



WRITTEN SUBMISSION TO THE PUBLIC REPRESENTATIONS COMMITTEE PROPOSED RECOMMENDATIONS FOR NEW CONSTITUTION



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Transparency International Sri Lanka
Written Submission to the Public Representations Committee
Proposed Recommendations for New Constitution
15th March, 2016

Transparency International Sri Lanka (TISL) is the local chapter of the global movement against corruption committed towards the promotion of principles of good governance and the elimination of corruption in all sectors and spheres in Sri Lanka. Initiated in 1999, TISL has worked with elected and public officials at the national and local level, media, youth, academics, policy makers and the citizenry at large on advocating for stronger accountability and transparency practices in governance by pushing for behavioral change, legislative reform, anti-corruption mechanisms and legal redress.

As one of the leading organizations working on governance issues, both nationally and regionally, TISL has a sound understanding of citizens' concerns and priorities in terms of governance and the structural changes required for a stronger integrity system. The recommendations proposed below have been developed in consultation with TISL's core stakeholders taking into consideration the wealth of knowledge and experience accumulated by TISL since its inception.

The following proposals are made on several basic premises including that:

- 1. At least the minimum mechanisms for good governance in the current constitution will be improved upon in the new constitution (e.g.:- that the independent commissions will continue);**
- 2. Other subordinate legislation will be amended/repealed/introduced subsequently within a reasonable period of time to be consistent with the letter and spirit of the new constitution.**

Proposals

The proposed recommendations have been framed under the categories outlined by the Public Representations Committee.

1. Recommendation 1: Amending the composition of the Constitutional Council

- *No. 12. Constitutional Council and Independent Commissions*

The current composition of the Constitutional Council (CC) is as follows:

- a. the Prime Minister;
- b. the Speaker;
- c. the Leader of the Opposition in Parliament;
- d. one Member of Parliament appointed by the President;
- e. two Members of Parliament nominated by both the Prime Minister and Opposition Leader and appointed by the President;
- f. three members of Civil Society nominated by both the Prime Minister and Opposition Leader and appointed by the President;
- g. one Member of Parliament to be nominated by political parties or independent groups represented in Parliament, except those represented by the Prime Minister and the Opposition Leader

Of the 10 members, therefore, 7 are Members of Parliament. This does not uphold the independence of the CC, especially given that the quorum for meetings is 5 members. MPs who hold Ministerial positions may be appointed, causing a conflict of interest. Moreover, since it is the CC that is vested with power to recommend members to the independent commissions and to high offices in the public service, it is paramount that its integrity and independence is preserved, and not be vulnerable to politicization.

In the interest of retaining the independence of the CC it is recommended that the previous formulation of the CC, as proposed in the 19th Amendment Bill published in the Gazette issued on 16th March, 2015, be followed, as set out below:

- (a) the Prime Minister;
- (b) the Speaker;
- (c) the Leader of the Opposition in Parliament;
- (d) one person appointed by the President;
- (e) five persons appointed by the President, on the nomination of both the Prime Minister and the Leader of the Opposition;
- (f) one person nominated by agreement of the majority of the Members of Parliament belonging to political parties or independent groups, other than the respective political parties or independent groups to which the Prime Minister and the Leader of the Opposition belong, and appointed by the President

The draft 19th Amendment Bill contained an important provision in Section 10, as subsections (4) and (5) to Article 41A (as it was to be amended) as follows:

“(4) In nominating the five persons referred to in sub paragraph (e) of paragraph (1), the Prime Minister and the Leader of the Opposition shall consult the leaders of political parties and independent groups represented in Parliament so as to ensure that the Constitutional Council reflects the pluralistic character of Sri Lankan society, including professional and social diversity.

(5) The persons to be appointed or nominated under sub-paragraphs (d), (e) and (f) of paragraph (1) shall be persons of eminence and integrity who have distinguished themselves in public or professional life and who are not members of any political party.”

