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Women and Media Collective

## **Submission of Proposals for Constitutional Reform by Women and Media Collective**

### **To the Expert Committee to draft a New Constitution**

December 2020

The second Republican Constitution was adopted by the sovereign people of Sri Lanka in 1978 and has gone through 20 successful amendments amongst others. A constitution is the cornerstone that transforms the inalienable sovereignty of the people into the branches of government within the principles of rule of law, separation of powers, sovereignty, fundamental rights, franchise and elections and constitutionality - all of which are an extension of the sovereign; the people of Sri Lanka. Modern constitutional thinking requires that constitutions are dynamic and transcending to reflect the diverse aspirations of the people of a country so much more in a pluralistic society such as Sri Lanka. A modern constitution should also aspire to be reflective of Sri Lanka as an international entity reflecting the norms and principles enshrined over long years and established as universal principles of a non-derogable nature. It is therefore crucial that the proposed new constitution be reflective of all of the above and more to suit the dynamic nature of government and citizenry that is deeply yearned for by the people of Sri Lanka, who deserve a constitution for the people, by the people and of the people.

The submissions below is a consolidated document that draws from the following sources:

- Consolidated Submissions on Proposed Constitutional Provisions Related to Women's Rights, Gender Equality and Electoral Reforms by Women's Groups and Networks to the Public Representations Committee on Electoral Reforms - March 10, 2016
- The Report on Strengthening Women's Rights in the Constitution by the Working Committee on Gender Perspectives on Constitutional Reform - August 22, 2016
- The Report on Public Representations on Constitutional Reforms by the Public Representations Committee on Constitutional Reform - May 2016

While the following submission emphasizes women's political, civil and social rights in the Constitution, it also proposes key priorities that should be integrated in the New Constitution.

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## **B) FUNDAMENTAL RIGHTS**

Under the chapter of fundamental rights we propose broadly the following.

1. The expansion of the existing rights enshrined in the Constitution
2. The addition of new rights to the chapter on Fundamental Rights
3. To provide for the review of existing laws, customs, traditions which are in effect at the time of the new constitution

### **1. EXPANSION OF THE EXISTING RIGHTS ENSHRINED IN THE CONSTITUTION**

- The non-discrimination clause of Article 12 (2) of the current constitution should include the following additional grounds.  
No person shall be discriminated against on the grounds of race, religion, caste, marital status, maternity, age, language, mental or physical disability, pregnancy, civil status, widowhood, sexual orientation, or sexual and gender identities.
- We propose that the all persons are equal before the law and are entitled to the equal protection and equal benefit of the law.
- We propose that the work of women in the care economy should be recognized as productive work so as to be incorporated in the freedom to engage an occupation as currently provided in Article 14 (1) g.

### **2. ADDITION OF NEW RIGHTS TO THE CHAPTER ON FUNDAMENTAL RIGHT**

- We propose that the right to life and dignity for every person must be expressly given effect to.
- All persons must have the right to be free from all forms of violence and harm, and free from torture and degrading and cruel and inhuman treatment in private and public places.
- Access to Justice must be included as a Fundamental Right. The State shall ensure effective access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.
- We propose that the Constitution should adopt rights contained in the International Covenant on Economic, Social and Cultural rights which includes education, health, food, housing and sanitation as Fundamental Rights for all citizens.
- The State will undertake to take steps, to the maximum of its available resources, to achieve the full realization of the Economic, Social and Cultural rights recognized in the Constitution.
- All persons of full age without any limitation due to race, nationality or religion, gender identity or gender and sexual orientation should have the right to marry



and to found a family. They must be entitled to equal rights as to marriage, during marriage and its dissolution.

- Marriage shall be based only on the mutual consent of both individuals and no person may be married under the age of 18.
- Rights should be recognized to prohibit discrimination in matters of employment and of remuneration founded on grounds of race, religion, caste, sex, gender, marital status, maternity, age, language, mental or physical disability, pregnancy, civil status, sexual orientation. The State must guarantee workers' rights and affirm employers' responsibility to provide safe working conditions for all employees.

