

ANFREL Proposal for Sri Lanka's Parliamentary Committee on Electoral Reform



ANFREL
Asian Network for Free Elections



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1. Organization Profile

The Asian Network for Free Elections (ANFREL) is an international NGO based in Bangkok, Thailand that unites 27 member organisations across 17 countries in promoting democratic elections throughout Asia, including Sri Lankan election observer groups People's Action for Free & Fair Elections (PAFFREL) and Centre for Monitoring Election Violence (CMEV).

Since its formation in 1997, ANFREL has observed 69 elections across Asia, including 12 elections in Sri Lanka since 2001. The latest elections that ANFREL covered in Sri Lanka are the 2019 Presidential Election and the 2020 Parliamentary Elections.

Since 2012, ANFREL has also organized the Asian Electoral Stakeholder Forum (AESF), which brings together election-related civil society groups and election management bodies from across Asia and beyond to foster greater understanding and cooperation for addressing the challenges to free and fair elections in Asia. The fourth AESF was held in Colombo, Sri Lanka in 2018 in collaboration with the Election Commission of Sri Lanka, and gathered more than 300 election stakeholders from Asia and beyond.

2. Introduction

The Asian Network for Free Elections (ANFREL) appreciates the timely efforts of the Parliament of Sri Lanka to reform the country's election laws. The appointment of the Select Committee to Identify Appropriate Reforms of the Election Laws and the Electoral System and to Recommend Necessary Amendments as well as the solicitation of proposals from interested groups are important and welcome initiatives. We believe the committee will receive progressive proposals from groups that seek to strengthen and make more inclusive Sri Lanka's elections.

Sri Lanka's election system is based on the country's Constitution and the nine main Acts and Ordinances¹. According to the "universal franchise", all adult Sri Lankan citizens have the right to choose their own representatives freely without discrimination. Sri Lanka granted universal franchise to its citizens above 21 years of age under the Donoughmore reforms of 1931. The right was given to both men and women without discrimination. The voting age was then lowered to 18 by the Elections Amendment Act No. 11 of 1959.

Sri Lanka has also signed and ratified most major international human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the Convention on the Rights of Persons with Disabilities (CRPD). Together, these contain a number of international standards applicable for democratic elections.

It has been 90 years since the people's right to vote was guaranteed in Sri Lanka. There have been 74 elections held since the Donoughmore reforms were enacted in 1931, and 15 parliamentary elections and 1 referendum held since 1947. According to the latest statistics, there are 16,263,885² registered voters and 70³ registered political parties in Sri Lanka. There remain, however, issues and challenges that need to be addressed to ensure that people fully enjoy their universal franchise rights and that governments are genuinely democratic. ANFREL would like to contribute to the improvement of the electoral system of Sri Lanka through these recommendations based on our experience in assessing elections in this country as well as others throughout Asia.

¹ 1) Parts of the Election Ordinance of 1946, 2) Parliamentary Elections Act No. 1 of 1981, 3) Presidential Elections Act No. 15 of 1981, 4) Referendum Act No. 7 of 1981, 5) Provincial Councils Elections Act No. 2 of 1988, 6) Local Authorities Elections Ordinance (Ch 262), 7) Local Authorities Elections Ordinance No. 53 of 1946 - has been amended 17 times, 8) Local Authorities Elections Amendment Act No. 22 of 2012.

² As per the 2020 Parliamentary Elections data

³ As of September 2019

3. Strengthening the Independence of the Election Commission

A fundamental aspect of free, fair, and genuine elections is an impartial Election Management Body (EMB) to organise and supervise elections. The Bangkok Declaration on Free and Fair Elections⁴ provides that the independence of EMBs should be guaranteed by a state's constitution and legal framework.

Current practice:

Since the 20th Amendment to the Constitution, the Election Commission of Sri Lanka consists of five members appointed by the President after seeking inputs from the Parliamentary Council⁵. Although the opposition leader and his/her nominee are consulted as part of the Parliamentary Council, the President is not obliged to take their recommendations into consideration when proceeding with the appointments. This mechanism leaves the Election Commission vulnerable to politically-motivated appointments, and therefore to criticism as to its independence or impartiality.

