

Proposals for Public Service Reforms

Background

The provision in Chapter IX of the Constitution provides for the public service in Sri Lanka. The public service is a group of services that provide specialized and professional services to the people by the state or the existing government.

Article 61 (e) of the Constitution defines who is a public servant. Recruitment, promotion and transfer of public servants are regulated by the Constitution and by the regulations introduced by the Establishments Code.

The public service operating in Sri Lanka has been classified under 39 service categories. Out of these, 28 service categories are being operated as professional services and 11 categories are being operated as non-professional services. The Sri Lanka Administrative Service has been established to administer all the above services at the executive level. That administrative service represents the executive function of the state, at national government, provincial council and local government levels. Their appointments, promotions and transfers are regulated by the Public Administration Commission.

Mission of the Public Service

Conceptually, public service is another instrument of the state that emerges as a result of the social contract between the state and the citizen. It is on such a basis that the public service is included in the Constitution as part of the executive. Accordingly, the mission of the public service can be identified as follows:

- to act as an instrument of the state which recognizes and expands the people's right to development, affirms it and works to expand those rights;
- to act with a results-oriented objective in the administration of the process of fulfilling the development needs of the people;
- to regulate and manage the above development outcomes;
- to create a level playing field for people's development;
- to continuously audit the development outcome;
- to ensure and enhance the effectiveness and efficiency in the development process.

In the last few decades, various efforts have been made to reform the public service in Sri Lanka. Those efforts have been presented as reports. The recommendations in all those reports have three common objectives:

- Reorganization of public service structure;
- Rationalization of Public sector carder;
- Introduction of result-oriented management methods and procedures.

In terms of the processes, most reports have reviewed a few structures of administration, mostly from a power-structure based approach. Generally, attention has been paid to:

- reviewing the key strategic actions of the Office of the President;
- coordinating the policy formulation process at Cabinet and Ministry level;
- Separation of policy making, service delivery and regulatory functions in public administration;
- re-alignment of existing functions under Ministries to increase efficiency;
- by introducing results-based management services, align inputs of public service (departments and public officials) with specified outcomes.

Although the discourse on public service reforms has been going on for a long time, it has not become a reality. Therefore, until the institutional capacity, efficiency and effectiveness of the public administration are enhanced, the objective of ensuring development aspirations of the people are likely to remain unachievable. In this context, One-Text Initiative proposes that achieving the objectives of public service must be emphasized as a constitutional responsibility. The present position paper presents constitutional reforms that are required for achieving the above.

1 - Appointment to high positions in Public Service

Proposal

Chapter IX of the Constitution on Public Service. Article 54 that the Heads of the Public Service and the Constitution shall be appointed by the President be amended as follows:

- High officials (e.g. Secretaries of Ministries) nominated by the President should be selected on the basis of criteria specified by the Constitution (based on criteria such as seniority, subject-related expertise, and efficiency).
- The officers proposed in this way have to be approved by the Public Service Commission on the basis of clear criteria for appointment by the President.

2 - Appointment, transfer and dismissal of public officers

Proposal

The power of appointment, transfer and dismissal of public officers as laid down in Article 55 (vested under the Cabinet of Ministers) should be brought under the purview of an independent commission that specifies a clear procedure.

3 - Public Service Commission

Context

The public service was placed under the Cabinet as per the 1972 Republic Constitution. The argument then has been that since the Cabinet is responsible to the Parliament, the public servants should be maintained as a service ultimately responsible to the Cabinet and the Ministers. The 1972 Constitution abolished the Public Service Commission which had existed since 1948 and made appointment, promotion and transfer of public servants a power of the Cabinet.

However, the 1978 constitution re-introduced the Public Service Commission, but the powers of the Public Service Commission were limited to acting as an agency vested in the Cabinet. Accordingly, the current Public Service Commission is functioning only as an institution that facilitates the Cabinet in the appointment, promotion and transfer of public servants.

Article 54, 55(2) of the Constitution has defined public servants who are not under the administration of the cabinet and such public servants have been placed under the Public Service Commission. Accordingly, the secretaries of ministries and heads of institutions are still controlled by the Cabinet. Also Article 59 of the Constitution gives the Cabinet the power to suspend the decision of the Public Service Commission.

Although the Public Service Commission was established as an independent commission by the 17th Amendment and 19th Amendment to the Constitution, they have failed to balance and curtail the powers of the Cabinet.

Also, the government employees working in the provincial council service, other statutory bodies such as boards, corporations, and public company employees are also not subject to the power of the commission. Similarly, the secretaries of the ministries are appointed by the president, and the heads of the institutions are appointed by the Cabinet of Ministers. That means, there is a large proportion of public servants who are outside the purview of the Commission.

According to Article 52(7) of the Constitution, the Public Service Commission cannot make policy decisions. In comparison, the Australian Public Service Commission is empowered to make policy decisions. Accordingly, the Public Service Commission of Sri Lanka functions only as an advisory council.

