

Sri Lanka

Governance Report 2010



**TRANSPARENCY
INTERNATIONAL
SRI LANKA**

A nation that upholds Integrity

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Abbreviations and Acronyms

ADB	Asian Development Bank
APRC	All-Party Representatives Committee
BBC	British Broadcasting Corporation
CAFFE	Campaign for Free and Fair Elections
CBSL	Central Bank of Sri Lanka
CC	Constitutional Council
CCS	Countries at the Crossroads Survey
CEB	Ceylon Electricity Board
CIABOC	Commission to Investigate Allegations of Bribery or Corruption
CIB	Complaints Information Book
CJ	Chief Justice
CMEV	Centre for Monitoring of Election Violence
COPE	Committee on Public Enterprises
CPA	Centre for Policy Alternatives
CPC	Ceylon Petroleum Corporation
CPI	Corruption Perception Index
DNA	Democratic National Alliance
ESCAP	Economic and Social Commission for Asia and the Pacific
EIB	Election Information Book
FMRA	Fiscal Management Responsibility Act
FSI	Failed States Index
GDP	Gross Domestic Product
GoSL	Government of Sri Lanka
IDPs	Internally Displaced Persons
IGP	Inspector General of Police
IMF	International Monetary Fund
IPS	Institute of Policy Studies
ISW	Index of State Weakness
ITAK	Illankai Tamil Arasu Kachchi
JVP	Janatha Vimukthi Peramuna
LTTE	Liberation Tigers of Tamil Eelam
MP	Member of Parliament
MOD	Ministry of Defence

MOIB	Minor Offence Information Book
NIC	National Identity Card
OECD	Organization for Economic Co-operation and Development
PA	People's Alliance
PAFFREL	People's Action for Free and Fair Elections
PC	Provincial Council
PPPR	Programme for Protection of Public Resources
PR	Proportional Representation
PSC	Public Service Commission
REPPIA	Rehabilitation of Persons, Properties and Industries Authority
SDR	Special Drawing Rights
SLMC	Sri Lanka Muslim Congress
SLMP	Sri Lanka Mahajana Pakshaya
TI	Transparency International
TISL	Transparency International Sri Lanka
TNA	Tamil National Alliance
UK	United Kingdom
UMNO	United Malays National Organization
UNDP	United Nations Development Programme
UNP	United National Party
UN	United Nations
UNF	United National Front
UPFA	United People's Freedom Alliance
USA	United States of America
USD	United States Dollar
WGI	Worldwide Governance Indicators

Foreword

Transparency International Sri Lanka (TISL) maintains a vision to build a nation that upholds integrity by supporting the collective effort to enhance integrity and eradicate corruption. We do this by engaging all stakeholders in constructive dialogue, in order to devise joint strategies for the eradication of corruption and the promotion of good governance. As it is our belief that a collective effort is necessary to combat corruption, we resolved to bring a cluster of external experts to compile articles under one key theme, 'Centralization of Power'.

As in previous years, the Governance Report 2010 aims to stimulate debate on governance issues that have occurred between November 2009 and November 2010. The year 2010 gave birth to a series of governance issues as a result of the concentration of power on a particular entity or state agency. At a consultative meeting held in June 2010 with the participation of experts from varied fields, it was decided that the overarching theme of the Governance Report 2010 would be the concentration of decision-making power among a diminutive set of persons. TISL invited experts in diverse sectors to articulate their opinions and analyse the core subject area in relation to the predominant trends towards the centralization and concentration of power in 2010. While the report may not be extensive, it comprises multiple chapters where subject experts have commented on the adverse effects of the centralization of economic, political and administrative governance. Unlike the reports of previous years, the 2010 report focuses on selected sectors and is specially designed to initiate dialogue, encourage specialists to conduct further research and advocate for policy change. The synthesized knowledge in the report will be the basis for future advocacy and training to be initiated by TISL.

The chapters were compiled by external authors and subjected to an anonymous peer review, where each chapter was reviewed by a second subject expert in order to ensure the high standard of the report. In a post-war context, it was indeed a challenge to gain the assistance of experts to produce a publication of this standard, with many social scientists and academics being contacted by TISL but only a few accepting the invitation. I wish to thank all the authors and reviewers for the compilation of this excellent text. I would also like to commend Ms. Bettina Meier and the TISL research team for working with great diligence to ensure the quality and accuracy of this report.

Wijaya Jayatilaka
Executive Director

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Transparency International Sri Lanka (TISL) would like to extend our sincere gratitude to all those who have been responsible for the publication of this report.

We express our profound gratitude to all the authors and reviewers, whose research, ideas and contributions enabled TISL to produce this annual publication. We are particularly thankful to our editorial panel for ensuring that the publication adheres to a high professional quality. Special mention should be made of the valuable contribution of the editors of the Governance Report 2010, Mr. Lakshman Gunesequera and Ms. Kumudini Hettiarachchi.

It is also our pleasure to thank all our colleagues at TISL whose counsel and support have been of immense value and a source of encouragement in the compilation of the Governance Report 2010.

The effort of our printer is also much appreciated.

The core funder of this project, the Netherlands Minister for Development Cooperation, deserves special mention for the financial support and trust in TISL.

Introduction

Step back in democracy-walk

The concept of good governance entails the process of decision-making and the manner in which decisions are implemented. A comprehensive analysis of governance focuses on the formal and informal actors involved in decision-making and the implementation of the decisions made. Good governance is a clear result of the practice of democracy and the adherence of state authorities to democratic processes, where the decision-makers work in the interests of the people.¹

The modern definition of democracy² maintains that it is a form of government, where a constitution guarantees basic personal and political rights, fair and free elections and independent courts of law.³ Therefore, democratic governments in the modern world are bound to uphold their own constitutions as well as the international covenants to which they are signatories. History has also demonstrated that while all forms of government are vulnerable to corruption, democracies are better designed to control corruption since citizens can take advantage of regular elections to vote out corrupt politicians.

Since Independence, although Sri Lanka continues to strive to be a democracy adhering to basic democratic principles, in recent times however,⁴ the country seems to have taken a step back in its walk towards democracy and adopted a contrasting form of government where the concentration of power is seen among a few political actors. 2010 saw an upsurge in a range of governance issues, while the citizens of Sri Lanka were compelled to face several elections and mutely witness the implementation of the 18th Amendment to the Constitution.

1. "What is good governance." ESCAP.
<http://www.unescap.org/pdd/prs/projectactivities/ongoing/gg/governance.asp> accessed 13 August 2011.

2. "Definition of democracy"; <http://www.democracy-building.info/definition-democracy.html> accessed 15 August 2011.

3. Perera, Jehan. "Peace time governance requires more power sharing." The Sri Lankan Guardian. June 2007.

4. "Tackling Corruption, Transforming Lives." Asia Pacific Human Development Report. UNDP. 2009.

The annual publication of Transparency International Sri Lanka (TISL), 'Sri Lanka Governance Report 2010' focuses on a range of issues and seeks to provide an account of key incidences and emerging trends in governance during November 2009 and November 2010.

The selected thematic emphasis of the Governance Report 2010 is the centralization and concentration of power and each chapter analyses its core subject area in relation to the predominant trends in this direction. The report further explores centralization in terms of administrative, political and economic governance. The concentration of power should be understood in relation to the more informal concentration of decision-making within a small group of people.

In the Overview, the author provides an account of the key events compounding the challenge to democratic governance in the country in 2010.

As emphasized by the author of the chapter on the 18th Amendment, the amendment must be seen as yet another decisive step in the centralization of power in the Executive. The 18th Amendment has indeed empowered the Executive to a degree that may not have been intended at the inception of the 1978 Constitution.

The chapter on the allocation of ministries highlights the irregularities that have risen because of the imprudent allocation of subjects among the ministers and the appointment of individuals to leadership positions underlying strong nepotistic tendencies.

The brief chapter on parliamentary crossovers analyses the practice of crossing over of MPs from the ruling party to the opposition which, in turn, diminishes the value of the votes of the people and weakens the electoral process.

The author of the chapter on elections notably emphasizes the misuse of public property and non-adherence to the rule of law during the two elections in 2010.

In the chapter on regulatory and oversight bodies, the author highlights the regulation of economic activity by various key regulatory bodies such as the Central Bank of Sri Lanka, the Securities & Exchange Commission and other financial institutions that function under the Central Bank.

The increase in public debt is a result of the injudicious stabilization of the economy and economic growth. The author of the chapter on public debt discusses the inflationary pressures generated by large fiscal deficits and the manner in which they increase the cost of living and cause severe hardships, especially to the lower wage earners, pensioners and fixed income earners.

Finally, the chapter on governance indices examines six indices, which assess the quality of governance in Sri Lanka. Even though the indices cannot be compared, some commonalities can be seen in their assessment of Sri Lanka.

TISL publishes the Governance Report annually with the following objectives in mind:

1. To enrich the debate on good governance by identifying trends in governance and areas for governance reform and by generating new insights and perspectives.
2. To engage in a discussion with decision-makers in the state on how they can contribute to raising integrity and meeting the challenges that corruption poses to economic growth, development and peace.
3. To be a key reference tool for activism and advocacy by providing evidence-based information, facts and figures that support demands for improved governance. Locally and internationally, activists need accurate information on the ground situation, in order to press for positive change and transformation.

Overview 2010

Centralization & dynastic rule

Dr. Paikiasothy Saravanamuttu

A trajectory of centralization of power

Key events compounding the challenge to democratic governance in the country unfolded in 2010. When the year dawned, the country was gripped by election fever, whilst then as now, the overall challenge of governance persists of moving from a post-war situation to a post-conflict one – i.e. one in which the sources of conflict are not sustained and certainly not reproduced.

The first post-war Presidential Election was held on January 26, 2010, followed by a General Election on April 8. Both elections provided the ruling regime with robust mandates even though they were contested and surrounded in controversy pertaining to the integrity of the electoral process. The latter, it should be noted, along with corruption and malpractice in public affairs, is not a new issue but has been on the agenda of governance over the last three decades with increasing salience.

In the case of the 2010 Presidential Election, controversy was reinforced by the detention of the chief opposition candidate, war hero and former Army Commander Sarath Fonseka.¹ Throughout the year, he was arraigned before civilian and military courts on a series of charges, stripped not only of his military honours but also of the parliamentary seat he won at the April General Election whilst in detention and sentenced to rigorous imprisonment.

Given the allegations of intensified violence, malpractice and gross abuse of state resources by the ruling party, the elections highlighted the importance of the 17th Amendment to the Constitution which provided for independent commissions to act as checks and balances on the exercise of Executive power including the protection of the integrity of the electoral process. Introduced later in the year, on the eve of the commencement of the incumbent's second term in November, an Amendment not mentioned in either of the two national elections - the 18th Amendment to the Constitution -- was enacted

1. Human Rights Watch 2011, Events of 2010(Sri Lanka)

into law with a two-thirds majority in the legislature. The 18th Amendment effectively jettisoned the 17th along with the term bar on an incumbent contesting the Presidency.

Executive action from the elections to the appointment of the Cabinet and other key government posts culminating in the 18th Amendment, charts the trajectory of the centralization of power and dynastic rule, underpinned in turn by a majoritarian ideology. The appointment of President Mahinda Rajapaksa's siblings to key positions from Speaker to Minister of Economic Development to Defence Secretary in charge of the national security apparatus as well as urban development and the promotion of his son, first-time Member of Parliament (MP) Namal Rajapaksa, illustrate the dynastic nature of the regime and its near total control and consolidation of Executive power and national resources. Similarly illustrative is the design and implementation of economic development in the north and the east through the Presidential Task Force headed by brother Basil and the militarization of the administration there.

Ethnic majoritarianism is illustrated by the revelations of Cabinet discussions pertaining to the national anthem and the languages it can be sung in, as well as through the sustenance of the belief that the end of war is also the end of conflict with no political settlement required and of the officially sanctioned dichotomy of patriots and traitors in public discourse and political action.

In all these respects, 2010 was an instructive year in the regime's attitude as well as intentions towards governance. The rationale for centralization and the authoritarianism that goes with it, not to mention the dynastic dimension, is that with the war against terrorism won, the national priority is economic development and the state will pursue it with the same determination and single-mindedness of purpose as it did the war. The argument is that economic development requires strong and stable government. J.R. Jayewardene used the same rationale when introducing the Executive Presidency. Insurrections in the south and in the north and east followed. According to this perspective, any talk about 'rights' is seen as irrelevant at best and subversive at worst.