Recommendation:

The current legal framework undermines the independence and impartiality of the Election Commission by placing the power to appoint its members in the hands of a single person. In order to reduce the chance of the institution being politicized, ANFREL recommends establishing an appointment mechanism that would subtract political considerations and seek consensus from multiple parties. This could involve compulsory recommendations by the Constitutional Council, as was the case under the 17th and 19th Amendments, or any process that involves collective decision making. Staggered terms for members of the Commission would also help reduce their exposure to political motives.

4. Improving Voter Registration to Implement Universal Suffrage

Current practice:

According to the Bangkok Declaration on Free and Fair Elections, an election management body should strive to maintain a list that is complete, current and accurate. All Sri Lankan citizens who are 18 years old and older are legally eligible to vote.

The Registration of Electors Act No. 44 of 1980 includes a qualifying date for when an elector would be included in the register. This unduly deprives voters who are 18 years of age after this qualifying date. In the 2019 Presidential Election, the qualifying date (June 1) and the lack of legal provisions for supplemental voter registers in the Registration of Electors Act of 1980 disenfranchised hundreds of thousands of young voters who had attained the age of 18 years by Election Day.

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<https://anfrel.org/wp-content/uploads/2013/04/The-Bangkok-Declaration-on-Free-and-Fair-Elections-Its-Endorsers-.pdf>

⁵ Articles 41A and 103 of the Constitution

Recommendations:

In order to comply with the universal franchise mandate, Parliament should amend the Registration of Electors Act to allow for supplemental registers after the cut-off date and enfranchise all voters older than 18 years of age on Election Day.

Furthermore, ANFREL advocates for the use of biometrics in voter registration data to strengthen the integrity of the voter list. The registration process should also capture data on voters who are elderly, differently abled or in need of special assistance to better prepare local election staff on the needs that should be provided to these sectors during the polling.

5. Regulating Campaign Finance

Current practice:

The lack of campaign finance laws is a long-standing issue in Sri Lanka, which is the only country in South Asia to have no regulatory framework on the matter. Political campaigns are entirely unregulated and there are no limits or disclosure requirements on donations and spending. This results in a lack of transparency and accountability and the reinforcement of an unlevel playing field among candidates. The lack of campaign finance regulations also led to record-breaking campaign expenses on both printed and electronic media by the major candidates and political parties in recent elections, according to estimates compiled by CMEV.

Recommendation:

Fair elections demand that there be adequate oversight on campaign finance. In addition, governments and lawmakers must ensure that there exists a rigorous legal framework that appropriately regulates political donations and campaign expenditures and allows for transparency of donations and expenditures.

Therefore, ANFREL proposes to introduce adequate campaign finance laws to regulate campaign spending and contribution limits, including for the use of media, in order to ensure a level playing field and ensure that voters can make educated and unbiased choices. The campaign finance laws should establish a transparent reporting and oversight mechanism. The Parliament should also consider empowering the Election Commission to impose sanctions for those who breach campaign finance regulations through an impartial judicial mechanism with a possibility of appeal.

6. Safeguarding the Rights of Voters with Disabilities

Current practice:

The Elections Act No. 28 of 2011 provides voters with physical disabilities with the right to be assisted by a person of their choice when they exercise their right to vote. It should be noted however that this law only provides for voters with physical disabilities, although the 1978 Constitution provides for universal franchise.

Recommendation:

The Convention on Rights of Persons with Disabilities (CRPD) states that persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others. It is recommended for the Sri Lankan Parliament to amend the Elections Act No. 28 of 2011 to include voters with all types of disabilities and provide nuance on the assistance to be provided in different cases.

7. Recognizing the Role of Election Observers

Current Practice:

Election observation promotes accountability and fosters a democratic society. The importance of election observation was recognized in 1996 by the United Nations' Human Rights Committee in its General Comment 25⁶ and in the Colombo Pledge adopted at the fourth Asian Electoral Stakeholders Forum⁷. However, Sri Lanka's laws do not formally recognize election observation by domestic or international groups. In 1988, when PAFFREL was launched, it was through the advice and guidance of the then-Department of Elections that election monitoring in the country officially started. Since then, the Election Commission has accredited a number of election observation missions from Sri Lanka and abroad, including those of ANFREL. While this is a commendable practice, it would be preferable for election observers to have rights and responsibilities entrenched in law.

