

Proposals for a New Constitution

**Submissions to the
Public Representation Committee (RPC)**

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Mr. Lal Wijenayake (Chairman)
Attorney at Law
Public Representation Committee
Constitutional Reforms

Dear Mr. Wijenayake,

Proposals for a New Constitution

It is with commitment and pleasure that I wish to submit the enclosed proposals for a New Constitution.

Please note that I am not in a position to make any oral submissions or clarifications due to living abroad at present, and health conditions. However, I am willing and available to communicate through email or skype if and as necessary on any of the proposals submitted.

I regret that I could not complete proposals for a chapter on “Fundamental Human Rights and Freedoms.” I will be sending those proposals on the subject soon.

I further regret any inadvertent error or inaccuracy in the submissions. Please note that I make the proposals as an independent academic, based on study and experience and I am not expressing any partisan political opinion or advancing any personal or group interest. Within those premises, I take responsibility for the views expressed.

I have complete confidence in the process that you and the other members of the Committee have undertaken and wish you all success in the endeavor.

Yours sincerely,

Dr. Laksiri Fernando

Forward

Discontinuity and continuity appear to be part and parcel of constitution making and constitutional evolution in many countries except where major revolutions occur. Where discontinuity is intended, ‘innovation’ should take its place. It is not good for any country to move from one extreme to the other. The best policy would be to strike a balance and follow a Middle Path.

After all, good governance or democracy does not depend solely on the niceties of a constitution. Practice is more important than theory.

Constitutional making is particularly difficult in divided societies. An incrementalist approach might be the best. If I may borrow some ideas from Hanna Lerner (“*Making Constitutions in Deeply Divided Societies*,” 2011):

‘Avoidance of controversial formulations or change, the use of neutral legal language, and inclusion of contrasting provisions, yet absolute clarity in operational articles’ might be the best.

A good constitution can compromise in its visionary formulations, yet unambiguous in operational principles. The use of plain language also has become the norm of ‘people-centred constitution making’ in many countries.

It is in the above spirit and principles that the following proposals are made for the proposed New Constitution. Proposals are not necessarily my personal views or ideals. They are a compromise between ‘what is desirable’ and ‘what is feasible.’ However, fundamental democratic principles are not compromised.

(Note that when clear formulations are proposed those are “*italicized and placed in quotation marks*.” Other proposals are in ordinary font. Rationale for the proposals are given only when they are necessary.)

1

Nature of the State

Proposal:

“Sri Lanka (Ceylon) is a Free, Sovereign, Independent, Indissoluble, Plural and Democratic Republic and shall be known as the Republic of Sri Lanka.”

“The Republic of Sri Lanka is a Unitary State with Devolution of Power in Nine Provinces as prescribed in this Constitution. The State takes responsibility for peace, unity and welfare of the people. The State shall preserve and advance a Sri Lankan identity while recognizing multi-ethnic, multi-lingual, multi-religious and multi-cultural character of the Sri Lankan society.”

“In the Republic of Sri Lanka sovereignty is in the people and is inalienable. Sovereignty includes the powers of government at national, provincial and local levels, fundamental human rights and the franchise. The sovereignty is exercised through representative institutions while the people retaining the ultimate authority.”

Rationale:

In describing the Nature of the State, both the 1972 and 1978 constitutions use the terms ‘free,’ ‘sovereign,’ ‘independent’ and ‘democratic.’ In addition, this proposal uses the terms ‘indissoluble’ and ‘plural’ in that order. It is a compromise formulation to emphasise the ‘plural’ character within an ‘indissoluble’ state.

In the proposer’s personal opinion, the State also shall be ‘secular’ and ‘federal.’ However, it is not proposed. There can be alternative ways of coming closer to both objectives and particularly for a ‘secular’ state through various other provisions of the constitution i.e. fundamental human rights, chapter on religion, independence of the judiciary, rule of law and ensuring independent and impartial public service.

It might be practically impossible to change the present formulation ‘Sri Lanka as a unitary state.’ Instead, a compromise is proposed to include devolution of power in the same sentence as a qualification. What is proposed promoting Sri Lankan identity while recognizing multi-ethnic, multi-religious, multi-lingual and multi-cultural character of the Sri Lankan society is very much similar to the August 2000 draft. However, the present proposal has given priority to multi-religious character after stating multi-ethnic character. This is necessary recognizing the Muslim or other religious identities.

The description of peoples’ sovereignty is elaborated. ‘The powers of the government’ as part of sovereignty are defined to include the ‘powers at the centre, the provinces and the local governments.’ This is an implied recognition of ‘shared sovereignty’ not purely in ethnic terms but in horizontal dimensions. A fundamental difference is the inclusion of the following sentence as a clarification of people’s sovereignty.

“The sovereignty is exercised through representative institutions while the people retaining the ultimate power.”

Form of Government

Proposal:

“Sovereignty of the people for governance shall be exercised in the Republic by all delegated authorities in the following manner according to this Constitution. This Constitution is the supreme law of the Republic. Any law or conduct inconsistent with the Constitution or fundamental human rights provisions is invalid. The obligations imposed by it must be fulfilled.”

“The legislative power of the Republic shall be exercised by the national Parliament, consisting of the National Assembly and the Senate as prescribed in this Constitution. Parliament may seek people’s mandate through referendum on important policy matters. The Provincial Councils shall exercise devolved legislative functions as prescribed in this Constitution. Elections for the National Assembly and the Provincial Councils shall be on a mixed system of proportional representation and constituency based first-past-the-post principle within an overall proportional representation.”

“The judicial power of the Republic shall be exercised by the Supreme Court, the Constitutional Court, Human Rights Court, the other Courts, Tribunals and Institutions established by this constitution or by law under the Constitution. The independence and impartiality of the judiciary are the cardinal principles. There shall be a Constitutional Court on all matters of the constitution with the powers of post-enactment judicial review.”