The state aims to effect a transformation of Sri Lanka's political culture and political architecture. It favours the more disciplined and less rights conscious model of Malaysia to the more boisterous and unruly post-colonial South Asian culture that has implicit faith in democratic processes and institutions. This is attested to, in addition to the emphasis on economic development, by the emphasis on patriotism and nationalism, as well as the active pursuit of

defections from the opposition so as to consolidate power within the ruling alliance as an umbrella political organization, not unlike the United Malays National Organization (UMNO) in Malaysia.² Furthermore, there is a practice of acknowledging ethnic diversity and pluralism through mere gesture and not beyond – the tendency to include sentences in Tamil in public speeches being the best example.

18th Amendment

The introduction and passage of the 18th Amendment were especially illustrative of the paradigm of governance of the regime.

As already indicated, an Amendment proposal of this nature did not feature in the election campaigns. The expanded rationale for the Amendment (additionally to the general argument for centralization cited above) was that the incumbent would not be taken seriously and become a lame duck President into the end of his second term and that this would spark off a disruptive, if not, destructive succession battle with adverse consequences for political stability and development. Critics have pointed out that it is indeed the fear of a succession battle and its adverse consequences for dynastic rule that led to the Amendment.

The key element of the Amendment is that it has the potential to make the incumbent, President for life with enormous powers. The removal of the term bar must be seen together with the legal immunity already granted to the holder of the office under the Constitution as well as the jettisoning of the Constitutional Council and independent commissions previously set up under the 17th Amendment. The latter will now be made up of Presidential nominees. There is only a requirement to consult the Parliamentary Commission³ made up of the Speaker, the Prime Minister, the Leader of the Opposition and nominees of the last two respectively. There is, of course, the requirement of an election, which defenders of the regime have emphasized as ensuring a check and balance on untrammelled power. The counter here is that the integrity of the electoral process is further challenged by the changes wrought by this Amendment.

2. UMNO is the dominant party in the National Front governing coalition that has ruled Malaysia without interruption since independence.

3. This replaces the Constitutional Council of the 17th Amendment.

The process by which it was passed was also disturbing. The regime availed itself of the constitutional provision – also abused by its predecessors – which allows the government of the day to send as urgent in the national interest, proposed legislation to the Supreme Court for an opinion on its constitutionality. Opposition MPs and civil society activists questioned the ‘urgency’ and ‘national interest’ arguments of this process, given that the President had yet to commence his second term. At the same time, the constitutional provision requiring consent for the Amendment by the Provincial Councils (PCs) – since the 18th Amendment provisions impinged on their powers – was overlooked.

It should be noted that the commissions have yet to be appointed.⁴ Consequently, the Commission to Investigate Allegations of Bribery and Corruption and the Human Rights Commission for example are effectively defunct.

Political settlement

On the specific issue of a political settlement of the ethnic conflict – a pivotal element of the transition to a post-conflict situation – there was no demonstrable progress in the period under review beyond rhetorical reiterations of a commitment towards a political settlement. The Tamil National Alliance (TNA), however, was asked and, has submitted the names of seven of its representatives to make recommendations on the process of return and rehabilitation of internally displaced persons (IDPs). Most of the IDPs in the Menik Farm complex have been let out, but their return to their areas of original residence and resettlement are incomplete, resulting in them living with host families and in transit camps. As to what the relationship of this group of TNA representatives will be to the Presidential Task Force has yet to be established.

The All-Party Representatives Committee (APRC) which was set up four years ago and charged with the responsibility of identifying a consensus settlement failed to do so. It, nevertheless, presented its report to the President and was effectively wound up. Talks have been initiated with

4. As at the end of 2010.

various Tamil political parties, including the TNA, on the issue of a political settlement, but these meetings have been infrequent and lacking in both a clear-cut agenda and timeline. There was speculation in the media that the regime was thinking along the lines of a second chamber to accommodate provincial representation at the centre, but without substantive powers.

The public debate has, in the main, focused on the 13th Amendment – ‘plus’ or ‘minus’ - with clear indications that police powers as envisaged under that Amendment and subsequent legislation setting up PCs, will not be devolved and that the same may well apply with regard to provisions relating to land. The extensive deliberations of the APRC notwithstanding, it is clear that the state sees the issue of a political settlement of the conflict and devolution through the lens of its innate ethnic majoritarianism and the military defeat of the Liberation Tigers of Tamil Eelam. Accordingly, it is in no hurry to move on this front, the remonstrations of the Tamil polity and the international community, particularly India, notwithstanding. Frequent references to an “indigenous” and “home-grown” solution, strongly suggest that beyond the election of a PC in the north, the regime intends the economic to trump the political and to retain at most the current status quo. Centralization and the unitary state will be reinforced under the banner of a united Sri Lanka, energetically employed in economic development.

Behaviour of ministers and officials

Illustrative too of the attitude to governance is the state’s apparent endorsement and encouragement of the antics of Mervyn Silva, former deputy minister of highways, deputy minister for media for a short time and currently Deputy Minister for Publicity and Public Relations. Silva has a record of many allegations and incidents of apparent hostility and violence toward sections of the private news media, of seemingly constantly abusing the rule of law and basic tenets of democratic governance with impunity. In an incident that was reported widely in the media, Silva, in the presence of police officers, tied up a Samurdhi animator to a tree as punishment for that individual’s failure to attend a meeting on combating dengue.⁵ The animator was subsequently reported as having stated that this was an incident of “self-punishment”. In response to the public outcry, a disciplinary inquiry into the incident was held by the ruling party, which found Silva not guilty of any offence. The police did not take any action and Silva continues to hold ministerial office and that for ‘publicity and public relations’ to boot!

5. Minister Mervyn Silva ties officer to tree for absence-ancient punishment
<http://www.youtube.com/watch?v=Jk2uWbryjll> accessed 28 September 2011

The Mervyn Silva case is illustrative not only of the regime's attitude to governance but to a wider and worrying public attitude towards governance illustrated by it. Silva's antics are treated with amusement or cynicism by many, with fear by those directly affected and concern by the few, concerned in turn about the fate of governance in the country. That he is regarded as and relishes the role of a nasty court jester reflects the temper of the times, as does the public attitude towards the inaction of the police. Defence Secretary Gotabhaya Rajapaksa's outburst on Sarath Fonseka in his BBC HARDtalk interview with Stephen Sackur must be seen in the same light.⁶ It constituted a clear and unequivocal departure from the code of conduct governing public officials and was carried out with impunity. This was not the first such instance involving this particular public official.

Both nationally damaging and yet farcical was the attempt by high-profile Minister Wimal Weerawansa to besiege the local office of the United Nations (UN) and begin a "fast unto death" outside its premises.⁷ All of this was on account of the UN Secretary-General Ban Ki-moon constituting a Panel to look into the allegations of war crimes by both sides in the last phase of the war. Weerawansa declared that he would fast to death if Moon did not rescind his Panel. The latter did not happen and within a day Weerawansa ended his fast when the President visited him and administered liquid to him. Whilst the whole exercise may well have been initiated with the aim of galvanizing public opinion against the international community and the issue of accountability for alleged war crimes, it was roundly condemned by most commentators as puerile and damaging to Sri Lanka's position in the international community. Clearly the Minister's antics had the approval of the highest echelons of the regime and reflected its populist and combative perspective on international relations to the extent of making foreign policy in the streets.

Whilst the regime emboldened by robust victories in the two national elections stamped its inimitable brand of governance on the administration of the country, other institutions as well faced challenges on this score.

6. . Sri Lanka Defence Secretary Gotabhaya Rajapaksa, says General.....
<http://www.youtube.com/watch?v=7tHISZnrUiE> accessed 28 September 2011

7. Human Rights Watch Report 2011; Sri Lanka
<http://www.hrw.org/world-report-2011/sri-lanka> accessed 28 September 2011

Weak opposition - lack of intra-party democracy

UNP leadership crisis

The major Opposition party, the United National Party (UNP), on the heels of yet another two electoral defeats in a series of setbacks dating back to 1994 and, further defections to the current government, was beset by a leadership crisis and demands for intra-party democratic reform to resolve it. After much dissension publicly expressed and behind-the-scenes manoeuvres, the UNP decided to adopt a new party constitution, which provides for the election of key positions including that of party Leader. Elections have now to take place within 40 days of the adoption of the new constitution. The current party leader Ranil Wickremesinghe and Hambantota district MP Sajith Premadasa are expected to be the main candidates for the party leadership.

Aside from successive electoral defeats over a decade under the leadership of Wickremesinghe (with the exception of the 2001 General Election victory), the internal problems of the UNP illustrate a key challenge of governance in Sri Lanka – the lack of intra-party democracy. It also serves as another example – like that of political party funding - of the culture of centralization and lack of transparency that pervades political decision-making and institutions. It is arguable that in many senses it is as unrealistic as it is pivotally important to expect political leaders who have near-complete control over their parties to resist the temptation and reverse the tradition of centralization of power once in government.

Women's political participation

The low number of women candidates and the low level of inclusiveness of women in the decision-making structures of political parties are another dimension of the overall challenge of intra-party democracy. Whilst the participation of women in party politics may well be discouraged by electoral violence and the high costs of contesting an election, there is little evidence of a demonstrable commitment by respective party leaderships to actively encourage higher levels of political participation of this nature by women.

Weak legislature

Yet another disturbing consequence of a weak opposition is a weak legislature - Parliament. The internal problems of the main Opposition party in particular, as well as in others, and the manifest inability or unwillingness to conclusively resolve them, have adversely affected the key

legislative functions of parliamentary oversight and debate and reinforced the constitutional privileging of the Executive in the 1978 Constitution and, its amendments thereafter, in terms of the traditional balance of power between the Executive, legislature and judiciary. Substantial crossovers to the government benches by opposition MPs on the grounds of intra-party problems and the fear of being consigned to the opposition benches for long periods of time on account of them, have vitiated the traditional role of Parliament in a functioning democracy. This underpins the contention that Parliament's main function has degenerated into rubber stamping the actions of the Executive.

Non-governmental organization governance

The governance challenge was also part of the hostile attitude of the regime towards non-governmental organizations (NGOs) which it considered to be partisan, unpatriotic and committed to regime change in fulfilment of alleged donor agendas. It focused, in the main, on financial transparency and accountability, with questions being raised in Parliament with regard to the finances of key NGOs that were critical of the regime's record on human rights and governance in particular. Throughout the year there was speculation to the effect that the government would bring in new legislation to govern NGOs, building on the findings of the Parliamentary Select Committee to investigate their workings, but this has yet to be brought to Parliament.

Chapter 1

Empowering an already all-powerful Executive

The impact of the 18th Amendment

J.C. Weliamuna

The purpose of this chapter is to examine how the 18th Amendment to the Constitution affects the governance structure in Sri Lanka and its significance in the centralization of power in the hands of the Executive. In the view of this writer, the 18th Amendment to the Constitution was introduced primarily to achieve two main objectives:

- i. To remove the two-term limitation on the President.
- ii. To remove the constitutionally guaranteed checks and balances between the Executive and the legislature that were entrenched in the 17th Amendment to the Constitution.¹

Political events leading up to the 18th Amendment

The manner in which the 18th Amendment was introduced clearly indicates the political psyche of the current governmental leadership and the purpose of the 18th Amendment itself. At the Presidential Election held on January 26, 2010, President Mahinda Rajapaksa was elected for the second time as the country's fifth President. Within three weeks, Parliament was dissolved and on April 8, 2010, people cast their votes to elect the 14th Parliament of the Democratic Socialist Republic of Sri Lanka.² The election manifestos of the two main political parties not only promised better governance in the country but also the abolition of the Presidential system³ or the conversion of the Presidential system to a trusteeship which is capable of "controlling Executive power".⁴ No mandate was sought from the people to move away from the guarantees introduced by the 17th Amendment.

1. The Amendment Bill also included several other consequential but inconspicuous amendments with far-reaching effect. For example, the repealing of Article 154G changes the fundamental structure of the devolution of power. This Article was deleted though it is not a consequential provision of the main Amendments.

2. Parliament was dissolved on February 9, 2010.

3. See election manifesto of the UNF.

4. See Mahinda Chinthana Idiri Dekma, the election manifesto of the UPFA: page 59.

In July 2010, the new government was formed but was short of a two-thirds majority in Parliament. A two-thirds majority is required in Parliament in order to effect any amendment to the country's Constitution except in the case of certain articles, which additionally require the approval of the people at a referendum.⁵ Thereafter, though the specific purpose was not clear to the public, a manoeuvring process took place among the political parties in Parliament with several opposition Members of Parliament (MPs) crossing over to the government, thereby providing the government coalition with a two-thirds voting majority.⁶

Until August 31, 2010, there was no information whatsoever in the public domain about any Amendment to the Constitution, but reports suddenly appeared in the news media that the Cabinet had approved an Amendment to the Constitution, which it said was "urgent in the national interest".⁷ Between September 3-8, seven opposition MPs⁸ crossed over to the government. Subsequently, a further eight opposition MPs (who had not earlier announced their political shift) also voted in favour of the Amendment while remaining in the opposition.⁹ This provided the government with the required two-thirds voting majority. As has been experienced under previous governmental regimes, it is due to the present Executive Presidential system of government that such political manoeuvring has become possible.

