

RECOMMENDATIONS MADE BY THE SUB-COMMITTEE ON JUDICIARY

This booklet summarizes recommendations made by the Sub-Committee on Judiciary. For purposes of clarity, the proposals recommended by the Sub-Committee have been simplified and presented in Question and Answer format

Constitutional
Assembly
Secretariat

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Comments made in this booklet which are not extracted from the Sub-Committee Report have been given in italics and begin with an asterisk (). The contents of the Report have been paraphrased in places in order to simplify some of the recommendations made by the Committee.*

Broad areas of focus of the Sub-Committee on Judiciary

- ✚ Independence of the Judiciary
- ✚ Courts' structure
- ✚ Courts' jurisdiction including Judicial Review
- ✚ Constitutional Court and its jurisdiction

I. Independence of the Judiciary

Why is it important to focus on strengthening the Independence of the Judiciary?

- ✚ Taking into consideration the experience which the country has undergone in the judicial sphere, the Sub-Committee recommends that it is desirable to incorporate some express provisions in the Constitution guaranteeing and securing the principle of judicial independence.
- ✚ Although the present Constitution contains in Chapter XV [the Judiciary] a few Articles under the sub-title "Independence of the Judiciary", those Articles deal with primarily the appointment, tenure, removal, age of retirement, salaries of judges of the Supreme Court and the Court of Appeal, there is no express provision incorporated in the Constitution which lays down the requirement and importance of ensuring the principle of judicial independence in the country.

What Constitutional reforms are recommended to safeguard the principle of the Independence of the Judiciary?

- ✚ Incorporating express Constitutional provisions which provide that the judiciary shall function independent of the Executive and the Legislative organs of the State and that no authority shall have power to interfere with the judicial functions and processes.
- ✚ Introducing constitutional provisions which guarantee the independence of the judges to function without any restriction, pressure, interference, inducement, intimidation, direct or indirect from any person or authority and to act according to their judicial conscience and to judge impartially only based on the law and facts of the case.
- ✚ Vesting the judicial power of the people directly on the judiciary by the Constitution. This is because the present position of it being exercised by Parliament through courts, tribunals, etc., is unsatisfactory and should be altered.

Recommendations to ensure an independent judicial service

What measures are recommended to ensure an apolitical appointment process?

Appointment

Judges of the Superior courts to be appointed by the President on the recommendation of the Constitutional Council based on nominations received from a panel of former judges of the Supreme Court.

The panel of former judges shall be nominated by the sitting Chief Justice in consultation with the Attorney General and the President of the Bar Association of Sri Lanka.

What recommendations have been made to ensure an independent tenure of office?

Age of retirement

Specified age of retirement of judges is 65 years of age. Those who could provide service in overseeing and mentoring judges of the lower courts on the recommendation of the Constitutional Council after retirement shall work till 70 years of age.

Salaries of judges

Salaries shall be fixed by the Parliament and shall not be reduced during the tenure of the judges.

Retirement payment

The judges of the superior courts shall be paid the same consolidated emoluments (salary and allowances) that they obtained at the time of their retirement or whatever the consolidated emoluments (salary and allowances) that are received by the judges of the contemporary period whichever is more.

What disciplinary procedures have been recommended in order to ensure that the independence of the judiciary is not compromised?

Disciplinary control and dismissal

Allegations of misconduct or incapacity are to be inquired into by a Superior Court Judges' Disciplinary Commission which reports to the Constitutional Council. The members of the Commission shall be recommended by the Constitutional Council and appointed by the President.

The Constitutional Council has the authority to recommend the removal of any such judge to

the President after such recommendation is approved by Parliament.

Would the independence of the judiciary be affected by sitting judges being allowed to engage in other functions?

Inviting serving or retired judges to perform other functions

Sub-Committee is of the opinion that it is desirable not to permit any sitting or retired judges to accept any paid or unpaid role in order to avoid any real or perceived lack of independence of the judges of the superior courts.

However the Sub-Committee is not averse to the idea of judges of the superior courts or other courts being given the opportunity to gain foreign exposures on no pay leave for short period for programs judiciary aligned with correct global legal trends.

Short-term *ad-hoc* appointments to the superior courts could be made from leading practitioners to tide over the vacancies arising out these short spells of absence and to enrich and uplift the quality of justice in the country.

II. Courts' Structure

What is the courts' structure recommended by the Sub-Committee?

The following shall be the structure of courts to be recognized by the Constitution.

Supreme Court



Court of Appeal & Provincial Courts of Appeal



High Court of Sri Lanka

The other courts and their structure shall be provided for by legislation passed by Parliament such as District Court, Family Court, Magistrate's Court, Primary Court.

III. Courts' jurisdiction including Judicial Review

How does the courts' structure recommended by the Sub-Committee facilitate greater access to justice?

**The Sub-Committee has recommended increasing the number of judges of the Supreme Court¹ and the Court of Appeal² and also establishing Provincial Courts of Appeal*



The Supreme Court

- Shall consist of 15 judges
- Shall have the final appellate jurisdiction in the country
- Will not have any original jurisdiction



The Court of Appeal

- Shall have 45 judges
- Shall sit in the Provinces and they shall be known as the respective "Provincial Court of Appeal"
- There can be different divisions of the Court of Appeal such as a Criminal Division and a Commercial Division
- Will have the fundamental right jurisdiction and writ jurisdiction

¹ Article 119(1) of the present Constitution provides that *"the Supreme Court shall consist of the Chief Justice and of not less than six and not more than ten other judges..."*

² Article 137 of the present Constitution provides that *"the Court of Appeal shall consist of the President of the Court of Appeal and not less than six and not more than eleven other judges..."*

- Will also have the appellate jurisdiction from the courts of first instance

The High Court

- Will only exercise criminal jurisdiction over grave crimes
- Appeals from the judgements of the High Court shall be heard by the Criminal Division of the Court of Appeal
- Will not have any writ or appellate jurisdiction

IV. Constitutional Court and its jurisdiction

What is the role of a Constitutional Court as recommended by the Sub-Committee?

The Committee has recommended the establishment of the Constitutional Court. A Constitutional Court is established to adjudicate issues of constitutional importance by specialists in the field³.

³ Recommendations pertaining to the need for a Constitutional Court and its nature are matters directly determined by the Steering Committee of the Constitutional Assembly.

What is the nature and the composition of the proposed Constitutional Court?

- ✚ Consists of 7 members/judges, appointed by the President on the recommendation of the Constitutional Council.
- ✚ Members to be appointed from among distinguished persons in the judicial sphere and legal practice or legal education with specialized knowledge on Constitutional Law.
- ✚ Members shall be appointed for a term of 5 years and will not be eligible for reappointment.
- ✚ All members shall sit as the Court.
- ✚ This court will not fall within the court structure although any matter falling within the jurisdiction of the Constitutional Court as per the Constitution that arises in any other court in the country shall be duly referred to the Constitutional Court.

What are the parameters of the judicial competence of the Constitutional Court?

The jurisdiction of the Constitutional Court shall be as follows:

-  Interpretation of the Constitution
-  Determine whether a matter or issue falls within the ambit of interpretation of the Constitution
-  Judicial Review of Bills
-  Judicial Review of Laws and Statutes
-  Issues arising between and/or among the Centre and Provinces
-  Breach of privileges of Parliament
-  Review of its own judgement