“The executive power of the Republic shall be exercised by the President, the Prime Minister and the Cabinet as prescribed in this Constitution. The devolved executive functions shall be exercised by the Governors, the Chief Ministers and the Council of Ministers as prescribed in this Constitution.”

“The President of the Republic shall be elected at a national election and be in charge of National Reconciliation and National Security. All other executive powers of the President shall be ceremonial and on the advice of the Prime Minister and the Cabinet. The position of the President is not of an executive president. Head of the Cabinet shall be the Prime Minister. The President shall chair the Cabinet, as Head of the State, only when matters of national reconciliation or national security are discussed or she/he is so invited by the Prime Minister on other matters.”

“The Provincial Governors of the provinces shall be appointed by the President on the advice of the Prime Minister. The Provincial Councils shall be elected as prescribed in this Constitution and laws under this Constitution. The Governors have special responsibilities on national reconciliation and national security. All other executive powers of the Governors shall be ceremonial and on the Advice of the Chief Ministers and the Council of Ministers. Head of the Council of Ministers shall be the Chief Minister.”

Rationale:

The proposed form of government is Parliamentary. Nevertheless, the President shall be nationally elected like in Ireland and shall have responsibilities for ‘national security and national reconciliation.’ The latter is proposed considering the specific situation in Sri Lanka after the war: (1) continued requirement of ‘national security’ and (2) the pressing need for ‘reconciliation’ in its broadest meaning of the term. The placing of both tasks in one hand might be the best as they are interrelated. The position of the President is the best, as elected by the whole nation and divorced from the ‘political’ Cabinet. Cooperation and/or cohabitation between the President and the PM is necessary.

This proposal prefixes the form of government reiterating principle of sovereignty and constitutionalism and eliminates the most obnoxious negation of the supremacy of constitutionalism in Articles 16, 80 (3) and 84. The justification is clear.

The proposal also brings provincial councils into the explanation of legislative power of the republic. This is due recognition of the second tier of governance. As part of the form of government it is important to spell out the basis of election principles.

Independence of the judiciary is established with post-enactment judicial review by the Constitutional Court. Two new additions to the court system are the Constitutional Court and the Human Rights Court. Both are specialities, final review shall be by the Supreme Court as necessary.

The executive power is explained after the judiciary, not before. First the basic principles and the institutions, bringing the provincial executive also into the equation. The Governors of the provinces are linked to the President also with responsibilities on ‘national security’ and ‘reconciliation.’ Both the President and the Governors are nominal in all other respects.

Basic Structure of the Constitution

Proposal:

The basic structure and contents of the constitution could be as follows.

CONTENTS

Preamble

Chapter I: The People, the State and Sovereignty

Chapter II: Fundamental Human Rights and Freedoms

Chapter III: Fundamental Duties of the State, Political Parties and Citizens

Chapter IV: Buddhism and Religions

Chapter V: Official Language and Language Rights

Chapter VI: Citizenship and Citizenship Rights

Chapter VII: The National Legislature (Parliament): The National Assembly

Chapter VIII: The National Legislature (Parliament): The Senate

Chapter IX: The National Executive: The President, the Prime Minister and the Cabinet

Chapter X: The Provincial Legislatures: The Provincial Councils

Chapter XI: The Provincial Executives: The Governors, the Chief Ministers and the Council of Ministers

Chapter XII: The Local Government System: Powers and Functions

Chapter XIII: Franchise, Elections and Referendum

Chapter XIV: Basic Principles of the Electoral System: National, Provincial and Local

Chapter XV: Independence of the Judiciary

Chapter XVI: Structure, Functions and Appointment of the Judiciary

Chapter XVIII: The Supreme Courts and the Court of Appeal

Chapter XVII: The Constitutional Court and the Human Rights Court

Chapter XVIII: Public Finance and Fiscal Devolution (including Finance Commission)

Chapter XIX: Constitutional Council and Independent Commissions

Chapter XX: The Public Service: National, Provincial and Local

Chapter XXI: The Public Security

Chapter XXII: International Relations and External Affairs

Chapter XXIII: Interpretation, Amendment and Repeal of the Constitution

A model for a Preamble is proposed below.

PREAMBLE

We the People of Sri Lanka,

In order to consolidate national unity, to preserve territorial integrity and peace, to enhance democracy and good governance, to ensure social justice to all communities, to promote social and gender equality, to further promote general welfare and social security of citizens and inhabitants,

Believing in unity in diversity, and

Being a member of the family of democratic nations,

Hereby establish this Constitution,

On the basis of fundamental human rights, people's inalienable sovereignty, constitutionalism and rule of law, compulsory adult universal franchise, and equality of all citizens irrespective of ethnicity, gender, religion, language, political opinion or any other distinction.

This Constitution is supreme and is the fundamental law of the country.

Rationale:

Continuity and discontinuity should be the principles that should be followed in the structure of the constitution. It is highly recommended that there should be an operational Preamble. A draft is given. It proposes a Vision and Basic Principles for a constitution in a plural society with threats and anxieties. The vision is presented taken into consideration the difficulties of constitution making in 'divided societies' (See Forward) and proposing 'contrasting principles.' The interest and concerns of the majority and minority communities are taken into consideration. On the one hand, 'national unity,' and 'territorial integrity' and on the other hand 'justice to all communities' and 'social equality' are emphasized. The concepts such as 'unity in diversity' and 'membership in the global community' are introduced for the first time.

First chapter is proposed on the same title as in the 1972 and the 1978 constitutions. Then should come the 'Fundamental Human Rights.' Emphasis on 'human' is introduced to 'fundamental rights.' This should continue even as an educational device.