Around the same time, the proposed Bill¹⁰ was forwarded by the President to the Chief Justice¹¹ requiring a Supreme Court (SC) determination as to whether it needed to be passed by a referendum in addition to a two-thirds majority in Parliament. On August 31, 2010, the SC forwarded its determination to the Speaker of Parliament.

5. Article 83 of the Constitution.

6. See TISL position paper, 'Adverse Impact of the 18th Amendment on Governance', pages 2-3, Nov. 4, 2010.

7. See Daily News of August 31, 2010. Note: The text of the Amendment was not available to the public or political parties.

8. The seven members included six UNP MPs and one TNA MP: Abdul Cader, Manusha Nanayakkara, Lakshman Seneviratne, Earl Gunasekera, N. Wijenayake and Upeksha Swarnamali of the UNP and Podiappuhamy Piyasena of the TNA.

9. On August 27, 2010, the SLMC decided to support the government to effect constitutional changes. See Daily Mirror online version – August 27, 2010, available at <http://www.dailymirror.lk/index.php/news/6130-slmc-decides.html> accessed 17 October 2010.

10. A draft statute is called a Bill.

11. Under Article 122 of the Constitution.

Intervening petitioners brought to the notice of the SC, a list of authoritarian countries that have no limitations on the terms of the Executive heads of states. However, the main arguments in the SC were that the Amendment was contrary to Articles 3 and 4 of the Constitution for the following reasons:¹²

- i. The proposed Amendment eliminates the time limit of the President, altering the Executive power and nature of franchise; it also repeals the checks and balances incorporated into the Constitution by the 17th Amendment which Amendment had strengthened the sovereignty of the people.
- ii. In the Constitution, legal immunity has been granted to the President under Article 35 on the basis that he or she would be liable to legal action on the completion of two terms. The removal of the two-term limit, therefore, has the effect of removing the judicial power of the people.

Rushing the Amendment through

On September 7, 2010, the Speaker announced in Parliament that he had received the determination from the SC and that the Bill could be passed with a two-thirds majority in Parliament without reference to the people at a referendum. On September 8, the Amendment was passed with 161 members voting in favour, while only 17 opposed it.¹³ The MPs representing the main opposition United National Party (UNP) boycotted the debate in protest, while the Janatha Vimukthi Peramuna (JVP) and Tamil parties participated but opposed the Bill.¹⁴

Two issues were raised by opposition MPs opposing the Bill:

- (a) Firstly, the introduction of the Bill as an Urgent Bill when there was no urgency, since the next Presidential Election was six years away.
- (b) Secondly, the Bill having provisions encroaching on provincially devolved subjects and, thus, needing the approval of the Provincial Councils (PCs) before being placed on the parliamentary Order Paper.

12. Article 3 states that the sovereignty is in the people and is inalienable and that it includes the powers of government, fundamental rights and franchise; Article 4 defines how sovereignty is exercised by various branches of the government.

13. See Hansard September 8, 2010.

14. Ibid

When the Prime Minister moved the Bill on September 7, it was found that it had not even been distributed among the MPs.¹⁵ The arguments of the government MPs and ministers were that by permitting the President to face an election, the franchise was enhanced and that there was no justification to limit the President's terms to two. After a debate of one day, the 18th Amendment was passed.

Many organizations and individuals publicly raised objections to the 18th Amendment both on its process as well as its contents. The Bar Association of Sri Lanka, the representative body of the lawyers, urged the government not to pass the Bill as 'urgent'. Other organizations objected to its contents, urging the government to ensure institutional integrity, protection of judicial powers and independence of the Public Service. However, these representations were seemingly ignored by the government, which proceeded with the Amendment.¹⁶

Effects of removing the two-term limit

Constitutionally, the President is not subject to the scrutiny of Parliament or any other public agency. He is the Head of State, Head of the Armed Forces and Head of the Cabinet (while holding Cabinet portfolios) and can dissolve Parliament without the concurrence of that body. There is no effective Presidential impeachment process.¹⁷ The President's actions are not, in any way, subject to judicial review. The President enjoys immunity for private and official acts during his/her tenure in office.¹⁸ The only effective check on the incumbent President was the two-term limitation.

Legal immunity has been effectively bestowed on the President by this Amendment. Previously, the President enjoyed two terms, after completion of which he/she could be subjected to legal action for the actions while in office. The removal of the term limit, thereby allowing an incumbent President to continue for an unlimited number of terms, has the added effect of removing, forever, the possibility of judicial review of any possibly unlawful actions or omissions committed by the President.

15. Hansard September 7, 2010, Columns 74-86.

16. See statements issued by the Bar Association <http://www.thesundayleader.lk/2010/09/12/statement-by-the-bar-association-of-sri-lanka/>; by the Asian Human Rights Commission at <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-189-2010>; by the Civil Rights Movement at http://transcurrents.com/tc/2010/09/civil_rights_movement_statement.htm; and by the Centre for Policy Alternatives at <http://cpalanka.org/statement-on-the-eighteenth-amendment-bill/>.

17. Vide Chapters VII and VIII of the Constitution and Article 38 of the Constitution.

18. Article 35 of the Constitution. In *Karunathilaka v. Dissanayake* (1999) (1 LR 157) the Supreme Court held that legal action could be taken after the President relinquishes office even for actions committed while in office.

Generally, the President is also the head of his/her political party. In Sri Lanka, political parties do not have strong structures to ensure internal party accountability. Therefore, with assured unlimited terms of office, the President is free to concentrate the power and political influence of his/her own party in his/her hands. Further, with the possibility of the President being in office indefinitely, he/she could patronize the entire state mechanism. In a country where the practice of political patronage is persistent at many levels of government, the adverse effects on governance are thus potentially enormous.

Loss of scrutiny ensured by the Constitutional Council

The Constitutional Council (CC) established under the 17th Amendment had powers to:

- i. Select members to seven independent commissions:¹⁹ The Public Service Commission (PSC), the Human Rights Commission, the Elections Commission, the National Police Commission, the Commission to Investigate Allegations of Bribery and Corruption (CIABOC), the Finance Commission and the Delimitation Commission.
- ii. Approve nominees of the President in respect of high posts viz. the Chief Justice and Supreme Court judges, the President and Judges of the Court of Appeal, the Judicial Service Commission, the Attorney General, the Auditor General, the Inspector General of Police, the Parliamentary Commissioner for Administration (Ombudsman) and the Secretary-General of Parliament.²⁰

In short, the 17th Amendment removed the absolute discretion that was earlier given to the President to select and appoint these individuals and subjected the President to a scrutiny in relation to those appointments. It also gave confidence to the officials of the Public Service and the police to carry out their duties without fear or favour and to uphold the rule of law. Consequently, under the 17th Amendment, merit and performance were recognized as key factors in making appointments to key positions in the state. It is reasonable to argue that the 17th Amendment slowed down the gross politicization that has been permeating the public administration and judiciary under successive governments.

19. See Article 41B of the Constitution and the Schedule.

20. See Article 41C and Schedule 1 under the 17th Amendment.

The 18th Amendment abolished the CC and connected safeguards. Instead, it established a Parliamentary Committee, which has little effective power. In fact, the Parliamentary Committee²¹ is only a loose body from which the President is merely required to seek “observations” in respect of appointments.

The Parliamentary Committee’s principal shortcomings are:

1. The President is not bound by its observations.
2. Since the majority of its members are drawn from the Government Parliamentary Group, the committee is weighted in favour of the government and the President, if he/she is also from the governing party.²²
3. The President is empowered to withdraw the MP nominations, providing the possibility of political delays and manoeuvres in the appointment process.
4. The committee is required to convey its “observations” within seven days, which limits the time for substantial review.

In practice, therefore, the President’s choice could remain unchallenged in relation to all high official appointments. In effect, the President is now in total control of the Public Service and police. Past experience of successive governmental regimes over decades indicates that such unfettered control will not serve to halt the current process of politicization of these institutions, thereby accelerating the on-going, increasingly pervasive degeneration of institutional integrity.

Future of Public Service, police and anti-corruption commission

The members of all seven state commissions previously nominated by the CC, are now appointed by the President, while the powers of the Police Commission have also been reduced. The other important change is that Article 41A(4) that provides that commission appointees “shall be persons of eminence and integrity who have distinguished themselves in public life

21. Consists of the Prime Minister, Speaker, Leader of the Opposition, nominee (an MP) of the PM and nominee (an MP) of the Leader of the Opposition. See Article 41A(1) of the 18th Amendment.

22. Then CIABOC Director General Piyasena Ranasinghe was removed by the President on February 19, 2008 without assigning reasons. See TISL press release available at <http://www.tisrilanka.org/pub/pp/pdf/ciaboc-papaer-final1.pdf>

and who are not members of any political party”, has been repealed leaving the process free of such criteria that help protect against appointments that may hinder good governance.

Police – Under the 18th Amendment, oversight (and disciplinary control) of the 60,000-strong Police Force has been assigned to the PSC, which also deals with the rest of the public services with a cadre of over one million at present. The Police Commission’s powers have been reduced to merely handling complaints and providing redress. The Inspector General of Police (IGP) whose appointment previously needed approval by the CC, is now appointed by the Cabinet of Ministers as any head of department.

Public administration – PSC members can now be removed by the President at will, whereas under the 17th Amendment, removal was possible only with the approval of the CC. The power previously held by the PSC to delegate powers to committees and public officers has been transferred to the Cabinet, thereby greatly disempowering the PSC and limiting its executive reach. Earlier, all heads of departments were appointed by the Cabinet only after obtaining the views of the PSC. Now the Cabinet is vested with the sole authority of appointing heads of departments, not to mention the influence that the political authorities wield over all other public officials.

Anti-corruption commission – Judging from past experience in Sri Lanka, such political influence will also affect the integrity and efficiency of the operations of all state commissions including the main anti-corruption body of the country, the CIABOC. The chief executive of the CIABOC, the Director General, does not have a guarantee of his/her own tenure either.²³ In addition, the CIABOC must rely on seconded police teams for its investigations. Thus, due to the influence of the President over the institution of the police and given his/her power to select CIABOC members, the ability of the commission to independently and effectively investigate the corrupt conduct of powerful individuals is seriously affected.

Electoral process weakened

Reports by independent groups concerning the conduct of previous elections at all levels of governance indicate the persistent tendency of successive political parties in power to abuse state resources to their benefit at

23. Ibid

elections.²⁴ In order to control the abuse of state resources during elections, the 17th Amendment authorized the Elections Commission to prohibit the misuse of state resources, while placing some restrictions on the state media. Exercising these powers, the Elections Commissioner has to some extent in the past managed to somewhat restrain governing parties from abusing state resources.²⁵

The 18th Amendment has removed these safeguards in two ways:²⁶

- (a) By restricting the Elections Commissioner's powers to curb government actions during election periods unless they are directly linked to the elections.
- (b) By removing the powers of the Elections Commissioner to review and control the administration of public services and the police during the elections.

In effect, the constitutional limitations that aimed to restrict the abuse of state resources by political parties and politicians have now been removed, resulting in the severe erosion of the framework of fair electoral competition, thereby distorting the mandate of the people at an election.

Conclusion

The discussion above indicates that in political and constitutional terms, the 18th Amendment must be seen as yet another decisive step in the centralization of power in the Executive. The original impetus towards such centralization was given by the second Republican Constitution of 1978.

The ills of such centralization have long been acknowledged across a wide spectrum of political perspectives and major parties in successive recent elections have promised to roll back such centralization but it was only under the 17th Amendment that an initiative was taken. Now that initiative has itself been rolled back. Given the accumulation of such centralized power over the

24. Reports of TISL on the Presidential Elections 2010 and the General Elections 2010 and reports by the PAFREL on successive parliamentary and other elections. Also see the Report of the Commonwealth Expert Team, Sri Lanka Presidential Election 26 January 2010, p 16.

25. For example, by directive of the commission dated December 7, 2009 (press release No. 10) of the Elections Commissioner, the government was prevented from making fresh appointments to state institutions pending elections. It is often seen that these appointments are made as gratifications/bribes to attract votes for the governing party.

