



Written Submissions by the Centre for Policy Alternatives to the Subcommittee of the Constitutional Assembly on the Judiciary

18th July 2016

Introduction

The Centre for Policy Alternatives (CPA) is thankful to the chairperson and members of the Subcommittee of the Constitutional Assembly on the Judiciary, for the invitation to provide written submissions in respect of the judiciary.

Even though some institutional improvements towards securing the rule of law have been made by the Nineteenth Amendment to the Constitution enacted last year, the present reform debate takes place in a context where public confidence in the judiciary is quite low.¹ This is the result of decades of systematic failings of the judicial system, especially under the two republican constitutions. The promulgation of the second republican constitution, like its predecessor, resulted in removing the judges of the apex court who were in office at the time. Under the same constitution, judges have been threatened and intimidated, locked out of their offices, humiliated, subjected to degrading treatment before select committees of Parliament, and even removed from office without any regard to basic principles of natural justice, provisions of the constitution, or rulings of the Supreme Court. Parliament has also on several occasions acted contrary to or in complete disregard of judgments of the Supreme Court. All this is in addition to the politicisation of the judiciary through questionable and politically motivated appointments made by several Executive Presidents.

CPA recognises that constitutional provisions alone – no matter how well crafted and despite the best of intentions – cannot restore the credibility and potency of the Sri Lankan judiciary. However, it is important to recognise the constitutional flaws that led

¹ CPA, Democracy in Post war Sri Lanka, Top Line report, June 2015, pp 33 -34

to our present predicaments and create a constitutional environment more conducive for an independent and robust judiciary.

To this end, CPA makes the following recommendations in the structure set out below:

- I. The Independence of the Judiciary
- II. Court Structure and Jurisdiction,
- III. Judicial Review
- IV. Judicial Accountability

THE INDEPENDENCE OF THE JUDICIARY

Bearing in mind that the structural changes necessary to firmly establish the independence of the judiciary reach beyond the purely constitutional plane, this section focuses on the constitutional reforms necessary to protect and strengthen the independence of the judiciary, particularly against undue influence from the executive and legislative arms of government.

- i. The judiciary should be recognised as a co-equal arm of the state

Article 4 (c) of the constitution provides that “the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution”. This provision suggests (or, at the very least, lends itself to the interpretation) that Parliament is the original locus of the people’s judicial power and, as such, that courts and tribunals are inferior to Parliament in exercising their constitutional powers. It is recommended that the reference to Parliament be deleted. If necessary, special provisions may be included to recognise and regulate the powers and privileges of Members of Parliament within the framework; however, such provisions need not (and ought not) come at the expense of the principle that the judiciary, the executive, and the legislature are all co-equal arms of the state.

- ii. Ensure the independence of judicial appointments

The Nineteenth Amendment to the Constitution brought about significant improvements to the appointments procedure applicable to Supreme Court and Court of Appeal judges. However, even within that framework, there are several shortcomings that need to be addressed. These are as follows.

- a. The composition of the Constitutional Council

Of the 10 members of the Constitutional Council, only three are identifiably apolitical actors insulated from partisan influences. This is inadequate. At a minimum, the ratio between the numbers of political representatives to non-

political representatives on the Constitutional Council ought to be 1:1, and ideally, non-partisan members should be in a majority as originally proposed in the Nineteenth Amendment Bill.

b. The nomination procedure by the President

Under the Nineteenth Amendment, the President retains the power to nominate individuals to be appointed as a judge of a superior court. Case law suggests that there was a practice (at least until 1994) for the President to consult the Chief Justice, Attorney General, and Minister of Justice before making a nomination. However, this practice has lapsed over the years. Broad and meaningful consultations are of critical importance when making appointments to the judiciary, especially considering that the power of the Constitutional Council is limited to either accepting or rejecting the nominations of the President. Considering the historical unreliability of conventions within Sri Lanka's political culture, it is recommended that the constitution stipulate the officeholders who should be consulted by the President when making a nomination. Having done so, it would also be appropriate if the President were required to provide reasons to the Constitutional Council for his nomination. This would assist the Constitutional Council in coming to its conclusions on the nomination.

c. Decision making procedure by the Constitutional Council

The constitution should expressly provide that the Constitutional Council make rules providing for the discharge of its functions. Though the current constitution also provides the Council's power to regulate its own business, the need to promulgate rules is not mandatory. The Constitutional Council has not, to date, promulgated any rules that deal with how it will discharge its functions. As a result, the processes adopted by the present Constitutional Council in discharging its functions appear *ad hoc* and remain unclear.

iii. Security of tenure and protection from arbitrary removal from office

The provisions in the constitution relating to the impeachment of judges of the superior courts are grossly inadequate. The existing framework has three components: the framing of charges against the judge; the investigation of those charges; the address of Parliament, based on a finding of guilt, authorising the President to remove the impugned judge.