There is a marked difference in the constitution of the proposed CC in that the members to be appointed are not members of political parties, thereby significantly reducing the risk of politicization.

2. Recommendation 2: Expanding the scope of the Commission to Investigate Allegations of Bribery or Corruption

- *No. 12. Constitutional Council and Independent Commissions*

TISL notes with appreciation the powers vested in the Commission to Investigate Allegations of Bribery or Corruption (CIABOC) by the 19th Amendment to the Constitution¹ to investigate or inquire into an allegation of violation either on its own motion or on a complaint made to it. It is proposed that the mandate of the CIABOC should be extended to private sector violations as well. In fact, the 19th Amendment² enshrined in the Constitution the need to adopt measures to implement the United Nations Convention Against Corruption (UNCAC) and other international Conventions relating to the prevention of corruption. The UNCAC specifically recognizes the need to regulate the private sector as well, to curb corruption.³

It is submitted that the high level of bribery and corruption prevalent in the country continues to proliferate due not merely to the public sector, but also the private sector which seeks to derive benefit from opportunities to engage in such activities. Repercussions should flow for such action, and a broader regulatory mechanism should be introduced under the aegis of the CIABOC.

In this context, and in view of the provisions of the Constitution following the 19th Amendment to the Constitution, it is proposed that the powers vested in the CIABOC be extended to the private sector as well.

3. Recommendation 3: Recognition of the right to information

- *No. 4. Citizenship, religion, fundamental rights and duties, language rights, individual and group rights, directive principles on State policy.*

The Constitution should continue to recognize and uphold the right to information as a fundamental human right, as currently enshrined by the 19th Amendment to the

¹ Section 51, 19th Amendment to the Constitution of Sri Lanka, certified on 15th May, 2015.

² 156A (c) of the Constitution, introduced by the 19th Amendment to the Constitution of Sri Lanka, Certified on 15th May, 2015.

³ Article 12, United Nations Convention Against Corruption.

Constitution. It is of great concern that Bhutan and Sri Lanka remain the only countries in South Asia who have thus far failed to give effect to this right. It is proposed that enabling legislation should be passed to give maximum effect to this right with immediate effect.

4. Recommendation 4: The grievance redress mechanism of the Right to Information (RTI) framework to be established within the Right to Information Commission

- *No. 12. Constitutional Council and Independent Commissions*

As per the proposed Right to Information legislation presented to the Cabinet, penalties and fines related to non-disclosure of information or delays in processing RTI applications are addressed through the Magistrate's court, and the jurisdiction to impose a sentence in terms of such offences remains with the Magistrate's Court.⁴

It is proposed that the RTI Commission be recognized as the authority that handles grievances and prescribes related penalties. The need for a Magistrate's Court proceeding when citizens seek to uphold their fundamental right to information should be removed.

This would require the constitutional recognition of the RTI Commission as a body that can levy penalties and fines – which is currently the sole preserve of judicial bodies.⁵

5. Recommendation 5: Prohibiting crossovers

- *No.5. Legislature (unicameral / bicameral)*

In the existing electoral system, at elections, candidates go up for elections on the mandate given to them by the party. To allow crossovers in such a context would amount to a betrayal of the vote cast in favour of that candidate's party, as her mandate flows from her party, and the voter does not distinguish between the party and the candidate. Therefore, it is proposed that crossovers should not be allowed in Parliament, Provincial Councils or Local Authorities, if the existing electoral system were to remain.

⁴ Section 39, Right to Information Bill, issued on 21.12.2015.

⁵ Article 105 of the Constitution of Sri Lanka.

However, if a Mixed Member Proportional dual ballot system as proposed in Annexure 1 hereto is introduced (Refer Recommendation 7), the same ban does not need to apply as citizens vote for the candidate as distinct from the party. If the candidate is individually identifiable on the ballot paper, her legitimacy stems directly from the people and therefore is distinct from the party affiliation and is directly derived from the sovereignty of the people. In that event, it is proposed that crossovers should not be prohibited.

