TRANSPARENCY INTERNATIONAL SRI LANKA
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THE JUDICIARY

WRITTEN SUBMISSIONS BY TRANSPARENCY INTERNATIONAL SRI LANKA TO THE SUBCOMMITTEE OF THE CONSTITUTIONAL ASSEMBLY ON THE JUDICIARY

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The Judiciary

These written submissions will set out the position of Transparency International Sri Lanka (TISL), drawing from the findings of the Public Representations Committee on Constitutional Reform (PRC) where necessary. Four main thematic areas suggested by the invitation to make submissions will be dealt with: Judiciary, Courts Structure/ Jurisdiction of Courts including the fundamental rights jurisdiction, Judicial Review and Constitutional Court/Constitutional Review.

1. Judiciary

The approach to designing the judicial arm of government in a constitutional democracy must be one undertaken with careful consideration for the history and needs of the country, as well as basic principles of constitutional law.

1.1. Direct Constitutional Vesting of Judicial Power

One of the major factors that was brought into sharp focus during the recent impeachment of the former Chief Justice of Sri Lanka was the conflicting views on whether the Parliament was supreme over the judiciary due to the wording of Article 4(c) of the Constitution which reads as follows:

"The judicial power of the people shall be exercised by Parliament through courts, tribunals and institutions created and established, …by Parliament according to law;"

The concept of the Parliament being supreme over the judiciary has not been recognized, in the 1978 Constitution. However, the above provision has lent itself to multiple interpretations. There is therefore, a need to clearly delineate the powers of the three arms of government, by the direct Constitutional vesting of judicial power in the judiciary, establishing parity between the executive, the legislature and the judiciary. This view has also been recommended by the PRC in its report.[1]

[1] P. 134, "Report on Public Representations on Constitutional Reform", Public Representations Committee on Constitutional Reform, May 2016.

1.2. Representation

The composition of the judiciary must be of prime consideration in creating constitutional provisions for the setting up of a judiciary in whom the confidence of the public would repose.

Sri Lanka has largely restricted judicial appointments to the superior courts to existing members of the judiciary and to the official bar. However, especially but not limited to the Constitutional Court, it is essential that the judiciary be representative from the perspective of including members of the academia, the Bar, and other sectors of law.

It is recommended that there should be a constitutionally enshrined mandatory consideration of legal background.

1.3. The Judiciary as a Check

The principle of separation of powers between the branches of government is accompanied by the corresponding need for checks and balances between them. The judiciary has a role to play in acting as a check on the other branches of government. Whenever another arm of government exceeds its powers such action can be challenged before the judiciary. This may come into effect during elections, in checking the constitutional and/or the legality of administrative action, etc.

1.4. Checking the Power of the Judiciary

The judiciary is often seen as the 'last bastion of hope' for people in need of redress, to address any perceived injustice. By virtue of the role it plays, the judiciary also wields considerable power. The question 'Who guards the guards?' is therefore one of immense importance. Whether one takes a positivist role to statutory interpretation or not, the judicial interpretation of law involves a large creative component, and therefore necessitates regulation. Such regulation must include a functioning and effective appeals system, detailed statutes and the compulsory consideration of judicial precedent.

The most effective means of control over the judiciary lies in the appointment, tenure and removal of judges by other entities, and can prove particularly problematic, and will be dealt with in detail in section 1.5 below.

1.5. Independence of the Judiciary

The role of the judiciary can only be performed to full effect if the judiciary is able to apply the law impartially.

The manner in which judges are appointed and removed, as well as their tenure and remuneration, are matters which have a significant bearing on the independence of the judicial arm of government, and are the means by which undue influence may be exercised on the independence of the Judiciary.

The role and independence of the judiciary is also of vital importance with respect to the upholding of fundamental rights that are set in place to resist the tyranny of the majority that risks subsuming the rights of a few in the interests of the majority.

1.5.1.Express Recognition

The commitment to an independent judiciary should be expressly enshrined in the Constitution. The current Article 111C recognizes interference with the judiciary as a punishable offence. However, the principle of the independence of the judiciary is not expressly recognized. The South African model may be followed in this instance, which reads as follows:

Article 165

(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

(3) No person or organ of state may interfere with the functioning of the courts.

(4) 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.

1.5.2. Appointment

While the appointments to the superior courts may be made by the President or the Prime Minister (depending on the form of government enshrined) finally, the appointment process needs to be subject to the check of the approval of the Constitutional Council, on who may be appointed. This would also require an independent Constitutional Council, with at most a minority of seats allocated to members of Parliament.

