700,000 Taka (approximately US$ 8,530).

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In 2014, in the case relating to the Rana Plaza disaster, the High Court issued directions to set up an expert committee comprising economists, social scientists, healthcare experts and others to propose a set of criteria for assessing the rates of compensation due to Rana Plaza victims. Their proposals have been submitted before the Court for its consideration.\textsuperscript{401} Independent of the legal proceedings, and as a voluntary measure adopted and sponsored by the brands whose products were being manufactured in the collapsed building, trust funds were set up and funds disbursed to the victims of the Rana Plaza disaster.\textsuperscript{402} The writ petition pending in the Supreme Court is intended to determine the liability of the owner of the collapsed building, and the owners of the garment factories housed in that building, to determine compensation for victims and their families. The latest tragedy that occurred in the industrial sector is the Tampaco factory fire. Three human rights organisations filed a petition before the High Court. The Court issued a Rule and an interim direction upon the Bangladesh Bank, to identify

\textsuperscript{401} Suo Motu Rule No. 9 of 2013, (Rana Plaza case); \textit{ASK & BLAST} vs. Secretary, Ministry of Public Works and Others (Rana Plaza case), Writ Petition No. 4390 of 2013, \textit{Kamal Hossain Meahzi and Others vs. Bangladesh and Others} (Rana Plaza case), Writ Petition No 4428 of 2013. The Government of Bangladesh formally directed the ILO to assist in the implementation and coordination of the National Tripartite Plan of Action on fire safety and structural integrity (NTPA), which was developed following the Tazreen factory fire in November 2012. The ILO has played a leading role in helping to coordinate the response to the Rana Plaza collapse. The ILO works with the National Tripartite Committee (government, workers' and employers' organizations) and others, the Accord and Alliance to help ensure coordination. ILO is providing technical assistance for trade union organizations to improve the capacity of workers to organize through a workers' education programme organized in collaboration with the National Coordination Committee for Workers Education (NCCWE) and the Industrial Bangladesh Council (IBC). The programme aims at creating an enabling environment for worker organizations and collective bargaining at factory level that will lead to workers participating in occupational safety and health as well as rights-related matters.\textsuperscript{402} Action Aid Bangladesh, "Three years Post Rana Plaza: Changes in the RMG Sector," 15 April 2016, accessed 18 April 2017, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&cad=rja&uact=8&ved=0ahUKEwjK072v0K3TAhL4AjQFghCMAU&url=http%3A%2F%2Fwww.actionaid.org%2Fsites%2Ffiles%2Factionaid%2Frana_plaza_year_3.pdf&usg=AFQjCNFDJfkMmaeXt119Kdd4Yb_1Hi3rFw.
and freeze the bank accounts of Tampaco Foils Ltd and the Managing Director and Chairman of the company so as to ensure that the funds held in those accounts are not diverted and are preserved for providing compensation to the victims.403

The increasing number of child workers in various factories is also a major concern. In 2011, a petition was filed seeking to protect an estimated 25,000 child workers in a factory. The petitioners also sought a declaration that such activity was illegal and unconstitutional. The Court observed that the age-old practice of bonded labour, where young children are victimized, must be put to an end. The Court further directed the relevant government ministry to secure the right to education, food and clothing for the children. All the employers engaging children as labourers were directed to abide by the law and not engage children below the legal age stipulated by statute, and to provide all necessary facilities and equipment to ensure a healthy working atmosphere in their establishments for those who may be lawfully engaged in remunerated work.404

403 BLAST and Others vs. Bangladesh and Others (TAMPACO Fire and Collapse case) Writ Petition No. 12182 of 2016. On 10 September 2016, a fire broke out and an explosion occurred at the factory of Tampaco Foils Limited, Dhaka, resulting in the collapse of the building that left twenty-nine dead and fifty injured. Three human rights organizations, i.e., Bangladesh Legal Aid Services and Trust (BLAST), Ain o Shalish Kendra (ASK) and the Bangladesh Environment Lawyers Association (BELA), filed a writ petition impugning the failure of the concerned authorities to discharge their statutory duties relating to building construction, labour safety and welfare and to ensure that appropriate actions were taken to investigate the causes of the fire; to prosecute and punish those responsible for this incident, and also to ensure sufficient compensation for the victims, including long-term medical treatment and rehabilitation of those injured, and to prevent future incidents occurring by ensuring effective enforcement and implementation of workplace safety laws in industries, in particular to ensure the fundamental rights to life and the protection of law of all workers and other people therein.

404 Ain o Salish Kendra vs. Bangladesh, (Writ Petition No. 1234 of 2004), 63 (2011) DLR (HCD) 95, para. 32.
Right to shelter

A large number of people live in urban slums in Bangladesh due to the lack of adequate housing. According to the Constitution, the State has a responsibility to provide and secure the basic necessities, including, among others, the right to shelter for each of its citizen as a Fundamental Principle of State Policy.\textsuperscript{405} The right to shelter as a basic component of social rights has been, time and again, ensured and secured by the judiciary whenever there has been an incident of arbitrary or forcible eviction by any executive authority. The High Court has ruled consistently that state authorities are required to give notice in accordance with the law and provide rehabilitation or resettlement before evicting slum dwellers.\textsuperscript{406}

In one of the cases that came before the High Court in the context of attempted evictions of slum dwellers, the following guidelines were laid down by the Supreme Court:

The Government should undertake a master plan or rehabilitation schemes or pilot projects for rehabilitation of the slum dwellers and undertake eviction of the slum dwellers according to the capacity of their available abode and with option to the dwellers either to go to their village home or to stay back leading an urban life, otherwise the wholesale demolition of slums may not solve the problem because the evicted persons from one slum may flock together to another place forming a slum or slums and thereby mounting problems for the Government and the country. We have been told that ECNEC [Executive Committee of the National Economic Council] has also approved construction of residential apartments for the slum dwellers and lower income people. We appreciate the Government anxiety but considering the

\textsuperscript{405} Bangladesh Constitution, art. 15.
human aspects that is attached to the slum dwellers, we provided the guidelines to the Government to undertake a master plan rehabilitation scheme/pilot programme for rehabilitation by evicting the slums phase by phase otherwise, the wholesale removal will give rise to multiple problems for the society and the State.407

Subsequent to the above observations, a series of cases followed, where the spirit of this judgment was reflected. The reality, however, is grim. Various government bodies have exhibited systematic disregard for judicial directives and observations, and have continuously been attempting to displace the slum-dwellers in the name of development, without taking any measures for their rehabilitation. There are instances where interim injunctive orders passed by the Supreme Court have been flouted by the Government who went ahead in evicting slum-dwellers, and the remedy against the Government’s high-handedness has proved ineffective.

National security and terrorism

Bangladesh has a documented history of torture and abuse during detention and interrogation by law enforcement agencies. The recent years have witnessed an increase in the incidents involving arbitrary and illegal arrests, enforced disappearances, torture and custodial deaths.408

In Bangladesh Legal Aid and Services Trust (BLAST) vs. Bangladesh,409 the High Court provided fifteen directives in the form of guidelines for reforming provisions of arrest without warrant and

interrogation on remand, under Sections 54 and 167 respectively, of the Code of Criminal Procedure of 1898. Subsequently, in *Saifuzzaman vs. State and Others*, the Court issued guidelines in respect of arbitrary arrest, detention, investigation and the treatment of suspects to be followed by the Government, magistrates and the police. In the BLAST case, the Court directed the legislature to amend Sections 54, 167, 176 and 202 of the Code of Criminal Procedure to ensure accountability on the part of the police and magistrates while dealing with issues relating to the arrest of a person for suspicion of commission of any offence, detention in custody, manner of investigation, persons empowered to investigate and the duties of magistrates in cases of detention and custodial deaths. It was further observed that Sections 54 and 167 of the Code are inconsistent with constitutionally guaranteed rights.

These guidelines, though not systematically observed, have played a vital role in protecting vulnerable persons from custodial violence. In 2004, the Government filed an appeal against the judgment of the High Court. When the matter finally came up for hearing in 2016, the Supreme Court turned down the appeal and upheld substantially the guidelines of the High Court with certain modifications. The Court in formulating the guidelines held as follows:

...We are of the view that all the recommendations are not relevant under the changed circumstances. We formulate the responsibilities of the law enforcing agencies which are basic norms for them to be observed by them at all levels. We also formulate guidelines to be followed by every member of law enforcing agencies in case of arrest and detention of a person...

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410 *Saifuzzaman vs. State and Others*, 56 DLR (HCD) 2004, at 324.
out of suspicion who is or has been suspected to have involved in a cognizable offence. In order to ensure the observance of those guidelines we also direct the Magistrates, Tribunals, Courts and Judges who have power to take cognizance of an offence as a court of original jurisdiction.”  

The Government has filed a review petition against the judgment, which is pending before the Appellate Division.  

Recently, Bangladesh has witnessed a series of murders of bloggers, atheists, foreigners and LGBTI activists and finally the Holey Artisan Bakery attack in Dhaka on 1 July 2016. In response to the earlier murders, the law enforcement agencies arrested nearly 15,000 people during the month of June alone. According to the 2016 Human Rights Watch Report, since the bakery attack, security forces have conducted raids, killed alleged militants in so called encounters, and arrested many others in a manner that has raised questions. Law enforcement agencies secretly detained two individuals, who were hostages in the Holey Artisan Bakery attack, for over a month before the Government, in the face of intense national and international pressure, admitted to having them in custody. One was finally released without charge after three months in detention; the other is still in detention and it is unclear what charges have been brought against him. The Supreme Court has not intervened on its own motion in any of these incidents, nor has any arrested or detained person or their family members raised these issues before the Supreme Court.

161 Bangladesh, represented by the Secretary, Ministry of Law, Justice and Parliamentary Affairs vs. Bangladesh Legal Aid and Services Trust and Others, (Civil Appeal No. 53 of 2004).  
4 1 4 Government of Bangladesh, Bangladesh Secretariat and Others vs. Bangladesh Legal Aid and Services Trust and Others, (Civil Review Petition No.41 of 2017) filed on 24 January 2017.  
Conclusion

An independent judiciary is indispensable for good governance and for bolstering a culture of accountability. A judiciary that is not independent of the executive and the legislature affects society as it fails to uphold the rights of citizens. Interference in the appointment process and non-compliance with statutory obligations further weakens the state of rule of law and undermines the rights guaranteed under the Constitution.16 The absence of legislation providing for the appointment and removal of judges in an orderly and transparent manner leaves room for political manoeuvring and also makes judges susceptible to various forms of manipulation. Despite limitations, the judiciary in Bangladesh has been playing a constructive role in protecting the civil liberties and socio-economic rights of citizens. The inherent institutional weaknesses in the judiciary, ranging from a politicized appointment process to the lack of financial independence of the judiciary, have affected its capacity to function as a strong check on abuses of power and the violation of human rights. If the maladies inherent in the selection and operation of the judiciary are not remedied by the installation of a transparent system for the appointment of and disciplining of judges, whilst also allowing for financial independence, the ability of the judiciary to uphold rule of law and the rights of citizens will continue to wane. The foundation of the Constitution visualizes a society where rule of law, fundamental human rights and freedoms, equality and political, economic and social justice, is guaranteed to all citizens. This vision is also echoed in the Preamble to the Constitution. The Republic nature of State can be ensured if the mandate of the Constitution is obeyed and the judiciary is free from all interference.417

417 Advocate Asaduzzaman Siddiqui and Others vs. Bangladesh and Others, (Writ Petition No.9989 of 2014), judgment delivered 05 May 2016.
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23. ASK & BLAST vs. Secretary, Ministry of Public Works and Others (Rana Plaza case), Writ Petition No. 4390 of 2013. Unreported.


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30. Bangladesh, represented by the Secretary, Ministry of Justice and Parliamentary Affairs and Others vs. Md. Idrisur Rahman and Others, (Civil Petitioner for Leave to Appeal Nos. 2221, 2222, 2046 and 2056 of 2008), 17 (2009) BLT (AD) 231.


34. BLAST and Others vs. Bangladesh and Others (TAMPACO Fire and Collapse case), Writ Petition No. 12182 of 2016. Unreported.


44. Hassan MS Azim and three others vs. Bangladesh, 16 (2011) BLC (HCD) 800.


64. Saifuzzaman vs. State and Others, 56 (2004) DLR (HCD) 324.


INDEPENDENCE AND ENGAGEMENT OF THE BHUTANESE JUDICIARY IN THE PROTECTION OF RIGHTS AND FREEDOMS

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Background

In Bhutan, one of the core objectives of the judiciary is to be structurally and functionally independent.⁴¹⁸ The Thrimzhung Chhenmo (Supreme Law), which came into effect in the 1950s,⁴¹⁹ was the beginning of the codification of laws and institutionalization of the modern legal system in Bhutan.⁴²⁰ Though it did not mention a formal court structure, it provided that cases shall be adjudicated by the courts with jurisdiction, which shall not be usurped by any other court.⁴²¹ Any person working in the Government was prohibited from communicating with the judge about a case.⁴²² The Civil and Criminal Procedure Code of Bhutan of 2001 (CCPC) repealed the above provision in the Thrimzhung Chhenmo⁴²³ and expressly provides a formal structure of courts.⁴²⁴ The Constitution of Bhutan⁴²⁵ has confirmed the separation of powers provided in the CCPC⁴²⁶ and the Judicial Service Act of 2007.⁴²⁷

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⁴²⁰ Ibid.
⁴²¹ Ibid., sec. 2.4.
⁴²⁴ Ibid., chapter 2.
⁴²⁶ CCPC, sec. 2.
Following the tradition of the common law system, the judiciary of Bhutan may not have contributed by way of intervention on its own, although other judiciaries in South Asia play similar roles. However, despite the very short span of time since the enactment of legislation and the adoption of the Constitution, the judiciary has flourished and has played a laudable role in protecting rights through cases filed by the State or the aggrieved party. With the constitutional mandate to enhance access to justice, the Supreme Court has begun issuing writs and directives in recent times.

Out of areas like labour rights and minority rights, freedom of speech and association, and national security and terrorism, courts in Bhutan have been engaged mainly in the protection of labour rights and freedom of speech. Therefore, this chapter will attempt to assess the advancement of the independence and engagement of the judiciary in protecting labour rights and freedom of speech.

**Independence of the Judiciary**

The principle of natural justice that "*justice should not only be done, but should manifestly and undoubtedly be seen to be done*" cannot be upheld without a definite court structure and independent court buildings. People should be able to know where to go for remedy upon infringement of a right. Further, structural independence would be of no avail without functional independence. The judiciary must be empowered by laws to protect rights without fear or favour. With His Majesty the King's benevolence in advocating an efficient judicial

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428 Bhutan Constitution, art. 21, sec 1.
system, and assistance from the Government and Parliament, many institutional reforms have been introduced for the advancement of judicial independence and access to justice.