6. Recommendation 6: Introducing a fixed election calendar

- *No. 14. Electoral reforms*

It is proposed that an election calendar is developed and implemented to ensure fixed cycles of elections. This will prevent the elections being used as a tool for political opportunism by the government in power and provide stability and predictability to the system. It will also be conducive to better manage resource allocation during elections.

Elections are the principal manner by which citizens exercise their sovereignty. Therefore, there should not be any space left for political maneuvering at the cost of citizens' sovereignty. Establishing and safeguarding the sanctity of elections should be of paramount importance.

7. Recommendation 7: Introducing electoral reforms

- *No. 14. Electoral reforms*

7.1. Implementing a Mixed Member Proportional electoral system, with a dual ballot paper

Please refer Annex 1.

It is proposed that a Mixed Member Proportional system with a dual ballot is adopted. It is the only system of representation which allows for constituency representation whilst guaranteeing a proportional result. The anchor point of this system is that PR list seats are used to compensate in order to reflect a party's overall national performance.

Fictional example:

In a 100-member parliament - 70 constituency FPTP seats and 30 PR list seats.

If party X gets 10% of the popular vote, but only 4 constituency FPTP seats, they should get 6 PR list seats as a top up / compensation to ensure that they have 10% of the overall number of Members of Parliament (a proportionate result).

To ensure this result a dual ballot paper is needed, which has constituency FPTP candidates on one side of the ballot and parties on the other side of the ballot.

This allows a citizen to vote for a candidate (irrespective of party) and to vote for the party separately (known as 'split-ticketing').

While enhancing the voter's choice, this system also safeguards against 'wasted vote' campaigning.

For a detailed explanation hereof, refer Annex 1.

7.2. Women's Representation

The Local Authorities Elections Act was recently amended⁶ to increase the total number of members in order to assign those seats to women candidates. This move does not promote sound policies of governance, as it goes against public demand for smaller legislatures. Moreover, the necessity for quotas for women should be accommodated within the existing cadre, as to do otherwise would contravene the principle quotas seek to uphold.

8. Recommendation 8: Executive to be outside of the legislature (assuming Executive Presidency continues)

- *No. 16. Powers of President under Parliamentary system*

In the event that the President retains executive powers and is the head of the cabinet of ministers, it is proposed that the cabinet is formed outside of the legislature (parliament).

Sri Lanka is the only country with an executive presidency that still has a cabinet that is formed from within the legislature. As a result, there is a serious erosion of separation of

⁶ Section 2, Local Authorities Elections (Amendment) Act No. 1 of 2016.

powers and its associated checks and balances, with the legislature predisposed to not call the executive to account for its actions and decisions.

If the Executive Presidency is abolished and an Executive Prime Minister is instituted, the Cabinet remaining within the legislature causes less threat to the separation of powers, as the Prime Minister will be directly accountable to Parliament.

9. Recommendation 9: Enshrining the supremacy of the Constitution

- *No. 6. Supremacy of Constitution or Parliament*

The supremacy of Parliament is not a concept enshrined in the current constitution, in spite of arguments otherwise. The inalienable sovereignty of the people is in the people, and is exercised equally through the executive, the legislature and the judiciary. This is in consonance with the principle of separation of powers, and averts the danger of removing the checks and balances assured by this balanced system.

However, certain mechanisms are utilized by the Executive and by Parliament in a manner that erodes the independence of these institutions.

9.1. Passage of Laws

The procedure set out under the present constitution and Standing Orders of Parliament is not conducive to the supremacy of the constitution. On the one hand, there is a very short time span within which a Bill may be challenged in court. During this time, it is almost impossible for an ordinary citizen to obtain a copy of such Bill.