Recommendation:

As an important undertaking and to build on the long practice of election observation in the country, ANFREL recommends that the Sri Lankan Parliament enact a law or amend existing electoral laws to provide a legal framework for election observation. This way, election observation would not be subject to administrative decisions which could be detrimental or ineffective to the spirit and purpose of election observation.

⁶ "There should be independent scrutiny of the voting and counting process and access to judicial review or other equivalent process so that electors have confidence in the security of the ballot and the counting of the votes".

⁷ <https://anfrel.org/the-colombo-pledge-to-promote-and-defend-democracy/>

8. Expanding Advance Voting

Current practice:

The current “postal voting” system in Sri Lanka only allows government officials who are on election duty, essential work and the candidates who are outside their voting constituency on Election Day to vote in advance. However, many countries have more extensive advance voting systems that allow citizens who are not able to vote at their polling station on Election Day for various reasons to vote in advance at their place of residence or in a different location.

Recommendation:

ANFREL recommends for the Parliament of Sri Lanka to consider extending advance voting mechanisms and thus enfranchise more voters. In drafting a future advance voting system, the legislature can consider including the following groups:

1. Voters in hospitals and long-term care facilities and/or voters who have difficulties to travel to a polling station due to immobility (e.g. those who are homebound due to physical disabilities or serious illnesses) and the voters who need to attend medical treatments on Election Day;
2. Voters living in remote areas or far from their registered polling station, including in-country migrant workers and students;
3. Private sector employees who are working on Election Day;
4. Pre-trial detainees, all of whom have the legal right to vote.

9. Implementing Overseas Voting

Current practice:

Approximately 1.5 million Sri Lankans or nearly 10% of all eligible voters live abroad and contribute to the country’s economy as migrant workers⁸, while a large number of young people study in different parts of the world. All of them are disenfranchised under Sri Lankan election law, as they are unable to cast ballots from abroad.

Recommendation:

Most countries nowadays empower their citizens residing abroad to vote through either mail-in ballots, polling stations in embassies and consulates, or both⁹. ANFREL recommends that Sri Lanka enacts legislation providing for the enfranchisement of its overseas citizens, at least in national-level elections (presidential and parliamentary) and referendums.

⁸ https://www.un.int/srilanka/sites/www.un.int/files/Sri%20Lanka/2020/July/01/speech-_sfr.pdf

⁹ <https://www.idea.int/data-tools/data/voting-abroad>

10. Promoting Women's Political Participation

Current practice:

While fifty-two percent of the Sri Lankan population are women¹⁰, their representation in political instances remains very low. According to the Inter Parliamentary Union, in 2019, Sri Lanka ranked 182nd out of 193 countries worldwide for women's participation in politics, with only Maldives faring worse in South Asia. Today, only twelve out of 225 Sri Lankan MPs are women. While Article 12 of the Sri Lankan Constitution provides equal opportunity for men and women without any discrimination, the reality draws a different picture.

The Local Council Elections Act No. 16 of 2017 was amended recently and Article 27F now provides a 25% seat quota for women. In practice, those quotas are filled by the family members of politicians who are already rooted in the political field. The situation is also dire in the Election Commission, where all five members are men. Inclusive political participation of women has yet to be seen in Sri Lankan politics despite universal suffrage being given equally as early as 1931.

Recommendation:

ANFREL recommends that Parliament consider amending the Parliamentary Elections Act No. 58 of 2009 to include a quota for minimum representation of women on the list of candidates submitted by political parties. This would be easier to implement than a seat quota like the one included in the Local Council Elections Act. A minimum of 30% of women candidates would mark significant progress, but it is possible to go further; for instance, some countries require party lists to alternate between male and female candidates. Parliament should also provide for incentives and penalties for compliance or failure on the part of political parties to meet legal requirements.

11. Strengthening Election Dispute Resolution

Current practice:

The Election Commission established an Election Complaint Management Center (ECMC) during the 2019 Presidential Election and 2020 Parliamentary Elections in its headquarters and 25 district offices. While the ECMC was observed to be accessible and transparent, as it provided information on the number and type of complaints received, further efforts should be made to inform stakeholders on how the cases are handled and resolved to promote transparency and public trust.