The question of whether the independence of the judiciary has structurally and functionally bloomed or is doomed can be answered by analysing the structure of courts, construction of court buildings, the system of appointment and removal of judicial personnel, and the relationship of the judiciary with the executive and legislature.

Structure of courts

Until 2001, districts with sub-districts had a three-tiered court system while other districts had two-tiered courts. The High Court was the highest appellate court. The CCPC added the Supreme Court to the then existing court structure, which was to be established pursuant to a command from His Majesty. The parties, if they were not satisfied with the decision of the High Court, could appeal to the Supreme Court, with the only condition being that they would pay the costs of litigation upon the decision being upheld by the appellate court.

The Judicial Service Act and the Constitution of Bhutan also vest judicial authority on the Supreme Court, High Court, District Courts, Sub-district Courts, and other Courts and Tribunals, which may be established by the King upon the recommendation of the National Judicial Commission. The office of the Supreme Court was established at Kuengacholing, Thimphu, on 21 February 2010, and currently the

431 CCPC, sec. 9.
432 Ibid., sec. 17.
433 Bhutan Constitution, art. 21, sec 2.
districts with sub-districts have a four-tiered court system whilst the other districts have a three-tiered court system.

Besides court offices, every court has an administration and finance office which functions under the Registrar General of the Supreme Court, who is responsible for Human Resource development and supervision of judicial personnel. Every court has a Registrar who works under the judge, although the judiciary is yet to appoint persons with the required qualifications.

In 1994, the Research and Training Bureau was established pursuant to a Royal Command. The Bureau studies the sources of laws and Bhutanese etiquette and terminologies, acting as a corroborator of the judiciary. It also conducts in-service trainings for judicial personnel. This office, along with the Information and Technology section, is attached to the Supreme Court. Also, the Thimphu District Court has a Notary Public Office that issues certificates and delivers notarization services.

Modern court buildings

In the past, District Courts were located in dzongs (fortresses), which were traditionally the abode of monks and are now commonly used as administrative centres. Sub-district courts were also attached to administrative offices. The plan to structurally separate courts from administrative offices began in 2004, under the administration of the

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436 Section 49 of the Judicial Service Act reads: "To be eligible for the Judicial Personnel Selection Examinations, a person shall have a minimum of Bachelor of Laws degree from an institution of repute recognized by the Government and complete a year of Post Graduate Diploma in National Law."
439 Bhutan Constitution, Glossary.
first Chief Justice of the Supreme Court of Bhutan. In 2007, the Royal Assent was granted for the establishment of courts in every sub-district, and the number of sub-district courts increased from three to fifteen, in addition to twenty District Courts.

By the end of 2009, twelve sub-district courts were established, and by the end of 2013, eleven District and eleven Sub-district Court buildings were under construction with financial assistance from the Government of India, the Austrian Development Agency, DANIDA (Denmark's Development Cooperation), Swiss Development Cooperation and the Government of Bhutan. By the end of 2014, only seven districts were without modern court buildings, and all the courts with new buildings were separated from the dzongs.

In 2006, the construction of the Supreme Court began with funds from the Government of India, and was inaugurated by Shri Narendra Modi, the Prime Minister of India, on 15 June 2014. The only High Court in the Bhutanese judicial system has had an independent structure since its establishment in 1968.

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452 Ibid.
Appointment and removal of judicial personnel

The Thrimzhung Chhenmodid not provide for any procedure for the appointment of justices or judges, except that the judges were to be appointed by the Government. According to the CCPC, the Chief Justice of Bhutan and justices of the Supreme Court, the Chief Justice and justices of the High Court, and the judges of District Courts are to be appointed by His Majesty the King upon the recommendation of the National Judicial Commission. The provisions under the Judicial Service Act and the Constitution are the same. The amendment made to the CCPC in 2011 provides that judges of both the District and Sub-district courts will be appointed by the Chief Justice of Bhutan upon the recommendation of the Judicial Service Council, whereas the Judicial Service Act provides that district judges are to be nominated by the Judicial Service Council, recommended by the Chief Justice of Bhutan, and appointed by His Majesty. However, this inconsistency has been resolved with the appointment of three district judges by His Majesty the King, in accordance with section 73 of the Judicial Service Act, giving precedence to the specific Act over the general statute. The Chief Justice of Bhutan appoints the Registrar Generals of the Supreme Court and High Court for a term of three years, and Sub-district judges.

The Chief Justice of Bhutan is the Chairman of the National Judicial Commission and the members include the most senior Justice of the Supreme Court, the Chairperson of the Legislative Committee of the National Assembly and the Attorney General of Bhutan. Thus, the judiciary has been endowed with adequate power in the appointment

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47 Thrimzhung Chhenmo, sec. 1.1.
48 Judicial Service Act, sec. 62.
49 Bhutan Constitution, art. 21.
50 Judicial Service Act, sec. 73.
52 Judicial Service Act, sec. 76.
53 Ibid., sec 7.
of justices. Further, the Chief Justice appoints the members of the Royal Judicial Service Council.454

The Judicial Service Act provides that the justices of the Supreme Court and High Court can be removed only by way of impeachment by a majority of not less than two-thirds of the total number of Members of Parliament, on grounds of incapacity, incompetency or serious misconduct.455 The Constitution also guarantees independence of tenure to the justices and the provisions on impeachment are the same as in the Act, except that the National Judicial Commission can submit recommendations to His Majesty, who may censure or suspend any Justice of the Supreme Court or High Court for proven misbehaviour.456

Judges of the District and Sub-district courts enjoy security of tenure as long as they abide by the Code of Conduct.457 A judge, who breaches the Code of Conduct may be reprimanded, suspended or removed from service with or without benefits, or the Judicial Service Council can withhold their promotion or annual pay increment.458 The Chief Justice of Bhutan, on the recommendation of the Judicial Service Council, can censure or suspend a judge for proven misbehaviour.459

Relationship of the judiciary with the executive and legislature

The Thrimzhung Chhenmo expressly prohibited interference and implicitly restricted other offices from encroaching on the power of a judge to adjudicate.460 The CCPC repealed the above provision in the

454 Ibid., sec. 21.
455 Judicial Service Act, sec. 148.
456 Bhutan Constitution, art. 21, sec. 15.
457 Judicial Service Act, sec. 75.
458 Ibid., sec. 145.
459 Judicial Service Act, sec. 131.
460 Thrimzhung Chhenmo, Dha-2.4.
461 CCPC, sec. 1.3 (a).
Thrimzhung Chhenmo and expressly provided that the judiciary is separate from the executive and legislature, and should function independently. However, until 2007, the year when the Judicial Service Act came into effect, the service conditions of judicial personnel were governed by the Bhutan Civil Service Rules, which governed all the civil servants under the executive, legislature, and judiciary. The Judicial Service Act reinforced the independence of the judiciary ensured by the CCPC and provides for no encroachment, except as prescribed by the laws.

The Civil Service Act of Bhutan, 2010, without expressly repealing any section of the Judicial Service Act, provided that it will not apply to judges and associate judges. Thus, beginning in 2010, judicial personnel—namely Registrars and below—were once again to be under the Royal Civil Service Commission. However, the justices of the High Court and Supreme Court being the holders of Constitutional Office and judges and associate judges being excepted by the Act, are not governed by the Civil Service Act.

The Judicial Service Act having been passed in 2007, and the Royal Civil Service Act in 2010, the later Act may have to be given priority over an earlier Act according to the later-in-time rule. This rule, though applied in cases of conflict between a domestic law and international treaty, is replicated in section 38 of the Evidence Act of Bhutan, 2005. However, the Civil Service Commission, though an autonomous agency, functions under the Executive. In the case of the appointment of district

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463 Ibid., sec. 2.
464 Judicial Service Act, sec. 5.
465 Bhutan Constitution, art. 31, sec 2.
466 Section 38 of the Evidence Act reads, “If there is more than one written agreement executed between the same parties regarding the same subject matter then the last agreement shall be the valid written agreement,” accessed 31 January 2017, http://oag.gov.bt/wp-content/uploads/2010/05/Evidence-Act-of-Bhutan-2005English-version.pdf.
judges, the Judicial Service Act, which is a specific law, was afforded priority over the Civil Service Act, which is a general law. Further, the implied meaning of a later law may not override the express provisions of an earlier law. Thus, judicial personnel may be governed by the Judicial Service Act.

One of the salient features of the Constitution is the separation of powers among the executive, legislature and the judiciary. Section 13 of Article 1 of the Constitution prohibits encroachment on each other's powers, except to the extent provided by it, while section 5 of the Judicial Service Act permits encroachment on judicial power, as long as it is permitted by laws. Section 10 of Article 1 of the Constitution provides that any law made before or after the Constitution shall be null and void if it is inconsistent with the Constitution. Thus, any encroachment on power ought to be permitted by the Constitution, being the Supreme Law of State. Any undue interference would hinder the judiciary from achieving its constitutional mandate to enhance access to justice and to administer justice independently.

In the first and historic constitutional case between the Opposition Party and the Government, the Government raised the tax base despite Section 234 of the National Assembly Act of Bhutan, 2008, providing that financial bills shall originate only in the National Assembly. The Opposition Party contended the matter of raising tax to be within the legislative domain, and hence, the tax should have been raised by Parliament, and not the Government, whereas the Government contended that it was a case of delegated legislation by Parliament to the Government. The Court ruled that the power to alter the rate of taxes belongs to the elected representatives of the people and must be approved and passed by Parliament, and any exercise of this power by

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467 Bhutan Constitution, art 1, sec. 9.
468 Ibid., art. 21, sec. 1.
the Government or any other branch of government would amount to usurpation of power. The Court also observed that once a matter is sub-judice, Parliament too must uphold the principle of separation of powers and abstain from deliberating on the matter. The Supreme Court observed,

Constitutionalism is an anti-thesis to autocracy. Therefore, the Constitution has different centres of power under vertical, horizontal and intra check and balance ensured through separation of power. The Constitution has carefully crafted the checks and balance inherent to constitutionalism.470

In this case, besides deciding on the matter before it, the Supreme Court has endeavoured to mark and make the boundary between the three arms of government more distinct and clearer by ruling on various procedural aspects provided under the Constitution. The Court has accorded high esteem to the principle of separation of powers and defined the functions of the legislature, the executive and the judiciary.

Judicial Engagement in the Protection of Rights

Upon breach of any fundamental right guaranteed by the Constitution, any person—regardless of religion, language, sex or race—has the right to motion for remedies before the High Court or Supreme Court.471 Any person can file a complaint by way of civil litigation in any court to enforce rights prescribed by other statutes too. Moreover, the Supreme Court and High Court are bestowed with the discretion to issue orders, declarations, directions or writs depending on circumstances.472

470 The Government of Bhutan vs. Opposition Party, para. 3.
471 Bhutan Constitution, art. 7, sec. 23.
472 Bhutan Constitution, art. 21, sec. 10.
Among many areas like labour rights, minority rights, and freedom of speech and association, courts in Bhutan have not notably engaged in the area of minority rights. This may be because there is no majority in ethno-linguistic terms, though there may have been in sociological terms. In 2005, the Drukpa were found to have formed the majority while the Lhotshampa formed the minority in sociological terms; with prospects for reduction of the gap, as both knew they were all a minority when alone. Since then, the first democratic election in 2008, integrated the minority with the majority with representatives from the minority being elected to the National Assembly. The Government has also been consistently endeavouring to provide public services and goods in all the regions without discrimination. Ninety-six religious organizations and forty-seven Civil Society Organizations have been registered pursuant to the freedom of religion and association guaranteed by the Constitution. Every citizen has been guaranteed the right to move any court of law in the event of being discriminated against on the basis of race or religion, or being

474 The term refers to the people living in eastern, western and northern Bhutan, and are mostly the followers of Mahayana Buddhism, according to Daniel Schäppi (cited above in note 56).
475 The term refers to people living in Southern Bhutan, and who mostly practise Hinduism, according to Daniel Schäppi (cited above in note 56).
476 Schäppi, 21.
480 Bhutan Constitution, art. 7, sec. 12.
481 Ibid., art. 7, sec. 4.
denied freedom to move or reside anywhere in Bhutan or equal opportunity to join the public service.

Given the very short time that has passed from the enactment of legislation to the adoption of the Constitution, the role of the judiciary in protecting labour rights and the freedom of speech deserves to be applauded. Recognising that most of the aggrieved restrain from moving the courts either due to ignorance of their rights or feeling too intimidated to approach a court of law, the judiciary has not missed many opportunities to protect rights through decisions. In deciding such cases, the courts—as an institution run by judges subject to human frailties—may have leaned either in favour of governmental policies or societal interests. It is in this context that this section will assess the endeavour of courts to protect labour rights and freedom of speech through judgments.

Judiciary and labour rights

Courts often regard cases, both criminal and civil litigation, involving two private parties or the State and a private party, as a platform to protect rights and alert people about their rights. The decisions convey the perception of the courts. However, to infer the approach and perception of the judiciary in protecting the rights of labour, an understanding of the evolution of labour laws, their enforcement and the conditions of labour is indispensable. Therefore, this section will proceed with a brief background.

The Thrimzhung Chhenmo had no section or chapter on labour except the general procedure for filing and adjudicating cases. The Labour and Employment Act of Bhutan, 2007, brought about significant and positive changes in labour protection by prohibiting child labour,

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482 Bhutan Constitution, art.7, sec. 7.
483 Ibid., art. 7, sec. 8.
sexual harassment and discrimination of employees. It also provides the minimum standard of health and safety conditions, and permits the formation of Workers' Associations to represent their interests. Further, the right to life, liberty and security of person, the right not to be discriminated against on the basis of religion, language, sex or race, and freedom of association have been codified by the Constitution as fundamental rights.

Going by the Millennium Development Goals Report, one would not easily agree that labour laws have been adequately enforced. Working conditions are still poor. In 2013, Kuensel, the national newspaper, reported that twenty-three Indian workers ran away from a worksite at Bumthang, a northern district of Bhutan, without working for a single day. According to the report, the investigators found out that the workers were not given clothes to bear the cold and their camps were without proper drinking water and sanitation facilities. Contradictorily, the report also stated that the workers had run away of their own free will and the labour officials could not charge the contractor due to a lack of a complaint from the workers. However, according to the Labour Act, the Labour Inspector, depending on the circumstances, is empowered to issue either an improvement or prohibition notice if the employer fails to implement the health and safety provisions under the Act. It is only after the issuance of notice that the question of charging a person arises.