Instead of a chapter on 'Directive Principles of State Policy and Fundamental Duties' 'Fundamental Duties of the State and Citizens' is proposed. Rationale is to emphasise that the State do have 'fundamental duties' and so do the citizens. This is more effective than vague pronouncements under 'directive principles.' Mixing of rights and duties in one chapter is not advisable.

Chapter on Buddhism is retained however renamed as 'Buddhism and Religions' allowing the recognition of other religions. It is placed after the chapter on 'fundamental human rights' and also the 'fundamental duties' for more clarity.

Instead of just 'language' the chapter title is proposed as 'official language' also to include 'language rights' in the same chapter. Likewise, the chapter on 'citizenship' should go with the 'citizenship rights.'

Chapters on the 'legislature' and the 'executive' go stage by stage for the national and the provincial arrangements. The contents should be clear and elaborate as the titles suggest.

A new chapter is proposed to cover the 'local government system' emphasising the importance, powers and functions within the overall democratic architecture. This is new and is the international trend.

'Franchise, elections and referendum' are combined in one chapter unlike in the present constitution. A new chapter is proposed to lay down the 'basic principles of the electoral system' for the national, provincial and the local elections.'

The provisions for the judiciary is proposed to be more elaborate with emphasis on 'independence of the judiciary.' Four chapters are proposed beginning with the 'independence of the judiciary.' After the 'structure, functions and the procedure to appoint the judiciary,' the setup of the 'Supreme Court and the Court of Appeal' could be explained without diluting the position under the nomenclature 'the superior courts.' What is proposed new are the 'Constitutional Court' and the 'Human Rights Court.' Rationale for these will be explained under the judiciary.

Chapter on 'Finance' needs to be looked into carefully. Expert opinion should be sought. It is proposed to call it 'Public Finance and Fiscal Devolution.' The most important is the role of Parliament in financial control in respect of 'public finance.' Equally important might be to constitutionalize funding formulae for the provincial councils and local governments to ensure fiscal devolution. In this respect, the role of the Finance Commission should be brought into the picture.

The 'Constitutional Council and the Independent Commissions' should be one new chapter. The chapter on 'Public Service' needs to be looked into carefully. At present, it is appallingly out of gear. Principles for the public service at the national, provincial and local levels should be laid down. It is also proposed to have a chapter on 'International Relations and External Affairs.' This is a sphere where constitutional provisions needs to be worked out.

Citizenship, Religion, Fundamental Rights and Duties, Language Rights, Individual and Group Rights, Directive Principles on State Policy

Proposals:

1. Citizenship

There shall be one status of citizenship known as the ‘citizen of Sri Lanka.’ All distinctions as to the way that citizenship was/is acquired by ‘descent’ or by ‘registration’ should be eliminated for all purposes, public or private. No discrimination is permitted.

No citizen of Sri Lanka shall be deprived of her/his citizenship except under the law and by order of the Constitutional Court. The Citizenship Act should be so revised.

All citizens who migrate or have already migrated to other countries are encouraged to retain their citizenship or apply for dual citizenship. Their continued contribution to Sri Lanka is appreciated.

Those who have dual citizenship may acquire the right to be a candidate in a local, provincial or national election after six months from making a statutory declaration before the Constitutional Council provided that all other conditions are fulfilled under the elections and other laws. All dual citizens are entitled to all other fundamental rights i.e. freedom of expression, political participation etc. while they reside in the country.

2. Religion

There can be a chapter on “Buddhism and Religions” as suggested in the “Basic Structure of the Constitution” although it is not ideal. It should however come after the chapter on “Fundamental Human Rights” and also after the proposed “Fundamental Duties of the State and Citizens.” A secular constitution/state would have been the best. However, given the prevailing conditions, there can be other ways of sobering one religion, however important, emerging as a state religion or discriminating others. The following formulation is a suggestion.

“The Republic of Sri Lanka recognizes the historical importance of Buddhism and its foremost contribution to the country’s social and cultural formation and it shall be the duty of the State to protect Buddhism without any discrimination to other religions.”

3. Fundamental Rights and Duties

It is proposed not to combine ‘rights and duties’ in one chapter or make one dependent on the other, particularly rights on duties. The present proposer is strongly (academically) convinced on the matter although not elaborated here.

It is suggested to call “Fundamental Human Rights and Freedoms” and not ‘fundamental rights.’ ‘Freedoms’ are suggested to be added as in the 2000 draft.

Proposed contents for a chapter on “Fundamental Human Rights” is in Annexed I.

4. Language Rights

The new constitution should avoid discriminatory formulations such as “Tamil shall also be an official language” (13th Amendment).

There can be a chapter on “Official Language and Language Rights.” It is proposed to include English as an official language along with Sinhalese and Tamil. The proposer differs on the prevailing interpretations of ‘official’ and ‘national’ languages. English can be an ‘official language’ but not a ‘national language.’ An ‘official language’ has only a legal and an administrative meaning. ‘National languages’ does have a historical/ cultural meaning. Some of the proposed contents could be as follows.

“The official languages of Sri Lanka shall be Sinhalese, Tamil and English. Sinhalese and Tamil shall also be national languages to mean indigenous to the people while recognizing the families/communities using English as ‘mother tongue.’”

“Any citizen of Sri Lanka shall be entitled to communicate with the public service for any official matter in any of the official languages, Sinhalese, Tamil or English of her/his choice. The public servants are obliged to communicate with such citizens in the same language provided that some of the official documents could be supplied in the language that they are available at the time with an unofficial translation pertaining to the particular matter, inquiry or request.”