Under the 13th Constitutional Amendment, Provincial Public Service Commissions have been established, but their powers remain similar to the National Public Service Commission, and ultimately functions as an advisory committee to the Governor.

Proposal

Therefore, the powers of the Public Service Commission should be revised in the following manner:

3.1. Changing the functioning of the Public Service Commission as an advisory council vested within the powers of the Cabinet.

3.2. By making the Public Service Commission an executive body, it must be empowered to make appointments, promotions and transfers. Its fiscal independence must be ensured by making it accountable to Parliament and the citizens separately. It must also be allowed to fight corruption and malpractices, develop etiquettes for public servants and make policies. This must be achieved by defining and differentiating powers of the Ministry of Public Administration and the Public Service Commission.

3.3. The power of the President to appoint secretaries of ministries and the power of ministers to appoint and transfer heads of institutions, must be made on the recommendation of the Public Service Commission, as a constitutional requirement.

3.4. Appointment of a Parliamentary Sectoral Committee to monitor the work of the Public Service Commission and timely and frequent monitoring of the work of the Commission by the Committee.

3.5. To provide administrative and financial independence to the Public Service Commission.

4 - Parliamentary Oversight

Proposal

It is appropriate to establish a Parliamentary Oversight Committee to monitor the services of government officials under each ministry. That committee should be given the power to accept citizens' petitions. Also, the Speaker must have the power to call experts (in addition to the members of Parliament) to the concerned committee. (Subject to the approval of the constitution - e.g. Swedish Constitution, The Riksdag Act, Chapter 4 Section 4.2)

5 - Performance Indicators

Performance indicators must be introduced to public service on a project format instead of a currently practiced functional format. This must be introduced as a part of the implied social contract, as a constitutional responsibility of the Secretary to each Ministry.

6 - Separation of Ministry of Finance from Treasury

Define and declare by the constitution that the Ministry of Finance and the Treasury should be managed separately by two heads of the Ministry, and the horizontal institutional relationship to be maintained between these two heads and the Governor of the Central Bank and the monetary board must be defined by the constitution.

7 - Key Performance Indicators

The Constitution itself should emphasize the need to introduce Key Performance Indicators for the public service and focus on setting up a National Performance Authority through an Act of Parliament to fulfill that task. The responsibility of conducting management audits must be vested in the National Performance Authority and the Auditor General Department as a collective responsibility by establishing a horizontal organizational relationship with the above institutions. To implement that responsibility, a new Act as the Government's Performance and Results Act. For further studies on the policy and procedure corresponding to this proposal, see: Government Performance and Results Act of 1990 by the US Congress and the subsequent GPRA Modernization Act of 2010.

8 - Audit Service Commission and Procurement Commission

Re-constitution of the Audit Service Commission and the National Procurement Commission in order to make it easier to maintain the auditing work (financial and social) in the public service with a proper accountability framework to ensure efficient operation of those institutions.

9 - Court of Accounts

It is proposed to introduce a Court of Accounts to investigate public wrongs identified by the Committee on Parliamentary Accounts (COPA), Committee on Public Business (COPE) and to investigate public wrongs identified by the Auditor General and Procurement Commission. For this, the Judiciary Organization Act should be amended, and it would be more effective to introduce an Act to introduce the relevant offenses as statutory offenses under the statutory authority established here. It is also proposed to establish a financial crime investigation unit under it.

10 - Public Protector (Reforms to Ombudsman)

It is proposed to amend the existing powers of the Parliamentary Affairs Ombudsman and establish the post of Public Protector, by further expanding existing powers. It is proposed to enshrine this position constitutionally and introduce powers through an Act. Those powers are the power to conduct an independent inquiry on a complaint made by a citizen about wrongdoing by a public service, public administration, commission or organ of the state. Section 182 of the South African Constitution will be important to study further in this regard. (Box 1)

Functions of public Protector:

- (1) The Public Protector has the power, as regulated by national legislation-
 - a) To investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice.
 - b) To report on that conduct; and
 - c) To take appropriate remedial action
- (2) The public protector has the additional power and functions prescribed by national legislation.
- (3) The public protector may not investigate court decisions.
- (4) The public protector must be accessible to all persons and communities.
- (5) Any report issued by the public protector must be open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report be kept confidential.

Tenure

183. The public protector is appointed for non- renewable period of seven years.

(Box 1: Functions of the Public Protector in South Africa)

11 - Deliberative Democracy

Enhancing the legislative process for participatory development and results-oriented development planning by upholding deliberative democracy in the administration of local resources and in the law-making process.

It is proposed to empower the Speaker under this Chapter to constitute a Parliamentary Oversight Committee to monitor the services of public servants and to involve citizens and experts in the Committee (Concept - Deliberative Democracy).

