

Proposals for Constitutional Reform National Movement for Social Justice

1. Constitutional Principles, Nature of the State, Sovereignty

The Republic of Sri Lanka is a free, sovereign, democratic and independent Republic founded on the following values:

- (a) Human dignity, Social justice, equality and the advancement of human rights and freedoms;
- (b) Non-racialism and gender equality;
- (c) Supremacy of the Constitution and the rule of law;
- (d) Regular elections and a multi-party system of democratic government;
- (e) The assurance of accountability, responsiveness and transparency.

The Republic of Sri Lanka is an *aekiya rajyaya**, consisting of the institutions of the Centre and of the Provinces which shall exercise power as laid down in the Constitution.

In the Constitution, *aekiya rajyaya* means a State which is undivided and indivisible, and in which the power to amend the Constitution, or to repeal and replace the Constitution, shall remain with the National Legislature and the People of Sri Lanka as provided in the Constitution.

In the Republic of Sri Lanka, sovereignty is in the People and is inalienable, and includes the powers of government, fundamental rights and the franchise.

The legislative, executive and judicial power of the People shall be exercised as provided for by the Constitution.

*Correct term in Tamil to be used in the Tamil version.

2. Legislature

The legislature shall be composed of two Houses—Parliament, and a Second Chamber (suitable name to be found).

The term of Parliament shall be 5 years.

Parliament shall be dissolved by the President if Parliament passes a motion of no-confidence in the government or the Appropriation Bill (Budget) is defeated in Parliament or the Statement of Government Policy is defeated in Parliament and a new government formed does not win a vote of confidence within fourteen days.

Parliament shall also be dissolved if a motion in the name of the Prime Minister to that effect, tabled with the agreement of the Leader of the Opposition and the leader of the third-largest party in Parliament is passed. (This is proposed as a 2/3 majority may be impossible to achieve).

The President shall not dissolve Parliament other than in the above circumstances.

Anti-cross-over provision:

At present, a Member of Parliament who loses membership of the party or group on whose list s/he was elected consequently loses her/his seat in Parliament. But such Member may challenge the expulsion in the Supreme Court. In practice, however, such Members get injunctions from the District Court preventing any disciplinary proceedings and thereby frustrate the purpose of the anti-defection provision. This was sought to be remedied by the Nineteenth Amendment but had to be withdrawn at the Committee stage in Parliament.

The following provision should therefore be inserted:

“No court other than the Supreme Court shall have jurisdiction to hear and determine any matter relating to disciplinary action taken or proposed to be taken by any recognized political party or independent group against a member thereof, who is a Member of Parliament, and accordingly no court shall have the power to grant a writ, injunction, an enjoining order or any other relief, preventing, restraining or prohibiting any such action or proposed action.”

Second Chamber

A second chamber of the legislature has been used in many countries as an instrument of power-sharing. Almost every country with devolution has such a chamber. A second chamber comprising representatives from the provinces would engender in the provinces a strong feeling that they too have a distinct role to play in the national legislature. It would function as a mechanism to rectify possible imbalances of representation in the lower house and also act as an in-built mechanism against hasty legislation and legislation that may have an adverse effect on the provinces.

The Second Chamber shall consist of 55 Members, each PC nominating 5 members on the basis of a Single Transferable vote.

Option 1: Members shall be persons of eminence and integrity who have distinguished themselves in public or professional life.

Option 2: Members nominated will be PC members. Provincial Ministers may be nominated.

The Second Chamber shall not have the power to veto ordinary legislation. All Bills placed on the Order Paper of Parliament shall be referred to the Second Chamber to obtain its views, if any, prior to the Second Reading.

A Bill seeking to make national policy or standards on a subject or matter in the Provincial Council List shall, however, be passed by the Second Chamber as well.

The Second Chamber shall also exercise such oversight and other functions as may be prescribed by the Constitution or law.

No Constitutional Amendment shall be enacted into law unless passed by both Parliament and the Second Chamber, with special (2/3) majorities.

3. The Executive

The President shall be elected by an electoral college comprising Members of Parliament and members of the Second Chamber. The electoral college shall also elect a Vice-President who shall be from a community other than the community to which the President belongs.

The formal Head of the Executive shall be the President. The President shall, except where specifically provided by the Constitution, exercise powers on the advice of the Cabinet of Ministers conveyed to him by the Prime Minister.

The Cabinet of Ministers shall be charged with the direction and control of the Government of the Republic.

The Cabinet of Ministers shall be collectively responsible and answerable to Parliament.

The President shall appoint as Prime Minister the Member of Parliament, who, in the President's opinion, is most likely to command the confidence of Parliament. However, the President shall not have the power to remove the Prime Minister.