“All citizens are entitled to use their ‘mother tongue’¹ or the language that they are comfortable with in making complaints or statements at police stations, human rights commission or any such institutions and those should be recorded in that language. All citizens are entitled to appear and make submissions before Courts, tribunals or such legal proceedings in their ‘mother tongue’ or the language they are comfortable with.”

“A Member of Parliament, a Member of a Provincial Council or a Member of a Local Government shall be entitled to perform her/his duties and discharge functions in Parliament, Provincial Council or Local Government in any of the official languages, Sinhalese, Tamil or English of her/his choice provided that common sense for effective communication should prevail.”

“A person shall be entitled to be educated through the medium of any of the official or national languages, Sinhalese, Tamil or English. Considering however the pedagogical importance of ‘mother tongue’ for the formative development of children, the State shall provide and promote education particularly in Sinhalese and Tamil in schools as relevant with gradually promoting English knowledge in every school.”

“Every child is entitled to sit for public examinations i.e. GCE (O/L or A/L) or any other legally proclaimed in any of the official languages, Sinhalese, Tamil or English.”

¹ Mother Tongue in Sri Lanka can be either Sinhalese, Tamil or English.

“The determination of the medium of instruction in faculties, departments or courses/subjects shall be left for the relevant Institutions of Higher Education provided where one national language is the medium of instruction (Sinhalese or Tamil), the other national language (Sinhalese or Tamil) shall also be made available as a medium of instruction for those who obtain admission to that institution in that language (Sinhalese or Tamil) as the medium of instruction. This does not apply where the medium of instruction is determined as English for pedagogical purposes.”

“The State shall promote and support the progressive implementation of English as the main medium of instruction in all institutions of higher education to make the graduates of all degree courses equivalent to international standards and suitable for competitive professional opportunities.”

5. Individual and Group Rights

It is difficult to place human rights strictly into one or the other side of the ledger, as individual or group rights. Most of them overlap. Seemingly group rights prove individual, and vice versa. For example, freedom of the press is both an individual right at the level of the journalist, and a group right at the level of a media institution. The right to use one’s mother tongue in courts, seemingly a group right of an ethnicity, in operation is an individual right.

It is best that the proposed constitution does not make a clear distinction. There should not be separate sections on ‘individual rights’ and ‘group rights.’

More relevant is addressing the economic, social and cultural rights going beyond the traditional civil and political rights.

6. Directive Principles on State Policy

As it was proposed in the “Basic Structure of the Constitution” it would be better to put them more positively as “Fundamental Duties of the State” combining with the “Duties of the Citizens.” Some of the proposed formulations could be as follows.

Constitution and Country

“It is the primary duty of the State, all state institutions and representatives/officials to recognize the Constitution as the supreme and fundamental law of the country and obey its provisions. All political parties, non-governmental sectors and all citizens are obliged to do the same while retaining the freedom to peacefully criticise and seek changes to its provisions in part or as a whole.”

“It is the duty of the State to protect and preserve sovereignty, territorial integrity and national unity of the country. All political parties, non-governmental sectors and all citizens are obliged to do the same while retaining the freedom to peacefully differ, criticise and seek changes to the policies of the State in respect of the above.”

Social and Ethnic Harmony

“It is the duty of the State to promote national unity among the people, build ethnic and religious reconciliation and harmony and maintain peace and stability in the country. All political parties, non-governmental sectors and all citizens are obliged to do the same while

retaining the freedom to peacefully differ, criticise and seek changes to the policies of the State in respect of the above.”

“It is the duty of the State to recognize the diversity of cultures, customs and practices and protect them as far as they are not in breach of the constitution, laws or the cultures, customs and practices of others. It is the duty of the State to promote multiculturalism in the country, set out its policies and at the same time promote Sri Lankan identity above and over multiculturalism. All political parties, non-government sectors and all citizens are obliged to do the same while retaining the freedom to peacefully differ, criticise and seek changes to the policies and practices of the State in respect of the above.”

“The State shall not promote in any manner ethno-nationalism in the country directly or indirectly. On the contrary, the State shall promote civic nationalism and liberal patriotism based on most enlightened religious and secular principles, fundamental human rights, and cosmopolitanism. The State shall launch educational programs, formal and informal, to promote the above. All political parties, non-government sectors and all citizens are obliged to do the same and participate in such educational programs at will while retaining the freedom to peacefully differ, criticise and seek changes to the policies and practices of the State in respect of the above.”

Social Justice, Equity and Poverty Alleviation

“It is the duty of the State to ensure and promote social justice in all spheres of economic, social, political, civil and cultural life of the people taking inspirations and guidelines from international human rights and democratic norms and strictly following the ‘fundamental human rights and freedoms’ chapter in the Constitution. It is the duty of all political parties, non-governmental sectors and all citizens to do the same while retaining the freedom to peacefully differ, criticise and seek changes to the policies and practices of the State in respect of the above.”

“The State has special obligations to alleviate poverty and look after the poor and the marginalized in society. It is the duty of the State to promote policies and programs to bridge the gaps between the rich and the poor and promote equitable income distribution throughout the society and the country as much as possible. The State should seek the cooperation of the private sector and all sections of the society to develop the economy and society, in a sustainable and equitable manner and it is the duty of the private sector, all political parties, other sectors of society and all citizens to support the State in these ventures while retaining the freedom to peacefully differ, criticise and seek changes to such policies and practices.”

Children, Women, Elderly and Disabled

“The State has special obligations to look after the rights and welfare of the children, women, elderly and people with disability. It is the duty of all political parties, non-governmental sectors, private enterprises and all citizens to support such efforts and likewise look after the rights and welfare of the children, women, elderly and people with disability within families and in society.”