26. Article 104B as amended by Section 17 of the 18th Amendment.

recent decades, it may be concluded that the 18th Amendment has taken this process far beyond even the parameters set by the 1978 Constitution.²⁷

In conclusion, it is arguable that the 18th Amendment has pushed Sri Lanka backwards in its post-Independence journey towards modern democracy. While empowering an already all-powerful Executive, it reduces the people, in whom sovereignty is vested under the Constitution,²⁸ to the status of mere spectators rather than genuine citizens. This degeneration of the sovereignty of the people has serious adverse consequences for all branches of the state and for the liberties of Sri Lankan citizens in general.

27. See Dr. P. Saravanamuttu in Chapter 1 and Aruni Jayakody in Chapter 2 in Rohan Edrisinha & Aruni Jayakody Eds: *The 18th Amendment to the Constitution*, CPA, Colombo 2011.

28. Article 3 of the Constitution.

Chapter 2

Allocation of ministries

Austin Fernando

The essence of parliamentary democracy is the accountability of the government (or Cabinet of Ministers, Executive or administration) to the legislature.¹ In it, the Cabinet is featured as the body for policy formulation, supervision of policy implementation, coordination with the legislature, approval of draft laws, etc. Thus, the Cabinet and its constituent ministries, their functions and operational institutions, all become important tools of democratic governance.

The ‘Cabinet’ and ‘Cabinet process’ have both seen changes over the post-Independence decades. More such changes in structure and process were seen when a Cabinet with 45 ministries (38 ministers) was appointed after the General Election in April 2010. This was followed in November 2010 by the appointment of a Cabinet with 65 ministries (61 ministers), when President Mahinda Rajapaksa assumed office for the second term.

This chapter of the Governance Report attempts to dispassionately review these two Cabinet appointment exercises, that is the allocation of ministries, subjects and institutions in terms of good governance.

Describing the Cabinet, Sir Ivor Jennings states: “In substance, the Cabinet is the directing body of national policy..... Consisting, too, of the heads of the more important Government departments, it is able to forward its policy by laying down the principles to be followed by the central administrative machine.”² However, in Sri Lanka since 2005 to date, the current government’s election policy platform of ‘Mahinda Chinthanaya’ has been the fountain of ‘national policy’, as described in Column 1 of the Gazette notifications published under Article 44 (1) (a) of the Constitution, allocating duties/functions, institutions and laws,³ thereby making Jennings somewhat less relevant.

1. Laver, Michael & Shepsle, Kenneth A. *Making and Breaking Governments*. Cambridge: Cambridge University Press, 1996: page 3

2. Jennings, Sir Ivor. *Cabinet Government*. Cambridge: Cambridge University Press, 1951: page 210

3. The Gazettes of the Democratic Socialist Republic of Sri Lanka (Extraordinary) No: 1651/20 of 30-4-2010 and No: 1681/3 of 22-11-2010.

In the period under review, 2009-10 being an 'election year', the Mahinda Chinthanaya policy document clearly seemed to be formulated to dovetail with election campaign vote-catching needs rather than governance needs. This affirms a research finding that "if the chances of getting in to power are enhanced by changing policies, then an 'office-seeking' politician will see no cost in changing".⁴ The manner in which Cabinet portfolios were distributed in November 2010 to meet parliamentary 'crossover' needs, the splitting of ministry functions, the reallocation of institutions to different ministries or not allocating them at all to the relevant ministries and the appointment of ministers without reference to any relevant competence, has proven the appropriateness of this research finding to Sri Lankan experiences in 2010.

Examining how the appointment and restructuring of the Cabinet in 2010 comply with the principles of good governance (i.e. Legitimacy and Voice, Accountability, Transparency, Fairness/Equity and Rule of Law) is the task of this chapter.

Structure of Cabinets appointed in 2010

Representation

It is noteworthy that the Cabinet appointments in April and November 2010 exhibit similar compositions and conventional considerations (i.e. ethnic, religious, caste, regional etc). Table 1 gives a comparison to prove one such consideration - ethnicity.

4. Laver, Michael & Shepsle, Kenneth A. Making and Breaking Governments. Cambridge: Cambridge University Press, 1996: page 19

Table 1: Ethnic composition of ministers in Cabinets since Independence

Selected Cabinet appointments	Sinhalese	Tamils	Moors	Others
D.S. Senanayake Cabinet (Sept. 1947)	11 (79%)	2 (14%)	-	1(7%) ⁵
Dudley Senanayake Cabinet (June 1952)	11 (79%)	2 (14%)	1 (7%)	-
S.W.R.D. Bandaranaike Cabinet (April 1956)	12 (92%)	-	1 (8%)	-
Dudley Senanayake Cabinet (March 1960)	7 (87.5%)	-	1 (12.5%)	-
Sirima Bandaranaike Cabinet (July 1960)	10 (90.9%)	-	1 (9.1%)	-
Dudley Senanayake Cabinet (March 1965)	15 (88%)	1 (6%)	1 (6%)	-
Sirima Bandaranaike Cabinet (May 1970)	18 (85%)	1 (5%)	1 (5%)	1(5%) ⁶
Sirima Bandaranaike Cabinet (May 1972)	17 (82%)	1(6%)	1 (6%)	1(6%) ⁷
J.R. Jayewardene Cabinet (July 1978)	22 (88%)	1 (4%)	2 (8%)	
J.R. Jayewardene Cabinet (Sept. 1978)	25 (86%)	2 (7%)	2 (7%)	
R. Premadasa Cabinet (Feb. 1989)	19 (86.5%)	1 (4.5%)	2 (9%)	
C.B. Kumaratunga Cabinet (Sept. 1994)	19 (86.5%)	1 (4.5%)	2 (9%)	
C.B. Kumaratunga Cabinet (Oct. 2000)	38 (84.6%)	3 (6.6%)	4 (8.8%)	
Ranil Wickremesinghe Cabinet (Dec. 2001)	20 (71.4%)	3 (10.7%)	5 (17.9%)	
C.B. Kumaratunga Cabinet (April 2004)	27 (84.3%)	2 (6.3%)	3 (9.4%)	
Mahinda Rajapaksa Cabinet (Nov. 2005)	22 (84%)	1 (4%)	3 (12%)	
Mahinda Rajapaksa Cabinet (April 2010)	33 (87%)	2 (5%)	3 (8%)	
Mahinda Rajapaksa Cabinet (Nov. 2010)	55 (91%)	2 (3%)	4 (6%)	

Source: Information extracted from Government Gazettes published on the appointment of Cabinets and processed by the author.

5. Minister T. B. Jayah was a Malay in this Cabinet.

6. Minister Pieter Keuneman was a Burgher in this Cabinet.

7. Minister Pieter Keuneman was a Burgher in this Cabinet.

It is clear from Table 1 that in appointing ministers, some pluralist societal considerations, especially social group representation, as noted by scholars 35 years earlier, are still applicable.⁸

In terms of ethnic representation, ministerial appointments to both Cabinets of 2010 have been unfavourable to Tamils in comparison with the representation of the Moor (Muslim) community. While Cabinets of the 1956-1960 period have been the worst in this aspect (see Table 1), ethnic Sinhala 'supremacy' in Cabinet formation may again be observed at its height in November 2010 (91%).

Size of Cabinet

The Sri Lankan Constitution does not limit the number of ministers in government and this constitutional flexibility has been used by previous Presidents in appointing excessively large Cabinets. This criticism is also valid for the 2010 Cabinets since this constitutional loophole was once again excessively exploited by the appointment of the largest Cabinet in history, involving the splitting of governmental functions, re-distribution of institutions etc., for the political expediency of coalition-building. Such arbitrary and ad hoc allocation of portfolios entails waste, inappropriateness, high costs and weak coordination.

While the April 2010 Cabinet showed a 16% reduction from the previous highest number of ministers appointed in October 2000, the Cabinet of November 2010 saw an increase of ministers by 36% over 2000. The number of ministries was increased in November 2010 to 64 from 45 in April. There were 61 ministers and 31 deputy ministers - totalling 92 - in November 2010 compared to 37 ministers and 39 deputies - a total of 76 - in the April Cabinet. This was in addition to the President who held several portfolios in both instances. This is a reminder of Dr. N. M. Perera's comment: "In summation, the muster roll of the office-holders in Parliament will be almost half the full membership"⁹ which is more than true in the 2010 Cabinets, because the numbers well exceeded half the overall Parliament muster roll.

8. Wilson, AJ. *Politics in Sri Lanka 1947-1973*. London: The Macmillan Press Ltd, 1974: pages 15-59

9. Perera, Dr. NM. "Critical Analysis of the New Constitution of the Sri Lanka Government." Colombo. (June 1979): pages 56-57

The appointment of a large number of ministers and deputy ministers, thereby making these parliamentarians part of the Executive, raises issues about the Executive's encroachment upon the legislature and the disregard for the principle of separation of powers. The argument that this is required for political alliances cannot hold water, as the President and his advisors ought to know that India and the United Kingdom (UK), which have coalition governments, have Cabinets of just 27 and 21 ministers respectively. Further, one may question the propriety of large Cabinets at the centre when substantial power is devolved to the provinces under the 13th Amendment to the Constitution.

One may argue that larger numbers mean broadened participation, which satisfies good governance. Then, why not in India and the UK? It is common knowledge that the ministries were increased mainly as a reward for political support extended at crucial political junctures, which is neither good governance nor reinforcement of democracy. For example, the withdrawal of certain functions and institutions from the Ministry of Labour Relations and Productivity Improvement (April) and the creation of the Ministry of Productivity Promotion (November) aptly fit this description, where a late crossover from the opposition United National Party (UNP) is rewarded with some ministerial functions withdrawn from the portfolio of an earlier crossover from the UNP.

Distribution of portfolios

The arbitrary distribution of some ministerial functions among several different ministries in April and November only increased administrative confusion, inefficiency and ineffectiveness. For example, the April Cabinet had a Ministry of State Management and Reforms as well as a Ministry of Public Administration. In the November Cabinet there are a Ministry of Public Administration, a Cabinet Minister for Public Management and Reforms and a 'Senior Minister' for Good Governance. Such overlapping appointments make it difficult to avoid criticisms of waste, illogic, duplication or confusion.

Allocation of functions and institutions

Some combinations of ministry functions and institutions are confusing. An example is the Ministry of Rehabilitation and Prison Reforms (April) which had the REPPIA (Rehabilitation of Persons, Properties and Industries Authority) under its purview while another 'Ministry of Resettlement' was given the function of 'resettlement of affected civilians from the conflict'. Ideally, REPPIA should have been the partner organization of the latter ministry.

Meanwhile, institutions such as the Sri Lanka Tea Board, Local Loans and Development Fund, Rural Economic Resuscitation Fund and Jana Diriya Fund were brought under the Ministry of Finance in 2010, while other ministries were given operations linked to these institutions. There are also institutions like the Agriculture and Agrarian Insurance Board and Sri Lanka Export Credit Insurance Corporation that have traditionally been functioning under other ministries, which have been brought under the Ministry of Finance. This not only results in centralizing power in that ministry but also diffusing the focus of management and policy due to the diversity of functions and objectives of these bodies. This, in turn, results in the dilution of their relevance and reduction of efficiency of function.

Presidential control of ministries

The criticisms against the President for bringing a large number of departments pertaining to defence under him are invalid because the functions and institutions coming under the purview of the Ministry of Defence (MoD) that are relevant to the subject need not and should not – in the interests of good governance -- be diverted to any other office or portfolio.¹⁰ On the basis of the principles of specialized competence and operational coordination with related agencies, some question the relevance of the Urban Development Authority being placed under the MoD. However, arguments that such diffusion of administrative focus causes inefficiency in resource deployment and operational productivity have been somewhat negated by recent observed progress in urban development work, especially in Colombo.

In the past, the Head of State usually took only the defence portfolio and, at most, another ministry – usually Finance - although he could constitutionally [Article 44 (2)] hold any number of portfolios. In November 2010, however, the President held the Ministries of Defence, Finance, Highways, Ports and Aviation and “supervised” functions in petroleum exploration and held on to the Attorney General’s Department. This is while there are ten Senior Ministers who enjoy all ministerial perquisites and benefits personally but have vaguely-defined official functions (except D.E.W. Gunasekara who is Chairman of the Committee on Public Enterprises) not in keeping with their seniority, experience and capacity. Hence, the question arises whether these Senior Ministers’ appointments in November 2010 are a mere cosmetic exercise to sustain cross-party political alliances on which the government heavily depends for its parliamentary majority.

10. Constitutionally, the President is also Commander-in-Chief of the Armed Forces.

Even though the Cabinet has become massive, in reality more power seems to have become concentrated in the President. The way current policy pronouncements are made indicates that a few unelected officials such as the Secretary to the Treasury, Central Bank Governor, Secretary to the President, Attorney General and some Presidential advisors are in the inner sanctums of policymaking. Thus, the Cabinets of 2010 contradict Jennings's theory that Cabinet ministers lay down national policy. Contrarily, such concentration of power can be interpreted as the demonstration of a lack of confidence in Cabinet colleagues, hesitancy to share power, internal rivalries in government, power centralization among confidantes, potential misuse of constitutional presidential immunity, disorientation of management systems and a possible personal interest in handling a massive share of governmental functions.