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485 Bhutan Constitution, secs. 176-77.
486 Ibid., art. 7, sec. 1.
487 Ibid., art. 7, sec. 15.
488 Ibid., art. 7, sec. 12.
490 TashiDema, “Two runaway expat workers dead,” Kuensel, 03 April 2013.
In 2009, the Ministry of Labour, in its Annual Progress Report, stated that making private and corporate sectors aware of the Labour Act and ensuring obedience to the Act are two of its main objectives.\(^{491}\) However, in a report where six Indian employees of an Indian Company working in the powerhouse of a hydropower project in Wangduephodrang were buried alive in the surge chamber when muck and soil fell and blocked the entrance, the Managing Director of the Punatsangchu Hydropower Project Authority-II was quoted as saying, "[w]e are thinking of an immediate remedial measure and long-term measures."\(^{492}\) This implied that no safety measures—either short-term or long-term—were in place and that he was neither aware of nor complying with the Act. Another hydropower project\(^{493}\) was reported by Kuensel to have failed to regularize the service of temporary employees who had been working for more than a year and thereby, violated the Labour Act.\(^{494}\) In 2015, out of the thirty-seven companies assessed by the Ministry of Labour, only ten were found to have abided by the Occupational Health and Safety Standards Regulations.\(^{495}\)

However, the efforts of the executive far outweigh the reported precariousness. On 31 October 2013, the Ministry of Labour and Human Resources increased the daily National Minimum Wage rate from Nu 100\(^{496}\) a day to Nu 125 or Nu 3000 a month to Nu 3750.\(^{497}\) In 2009, the

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\(^{493}\) The project was the Mangdechhu Hydropower Project Authority.


\(^{496}\) The Bhutanese Currency is known as Ngultrum (Nu) and is on par with the Indian Rupee.

\(^{497}\) Circular No. MolHR/EOM/13/392 dated 31 October 2013 issued by the Ministry of Labour and Human Resources.
Ministry endorsed fourteen regulations pursuant to the Labour and Employment Act, mainly to attract more Bhutanese into the private and corporate sectors by improving conditions of work. The Ministry has also been working hard to implement and enforce the Act by conducting various activities. The Ministry hosted a meeting for the owners and employees of private businesses called drayangs (dance clubs) to make them aware of their rights and duties, and asked the owners to introduce provident fund schemes for their employees. Noting the preference for the public sector over the private sector by job seekers to be due to the disparity in benefits, the Ministry has proposed social protection policies, such as a private sector pension, a retirement scheme for the national workforce and unemployment insurance—all of which are being reviewed by the Gross National Happiness Commission.

The judiciary, to protect the aggrieved and to uphold the laws, has been actively participating in the protection of labour rights. While protecting rights and being a part of the State, the judiciary has also not forgotten national policies and objectives. In Passang vs. Namgyal, where the respondent, a driver, was terminated by the employer, the trial court ordered restitution of the respondent to his previous position in accordance with sections 93 and 94(a) of the Labour and Employment Act. However, the High Court ordered that the issue of the respondent's restitution to his earlier position should be dealt with in accordance with the rules of the organisation (employer).

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501 Case No. HC-09-69 dated 01 May 2009.
502 Ibid., sec. 9 of the judgment.
According to the Labour and Employment Act, if an employee is to be dismissed or reinstated in accordance with internal service rules, the rule must not fall short of the minimum terms prescribed by the Act and must be approved by the Chief Labour Administrator. The employer can summarily dismiss an employee only upon finding him guilty of serious misconduct, and for nothing less than serious misconduct even if the internal rule prescribes so. Such a provision in the internal rule would amount to violation of the Act. The trial court observed that the reason for dismissal did not amount to serious misconduct, whereas the appellate court neither mentioned the gravity of the misconduct nor the standard of the internal rule. Thus, it may be presumed that the appellate court restrained from scrutinizing the internal rule.

The planned development of Bhutan began in 1961, with development activities and a budget planned for a period of five years. The first Five-Year Plan period was from 1961-1966, and the judgment was passed during the tenth Five-Year Plan (2008-2013), during which the promotion of private sector growth was among the main objectives of the Ministry of Labour and the Government had begun the policy of boosting the private sector by enhancing access to finance, reducing taxes, and facilitating trade. By 2012, out of 183 countries, Bhutan's ranking in Doing Business moved up to 142 from 176 in 2010. The private sector's contribution to the national revenue, which stood at 1.9 percent in 2006, increased to 5.1 percent in 2010. Therefore, the appellate court's reason to favour the internal rule of an organization over the national legislation could be found in the national policy of promoting the private sector.

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503 Labour Act, secs. 78-80.
504 Ibid., sec. 87.
In one criminal case, \(^{508}\) which involved exploitation of child labour, the defendant was charged with soliciting the services of a child for sex and having raped the child. The victim was a sixteen-year-old girl and there were two charges: one for the rape of a child above twelve years of age and the other for paedophilia. The defendant denied the charges and alleged that he did not have sex with the victim but that she was kept in his house as a baby-sitter. The State failed to prove the charges of rape and paedophilia beyond reasonable doubt. However, the trial court, despite the prosecutor never having raised any questions concerning the exploitation of child labour, convicted the defendant of child abuse as he had subjected the child to unpaid labour. The Court observed that the defendant had derived economic benefits by subjecting the victim to work without the consent of either the parents or guardian, and without payment. The defendant was sentenced to two years and eleven months, but was ordered to pay fines in lieu of imprisonment since the defendant did not have a prior record of conviction.\(^{509}\) He was further ordered to pay a fine equivalent to two hundred days’ minimum wages and compensate the victim with payment for thirteen days of work for not having paid the victim in accordance with the Acceptable Forms of Child Labour Regulation, 2009.\(^{510}\)

In and around 2013, the year of the judgment, instances of people making their relatives’ children work on the pretext of providing education were not uncommon in society, although rarely reported. The Ministry of Education issued a circular on 25 October 2011 and published the Education Policy Guidelines and Instructions (EPGI) of 2012, reminding Education Officers and principals to refuse to admit children to schools located outside the area their parents lived in. This was done to ensure appropriate parental guidance, curtail rural-urban

\(^{508}\) OAG vs. Tashi Tobgay, Case No. GP-13-102 dated 19 March 2013.


\(^{510}\) Acceptable Forms of Child Labour Regulation 2009, secs. 19 and 23.
migration and check growing youth issues. Even the Labour Force Survey of 2013 did not consider baby-sitting by family members as work. However, Kuensel reporting on the exploitation of domestic helpers, quoted the President of the Bhutan Association of Women Entrepreneurs (BAOWE) as saying, "...there are employers, who treat the helpers like they aren't human beings, making them do everything from morning to night." Thus, the Court's reason to exercise its discretion—granted by section 187.3 of the CCPC—to either alter or add to any charge, and convict the defendant of child abuse and failure to pay the child, may reasonably be construed to have been swayed by the need to remedy the prevailing societal trend of domestic helpers being exploited by their employers.

In one civil case that related to compensation for labour, the plaintiff alleged that the defendant, after making his late maternal uncle work for twelve years with the promise that he would be given land as payment, failed to keep his word. The plaintiff submitted an alternate claim for either the land or wages as compensation. The defendant alleged that the deceased expired during his stay as a tenant in his house and the claim for land or wages had no legal basis. The witnesses established that the defendant had promised a plot of land and the deceased had worked and stayed in the defendant's house, whereas the defendant failed to produce any evidence indicating the existence of a landlord-tenant relationship. Later, the defendant rescinded the verbal promise but acquiesced to the deceased staying and working on his property despite the rescission of the verbal agreement. The trial court upheld the rescission of the verbal agreement made in accordance with

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section 67(a) of the Labour and Employment Act and quashed the plaintiff's claim for land, but ordered the defendant to pay the national minimum wages of ten years and two days to the plaintiff as payment for the labour of the deceased, relying on the principle of estoppel. Since there was no contractual basis to award either the land or wages to the plaintiff, the legal successor of the deceased, one could assume the court perceived the need to indicate that labour without payment is exploitation and work should be compensated.

In the first and historic constitutional case between the Opposition Party and Government, one of the issues before the constitutional bench of the High Court was whether or not the representative of the petitioner could practise before a court of law. The representative of the Opposition Party was a serving Member of Parliament, who had served as a judge and also as the Attorney General of Bhutan, before being elected as a Member of Parliament. The appellant contended that an ex-judge was barred by the Jabmi Act, 2003 from practising before a court of law while the defendant opined that the Act barring an ex-judge would infringe his fundamental right to practise any lawful trade.

The High Court admitted the petition for the reasons that the Petitioner, when he resigned to contest the election, was the Attorney General and not a judge; that he was not a "retired judge" as he had not attained the age of superannuation; that the Jabmi Act bars a retired judge from practising as a Jabmi and not from appearing for his own cause and the said appearance by representation was not a "practice" before the Court.

The Supreme Court confirmed the decision of the High Court stating that the Jabmi Act may be in contravention to the fundamental right to life, which includes the right to earn a livelihood and the right

516 Jabmi means 'Legal Counsel' according to the Constitution.
to practise any lawful trade, profession or vocation enshrined in the Constitution. The Court observing that there were sufficient provisions to check judges who practise as Jabmi from meddling with the result of a case, went a step further by suggesting that the executive frame guidelines to regulate the practice of retired judges as Jabmi. The Court observed:

Relevant guidelines may be established for individuals to practise as Jabmi after having held the post of Drangpons by Parliament through an amendment that may include:

a) Requirement of having to register as a Jabmi;
b) Being allowed to practise only in courts which are higher than the one that s/he has last held the post of Drangpon; and
c) Need to require such individuals to adhere to the conflict of interest issues.

In this case, the Supreme Court has established the right to life guaranteed by the Constitution to include the right to earn a livelihood. Thus, any issue of low wages not affording a respectable living or any condition short of a comfortable life would amount to infringement on the right to life. The failure to create and maintain working conditions set out in the Labour Act would not only violate the Act but also the Constitution and the liability of the employer may shift to the State, if the employer fails to implement health and safety standards prescribed by labour laws.

Judiciary and freedom of speech

There are a few decisions through which the courts have played a remarkable role in protecting the freedom of speech and expression. Just as the judgment is a medium between the judiciary and the people, the media—like the press and radio—play an important part in the

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17 According to the Constitution, Drangpon is a “Judge or Justice of a Royal Court of Justice.”

18 The Government of Bhutan vs. Opposition Party, para. 5.3.
enjoyment of freedom of speech and expression. However, the media would be toothless without laws granting rights and freedom, and the willingness of the State to enforce laws.

The anti-thesis of freedom of speech is defamation. The Thrimzhung Chhenmo prescribed an imprisonment from one month to three years for the publication of false information if it is related to serious matters, and a fine and compensation to the victim for other matters.\footnote{Thrimzhung Chhenmo, sec. 1.1.} In 2004, the Penal Code repealed the provisions of Thrizhung Chhenmo, but defamation is still an offence of fourth degree felony, if the false or distorted information relates to terrorism, murder, armed robbery or treason, and a petty misdemeanour with the liability to pay compensation to the victim in other cases.\footnote{Penal Code, sec. 319.} The term of imprisonment and amount of compensation for libel are the same as provided for defamation.\footnote{Ibid., sec. 321.} However, the exceptions to defamation provided by the Penal Code directly help in advancing the freedom of speech as they are interpreted as rights. For example, the exception to express \textit{bona fide} thoughts in the interest of public does not amount to defamation. In other words, it gives a person the right to express his thought if it benefits the public.\footnote{Penal Code, sec. 318(a).}

In 2006, the Bhutan Information, Communications and Media Act came into effect to implement a media policy and provide information services. The certification or performance of a film or drama can only be denied if it is detrimental to the country or a friendly State, or is likely to incite an offence or infringe on the rights and freedom of others.\footnote{Information, Communications and Media Act, 2006, secs. 108 and 115, accessed 31 January 2017, \url{http://oag.gov.bt/wp-content/uploads/2010/05/Bhutan-Information-Communications-and-Media-Act-2006English.pdf}.} According to sections 113 and 203 of the Act, the Bhutan Information and Media Authority has the power to declare any film as
detrimental to the interests of peace and stability. The Act also provides the procedures of licensing for radio, television and press. Thereafter, in 2008, the Constitution guaranteed every citizen the freedoms of speech, opinion and expression subject to reasonable restrictions.\footnote{Bhutan Constitution, art. 7, secs. 2 and 22.}

The Media Development Assessment in 2010 reported that despite people's understanding of the right to freedom of speech and expression, the exercise of this right is being impeded by traditional and bureaucratic hindrances.\footnote{Department of Information and Media in collaboration with UNESCO, UNDP and IMS, \textit{Media Development Assessment 2010}, (Bhutan, 2010), Executive Summary, xii, accessed 19 October 2016, \url{http://www.moic.gov.bt/wp-content/uploads/2016/05/MDA-Book.pdf}.} In 2013, the final report of the Bhutan Information and Media Impact Study pointed out the insufficiency of media regulations as the regulating authorities were then struggling to institute regulations for different types of media. The report recommended the facilitation of access to public information through the creation of posts for media planning officers to deliver information successfully.\footnote{Department of Information and Media with UNDP. \textit{Bhutan Information and Media Impact Study: Final Report 2013}, (Bhutan, 2013), 74-79, accessed 19 October 2016, \url{http://www.moic.gov.bt/wp-content/uploads/2016/05/media-impact-study-2013.pdf}.}

Nevertheless, however late the media laws may have been initiated, the media as a means of expression, if not progressing equally, is at least not lagging behind the economic, social and developmental needs of the country. The only newspaper, \textit{Kuensel}, began as an official news bulletin only in 1967 and the first radio broadcast began in 1973. The only television or Bhutan Broadcasting Service and internet services were introduced in 1999, and private newspapers in 2005. By 2011, there were six newspapers, one television broadcaster and seven radio channels.\footnote{KesangDema and Alan Knight, "The budding of free speech in the mountain Kingdom of Bhutan," \textit{Ejournalist.com.au} 11, no. 2, (2011): 55-56, accessed 12 October 2016, \url{http://ejournalist.com.au/v11n2/DemaKnight.pdf}.} Mobile telephony services were initiated in 2003.\footnote{Media Impact Study 2013 (cited in note 109).}
In line with the executive, the judiciary has also been vigorously participating in the protection of freedom of speech. In a case decided prior to the adoption of the Constitution, the State charged the defendant for defaming two Ministers and a senior civil servant by announcing in a conference conducted by the Anti-Corruption Commission that his business has been closed down by the three at the instance of some Indians. It was alleged that this statement was malicious and had no truth since the three alleged victims were senior officials, who had served the country for many years with dedication, and the business of the defendant was closed on the basis of the 86th National Assembly Resolution. The National Assembly in this session resolved that instead of a ban, the taxes for “Playwin”—an online lottery—should be increased and tender procedures formulated. The trial court exonerated the defendant of the charge by observing:

The act of defendant is deplorable but not imputable under the various provisions of law sought by the prosecutor to be imputed. The material facts reveal that the statement made in the public forum by the defendant is protected by the law that he has a right to express his thoughts. The forum invited all walks of life to attend on the subject of corruption.