The second aspect is the most contentious. At present, the constitution appears to leave it to parliamentary discretion to provide for the investigation of charges either through standing orders or by law. Currently, the procedures are contained in the Standing Orders of Parliament. These procedures have been criticised widely since their inception and should be replaced.

Several models for investigations have been proposed over time. These include the procedure under Article 151(4)(b) of the Draft Constitution of 2000, as well

as the proposals in the Report of the Public Representations Committee on Constitutional Reforms. While recognising that the constitution cannot provide detailed provisions on all aspects relating to the removal of judges, CPA still emphasises the following recommendations:

- a. Investigation into charges must be carried out by a body that does not include Members of Parliament. This ensures that the authority framing the charges and acting positively on their outcome will not also be tasked with the role of establishing their veracity. Alternatively, Parliament may retain its authority in this respect, but be required to follow the recommendations of a special quasi-judicial panel appointed to investigate allegations against superior court judges. Such a panel should comprise of retired superior court judges and should include at least one from a Commonwealth country. The Speaker should be given the leading role in appointing this panel when required.
- b. The constitution must stipulate that Parliament legislates upon all matters concerning substantive and procedural aspects of removing a judicial officer. Such legislation should include, among others, the procedures to be adopted, the admissibility of evidence, the burden and standard of proof, as well as the rights of an impugned judge during the course of the investigations.
- c. The procedures relating to investigation should be subject to review by the future Constitutional Court (see below).

iv. Retirement of Judges

a. Age of retirement

At present, the constitution provides different ages of retirement for judges of the Court of Appeal (63) and judges of the Supreme Court (65).² This discrepancy in ages of retirement creates anomalies and has prevented competent and respected judges of the Court of Appeal from advancing to the Supreme Court. CPA recommends a uniform age of retirement for all judges of the superior courts.

b. Fixed terms for chief judges

Despite recommendations to the contrary from other quarters, CPA advises strongly against fixed terms for the chief judges of the superior courts, for a number of reasons. First, a fixed term would curtail the career of a competent judge unnecessarily. Second, as far as ensuring the independence of judges is concerned, such a measure would be superfluous, as the degree to which a judge's office is insulated from political pressures is better achieved not by fixed terms but by security of

² Article 107 (5) of the 1978 Constitution

tenure. In this context, it would be better to set a concrete but relatively high retirement age. If a judge holds office for a limited period of time it is more likely that they would be susceptible to external pressure during their tenure. Short or limited tenures could encourage judges to act in a manner which does not antagonise the executive, so as not to jeopardise post-retirement opportunities.

The argument in favour of fixed terms has been advanced based on specific experiences in relation to former Chief Justices who held office for long periods of time. These cases are exceptional, particularly to the extent they ascended to office as political appointees of the executive. These cases revealed not flaws in the tenure of office but in the procedures provided for appointment.

c. Post-retirement conditionality

The current constitution prohibits a retired judge of the Court of Appeal or Supreme Court from appearing or practicing in any court, tribunal, or institution as an Attorney-at-law at any time without the written consent of the President. CPA recommends the replacement of this provision with an absolute prohibition on retired superior court judges from practicing as Attorneys-at-Law.

CPA further recommends a constitutionally mandated “cooling off” period counted from the time of retirement, during which further appointments to any other paid or unpaid position is prohibited, both under the state as well as the private sector. To compensate any financial losses arising from such restrictions, CPA recommends that retired judges be paid their full salary and other benefits from the time of retirement as pension benefits.

THE COURT STRUCTURE AND JURISDICTION OF COURTS

i. The need for a Constitutional Court

Though the Constitutional Court under the first republican constitution (1972-78) was not entirely useful, in principle, such a Court is immensely significant in expounding and developing the new constitution, particularly with respect to the bill of rights. Such a court should deal only with cases involving questions of constitutional significance. As such, the Constitutional Court would be the guardian of the fundamental principle of the supremacy of the constitution. As submitted below, such a function is only possible if the court is composed of individuals from diverse backgrounds (which might not be suitable for a court of final appeal on issues of civil and criminal law). As such CPA does not recommend the suggestion for a Constitutional Bench of the Supreme Court instead of the Constitutional Court. The functions envisaged of a Constitutional Court are very different to that of a court of final appeal. It would require

dedicated personnel with very different skills to court of final appeal (see below).