In positive terms, the close relationship between the President and his brother, Basil Rajapaksa (Minister of Economic Development), may provide quick decision-making potential and even smoother resource mobilization. Media reports of the Economic Development Minister's field tours and meetings indicate an accelerated positive performance possibly due to this familial linkage. Though there could be complaints about the lack of a level playing field (due to the coinciding of family interests), one may counter-argue that output is more important than conventional management systems. Such perceptions are exemplified by the following news report in a major business weekly:

*Trusted by the President not only because they are brothers but also because of his sharp acumen and people skills, Basil Rajapaksa is breaking boundaries that none would have thought possible. The President knows that once a task is assigned to him, it will be completed.*¹¹

However, these practices are in conflict with good-governance principles. Participation in decision-making is reduced. Having a veritable kingdom of institutions under one powerful minister greatly reduces transparency due to the very fact that supervisory power and authority are focused on a single 'Superman' who 'cannot' or 'should not' be challenged not only because he is the sole ministerial authority but also because of his intimate familial

11. Amarasinghe, Udeshi & Kahandaarachchi, Thilini. "Turning the wheel of change." Business Today. October 2009: page 15.

connections. In this context, the framework of free access to the authorities and flow of information is undermined. Fairness and equity are undermined from ministers and other ‘under-employed’ ministers.

While the sheer number of ministries, the arbitrary diffusion or concentration of ministerial functions and the allocation of institutions to ministries are constitutional, the norms of equity and fairness are lost. Thereby, the Rule of Law is devalued and governmental accountability diffused.

In 2010 there was the usual complaint about the familial Cabinet connections of the incumbent President. However, in many previous governments there have been father and son, aunt and nephew and sister and brother relationships in the power concentration within the Cabinet. But the continued practice of such closely coordinated familial roles in government and public administration from the highest level downwards cannot be justified by precedents.

Executive Presidency and Cabinet functions

Sri Lankan democratic governance differs from Westminster-style governance, partly due to Presidential powers. In 2010, the Executive Presidency was further reinforced constitutionally through the 18th Amendment. Constitutionally, the President is empowered to change ministerial portfolios [Article 44 (3)]. Since a two-thirds majority was essential for the passage of the 18th Amendment, the crossover of opposition parliamentarians was organized. With the crossover, the President increased the number of ministries in November. Analysts had predicted such political behaviour decades earlier. One had said of these constitutional powers: “These provisions for ministerial and semi-ministerial appointments give ample scope for patronage, enabling a President to cast his net far and wide to secure support in the legislature.”¹² This is exactly what President Rajapaksa did in 2010.

The manoeuvres in Cabinet appointments caused some ministers (April) to sacrifice their portfolios, others to accept senior ministerships and still others to accept reduced powers and institutions. Simple examples are the splitting of the small Ministry of National Heritage and Cultural Affairs (April) into the Ministry of National Heritage and the Ministry of Culture and Arts (November) and the carving out of a separate Ministry of Private Transport Services (November) from the Ministry of Transport (April).

12. Wilson, AJ. *The Gaullist System in Asia*. London: The Macmillan Press Ltd, 1980: page 66

Petroleum exploration activity was retained by the President in 2010, sidelining the Ministry for Petroleum.¹³ In November, the Sri Lanka Tea Board was transferred from the Ministry of Plantations to the Ministry of Finance (under the President).

The allocation of ministerial functions for urban development, land reclamation and coast conservation to the Ministry of Defence is considered unconventional. Nevertheless, does this imply the government's preference for a more regimented implementation of urban development and urban environmental management?

The Decentralized Budget, which gives recognition to local politicians who plan, direct and monitor local development (and allegedly acquire personal gains too), was very efficiently managed by the District Secretaries/ Government Agents from its inception. In 2010, the Minister of Economic Development took charge of this activity¹⁴ and directly reaches the districts. The local politicians are now sidelined and dependent on his patronage. Is it coincidental that such crucial changes have been made to benefit powerful ministers? The criticism 30 years back on centralization that "...the decentralization of Colombo-centred administration appears more an effort of and an imposition by the central government..."¹⁵ is still relevant in the context of current changes, because a central minister is now at the helm, rather than the 'locals'. The usurpation of such long enjoyed rights may demoralize the local politicians. Democratic governance is adversely affected by such personalized centralization of power over resources.

The institution-wise status in 2009-10 clearly shows power concentration in certain ministries (see Table 2). For example, the Ministry of Economic Development supervises major economic areas such as tourism, technology development, rural/regional development programmes, rural livelihood development initiatives, up-country development, regional economic development, etc. New functions - i.e. infrastructure facilitation in rural and estate sectors, foreign direct investment and promotion of private sector - were allocated to it in November 2010. In stark contrast, other ministers had their functions pruned.

13. Article 44 (2) of the Constitution provides this power to the President

14. Under Prime Minister Sirima Bandaranaike and President J.R. Jayewardene this function was performed by a "District Political Authority" and "District Minister" respectively and later by the District Development Committee co-chaired by a senior minister from the area and the provincial chief minister.

15. Wilson, A.J. *The Gaullist System in Asia*. London: The Macmillan Press Ltd, 1980: page 68

Table 2: Selective comparison of institutions and Budget estimations of ministries in the Cabinets of April & November 2010

Ministry	No. of institutions April 2010	No. of institutions November 2010	Financial provision (Rs.) (approximated as per Budget estimates of 2010-(Recurrent + Capital)
Smaller number of institutions and expenditure			
Ministry of Posts	2	1	7.55 billion
Ministry of Resettlement	1	1	3.1 billion
Ministry of Parliamentary Affairs	L	0	369 million
Ministry of Public Relations and Public Affairs ¹⁶	-	0	-
Ministry of Water Supply and Drainage	1	1	25 billion
Ministry of Public Management Reforms	1	1	83 million
Larger number of institutions and expenditure			
Ministry of Finance and Planning (a)	46	46	394 billion ¹⁷
Ministries of Ports, Aviation and Highways (a)	11	5(e)	30 billion
Ministry of Defence (a)	21	22	202 billion
Ministry of Education	11	11	27 billion
Ministry of Health (b)	16	16	53 billion
Ministry of Economic Development (c)	14	13	68 billion (f)
Ministry of Youth Affairs (d)	20	19	5 billion

Sources: The two Gazette notifications under Article 44(1)(a) of the Constitution and Budget estimates 2010.

Notes: (a) Portfolios held by the President
 (b) Portfolio held by the Secretary General of the Sri Lanka Freedom Party.
 (c) Portfolio held by the President's brother
 (d) Portfolio held by a President's close ally
 (e) Considerable reduction due to the creation of the new Ministry of Civil Aviation.
 (f) Does not show the provisions for individual items e.g. Decentralized Budget, Samurdhi.

16. This portfolio was established immediately before the 2011 Budget and hence no reference could be made to financial appropriations for 2010.

17. This amount is without debt amortization estimate of Rs. 456.78 billion for 2010 for the Ministry of Finance and Planning.

This development is what led to the many comments in the mass media that the President and his siblings now control a huge portion of the national budget.

There were ministries that had only a few institutions under their purview but received substantial financial provisions. An example is the Ministry of Water Supply and Drainage with just one institution receiving Rs. 25 billion in 2010. Table 2 also indicates the range of development interests of the government (e.g. Defence vs. Education+Health+Youth+Resettlement). It is also noteworthy that the Ministry of Public Relations and Public Affairs (November) does not have a single institution or a law for implementation under its command.

2010 also saw the additional overloading of ministries with ad hoc arrangements external to the Cabinet process. One such is the appointment of three 'monitoring' parliamentarians to ministries. Governance is blatantly ridiculed when novice parliamentarians are to 'monitor' ministries when senior politicians hold the portfolios. Although there were reports that the 'monitor' appointed to the Ministry of External Affairs had begun activity in ways that seem to rival the minister himself, a formal outcome of this new experiment is yet to be reported. No information is available on any results from the other two monitors.

Devolution and Cabinet formation

When forming ministries due consideration ought to have been given to devolution as laid down in the constitutional provisions for the Provincial Council (PC) system. Some examples of non-compliance with these provisions observed in 2010 are given below:-

- (a) As previously, there was a Ministry of Co-operatives in the April and November Cabinets 2010, notwithstanding that almost all cooperative sector activities are now constitutionally devolved to the provinces.¹⁸ Therefore, the role of a national Ministry of Cooperatives is limited to the preparation of the National Policy for cooperatives and dealing with national-level cooperative bodies.

18. See 13th Amendment to the Constitution: List I, Items 17:1 to 17:4.

- (b) Provincial economic planning and rural development are devolved under the 13th Amendment.¹⁹ Yet in the April and November Cabinets, rural community development is retained within the functions of a national ministry,²⁰ which deals only with this one project. Additionally, there is a Senior Minister for Rural Affairs. The same is true of the regulation of road passenger carriage services, a PC subject (13th Amendment, List I: Item 8) that could be undermined by the newly-created Ministry of Private Transport Services. Instead of a whole ministry, a minor department could have carried out these functions.
- (c) The requirement for the PC to obtain line ministry concurrence before statutes are passed or to issue circulars dictated by the Cabinet of Ministers²¹ is a glaring instance of encroachment of the powers of the PCs.
- (d) Another violation of devolution provisions is the division of the country into six regions and the appointment of zonal ministers functioning under the guidance of the Ministry of Nation Building to supervise the Gama Neguma (Village Uplift programme). This entire process was made the responsibility of the zonal ministers,²² thereby totally ignoring the existence of the PCs. This provides opportunities for parliamentarians to encroach on PC functions relating to economic, social and cultural matters. These new appointments are not provided for by the 13th Amendment and could be perceived as a means of circumventing the constitutional provisions for devolution.

19. Ibid: Items 2 and 10

20. Ministry of Livestock and Rural Community Development

21. Cabinet decision made on September 29, 2010 on Cabinet memorandum numbered 10/2222/412/004

22. Yatawara, Dhaneshi, "Gama Neguma targets better living conditions." The Sunday Observer . 7 June 2009

'Senior Minister' appointments

President Rajapaksa seems to have strategically kept the elder ministers content by appointing them as Senior Ministers but minus any governmental portfolio. The November Cabinet includes nine such ministers who possess extensive political experience, have enjoyed senior positions of power and deserve to be called Senior Ministers. For instance, they include a former Prime Minister, veteran parliamentarians, two heads of parties that are long-standing coalition partners and another who is highly educated and experienced in governance.

After their appointments there was an announcement that the Senior Ministers would be delegated some powers, but up to the end of the period under review, such delegation has not happened. The only publicly known delegation of power was to Senior Minister Ratnasiri Wickremanayake to represent the President at an official function in Brazil. While these Ministers saw a reduction of their functions and institutional responsibilities, the state continues to meet the cost of their offices.

An argument submitted by the opposition is that the appointment of Senior Ministers is illegal as the Constitution does not permit them. This has to be contested in court for interpretation. Another impression created was that the concept of appointing Senior Ministers was based on the Singaporean model. In Singapore, such positions are filled by a Prime Minister or Senior Cabinet Minister who relinquishes his or her post but still has something to contribute to the government based on long experience.²³ Sri Lanka's appointments do not match these criteria.

Conclusion

The Cabinets constitutionally appointed in 2010 unfortunately reveal several aspects of weak governance. Compliance with good governance principles of 'legitimacy' and 'voice transmitted by participation' is poor due to the manner in which ministers have been selected and subjects/functions assigned. Senior Ministers are reduced to passive participants in the Cabinet process.

23. en.wikipedia.org/wiki/Senior_Minister

With some ministerial assignments seeming to undermine constitutionally enshrined devolution, one may even wonder whether the Rule of Law is honoured.

The selection of ministers shows lack of fairness with regard to seniority, experience etc., and lack of equity that could be judged from the allocation of institutions, laws to be implemented by them and budgets provided. There is a common public perception that this is all due to 'political manipulations'. Some ministers have been allocated extensive responsibilities and institutions with vast resources, while others like the Senior Ministers, are sidelined and made impotent in all these aspects. Additionally, the inclusion of ethnic Tamil Cabinet Ministers is demographically less than proportionate, though this need not be a criterion for appointment as ministers.

The accountability principle, too, is negatively affected due to the ad hoc manner in which ministerial assignments have been made with seemingly little consideration for representation, competence and cohesive portfolios. Additionally, constitutional immunity enjoyed by the President who holds unmatched powers will not permit legal action, if transparency or accountability to the public and institutional stakeholders is violated by him. In his capacity as Minister of Finance, he may freely monopolize resources for his ministries, which capacity shatters the good governance principle of Equity.