The Prime Minister shall be deemed to have resigned if a motion of no-confidence in the Government is passed, the Appropriation Bill (Budget) is defeated in Parliament or the Statement of Government Policy is defeated in Parliament.

Secretaries of Ministries and Heads of Departments shall be appointed by the National Public Service Commission in consultation with the relevant Minister.

4. Devolution

There shall be the maximum possible devolution based on the principle of subsidiarity, that is whatever could be more efficiently handled by the lowest tier should be vested in such tier. Local government shall be recognized as a tier of government. The allocation of subjects and functions between the three tiers of government shall be guided by the principle of subsidiarity. Such allocation shall be clear and unambiguous and shall not be overridden or encroached on except by constitutional amendment.

The Province shall be the primary unit of devolution.

The term of a Provincial Council shall be five years. Elections to all Provincial Councils shall be held on the same day. Appropriate constitutional provisions shall be made to ensure that elections are held regularly for all Provincial Councils as in the case of Parliamentary elections.

If a Provincial Council passes a motion of no-confidence in the provincial administration or the Draft Appropriation Statute (Budget) or the Statement of Policy is defeated in the Provincial Council and a new administration formed does not win a vote of confidence within fourteen days, the Provincial Council shall be dissolved and the Governor shall be in charge of the Provincial administration until an election is held for the constitution of the Council along with elections for the other Provincial Councils.

Parliamentary legislation on matters in the Provincial Council List shall not have the effect of the Centre taking over the administration of such matters.

In formulating National Policy on matters contained in the Provincial Council List the Central Government shall adopt a participatory process with the Provincial Councils. The Constitution shall provide the circumstances in which the Centre may prescribe National Policy.

National Policy shall not override statutes enacted by a Provincial Council in respect of matters in the Provincial List. Provided that in the event that the Central Government enacts legislation (to give effect to such national policy) in accordance with the constitutional provisions relating to the enactment of legislation on devolved subjects, the relevant Provincial statutes shall be read subject to such national legislation. The approval of the Second Chamber would be necessary for such legislation.

Formulation of National Policy on a Provincial List matter would not have the effect of the Centre taking over executive or administrative powers with regard to the implementation of the said devolved power; the Province will retain the executive or administrative powers with regard to the said devolved power;

Parliament may by law provide for the implementation of functions on selected subjects in the Reserved List by the Provinces.

Parliament or Provincial Councils, as the case may be, may by law/statute provide for the implementation of specified functions within their purview, to be carried out by the Local Authorities.

The Governor of a Province shall not have been politically active during the period of three years immediately prior to appointment and shall not be involved in politics during the period of office.

The Chief Secretary of a Province shall be appointed by the National Public Service Commission with the concurrence of the Chief Minister.

Secretaries of Provincial Ministries and Heads of Departments shall be appointed by the Provincial Public Service Commission in consultation with the relevant Provincial Minister.

The appointment, promotion, transfer, dismissal, and disciplinary control of officers of the Provincial Public Service shall be by an independent Provincial Public Service Commission (PPSC) constituted for each Province. The members of the PPSC shall be appointed by the Governor on the joint nomination of the Chief Minister and the Leader of the Opposition of the Provincial Council concerned. Where there is no agreement between the Chief Minister and the Leader of the Opposition, the Constitutional Council shall make the nominations after consulting the Chief Minister and the Leader of the Opposition.

There shall be a Chief Ministers' Conference, comprising the Prime Minister and the Chief Ministers of all the Provinces, which shall meet at regular intervals to discuss issues of common concern and to promote inter-provincial and Centre-Province co-operation. The Prime Minister shall preside at the Chief Minister's Conference.

Community Councils: Constitutional provisions shall be made to ensure that at various levels of government and in different geographical areas, the rights of communities which are minorities within such areas are protected.

5. Safeguards against secession

The President may, on the advice of the Prime Minister, where a situation has arisen in which a provincial administration is promoting armed rebellion or insurrection or engaging in an intentional violation of the Constitution which constitutes a clear and present danger to the territorial integrity and sovereignty of the Republic, by Proclamation –

(a) Assume to the President, all or any of the functions of the administration of the Province and all or any of the powers vested in, or exercisable by, the Governor, the Chief Minister, the Board of Ministers or any body or authority in the Province concerned; and

(b) Where it is necessary for the effectual exercise of the powers under subparagraph (a) of this paragraph, dissolve the Provincial Council.

(c) The proclamation shall include reasons for the making of such proclamation.

Such a Proclamation shall be subject to Parliamentary approval and be subject to judicial review.