On the other hand, even if such Bill has been referred to the Supreme Court for its opinion and then returns to Parliament, changes can be worked into the Bill at the Committee Stage of Parliament. This undermines the sovereignty of the people and grants to Parliament an unwarranted supremacy. (See further Recommendation 11)

9.2. Article 84

Article 84, with the side note 'Bills inconsistent with the Constitution' sets out the manner in which an unconstitutional Bill may be enacted as law. A

constitutional provision that provides for the enactment of laws inconsistent with the Constitution is in and of itself a perversion of the law. Constitutions reflect the will of the people, and are drafted in a manner that will encapsulate the same for a significant amount of time. To allow a legislature under a certain government the power to undermine the Constitution by the passage of unconstitutional Bills is prone to serious abuse. It is proposed that this provision be struck off.

9.3. **Article 16**

Article 16 (1) of the present constitution provides as follows at the end of the chapter on Fundamental Rights:

“All existing written and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this Chapter”.

This provision is in direct contravention with first principles of constitutional law. Most countries in their constitutions enshrine an Article that is diametrically opposite to this Article. Article 13(1) of the Indian Constitution, and Article 2 of the South African Constitution unequivocally set out the supremacy of the Constitution in case of conflict with other laws. It is proposed that this Article that has been a part of our constitutions from 1972, be removed.

9.4. **Parliament v. The Judiciary**

The recent impeachment proceedings against the sitting Chief Justice of Sri Lanka, brought into sharp focus the conflicting claims for supremacy between the Parliament and the judiciary. (See further Recommendation 12)

It was argued that Article 4(c) of the Constitution which states that the judicial power of the people is to be exercised by Parliament through courts, tribunals *et cetera*, allowed Parliament supremacy over the Judiciary.

Much in contrast, the literal and purposive interpretation of the provision states that Parliament is mandated to exercise the judicial power of the people only by means of legislation. This is limited to legislating to give

power to the Judiciary (through the Constitution and other laws) and to exercising its judicial power through such courts, tribunals, and institutions.

An exception hereto lies in relation to the residual powers of Parliament regarding privileges, immunities and powers of Parliament and its members, which has been exercised by enacting the Parliament (Powers and Privileges) Act No. 21 of 1953 as amended.

There is no judicial power vested in Parliament except in these limited circumstances.

It is therefore clear that there is a clear delineation of power between the three arms of government. It is recommended that the concept of separation of powers be clearly enshrined in the Constitution, in this respect.

In accordance with the above, we recommend that the Constitution expressly enshrines the principle of constitutional supremacy and enshrines provisions and procedures that lend themselves to the same.

10. Recommendation 10: Establishing a Constitutional Court

- *No.8. Independence of the Judiciary and the Courts Structure*

It is proposed that a Constitutional Court be instituted in order to perform several important functions, as South Africa, and notably Indonesia have done, in a move to create secure checks and balances for the administration of justice.

The jurisdiction to hear matters in relation to two instances should be vested in the Constitutional Court. It should be the ultimate authority in the interpretation of the Constitution, either by reference by the President (or any other specified person/body), or when challenged by way of litigation, i.e, where a case involves a question of law that requires constitutional interpretation, the final appeal should lie to the Constitutional Court. It should also have the power to review legislation post-enactment for its constitutionality.

Indonesia has also granted its Constitutional Court the jurisdiction to determine matters related to election results, dissolution of political parties and the president or vice president.

In keeping with the same, it may be possible to grant the Court jurisdiction over specified matters of national interest.

Appointments to the Constitutional Court should be made in a manner that assures independence and expertise on its bench. Examples may be drawn from Indonesia and South Africa, which have successfully introduced and utilized Constitutional Courts. In South Africa, the Judicial Service Commission recommends a list of names after having public interviews. Then the President, in consultation with the Chief Justice and leaders of the political parties represented in the National Assembly, chooses and appoints judges.⁷ This includes not only members from the existing judiciary but also other eminent persons. In Indonesia, appointments are made by the President with mandatory recommendations by the Supreme Court, Parliament and the President, from among the nominees of the Judicial Service Commission.⁸

In this manner, the Court can be comprised of judges who have expertise in constitutional law, and are free from political bias. Further, it ensures that the Supreme Court is not burdened with matters of constitutional interpretation that could be heard by a specialized court.

