

# **The Constitutional Assembly**

Report of the Sub-Committee on  
the Judiciary



**1. The Report of the Sub-Committee on the Judiciary focused on the following issues and its report is based on those issues:**

- a) Independence of the Judiciary
- b) Courts' Structure
- c) Courts' Jurisdiction including Judicial Review
- d) Constitutional Court and its Jurisdiction

**2. Independence of the Judiciary**

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 with 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.

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. The Constitution can make it clear that the judiciary shall be independent of the executive and legislative organs of the State and that no authority shall have any power to interfere with the judicial functions and processes. The Constitution can further provide that the judges shall, in the performance of their functions and duties, act without any restriction, pressure, interference, inducement, intimidation, direct or

indirect, from any person or authority and shall act according to their judicial conscience and applying the law to the facts as they deem the law and facts are.

In this respect, the Constitution of South Africa provides good guidance. In terms of Article 165, it is provided that "the Courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice", that "no person or organ of state may interfere with the functioning of the courts" and that "organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts."

It is also necessary and desirable that the judicial power of the People has to be vested directly in the Judiciary by the Constitution. The present position of it being exercised by Parliament through courts, tribunals, etc., is unsatisfactory and should be altered. These will also further strengthen the principle of judicial independence.

On the other hand, institutions exercising specialized adjudicatory powers and alternative dispute resolution powers, viz., quasi-judicial bodies, may be set up by Parliamentary legislation in specific cases to complement the judicial power vested in the Judiciary.

These express guarantees are in addition to the guarantee with regard to the appointment, tenure, retirement, removal, disciplinary control, salaries, retirement benefits, employment after retirement, engagement of them with regard to other services etc. of the Supreme Court and Court of Appeal judges.

In these respects, the following recommendations are made:

**Appointment:**

Judges of the superior courts shall be appointed by the President on the recommendation by the Constitutional Council, which has received nominations from a panel of former judges of the Supreme Court. The panel of former judges, including a former Chief Justice, shall be nominated by the sitting Chief Justice who shall consult the Hon. Attorney General and the President of the Bar Association in nominating the members to the Panel. For the former Judges of the Supreme Court to be nominated to the Panel, a minimum period of two years must have lapsed between their date of retirement and being nominated to the Panel.

**Age of retirement:**

The age of retirement of judges of all the superior courts shall be the same, preferable, 65 years of age. Some of the judges when they retire could be engaged, on the recommendation of the Constitutional Council, to provide service in overseeing and mentoring the judges of the minor judiciary to develop and improve upon their competence and service delivery. These judges can go up to 70 years of age.

**Salaries of judges:**

The salaries of judges of superior courts shall be fixed by Parliament and they shall not be reduced during the tenure of the judges. The salaries of judges of all superior courts shall be the same.

### **Disciplinary control and dismissal:**

There shall be a Superior Courts' Judges Disciplinary Commission, the members of which shall be recommended by the Constitutional Council and appointed by the President, which shall inquire into any allegations of misconduct or incapacity and submit a report to the Constitutional Council. The Constitutional Council shall have authority to recommend the removal of any such judge to the President who shall thereupon remove such judge. However, the recommendation of the Constitutional Council shall be approved by Parliament before it is sent to the President for removal.

### **Retirement payment:**

It is the opinion of the Committee that 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.