### 3. TO PROVIDE FOR THE REVIEW OF EXISTING LAWS, CUSTOMS, TRADITIONS WHICH ARE IN EFFECT AT THE TIME OF THE NEW CONSTITUTION

- Article of 16 of the current Constitution provides that all existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the Chapter on Fundamental Rights. We propose that this provision should not be replicated in the new constitution.
- The Chapter on Fundamental Rights must impose an obligation on the state to ensure that all Laws both written and unwritten shall conform to the rights enshrined in the Constitution.
- This may be enforced through the provision of a mechanism for the review and repeal of all legislation past, present and post enactment by allowing Court the ability for judicial review.



## D) DIRECTIVE PRINCIPLES OF STATE POLICY

- The PRC report contains an exhaustive listing of Directive Principles of State Policy. While the substance of these principles are welcome, it is recommended that rather than a regime of Directive Principles we frame them as '**State Obligations**' to stress their unequivocal character. Such a shift is also in keeping with international developments and law that stress on state obligations.
- The term "State Obligations" places strong emphasis on the obligation owed by the state to comply with its respective obligation as opposed to treating such as a directive which is non justiciable.
- We propose that state obligations should be justiciable as against the state judged to a standard of due diligence. The distinction between state obligations and fundamental rights is that a person invoking the jurisdiction of court under state obligations does not have the ability to avail themselves any personal right or remedy in respect of such obligation. Such person is only permitted to seek a direction or suitable order on the state to comply with its obligation in general.
- The obligations of the state must account for the historical commitment of the Sri Lankan state to welfare under which it has embraced a range of de facto obligations that must be crystalised within the new constitution as state obligations.
- State obligations should also recognize the obligation of the State to promote reconciliation between its peoples and communities.
- The State shall ensure that appointments made by the Executive under its powers under the Constitution should take into account the obligation to ensure women's representation.
- The State must have an obligation to take action against any private individual, corporate and non-state actor which is in violation of the rights guaranteed by the State in the constitution.



## E) THE EXECUTIVE

- We further propose that the Parliamentary Council in terms of the 20<sup>th</sup> Amendment be repealed and a Constitutional Council as per the 19<sup>th</sup> amendment be reinstated inclusive of a representative for women and two persons from the public sphere.
- The new constitution should also establish procedures and transparent hearing with appropriate rights of representation with all hearings in public similar to the United States Congressional Hearings.
- We propose that the Human Rights Commission be given constitutional status.
- We propose that the Cabinet of Ministers should consist of 1/3<sup>rd</sup> women at the minimum.
- We propose that in the determination of subjects and functions that there shall be certain mandatory ministries that shall be appointed in terms of the constitution, including Defence, Finance, Environment, Agriculture, Power and Energy, Education, Health, Tourism and Women.
- Parliament shall by law provide for the establishment of a Commission for Women.  
Such law shall provide for
  - a) The appointment of the members of the Commission by the President on the recommendation of the Constitutional Council.
  - b) The powers of the Commission including the power to make recommendations to the State, give directions to state entities and also issue guidelines and recommendations to any non-state actor which is found to be acting in violation of the rights guaranteed under the Constitution or by the said law for women.
  - c) Measures to implement the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) and any other international convention relating to the rights of women to which Sri Lanka is a party.
- We propose that all appointments to the various commissions set out in the schedule to the Article 41 (b) shall consist of the mandatory quota of 1/3<sup>rd</sup> of women representatives.



## **F) THE LEGISLATURE**

The Legislature requires to be bound to implement appropriate laws to give effect to declarations of non-compatibility by the Supreme Court. This will give effect to the determinations of incompatibility by the Supreme Court where a certain existing law, practice, custom or tradition is found to be in violation of the Chapter on Fundamental Rights.



