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**Submission by the Centre for Policy Alternatives (CPA) to the Ministry of Justice
Experts Committee to Draft a New Constitution**

1. 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 addresses some of the major constitutional issues that have been the basis of public debate for many years.
2. We make this submission in good faith consistently with our record of constructive engagement with all constitutional reform processes since 1996. We are prepared to submit more detailed explanations and proposals, orally or in writing, if so invited by the Committee.
3. However, we note that the current process could be improved by publicly clarifying the role and mandate of the Experts Committee, and what the outcome of these consultations will be. In particular, there needs to be clarity about whether the role of the Committee is to propose a draft constitution, or a report which is to be used as the basis of a new constitution, or something else.
4. As with CPA's previous engagements with reform initiatives, this submission will be made public as it is a matter of public interest and importance.

Foundations and Fundamental Principles

5. The fundamental task of any constitution-making process is to help build a united and indivisible country, an inclusive Sri Lankan nation, and a strong, efficient, and democratic Sri Lankan state, as the basis for the pursuit of economic development and prosperity. The constitution of a new Sri Lanka must provide for the peace, order, and good government that will enable our country to play its due role as a respected member of the international community.
6. The new constitution must contain a coherent statement of the fundamental principles upon which it is founded, so that it provides a politically irreversible basis for a strong culture of constitutional government based on the values of plural democracy, multicultural citizenship, transitional justice, sustainable development, respect for the environment and biodiversity, and a commitment to tackling climate change. The principle of constitutional supremacy is the cornerstone of a state that respects these values.

7. 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 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 plural 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. All of our communities seek to be recognised and appreciated as intrinsic to the political and cultural mosaic that is Sri Lanka.
8. Unhelpful debates about formalistic classifications as between 'unitary' and 'federal' are best avoided. However, 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.
9. 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 and the injustices of the past would also be important. Both the preamble and the fundamental principles would constitute the basis for the new constitution to be interpreted and operated coherently and fairly in operation.

The Executive

10. We advocate the complete abolition of the executive presidential system of government. Civil society has long campaigned for this, in view of the authoritarianism, maladministration, and corruption that this institution has fostered ever since its introduction. We strongly urge the return to a fully-fledged Westminster model as was reflected in our independence constitution from 1947 to 1970. The reinstatement of parliamentary democracy will 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.

11. Accordingly in the new constitution, the President of the Republic would be a ceremonial head of state while the Prime Minister will be the head of government. The Cabinet of Ministers would collectively constitute and be accountable to Parliament according to the principles of responsibility and confidence.
12. The ceremonial President will be elected by the bicameral Parliament (see below). The President will be the symbol of national unity. There should be a constitutional cap on the number of Cabinet and other Ministers, and the Prime Minister will not hold any other substantive ministerial portfolio.

National Security

13. We recommend the establishment in the new constitution of a National Security Council (NSC). The NSC will be chaired by the President and include the *ex officio* membership of the Prime Minister and the Minister of Defence. The NSC will be responsible for policy formulation and oversight of the armed forces and intelligence agencies. The NSC will be served by an independent National Security Advisor (NSA), who will be an individual with expertise in security and strategic policy and national security governance. The NSA will not be a serving or retired member of the armed forces, police, or intelligence services. There will be a clear separation between military and non-military intelligence activities. There will be no military involvement in civil administration, except in constitutionally regulated roles in aid of the civil power under formally declared states of emergency.
14. The constitution should also provide for the establishment by Standing Orders of a standing parliamentary select committee on national security chaired by a senior Opposition MP. The Prime Minister and the Minister of Defence will answer to the committee on behalf of the NSC.

The Electoral System and Political Parties

15. We strongly affirm in principle that our electoral system should be proportional in order to serve the requirements of inclusion, pluralism, and accommodation. We recognise however that in practice, especially the preferential voting element of our current electoral system has led to an unacceptable degree of hyper-competition, corruption, and violence. However, preferential voting is not the sole reason for these problems and eliminating preferential voting will not lead to a reduction of these problems.
16. We are however emphatic in our understanding that an electoral system has to reflect the overall “will of the people” and must as far as possible guarantee the bedrock principle of “one person, one vote”. As such any new electoral system has to be a proportional electoral system. Returning to a First Past the Post (FPP) system will be a regressive step and it will not guarantee stable governments (as was seen in several elections between 1948 and 1970)

17. 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 a system in the new constitution.
18. A claim often made is the need for an electoral system which can give a clear majority to one political party. In practice such a system is very difficult to design because voting patterns are difficult to predict. Any assertion that FPP will lead to such a system is completely misplaced. A survey of election results between 1948 and 1970 will reveal the unpredictable nature of FPP and how it can easily lead to “weak governments”.
19. One possible way to resolve the issue of stable governments is to change the way “bonus seats” are allocated in the proportional system. Instead of bonus seats being offered at electoral district level, they can be offered at the provincial and national level. This will give the largest party an advantage and it will do so in a predictable and transparent manner. At present 22 bonus seats are offered at the district level to the party that gets the greatest number of votes in the district. In many situations these seats get divided between the party with the most votes nationally and the party that comes second, thereby reducing the advantage of the party that wins the greatest number of votes nationally.
20. Strong campaign finance laws are essential to address the issues of hyper-competition, corruption, and violence. Changing the electoral system will be of no use if there are no strong and enforceable campaign finance laws in place and required by the Constitution. There is a strong draft campaign finance law which was the result of the efforts by the Independent Election Commission [LDO 30/2018] which is a suitable first step in this regard.
21. In addition to campaign finance laws, efforts should also be made to change the assets and liabilities declaration laws to make it mandatory that assets and liabilities declarations by elected officials are made public. The present law does not allow for this information to be shared with the public.
22. The new constitution should also establish the framework for political parties, including the relationship between the ruling party and state institutions, the basic principles of parties’ internal organisation, members’ rights, and anti-defection provisions. These matters can be elaborated in further legislation.

