

**PRELIMINARY SUBMISSION BY THE CENTRE FOR POLICY ALTERNATIVES (CPA) TO
THE PUBLIC REPRESENTATION COMMISSION**

This submission by the Centre for Policy Alternatives (CPA) outlines our general views on the nature and form of a new constitutional settlement for Sri Lanka. It focuses on the major constitutional issues that are currently the subject of public debate and which featured in the democratic decision of the people of Sri Lanka in the two historic elections of 2015 in both changing the government and mandating the current Parliament to enact a new constitution. We are prepared to submit more detailed explanations and proposals, orally or in writing, if so invited by the Public Representation Commission, the Constitutional Assembly, and/or Parliament.

Fundamental Principles

The new constitution must contain a coherent statement of the fundamental normative principles upon which it is founded, so that it provides a politically irreversible basis for a strong culture of constitutional government, multicultural citizenship, gender justice, and respect for the values of plural democracy. If it is to build trust among Sri Lanka's plural communities, the new constitutional order must be aimed at providing all citizens a sense of ownership over, and therefore commitment to, the new Sri Lankan state. In this context, the provisions concerning the foremost place of Buddhism and the unitary character of the state that have characterised both republican constitutions since 1972 are, in our view, inconsistent with the pluralistic social foundations of the Sri Lankan state. Our society is and has historically been richly plural in terms of cultures, ethnicities, and religions. While the Sinhalese and Buddhism have enjoyed a prominence in the history of our island, different minority groups with long histories within the island also seek different relationships with the state of which they are a part. For example, the Tamil people of the north and east seek a measure of territorial self-government, while Muslims and other minorities seek other forms of accommodation. Furthermore, all of our communities seek to be recognised and appreciated as intrinsic to the political and cultural mosaic that is Sri Lanka.

The main point and purpose of the constitutional state in a plural polity is to ensure that it recognises, represents, and accommodates all persons and groups that collectively constitute the polity, and not merely the ethnic or other political majority. It follows that, within the overarching framework of common Sri Lankan citizenship and nationhood, collective claims are treated on a basis of group-differentiated rights, and that it is possible to constitutionally recognise multiple conceptions of nationality within the rubric of a single and united Sri Lankan state. This ensures social justice as well as the stability and security of the state, without the need for coercion and oppression. Seen in this light, the Buddhism clause privileges the majority community and, at least symbolically, demotes other communities to a secondary status. Perhaps more importantly, the unitary state principle has stood in the way of providing a meaningful response to the Tamil claim to autonomy.

Unhelpful debates about formalistic classifications as between ‘unitary’ and ‘federal’ are best avoided, but CPA firmly believes that the new constitution’s normative foundations and structural architecture must ensure extensive devolution and power-sharing unhampered by majoritarian principles such as the unitary state, while guaranteeing the unity and territorial integrity of a new form of democracy in the Sri Lankan state within which pluralism and multilevel governance can flourish. It is also worth stressing that both pluralism and multilevel government are recognised as fundamental aspects of good governance in the contemporary world.

We strongly recommend that the principles of republicanism, secularism, political pluralism, constitutional supremacy, the rule of law, the separation of powers, devolution and subsidiarity, and most importantly of all, human dignity, be explicitly recognised in the new constitution. An appropriate preamble that acknowledges Sri Lanka’s societal pluralism, the injustices of the past, and the significance of the democratic renewal of 2015 would also be important. Both the preamble and the enumeration and elaboration of fundamental principles would constitute the basis for the new constitution to be interpreted coherently and fairly in operation.