11. Recommendation 11: Allowing for post enactment judicial review

- *No. 15. Judicial review of legislation*

Article 80(3) of the present constitution prohibits post-enactment judicial review of legislation. There exist some lacunae in the present constitutional procedure for the enactment of legislation. Due to the above prohibition, Bills that are not considered or reviewed prior to enactment cannot be revisited.

11.1. Bills (not to be confused with draft Bills) unavailable to the public

There is a short window of time within which a citizen may challenge a Bill in the Supreme Court. Such challenge has to be made within one week of a Bill being placed on the Order Paper of Parliament. A Bill is required to be published in the Gazette at least 14 days prior to it being placed on the Order

⁷ Article 174 of the Constitution of South Africa, 1996, Superior Courts Act No. 10 of 2013.

⁸ Article 18, Constitutional Court Act, Law No 24 of 2003, Indonesia.

Paper of Parliament.⁹ As a practice, such publication is not done in time. As a result, a citizen does not have access to such bills in time to examine and challenge it in the Supreme Court, as provided for by Article 121 of the Constitution.

11.2. **The Committee Stage**

Even in the event of a citizen successfully challenging a Bill, or a Bill being referred to the Supreme Court for its opinion by the President as per Article 121 of the Constitution, there can be two outcomes. The Supreme Court could direct that the bill be amended, or give its opinion that the Bill is in conformity with the constitution. Such Bill would then be submitted to the Second Reading Stage of Parliament, after which any amendments would have to be incorporated at the Committee Stage. After such amendments have been made, there is no mechanism by which the Supreme Court reviews the Bill. Therefore, in either case, the final decision on what changes are incorporated into legislation remains with the legislature, in spite of possible unconstitutionality. This *de facto* makes Parliament the final arbiter of the constitutionality of legislation.

In view of the aforementioned lacunae in the existing law, and also in view of ensuring that the rule of law and international best practices are followed in Sri Lanka, it is proposed that post-enactment judicial review be introduced.

12. Recommendation 12: Prescribing detailed procedures for the removal of judges before the end of their term

- *No.8. Independence of the Judiciary and the Courts Structure*

It is proposed that a detailed process for the removal of judges be prescribed in the Constitution to replace the deficient provisions of Parliamentary Standing Order 78A. This

⁹ Article 78 of the Constitution of Sri Lanka, as amended by section 18 of the 19th Amendment to the Constitution, certified on 15th May, 2015.

should be done by way of a constitutional provision and enabled through legislation, and not by way of Standing Orders.

To leave the process in the hands of Parliament leaves too much space for interference with the independence of the judiciary. The possibility of impeachment by Parliament could prevent judges of the superior courts from giving impartial judgments.

Furthermore, clear grounds upon which removal may take place, must be defined. Procedural requirements in this regard have been aptly set out in a paper by the International Bar Association,¹⁰ dealing specifically with the Sri Lankan situation.

It is proposed that investigations into alleged wrongdoing should be a judicial process with proper procedural safeguards and with the inclusion of esteemed persons from Sri Lanka and the Commonwealth.

13. Recommendation 13: Upholding gender equality

- *No. 4. Citizenship, religion, fundamental rights and duties, language rights, individual and group rights, directive principles on State policy.*

It is proposed that the new Constitution of Sri Lanka include provisions that uphold equality among all persons, with specific reference to equality between men and women.