The Bill of Rights

23. 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.

24. In this context, CPA urges the formulation of a new constitutional bill of fundamental rights that is consistent with the ten core United Nations human rights treaties. We also urge unimpeded access to the relevant treaty bodies. Socioeconomic rights must be made justiciable subject to the accepted “available resources” and “progressive realisation” doctrines of international and comparative human rights law.
25. 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.
26. In view of the serious challenges of degradation of the natural environment and biodiversity now facing Sri Lanka, we recommend the inclusion of environmental rights in the bill of rights.

Language Rights

27. The status of language has been a source of conflict in Sri Lanka since the Official Language Act 1958. Notwithstanding the subsequent enactment of the (largely unimplemented) Tamil Language (Special Provisions) Act 1958, the result of the “Sinhala Only” policy was to divide the country and create the conditions for armed conflict.
28. While in law the Thirteenth and Sixteenth Amendments granted equal status to both Sinhala and Tamil, in practice these constitutional provisions are observed in the breach. Tamil language competency within the public sector remains low, including in important areas such as law enforcement and public health, even in the Northern and Eastern Provinces. The ideal of a multilingual Sri Lankan can only be achieved by the protection of the equal status of both Sinhala and Tamil, and investing public resources in language education including English.
29. In this context, any attempt to undo the equal status of Sinhala and Tamil, as recognised by the Constitution, would be extremely ill-advised and a repetition of

the costly errors of governments in the 1950s and 1960s. As such, the existing constitutional provisions on language rights should not be changed except to give constitutional recognition to the National Language Commission, and ensure that its decisions are binding on public institutions.

Climate Change

30. To fully implement Sri Lanka's obligations under the Paris Agreement, there must be a new chapter on climate change in the constitution. A chapter on climate change must establish the state's commitment to net-zero greenhouse gasses emissions by 2060, and other relevant principles of sustainable development and the protection of workers and communities reliant on carbon-intensive sectors during the transition to net-zero. It should also establish an independent Commission on Climate Change to assist the government to implement the Paris Agreement.

Devolution and Local Government

31. 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. 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, 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.
32. In advocating devolution, we are encouraged 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.
33. More specifically, we must learn the lessons of our 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 muddled by excessive nationalistic rhetoric on both sides of the ethnic divide, as well as a lack of detailed knowledge about its strengths and weaknesses.

34. 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.
35. A new devolution on this basis would require consideration of the following matters:
- a. 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;
 - b. The powers of the Governor must be curtailed in favour of the elected provincial political executive;
 - c. 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);
 - d. The concurrent competences must be exercised consistently with subsidiarity;
 - e. And except in narrowly defined and exceptional circumstances (e.g., the prevention of secession), and subject to requirements of accountability, executive powers in relation to even legislative competences retained by the centre must be devolved.
36. As is implicit in the last paragraph, 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.
37. 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.
38. The local government tier should have constitutional recognition, and the fundamental framework of their structure, composition, powers, and functions should be set out in the constitution, for further elaboration by legislation. The principle of subsidiarity must inform the design of this constitutional framework. There must be no replication of functions between the local government level and other levels of government, and administrative structures which enable other levels to replicate or supplant local government authorities must be removed.

The Second Chamber

39. 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.
40. 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.
41. To meet these requirements, we believe that the second chamber should be comprised primarily of members elected by the provincial legislatures and include also persons of exceptional calibre, appointed by political consensus or in some other appropriate non-partisan manner.

The Judiciary, the Constitutional Council, and Independent Institutions

42. We reiterate the need mentioned above for a decentralisation of judicial power, so that the Provincial High Courts become the courts of first instance for fundamental rights applications. This will assist in case management as well as access to justice. The appellate jurisdiction of the Supreme Court in fundamental rights matters must be used to develop a coherent body of case law around the bill of rights, leaving matters of fact to be disposed of by lower courts.
43. The de-politicisation of governance remains a priority and we urge the Committee to recommend the reinstatement of the Nineteenth Amendment framework of the Constitutional Council and the independent commissions.
44. The changes made by the Twentieth Amendment to the appointment procedure of the higher judiciary and the Judicial Services Commission must be replaced with a consultative and transparent process to ensure that one individual or political party alone do not get the sole and final say in these appointments.
45. There should be established an independent department of the Director of Public Prosecutions responsible for all criminal prosecutions, and these functions should be removed from the Attorney General's department. The Attorney General's powers, functions, and duties should be clarified to ensure the Attorney General's constitutional role as the Chief Law Officer of the State to advise the government on legal issues in the public interest. The Attorney General should neither be the chief public prosecutor nor the legal counsel for the ruling party.