The Court touching on the rule of law and the role of courts in protecting the right to freedom of speech of citizens observed:

The very essence of liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives any injury. The Royal government of Bhutan has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the court of law does not interpret as deem[ed] fit for the protection of the vested legal right of the Bhutanese citizens.

530 Office of the Attorney General vs. Sangay Dorji.
531 Ibid.
The High Court upheld the decision of the trial court *in toto* and dismissed the appeal filed by the State. The Constitution was yet to be adopted and the Penal Code did not provide rights. However, one can read rights in between the lines of the decision. It was around the time of the judgment that consultation meetings on the Constitution in all the districts were completed and the most discussed topic was fundamental rights, in addition to judges' understanding of freedom of speech as an internationally acclaimed right. The Constitution was adopted within a fortnight of the judgment. Thus, in the absence of a law with specific provisions for the right to freedom of speech, this specific fundamental right took the shape of an exception to defamation.

In a post-Constitution case, where the petitioner alleged that the defendant had defamed his wife and him by imputing the status of a thief to him and that of a prostitute to his wife, the trial court, taking cognizance of verbal argument as an assault, ordered the defendant to pay a fine. The petitioner appealed to the High Court on the grounds that the trial court failed to convict the defendant for defamation though the witnesses deposed the defendant to have said the defamatory words.

The High Court, holding that the defendant has defamed the petitioner, convicted the defendant to one month of imprisonment and ordered him to pay a fine in lieu of imprisonment. The defendant was also ordered to pay damages to the petitioner. Though the trial court reasoned the defamatory words were uttered during an argument, the appellate court did not reason as to why it was defamation and not assault. Legally, the reason could be the requirements of the section as the definition of assault includes apprehension of bodily injury to the aggrieved, while defamation includes damage to the reputation. A more likely reason could be the parties involved. In the pre-Constitution case, one of the parties was the State, which is the protector of freedom, and the general tendency of every society is to criticize a State

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functionary when public services are seen as lacking. In the post-Constitution case, both the parties were private parties who had an obligation to respect each other's freedom.

The nominal engagement of the judiciary by way of intervention on its own, is not because the courts are blind to infringement of rights; but because the laws have been passed quite recently and the Constitution forbids the judiciary from encroaching on the powers of the executive and the legislature. Moreover, guided by the developmental philosophy of Gross National Happiness (GNH), blatant disregard for rights seldom happens in Bhutan, and even if it occurs, the Supreme Court has started to exercise the power of writ within the confines of the Constitution to translate written rights to enjoyable rights.

In 2015, reiterating the duty of the executive to execute judgments in accordance with the CCPC, the Supreme Court, by a directive, reminded the Chief of Police and the Attorney General of Bhutan that in the event of an elected person being convicted by a court of law, it is their duty to report it to the Government for the purpose of implementing the dos and don'ts prescribed in the Constitution and the Election Act, and to execute the judgments in consultation with other relevant authorities. The recent issuance of a writ by the Supreme Court, directing the Election Commission of Bhutan, to stay the Thromde Elections (Municipal Elections) in the districts, until a special commission of legal experts was formed—and laws made consistent—is an example of the judiciary advancing its role for the protection of rights and general welfare on its own motion. The Court, in the order, clarified that the Constitution is the Supreme Law of the State and the Supreme Court is the guardian and final authority on the interpretation of the

53 Bhutan Constitution, art. 1, sec. 13.
54 CCPC, sec. 2.1.
Constitution, and declared section 196 of the Election Act null and void as it contradicted section 5 of Article 24 of the Constitution.\(^{39}\) In the explanatory note to the writ, the Court, noting that some citizens, despite having the right to vote by direct adult suffrage, have been unable to participate in election meetings, and acknowledging the importance of letting people participate in such meetings, directed the Election Commission to create better occasions benefitting the general welfare and ensure that citizens are not separated from their rights.\(^{40}\)

Conclusion

The above assessment leads to only one conclusion: The judiciary of Bhutan has been progressively working towards the enhancement of access to justice. The Constitution has affirmed the structure of courts prescribed under earlier statutes. The courts, except a few, have been separated from the administrative centres and have been provided with independent buildings. The tenure of Justices of the Supreme Court and the High Court has been guaranteed by the Constitution and the procedures of appointment and removal of other judicial personnel by other laws. The Supreme Court is the final authority on the interpretation of the Constitution which enshrines separation of powers. Thus, the structural and functional independence of the judiciary is blooming.

The judiciary may seem slow, but it has been dynamic in protecting rights. Despite a negligible number of cases, it has seized every opportunity to protect labour rights and freedom of speech. It has begun to exercise writ jurisdiction to supplement the country’s developmental philosophy of Gross National Happiness. Thus, aspiring to become the best in the region may be too optimistic, but to describe the Bhutanese judiciary as trailing behind other judiciaries in the region would also be too pessimistic.

\(^{39}\) Writ No. SC (54)-2016/1561 dated 05 August 2016.

\(^{40}\) Explanatory Note No.: SC (54)-2016/1651 dated 15 August 2016, para. 3.
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INDEPENDENCE OF THE JUDICIARY IN NEPAL: CONCEPT, CONTEXT AND CONCERNS

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Introduction

In South Asia, Nepal has a territorially and functionally differentiated judicial system, with the Supreme Court as the highest court of the country. An independent, impartial and competent judiciary and the concept of the rule of law have been recognized as foundational values in the Constitution of Nepal 2015.541 Part 11 of the Constitution (Articles 126 to 156) has laid down the basis for an independent, impartial and competent judiciary, which has been mandated to exercise powers relating to justice in accordance with this Constitution, the other laws in prevalence and universally recognized principles of justice. The constitutional arrangement is consistent with internationally accepted basic principles on the independence of the judiciary. The elaborated constitutional provisions have paved a way for a judiciary independent in its functions.

The Nepalese judiciary is working with the vision to institutionalise an independent, competent and effective system of justice and to protect the rule of law, civil rights and freedom of citizens to ensure justice for all.542 The core mission set forth by the Nepalese judiciary is to dispense fair and impartial justice in accordance with the provisions of the Constitution, other laws and the recognized principles of justice. The judiciary has acknowledged the following as its core values: allegiance to the Constitution and the law, independence, autonomy, accountability, quality, good conduct, representation, inclusiveness, fairness, equality and impartiality.

The Constitution of Nepal has made the judiciary independent and powerful. It has sought to establish judicial supremacy in governance. It is expected that the Supreme Court shall play a significant role in promoting and protecting human rights as well as entrenching

important principles through its judgments. It also has a right to issue directive orders for formulating necessary enabling laws. Further, the Supreme Court can also advance a public interest litigation regime for the protection and promotion of public interest and human rights, enabling the public to seek redress against violations of a range of human rights. Public interest litigation has frequently been resorted to in the past, and its contribution in promoting the rule of law and due process of law, among other issues, is vital. The contribution of the Supreme Court of Nepal in consolidating the democratic culture in Nepal is significant. Even in promulgating the present Constitution, by inhibiting the act of indefinitely extending the Constituent Assembly’s tenure, the contribution of the Supreme Court is unforgettable. It was by the decision of the Supreme Court that the new Constituent Assembly election was held, and the Assembly was then able to promulgate the present Constitution within a short period of time.

In the context of judicial functions, the recent findings of the World Justice Project Rule of Law Index 2016—based on considerations of constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, criminal justice and informal justice—ranks the Nepalese judiciary ahead of other South Asian countries and 63rd among 113 countries, with an overall score of 0.52. It is an encouraging finding although the study does not reflect the overall performance index of the judiciary. The judiciary has demonstrated a commitment to promoting the rule of law and to increasing public trust

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54 Nepal Constitution, arts. 133-134.
544 Bharatmanijungamvs. Office of the President and Others, Writ No. 68-ws-0014, http://www.supremecourt.gov.np/web/assets/downloads/judgements/Constitution_Assembly_Case.pdf. This case related to the extension of tenure of the Constituent Assembly. It was held that those state organs exercising the power delegated by the sovereign people shall have no right to use the doctrine of necessity as a tool of defence for concealing their repeated omission of duty and long indecisiveness having a direct impact on the fate of the nation and her people.
and faith in the judiciary. It has undertaken a planned reform process in the form of a five-year strategic plan, which commenced from the year 2004/2005, with the third five-year plan being implemented until 2018/19.

Constitutional Arrangements: A Brief Overview

Like its predecessor, the Constitution of Nepal, 2015 recognizes an independent, impartial and competent judiciary as a prerequisite state apparatus for the observance of the rule of law. Part 11 of the Constitution has spelt out the provisions relating to the judiciary in thirty elaborated articles. The blueprint for the independence of the judiciary is reflected in these constitutional provisions. The constitutional provisions have shed light on the institutional architecture, normative context, structure and composition of the judiciary, as well as enabling norms pertaining to the functioning of the judiciary.

The principal provision enshrined in the Constitution can be explained under the following headings:

Structure of the judiciary

The Constitution has designated a three-tier judiciary that includes the Supreme Court, High Court, and District Court. The Constitution also recognizes the prospect of specialized courts and the formation of other judicial bodies required to pursue the policy of an alternative dispute settlement process. The Supreme Court, headed by the Chief Justice, spearheads judicial administration and management. It is also recognized as the court of record entrusted with the authority to interpret or construe the Constitution and the laws of Nepal. The Supreme Court is also responsible for the inspection and supervision of and the provision of necessary directives to all subordinate judicial bodies to ensure effective judicial administration in the country.

546 Nepal Constitution, art. 127.
The Constitutional Council, Judicial Council and Judicial Service Commission also play an instrumental role within the judicial structure as envisioned in the Constitution. The Constitutional Council is responsible for the recommendation of the prospective Chief Justice for the approval of the President.\textsuperscript{547} The Judicial Council makes recommendations and plays an advisory role in the appointment, transfer, taking of disciplinary action and dismissal of judges and in other matters relating to the administration of justice.\textsuperscript{548} Similarly, the Judicial Service Commission is responsible for forwarding recommendations relating to the appointment, transfer or promotion of gazetted officers of the Federal Judicial Service or taking departmental action concerning such officers in accordance with the law.\textsuperscript{549}

**On the question of jurisdiction**

The Constitution has spelt out the jurisdictional competence of the courts in all three tiers including that of specialized courts.

**Supreme Court**\textsuperscript{550}

The jurisdiction of the Supreme Court includes regular jurisdiction over appeal cases, review of appeals and extra-ordinary jurisdiction over writ petitions to declare any laws void on the grounds of inconsistency with the Constitution. The Supreme Court under its extra-ordinary jurisdiction may also hear individual petitions, public interest concerns and cases involving constitutional or legal questions for the enforcement of the fundamental rights conferred by the Constitution of Nepal. The Court also has an obligation to hear cases on the encroachment of legal rights for which no other remedy has been provided in any other laws or if the remedy, even though provided,

\textsuperscript{547} Nepal Constitution, art. 284.
\textsuperscript{54} Ibid., art. 153.
\textsuperscript{549} Ibid., art. 154.
\textsuperscript{549} Ibid., arts. 133-134.
is deemed inadequate or ineffective for the settlement of the dispute. The Supreme Court also exercises other powers and procedures as provided in Federal law.

High Court\textsuperscript{551}

The jurisdiction of the High Court allows it to originally try and settle cases, hear appeals and test judgments referred for confirmation. Further, similar to the functions of the Supreme Court, the High Court exercises the power to issue necessary and appropriate orders, and writs including the writs of habeas corpus, mandamus, certiorari, prohibition and quo warranto. In addition, the High Court also exercises other powers and procedures as provided for by federal law.

The High Court, in a situation where judicial impartiality is in question, may transfer a case from one District Court to another District Court under its jurisdiction.

District Court\textsuperscript{552}

The District Court is the court of the first instance. Further, the District Court enjoys jurisdiction over the local-level judicial bodies established in accordance with State law. The District Court may inspect, supervise, give necessary direction to its subordinate judicial bodies and exercise writ jurisdiction in cases of injunctions and habeas corpus.

Besides the provision on jurisdictional issues, the Constitution has also spelt out the power of the Supreme Court and High Courts to transfer sub judice cases, if the case merits it. Further, the Constitutional Bench in the Supreme Court is also envisioned in the Constitution as having jurisdiction over a) the disputes relating to jurisdiction between

\textsuperscript{551} Nepal Constitution, art. 144-145.

\textsuperscript{552} Ibid., art. 148.
the Federation and a State, between States, between a State and a local level government and between local level governments, b) disputes relating to the election of members of the Federal Parliament or State Assembly and matters relating to the disqualification of a member of the Federal Parliament or of the State Assembly, and c) disputes involving a question of serious constitutional interpretation.

**Appointment and qualifications of judges**

The Constitution has made arrangements to ensure the appointment of highly qualified individuals to the positions of the Chief Justice, judges of the Supreme Court, Chief Judge, judges of the High Court and the District Court. The provisions specify the required qualifications and the process by which judges are appointed. For instance, the President shall appoint the Chief Justice on the recommendation of the Constitutional Council and other judges of the Supreme Court on the recommendation of the Judicial Council. Whereas, the Chief Justice shall, on the recommendation of the Judicial Council, appoint the Chief Judge, judges of the High Court and judges of the District Court.

In terms of qualifications, the Constitution has clarified the required qualifications to be eligible to be appointed as a justice in the different tiers of the judiciary. The required qualifications are specific to each judicial position and consider factors such as prior work, education, legal practice and judicial service while determining eligibility for appointment. For instance, any person who has served as a judge of the Supreme Court for at least three years is qualified to be appointed as the Chief Justice for a tenure of six years. However, in the case of a judge of the Supreme Court, any citizen of Nepal who has obtained a

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53 The Chief Justice is the chief judge of the Supreme Court of Nepal who also heads the judicial branch of Nepal whereas the Chief Judge is the head amongst the High Court Judges of a particular high court.

54 Nepal Constitution, arts. 129, 140 and 149.
Bachelor's degree in law and served as the Chief Judge or a judge of a High Court for at least five years or who has obtained a Bachelor's degree in law and constantly practised law as a senior advocate or advocate for at least fifteen years or who is a distinguished jurist having constantly worked for at least fifteen years in the judicial or legal field or who has served in the post of a gazetted first class or a higher post of the judicial service for at least twelve years, is deemed to be qualified for appointment as a judge of the Supreme Court. Similar criterion has been set for appointment as the Chief Judge or a judge of the High Court.