The Executive

The people of Sri Lanka have clearly mandated the complete abolition of the executive presidential system of government in the 2015 elections. Civil society has long campaigned for this, in view of the authoritarianism, maladministration, and corruption that this institution has fostered ever since its introduction. While we are heartened by the re-commitment to abolition expressed at the highest levels of the new government, we are alarmed by suggestions that a directly elected prime minister may replace the executive presidency. Such an arrangement would not only be

extremely unusual but also merely replicate the self-aggrandisement and authoritarianism that accompanies the direct election of an individual to the office of the chief executive, when what is needed is the collegiality that is the hallmark and main strength of a more orthodox form of parliamentary and cabinet government. We strongly urge the return to a fully-fledged Westminster model as was reflected in our independence constitution from 1947 to 1970, which would ensure the constant political accountability of the executive to the legislature, together with such other legal safeguards for constitutional rights, good government, pluralism, and devolution as are outlined below. In such a system, we wish to see the restoration of Parliament to a central place in national life as the main institution of representative democracy and political accountability. CPA urges that the Commonwealth statement of best practice reflected in the Latimer House Principles guides the design of the new constitution.

The Electoral System

The second major constitutional issue that featured in the 2015 elections was electoral reform, and in particular the abolition of the open list system reflected in preferential voting. While designed to improve voter choice in the context of proportional representation, in practice preferential voting has led to an unacceptable degree of hyper-competition, corruption, and violence. There has been a growing consensus within civil society that a mixed member proportional (MMP) system, which combines the virtues of the first-past-the-post system while preserving the overarching principle of proportional representation, is vital to the proper democratic representation of a plural society. MMP systems ensure the close connection between the voter and the representative by providing for smaller territorial constituencies, while ensuring the proportionality of legislative representation through party lists. We urge the adoption of such system in the new constitution.

The Bill of Rights

The current chapter on fundamental rights falls short on a number of counts in meeting general international standards and as well as Sri Lanka's international obligations. Its enumeration of rights is incomplete, the scope and nature of the rights are expressed in terms that are narrower and more restrictive than those provided by international standards, and above all, the restrictions framework allows incursions into rights that are both procedurally and substantively unacceptable. Paradoxically, the improvement effected by the Nineteenth Amendment to the Constitution in 2015 in introducing the freedom of information as a fundamental right has also introduced an anomaly in the form of a restriction clause that applies only to itself, while the

broader restriction clause remains operative for all other rights. In this context, CPA urges the formulation of a new constitutional bill of fundamental rights that fully meets and even exceeds the standards set under the ten core human rights instruments recognised by the United Nations. We also urge unimpeded access to the relevant treaty bodies. 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, including through the devolution of judicial power so that Provincial High Courts become the courts of first instance for fundamental rights applications. The new bill of rights must constitute the foundational basis for the civic conception of common Sri Lankan citizenship that must underpin the new constitution.

The Constitutional Court

While our experience with a Constitutional Court under the first republican constitution (1972-78) was not especially useful, in principle such a court could be of immense significance in working and expounding the new constitution, and especially the new bill of rights. CPA believes that such an apex court should be representative of Sri Lanka's societal and regional pluralism including gender, be comprised in addition to judicial officers and academic lawyers of those with professional or academic distinction in relevant fields other than law (especially political scientists), and deal only with cases which involve significant questions of constitutional interpretation and principle, i.e., *not* function as a regular court of final appeal. In short, the Constitutional Court would be the guardian of the fundamental principle of the supremacy of the constitution.

Devolution

Sri Lanka has another opportunity after a history of failure from pre-independence times to establish a constitutional framework of devolution and power-sharing that is congruent with its societal pluralism. Given the tragic history of ethnic relations, including more than three decades of armed conflict, the difficulties involved in the present exercise cannot be overstated, although we are encouraged by the fact that the recent elections have overwhelmingly endorsed moderate parties in both north and south. At least notionally, this opens a space for a principled and deliberative process in which all communities' interests can be openly articulated and for a new settlement to be negotiated from a perspective of mutual respect and understanding. In this regard, we stress the need for the north and east to be treated distinctively from other provinces in terms of devolution needs, and if that necessitates asymmetric

arrangements, then we find that consistent with contemporary constitution-making practice as well as democracy and equality.