Recommendation:

We recommend that Parliament institutionalize the Election Complaints and Management Center, and promote public access to the body by establishing an open data site containing updates on the cases filed or already adjudicated. Parliament should also amend Article 71

¹⁰ <https://data.worldbank.org/indicator/SP.POP.TOTL.FE.ZS?locations=LK>

of the Presidential Elections Act to provide the Election Commission with prosecutorial power, thus empowering the institution to efficiently resolve election-related cases.

12. Strengthening Self-Regulation in Media

Current practice:

Fair and balanced election reporting by the media is important to ensure an equal playing field among candidates and political parties so that the electorate is able to make fully informed decisions. This is, however, not the case in Sri Lanka as media coverage during elections tends to focus on a few candidates and political parties who have access to vast resources. Both private- and state-owned media tend to be biased towards specific candidates and parties.

The media guidelines that the Election Commission issued during the 2020 Parliamentary Elections promoted the publication/broadcasting of election-related information that are “accurate, balanced and impartial” and that “no candidate shall be specially or favorably treated in the allocation of airtime on radio or television or space in the print media, to promote the election of such candidate or to cause prejudice to another candidate.” While the issuance of media guidelines is welcome and much needed, there were shortcomings in the implementation of the guidelines and the Election Commission lacked the power to enforce them on private-owned media.

ANFREL believes that before any stern legal oversight and regulation on media, self-regulatory mechanisms should first be strengthened. The Sri Lanka Press Council and the Press Complaints Commission of Sri Lanka are existing bodies that could augment the monitoring of the media during elections and receive and resolve complaints regarding the media’s reporting of elections.

Recommendation:

ANFREL proposes to the Parliament enacting a law creating stronger media self-regulatory mechanisms to address breaches on media ethics, as well as forming a stronger independent self-regulation institution that is more inclusive, consultative and proactive. The Election Commission’s lack of oversight over privately-owned media during elections should also be reconsidered.

13. Removing Undue Restrictions on Election Campaigning

Current practice:

Election campaigns are an essential part of democracy as they allow voters to learn about candidates, political parties and their programs. While regulations are important to ensure campaigning goes smoothly, Articles 69 and 74 of the Parliamentary Elections Act, No. 1 of 1981, and the Presidential Elections Act, No. 15 of 1981, include limitations on the fundamental freedoms of expression and assembly that go beyond international standards.

For instance, Article 69 provides that no person shall conduct, hold or take part in processions between the day of candidate nomination and one week after the announcement of the election results, with exceptions only for Labor Day (May 1) processions and those with religious or social purposes.

Meanwhile, Article 74 prohibits any person, from the day of nomination until the day after an election to display the the flag or banner of any candidate, to post any handbill, placard, poster, notice, photograph of a candidate, symbol, sign or drawing on any place to which the public have a right of or are granted access, public road or vehicle. This extensive provision goes much further than most countries' legal framework for election campaigns, and violates the constitutionally guaranteed exercise of one's freedom of expression. It also contributes to an uneven playing field where well-known candidates and incumbents are more likely to hold an advantage over smaller or new political parties and candidates.

Recommendation:

In light of the abusive restrictions detailed above, ANFREL recommends that the Sri Lankan Parliament revises Articles 69 and 74 of the Presidential Elections Act and Parliamentary Elections Act which infringe on fundamental freedoms and negatively affect the fairness of the playing field. International human rights law, including Article 19 of the International Covenant on Civil and Political Rights, dictates that limitations on fundamental freedoms must be reasonable, necessary and proportionate.

14. Refining the Election Calendar

Current practice:

Article 24 (2) of the Presidential Elections Act, Parliamentary Elections Act and the rest of the election acts provide a time for opposing the nomination of candidates. Objections are only admissible if made to the Election Commission between 9:00 AM and 11:30 AM on the day of the nomination. While the system does provide an opportunity to object, the very restrictive time frame goes against international standards for effective redress under election adjudication.

Recommendation:

Considering the short calendar of Sri Lankan elections, and at the same time keeping in mind the principle of an effective redress mechanism, it is recommended that the window for filing objections to candidate nominations be lengthened. Hence, ANFREL proposes to revise the election laws accordingly and provide reasonable time frames to submit objection papers.