When appointing judges to the District Courts, the requirements include the following,

a) twenty percent of the vacant posts must be filled, on the basis of an evaluation of seniority, qualification, and competence, by candidates chosen from amongst officers who have obtained a Bachelor's degree in law and served for at least three years in the post in the gazetted Second Class of the judicial service,

b) forty percent of the vacant posts must be filled, on the basis of an open competitive examination, by candidates selected from amongst the officers who have obtained a Bachelor's degree in law and served for at least three years in the post in the gazetted Second Class of the judicial service,

c) the remaining forty percent of the vacant posts must be filled, on the basis of an open competitive examination, by candidates selected from amongst citizens of Nepal who, having obtained a Bachelor's degree in law, have constantly practised law for at least eight years as an advocate or who, having obtained a Bachelor's degree in law, have served in a gazetted post of the judicial service for at least eight years or have constantly been engaged in the teaching or research of law or served in any other field of law or justice for at least eight years.\textsuperscript{153}

\textsuperscript{153} Nepal Constitution, art. 149.
Provisions on the qualifications required to be appointed as judges clearly reflect the intent to appoint highly qualified individuals as judges.

**Reporting obligation**

The Constitution also spells out an annual reporting obligation to the Supreme Court, Judicial Council and Judicial Service Commission. The annual report is submitted to the President, and the President shall submit such reports to the Federal Parliament through the Prime Minister. Upon deliberating on the annual reports submitted to the Federal Parliament, Parliament, if necessary, may provide suggestions to the concerned body through the Ministry of Law and the Justice of Nepal. This reporting obligation ensures a balance of power between the executive and the judiciary.

**Engagement in the practice of law**

The Constitution provides that the Chief Justice or judge of the Supreme Court after retirement from service may not be engaged in the practice of law, mediation or arbitration proceedings before any office or court. However, a retired judge of a High Court may be eligible to engage in the practice of law before the Supreme Court and a High Court, other than the High Court where he or she has served as a judge during his/her working tenure and a subordinate court.

The restriction on the engagement of retired judges in the practice of law has been driven by the idea of maintaining the delicate balance between the bar and the bench. However, retired Chief Justices or retired judges of the Supreme Court of Nepal are eligible to be appointed as the Chairperson or a member of the National Human Rights Commission under the Constitution of Nepal.

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556 Ibid., art. 138.
557 Nepal Constitution., arts. 135 and 146.
558 Ibid., art. 248(6).
Other provisions

The Constitution also sets out conditions of service and facilities of the Chief Justice and other judges, vacation of office by the Chief Justice or judge, non-engagement of judges in any other office, provisions relating to transfers, provisions relating to the Judicial Council, and provisions relating to the Judicial Service Commission. The Constitution also specifies the responsibility of the Chief Justice and Chief Judge of the High Court for the effective administration of justice.

The constitutional provisions reflect that Nepal has a structurally independent judiciary as one of the basic features of the Constitution. The provision of the structure, jurisdiction and other domains of the judiciary implies that the Constitution backs judicial supremacy in Nepal. The constitutional arrangements do not indicate any alarming concerns with regard to the independence of the judiciary and judicial accountability.

Independence of the Judiciary in Nepal: Reflection on Judicial Decisions

The independence of the judiciary is very much reflected in the decisions the courts make. An analysis of case decisions and jurisprudence set by the judiciary of Nepal clearly indicates that the independence of the judiciary is emphasized and practised in Nepal. Decisions issued by the courts in the domains of social, economic and democratic rights clearly indicate that courts exercise full independence and freedom from interference. The judgments issued by the Supreme Court in a number of cases reflect that the role of the judiciary is established as the guardian of the Constitution.

Nepal Constitution, arts. 130-132, 136, 141, 142, 146, and 149.
Judicial engagement in the social rights cleavage

The judiciary has been progressive in matters concerning social rights claims and in giving its final verdicts. The Supreme Court has upheld international human rights law and made exemplary judgments in cases relating to various aspects of social life.

Gender equality, reproductive health, protection of the vulnerable, cases of bonded labour, LGBTI rights, caste-based discrimination, protection of elderly people and persons living with disability are some of the issues relating to the social cleavage where the judiciary stepped up to ensure that claims and rights were protected.

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560 Advocate Prakash Mani Sharma and Others vs. Office of Prime Minister and Cabinet, NKP 2067, DN 8456, Full Bench (case related to property of women); Dil Bahadur Biswhokarma vs. Then Government of Nepal, NKP 2062, DN 7603, Full Bench (case related to discrimination of women in access to the Sanskrit University hostel) and Punyawati Pathak vs. Then Government of Nepal, NKP 2062, DN 7585, Division Bench (case related to women having to get consent while obtaining a passport).

561 Forum for Protection of Public Interest (Pro Public) and Others vs. Then Government of Nepal, NKP 2060, DN 7268, Full Bench (case regarding maternal care and maternal leave increment) and Laxmi Devi Diktha vs. Nepal Government, NKP 2067, DN 8464, Division Bench (case regarding abortion and reproductive rights).

562 Advocate Kabita Pandey vs. Nepal Government, NKP 2067, DN 8411, Division Bench (case regarding the protection of single women).

563 Uttam Tamata vs. Nepal Government, NKP 2064, DN 7895, Division Bench (case regarding rehabilitation of freed bonded labour) and Som Prasad Paneru vs. Then Government of Nepal, NKP 2063, DN 7705, Division Bench (case regarding the practice of kamala).

564 Sunil Babu Pant vs. Nepal Government, NKP 2065, DN 7958, Division Bench (case regarding the protection of LGBTI rights).

565 Mohan Sashankar vs. Ministry of Education and Sports, NKP 2067, DN 8379, Division Bench (case regarding admission of everyone in Nepal BedhBidhyashram) and Nepal Government vs. Tek Bahadur Bista, NKP 2069, DN 8863, Division Bench (criminal case regarding caste-based discrimination).

566 Advocate Chandra Kanta Gyawali vs. Prime Minister and Council of Ministers, NKP 2063, DN 7643, Division Bench (relating to the protection of elderly people).

567 Raju Chapagain and Others vs. Office of Prime Minister and Cabinet, NKP 2066, DN 8053, Full Bench (case repealing the provision of strict detention for the insane) and Forum for Protection of Public Interest (Pro Public) vs. Ministry of Women, Children and Social Welfare, NKP 2064, DN 7896, Division Bench (case regarding the special treatment of persons with disability).
and upheld. These court decisions have led to the enactment of new legislation, changes in legislation, declaration of laws as unconstitutional, directive orders to the government and the banning of certain social practices through exemplary judgments. A study of cases raising social claims indicates that the judiciary has delivered some landmark judgments in the cases that come before it.

In some of the cases concerning social rights, the Supreme Court has given various exemplary decisions. For instance, on 21 December 2007, the Supreme Court ruled that the Government must enact laws to enable equal rights to protect LGBTI rights and change existing laws that are tantamount to discrimination. While not explicitly legalizing same-sex marriage, the ruling of the Court instructed the Government to form a committee to look into same-sex marriages. The Court held that it is an inherent right of an adult to have marital relations with another adult with his/her free consent and according to his/her free will. Further, the Court declared various legal provisions null and void to protect the social rights of citizens and gave a directive order to the Government to enact proper legislation in line with the Constitution and international law.

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568 Homlal Shrestha vs. Interim Parliament, Singadurbar, NKP 2066, DN 8217, Division Bench (case related to the banning of smoking in public places resulting in the subsequent enactment of new legislation).

569 Sapana Pradhan Malla vs. Nepal Government, NKP 2065, DN 8038, Division Bench (case where the Court in the year 2008, asked to increase the limitation in rape cases which was subsequently increased by Parliament in 2016).

570 Raju Chapagain and Others vs. Office of Prime Minister and Cabinet, NKP 2066, DN 8053, Full Bench (case repealing the provision of strict detention for the insane).

571 Pooja Khatri and others vs. Nepal Government, Writ No. 069-WO-0059, Full Bench (case whereby the Court ordered the government to change discriminatory legal provisions relating to human organ transplants) and Forum for Protection of Public Interest (Pro Public) vs. Nepal Government, Ministry of Women, Children and Social Welfare, NKP 2065, DN 8005, Division Bench (case issuing an order to regulate dance clubs in Nepal along with a mandatory directive).

572 Dil Bahadur Bishwokarma vs. Then Government of Nepal, NKP 2062, DN 7531, Division Bench (case relating to an order by the Court to abolish the practice of chhaupadi in far western Nepal) and Kabita Pandey vs. Government of Nepal, NKP 2069, DN 8901, Division Bench (case relating to an order by the Court to abolish the practice of baikalya in Terai).

573 Sunil Babu Pant vs. The Prime Minister and Council of Ministers et al, 2064 BS/ Writ No. 917, year 2064 BS. The Court ruled that the Government must enact laws to enable equal rights to protect LGBTI rights and change existing laws that are tantamount to discrimination.
However, the pertinent question relating to social claims is the component regarding access to justice, which has not been an easy process for the judiciary of Nepal. Accessibility and public trust and faith in the judiciary are important variables in protecting and promoting social rights. The social claims that have been brought before the Supreme Court led to positive changes but equally important are concerns of access to justice, which need to be considered.

Judicial engagement in the economic rights cleavage

The attitude of the judiciary in relation to economic cleavages can be extracted from court judgments in cases related to economic rights. The most significant aspects of economic cleavages widely addressed by the Supreme Court in Nepal are rights regarding trade unions, labour rights, legal aid, rights of women working in the entertainment sector, the

576 Udayan Ganguli vs. Labour Court and Others, NKP 2069, DN 8892, Division Bench (regarding the rights of contractual workers and limited applicability of the Labour Act) and Surendra Lal Suwal vs. Labour Court and Others, NKP 2069, DN 8879, Division Bench (regarding the protection of the rights of workers regardless of a change in management).
577 Yagya Murti Banjade vs. Durga Das Shrestha, NLR 2027, 157 (ensuring legal aid rights under the Constitution).
578 Prakash Mani Sharma vs. Ministry of Women, Children and Social Welfare & Others, SCN, Writ No. 2822 of 2062. The Supreme Court gave an order requiring the State to enforce international standards and protection of women in the workplace as guaranteed in the Constitution.

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right to education,\textsuperscript{579} the right to food\textsuperscript{580} and other fundamental rights guaranteed under the Constitution of Nepal. The judgments of the court in most of the cases have resorted to international norms and obligations \textit{vis-à-vis} economic rights.

There are instances where the Supreme Court of Nepal has rendered some influential jurisprudence in line with international norms and standards in issues regarding the rights of trade unions. The Court, for instance, has referenced ILO Conventions while determining an important case regarding rights of a worker and protection against discrimination, including other fundamental rights of a trade union. As such, adequate protection against acts or anti-discrimination in respect of the employment of trade unions has been guaranteed by the Court though the case.\textsuperscript{581}

Similarly, the Supreme Court of Nepal has played an instrumental role in developing the legal aid scheme in the country. Recognising the fundamental right to consult the lawyer of choice, securing representation and realizing the financial reality of being able to afford representation, the government of Nepal, through the initiation of the Supreme Court, developed a legal aid scheme for the first time in 1958.\textsuperscript{582} The Supreme Court has progressively realized the importance

\textsuperscript{579} Dilbahadur Bishwakarma and Others vs. Cabinet Secretariat and Others, Writ No. 7531 of year 2005 (2062), (it involved a directive order against a social practice, known as chhaupadipratha) and Prakash Mani Sharma and Others, Writ No. 0388 of year 2065 (the Supreme Court of Nepal has also acknowledged the right to food as a fundamental right, which is guaranteed as the right to food sovereignty in the Constitution).

\textsuperscript{580} Bajuddin Miya and Others vs. the Prime Minister, the Office of Council of Ministers and Others, NKP. 961 (2066 BS or AD 2009). Upholding the right to food, to be free from hunger and the claimants' right to compensation for the loss of crops, the Court ordered the constitution of a permanent committee for processing the claims of affected people.

\textsuperscript{581} Dataram Rijal et al. vs. Self Sustain Development Centre, No. 2061 BS(AD 2004). The Court cited the Right to Organize and Collective Bargaining Convention, 1949, art. 1.1 and stated that that the worker shall enjoy adequate protection against acts of discrimination in respect to their employment.

\textsuperscript{582} Bhim Rawal, "Free Legal Aid: Development, Recognition and its Possibilities with Reference to Nepal," \textit{Nyayadoot}, no. 49, 3.
of legal aid and in various judgments has encouraged free legal aid to poor and helpless individuals. This has also been reflected in the cases decided by the Supreme Court in matters concerning legal aid.

Further, the Supreme Court of Nepal has deliberately considered issues and cases dealing with both gender and caste discrimination. In 1995, discriminatory laws governing inheritance of property were challenged as unconstitutional. While the Court did not only strike the law down as unconstitutional, it also ordered the Parliament to deliberate on the issue and introduce a bill reforming property rights for women.583

The judiciary has had positive judgments with regard to issues concerning the right to employment guaranteed under the Constitution of Nepal. The Court has interpreted the right to employment as part of the right to live with human dignity and linked it with the right to equality, the ban on untouchability and racial discrimination, the right to environment and health, the right to education and culture, women's rights, the right to social justice and the rights of the child.584

In the same milieu, the Supreme Court's directive orders have been influential in determining educational rights as being a fundamental concern vis-à-vis the economic rights of citizens. In some cases, the Supreme Court has observed that education is a matter to be realized subject to the availability of economic resources. For instance, permitting a school committee to charge additional fees when required was held inconsistent with the Constitution and prevailing law. In another instance, the Court has followed up on the implementation of the

583 Sapana Pradhan Malla vs. HMG, Writ No. 3561 year 2063 BS. The Court issued a directive order to make laws that protect the privacy of victims, i.e., women, children and HIV/AIDS patients.
584 Prem Bahadur Khadka and Others vs. Government of Nepal and Others, SCN, Writ No. 066-WO-07193, year 2009. The Court interpreted the right to employment as part of the right to equality, the right to freedom from discrimination, the right to health, the right to education and culture and the right to social justice.
decision it has rendered during the case; the Court had issued a directive
order and later also observed that books were being provided to students
in these schools and that free education for students from families below
the poverty line, Dalit and ethnic communities and girl students, up to
lower secondary and secondary level was being implemented.585

Against this backdrop, the judiciary of Nepal has been
determinedly progressive in relation to the economic dominion of rights
guaranteed under the Constitution and different national laws. In 2007,
the judiciary of Nepal established a monitoring division to oversee and
scrutinize the implementation of the decisions/directive orders it has
made and to interact with the relevant stakeholders regarding the same.
Following this, it has also established a Judgement Implementation
Directorate.586 However, in many instances, economic concerns are
recognized as unjustifiable in courts and have to be progressively realized
over due course of time.587 The implementation of judgments regarding
economic rights have been sluggish and a major challenge that needs to
be seriously scrutinized especially in the light of economic cleavages.
However, the Supreme Court of Nepal has also frequently been criticized
for being too proactive and, in particular, being overly influenced by
non-governmental organizations (NGOs). It is also alleged that NGOs
lead the changes induced through courts and at times judgments are
swayed by popularity concerns.

