

Concept paper for constitutional reforms draft for discussion

By

Transparency International, Sri Lanka

April 29, 2003

This concept paper is a working document that sets out basic proposals for constitutional reform, incorporating principles of transparency and accountability. These proposals consist of basic concepts that should form the basis of an exhaustive study.

TI Sri Lanka proposes to supplement this concept paper with an explanatory paper in due course.

1. Legislative process

Presentation of Bills Every bill that is presented should be gazetted and made available to the public for adequate public debate.

All statutes should be subject to judicial review, in relation to unconstitutionality. This must be considered as a priority in order to ensure accountability of the entire legislative process.

TI Sri Lanka is not satisfied with the present limited pre-enactment judicial review procedure. However, if the present system of limited pre-enactment judicial review is to continue, this procedure should be changed as follows:

- i. If provisions relating to Urgent Bills are to be retained, those Bills need to be made available to the public, at least upon request. Members of Parliament must be given copies of the Bills at least 2 days before it is tabled in Parliament.
- ii. The Constitution should ensure that transparency prevails in the legislative steps taken by the Parliamentary Committees.
- iii. Supreme Court determinations should be delivered in open court like in any other cases. There should not be any secrecy in communicating determinations to various authorities.
- iv. When a statute has been passed by Parliament in exceptional cases where totally new provisions have been introduced at Committee Stages, the Supreme Court should be empowered to review these new provisions.
- v. Public should be afforded at least 2 weeks time (from the time the Bill is available to the public) to challenge the constitutionality of the Bill. If such a challenge is made the Supreme Court should be permitted at least one month to consider the determination.
- vi. Judicial review process of Bills (or any statute) should be transparent. TI Sri Lanka recommends that all constitutional amendments need to be considered by a full bench. The powers of the Chief Justice to constitute arbitrary benches should be subject to limitations, which guarantee confidence of judicial integrity and independence.
- vii. Supreme

Court should be given sufficient time to consider a Bill, and it is recommended this period be a minimum of 3 weeks for all categories of Bills.

Transparency and Accountability of Provincial/ Regional Statutes

Judicial review of these statutes should be guaranteed at all stages.

Enactment procedures should be transparent and all statutes prior to discussion by Provincial/ Regional bodies should be gazetted at least one month prior to enactment.

2. Parliamentary Affairs

Parliamentary Affairs should be conducted in a transparent manner while guaranteeing the dignity of the Institution and recognising the rights and privileges of its Members. The following aspects need to be specifically addressed:

Members should be free from any limitation and restriction in relation to parliamentary affairs and in particular the parliamentary debates.

Committee sittings should be open to public.

Members serving all committees should be required, constitutionally, to attend the sittings and observe its deliberations.

Members of all committees should be selected in a transparent manner and with a view to ensuring accountability.

Declarations of Assets and Liabilities of all Members should be made available in Parliament and the public should have free access to them.

3. Judiciary

Selection of judges must be done by the Constitutional Council while giving highest priority to the integrity of persons being considered.

Appointment of judges should be made without delay once a vacancy arises.

Judges should not be subjected to administrative control by the Executive (In areas such as Transfers, Promotions, Foreign travel, Training etc). This should not deprive the relevant authority of its lawful powers to remove or otherwise deal with judges in the event of malpractices, misbehaviour etc.

All judicial sittings should be open to the public, subject to recognised exceptions such as privacy in matrimonial cases. The Public should have reasonable access to the proceedings and pleadings in all cases unless otherwise decided by the hearing judge in exceptional cases.

Retirement ages of Judges of all Superior Courts should be same. After retirement judges should be encourage to engage in a legal practice in Superior Courts and should not be permitted to engaged in any political office.

Appropriate changes should be introduced while guaranteeing traditional safeguards that ensure that the Independence of the Judiciary are protected.

3.1 Judicial Services Committee (JSC)

Senior most judges should be appointed to the JSC. There should be a constitutional provision to remove members of the JSC in the event of proved misbehaviour.

While guaranteeing independence and integrity of judiciary, certain checks should be laid down against possible arbitrary actions by the JSC.

4. Executive

Either the executive or ceremonial presidency should be subject to checks and balances that guarantee accountability in governance. No provision should deprive the public in taking up any issue on accountability and transparency against any person in the Executive.

4.1 Immunity

There should be no immunity on major governance issues for actions done by the Head of the Executive in an official capacity. Action should be maintainable against AG or the person/officer who implements such decisions of the Executive, in an appropriate forum. In case of voidable actions, personal action should be permitted.

(TI Sri Lanka has no objection to retain immunity for private actions of the Head of the Executive)

4.2 Cabinet All actions of central government as well as regional cabinets should be subject to public scrutiny and judicial review by the appropriate courts.

5. Electoral Process

Election Commission should be given wide powers to ensure free, fair and transparent elections through out the country at all levels of elections.

All election related communications to be made public at least following the elections.

Counting process to be transparent (Constitutional guidelines need to be provided.)

Electoral systems should not be changed without consensus. Prior to the enactment of the new constitution, the electoral system needs to be reconsidered.

6. Public Finance

Parliament should remain the guardian of public finance while the public/state reserve should be free from political interference. TI Sri Lanka proposes that a body of independent experts representing the State should manage the National Reserve/Consolidated Fund etc. and financial discipline is to be strictly observed by the public sector.

Auditor Generals scrutiny of all public finance including all interests of Government without any exception.

Independence of the Auditor General should be assured in all aspects including the administrative sphere. Wide powers should be given to the AG to ensure effective auditing in public institutions.

Funds voted for the AG should be decided by a committee of Parliament and should not be exclusively decided by the Executive.

Effective parliamentary scrutiny should be guaranteed through committee systems with transparency in the working of the systems. The Public should have access to all committees in parliament.

Either the Auditor General or Specific Parliamentary committees that are appointed should consider realistic nature of budget projections prior to the presentation of Budget to Parliament. TI Sri Lanka considers it necessary to have a pre-budget analysis even in supplementary budgets.

7. Independent Commissions & Constitutional Council

Financial Independence of all Independent Commissions to be assured by Parliament (should not be exclusively left to the Executive)

Activities of the Commissions to be transparent

Public hearing to be encouraged on complaints regarding integrity of persons so appointed to the independent Commissions. Decision of the Executive not to appoint members to the Commissions should be subject to judicial review.

8. Other provisions

a. Constitutional Amendments

Strict Accountability framework for Constitutional amendments should be guaranteed.

No constitutional amendment should be introduced by way of Urgent Bills. More discussion should be encouraged at the pre-enactment stage within the constitutional framework.

b. Fundamental Rights

Freedom of Information to be made a specific fundamental right subject only to the limitations accepted by international law.

c. Independence of Members

All Members of Parliament should be free to debate and vote in all sittings in Parliament according to his/her conscience, independent of the party whip. Disciplinary control of MPs should be limited to matters outside Parliamentary Debates.

The Constitutional arrangement that provides for the cessation of Parliamentary membership in the event of expulsion of the Party should be abolished.

d. Accountability and Transparency to be assured in all affairs

TI Sri Lanka proposes that Accountability and Transparency should be incorporated into the constitution, as a general guideline both in the Svasti (Preamble) as well as in the Directive Principles.

Source: <http://www.tisrilanka.org/?p=175#>