12 - Asset Declaration

The obligation to declare the assets of Members of Parliament and their relatives should be made constitutional under Sections 66 and 67, and the procedures to be taken in case of violation of that constitutional obligation, the Assets and Liabilities Act No. 78 of 1988 and the Parliamentary Privileges and Powers Act should be amended. The related Indian provision is mentioned below for use in a discussion about this. The Representation of the People Act, 1951 makes the provision related to declaration of assets as follows. (Box 2)

75A. Declaration of assets and liabilities: (1) Every elected candidates for a Houses of parliament shall, within ninety days from the date on which he makes and subscribes as an oath or affirmation, according to the form set out for the purpose in the Third Schedule to the Constitution, for taking his seat in either House of Parliament, furnish the information, relating to:

- I. The movable and immovable property of which he, his spouse and his dependent children are jointly owners or beneficiaries;
- II. His liabilities to any public financial institution; and
- III. His liabilities to the Central Government or the State Government,

(2) The information under sub – section (1) shall be furnished in such form and in such manner as may be prescribed in the rules made under sub – section (3).

(...) (5) The Chairman of the Council of States or the Speaker of the House of the people, as the case may be, may direct that any wilful contravention of the rules made under sub – section(3)

By an elected candidate for a House of Parliament referred to in sub – section (1) may be deal with in the same manner as a breach of privilege of the Council of State or the House of the People, as the case may be.

Asset Declaration Act in India (Box 2)

13 - Public Accountability

Using the judicial process to ensure transparency and accountability as a minimum to be maintained in public accounting as well as the accounting process and utilization of public resources.

4.1 Introduction of Public Accounts Jurisdiction as a new jurisdiction vested in the Court of Appeal.

4.2 Supreme Court to establish special courts for constitutional interpretation, Appellate Court for provincial appeals, human rights cases and other jurisdictional powers to that court.

14 - Management of national resources

Context

The executive holds power as entrusted by the people for a specified term. During that time, they have the power to make decisions about the local resources. It is important for the sustainable use of the local resources to clarify in the provisions of the constitution about the measures to be followed in the implementation of that power. Accordingly, it is necessary to create a legal responsibility for the use of local resources for the benefit of the people, ensuring the transparency of decision-making about local resources. For that, the following proposal is submitted.

Proposal

14.1 Under the principles and duties of guiding public policy of the Constitution, it is stated under 27 (14) that "the government shall protect, secure and improve the environment for the benefit of the people." It is proposed that this provision, which is currently not a legal obligation, be converted into a constitutional obligation.

Following the judgment of the Supreme Court in the case of *Bulankulama v. Ministry of Industrial Development (Eppawala case)* and *Sugathapala Mendis v. Chandrika Kumaratunga (Water's Edge)*, it is proposed to constitutionalize the responsibility of the state in relation to the management of state / local resources. Where The court held;

"In order to maintain a balance between the needs of economic development and the needs of sustainable development of a state, it is proposed to give recognition to the principles mentioned in the Rio de Janeiro Charter of the United Nations and the principles mentioned in the Stockholm Charter, or to accords to their essences. It is proposed to introduce a provision to strike a balance between environment and development through an Act of Parliament based on that constitutional provision."

14.2 Based on the above constitutional principle, in entering into international bilateral or multilateral trade agreements:

- a. The present unlimited discretionary power given to the President in entering into such agreements under Article 157 is proposed to be balanced and hedged on the doctrine of public trust over time and future generations.
- b. Any such agreement should be tabled in Parliament and a debate should be held on it.

15. Role of executive and legislature in entering into international agreements

Context

When a country enters into international agreements, it is extremely important to specify a method of diversity through the provisions of the constitution. The agreements reached by the executive who is in charge of a government for a period of 05 years will have a decisive impact on the future of the next generation of the entire country. Therefore, it is necessary to include the provision in the basic law of the country about the procedures to be followed in entering into international agreements, and for that we can get the example of the foreign constitutions that have already dealt with it.

Provisions related to existing international agreements and conventions should be comprehensively stated in the Constitution. In this regard, we can learn from the South African Constitution, Chapter 14, Section 231, 232, and 233. Let us quote the clause as follows.

231: International Agreements

- 1) The negotiation and signing of international agreements is the responsibility of the national executive.
- 2) An international agreement binds the republic only after it has been approved by the national assembly, and the national council of provinces, unless it is an agreement referred to in submission (3)
- 3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require a ratification or accession, entered into by the national executive, binds the republic without approval by the National assembly and the national council of provinces, but must be tabled in the assembly and the council within reasonable time.
- 4) Any international agreement becomes law in the republic when it is enacted in law by national legislation: but a self-executing provision of an agreement that has been approved by parliament is law in the republic unless it is inconsistent with the constitution or an act in parliament.

Customary International Law

232. Customary international law is law in the republic unless it is inconsistent with the constitution or an act of parliament.

Application of International Law

233. When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

The above ideas and options have been compiled for providing inputs for informed discussion among stakeholders including political parties, citizens and policy makers.

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