ii. The jurisdiction of the Supreme Court and the Constitutional Court

CPA recommends the establishment of a Constitutional Court to deal with important constitutional law issues and it should be the apex body with regard to the interpretation of the constitution as well as having the sole and exclusive jurisdiction to strike down primary legislation (i.e., Acts of Parliament and Statutes of a Provincial Council). When a lower court including the Supreme Court decides an Act or Statute is unconstitutional it should be automatically referred to the Constitutional Court to either validate or overturn the decision of the lower court. Subject to this principle, the Supreme Court shall be the highest and final court of record in the Republic. However, CPA does not recommend that either court is vested with exclusive jurisdiction on any area. The dispersal of constitutional jurisdiction to a wider range of lower courts, including the Supreme Court, will foster a 'constitutional consciousness' throughout the judicial system of the country, especially to the extent that judges of lower courts are empowered (and required) to deal with constitutional matters, including fundamental rights issues. However, limiting the Constitutional Court's jurisdiction to exclude non-constitutional issues will establish a clear division of labour between that court and the Supreme Court, which is expected to create, in turn, a conducive working environment in which judges of both courts have the freedom to develop their respective jurisprudence through broader research and writing of judgments.

A corollary of this recommendation is that all decisions (judgments, orders, etc.) of the superior courts are required by the constitution to be published immediately. We recommend abolishing the consultative jurisdiction (see below), but if it is retained, then the publication requirement applies perforce to advisory opinions given the past experience of secrecy, manipulation, collusion between the executive and the judiciary.

A particular area requiring the recognition of exclusive/ original jurisdiction in favour of the Constitutional Court should be the review of impeachment proceedings for judges of the superior courts.

CPA recommends removing the consultative jurisdiction of the Supreme Court insofar as it is set out in Article 129(1) of the constitution. The said provision enables the President to obtain the 'opinion' of the Supreme Court on a question of law or fact, which is of public importance. This jurisdiction creates a conflict of interest as having expressed an opinion within a time period specified by the President, the Court then might have to decide the same issue during the course of exercising its regular jurisdiction. Furthermore there is no transparency in the entire process relating to the reference. The President can refer such a question by way of a private communication, which the court could then hear excluding all other parties except the Attorney General subsequent to which the Courts opinion will be transmitted to the President.

Even if measures are taken to improve the transparency of the process (as has been suggested) it will still not rectify the fundamental problem of the conflict between this specific jurisdiction and the Courts regular jurisdiction. If the President, Prime Minister, or Speaker requires a legal opinion on an important issue, they are free to obtain the opinion of the Attorney General and act on same. If any citizen is unsatisfied by the conduct of the President they can subsequently challenge same before an appropriate forum. The Court should not be treated as the government's legal advisor.

iii. Composition of the Supreme Court and Constitutional Court

While CPA recommends broadening the range of qualifications for all apex court judges, to specifically include individuals eminent in the legal academia in addition to career judges (including judges retired from the Supreme Court) and lawyers from both the official and unofficial bar, CPA recommends further that non-law scholars of eminence are included within the composition of the Constitutional Court. This is in recognition of the fact that a broad range of skills is required to dispose of the cases expected to arrive at the apex courts, and career judges and lawyers represent only a specific set of skills, such as a sound appreciation of the legal method as well as an intimate familiarity with judicial procedure. On the other hand, academics, both from the legal field and beyond, stand to infuse a degree of scholarly rigour to the judicial process, both with regard to a greater comparative capacity and in contextualising constitutional judgments within the wider social context of Sri Lanka.

The Constitutional Court should have the power to decide on what cases it will adjudicate on and all members of the court, unless otherwise unavailable or disqualified to hear a particular case, should simultaneously hear all cases that come before them. It is expected that the Constitutional Court would grant leave to proceed for applications involving significant questions of constitutional law and interpretation only. Limiting the court's caseload to only exceptional issues ensures that it would have the time and resources for the fullest possible engagement with the disputed issues, and over time to develop a consistent, coherent, comparatively informed, and theoretically sound body of constitutional jurisprudence. The Court should however be constitutionally enjoined to provide full published reasons of its leave to proceed decisions, which is important especially in relation to rejected applications.

iv. Devolution of judicial power

a. The need for devolution of judicial power

The need to bring adjudication of fundamental and language rights issues closer to the people has been discussed for a significant period of time. Presently, the Supreme Court exercises sole and exclusive jurisdiction to hear and determine any question relating to fundamental and language rights. This is a significant barrier for individuals from outside Colombo who want to vindicate their rights through a judicial mechanism, as doing so would require a significant amount of time and other resources. As

such the existing mechanism precludes a significant part of the population from accessing an effective remedy. It is also not consistent with the greater devolution of power that is contemplated in other areas of the proposed new constitution.