Free Education and Health Care

“It is the duty of the State to maintain and promote free education including higher education with the cooperation of the private sector as necessary. It is also the duty of the State to maintain and promote free healthcare and hospitals with the cooperation of the private sector as necessary. The public private partnership (PPP) should be the norm. On both education and health, the State should determine target allocations from the annual budgets from time to time. When citizens offer education or health in the private sector, the State should ensure that those services are affordable. The State should have a national medical drugs policy to ensure all necessary medical drugs are affordable and available. It is the duty of all political parties, non-governmental sectors, the private sector and all citizens to support the policies and programs of the State on free education and health care as much as possible while retaining the freedom to peacefully differ, criticise and seek changes to such policies and programs.”

Welfare and Social Services

“It is the duty of the State to maintain and promote general welfare and assistance services as necessary to the citizens without any political or any other partiality through the national services, provincial councils or local government institutions. These should be announced in national, provincial and local government budgets and policies. It is the duty of all political parties, non-government sectors and all citizens to support such efforts while retaining the freedom to peacefully differ, criticise and seek changes to such policies and programs. It is the prerogative of all citizens not only to obtain these services as necessary but also to support them through voluntary work or any other means.”

Environmental Protection

“It is the primary responsibility of the State to protect the environment within its territory, land and offshore, in line with international standards and efforts, and reduce greenhouse gas emissions. It is the duty of all political parties, non-governmental sectors including the private enterprises and all citizens to do the same and support the efforts of the State in those ventures while retaining the freedom to peacefully differ, criticise and seek changes to the policies and practices of the State.”

Personal Security, Law and Order

“It is the primary duty of the State to maintain law and order and ensure social and personal security of citizens through effective and citizen’s friendly police service/s and other law enforcement agencies particularly preventing robbery, theft, crime and violence in society. It is the duty of all political parties, non-governmental sectors and all citizens to cooperate with the State, the police service/s and other law enforcement agencies in preventing robbery, theft, crime and violence in society while retaining the freedom to peacefully differ, criticise and seek changes to the policies and practices of the State, the police service/s and other law enforcement agencies in this respect.”

Duties of Public Servants

“It is the primary duty of all State officials including the police officers to serve the citizens, be polite to them, and maintain the best professional standards and refrain from favouritism, nepotism or any kind of monetary or other misdeeds. It is the duty of all political parties, non-governmental sectors and all citizens to extend cooperation to state officials, follow all

relevant rules in dealing with them and refrain from trying to influence them politically or in any other respect while retaining the freedom to peacefully raise issues, stand for one's rights or peacefully differ, criticise and seek changes to the public services and practices as relevant."

Duties of Political Parties and Leaders

"It is the duty of all political parties to be democratic in their policies and organizational structures, maintain high professional standards and refrain from nepotism, and any kind of monetary or other misdeeds. It is the duty of political party leaders to be accountable to their members, party organizations and maintain transparent and accountable practices for campaign funding and refrain from nepotism or any unethical practices."

"It is the duty of all political parties, politicians, national, provincial or local, to maintain high standards of professional ethics and refrain from favouritism, nepotism and any kind of monetary or other misdeeds. It is the duty of the State to have codes of ethics for all members of parliament, provincial councillors, and local government representatives."

Duties of Citizens

"It is the duty of all citizens to be respectful to each other, recognize each other's dignity and rights, be reasonable and rational in all dealings with the state officials or fellow citizens and refrain from violent or aggressive behaviour at all times. All politicians, citizens and media personnel should refrain from hate speech or expressions that could lead to incitement or social disharmony."

Please note that the duties to respect human rights including 'economic and social rights' and freedoms are not included here as they can be more effectively protected and implemented through a 'Fundamental Human Rights and Freedoms' chapter. All legally enshrined fundamental human rights automatically generate necessary duties.

Legislature (Unicameral or Bicameral)

Proposal:

The national legislature shall be bicameral both for the reasons of devolution and otherwise. The national Parliament should consist of two chambers: National Assembly or the lower house and the Senate, the upper house. It should consist of 36 members, one half of them or 18 members nominated 2 each by provincial councils (one female and one male) and the other half or 18 members nominated by the President on the advice of the Prime Minister to represent unrepresented sections of society (i.e. special minorities) and professional groups/interests and 9 members strictly being women. The term of office of the Senate should be 3 years only, one half retiring after 18 months at the beginning. All members should be over 40 years of age, with professional and/or personal integrity not involved in active politics and qualify to be elected only twice.

The terms and functions of the Senate could be similar to the Senate under the 1947 constitution as revised to suit the present conditions. However, no minister should be appointed from the Senate and tasks of the Senate purely should be legislative and policy. Policy inputs on human rights, reconciliation, devolution, public finance and social justice, and also the people's grievances should be the main tasks.

Rationale:

The Senate is proposed to have a sobering effect on the lower house. It should be a part of checks and balances in the legislature. The members should have expertise or interest in legislative and/or financial matters. The Senate should particularly safeguard the interests of the provinces. The Senate however should not be a chamber of filibustering. After referring a bill to the Senate it should dispose of it within 3 months or 1 month in the case of a national budget or financial bill so determined by the Speaker.

6

Supremacy of Constitution or Parliament?

Proposal:

Parliament should not be declared as supreme by any means. The Constitution should be declared as supreme following the basic tenets of constitutionalism. The legislature, the executive and even the judiciary should work and operate under the constitution. The 'duties on the part of the State, political parties and citizens' on 'constitutionalism' were proposed previously. Supremacy of the constitution should be pronounced at the very beginning of the Constitution. The interpretation of the Constitution should be left only to the judiciary (Constitutional Court and any appeal going to the Supreme Court in special circumstances) so design to ensure its impartiality, professionalism and integrity in all its matters.

Rationale:

The accorded supremacy of parliament has been the curse of the country. It has led to the assumption of supremacy by unscrupulous politicians.