These weaknesses have to be looked at from another angle due to the challenges faced by the government. The proof of successful familial efficiencies (e.g. in war) might have created the confidence to overload certain confidantes, as observed by the quoted external commentators.

However, if the governmental authorities act in accordance with constitutional and good governance principles, these shortcomings could be countered. The final outcome should be a people-oriented, constitutional, legal and democratic governance-bound Cabinet operation to execute state policies, with responsibility to Parliament. It is the constitutional requirement and the government's responsibility. It is clear that the authorities have a long way to go to achieve such heights in governance.

Chapter 3

Crossovers give short shrift to voters

Elmore Perera

Democracy as a form of government has been defined by Dicey as one “in which the governing body is comparatively a large fraction of the entire nation”. According to Abraham Lincoln, it is “a government of the people, by the people, for the people, by all, for all”. In the words of Bryce, it denotes “that form of government in which the ruling power of a state is legally vested, not only in any particular class or classes, but in the members of the community as a whole”.¹

There are two types of democracy, viz. direct and indirect or representative. Direct democracy existed in Greek and Roman city states in ancient times. As modern states are huge in size and population, direct democracy is inconceivable and the people govern these states indirectly through popularly-elected representatives. The will of states is formulated and expressed not through the people directly but through their representatives in whom they repose confidence. This type of democracy rests on the principle that though sovereignty belongs to the people, it is their representatives who exercise it. These representatives, elected periodically, are responsible to the people who can oust them at periodical elections if they do not come up to their expectations. Hence, these representatives govern the people as their trustees. In liberal democratic theory, political power is considered a trust, not an entitlement. As such the representatives have to be responsive to public opinion for fear of being deprived of a place in the legislature when the next election takes place. In representative democracy, parties play a vital role as they articulate and organize the will of the people and act as the channel of communication between the government and the governed.

In liberal democracies, Parliament is vested with sovereignty constitutionally. It should be a representative institution that accurately reflects the will of the people. Its main task is to secure full discussion and ventilation of all matters.

1. Aggrawal, et. al, 1998.

It is the custodian of the liberties of the people. The legislature needs to have persons of integrity who are willing and able to perform the functions expected of Members of Parliament (MPs). According to Sir Ivor Jennings they should be persons who could pay for the privilege of being an MP.

Despite differences in position, there are certain important functions such as representing the voters, making laws and policies, controlling the Executive, amending the Constitution, making budgets, etc. which the legislature performs. The success of Parliament as a democratic institution depends on the quality and intensity of debate within it. The Parliament should consist of people who are genuinely concerned about policy issues, reflect on the burning issues of the day and decide in favour of the well-being of the people. Sadly, however, the flawed electoral process and the benefits an MP now enjoys, attract the wrong persons who are solely bent on exploiting those benefits. The lack of basic qualifying criteria for an MP has had disastrous consequences.

The situation in Sri Lanka

Under the 1978 Constitution, sovereignty is inalienable and vested in the people. People elect a President (to exercise their Executive power) and MPs (to exercise their legislative power directly and their judicial power through courts) as stewards of their sovereignty. However, in practice, Sri Lankan voters have realized that their sovereignty is not represented. They are sovereign only during elections, but that sovereignty vanishes thereafter. People realize that “the power of money, more often than not, overtakes and vanquishes the power of the people. The people are many and their power is diffused. It takes time to harness it. The power of money is concentrated in a few and it is closely knit when the few realize they are losing all their privileges. They have got the means to corrupt and to organize their strategies”.²

Deterioration of sovereignty of the legislature

In 1987, MPs Chandra Kumara Wijaya Gunawardena and Mahinda Yapa Abeywardena abstained from voting for the 13th Amendment, were expelled from the United National Party (UNP) and appealed to the Supreme Court (SC). Chief Justice (CJ) S. Sharvananda opined that “democracy has

2. T.W. Rajaratnam: “A Judiciary in Crisis?”, 1988 Kumaran Pathippagam Publishers, page 7

assigned to individual MPs the role of a cog-in-the-party-wheel, where the MP becomes little more than a rubber-stamp for party decisions” and determined the expulsions valid. In 1988, the 14th Amendment introduced the National List for party nominees. Electors could indicate preferences for district party candidates. In July 1991, Justice Sarath N. Silva in dismissing Y.P. de Silva’s application for a Writ of Mandamus in relation to a nomination to fill a vacancy, opined that “political parties were essentially unincorporated, private, voluntary organizations of members, regulated by their constitutions and although there was considerable public interest in their activities and the Elections Act recognized them for the purpose of elections, they do not convert into public authorities”. In September 1991, the UNP expelled Gamini Dissanayake, Lalith Athulathmudali and others for moving to impeach President R. Premadasa. Justice K.M.M.V. Kulatunga opined that in this country the electors elect under conditions of turmoil and death, a government for six years. It is then the duty of both the opposition and the government, owed to the people, to ensure as far as possible a stable government.

The 1978 Constitution has frozen party composition in the House for the duration of Parliament and made provision for the vacation of seats where an MP ceases to be a member of the party/group which nominated him. The SC observed that because the party carries the mandate of the electors and, in turn, gives a mandate to the MP, the rights of the MP are subordinate to party discipline and the Constitution confers primacy to the party vis-à-vis the MP, and held all expulsions valid. The subsequent attitude of the courts in this matter has significantly contributed to a situation where MPs crossover at will but do not vacate their seats as the existing laws can be interpreted to let them do so. An unprecedented number of MPs have crossed over in 2010, within months of the election.

Appendix I contains the lists of MPs who crossed over from the opposition to the government and vice versa from 1999 to 2009 and Appendix II contains the lists of MPs supporting the government and the opposition as of January 16, 2010, prior to the dissolution of Parliament on February 9, 2010.

Analysis of expulsion determinations

When an MP criticizes his own party or the party policy in Parliament, disciplinary action against the MP or a change of party by the MP himself/herself usually follows.

Regarding the expulsion of Dr. Neville Fernando, Lalith Athulathmudali stated in Parliament that “the second red herring was that MPs have no right to criticize. What is this kind of nonsense? Are we living in the era of Independent MPs of the Donoughmore Constitution? In this system if you join a party you have to accept the discipline of it. There was a lot of talk about the independence of MPs to criticize the Party. Are you going to tolerate in this country, in parliamentary democracy, party democracy, MPs having the right to get up and criticize their party? Are we going to tolerate MPs of our party criticizing our party in the House? If that is so let us say we do not want party democracy. Then we can go back to the Pre Donoughmore era or the Donoughmore era in the early stages” (Hansard of December 23, 1981).

In 1988, CJ Sharvananda’s opinion about the role of an MP was institutionalized by the introduction of a National List of party nominees by the 14th Amendment. In 1991, the SC held that the Constitution confers primacy to the party vis-à-vis the MP as the party carries the mandate of the electors and the party gives a mandate to the MPs. In 1999, when the UNP nominated its leader as a candidate for the Presidential Election and Sarath Amunugama and others met President Chandrika Kumaratunga at Temple Trees and assured their support for her candidature, they were summarily expelled from the UNP. In a radical departure from the consistently held view of the primacy of the party, the expulsions were declared invalid by the SC on the basis that the principles of natural justice had not been observed. The UNP inserted Clause 3.4 in its constitution specifically providing that any member accepting office in an administration formed by another party, shall ipso facto cease to be a member.

In 2000, Justice J.A.N. de Silva held in *Gunasiri v SLMP & others* that when a member loses his membership in one of the constituent parties of the People’s Alliance (PA), expulsion from the PA is automatic in terms of the PA constitution. However, the SC invalidated the expulsion of Hussein Bhaila from the Sri Lanka Muslim Congress (SLMC) on August 24, 2004 citing natural justice. The expulsions of Abdul Majeed, Risath Badhiutheen and Ameer Ali, all opposition MPs who supported President Kumaratunga’s National Advisory Council for Peace and Reconciliation and accepted project ministerial portfolios from her on October 30, 2004 were invalidated by CJ S.N. Silva as being contrary to natural justice, mala fide and ultra vires the SLMC constitution. He held that an MP could not be expelled save on cogent grounds which are, beyond doubt, in the public interest. On November 18, 2004 ipso facto cessation of Rohitha Bogollagama’s UNP membership

in terms of Clause 3.4 of its constitution was invalidated by the SC in a convoluted determination on the basis that Clause 3.4 of the UNP constitution was inconsistent with Article 99(13)(a) of the Constitution. On April 5, 2005, the SC invalidated Hussein Bhaila's purported expulsions from the SLMC and the UNP.

On January 16, 2006, the SC reiterated that Clause 3.4 of the UNP constitution was inconsistent with Article 99(13)(a) of the Constitution and invalidated the expulsions of Keheliya Rambukwella and Mahinda Samarasinghe. In his judgment, CJ Silva stated "in view of the change of the electoral system effected by the 14th Amendment the review of the validity of a decision of expulsion has to be, in my view, now considered not only from the perspective of a vacation of the seat of the MP but also from the perspective of the impact on the electorate from which he was declared elected on the basis of preference votes cast in his favour". However, the SC failed to consider the consequences of accepting a ministerial portfolio and also the genuine political conscience of the petitioner. The CJ noted that the basic nature of a political party being akin to that of a "club", that the relationship between the members and the party being one of contract, was a subject in the realm of private law is correct. However, the SC held that the standard of review of a decision of expulsion should be akin to that applicable to the review of the action of an authority empowered to decide on the rights of persons in public law -- a far cry from his above-mentioned pronouncement in Y.P. de Silva's case in 1991 that political parties do not convert into public authorities."

Ranjith Aluvihare and Alick Aluvihare were elected to the two seats won by the UNP at the Parliamentary Election in 2004 at which Nandimithra Ekanayake obtained the third highest and Rohana Bandaranayake the fourth highest number of preference votes. Ekanayake resigned from the UNP, joined the UPFA and got elected to the Provincial Council on February 14, 2009. When Alick Aluvihara died on May 16, 2009, Bandaranayake sought a declaration that the appointment of Ekanayake to fill this vacancy would be an infringement of his fundamental rights as Ekanayake was not entitled to be appointed. The SC dismissed the application without even granting him leave to proceed. Ekanayake was declared elected from the UNP list, sat in the opposition for a few days and later crossed over to the government on December 8, 2009.

Conclusion

The electoral process is intended to enable the sovereign people to elect as their representatives, 225 MPs to be entrusted with their legislative and judicial power. A by-election was an important yardstick that provided an assessment of public opinion during the mid-term of a government. However, now 29 are nominated from the National Lists of party/group nominees. While it may be correct to say that the party holds the mandate of the people in respect of those 29 elected from the National List, a substantial part of the people's mandate is held by the 196 MPs elected by preference votes cast in their favour. The individual responsibility of an MP towards his constituents should not be undermined at any time. He should be able to exercise his political conscience freely for the betterment of society.

Formerly crossovers, invariably from the government to the opposition on matters of principle, were rare. Today, crossovers from the opposition to the government, invariably rewarded by the withdrawal of charges pending with regard to embezzlement, fraud or even murder and granting of ministerial portfolios, perks and privileges, are commonplace. Crossovers by opposition MPs adversely affect democracy and the business of Parliament. Without crossing over, opposition MPs have a vital role in Parliament to safeguard democracy by controlling the excesses of the government within a democratic framework for the benefit of the masses and providing electors with a credible alternative. The risk of political opportunism by crossing-over poses a greater threat to democracy and participatory governance than the limitation of freedom of conscience and expression of MPs in the House. An opportunistic or misguided member who defects from his party not only fails to represent his constituents but actually works against their interests.