We also note that addressing the over-centralisation of political power and legal authority – a particularly baleful legacy of the colonial state – by a greater diffusion of power and authority, spatially and territorially, also serves the aims of democratising the state. Democratic institutions in turn ensure political accountability, and in this way, economic development. The more power is centralised, the less democratic a state is; and this is a powerful rationale beyond the question of ethnic relations for the new constitution to reflect a radical devolution of power when seen against the needs of democratisation and development in the country.

CPA would like to see a new devolution settlement that meets the aspirations of the Tamil community of the north and east for self-government, in consonance with the legitimate claims of all other minority groups, including that of the Muslims of the north and especially the east, while assuring to the Sinhala-Buddhist majority their rightful place in the history and ethos of the new Sri Lankan state. We are encouraged in this view by our understanding of pre-colonial history in which the devolutionary polities of the ancient Sinhala-Buddhist kingdoms gave rise to a hydraulic civilisation of which we are all justly proud, but which also ensured a high degree of tolerance and respect for minorities consistent with the best spirit of the Theravada tradition. This included significant autonomy in practice for those territories outside the immediate monarchical centre. We recall that the centralised unitary state is not only a colonial creation but also a very recent one, when seen against the devolutionary, asymmetric, and pluralistic character of the historic South Asian state tradition from which we can learn rich lessons as we address our contemporary challenges of unity in diversity.

More specifically, we must learn the lessons of our (largely unsatisfactory) experience with devolution since the introduction of Provincial Councils by the Thirteenth Amendment to the Constitution and related legislation in 1987. Public discussion about the Thirteenth Amendment is often muddied by excessive nationalistic rhetoric on both sides of the ethnic divide, as well as a lack of detailed knowledge about its strengths and weaknesses. A more informed and dispassionate approach to constitutional design is needed, and the overarching principle in this regard must be that devolution means not merely the transfer of decision-making powers to the provinces so as to constitute a better balance between central and provincial institutions, but also that devolution of power is complemented by the devolution of responsibility and accountability. Such an approach of shared responsibility and accountability will serve to knit the provinces the provinces and centre together.

Thus, the division of competences must be revisited with a view to enhancing provincial autonomy whilst protecting a coherent balance between central and provincial institutions as well their effectiveness; the powers of the Governor must be curtailed in favour of the elected provincial political executive; the fiscal and financial framework must be fundamentally redesigned to ensure that those who have the power to raise public finance must be democratically accountable (while allowing for processes of fiscal equalisation); the concurrent competences must be exercised consistently with subsidiarity; and except in narrowly defined and exceptional circumstances (e.g., the prevention of secession), and subject to requirements of accountability, that executive powers in relation to even legislative competences retained by the centre must be devolved. As is implicit in the last point, CPA argues for the retention of the concept of concurrency (although not the current Concurrent List), subject to safeguards for provincial autonomy, as a necessary instrument of power-sharing and effective multilevel government in a modern democracy.

Finally, CPA is firmly of the view not only that the new devolution settlement must remedy the design defects of the Thirteenth Amendment, but also that the scope and extent of devolution must qualitatively exceed what is currently offered by it. It follows that there can be no reduction of devolved powers, including in relation to policing and state land.

The Second Chamber

Just as much as we would like to see substantial and meaningful devolution to the provinces, CPA strongly believes in the interdependence and unity of the Sri Lankan people and the Sri Lankan state. Accordingly, we believe that institutional mechanisms have to be built into the new constitution that will encourage co-operation between the constituent territorial elements of the state. While these range from procedures for intergovernmental relations to fiscal and financial solidarity, one of the most important institutions is a second chamber of the central legislature that would ensure a voice for provinces in the making of legislation affecting the whole country. Needless to say, a second chamber also serves other ends of democratic government by ensuring thought and deliberation in the legislative process, as well as the representation of expert knowledge that would otherwise not find articulation. CPA would urge the design of a second chamber that meets these requirements, and believes that it should be comprised of a mix of members of exceptional calibre appointed by the Constitutional Council and members elected by the provincial legislatures.