6

Separation of Powers

Proposal:

'Separation of powers' should not be declared in the constitution. It could be implicit as necessary than explicit.

Rationale:

Even in the United States it was not declared as such even after a proposal by James Madison.

8

Independence of the Judiciary

Proposal:

Independence of the Judiciary should be ‘absolute.’ To ensure that independence, while provisions should be made for the independent, impartial and qualified appointments, the professional calibre of the legal profession should be uplifted at the source level of legal education and training.

To ensure impartial and professional appointments based on merit, the calibre of the President and her/his standing above partisan politics is important.

Rationale:

Independence of the judiciary is of paramount importance for safeguarding human rights of citizens, democracy as the governing system and to ensure a just society.

The record of the judiciary has been appalling since 1970s due to political or bad appointments or some of the persons themselves babbling in politics.

9

Constitutional Court

Proposal:

Constitutional Court can be of 7 members, 6 appointed by an ‘impartial and above politics President’ selected out of the judges (retired or sitting) of the Supreme Court or the High Courts on submission of applications or ‘written expression of interest.’ The Chief Justice shall be the ex-officio Chair of the Constitutional Court.

The main function of the Constitutional Court is to decide and determine on all constitutional issues referred to it by the President, the Prime Minister, the Speakers of the National Assembly or the Senate or any of the Governors or the Chief Ministers of Provincial Councils. Such a request also can be made by any other court to the Constitutional Court. There will be a legal committee attached to the Constitutional Court to screen those referred issues to determine their legal veracity.

No proceedings or functions of the Parliament or the Provincial Councils should be halted by the mere fact that a matter has been referred to unless the Constitutional Council so determines.

Rationale:

There can be issues of controversy with a New Constitution or even otherwise especially related to the devolution of power. The Constitutional Court also can be a safeguard to prevent the centre taking over the powers of the provincial councils.

Power Sharing, Devolution and Local Government

Proposal:

‘Shared Responsibility’ and ‘Cooperate Devolution’ should be the concepts. The ‘shared responsibility’ is a growing concept with the UN endorsement.

Rather than ‘power,’ what should be emphasized is justice and sharing of responsibility for governance. ‘Power sharing’ is an old and elitist concept, developed for the convenience of the ‘elite’ and the politicians who thrive on conflict. The inclusion of the concept of ‘power’ into the equation would create endless controversy and strive for power on all sides. By giving power or ‘sense of power’ to the provincial councils, a new layer of parasitic politicians have emerged particularly in the South.

‘Shared responsibility’ by different political parties representing different ethnic or religious communities should be built politically. ‘Unity governments,’ ‘coalitions’ or ‘united fronts’ could be the political mechanisms. However, the constitution cannot or should not spell them out.

A scheme of devolution is not proposed here. A proposal will be sent later. In essence, devolution should come closer to federalism.

Local government should be enshrined in the Constitution and it should be a Chapter not with details but with vision, principles and main contours. See Annex II.

Rationale:

Sri Lanka should not go back on devolution but forward. Devolution should come closer to federalism preventing the central government ‘giving from one hand and taking from the other.’ Even at present these aberrations are in operation.

Local government is an important institution in democracy. New initiatives for constitution making incorporate local government in constitutions. LG’s are the closest to the people and the full potentials are not utilized at present.

‘Sharing Power’ at the Centre

Proposal:

Although ‘sharing power’ is mentioned here, as it mainly means how to enlist and encourage the participation of ‘minority’ political parties and communities (Tamil, Muslim and Christian) in governance, it is proposed to mention some guidelines for the inclusion of those parties or representatives in a Cabinet. Inclusive governance also means the participation of women.

In addition to the preservation of an overall PR system for parliamentary elections and the new introduction of a Senate, the following is proposed as an example.

“The Prime Minister shall recommend to the President the names and assignments of Cabinet and other Ministers to be appointed, the number not exceeding 30 to the Cabinet, and not exceeding 60 in total, giving due consideration to create a representative and/or consensual government of different communities also representing an adequate number of women.”

Rationale:

It is obvious that an inclusive system of government or a consensual system of governance cannot be created by a constitution per se. It is left for higher level of democratic politics. The above however can be a guideline which could be put into practice through negotiation and compromise.

‘Constitutional Council’ and Independent Commissions

Proposal:

The name ‘Constitutional Council’ appears to be a misnomer. It should not be confused with the Constitutional Court in the public eye. The better name might be “Higher Appointments Council.”

The Higher Appointments Council can be of 9 members. Only 3 being ex-officio: The Speaker, the Prime Minister and the Leader of the Opposition. The other 6 members should be appointed by the President from an equal number of 6 names each proposed by the Speaker, the Prime Minister and the Leader of the Opposition. The names proposed should be of high calibre, with professional integrity and experience, the age not less than 40 and not less than 2 of them to represent minority communities. At least 2 of the nominees should be women.

The Higher Appointments Council should appoint all Independent Commissions on the basis of written expression of interest. It shall also appoint all Heads of Departments and Institutions such as the Attorney General, Auditor General and the IGP etc. on specific criteria developed by the Council with or without the expression of interest. It can be 60 percent merit and 40 percent seniority. The appointment of Heads of the Army, Navy and the Air Force is left to the President.

Rationale:

Hopefully self-evident from the proposal.

Public Service

Proposal:

The public service should completely be independent from politics, partisan or otherwise, at the national, provincial or local government level. This does not mean that certain categories of public servants should not have political rights. However, they should keep the two separately. All public servants should have the right to join a trade union or a professional association as the case may be.

The present provisions of Chapter IX should be completely overhauled. The present provision that “Subject to the provisions of the Constitution, the appointment, transfer, dismissal and disciplinary control of public officers is hereby vested in the Cabinet of Ministers, and all public officers shall hold office at pleasure.”