## **G) FRANCHISE AND ELECTIONS INCLUDING REFERENDA**

- Taking into account the proposals for electoral reforms, we propose that similar provision such as in Article 101 of the Constitution be made in the new constitution including the requirement to formulate laws to give effect to the below mentioned.
- Sri Lanka's electoral system should be a mixed-member proportional system, of which fifty (50) percent of the seats are elected through proportional representation and fifty (50) are elected through majoritarian, first past the post system.
- Women should account for at least one half of the total candidates nominated to contest FPP seats from each party under the majoritarian system. The Constitution must provide for promulgation of laws to ensure women can gain representation within a registered political party and to be included in list of nominations.
- The Constitution shall mandate that any law providing for the process of elections to any elected body shall have an equitable balance in the presence of women and men with each of the sexes accounting for no fewer than forty percent (40%) and no more than sixty percent (60%) of the total number of the candidates on the PR and National lists.
- The PR and National Lists should be closed zippered list, alternating between male and female candidates, in order of priority. This requirement prevents parties from indulging in undemocratic practices such as relegating a higher percentage of female candidates to the bottom of the list, thereby placing many of them in unwinnable positions.
- No additions or adjustments to the Proportional and/or National List should be possible after it is submitted to the Election Commission.
- Multi-member constituencies are recommended (for Parliamentary and Provincial Council elections) for electorates which are pluralistic in character.
- The Elections Commission's duties and functions as currently provided in Article 104 (b) should include a duty to ensure minimum quota in any registered political parties' list of nominees.
- The duty of political parties and the Election Commission to create enabling conditions for women to run for office should be required to be provided for by law. Political parties seeking registration or renewal of registration should be required by law to have at least 30% women elected to all Party decision making bodies.
- There should be a code of conduct for elected representatives. Those who violate the code can be either charged by the Courts or subjected to recall.



- Cross overs between political parties must be prohibited by the Constitution by recognizing a voter's mandate in voting for a candidate and a recognized political party. Any MP who seeks to represent a different political party than that s/he was elected from in the floor of the house must be deemed to have violated voter rights and have vacated his/her seat in parliament.
- A system of recall should be established for elected representatives at all levels of government who violate the people's mandate or the code of conduct. The Recall of MPs Act 2015 of England and Wales could be taken as a guideline in this regard.
- There should be a cap on election related expenditure by and on behalf of candidates. Sources and amounts of financial donations should also be disclosed. A stringent system to make the candidates accountable should be introduced through laws.
- Prospective candidates shall make an asset and liability declaration before an election, and if elected every year thereafter until their term of office expires. This should be made public so that any member of the public can question if what is given is not correct.
- Migrant workers registered with the government should be permitted to vote and an appropriate mechanism introduced.
- Regulations for propaganda during elections must be strictly enforced. The State should provide equal time on the media especially for candidates with limited resources. Environment friendly election propaganda activities and activities that do not unduly interfere with the day-to-day life of the general public should be encouraged.





## **H) DECENTRALISATION/ DEVOLUTION OF POWER/ POWER SHARING**

- The new constitution must remedy the short comings of the Thirteenth Amendment through an objective analysis with no dilutions to currently devolved powers.
- A Democratic State is strengthened by the devolution of decision making powers to the provinces, ensuring a better representation of societal pluralism and better balance of power between central and provincial institutions.
- There must be no replication of functions between the local government and other levels of government and administrative structures.
- The powers of the local government must be set out in the Constitution. The elected provincial representatives must be given their due recognition and the office of the Governor must be limited.
- The elected provincial representatives will embody the values of shared responsibility and accountability of devolved power.



## I) THE JUDICIARY

### DECENTRALISATION OF FUNDAMENTAL RIGHTS JURISDICTION

- Fundamental rights jurisdiction should be decentralized. This would be a meaningful measure towards securing access to justice at the provinces. This recommendation is based on the South African model.
- Provincial access to Fundamental Rights jurisdiction will be ensured by Fundamental Rights jurisdiction being vested in the Provincial High Court or the Supreme Court sitting in circuit.

### WOMEN'S REPRESENTATION IN THE SUPREME COURT

- Women must be represented in the Supreme Court. It is clear from past experience, for example in the Fundamental Rights case regarding affirmative action in favour of women for increased political representation in local government and in many other cases, that the Supreme Court is deeply conservative. Therefore it is only representation that can guarantee confidence.

