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Sri Lanka: Two Paths to Judicial Independence

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

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

This working paper examines the Sri Lankan court system through the lens of judicial independence. This paper is divided into five sections. First, it introduces the court structure of Sri Lanka. Second, it explores the current institutional and operational measures for protecting judicial independence. Third, it analyzes challenges to judicial independence in Sri Lanka and their consequences. Fourth, it provides a brief account of Sri Lanka's judicial performance on advancing democratic values and fundamental rights. Finally, it identifies areas for improvement for existing laws and institutions with the goal of enhancing the independence of the judiciary.

1. Overview of the Court Structure in Sri Lanka

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

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

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

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

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

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

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

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

2. Judicial Independence in Sri Lanka

The framework for protecting judicial independence and integrity is provided for under the Constitution of 1978 and the Judicature Act. The constitution also provides for the creation of the Judicial Service Commission (JSC), an independent institution vested with powers of administration over Courts of First Instance. Under the 20th Amendment,¹ the JSC comprises of three judges of the SC; the Chief Justice being the ex-officio chairperson, and two other judges appointed by the president. Interference with the decisions or members of the JSC is a punishable offense, and members of the JSC are granted immunity for acts done in good faith in the performance of their duties (S.L. Const. Art. 111(K), 111 (L)).

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

2.1 Measures to Protect Institutional Independence

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

2.1.1. Appointment/promotion of judges

The current constitution, following the 20th Amendment, vests the president with the power to appoint

¹ The 20th Amendment, which is the latest amendment to the Constitution of Sri Lanka, is a drastic shift from the 19th Amendment. Under the 20th Amendment, powers that were held by Parliament and independent institutions were effectively vested in the Executive President, thereby undermining the separation of powers and checks and balances.

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

2.1.2 Security of Tenure

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

2.1.3 Removal or Suspension from Office

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

2.1.4 Transfers

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

2.1.5 Salaries and Benefits

Salaries and pensions of judges of the SC and CA are paid from the Consolidated Fund (Art. 108(1)) and cannot be reduced. Furthermore, any salary increments must be approved by parliament (Art. 108(2)). The same rule applies to allowances afforded to the JSC. However, the salaries of judges in the Courts of First Instance can be increased by the cabinet of ministers. For instance, in 2017, the cabinet approved a considerable pay hike for all judges (Department of Government Information 2017).

2.1.6 Protection from Suit and Contempt

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

3. Challenges to Judicial Independence

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

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

3.1 Challenges to Institutional Independence

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

3.1.1. Appointments

Under the 20th Amendment, the president effectively has complete discretion over appointments to the superior courts, as the president is not bound by the observations of the Parliamentary Council. The president's direct and sole discretion over such appointments were only restricted during the operation of the Constitutional Council under the 17th and 19th Amendments (i.e., from 2001 to 2005 and 2015 to 2020).

These circumstances spurred the trend of appointments to the superior courts based on the discretion of the executive rather than meritocracy and seniority. For instance, Chief Justice Sarath N. Silva, Chief Justice Mohan Peiris, and incumbent Chief Justice Jayantha Jayasuriya were directly elevated from the post of Attorney-General, over senior judges with longer judicial experience. Chief Justice G.P.S. de Silva, Chief Justice Asoka de Silva, Chief Justice Kanagasabapathy Sripavan, and Chief Justice Priyasath Dep were officers of the Attorney General's department and later elevated to the superior courts. In fact, in the recent past, only two of Sri Lanka's Chief Justices; Chief Justice Parinda Ranasinghe and Chief Justice Nalin Perera, were career judges commencing their service in the primary courts. Moreover, the number of judges who have been directly appointed to the superior courts from the Attorney-General's Department is disproportionately higher than the number of career judges, members of the private bar, and academics who have received appointments (*See Table 1: Chief Justices Appointed under the 1978 Constitution*).

Chief Justices Appointed under the 1978 Constitution

<u>Chief Justice</u>	<u>Tenure in Office</u>	<u>Notes</u>
Neville Samarakoon QC	1978 - 1984	Member of the private Bar before appointment as Chief Justice
Suppiah Sharvananda	1984 -1988	Member of the private Bar before appointment as Supreme Court Judge; later elevated to Chief Justice
Parinda Ranasinghe	1988 - 1991	Career judge
Herbert Thambiah	1991 - 1991	Member of the private Bar before appointment as Court of Appeal Judge; later elevated to Supreme Court judge and Chief Justice
G. P. S. de Silva	1991 - 1999	Officer of the Attorney General's Department before appointment as Court of Appeal Judge; later elevated to