It is recommended that the composition of the Constitutional Council be as in the 19th Amendment Bill published in the Gazette issued on 16th March, 2015 that was subsequently altered and enacted in Parliament. This composition was recommended in the report of the PRC, too, as follows:

> *(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 additional vital sections to ensure an independent Constitutional Council in the Bill are 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.*

Ensuring that the Constitutional Council is representative would result in judges being appointed as a result of political negotiation and compromise, minimizing the risk of ideological extremism.

1.5.3.Tenure

The matter of tenure is important to enable judges to make decisions without fear of personal reprisals or a risk to job security and welfare. While the strongest form of legal protection for the judiciary is to offer life tenure, as in Argentina and Estonia, this could lead to a lack of accountability to the other arms of government. Reappointment is also an option that may be considered. However, this may lead to the judiciary feeling compelled to please the relevant electorate in order to be reappointed. A standard age of retirement, however, would be the most suitable avenue for Sri Lanka, being the system practiced in the current Constitution. This method frees judges of reappointment concerns, and reduces the risk of obligation to political actors.

In the current system, the age of retirement for a judge of the Court of Appeal is 63, and it is 65 for a judge of the Supreme Court. This may compel judges of the Court of Appeal to be obligated to make politically popular decisions in order to avoid retirement and be appointed to the Supreme Court.

It is recommended therefore, that there should be a uniform age of retirement in the superior courts, including the Constitutional Court, if established.

(Refer 1.5.6 for section on Retirement)

1.5.4.Remuneration

Remuneration that would incentivize the best possible candidates for judicial office is a major concern, in designing a judiciary that is competent and vibrant in the performance of its duties. The current pay scale of the judiciary, even in the superior courts has been flagged as insufficient to accomplish this end.

A standard provision to safeguard the independence of the judiciary, also, is that remuneration of judges should not be subject to reduction post-appointment, to avoid political reprisals. It is recommended that such a provision is included.

1.5.5. Removal

The process of removal and transfer of judges requires careful scrutiny due to the risk of arbitrary dismissals as a result of judicial conduct. However, provision must be made for removal as well, in specified and justified circumstances, in instances where the behavior of a judge warrants such dismissal. It must be noted that removal is not necessarily the only means by which judicial misconduct could be addressed.

In the current law, the procedure for the removal of judges is set out in Standing Order 78A of Parliament. It is recommended that a detailed process for the removal of judges be prescribed in the Constitution to replace the deficient provisions in this Standing Order. Allowing the Parliament to remove judges leaves the judiciary completely vulnerable to manipulation and influence, and without redress in case of bias in the proceedings, as was well demonstrated during the impeachment of former Chief Justice Shirani Bandaranaike.

Procedural requirements in this regard have been aptly set out in a paper by the International Bar Association[2] dealing specifically with the Sri Lankan situation, including but not limited to the following:

i. rules to ensure that that the case against a judge is considered by a diverse body of people
ii. independent of those who made the initial complaint;
iii. a guarantee of the presumption of innocence;
iv. rules of evidence and provisions as to standard of proof;
v. guarantees that an impugned judge will have timely notice of particularised charges,
vi. full disclosure of adverse evidence, and the right to confront and call witnesses, either in person or through freely chosen legal representatives;
vii. provision for open hearings at the option of the judge concerned; and

[2] *"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.

viii. explicit acknowledgment that disciplinary hearings against judges are subject to judicial

ix. review in the Court of Appeal and fundamental rights applications in the Supreme Court.

Furthermore, clear grounds, upon which removal may take place, such as misconduct or infirmity, must be defined. The United Nations Basic Principles on the Independence of the Judiciary refers to removal of judges as follows:

> *"Judges shall be subject to suspension or removal only for reasons of incapacity or behavior that renders them unfit to discharge their duties."*

The Commonwealth Latimer House Principles also refer to 'incapacity or misbehaviour that clearly renders them unfit to discharge their duties[3]. 4 The terms 'incapacity' and 'misbehaviour' are explained by the Latimer House Guidelines, which state:

Grounds for removal of a judge should be limited to:

(A) inability to perform judicial duties and

(B) serious misconduct.

South Africa provides for removal where a judge suffers from incapacity, is grossly incompetent or is guilty of gross misconduct.[4]A judge may be removed by a two thirds vote of the National Assembly after a finding from the Judicial Service Commission on the aforementioned grounds.