585 Mohan Kumar Karna and Others vs. Ministry of Education and Sports, SCN, March 2003,
N.K.P. 2060 No. 7/8, 51. The Court observed that education was a matter to be
realised subject to the availability of economic resources.
586 Ibid.
2055. It was accepted that ensuring the progressive realization of food to the people
was an obligation of the State.
Judicial engagement in the democratic rights cleavage

The judiciary of Nepal has been much in favour of and committed to upholding democratic rights in its judgments. The Supreme Court has ensured the civil rights of individuals through landmark judgments in cases relating to citizenship rights, privacy rights and other fundamental rights guaranteed under the Constitution.

In 2005, the Court, in a historic case, deemed the Royal Commission for Corruption Control (the state organ established during the royal regime to investigate corruption issues) unconstitutional. In another landmark case, the Supreme Court convicted the former Home Minister, Khum Bahadur Khadka, of corruption. Khadka was a popular Nepalese Congress leader who had frequent tenures as a minister in the Government of Nepal. He was slapped with a prison term of one-and-a-half years and a fine. In January 2017, in a landmark verdict, the Supreme Court disqualified the chief of the Commission for the Investigation of Abuse of Authority (CIAA), stating that he did not hold the “high moral character” required to lead the CIAA and did not meet the criteria set to head the constitutional body. The order annulled the appointment of the head of the Constitutional body in this unprecedented case.

The Court, in a wide number of cases, has actively protected the democratic rights of citizens, scrutinized the Government and punished high-ranking officials, thereby reflecting the independence of the judiciary. Further, the judiciary is tolerant towards fair criticism. In

588 Rajeev Parajuli vs. Royal Commission on Corruption Control, Writ No. 118 year 2062 BS (2005 AD). The Court declared the formation of the Royal Commission for Corruption Control void.
the question of alleged contempt of court, it was ruled that the Supreme Court does not enjoy immunity from fair criticism and does not claim itself to be always right. Hence, it did not seem appropriate to call the publication of a cartoon, (a blindfolded monkey resembling the then Honourable Chief Justice of Nepal), contempt of court.\(^{591}\)

The courts have played an important role in preventing abuse of discretionary power by administrative authorities. Judicial review of administrative action and enforcement of fundamental rights remain the top agenda on the list of writ petitions filed before the Supreme Court and Appellate Courts.\(^{592}\) Its role in the enforcement of the rule of law and constitutional norms has been widely recognized. Judgments delivered by courts in matters associated with democratic rights clearly reflect the functional independence of the judiciary. There are instances where the judiciary has stood tall as the guardian of the Constitution in significant cases; for instance, cases concerning the implementation of judgments delivered by the Supreme Court,\(^{593}\) the question of the legality of government institutions,\(^{594}\) compatibility of legislation with the Constitution and applicable international law\(^{595}\) and adherence to international law that Nepal has ratified.\(^{596}\) The rights of various

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591 Santosh Bhattarai vs. Kanakmani Dixit, the HimalKhabarPatrika Ltd., 2060 BS (AD 2003) Criminal Misc. No. 91 of 2060. The Court did not deem it appropriate to call the publication of a cartoon, contempt of court.


593 MeeraDhungana vs. Office of the Prime Minister, No. 064-WO-1074, decided on 2066 BS (it related to making arrangements to effectively implement the decision and directive order given by the Supreme Court).

594 Rajeev Parajuli vs. Royal Commission on Corruption Control, Writ No. 118 of the year 2062 BS (AD 2005). The Court declared the formation of the Royal Commission for Corruption Control void.

595 Advocate Madhav Kumar Basnet vs. Office of Prime Minister and Others, No. 064-WS-0028. The Court declared that some sections of the Army Act were incompatible with the Constitution and hence void.

596 Mohamud Rashid vs. Ministry of Home and Others, Writ No. 0039, 2044, (the Court recognized the doctrine of non-refoulement) and Obunneme Michael Ozor vs. Government of Nepal, No. 067-CR-0538 (the case explored the right to a translator under a free trial).
individuals including non-nationals have also been protected by the Supreme Court while enforcing fundamental rights.

On the basis of the case law and jurisprudence set by the Court, the independence of the Court is evident. The judgments delivered by the Court reflect the positive and constructive engagement of the judiciary in social, economic and civil rights aspects. The judiciary has played a constructive role in enhancing the rights of its citizens and has justified its aspiration as the guardian of the Constitution.

The engagement of the judiciary in a case concerning aspects of the transitional justice process has challenged the legality of governmental actions to address transitional justice concerns. The fundamental rights of citizens have been protected by the Court reflecting that constitutional supremacy is anchored in the independence

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97 Durga Soba vs. Secretariat of Council of Ministers and Others, Writ No. 3643, 2057 BS; Mohamud Rashid vs. Ministry of Home and Others, Writ No. 0039, 2044 (where the doctrine of non-refoulement was recognised); Laxmi Devi Dikita and Others vs. Office of Prime Minister, Writ No. 0757, 2063 (related to the right to privacy and maintaining privacy of those seeking an abortion) and Sapana Pradhan Malla vs. Office of Prime Ministers and Others, Writ No. 3561, 2063 BS where the Court issued a directive order to make laws to protect the privacy of victims.

98 Suman Adhikari and Others vs. Office of the Prime Minister and Council of Minister and Others, Writ No. 070-WS-0050, where the Court rejected, for the second time, the amnesty provision featured in the 'Commission on Investigation of Disappeared Persons, Truth and Reconciliation Act, 2014' [TRC Act]; Rajendra Prasad Dhakal and Others vs. Government of Nepal, Ministry of Home Affairs and Others where the Court directed the Government of Nepal to criminalize enforced disappearance in accordance with the UN International Convention for the Protection of All Persons from Enforced Disappearance and to ensure that amnesties and pardons are not awarded to those suspected or found guilty of those crimes; Government of Nepal vs. Gagan Raya Yadav, Criminal Appeal No. 3302, 2061, where the Court held that the government’s legal right to withdraw a case is a very important right; Sunil Ranjan Singh and Others vs. Office of the Prime Minister and Council of Ministers and Others, Writ Petition No. 1198, year 2067 (it involved the challenge of the promotion of a police officer to the rank of Inspector General of Police on the grounds of his involvement in enforced disappearances); Govinda Sharma ‘Bandi’ vs. Attorney General Mukti Narayan Pradhan and Others (2070) 55:12 NKP 1484, (an instruction by the Attorney General to hold a criminal investigation and prosecution of a conflict-era murder case was challenged in one case).
of the judiciary in Nepal. The country has a strong constitutional tradition of guaranteeing fundamental rights together with an independent judiciary as an immutable safeguard of such rights.\textsuperscript{599} Despite this, there are concerns relating to access to justice, execution of judicial decisions and the interplay between political forces and the judiciary.

The latest report by the National Human Rights Commission (NHRC) identifies the rule of law as one of the most significant human rights concerns in Nepal. The report considers the failure of the Government to ensure accountability in the case of human rights violations during the period of armed conflict and widespread impunity in the country as a challenge to the rule of law. Further, the NHRC states that the Government has not yet implemented the Human Rights Committee’s recommendations in matters concerning access to justice. The report emphasizes the implementation of laws and political commitment as a prerequisite of adherence to the rule of law in Nepal.\textsuperscript{600}

Efforts of the judiciary to enhance access to justice

The judiciary is making an effort to enhance access to justice through the implementation of strategic plans. At present, the Third Five-Year Strategic Plan is underway and is aimed at strengthening the judiciary in general. Focused on augmenting good governance and enhancing access to justice and accessibility, the strategic plan sees the judiciary turning its attention to the following priority areas:


a) Revising and reducing legal fees in the services provided by the courts to make the services more accessible to economically disadvantaged citizens.

b) Simplifying court procedures.

c) Making legal aid services provided by the court more effective.

d) Strengthening mediation services and making it more effective.

e) Providing services as required by the beneficiary.601

Further, recognizing the importance of access to justice, the judiciary has established a separate commission to address this issue.602 The commission has conducted various activities in pursuit of this goal, including the establishment of an information and assistance desk, ensuring minor services can be delivered within an hour, free legal aid, the creation of a free legal inquiry service accessible through a mobile and toll-free number, provisions for meetings with judges, interpreter services, SMS services and easing the process of collecting legal notices from the concerned court. The commission is also using information and communications technologies (ICTs) to provide information regarding cases, encourage mediation, monitor the services provided by courts, organise community outreach programmes, institutionalize pro bono legal services and undertake studies on access to justice. The judiciary’s efforts in Nepal to ensure access to justice in recent years have been exemplary.603

The judiciary has also pursued its reform agenda and invested in planning, research, monitoring and evaluation. This process has generated significant improvements in the administration of justice.

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602 The Commission is named as "Access to Justice Commission."

Pertinent Challenges Faced by the Nepalese Judiciary

Political influence in the appointment of judges

A major concern relating to the independence of the judiciary that requires a closer look is the influence of political parties in the appointment of judges. The recent appointment of judges has provided substantial evidence of political influence in the appointment of Supreme Court judges. The outcry of political influence in judicial appointments has been one of the long-standing allegations against the judiciary.604 Instances of politicization of the judiciary through the appointment of judges with close personal ties and affiliation to political parties have been witnessed and are attributed to the deterioration of political culture in Nepal.605

In the most recent instance, on 12 January 2017, the Judicial Council recommended the names of eighty judges to seven High Courts and the newly appointed judges of the High Court took the oath of office and secrecy on 18 January 2017.606 This appointment has faced widespread criticism for being politically influenced and failing to follow the principle of inclusion and proportional representation. The criticism was not limited to public scrutiny as a petition was lodged in the Supreme Court claiming that the Judicial Council’s recommendations violated the principle of inclusion as 83.75 percent candidates were from the Khas Arya community, while Madhesi, Janajati, women and Dalits were under-represented. The Supreme Court has issued a show cause notice to the Judicial Council regarding the appointment of judges to the High Court.

Courts. Further, Government attorneys boycotted hearings to protest the appointment of judges, showing dissatisfaction towards the appointments.

Even before this, in March 2016, the appointment of the Supreme Court judges also faced widespread criticism as some of the judges had a prior active political affiliation. In particular, the appointment of Sapana Pradhan Malla—a former Member of Parliament from CPN-UML—raised a lot of questions. In 2014, judges visiting party offices following their appointment, expressed significant concerns about political influence in the appointment of judges.

The Judicial Council has often been drawn into controversy in the past as well for appointing justices with political affiliations.

Corruption in the judiciary

Of great concern to the judiciary in Nepal is the allegation of widespread corruption among judges. Watchdog institutions and studies such as Right to Wrong by Transparency International have claimed that the Nepalese judiciary is increasingly plagued by corruption. The issue of corruption in the judiciary has been publicly acknowledged by Nepal’s judicial leadership who have placed it...
amongst priority concerns to be dealt with in the future. However, the allegations of corruption in the judiciary have been expressed more vocally in recent times with the appointment of controversial figures to the Supreme Court.

The Chief Justice’s acknowledgment of corruption inside the country’s judiciary is reason enough to arrive at the conclusion that the judicial system is in fact plagued by malpractice. Furthermore, as revealed in various position papers and declarations of the Nepal Bar Association, corruption is deep-rooted in Nepal’s judicial system. Unnecessary delays in rendering decisions and money transactions compromising the case for justice are extreme examples of what the judiciary are accused of. It has also been noted that the Supreme Court has produced contradictory decisions on similar issues which, to some extent, can be attributable to corruption and irregularities. On the other hand, mechanisms for disciplining judges have been more or less unsuccessful. As per the corruption report, Nepal’s court system is subject to pervasive corruption and executive influence, both root causes of inefficiency in the sector. Accordingly, studies show that more than three-quarters of citizens believe that the judiciary is corrupt.


Backlog of cases

The backlog of cases increases with the level of court. On average, a Supreme Court Judge has three times the burden of a judge in a court at a lower level. The Supreme Court is under pressure to dispose of more cases, thereby losing its vision of being an apex court for disputes involving policy decisions only. The number of unresolved cases before the Supreme Court had reached 21,755 by the end of the 2014/15 fiscal year, a rise from only 10,422 five years ago in the 2010/11 fiscal year. In the 2013/14 fiscal year, there were a total of 18,776 cases pending.

Concerned about this rapidly growing backlog, the judiciary has dedicated core sections of its strategic plans to designing and implementing a markedly more prompt and efficient adjudication process. However, it is yet to be seen if the judiciary will be able to handle the backlog of cases in an effective manner.

Enforcement of judicial decisions

With the purpose of strengthening the execution of decisions, a Decision Execution Directorate has been established and the work, duties and rights of the Directorate prescribed. In coordination with the National Judicial Academy, Decision Execution Guideline 2065 was published, distributed and an orientation program for the concerned staff was carried out. However, proper execution is still a challenge even today.