		Supreme Court judge and Chief Justice
Sarath N. Silva	1999 - 2009	Attorney-General before direct appointment as Chief Justice
Asoka de Silva	2009 - 2011	Officer of the Attorney General's department before appointment as Court of Appeal Judge, and later elevated to Supreme Court judge and Chief Justice
Shirani Bandaranaike	2011 - 2013	Dean of the Faculty of Law, University of Colombo before appointment as Supreme Court Judge and later Chief Justice
Mohan Peiris	2013 - 2015	Attorney-General before direct appointment as Chief Justice
Shirani Bandaranayake	28 January 2015 - 29 January 2015	
Kanagasabapathy Sripavan	2015 - 2017	Officer of the Attorney-General's Department until appointment as Court of Appeal Judge, thereafter elevated to the Supreme Court and Chief Justice
Priyasath Dep	2017 - 2018	Officer of the Attorney-General's Department until appointment a Supreme Court Judge and later Chief Justice
Nalin Perera	2018 - 2019	Career judge
Jayantha Jayasuriya	2019 - present	Attorney-General before being direct appointment as Chief Justice

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

Under the current constitutional scheme, the executive president has indirect influence over appointments to courts of first instance as he enjoys the power to appoint members of the JSC, which recommends appointments to High Courts and makes appointments to Magistrates and District Courts.

3.1.2 Disciplinary action and Removal

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

The impeachment motion was signed by 117 parliamentarians from the ruling party. The impeachment was heard by an 11 member Parliamentary Select Committee (PSC), of which seven

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

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

3.1.3 Promotions

Post-1978, promotions in the judiciary appear to be influenced by political factors. For example, when the Chief Justice post laid vacant in 1988, the most senior judge; Justice Raja Wanasundera, was passed over (Jayawickrama 2017). It was widely speculated that the decision to pass over Justice Wanasundera was primarily influenced by his dissenting judgment in the Special Determination of the politically controversial 13th Amendment Bill (Jayawickrama 2017). Further, in 1999, upon the retirement of Chief Justice G.P.S. de Silva, President Kumaratunge appointed Attorney-General Sarath N. Silva, superseding five senior judges including judges with over a decade of experience in the SC (Jayawickrama 2017). More recently, President of the CA Justice Sriskandarajah, who presided the Bench that quashed the proceedings of the PSC which recommended Chief Justice Dr. Bandaranayake's removal, was repeatedly superseded by his junior colleagues for promotion to the SC (Jayasuriya 2014).

3.2 Challenges to Financial Independence

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

3.3 Other Factors that Undermine the Authority and Reputation of Courts

There are other systemic issues that have significantly impacted the authority and reputation of courts in the eyes of the public. Erosion of public trust and confidence in the judiciary can have serious repercussions for rule of law and public order.

3.3.1 Presidential Power to Assign other Duties to Sitting Judges and Confer Post-retirement

³ Chief Justice Bandaranayke was later reinstated in 2015.

Benefits

The president is constitutionally authorized to assign any other appropriate duties or functions (under any written law) to a superior court judge. Moreover, a judge of the superior courts is required to obtain the written consent of the president to engage in ‘any other office or accept any position of profit’. Successive presidents have used this provision to appoint sitting judges to Presidential Commissions of Inquiry. For instance, President Sirisena appointed SC Justice Prasanna Jayawardena to the Commission of Inquiry on the Treasury Bonds in 2017, and President Gotabaya Rajapaksa appointed SC Justice Janak De Silva and CA Justice Bandula Karunaratne to the Commission of Inquiry on the Easter Sunday Attacks in 2020. A number of retired and sitting judges of Sri Lanka have also been nominated by the president to serve in the apex courts in Fiji (Menon 2019). There is a lack of transparency in nominating judges for such posts, and as such, they appear to be discretionary. Such benefits may influence judges which could potentially compromise their independence.

3.3.2 Laws Delays

In recent history, the Sri Lankan judiciary has attracted criticism due to excessive delays in serving justice. In 2017, a parliamentary report revealed that it takes the courts nearly 17 years to conclude a case of serious crime - approximately ten years between commission of the crime and judgment, and seven more years for the appeal process (Sectoral Oversight Committee 2017). Technological improvements that can reduce bureaucracy and expedite proceedings, such as e-filing and virtual hearings, were only very recently introduced during the COVID-19 pandemic (*See Table 2: District and Magistrate Court Backlogs*).

2019 District and Magistrate’s Court Cases

<u>Court</u>	<u>Beginning of the year</u>	<u>Institution</u>	<u>Disposals</u>	<u>Pending Cases</u>
Magistrate’s Court	464,011	840,717	838,972	464,098
District Court	206,837	97,469	75,219	229,087

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

4. Performance of Judiciary on Key Parameters

This section briefly analyzes the recent performance of the judiciary in respect of key judicial pronouncements over the last three years that: 1) upheld democracy and the constitution; and 2) safeguarded individual liberty and the rights of minorities/vulnerable groups.