The MP changing party allegiance and accepting ministerial portfolios goes beyond personal and narrow considerations. Considering the above judgments, it is clear that the judiciary has failed to consider the real effect of the Proportional Representation (PR) system and the Constitution does not provide adequate protection for the voters and the votes cast in favour of their respective parties. Moreover, the judiciary has shown its inability to protect the sovereign right of the voter. The whole philosophy that underlies constitutional provisions regarding Parliament should always be interpreted for the protection of representative democracy and against the MPs who change their party allegiance for what seems to be personal benefits, without a proper mandate from the constituents. If the SC had adopted this theory

in recent ‘expulsion cases’ in which the respective petitioners crossed over to accept ministerial portfolios, then the decisions of those cases would have been significantly different. Sadly, however, all SC decisions favoured the ruling party. The SC, without limiting itself to issues of rules of natural justice, should have gone beyond and inquired into the subsequent conduct of the expelled MPs, to test their bona fides by measuring such conduct against the stated reason for their defections. This is warranted as the interests and expectations of the electors must necessarily be a deciding factor in expulsion proceedings, as the voter has no legal remedy or recourse (as the jurisprudence stands now) to hold the relevant MP accountable unless and until he presents himself as a candidate at a subsequent election. The 18th Amendment which the SC, in great haste determined did not need the people’s approval at a referendum notwithstanding the fact that it irrevocably undermined the sovereignty of the people by removing all safeguards introduced by the 17th Amendment, was passed with the votes of 16 opposition MPs, viz. eight SLMC MPs, seven UNP MPs and one Tamil National Alliance (TNA) MP elected to the opposition a few months earlier. This disregard of electoral promises seriously undermines trust in the electoral process, leading to cynicism and disillusionment with the political system and jeopardizes the viability of democracy. In Sri Lanka, the President has sole discretion in appointing ministers, removing portfolios, dissolving Parliament and appointing special commissions against officers including MPs. The MPs of the President’s party will rarely dare to defy the party whip for fear of adverse “Executive” action. By seemingly lawful measures the President has, without any restraint, abused state resources extensively to effectively wield the carrot and stick at will, to ensure allegiance to himself.

This is clearly evident in the legislature which has been effectively reduced to the status of a rubber stamp or just a “talking shop” with most MPs overtly and unashamedly falling over each other to merit the goodwill of the President. Growing public perception is that a similar malaise is increasingly afflicting the judiciary whose constitutional responsibility entrusted to them by the people is to act in a manner to safeguard the interests of the people. Several judgments have regrettably become judge-made law.

Unless and until there is a stricter separation of powers, the supremacy of the legislature and independence of the judiciary restored and electoral laws amended drastically, this circus is likely to continue. Tinkering with electoral laws in the interim is not likely to be fruitful. The arbitrary suppression of the Parliamentary Select Committee proposals for the abolition of the PR system and other electoral reforms placed before Parliament is proof of this.

Appendix I

Crossover of MPs between 1999 and 2009

From the opposition to the government party	Date
Sarath Amunugama, Nanda Matthew, Wijepala Mendis, Susil Moonasinghe and Chula Bandara UNP	08.11.1999
Harindra Corea UNP	07.08.2004
Hussein Ahmed Bhaila, SLMC	18.05.2004
M.S. Sellasamy, Muthu Sivalingam and six others UNP-CWC	10.09.2004
M.N. Abdul Majeed, Risadh Badhiutheen, and M.S.S. Ameer Ali SLMC	30.10.2004
Rohitha Bogollagama UNP	18.11.2004
Suresh Avider UNP-CWC	14.12.2005
Keheliya Rambukwella and Mahinda Samarasinghe UNP	25.01.2006
Faizer Mustapha UNP-CWC	30.01.2006
Susantha PUNCHINILAME UNP	06.07.2006
Karu Jayasuriya, P. Dayaratna, Dharmadasa Banda, M.H. Mohamed, G.L. Peiris, Gamini Lokuge, Bandula Gunawardane, Rajitha Senaratne, Mahinda Wijesekera, Milinda Moragoda, Hemakumara Nanayakkara, Lakshman Yapa Abeywardena, Navin Dissanayake, Mano Wijeratne, Chandrasiri Sooriyaarachchi, M.M. Mustafa and Neomal Perera UNP	28.01.2007
Nandimithra Ekanayake UNP	18.12.2009
From the government to the opposition	Date
Ravi Karunanayake	11.04.1999
Vasudeva Nanayakkara	21.04.1999
Dixon J. Perera	07.08.2000
Rauf Hakeem, A.L.M. Athallah, M.B.M. Abdul Cader, Noordeen Mashoor, M.S. Thawfeek, Basheer Segubawood, Rizvi Sinnalebbe	20.06.2001
Bandula Gunawardena	09.10.2001
Bandula Parakrama Gunawardena, G.L. Peiris, S.B. Dissanayake, Mahinda Wijesekera, Wijayapala Mendis, Ediriweera Premaratne, Ananda Munasinghe and Jayasundera Wijekoon	10.10.2001
Edward Gunasekera	03.04.2007
Mangala Samaraweera and Sripathi Suriyarachchi	17.06.2007
Wijeyadasa Rajapakse	14.11.2007
Anura Bandaranaike, Rauf Hakeem, Faizal Cassim, Basheer Segu Dawood, Hussain Ali	12.12.2007

Appendix II

Opposition MPs supporting the government and government MPs supporting the opposition as of January 16, 2010 in the Sixth Parliament dissolved by the President on February 9, 2010.

Opposition MPs Supporting the Government

UNP MPs	From
Rohitha Bogollagama	18.11.2004
Mahinda Samarasinghe and Keheliya Rambukwella	25.01.2006
Susantha PUNCHINILAME	06.07.2006
W.B. Ekanayake	28.07.2006
Lionel Premasiri	02.08.2006
P. Dayaratna, Dharmadasa Banda, M.H. Mohamed, G.L. Peiris, Gamini Lokuge, Bandula Gunawardane, Rajitha Senaratne, Mahinda Wijsekera, Milinda Moragoda, Hemakumara Nanayakkara, Lakshman Yapa Abeywardena, Navin Dissanayake, Mano Wijeratne, Chandrasiri Sooriyaarachchi, M.M. Mustafa and Neomal Perera (16 persons)	28.01.2007
Mahinda Ratnatilaka	15.11.2007
Nandimithra Ekanayake	09.06.2009
Johnston Fernando and Indika Bandaranayake	16.12.2009
CWC MPs	
Arumugam Thondaman, Muthu Sivalingam, Shanmugam Jegatheeswaran, Vadivel Suresh, Faizer Musthapha and Puththirasigamoney Vadivel	30.11.2006
SLMC MPs	
Abdul Bais and M. Nijamudeen, National Congress MPs A.L.M. Athaulla	
ACMC MPs	
Hussain Ahmed Bhaila, M.N. Abdul Majeed, Abdul Risad Badhiutheen and M.S.S. Ameer Ali	
UCPF MPs	
P. Chandresekeran, Sandanam Arulsami and P Radhakrishnan	28.11.2006
JVP MPs	
A.R. Anjan Umma	26.06.2008
Wimal Weerawansa, Nandana Gunatilake, Jayantha Samaraweera, Piyasiri Wijenayake, Deepal Gunasekera, Achala Suranga Jagodage, Mohamed Mussammil, Padma Udayashantha Gunasekera, N.D. Nimal Jayasinghe, Samansiri Herath, and P. Weerakumara Dissanayake (11 persons)	28.12.2008
Independent MPs	
Ven. Uduwe Dhammaloka Thero	

Government MPs supporting the opposition

CWC MPs	From
M.S. Sellasamy and Murugan Satchithanandan	
SLFP MPs	
Mangala Samaraweera	19.06.2007
Wijeyadasa Rajapakshe	14.11.2007
Arjuna Ranatunga	18.12.2008
SLMC MPs	
Rauf Hakeem, M.T. Hasen Ali and Mohamed Faizal Cassim	12.12.2007
Abdul Majeed Mohamed Nuoshad	07.04.2008
WPF MPs	
Mano Ganeshan	
NUA MPs	
M.H. Cegu Isadean	

Chapter 4

Elections in 2010 -- integrity of system in question

Hiroshi Gunathilake and Saro Thiruppathy

This chapter assesses the conduct and outcome of the two major national-level elections held in Sri Lanka during the period under review -- the Presidential Election on January 26, 2010, followed by the Parliamentary General Election on April 8. (Elections for several polling divisions in the latter were also held on April 20). Since the 1970s, Sri Lanka's experience of elections at various levels of governance has been of concern over incidences of alleged irregularities, varying levels of violence and undermining of the electoral process.

2010 was also a year of sweeping changes to the institutional and legal framework of the electoral system. This chapter looks at the framework for the conduct of electoral exercises as it existed in 2010, the institutional shortcomings and the impact on certain vulnerable sections of the citizenry. Some recommendations for the improvement of the elections system are made for consideration by the relevant stakeholders.

As at 2010, there were 14,088,500¹ persons eligible to vote in these two elections. There were 11,102² polling stations countrywide. The President is elected for a six-year term. The Constitution originally limited the tenure of the President to two consecutive terms, but after the 18th Amendment, a person can now contest and hold office for an unlimited number of terms. Sri Lanka's Parliament has 225 seats of which 196 Members are directly elected and 29 nominated by political parties. The latter is based on the proportion of votes each party obtains at the polls.

1. Parliamentary Elections 2010 Final Report (PAFFREL, Colombo 2010), page16.

2. Ibid page16

This assessment of the conduct of these two elections is made with reference to the following set of “free and fair election” parameters as defined by the elections watchdog, the People’s Action for Free & Fair Elections (PAFFREL):³

1. An environment free from violence and intimidation for candidates, their supporters and voters before, during and after elections.
2. A level playing field for all candidates regardless of race, religion, caste, gender or political affiliation, where voters can make informed choices.
3. An independent election administration with sufficient space for maximum participation of all stakeholders including civil society organizations.
4. Meets international standards through the implementation of election laws which incorporate the objectives of the international covenants and rules to which the state has become a party.
5. Open, transparent, accessible and competitive.
6. Mass media (state and private) that provide opportunities for exchange of diverse ideas and objectives.
7. Rules that assure justice, opportunities to seek legal redress easily and efficiently and are applied evenly.
8. Parties respect rules and demonstrate leadership in peaceful campaigning.

Elections system

Legal framework

Sri Lanka is a signatory to key international legal instruments relating to the conduct of elections, including the UN Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention on the Elimination of Discrimination Against Women and the Convention for the Elimination of Racial Discrimination.

3. Ibid p. 9.

Sri Lanka's own election-related legislation reflects its international obligations and the key laws governing the conduct of the Presidential polls are: The Constitution of the Democratic Socialist Republic of Sri Lanka (1978, as amended) and the Presidential Elections Act (No. 15, 1981, as amended). The law governing parliamentary elections is the Parliamentary Elections Act No. 1 of 1981 and the Parliamentary Elections (Amendment) Act No. 58 of 2009. Separate laws exist for provincial and local government elections as well.

Institutional structure

The 17th Amendment to the Constitution provided for the establishment of an independent Elections Commission with wide-ranging powers. However, as at 2010, the 17th Amendment of 2001 was yet to be implemented with regard to the establishment of an Elections Commission. The Supreme Court (SC) had ruled that the powers foreseen in the 17th Amendment for the Elections Commission could, in the meantime, be assumed by the Commissioner of Elections. The Commissioner of Elections and his department are empowered to conduct elections at all levels of representative government in the country.

Assistant Elections Commissioners are appointed for each of the 22 electoral districts. They act as Assistant Returning Officers and are in charge of organizing the elections in the districts as the representatives of the Commissioner of Elections.

While the 17th Amendment was active during the period of the two elections held in 2010, in September of the same year, the 18th Amendment which repealed it was passed by Parliament. As such, the powers of the Elections Commission have been drastically reduced and changed. Rather than the consensual selection and appointment of the Elections Commission via the bi-partisan Constitutional Council under the 17th Amendment, the 18th Amendment gives the President the power to select and appoint the commission in consultation with the newly-formed Parliamentary Council also established under the 18th Amendment.

The Elections Commissioner has the power under the 17th Amendment to:

- (a) Prohibit the use of state/public property for the promotion of any candidate/party.
- (b) Provide binding media guidelines for public broadcasters.
- (c) Appoint a Competent Authority to takeover the management of public broadcasters in the event of a violation.

- (d) Notify the Inspector General of Police of the required numbers of police for election duties and instruct on such deployment.
- (e) Make recommendations to the Executive on the deployment of the armed forces as required.

However, through the enactment of the 18th Amendment on September 8, 2010, the Elections Commissioner no longer has the power to prevent the abuse of state resources during elections or to oversee and restrict transfers of public officers during an election period.

National political context of elections

Intertwined with the staging of these elections were the aftermath of Sri Lanka's internal war which ended in May 2009 and the social consequences of the ethnic conflict, especially the vast numbers of displaced voters.

In what was widely seen as a bid to capitalize on the wave of popularity that he was enjoying as a result of the military victory, President Mahinda Rajapaksa chose to call a Presidential Election in January 2010 even though his term of office would have expired only in November 2011. The decision for an early election was within the provisions of the Constitution. In any case, no formal reason, such as the interests of governance (or national development), was given for the early election.

Following Rajapaksa's triumph in the Presidential Election, Parliament was dissolved and a General Election called for April 8, 2010. It was the first General Election held in Sri Lanka following the conclusion of the 30-year civil war. However, due to violations of election laws, a re-poll was conducted in Nawalapitiya and Trincomalee on April 20, 2010.