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618 “Second Five-Year Strategic Plan of the Nepali Judiciary 2009/10-2013/14.”
Inclusiveness in the judiciary

In Nepal, most of the judiciary’s problems have political origins. The Judicial Council, Nepal’s constitutional body which appoints judges, is itself incomplete and lacks an inclusive character. In the judicial sector, which employs 4908 persons, Brahman/Chhetri are the dominant caste (77.6 percent), while Hinduism is the dominant religion (98.3 percent), and men the dominant gender (86.1 percent). Brahman/Chhetris constitute 87.1 percent of judges, 87.6 percent of gazetted officers, 82.1 percent of non-gazetted staff and 66.6 percent of staff from other services or class-less positions. This is followed by the Janajati group, which makes up 9.4 percent of total judges, 9.3 percent of gazetted officers, 11.2 percent of non-gazetted staff and 21.3 percent of other services. Representation of other groups is negligible.619

The inclusion status of the judicial sector does not reflect the composition of the national population by gender, caste, ethnic and other social groups. For instance, women, despite making up 51.5 percent of the national population, are represented in the judicial sector by 13.9 percent only. Brahman/Chhetri, constituting 32.1 percent of the national population, account for 77.6 percent of the total judiciary staff, while the representation of Janajati in the judiciary is only 14.5 percent even though they constitute 36 percent of the total population. Similarly, Other Backward Communities and the Dalit are represented in the judicial sector by 4.8 percent and 2 percent respectively, while they constitute 13.8 percent and 13.3 percent respectively of the national population.620

620 Ibid, v-vi.
Access to justice concerns

Access to justice is a major issue for the poorest and most marginalized groups. Patriarchal family values and caste-based social orders are deeply entrenched in Nepalese society and represent formidable informal barriers to accessing justice. Poverty, discriminatory legal provisions, under-representation of women and marginalized caste and social groups in the judicial service, physical distance of courthouses and poor legal education represent a few among numerous barriers. These obstacles often prevent access to justice for specific groups who are disadvantaged, excluded or restricted from exercising their fundamental rights.621

In the case of women’s access to justice, the main hindrances are financial constraints, fear of re-victimization by the perpetrators, family prestige, lengthy and complex court procedures, lack of knowledge about available legal remedies, lack of trust in the justice system, geographical distance from service providers and language barriers. Only 27.6 percent of women victims of violence and discrimination seek support from justice sector institutions. Only 41.5 percent of the women who are associated or familiar with court procedures were found to seek support from justice sector actors immediately after facing the problem.622


Action against judges and staff members

Despite the legislative arrangement of holding judges accountable, judges were alleged to have committed serious offences including corruption, miscarriage of justice and sexual assault but successfully avoided legal action in some instances. The Judicial Council has, at times, failed to investigate or prosecute judges, which has raised concerns relating to the accountability of judges. Although the number of cases involving specific allegations against the judges are few, consequent actions pursued by the judicial institution fail to hold the judges accountable. For instance, in the case where two Supreme Court judges acquitted a drug smuggler who was arrested at Kathmandu airport with 2.3 kgs of heroin, the Judicial Council failed to investigate or prosecute, allowing the judges to quietly withdraw into retirement. This reflects how the system is failing to hold judges accountable.

Similarly, two District Court judges who have recently been charged with sexual harassment have also managed to avoid prompt legal action against them.

Lack of an interface between formal and informal justice mechanisms

Though informal justice that promotes a 'victim-centric approach' has been welcomed throughout Nepal to increase access to justice for those who have traditionally been denied such access, issues remain relating to oversight, monitoring and the interface between the formal and informal justice system. As it now stands, it is difficult for members of vulnerable communities to choose the most appropriate justice mechanism because there is no streamlined information available about how to move cases between the formal and informal systems. Furthermore, vulnerable communities are often forced towards mediation as an option without understanding the consequences of this choice.

The constructive role of the Nepal Bar Association

The Nepal Bar Association is the federal organization of Nepalese practising lawyers. The professionalism and competence of the bar association are essential aspects of an independent judiciary. The Bar Association in Nepal is politicized, and the relationship between the Bar and the bench has not always been smooth. Further, the Bar Association can recommend a senior advocate or advocate who has practised law for more than twenty years to be a member of the Judicial Council. The bar can play a constructive role in promoting the independence of the judiciary and maintaining checks and balances in a number of ways. In the past, the Bar has expressed their dissatisfaction about various issues, which have even taken the form of protest in many instances. Most recently, in January 2017, the Nepal Bar Association protested against the Judicial Council’s recommendation for the appointment of eighty High Court judges.

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However, in recent times the once strong presence of the Nepal Bar Association has waned. For example, the activities of the Nepal Bar Association have been limited and do not reflect the potential influence it could have on the judiciary, the legal profession and legal system in general. Thus, the Nepal Bar Association, through its role in recommending the members to Judicial Council and other activities, could be a crucial player in the effort to institutionalize the independence of the judiciary in Nepal.

Role of public prosecution

A professional and competent public prosecution is essential to a functionally independent judiciary in Nepal. In the Constitution of Nepal, Part 12 (Arts. 157-161) contains provisions relating to the Attorney General of Nepal. The Office of the Attorney General plays a crucial role in ensuring proper functioning of the judicial system and maintaining the rule of law. A public prosecution that functions effectively can promote the functional independence of the judiciary.

Cost effectiveness

It is a common concern that justice comes at a high price and generally too late, particularly if the victim happens to be poor. In particular, the parties have to spend a lot during hearings before the Supreme Court as the capital is an expensive city and hearings are often delayed and postponed. It takes, on average, six years to get a final judgment from the Supreme Court; at which point the parties to disputes would have approached three levels of courts—the District Court, the Appellate Court and the Supreme Court. Sometimes, the cases take longer than that.631

The financial burden arising from resorting to the judicial system is one of the challenges that hinders access to justice. The judiciary, however, is working to review and make the fees that are charged for judicial services more affordable for economically deprived citizens.632

Recent Events

i  The Constitution of Nepal, 2015 has been adopted with a commitment to an independent, impartial and competent judiciary and to the rule of law.

ii  Honourable SushilaKarki, the first woman Chief Justice of the Supreme Court of Nepal, was appointed on 13 April 2016.

iii  Nepal ranks as the top performer in South Asia and 63rd globally in the WJP Rule of Law Index 2016.633

iv  A Provincial High Court was appointed for the first time. However, the appointment was clouded by allegations of political influence.

v  A landmark decision was made by the Supreme Court, declaring the former chief of the CIAA as ineligible for appointment.634

vi  The judiciary hit a new low as allegations of political influence in the appointment of High Court judges generated unprecedented criticism.

vii  The third Five-Year Strategic Plan of the Judiciary (2014/15-2018/19) is currently being implemented.

Conclusion and Recommendations

The Constitution of Nepal, 2015 has adopted a comprehensive blueprint for an independent, competent and impartial judiciary. The Constitution has made the judiciary independent and powerful, as it


633  World Justice Project, Rule of Law Index 2016, 23.

634  Advocate Om Prakash Aryal vs. Office of the President, Writ No: 069-FN-0498 of year 2071 BS (AD 2017).
has sought to establish judicial supremacy in governance. The notion of independence of the judiciary is also reflected in the cases decided by the courts. The Supreme Court has played a lead role in promoting and protecting human rights, entrenching important principles through its judgments in relation to internationally recognized human rights. The judiciary has also played a constructive role in promoting social, economic and democratic rights. The independence of the judiciary is reflected in the landmark judgments delivered by the courts.

Despite constitutional guarantees and progressive functions, the judiciary faces some significant challenges that include political influence in the appointment of the judges, corruption in the judiciary, backlog of cases, inclusiveness, access to justice concerns and challenges in the enforcement of decisions. In recent times, the judiciary has faced widespread criticism around these issues. This could be an indication of where there is room for improvement. The judiciary has also identified the challenges it is facing and is implementing a strategic plan to ensure "Speedy Justice for All." With the new Constitution, historic leadership of a female Chief Justice and a well-placed strategic plan, the judiciary is moving in the right direction. However, the way forward also requires the judiciary to neutralize political influence, reduce corruption, increase efficiency and make the judiciary more inclusive and accessible.

Recommendations:

i Implement the Strategic Plan of the Judiciary (2014/15-2018/19) in an effective manner.

ii Reduce political influence in the appointment of judges and encourage performance-based evaluation of judges.

iii Formulate a comprehensive plan to tackle corruption in the judiciary.

iv Promote informal and traditional justice mechanisms.

v Address the backlog of cases and the need for proper follow up for the execution of judgments.
vi Uphold the constitutional provision to promote inclusiveness in the judiciary.

vii Take proper legal action against judges and other staff as prescribed by the law, where required.
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A BRIEFING NOTE ON THE JUDICIARY IN PAKISTAN

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Introduction

The judiciary in Pakistan is composed of District Courts, High Courts, the Federal Shariat Court and the Supreme Court of Pakistan. Article 203 of the Constitution of Pakistan requires the High Courts to supervise all courts subordinate to them. While the Constitution does not explain, which courts are subordinate to a High Court, it is generally agreed that all courts (provincial and federal) working in a province are subordinate to their High Court. On the other hand, the Supreme Court of Pakistan does not directly administer or control any court in the country. Its only control over the courts is by way of judicial pronouncements. The control the Chief Justice of the Supreme Court and judges exercise over higher court judicial appointments comes by way of membership of the Judicial Commission and not as a court. The Supreme Court is, however, the last court of appeal in the country and the law laid down by it is binding on all courts in the country.

History of the Superior Courts

The High Courts in the country were established at different times and have come to acquire their current position gradually. A brief history of the High Courts and Supreme Court is as follows:

Punjab

In Punjab, the highest judicial authority after annexation was originally the Judicial Commissioner who was appointed in 1853. In 1866, the Chief Court of Punjab was established. In 1919, the Court was established as the High Court by letters patent. The Chief Court Act fixed a definite number of civilian and barrister judges in the Court. This condition was removed by the Letters Patent of 1919. The Court

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62 Chief Court Act IV of 1866.
had two judges in 1866, fifteen in 1937 and seven in 1948. The current strength of the Court is sixty. The Lahore High Court has benches at Bahawalpur, Multan and Rawalpindi.

Sindh

Established by the Bombay Act XII of 1866, the first and highest court in Sindh was the Sadr Court. In 1906, this Court was converted into the Court of the Judicial Commissioner of Sindh. Apart from being the highest court of appeal for Sindh in criminal and civil matters, the Court was also the District Court and the Court of Sessions of Karachi. In 1940, the Sindh Chief Court was established by bringing into operation the relevant provisions of the Sindh Courts Act of 1926. In 1907, the Court had one judicial commissioner and three additional commissioners. In 1935, the number of judges was increased to four. On the establishment of the West Pakistan High Court, the Court became the Karachi Bench of the West Pakistan High Court. On separation of the Sindh and Baluchistan High Courts, twelve judges were allocated to the Sindh High Court and three to the Baluchistan High Court. The present approved strength of judges is forty. The Sindh High Court has got benches at Sukkur, Hyderabad and Larkana.

Baluchistan

The Baluchistan High Court was established in 1976. The Court originally had five judges. Its current sanctioned strength is eleven judges (including the Chief Justice). The Baluchistan High Court has benches at Sibi and Turbat.

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Khyber Pakhtunkhwa

Before 1901, the Lahore High Court was the chief court of the areas comprising the North West Frontier Province. In 1901, the North Western Frontier Province Law and Justice Regulation No. VII of 1901 established the Court of the Judicial Commissioner. In 1955, the Court of the Judicial Commissioner was abolished and the Peshawar bench of the West Pakistan High Court assumed jurisdiction. The Peshawar High Court was established in 1970. The Court currently has twenty judges. The Peshawar High Court has benches at Abbottabad and Dera Ismail Khan. The Peshawar High Court has also got a shariat appellate bench at Mingora established under the NizamAdl Regulation, 2009.

Islamabad High Court

The Islamabad High Court was established under the Islamabad High Court Act, 2010. It is now established under the Eighteenth Amendment to the Constitution.

Supreme Court

The Supreme Court was established in 1956 under the then constitution of Pakistan. It succeeded the Federal Court of Pakistan. Since its creation, the Supreme Court has retained its name and jurisdiction through successive legal instruments including the Constitution of 1973. The Supreme Court is the highest appeal court in the country.

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The number of High Court judges for per capita provincial populations is as follows:

<table>
<thead>
<tr>
<th></th>
<th>Per capita HC judges (for million population)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Punjab</td>
<td>0.6</td>
</tr>
<tr>
<td>Sindh</td>
<td>0.48</td>
</tr>
<tr>
<td>KPK</td>
<td>0.74</td>
</tr>
<tr>
<td>Baluchistan</td>
<td>0.61</td>
</tr>
</tbody>
</table>

Judicial Leadership and Management

Judicial leadership comes from the National Judicial Policy Making Committee (NJPMC). The NJPMC is required to coordinate and harmonize judicial policy within the court system, and ensure its implementation. The Committee performs the following functions: (a) Improving the capacity and performance of the administration of justice; (b) Setting performance standards for judicial officers and persons associated with performance of judicial and quasi-judicial functions; (c) Improvement in the terms and conditions of service of judicial officers and court staff, to ensure a skilled and efficient judiciary; and (d) Publication of the annual or periodic reports of the court.

The management or administration of the superior courts comprises a Registrar and a number of Additional, Deputy and Assistant Registrars. All High Court Registrars are District and Sessions Judges.

Based on the sanctioned strength of judges (a strength of twenty eight judges has been used for Sindh) and estimated population figures of 2014-15.
The Supreme Court Registrar is a senior Pakistan Administrative Service Officer. Key administrative decisions are taken by a committee of judges called the administrative committee. Administration is not recognized as a capacity independent of judicial strengths\(^641\), with the result that nearly all aspects of administration require reform.

**Institutional Structure and Jurisdiction of Courts**

Subordinate courts are of two types—courts of general jurisdiction and courts of special jurisdiction.

**Courts of general jurisdiction**

Courts of general civil jurisdiction are as follows:

- Courts of District Judges
- Courts of Additional District Judges
- Courts of Civil Judges

Courts of general civil jurisdiction are established by the various civil courts ordinances of the provinces.\(^642\) These courts can hear and try all civil cases unless barred by law.\(^643\) The major category of cases heard by these courts relate to contract enforcements, tort liability and injunctive suits. Prior to the Eighteenth Amendment to the Constitution, civil procedure was a concurrent subject and provinces could not make any major structural changes in it. However, the provinces are now fully empowered to change civil procedure.


Courts of general criminal jurisdiction are of two types:

- Sessions Courts
- Courts of Magistrates

In each district, there is only one Court of Sessions. Courts of general criminal cases are established by the Code of Criminal Procedure and have jurisdiction to hear and try all cases under the Pakistan Penal Code and all local and special offences unless barred by the law. The Code of Criminal Procedure and the Pakistan Penal Code are still concurrent subjects and the provinces have comparatively lesser authority to amend these laws.

While civil and criminal courts are established by separate statutes, they are staffed by the same judges. Thus, the District Judge is also the Sessions Judge, the Additional Sessions Judge is also the Additional District Judge and so on and so forth. However, actual work allocation is based on local needs and judges may or may not have both civil and criminal work in their dockets.

Courts of special jurisdiction

Courts of special jurisdiction are created by special legislative enactments and generally follow special procedures in at least some part of their work. In other respects, they follow mainstream procedure. In some cases, powers of special courts are conferred on judges of courts of general jurisdiction. In these cases, the special court exists only to the extent of the special procedure. Examples of such courts are juvenile courts, courts of small causes and minor offences. Courts of special jurisdiction may have both civil and criminal jurisdiction, for example, the Consumer Court. Others may have exclusive criminal jurisdiction.