The nature of the present provisions itself requires a New Constitution!

The appointment, transfer, dismissal and disciplinary control of public officers should be under the Independent Public Services Commission (PSC). Some powers and functions could be delegated to the Heads of Departments under the supervision of the PSC.

The Minister can appoint Permanent Secretaries to their Ministries. They should not influence the other appointments in the public service directly or indirectly.

There should be reform and regeneration of the public service. This should be primarily achieved through education and training which are beyond the purview of the constitution making. However, certain principles could be laid down.

Rationale:

Political interference in the public service is a vexed problem. The recent most issue that the Minister of Higher Education is embroiled in is only a tip of the iceberg. It is also the primary cause for the degeneration of the political culture in Sri Lanka where people go behind politicians not to ameliorate grievances but seeking favours. This is also the root cause of nepotism and fraud that also leads to thuggery and violence in maintaining the status quo of political interferences or predominance.

Public Service should be completely overhauled including the Foreign Service.

14

Electoral Reforms

Proposal:

An overall PR system should be retained while reintroducing the single member or multi-member seats under the FPP for the election of Parliament. However, the ‘best-loser formula’ should not be adopted for the national, the provincial or the local government elections. This is simply not democratic. This has unfortunately crept into the President’s Manifesto in January 2015 and this is also the formula in the Local Government Elections Reform Act of 2012 with other regressive elements.

It is possible to introduce the FPP seats system within an overall PR system as I have elaborated elsewhere without increasing the number of Members of Parliament beyond 225. In view of the introduction of a Senate or even otherwise, increasing the number is not necessary. What is necessary is the ‘increase’ of the quality of members and their commitment. The Code of Ethics is a must.

For the local government system, a simple ward system might be the most appropriate with the objective of reducing partisan politics and enhancing consensual policy making as much as possible.

Rationale:

The rationale for the above proposal/s are given in the Articles referred in below. Please see the References given at the end of the document.

15

Judicial Review of Legislation

Proposal:

It is important that the consistency of legislation is reviewed by the judiciary. This is one basic principle of constitutionalism.

Post enactment judicial review should be reintroduced. Any citizen or organization/entity should be able to challenge legislation or some provisions of legislation before the proposed Constitutional Court. This is a fundamental right of citizens. Until a verdict is given, the legislation should prevail unless an injunction is sought in the case of personal grievance or damage.

Rationale:

The abolition of constitutional review has led to many aberrations in the legal and the justice system. Even before, there have been aberrations (1956 Official Languages Act) due to partiality or political influence. Most vulnerable have been the minorities. Especially in view of devolution of power, the judicial review of legislation should be re-introduced.

16

Powers of President under Parliamentary System

Proposal:

“The President shall be in charge of national reconciliation and national security. All other executive powers of the President shall be ceremonial and on the advice of the Prime Minister and the Cabinet. The position of the President is not of an executive president. Head of the Cabinet shall be the Prime Minister. The President shall chair the Cabinet, as Head of the State, only when matters of national reconciliation or national security are discussed or she/he is so invited by the Prime Minister on other matters. The President should be above politics after election and should resign from any party affiliation after election.”

Rationale:

Sri Lanka should not move from one extreme to the other. The position of the President even after the abolition of the executive presidency should be made for good use. There is much reason to leave Security and Reconciliation in the charge of a President after the termination of a long drawn war. There is much to be done, and the President and his/her office/staff will be in a better position than any minister to deal with the tasks of reconciliation.

17

Election of President under the Parliamentary System

Proposal:

President should be elected nationally as it is.

Rationale:

There is merit in an elected President as a symbol of national unity. The minorities have a better say in electing a President as shown in January 2015 and other elections. It would be easy for minorities or the Northern/Eastern Provincial Councils to deal with a non-executive President than a political Prime Minister or a Cabinet.

Ireland is a successful example of having an elected President in a parliamentary democracy.

18

Public Security

Proposal:

Public security should be under the President. The President shall consult the Prime Minister on all important matters. The President shall appoint the Heads of the Army, the Navy and the Air Force, and the Security Council. He/she shall preside the Security Council, the Prime Minister and another Minister of his choice as members of the Security Council other than all armed forces heads and any other members. All Heads of armed forces and intelligence should report to the President. All Governors of provinces directly accountable to the President and report and assist the President in matters of security and reconciliation. It is the final decision of the President to place or move cantonments or camps or any other establishment of the armed forces from any part of the country depending on security or other considerations.

Rationale:

Proposal can be considered largely self-evident. Security and security of the territorial integrity could be still considered national priorities. It is logical to place both security and reconciliation under the President given interdependence of the two matters.

19

Public Finance and Fiscal Devolution

Proposal:

It should be named “Public Finance and Fiscal Devolution” and not merely Finance. Parliament should have full control over public finance at the national level directly or through appointed standing committees. There can be joint committee sessions with the Senate on financial matters as necessary.

There should be fiscal devolution. Not only the provincial councils, but also the local governments should have ‘block grants’ and ‘other grants’ directly or through the provincial councils in the latter’s case. The ability of the provincial councils and the local governments to device their taxes, rates and levies should be flexible with strict auditing, accounting and accountability procedures.

The above are very basic proposals and the PRC or other committees in constitution making could organize seminars/workshops or specialist consultations to seek further views.

Rationale:

‘Public finance management’ can be considered one of the weakest in Sri Lanka. There are many untapped financial resources that could be utilized for social welfare and services for the poor and the needy. The national government should allow creativity and initiatives on the part of the provincial councils and local governments to pursue these avenues.

Other Matters

It is proposed not to rush a New Constitution.