In the recent past, the apex courts have displayed a mixed record in terms of safeguarding democracy and the constitution. The 2018 determination of the SC setting aside a proclamation by former President Maithripala Sirisena to dissolve Parliament was widely commended for safeguarding the tenure of Parliament and the sovereignty of the people, through the restriction of powers historically associated with the executive president.

After the change of government in 2019, the SC was petitioned to review the constitutionality of two critical pieces of legislation. The first of these was the 20th Amendment to the Constitution, which

sought to vest the executive president with wide powers. The second was the Port City Economic Commission Bill, which sought to establish a special regulatory body with vast powers to control the economic and commercial affairs within the Port City in Colombo. Both bills were met with strong opposition, with 39 and 19 petitions being respectively filed in the SC against the bills.

On both occasions, the AG proposed major changes to several clauses of the Bill during the determination in light of their patent unconstitutionality. Despite the far-reaching implications on the sovereignty of the people and public accountability, only a few clauses in each of these bills were declared by the SC as requiring further approval at a referendum. Both bills were subsequently enacted after being amended to comply with the SC determinations. Nevertheless, the passage of these bills has received much criticism in respect of their implications on the separation of powers and the system of checks and balances.

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

However, in 2020, the SC dismissed a number of petitions filed against a health directive to forcibly cremate all victims of COVID-19 in gross violation of the religious freedoms of minority communities. This decision of the SC, which was delivered without evaluating the merits of the petitions, was highly criticized as enabling the exercise of executive power to undermine fundamental rights.

5. Conclusion and Areas for Improvement

5.1 Conclusion

The legal and administrative framework of the Sri Lankan courts has several safeguards that attempt to ensure that the judiciary has the institutional capacity to function independently. However, inherent weaknesses in safeguards that are meant to shield the judiciary from political influence, as well as structural issues that undermine the effectiveness and authority of the courts, continue to present a plethora of challenges to the judiciary, imposing negative impact on its modern-day role as the sole protector of human rights and the sole mediator of conflicting interests.

5.2 Areas for Improvement

The following core and auxiliary areas for improvement have been identified to improve and protect the independence and authority of the Sri Lankan judiciary.

⁴ Nandasena Lalantha Anurudha v. Inspector of Police, Anuradhapura, S.C. (F.R.) Application 396/2013, S.C. Minutes of 29 June 2020; Rathnayake Tharanga Lakmali v. Niroshan Abeykoon, S.C. (F.R.) Application 577/2010, S.C. Minutes of 17 December 2019; Dr Ajith Perera v. Minister of Social Services and Social Welfare, S.C. (F.R.) Application 273/2018, S.C. Minutes of 18 April 2019; H.W. Karunapala and Others v. J.P.K. Siriwardhana, S.C. (F.R.) 97/2017, S.C. Minutes of 12 February 2021; Ravindra Gunawardena Kariyawasam v. Central Environmental Authority, S.C. (F.R.) Application 141/2015, S.C. Minutes of 04 April 2019; Landage Ishara Anjali v. Waruni Bogahawatte, S.C. (F.R.) Application 677/2012, S.C. Minutes of 12 June 2019; Hondamuni Chandima v. Inspector Malaweera, Ambalangoda Police Station, S.C. (F.R.) 242/2010, S.C. Minutes of 30 April 2021.

5.2.1 Core Areas

5.2.1.1 Measures to Improve Institutional Independence

This section is divided into (i) internal measures and (ii) external measures that can be adopted to improve judicial independence in Sri Lanka.

(i) Internal measures to promote judicial independence

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

(ii) External measures to promote judicial independence

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

- i. Improving communication and online visibility to enhance engagement with the public through maintaining up-to date official websites and social media accounts that regularly and transparently disclose updates on caseloads, court improvements, and other developments.
- ii. Issuing media guidelines about reporting on ongoing judicial proceedings. This would focus on maintaining accurate and unbiased information about ongoing trials and verdicts to the press.

5.2.1.2 Measures to Improve Financial Independence

Given the past experience in Sri Lanka where judicial salary determinations have stagnated for decades without revisions, the possibility of establishing an independent committee on judicial salaries and conditions of service, to maintain a timely review, should be considered. This committee would then conduct annual reviews on salary and pension indexes and make recommendations to parliament.

5.2.2 Auxiliary Measures

- i. Streamline the use of legal technology in the administration of justice.
- ii. Introduce the necessary processes to provide technical, research, and logistical capacity to the judges, by providing human and material resources.

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