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like the Drug Court, or exclusive civil jurisdiction like the Banking Court. Nearly all special court appointments lie with the Government although all such appointments are required to be made in consultation with the Chief Justice. Again, actual consultation varies from time to time and court to court. However, the Government generally agrees with the recommendations of the High Court regarding appointments.

Control and Supervision of Courts

High Courts only have administrative control of courts of general jurisdiction. Courts of special jurisdiction are administratively managed by the respective governments except those which exist for procedural purposes only. Judicial supervision is exercised by the High Court in both cases.

Control and administrative supervision of courts is exercised through the Office of the Registrar and the Member Inspection Team (MIT) (predesignated as the Directorate of District Judiciary\(^\text{646}\)). The Registrar manages human resources through performing functions such as managing transfer postings, and leave. The MIT reviews performance of the courts and judges and investigates complaints against judicial officers.

The practice in the courts is regulated by both statutes and rules. Rules are of two types—High Court rules and statutory rules. High Court rules are issued by the respective High Courts under Article 202 of the Constitution of Pakistan. Statutory rules are issued under various statutory rule making provisions. The High Court rules are subordinate to statutes and probably also to statutory rules. The major statutory rules on the civil side are the civil procedure rules. No rules have been issued under the Code of Criminal Procedure. One key area which has been affected by the absence of modern comprehensive rules is case management. Case management rules are for the most part absent and

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\(^{646}\) LHC Notification No. 09/RHC/DOJ, dated 08 April 2017.
the parties or their counsel drive the pace of the case. Efforts have been made in the Punjab courts to encourage courts to issue a comprehensive case management regime including issuance of case management rules. However, the approach of the court has been to rely on automation and performance management interventions.

**The Courts’ View of Their Position: Relations with the Executive**

The judiciary’s view of the criminal and civil process is very court centric. They frequently deny powers to police and/or prosecutors to assess evidence, formulate charges, or deal with cases in non-adjudicatory ways. The courts have also passed judgments which give them an important role in the prosecution process. The biggest impact of these actions is that prosecutors are unable to meaningfully perform their gatekeeping functions despite clear statutory provisions. Courts have also passed orders regarding conduct of investigations including transfer of investigations and probation of offenders without reference to probation officers. The result is that the criminal process has become too adversarial, uncoordinated and court centric.

Lawyers and judges consistently support more powers for the court. They have also taken an extreme view of the involvement of laypersons in adjudication and have frequently declared alternate or parallel judicial systems as unconstitutional and illegal. Courts have also opposed the grant of adjudicatory powers to Executive officers. A similar approach has also been adopted with regard to judicial

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appointments. The Supreme Court has nearly voided the role of the Parliamentary Commission in the appointment of judges. The opinion in the Presidential Reference of 2013 has reaffirmed the leading role of the Chief Justice (in as much as the court was concerned) in the nomination process. The logic for this approach is said to be centred on the doctrine of judicial independence. The Court for, instance, noted in Munir Bhatti's Case, "the process of making judicial appointments was inextricably linked with the independence of the judiciary and since the latter was a matter of public importance ... it was held that the petitioner had rightly invoked the jurisdiction of this Court." The Court then proceeded to hold that since the Parliamentary Committee acted in an executive capacity, its decisions were subject to judicial review and therefore subject to the jurisdiction of the Supreme Court.

At the provincial level, the High Courts have also taken a number of financial decisions on the administrative side without the involvement and sanction of the provincial government, which provides these funds. For instance, the administrative committee of the Lahore High Court has issued decisions allowing economic benefits to judges without the agreement of the provincial government. On the judicial side, the Court has ordered free medical facilities to lawyers as are available to civil servants when the former are independent service providers.

The courts have also tended to lay a large portion of blame for delays on the Bar and other criminal justice agencies. This is in stark contrast to both common perceptions and research studies that reveal case progression is affected by all actors within the criminal justice system, including judges. Additional findings by research studies show that the key reason for delay is the absence of a comprehensive case

651 See Munir Hussain Bhatti vs. Federation of Pakistan, PLD 2011 SC 407.
653 See the Order of the Lahore High Court in WP No. 38303/2016.
management framework, which the courts are empowered to issue under the Civil and Criminal Civil Procedure Codes.\textsuperscript{654}

The courts have steadily asserted control over the justice system and the assertion that Pakistan is an executive-dominated state is certainly not true in the context of judicial appointments and court management.\textsuperscript{655}

\textbf{Jurisprudence of the Courts}

Except in selected areas of law, superior courts generally follow western legal thought and jurisprudence. They think in terms of individual responsibility and have accordingly, viewed doctrines of tribal and communal responsibility with suspicion and distrust and have moved to extinguish these ideas and concepts. In a similar vein, they have acted to strike down justice systems which provide a role for communal justice and \textit{jirgas}.\textsuperscript{656} Courts since the return of democracy, have also taken a more liberal approach to legislative powers and have moved to reduce religious influence on legal doctrine. While superior courts have made pro-democratic interpretations of law, they have not moved with the same speed to embrace modern principles of administration of justice. Courts continue to give preference to oral evidence as opposed to scientific evidence; they are yet to institute a modern case management system and they still give way to private settlements in ways that may not be in the interests of justice.

\textsuperscript{654} Siddique, "Caseflow Management in Courts in Punjab: Frameworks, Practices and Reform Measures."


\textsuperscript{656} Government of NWFP vs. Muhammad Irshad, PLD 1995 SC 281.
Accountability

Subordinate courts are administratively accountable to the High Courts. This accountability takes place through performance evaluation reports, complaints (to MIT/ Directorate of District Judiciary) and the transfer posting process. In a number of cases, enquiries are initiated and judges are also disciplined. However, in serious cases, delinquent judges are allowed to resign. There is no system of independent inspections and the unit system does not take account of complexities associated with cases. The result is that complex cases get left behind and take years to conclude.

Superior court judges are accountable to the Supreme Judicial Council (SJC), which is a body established under Article 209 of the Constitution of Pakistan. The Supreme Judicial Council comprises the Chief Justice of Pakistan, the two most senior Supreme Court judges and the two most senior High Court Chief Justices. The SJC has its own rules and procedure for enquiry. While only the SJC can remove a judge of the superior courts from office, some judges have been removed through constitutional challenges to their appointment. The number of judges removed for misconduct is not reliably known. Some reports say one judge was removed while others say three judges were removed\(^6\)\(^5\)\(^7\). The accountability process of judges has attracted attention and some authors have found self-regulation to be ineffective\(^6\)\(^8\).

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\(^6\) Zafar Kalanauri, "Has the Supreme Judicial Council been able to Judge the Judges?,” unpublished.

Abilities of Judges

Pre-entry legal knowledge and skills

Lower court judges are appointed after a competitive exam. In Punjab, the exam for civil judges was conducted by the Punjab Public Service Commission till 2008 and since then by the Lahore High Court. The following table lays out the number of successful candidates:

<table>
<thead>
<tr>
<th>Year</th>
<th>2009</th>
<th>2008</th>
<th>2007</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of posts</td>
<td>35</td>
<td>99</td>
<td>106</td>
</tr>
<tr>
<td>Number of candidates who applied</td>
<td>274</td>
<td>2110</td>
<td>1510</td>
</tr>
<tr>
<td>Number of candidates who appeared for the written examination</td>
<td>135</td>
<td>746</td>
<td>583</td>
</tr>
<tr>
<td>Number of candidates who qualified through the written portion</td>
<td>11</td>
<td>190</td>
<td>84</td>
</tr>
<tr>
<td>Number of candidates interviewed</td>
<td>11</td>
<td>190</td>
<td>84</td>
</tr>
<tr>
<td>Number of candidates recommended for appointment</td>
<td>6</td>
<td>58</td>
<td>44</td>
</tr>
</tbody>
</table>

These results show that the ability of candidates (if judged solely by the six criteria listed above) for judicial office is not very high. Results are also reflective of the overall state of legal education in the country, which leaves much to be desired.

Training and skills development

There are judicial academies in all the four provinces. The first of these, the Sindh Judicial Academy was established in 1992. Judicial academies suffer from extensive capacity and governance issues. With

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659 Information provided by the Punjab Public Service Commission
most trainers being ex-judges, judicial training reinforces existing approaches and attitudes to law. There is little by way of modern training—course modules, training material or modern methods of education. Judicial training, therefore, has not led to a great improvement in knowledge and skills of judges.

The Ideological and Political Character of Courts

Courts and judges represent both the micro-cultures of the legal and judicial profession and the macro-culture of the societies they work in. In addition to these broader cultural issues, the bureaucratic culture of the civil service (the lower court judges are appointed under the Civil Servants Act) and in some cases, ideological and political leanings of the judges, also affect their workings. The overall culture of the legal profession is a culture of independence and political consciousness. It is not a culture of education, knowledge and ethics.

Legal education is not taken seriously because it is neither difficult to obtain nor costly to pay for; the failure rate is low. Prior to entry into the legal profession, lawyers sit for the licentiate examination of the Bar Council. This examination does not effectively filter out unsuitable law graduates seeking to enter legal practice and the system continues to stagger under a huge inflow each year. Once law graduates obtain licenses, they start working as unpaid associates and then work their way into the legal profession. Some of the lawyers clear the lower court judges' exam and become civil judges and additional sessions judges. There are few large law firms and most practice takes place in and around chambers of senior or experienced lawyers. Most chambers are not into high-end practice and deal with ordinary civil or criminal cases.

Ethical frameworks in the legal profession are not clear. Lawyers consider protecting their clients' rights their foremost duty as opposed to upholding and supporting the quest of justice. Witnesses frequently commit perjury but no action is taken by the courts. In fact, many courts give more value to (false) oral statements than forensic reports.
The income and social classes of most judges are middle class, conservative and majoritarian. Judges take a very textual view of the law coupled with a strong acceptance of private settlements (even on the sidelines). They also tend to discount the need for and importance of regulatory laws. While regulatory enforcement is also affected by limited and weak abilities of regulators and enforcement agents, it is also affected by court based approaches. The overall result is poor regulatory enforcement - Pakistan had a performance rating of 0.36 and a world ranking of 99/102 countries in regulatory enforcement*.

A short assessment of judicial attitudes in selected areas of legislation is given below.

**Judicial Attitudes with Regard to Labour, Minority Rights, Freedom of Association and Speech and National Security and Terrorism**

**Labour**

Courts of special jurisdiction—Labour Courts—administer labour rights. In 2016, the employment-population ratio was c. 41 percent. By 2016, there were thirty-six cases from Pakistan pertaining to freedom of association of labour before the International Labour Organisation. Out of these, thirty-two had been closed while two were active and two were in follow-up. The courts had decided most of these cases in favour of the trade unions or workers’ federations. In other instances, the courts have also showed a positive attitude towards rights of association of labour/trade unions.

Judges have also condemned child labour. Thus, in 2016, the conviction rate in offences under the Punjab Prohibition of Brick Kilns Act, 2016 was 70.02 percent.

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Minority rights

Article 36 of the Constitution provides for the following protection of minorities: "The State shall safeguard the legitimate rights and interests of minorities, including their due representation in the Federal and Provincial services."

While some organisations have reported that public pressure routinely prevents courts from protecting minority rights and forces judges to take action against any perceived offence to established orthodoxy, data does not appear to support this assertion. Thus, in Punjab, from 2007 till 2016, the judiciary had disposed of 719 cases of blasphemy. Out of these cases, only ninety-six resulted in convictions and out of these only six convictions involved minorities. It may not be out of place to mention that the overwhelming majority of blasphemy cases are registered against Muslims. Having said this, judges do pander to local pressure in cases of blasphemy but apparently do so due to security issues rather than any ideological leanings.

Freedom of association and speech

Major laws dealing with freedom of association and speech are the Political Parties Act and the Maintenance of Public Order Ordinance, 1960. Judicial approaches to freedom of association and political speech during democratic rule have been liberal as opposed to supporting restrictions on dissent during military rule. On the other hand, speech entailing toxic religious content has not been allowed to go unnoticed. The number of convictions for hate speech has risen steadily and acquittals have generally occurred on technical grounds only.

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National security and terrorism

The key legislation on national security and terrorism is the Anti-Terrorism Act, 1997 (Act No. XXVII of 1997).666 This particular piece of legislation is administered by the Anti-Terrorism Courts in the provinces. Convictions in terrorism cases have been less than those in session court cases and/or magistrate court cases. Thus, in Punjab, the conviction rate in terrorism cases was 32.09 percent in 2015 and 31.8 percent in 2016. On the other hand, the conviction rate in session court cases and magistrate court cases was 60.31 percent and 58.19 percent respectively in 2016.667 The police and other criminal justice agencies opine that judges have not agreed to consider the different nature of evidence in terrorism cases (circumstantial and scientific evidence vs. oral, direct evidence) and have continued to proceed with terrorism cases as they would in ordinary cases. The result is continued dissatisfaction with the system of criminal justice.

Conclusion and way forward

The Judiciary continues to strongly support its independence and has asserted its role in the legal process. It has also taken a number of steps towards judicial reform but many of these steps have not been taken as part of an overall process. Reform interventions have also not been developed after a process of review and consultation with relevant stakeholders in the Government668. Again, the role of non-judges in the administration of courts is not recognized and respected669, which is an outstanding feature of advanced judicial administrations. Resultantly these interventions have not led to substantial changes in the way justice is delivered. On the other hand, calls for reform from other actors have

667 Punjab CPS Annual Report 2015, 47.
steadily increased especially in the justice process and processes pertaining to judges' appointments, accountability, and the role of non-court actors in the legal process. The situations appear to be stalled; things are unlikely to improve unless the executive, the judiciary, political leaders and other justice sector actors enter into a dialogue in which the opinion of every actor is sought and respected.
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SOUTH ASIA JUDICIAL BAROMETER
The South Asia Judicial Barometer brings together the reform activism and legal expertise of a number of legal scholars and practitioners in order to interrogate the rule of law regimes in Bangladesh, Nepal, Bhutan, India, Pakistan and Sri Lanka.

This publication grapples with the institutional architecture of the judiciary, and the ideological character and contestations that shape judicial engagement, including the manner in which the judiciary approaches and perceives public interest, state-society relations, economic interests and the multiplicity of claims in the context of identity-related conflicts. The country chapters are animated by critical questions concerning the interventions of the judiciary: What is the nature of judicial engagement on socio-economic and political issues? How has this engagement changed over time? How can the ideological and social character of the judiciary impact access to justice?

This publication is a reminder of the significant role of the judiciary in shaping our societies and its impact on critical issues of national interest, ranging from the rights of workers and minorities to the freedoms of expression and association.