The PRC should focus not only on ‘soft’ or much discussed areas such as ‘presidential vs. parliamentary’ but ‘hard’ areas such as ‘public finance,’ ‘fiscal devolution,’ ‘public service’ etc. It is proposed to conduct more focused consultations with specialist on these matters.

For example, in seeking views on a chapter on ‘International Relations and External Affairs’ the views of the present or former diplomats could be sought. In revising the chapters on ‘Public Finance’ or ‘Public Service,’ views of the present and former senior public should be sought.

It is strongly proposed that a ‘Code of Ethics’ should be included in the New Constitution as a Schedule.

Recent Supporting Articles from the Proposer

On Constitutional Reforms

1. “Why do we need a New Constitution?” *Colombo Telegraph*, 4 January 2016.
<https://www.colombotelegraph.com/index.php/why-do-we-need-a-new-constitution/>
2. “Sri Lanka is already ‘Quasi Unitary,’” *Colombo Telegraph*, 6 January 2016.
<https://www.colombotelegraph.com/index.php/sri-lanka-is-already-quasi-unitary/>
3. “Some Notes on the Procedure to Enact a New Constitution,” *Colombo Telegraph*, 12 January 2016. <https://www.colombotelegraph.com/index.php/some-notes-on-the-procedure-to-enact-a-new-constitution/>
4. “Reflections on ‘Founding Principles’ for a New Constitution,” *Sunday Island*, 17 January 2016. http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=138716
5. “TNA Demand for Federalism is Reasonable,” *The Island*, 1 February 2016.
http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=139628
6. “Constitution Making and Strengthening Horizontal Democracy – Part 1” *The Island*, 8 February 2016. http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=140015
7. “Constitution Making and Strengthening Horizontal Democracy – Part II” *The Island*, 9 February 2016. http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=140065
8. “You Can’t Eat the Constitution: But the Constitution can Ensure Your Right to Eat (Food),” *The Island*, 28 February 2016.
http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=141169
9. “Fundamental Duties of the State, Political Parties and Citizens,” *Colombo Telegraph*, 2 March 2016. <https://www.colombotelegraph.com/index.php/fundamental-duties-of-the-state-political-parties-citizens/>

On Electoral Reforms

10. “Electoral Reforms should take Equal Priority in Constitutional Reforms,” *Colombo Telegraph*, 23 February 2015.
<https://www.colombotelegraph.com/index.php/electoral-reforms-should-take-equal-priority-in-constitutional-reforms/>

11. "Proposal for a Simple Electoral Reform," *Colombo Telegraph*, 16 March 2015. <https://www.colombotelegraph.com/index.php/proposal-for-a-simple-electoral-reform/>
12. "A Proof of Accommodating FPP within the PR System," *Colombo Telegraph*, 3 April 2015. <https://www.colombotelegraph.com/index.php/a-proof-of-feasibility-of-accommodating-fpp-within-the-pr-system/>
13. "Best Loser (Gunawardena) Method Undemocratic," *Colombo Telegraph*, 6 April 2016. <https://www.colombotelegraph.com/index.php/best-loser-dinesh-gunawardena-method-undemocratic/>
14. "No Need to Increase 225 to 255," *Colombo Telegraph*, 8 June 2015. <https://www.colombotelegraph.com/index.php/no-need-to-increase-225-to-255/>
15. "Degeneration of Parliament and Potential of Electoral Reform/s," *Colombo Telegraph*, 16 June 2015. <https://www.colombotelegraph.com/index.php/degeneration-of-parliament-potential-of-electoral-reforms/>

(Almost all these recent articles were published in *The Island*, *Colombo Telegraph* and *Sri Lanka Guardian* aiming at public education. Previous academic articles on the subject are not listed here)

Brief CV of the Proposer

The proposer became a university academic in Sri Lanka briefly serving as an Assistant Director of Commerce in 1969.

Educational qualifications include B.A. (Honours in Economics), University of Peradeniya; M.A. in Political Science, University of New Brunswick, Canada; and Ph.D. on Human Rights, University of Sydney, Australia. The proposer is one of the few living Political Science students of late Professor A. Jeyaratnam Wilson, a foremost constitutionalist in the country.

The proposer has considerable international experience as Secretary for Asia Pacific of the World University Service, Geneva, and Executive Director of the Diplomacy Training Program (DTP), Faculty of Law, University of New South Wales, after Jose Ramos-Horta (former President of East Timor). The proposer has been a key drafter of the 'Lima Declaration of Academic Freedom and Autonomy of Institutions of Higher Education' recognized by the UNESCO.

The proposer has been a Japan Foundation Scholar and has served as Visiting Scholar/Professor at the Universities of New South Wales, University of Heidelberg, Ryukoku University and the University of Sydney. The books published include '*Academic Freedom 1990: A Human Rights Report*'; '*Human Rights, Politics and States: Burma, Cambodia and Sri Lanka*'; '*Police-Civil Relations for Good Governance*'; '*A New Electoral*

System for Sri Lanka’; *Political Science Approach to Human Rights*’; *Sri Lanka’s Ethnic Conflict in the Global Context*’; *Sri Lanka: Challenges of a Society in Transition*’; and *Thomas More’s Socialist Utopia and Ceylon (Sri Lanka)*.’ Some of the above are edited works. He has recently contributed to Asanga Welikala (Ed.), *Reforming Sri Lankan Presidentialism*’ through a chapter on “Human Rights and the 1978 Constitution.”

At the time of retirement in Sri Lanka the present propose was Senior Professor in Political Science and Public Policy, University of Colombo, and the Chair and Director of the Centre for Advanced Studies in Humanities and Social Sciences (NCAS).

(The above information is given to assure that the proposals made for a New Constitution are independent, based on study and experience, and not on (partisan) political opinion or personal interest)