6. Constitutional Council

The Constitutional Council abolished by the Twentieth Amendment shall be re-established with powers not less than under the Nineteenth Amendment.

Apart from the Prime Minister, the Speaker and the Leader of the Opposition, the members of the Constitutional Council shall not be Members of Parliament.

The Right to Information Commission shall be added to the list of Commissions to which appointments could be made only on the recommendation of the Constitutional Council.

The National Audit Commission and the National Procurement Commission abolished by the Twentieth Amendment shall be re-established. An agency to assist and advise state sector institutions in the matter of procurement shall be established by law.

There is no need for a permanent Delimitation Commission. However, any Commission, committee or person tasked with delimitation in relation to Parliamentary, Provincial or local authority elections shall be appointed on the recommendation of the Constitutional Council.

Members of any regulatory authority established in relation to the electronic or other media, data protection, cyber security, public utilities, monetary and financial services, competition in trade and foreign trade shall be appointed on the recommendations of the Constitutional Council.

The Governor of the Central Bank shall be added to the list of officials whose appointment must be approved by the Constitutional Council.

7. Judiciary

All appointments to the Supreme Court and Court of Appeal shall be subject to approval by the Constitutional Council as under the Nineteenth Amendment.

In recommending persons for appointment as Judges of the Supreme Court and the Court of Appeal, the President shall take into consideration the views of the Chief Justice, Minister of Justice, Attorney-General and a panel of three senior President's Counsel nominated by the Chief Justice after ascertaining the views of the Bar Association of Sri Lanka.

There shall be a Constitutional Court consisting of seven Judges who shall be appointed by the President on the recommendation of the Constitutional Council. The Judges shall be chosen from among persons who have distinguished themselves in the judiciary, the legal profession or legal education with specialized knowledge on Constitutional Law. They shall be appointed for a term of five years and shall not be eligible for reappointment.

All seven Judges shall sit as the Court. Where any matter which falls within the jurisdiction of the Constitutional Court, 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 Acts and Provincial Statutes;
- c) Disputes between the Centre and Provincial Councils and between Provincial Councils;
- d) Breach of privileges of Parliament;
- e) Review of its own judgments.

The Court of Appeal shall conduct its sittings in each Province. It shall have an original fundamental and language rights jurisdiction. An appeal shall lie to the Supreme Court with leave from the Court of Appeal or special leave from the Supreme Court.

Removal of Judges of the Constitutional Court, Supreme Court and Court of Appeal

Allegations of misbehaviour or incapacity contained in a resolution in Parliament for the presentation of an address for removal of a Judge of the Constitutional Court, Supreme Court or Court of Appeal shall be inquired into by a panel consisting of three retired Judges of such courts appointed by the President on the recommendation of the Constitutional Council. Parliament shall by law provide for all matters relating to the presentation of such

an address, including the procedure for the passing of such resolution, the investigation and proof of the alleged misbehaviour or incapacity and the right of such Judge to appear and to be heard in person or by a representative.

8. Office of Attorney-General and Office of Public Prosecutor

The Office of Attorney-General shall be an independent entity.

An independent Office of Public Prosecutor shall be set up by law.

The Attorney-General and the Chief Public Prosecutor shall be appointed subject to the approval of the Constitutional Council.

9. Fundamental Rights

The Chapter on fundamental rights shall be improved to include rights that are universally recognized. The right to life shall be recognized. While the scope of civil and political rights shall be broadened, social and economic rights, cultural rights, rights of women, children, the aged and the disabled as well as environmental rights shall be recognized as judicially enforceable rights.

The draft proposed by the sub-committee on fundamental rights of the Constitutional Assembly in 2016 can be the basis for the new chapter on fundamental rights.

Public interest litigation shall be expressly recognized. There shall be no time limit for filing applications so that applications filed within a reasonable time could be entertained.

All existing law shall be read subject to the Constitution including the chapter on fundamental rights.

Post-enactment judicial review of laws and statutes would be permitted. Accordingly, the Constitutional Court shall have sole and exclusive jurisdiction and power to make-

- (a) a declaration that any law made by Parliament, any statute made by a Provincial Council or provision thereof that is inconsistent with any provision of the Constitution is invalid to the extent of the inconsistency; and
- (b) any order that is just and equitable, including –
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and
 - (ii) an order suspending the declaration of invalidity for such period and subject to such conditions as would enable Parliament or a Provincial Council to take steps to make the impugned law or statute cease to be inconsistent with the provisions of the Constitution.

10. Language

Sinhala and Tamil shall be the official languages of Sri Lanka.

English will be a link language.