Moreover, the existing mechanism also deprives an aggrieved party of the opportunity to appeal the decision to higher court and also leads to a stultification of the jurisprudence on fundamental rights since only a limited number of judges will hear and only a limited number of lawyers argue such cases. It is also clear that the Supreme Court has to deal with a large number of fundamental rights applications, which disables it from developing a coherent body of precedents around fundamental rights principles CPA therefore recommends the devolution of fundamental and language rights jurisdiction to the provincial level.

b. The form of devolution of judicial power

In addition to their existing jurisdictions, the Provincial High Courts should become the courts of first instance for fundamental rights and language rights applications. In general, and in the large majority of cases, there should one appeal from decisions of the Provincial High Courts to the Court of Appeal in circuit. If a significant constitutional issue is implicated, there can in exceptional cases be a further appeal to the Constitutional Court (see above).

JUDICIAL REVIEW³

All law, policy, practice, and conduct inconsistent with the bill of rights specifically and with the constitution more broadly must be comprehensively subject to judicial review and effective public law remedies.

The expansive relaxation of *locus standi* requirements over the course of the development of its fundamental rights jurisdiction by the Sri Lankan Supreme Court has been one of the more positive features of its case law. This should find some form of constitutional expression in the new constitution.

³ Based on CPA's written submissions to the sub committee of the constitutional assembly on fundamental rights.

JUDICIAL ACCOUNTABILITY

The corollary of ensuring greater independence and autonomy for the judiciary is the expectation that such power will be exercised responsibly and without abuse. In cases of proved misbehaviour and incapacity the legislature can initiate impeachment proceedings. However, impeachment should be the response of last resort; other measures to ensure that judges perform their functions consistently with the dignity and integrity of their office are also recommended.

i. The Judicial Service Commission

The Judicial Service Commission (JSC) has the power to transfer judges of the High Court; and appoint, promote, transfer, exercise disciplinary control, and dismiss lower judicial officers and scheduled public officers. However, at present the JSC is comprised of the Chief Justice and the two most senior judges of the Supreme Court (with at least one judge having experience as a judge in a court of first instance).

CPA joins calls by several other organisations to broaden the composition of the JSC. In addition to the existing members, the JSC should also include the President of the Court of Appeal and the senior most judge of the Court of Appeal (other than the President). Bringing in members of the Court of Appeal, which is functionally separate from the Supreme Court, will reduce the risk of arbitrary decisions by the Chief Justice as was seen at times in the past.

There have been proposals to include a senior legal practitioner from the private bar on the recommendation of the Bar Association of Sri Lanka as well as the Attorney General. Such a proposal would serve to broaden further the composition of the JSC, provided that any practitioner from the private bar who is on the JSC is prevented from practicing in the courts during their tenure in the JSC.

In addition to the powers currently provided in the constitution, the JSC should also be mandated to periodically conduct auditing and evaluation of judges under their preview, to ensure they are competent and efficient. The JSC should take these audits into consideration, together with seniority, when deciding promotions. It should also, in appropriate cases, consider the removal of judges based on their performance standards as disclosed by their audits.

ii. Ethics and standards of practice for judges

Sri Lanka does not have a code of judicial conduct. The constitution should mandate the JSC in consultation with judges of the superior courts and with inputs from the official and unofficial bar to develop a code of judicial conduct. This code should meet the basic international standards including those in the 'Bangalore Principles of Judicial Conduct'.

The JSC should be mandated to ensure adherence to the code by judges of the courts of first instance. In case of the superior courts, the President of the

Constitutional Court, the Chief Justice, or the President of the Court of Appeal as the case may be should be entrusted with the responsibility. In case of serious breaches of the code, the impugned judge could be referred to the appropriate authorities including Parliament to consider for impeachment proceedings.

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The **Centre for Policy Alternatives (CPA)** was formed in the firm belief that there is an urgent need to strengthen institution and capacity-building for good governance and conflict transformation in Sri Lanka and that non-partisan civil society groups have an important and constructive contribution to make to this process. The primary role envisaged for the Centre in the field of public policy is a pro-active and interventionary one, aimed at the dissemination and advocacy of policy alternatives for non-violent conflict resolution and democratic governance. Accordingly, the work of the Centre involves a major research component through which the policy alternatives advocated are identified and developed.

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