In "The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice" published by the British Institute of International and Comparative Law the following is stated:

"Thirdly, international principles also address the degree or level of misconduct that is considered sufficient to warrant the removal of a judge. The Latimer House Guidelines refer to 'serious misconduct'. In the words of the UN Special Rapporteur, removal processes and other disciplinary proceedings should be confined to 'instances of professional misconduct that are gross and inexcusable and that also bring the judiciary into disrepute'. Similarly, the Principles and Guidelines on the Right to a Fair Trial

[3] Principle IV.
[4] Article 177(1)(a)

and Legal Assistance in Africa speak of 'gross misconduct incompatible with judicial office', and the IBA Minimum Standards of Judicial Independence refer to a judge who 'by reason of a criminal act or through gross or repeated neglect … has shown himself/herself manifestly unfit to hold the position of judge'."

In Sri Lanka's particular context, an *ad hoc* tribunal constituted for the purpose of inquiring into an allegation for the removal of a judge is recommended. This approach has been adopted by 62% of the countries in the Commonwealth.

Thereafter such tribunal may make a recommendation to the Executive that may either be immediately binding upon the Executive, or be subject to appeal or mandatory referral to a court.

An *ad hoc* tribunal comprising of judges from the Commonwealth in a suitable approach for Sri Lanka, and affords flexibility to appoint persons who have no close interest or relationship in a particular situation, and can attract personnel who bring knowledge of comparable jurisdictions. Such a tribunal would also be comparatively cheaper than maintaining a standing tribunal which may rarely have to exercise its function.

The disadvantage of having a flexible, *ad hoc* tribunal lies in the entity that initiates proceedings and appoints such tribunal, as it would wield the discretion to maliciously institute proceedings and to elect its members. In order to assuage this concern, it is recommended that the initiation of proceedings be undertaken pursuant to a motion passed in Parliament by a two thirds majority. Upon such resolution being passed, a request shall be made by Parliament to the Commonwealth Secretariat to recommend judges for a tribunal for the purpose. In making the final appointments of judges who constitute the *ad hoc* tribunal, the Constitutional Council should be granted the authority to approve or alter the recommendations of the Commonwealth Secretariat prior to appointment by either the Legislature or the Executive or both.

A further concern is whether the judge in question would be suspended during the pendency of the hearing before the *ad hoc* tribunal. All 20 Commonwealth countries that have opted for *ad hoc* tribunals have provided for suspension.

It is recommended, therefore, that removal of judges be conducted pursuant to a decision of an *ad hoc* tribunal comprised of judges of the Commonwealth.

1.5.6. Retirement

That judicial officers should not be engaged as an attorney-at-law in any court, tribunal or institution or perform any state function upon retirement without special written dispensation of the President must be enshrined in the Constitution.

In addition to this, to alleviate concerns of judges feeling compelled to ensure that they are appointed to certain positions after retirement, and in the interests of having experienced judges in the superior courts, it is recommended that the age of retirement should be raised to 70.

2. Judicial Review

2.1. Concerns in Current System

Article 80(3) of the present constitution expressly prohibits post-enactment judicial review of legislation. Due to the above prohibition, Bills that are not considered or reviewed prior to enactment cannot be revisited. It is useful to consider the lacunae in the present system prior to an examination of the need for post-enactment judicial review.

2.1.1. Bills (not to be confused with draft Bills) frequently 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 Paper of Parliament. 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.

2.1.2. 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.

2.2. Judicial Review of Legislation/Treaties/Agreements

The need for judicial review of legislation springs from the principle of checks and balances, and is a cornerstone of a modern democracy. Proponents of solely pre-enactment judicial review argue that such a system offers certainty in legislation. However, it forces citizens to be dependent on political accountability to amend unconstitutional laws post-enactment, and is not desirable.

In general, and in Sri Lanka in particular, it is essential that Constitutional supremacy and the rule of law prevail. To this end, it is essential that potentially unconstitutional laws be subject to review by the judiciary at any point of time post-enactment. Also, most often, the effects of a law are only felt in the application of it. Leaving legislation open to judicial review is therefore essential, and encourages and ensures civic participation in the processes of government.