Concluding Remarks

We are faced with the exciting prospect of enacting our third republican constitution in the year 2016. A new constitution that reflects the values, norms, and principles outlined above would constitute a departure from the instrumentalism, executive convenience, and the intolerance that characterised the two previous republican constitutions. Such a constitution would entrench our common democratic inheritance while fully reflecting our society's rich pluralism. Both these traditions are a source of strength and suggests a promising future for Sri Lankan democracy and development; they must not yet again be mismanaged so that they become a source of weakness, institutional decay, ethnic antagonism and debilitating conflict as so often in the past.

We are aware that constitutional change is more often than not an evolutionary process and that the strongest liberal democracies have been built incrementally over time. Consequently, we do not expect the new constitution to be a panacea for all our constitutional and political travails, although it is to be hoped that principled leadership will ensure the best possible outcome within the constraints of the politically possible at this historic moment of our political development and constitutional evolution. We urge all political parties and leaders to exercise restraint, tolerance, understanding, and professionalism in the coming constitutional negotiations and in the deliberations of the Constitutional Assembly, and while legitimate democratic disagreement is inevitable, to constantly bear in mind the strong message of democratisation delivered by the electorate not once but twice in 2015. Not everyone will get all that they want, and constitutional negotiations are always a question of give and take, but if judicious attention is paid to both principle and pragmatism as we undertake the making of our third republican constitution, then it has the potential to transform our culture of politics and governance in a brave new direction. After decades of bad constitutionalism and worse politics, the peoples of Sri Lanka deserve nothing less.

SUMMARY OF RECOMMENDATIONS

1. **Fundamental Principles:** The new constitution must contain a coherent statement of the fundamental normative principles upon which it is founded, so that it provides the irreversible basis for a strong culture of constitutional government, multicultural citizenship, gender justice, and respect for the values of plural democracy. These include the principles of republicanism, secularism, political pluralism, constitutional supremacy, the rule of law, the separation of powers, devolution and subsidiarity, and most importantly of all, human dignity.
2. **The State in a Plural Society:** The main point and purpose of the constitutional state in Sri Lanka is to secure a plural polity that recognises, represents, and accommodates all persons and groups that collectively constitute the polity, and not merely the ethnic or other political majority. It must give all Sri Lankan citizens a sense of ownership and commitment to the state.
3. **Parliamentary Government:** We urge the return to a fully-fledged Westminster model, which would ensure the constant political accountability of the executive to the legislature, together with appropriate legal safeguards for constitutional rights, good government, pluralism, and devolution. We wish to see the restoration of Parliament to a central place in national life as the main institution of representative democracy and political accountability.
4. **Electoral System:** We urge the adoption of a mixed member proportional (MMP) system, which combines the advantages of the first-past-the-post system while preserving the overarching principle of proportional representation that is vital to the proper democratic representation of a plural society.
5. **Bill of Rights:** We urge the formulation of a new constitutional bill of fundamental rights that fully meets and even exceeds the standards set by the ten core international human rights instruments recognised by the United Nations, as well as unimpeded access to the relevant treaty bodies.
6. **Constitutional Court:** We recommend the creation of a constitutional court that is representative of Sri Lanka's societal and regional pluralism including gender, to deal only with cases that involve significant questions of constitutional interpretation and principle. The Constitutional Court would be the guardian of the fundamental principle of the supremacy of the constitution.

7. **Devolution:** We recommend a fresh approach to devolution, whereby devolution means not merely the transfer of decision-making powers to the provinces so as to constitute a better balance between central and provincial institutions, but also that devolution of power is complemented by the devolution of responsibility and accountability. Such an approach of shared responsibility and accountability will knit the provinces and the centre together. The division of competences must be revisited with a view to enhancing provincial autonomy and effectiveness, whilst protecting a coherent balance between central and provincial institutions.

8. **Second Chamber:** We urge the design of a second chamber that facilitates provincial representation in the national legislature, fosters cooperation between the territorial units, and improves legislative deliberation. To meet these requirements, we believe that it should be comprised primarily of members elected by the provincial legislatures and include also persons of exceptional caliber, appointed by political consensus or in some other appropriate non-partisan manner.

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