### **Inviting serving or retired judges to perform other functions:**

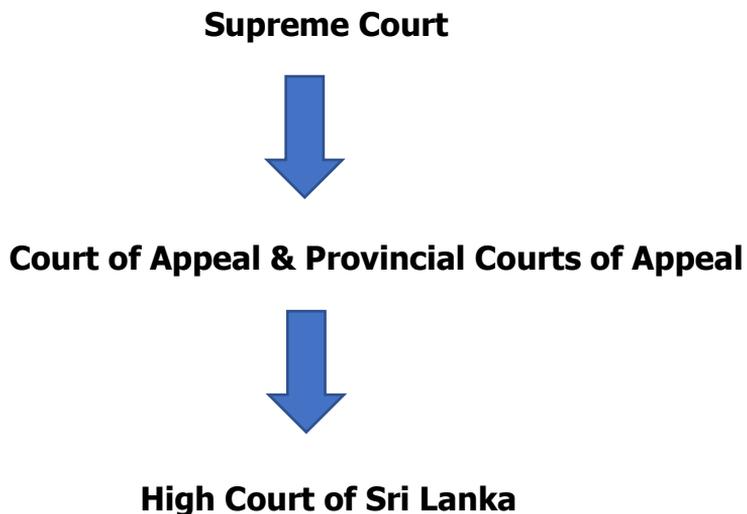
Although the judges may be well suited to be engaged in other functions, the Sub Committee is of opinion that it is desirable not to permit any sitting or retired judges to accept any paid or unpaid role in order to avoid any real or perceived lack of independence of the judges of the superior courts. However, the Sub-Committee is not averse to the idea of judges of the superior courts and other courts being given opportunities to foreign exposures by permitting them to work for a few limited spells in foreign jurisdictions. When superior court judges are

permitted to accept positions tenable with their standing and training, they should be placed on no-pay during that period. In this context, the judicial systems and democratic nature of the foreign countries must be borne in mind in granting this approval. The Constitutional Council shall have to evaluate such requests before making its recommendation to the President who shall have the authority to grant such requests.

In this context, the Sub-Committee also holds the view that 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.

### **3. The Courts Structure**

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



The other courts and their structure shall be provided for by the legislation passed by Parliament. The Sub-Committee recognizes that the other courts can be the District Court, Family Court, Magistrate's Court, Primary Court/Court of Small Claims.

#### **4. The composition and jurisdiction of the courts**

**The Supreme Court** shall consist of fifteen judges. The Court shall have the final appellate jurisdiction in the country. It will not have any original jurisdiction.

**The Court of Appeal** shall have forty five judges. The Court of Appeal shall sit in the Provinces and they shall be known as the respective Provincial Courts of Appeal. The President of the Court of Appeal shall nominate from among the judges of the Court of Appeal to sit in the Provincial Court of Appeal. There can be different divisions of the Court of Appeal. For instance, there could be Criminal Division and Commercial Division of the Court of Appeal.

The Court of Appeal will have the fundamental right jurisdiction and writ jurisdiction. The Court will also have appellate jurisdiction from the courts of first instance, viz., the High Court, District Court, Family Courts and Magistrates' Court Primary Courts/Small Claims Courts. The appeals from the Labour Tribunal, Agrarian Services Tribunal and similar quasi-judicial bodies can also be heard by the Court of Appeal.

#### **The High Court of Sri Lanka**

The High Court will only exercise criminal jurisdiction over grave crimes. The appeals from the judgements of the High Court shall be heard by

the Criminal Division of the Court of Appeal or Criminal Court of Appeal in Colombo. The High Court will not have any writ jurisdiction or appellate jurisdiction.

## **5. Constitutional Court and its jurisdiction**

Realizing the need for the adjudication of issues of Constitutional importance by specialists in the field, the Sub Committee recommends the establishment of a Constitutional Court consisting of seven members/judges who are appointed by the President on the recommendation of the Constitutional Council. The members shall be chosen from among persons who have distinguished themselves in the judicial sphere and legal practice or legal education with specialized knowledge on Constitutional Law. They shall be appointed for a term of five years and they will not be eligible for reappointment again.

It is also recommended that all seven members/judges shall sit as the Court. This Court will not fall within the court structure. Where any matter which falls within the jurisdiction of the Constitutional Court as per the Constitution, arises in any case before any court in the country, such matter shall be referred to the Constitutional Court.

The jurisdiction of the Constitutional Court shall be as follows:

- a) Interpretation of the Constitution, including the authority to determine whether a matter/issue falls within the ambit of interpretation of the Constitution;
- b) Judicial Review of bills;
- c) Judicial Review of laws and statutes;
- d) Issues arising between and/or among the Centre and the Provinces;

- e) Breach of privileges of Parliament;
- f) Review of its own judgments.