However, it is important that the roles of the different arms of government in enacting legislation not be confused, and that the responsibility of enacting legislation should lie with Parliament, in collaboration with the Attorney-General's Department. After enactment, such legislation should be liable to challenge before the judiciary for unconstitutionality. The striking down of legislation by the judiciary as being unconstitutional would then be a reflection of the failure on the part of the legislature and of the Attorney General's Department in the performance

of their duties. However, it is of vital importance the entire process of enacting legislation should be transparent and accountable, in order that there may be public agitation and pressure, where necessary.

It is also recommended that Treaties or Agreements that are accorded the force of law as per Article 157 of the Constitution (or its equivalent) should also be liable to judicial review.

A concern that may arise is whether a law that is struck down would then be applicable retrospectively. To prevent this, the constitution should recognize that a law would be rendered inoperative not *ab initio,* but prospectively from the date of the judicial decision.

The only exception to the strict restriction of review to post- enactment, would be if a Bill is referred to the judiciary by the President or the Prime Minister (depending on the form of government enshrined).

It is recommended, therefore, that post-enactment judicial review be enshrined in the Constitution, and be strictly limited to post-enactment review with the sole exception of when a Bill is referred for judicial review as enumerated above.

3. Constitutional Court / Constitutional Review

It is recommended that a Constitutional Court be established with the power to pronounce binding and final decisions upon any matter that involves constitutional interpretation and any other matter that raises a point of law that is of public importance. This includes legislation promulgated by Parliament and by Provincial Councils. The Constitutional Court would have the discretion to decide whether a certain matter warrants consideration by the Constitutional Court. Provided that leave is granted, any person may directly invoke the jurisdiction of the Constitutional Court.

As enumerated above (1.2), the composition of the Constitutional Court must be representative, and must ensure that such court be comprised of experts in the area of constitutional law.

4. Courts Structure/ Jurisdiction of Courts including the fundamental rights jurisdiction

The Supreme Court at present is the court of first instance in relation to fundamental rights applications. This results in the centralization of this jurisdiction to the detriment of accessibility by those living in the peripheries of the country. A further concern is that the Supreme Court is overburdened due to the volume of fundamental rights applications.

The PRC Report recommends the setting up of Provincial Courts of Appeal.[5] However, it is submitted that such a move would require too great an overhaul, without utilizing the existing infrastructure.

In order to address these concerns, it is recommended that the fundamental rights jurisdiction be devolved to the Provincial High Courts. This move would require rigorous training of judges of the Provincial High Courts. An appeal should lie from the Provincial High Court to the Supreme Court in fundamental rights applications.

[5] P. 134, "Report on Public Representations on Constitutional Reform", Public Representations Committee on Constitutional Reform, May 2016.

Summary of Recommendations

1. Judiciary
    - Judicial power should be directly vested in the judiciary, establishing parity between the executive, the legislature and the judiciary.

    - Representation -a constitutionally enshrined mandatory consideration of legal background.
    - The judiciary to act as a check on the other arms of government

    - The power vested in the Judiciary should be held in check
        - Functioning and effective appeals system
        - Detailed statutes
        - Compulsory consideration of judicial precedent
        - appointments, tenure, remuneration, removal and retirement

    - **Independence of the Judiciary**
        - The commitment to an independent judiciary should be expressly enshrined in the Constitution.
        - Appointments made subject to the approval of an independent Constitutional Council
        - Tenure – There should be a uniform age of retirement in the superior courts
        - Remuneration
            - Remuneration that would incentivize the best possible candidates for judicial office
            - Remuneration of judges should not be subject to reduction post-appointment

        - Removal
            - Detailed process for the removal of judges should be prescribed in the Constitution
            - Clear grounds upon which removal may take place, such as misconduct or infirmity, must be defined.
            - Removal of judges should be conducted pursuant to a decision of an *ad hoc* tribunal comprised of judges of the Commonwealth

    - Retirement
        - Judicial officers should not be engaged as an attorney-at-law in any court, tribunal or institution or perform any state function upon retirement except with special dispensation
        - Increase age of retirement

2. Judicial Review

- Post-enactment judicial review should be enshrined in the Constitution, strictly limited to post-enactment review
- Law should be rendered inoperative not *ab initio,* but prospectively from the date of the judicial decision.

3. Constitutional Court / Constitutional Review

- A Constitutional Court should be established with the power to pronounce binding and final decisions upon any matter that involves constitutional interpretation and any other matter that raises a point of law that is of public importance

4. Courts Structure/ Jurisdiction of Courts including the fundamental rights jurisdiction

- The fundamental rights jurisdiction should be devolved to the Provincial High Courts with an appeal to the Supreme Court