### JUDICIAL REVIEW OF LAWS PASSED

- In addition to broad and extensive powers of judicial review, the Constitution must place an obligation on the State through the Supreme Court to ensure review of all existing legislation in the light of the provisions in the new Constitution.
- It is recommended that in reviewing legislation or interpreting the Constitution, a Court:
  - a. Must promote the spirit, purport and objects of the Constitution;
  - b. Must promote the values that underlie an open, equitable, democratic and plural society;
  - c. May consider international law; and,
  - d. May consider foreign law (domestic law in other jurisdictions)
- Within two years of the adoption of the Constitution, all laws brought to the review of Court, written and unwritten, shall be reviewed by the Supreme Court. The Supreme Court may declare any such law as being incompatible with any provisions of the chapter on Fundamental Rights and additionally make recommendation on proposed amendments which shall make such law compatible.
- The determination of the Court on the constitutionality of passed laws shall not have retrospective effect over actions taken.



## **J) PUBLIC FINANCE**

- Given the importance of fiscal distribution in terms of advancing women's rights, greater transparency and mandatory consultation in the process of drawing up the annual budget is necessary. In particular, the Constitutional provisions on public finance must enshrine the principles of gender budgeting to ensure that women's concerns are reflected and accounted for in the distribution and allocation of resources.
- It is recommended that all laws and policies of the national, provincial and local governments undergo a standardized gender equality impact assessment to ensure gender equality in fiscal management.
- Further, the annual national and provincial budgets must be accompanied by a gender impact statement to monitor expenditure and public service delivery from a gender perspective and enhance women's access to public resources.



## K) PUBLIC SECURITY

- International law dictates that substantive rights must be recognized as non-derogable rights which would be protected in times of emergency. The Constitution must adopt the rights recognized as non-derogable under the Paris Principles and the International Covenant on Civil and Political Rights in the Constitution.
- Any derogations from other fundamental rights will also be subject to the following strict conditions
  - a) Demarcation of non-derogable rights (naming which rights are non-derogable)
  - b) The principle of notification, (a person's right to have official notice that certain rights may be derogated from in times of emergency)
  - c) Rule of proportionality, (rights to be restricted must be proportionate to the security concerns sought to be addressed by the proclamation of emergency) and standard of necessity should apply
  - d) Proclamations of emergency to be time bound to that emergency
  - e) Consistency with other international obligations,
  - f) Derogation measures must be non-discriminatory.
- No emergency measure can discriminate against women.



## **L) OTHER AREAS OF INTEREST NOT REFERRED TO ABOVE**

### **LANGUAGE OF THE CONSTITUTION**

- The Constitution must be written in a gender neutral and gender sensitive manner, in all languages.

### **OFFICE OF THE ATTORNEY GENERAL**

- Taking into account the central role and responsibilities of this office, it is of paramount importance that there is specific articulation of the principles underlying the Office of the Attorney General.
- Access to justice for women needs an independent Attorney General who will fulfill the role of this office in the administration of justice while being the Chief Law Officer of the official bar.
- It is recommended that the section dealing with the Office of the Attorney General include the obligations to:
  - a) Promote, protect and uphold the rule of law and defend the public interest.
  - b) Assist and protect the administration of justice through the Courts.
  - c) Ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts when exercising their functions and discharging their mandate.

### **INDEPENDENT DIRECTORATE OF PUBLIC PROSECUTION**

- It is proposed that the Constitution introduces an independent directorate of public prosecution. Several jurisdictions have recognised the need for a distinct and independent office with specialised competencies that directs public prosecutions. This is to ensure that public and Constitutional interest, particularly in cases involving criminal offences and public law, is effectively upheld.
- A DPP will respond to inherent conflicts of interest: There is currently a conflict of interest inherent in the overlapping mandates of the Office of the Attorney General representing public officials who are alleged to have violated Fundamental Rights or subject to a Judicial Review whilst having a duty to uphold the Constitution and act in the best interest of the State. The traditional role as being the protector of persons and upholding a duty to prevent a miscarriage of justice has been compromised from time to time. In this light, a strong constitutional position on the principles governing this office is imperative.
- It is necessary to ensure that the Constitution defines the office of the Attorney General who can be the chief legal officer of the Government and also distinguishes such office from the Director of Public Prosecutions who shall be acting on behalf of the State and not on behalf of the Government.



- In this light Parliament may enact legislation providing for the creation of independent office of the Director of Public Prosecution. The Judicial Service Commission shall be its appointing authority making the office independent of the Executive and Legislature of the day.

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