Affirmative action should be set in motion, and a mechanism set in place that would result in eventual equal representation of men and women in all strata of government, including Parliament, the judiciary, the executive, other public institutions and decision-making bodies. In view thereof, quotas should be provided for by way of the Constitution and enabling legislation, as a mandatory temporary measure.

Policies should also be set out in the Directive Principles of State Policy¹¹ to incentivize the private sector also to uphold gender equality.

¹⁰ "A Crisis of Legitimacy: The Impeachment of Chief Justice Bandaranayake and the Erosion of the Rule of Law in Sri Lanka", April 2013, A report of the International Bar Association's Human Rights Institute, p. 10.

¹¹ Chapter 6, Constitution of Sri Lanka.

Annex 1



Annex 1



Mixed-Member Proportional (MMP) Representation is a voting system that utilizes both non-proportional single-member district (SMD) plurality as well as national party list proportional representation (PR).

Two Tier Ballot

- In MMPs, citizens typically have two votes: one for their local constituency candidate and one for their national/regional party preference.
- The two vote system permits those who support smaller parties to attain representation. Small party candidates rarely win SMD plurality (local constituency) seats. Having two tiers of seats coupled with the 'dual' or two tier ballot gives voters the ability to select their preferred candidate from a larger party and give their PR vote to a different party, otherwise known as split ticketing. It also prevents voters from being forced to vote strategically to prevent 'wasted votes', a well studied phenomenon in electoral systems research (referred to as Duverger's law) that undermines the performance of smaller parties in plurality systems.
- The ratio of local constituency seats to PR seats also impacts voter and party behavior. If most of the seats are given to local constituencies, political parties will focus more on attaining local constituency seats. Further, voters will be more likely to support larger parties and their candidates as they will assume most of the seats.

Methods of Party List Proportional Representation

- Numerous types of PR methods are utilized to distribute seats among parties; however, the most common are the highest average methods, D'Hondt and Sainte-Laguë.
- Due to the formulas, the D'Hondt Method typically results in larger parties gaining a greater portion of seats, while the Sainte-Laguë Method is more favourable to smaller parties.
- Additionally, electoral thresholds impact party representation, which is the minimum amount of support a party needs to gain representation. Most MMPs use thresholds from 3%-5%, which only prevent small parties with little support from gaining seats. However, countries like Djibouti, who use a 10% threshold, sharply reduce the small party representation.

Closed List

- A closed list is generally used for the PR list, as it allows voters to see which candidates will be allotted seats and in what order. The list typically needs to be submitted to the elections commission prior to the election and cannot later be amended by the respective parties.
- Closed lists are also beneficial to minority groups and women, as quotas can be placed upon the party lists, ensuring greater representation.
- If the 'best losers' in constituency elections are to be included in a closed PR list this should be done on the basis that the losers within a party with the highest proportion of votes become eligible for inclusion in order of performance. A quota for 'best losers' could be included within a closed PR list.

Women's Representation

- As political parties select their PR candidates, implementing party list rules is the most effective way to increase female representation.
- Legislated Candidate Quotas: alternate males and females on the party list (Zipper Method), the top two candidates cannot be the same sex, 40:60 ratio for every five posts, and one out of every group of three must be a woman.
- Governments can also opt to make quotas voluntary for political parties but this has not succeeded in most countries. Germany's MMP system is a notable exception that has seen success with voluntary party quotas as their electorate is concerned with female representation in the Bundestag.

Overhang Seats

- Overhang seats are given when a political party acquires a higher percentage of local constituency seats than PR votes and is allowed to keep the additional percentage of constituency seats.
- The two most proportional methods of incorporating overhang seats are either not providing any overhang seats or giving balance seats in addition to the overhang. As overhang seats distort proportionality, balance seats can be given to the other parties to maintain their proportional share of the seats.
- The two less proportional options are only allocating overhang seats with no additional seats given and the Compensatory Method, which is when the amount of overhang seats is subtracted from the total possible seats in the PR section, leading to multiple parties not getting as many seats.