Sri Lanka has been governed under emergency law since 2005, a fact that has implications for the conduct of elections in terms of the degree of freedom and basic rights for political campaigning.

Communities displaced by war

A key element in both the Presidential and Parliamentary Elections was the issue of internally displaced persons (IDPs) and their democratic freedoms and rights. The military hostilities in the north up to May 2009 had resulted in the displacement of almost 300,000 persons,⁴ the majority of whom were accommodated in temporary camps, while others lived with friends and relatives in host communities. Whole populations of administrative divisions were displaced and dispersed. At the time of the elections, almost 100,000 still remained in camps⁵ and it was the responsibility of the government to ensure that they as well as the newly re-settled were provided with the required identification documentation, voter registration facilities and mobility to cast their vote, thereby protecting their democratic right to exercise their franchise. These issues have implications for voter participation which are discussed below.

Political participation

Once again, a large number of parties, political groups and candidates, representing a broad range of political interests and ideologies contested both elections, indicating a continued high degree of political participation in the country. Nevertheless, whether all these candidates and groups enjoy equal opportunities and facilities in the electoral contest is increasingly coming into question given the worsening record of political violence, irregularities and abuse of power, as is discussed below.

Presidential Election 2010

Any person who is qualified to be an elector can be nominated as a candidate at a Presidential Election, but in addition to the qualifications stipulated for voters, a candidate must also be at least 30 years of age. Candidates can be nominated by a recognized party, an unrecognized party or by a fellow citizen. The 2010 Presidential Election list of candidates originally had 23 nominated candidates but only 22 qualified as registered candidates. Even though retired Army Commander General Sarath Fonseka was not registered to vote, the Commissioner issued a statement that since he is qualified to be a voter, he was eligible to be a candidate.

Twenty-two candidates,⁶ the highest number yet in a Sri Lankan Presidential Election, handed in their nominations on December 17, 2009. Despite the

4. Commonwealth Secretariat: Sri Lanka Presidential Election Report - January 26, 2010, page 5.

5. Ibid page 5.

6. Ibid page 9.

large number of candidates, the contest was generally perceived as being a race between President Rajapaksa and Gen. Fonseka.

Three major opposition political parties, the United National Party (UNP), the Janatha Vimukthi Peramuna (JVP) and the Tamil National Alliance (TNA), came together to support a 'Common Candidate', Gen. Fonseka. An arrangement was reached whereby Gen. Fonseka contested as a common opposition candidate, as a member of the New Democratic Front – a relatively minor party which had not been politically active for some time.

The voter turnout at the Presidential Election was recorded as 74.5%, with 10,495,451 voters casting their votes from among 14,088,500 registered voters. President Rajapaksa was elected to a second term with 6,015,934 votes (57.88%) while Gen. Fonseka came in second with 4,173,185 votes (40.15%).⁷

Parliamentary Election 2010

A total of 336 political parties and 301 independent groups submitted nominations for their candidates for the Parliamentary Election amounting to 7,620 candidates vying for 196 parliamentary seats.⁸ The main parties contesting the election were the party of President Rajapaksa, the ruling United People's Freedom Alliance (UPFA), the main opposition United National Front (UNF) and the Democratic National Alliance (DNA) of Sarath Fonseka. The UPFA, UNF and DNA contested in all 22 electoral districts while the TNA contested in the five districts in the north and the east. The UNF contested under the name and symbol of the UNP, as it had done in the previous two parliamentary elections. The TNA contested under the name and symbol of the Illankai Tamil Arasu Kachchi (ITAK), as it did in the previous parliamentary election.

While all the constituent parties of the ruling UPFA contested under its unified banner, the parliamentary opposition parties, the UNF, the JVP and the TNA, which had come together to support the common opposition candidate Sarath Fonseka at the Presidential Election, were unable to form a common alliance. Therefore, the UNF and the TNA contested independently, while Fonseka and the JVP formed a new alliance, the DNA. Fonseka was the DNA's chief candidate in the Colombo district.

7. Ibid page 26.

8. Parliamentary Elections 2010 Final Report (PAFFREL, Colombo 2010), page 4.

Of 14,088,500 registered voters, a total of 8,630,689 votes were polled with the total valid votes polled being 8,033,717.⁹ The total number of rejected votes was 596,972 (6.92%).¹⁰ Voter turnout was registered at 61.26%.¹¹ It appears that, in a short space of three months, the voter turnout declined by 13.24% from 74.5% at the Presidential Election¹² to 61.26% at the Parliamentary Election.¹³ This decline could be due to election fatigue as well as disenchantment with the electoral processes.

Issues affecting the integrity of the elections

Voting rights of IDPs

Sri Lanka has universal franchise and to be eligible to vote in an election a person must be a citizen of Sri Lanka, at least 18 years of age and ordinarily resident at their designated address. The elections in 2010 were held on the basis of the 2008 Electoral Register.

Significantly, due to the prevailing conflict conditions in 2008, normal enumeration could not be conducted in the Northern Province and parts of the Eastern Province. Therefore, the names in the previous voter registers were used instead of updated electoral registers in these regions. The District Registering Offices did provide a period for submitting claims and objections, while the names of deceased persons were deleted from the list. Due to the high numbers of IDPs, using an outdated voter register which did not provide for new eligible voters to cast their votes implies a serious limitation.

The total number of registered voters according to the operative electoral register of 2008 was 14,088,500 voters.

(a) Presidential Election

Location problems: At the end of the military campaign against the Liberation Tigers of Tamil Eelam (LTTE), almost 300,000 IDPs were placed in enclosed camps or “welfare villages” while several thousand suspected LTTE cadres were housed in detention centres. Despite the speeding up of

9. Parliamentary Elections 2010 Final Report (PAFFREL, Colombo 2010), page 38.

10. Ibid page 38

11. Ibid page 38

12. Commonwealth Secretariat: Sri Lanka Presidential Election Report - January 26, 2010, page 26

13. CMEV: Final Report on Election Related Violence – Presidential Election, January 2010, page 1

the re-settlement process, at the time of the election, over 100,000¹⁴ people still remained in the camps. Of those re-settled, many were in their areas of origin, while others were living with host families or in transit centres.

Voter registration: While the state authorities had made some efforts to raise awareness on the voting process for IDPs, many remained unaware of the requirements of the Elections Department with regard to the application process and marking the ballot paper correctly to ensure the integrity of their vote. In accordance with Section 127B of the Parliamentary Elections Act No. 1 of 1981 and Section 119B of the Presidential Elections Act No. 15 of 1988, the Elections Commissioner had issued a notice in Sinhala and Tamil on November 15, 2009, calling for applications from those who are unable to vote at their designated polling stations. The deadline for applications was initially December 10, 2009, but was later extended to December 17 and then December 23, since the rate of applications was low in comparison to the large number of displaced voters.¹⁵

Expectations of rapid re-settlement, confusion among IDPs regarding the application process and the fact that sections of the displaced population were located outside the north and the east, resulted in the number of voter registration applications by IDPs amounting to a mere 31,758.¹⁶ In the Trincomalee district, of a total of 241,133 registered voters some 50,000 national identity card (NIC) numbers had not been recorded in the voter register.¹⁷ In Batticaloa, of the total of 333,644 registered voters, around 40,000 NIC numbers were not in the voter register.¹⁸

Identification documentation failures: Identification documentation recognized for voting was the NIC, passport, driving licence, government pensioner's ID card, elder's ID card, clergy ID card and temporary ID card issued by the Department of Registration of Persons for the previous Provincial Council election. Additionally, in the absence of any of these identification documents, the Elections Commissioner had issued a statement that any person not possessing any of the stipulated documents

14. Commonwealth Secretariat: Sri Lanka Presidential Election Report - January 26, 2010, page 5.

15. CMEV: Final Report on Election Related Violence, Presidential Election, January 2010, page 6.

16. Ibid page 7.

17. Ibid page 5.

18. Ibid page 5.

may apply for temporary identity cards. However, in some cases, such as in Allaipiddy,¹⁹ many who had applied for temporary ID cards, though promised, were not provided these in time and were, therefore, disenfranchised in the Presidential Election of 2010.

Transport failure: Another factor that contributed to the disenfranchisement of internally displaced voters was the travel arrangements to the polling booths organized by the government. In several instances, voters stood in line in the camps from 6 a.m. to 1 p.m. to be taken by bus to the polling booths. In one case, the buses only reached the camp at 1.30 p.m. and 300 IDPs were transported to Kilinochchi at 3.55 p.m. allowing them only five minutes to cast their vote. However, they were not allowed to cast their vote on the grounds that the polls had closed. The Centre for Monitoring Election Violence (CMEV) had been informed that these IDPs were stranded in Kilinochchi without accommodation or transport back to Vavuniya.²⁰

(b) Parliamentary Election

Identification documentation failures: It was estimated by PAFFREL that even at the time of the Parliamentary Election nearly three months later, more than 100,000 IDPs of the north housed in welfare camps did not possess any of the valid identity papers required for voting.²¹ A valid identity card was required for all voters to cast their ballots and seven different types of identity papers were accepted by the Elections Commissioner similar to the previous Presidential Election. However, some registered voters in the Vanni and plantation areas, were unable to obtain their identity cards in time. In addition, around 10,000 IDPs in the north did not receive adequate voter education and assistance for registering and obtaining valid identity cards.²² PAFFREL and other non-governmental organizations successfully managed registration, voter education and election day transport for 45,967 IDPs in both the north and the east.²³

19. Ibid page 12

20. Ibid page 60

21. Parliamentary Elections 2010 Final Report (PAFFREL, Colombo 2010), page 14.

22. Ibid page 19.

23. Ibid page 19.

Voter intimidation

(a) Presidential Election

Of a total of 178 election-related incidents²⁴ recorded on election day, 94 were classified as major incidents.²⁵ There were 26 cases of the presence of intimidators in the vicinity of polling stations in the Kandy district.²⁶ Of these, eight major incidents involved firearms.²⁷ The Kurunegala district recorded 36 major incidents, the highest in any district.²⁸

Party agents and members of the public have complained to the CMEV that party agents were assaulted and chased out of counting centres in a number of districts, such as Kurunegala, Anuradhapura, Polonnaruwa and Matale. Such incidents cast a doubt on the integrity of the tallying of votes and the legitimacy of the election results.

A series of explosions were reported in Jaffna on election day before polling commenced and immediately thereafter. Such incidents act as a deterrent to voter turnout, while lowering the morale of the war-affected people of the north. Voter intimidation is a denial of the people's fundamental right to exercise their franchise, thereby casting a slur on the entire democratic system.

(b) Parliamentary Election

During the campaign period, CMEV recorded a total of 413 verified incidents of which 231 were major, including 55 involving firearms.²⁹ Incidents of intra-party violence amounted to 86, while 49 verified instances of state property misuse for electioneering were reported.³⁰ In the casting of postal votes, 25 instances of irregularities were recorded by the CMEV.³¹ CMEV observers monitored a total of 6,972 polling stations (64% of the total number) on election day and recorded 524 incidents of violence and irregularities related to polling stations.³² During the post-election period, a total of 17 incidents were recorded of which 12 were categorized as major.³³

24. CMEV: Final Report on Election Related Violence, Presidential Election, January 2010, page 63.

25. Ibid page 63

26. Ibid page 63

27. Ibid page 63

28. Ibid page 63

29. CMEV: Final Report on Election Related Violence, Parliamentary Election, April 2010, page 2.

30. Ibid page 2.

31. Ibid page 2.

32. Ibid page 2.

33. Ibid page 2.

The highest number of incidents of intra-party violence within the UPFA was recorded in Puttalam, Ampara and Kalutara on election day.³⁴ While in most districts a relatively violence-free environment prevailed, a highly tense situation prevailed in polling stations in several electoral divisions of the Puttalam, Kandy, Kurunegala and Gampaha districts. Due to serious irregularities in 37 polling stations of the Nawalapitiya electorate and one in the Trincomalee electorate, the election results were annulled following a call by election observers.³⁵ A re-poll was subsequently conducted on April 20, 2010 in Nawalapitiya and Trincomalee.

Election violence and the role of the police

As the local law enforcement authority, the role of the police is fundamental towards maintaining law and order and crucial to ensuring the integrity of the electoral process. However, in spite of instructions issued by the Inspector General of Police (IGP), a common perception of the public and political party supporters is that the police do not act on incidents of election-related violence that are entered in the Election Information Book (EIB) maintained by them. The procedure that the police are expected to follow entails the recording of election-related complaints in the EIB, conducting speedy investigations into these complaints and reporting to the Magistrate Courts without delay. They are also supposed to update the police Divisional Operations Room on such complaints on a six-hourly basis.³⁶

However, even if the complaints are recorded in any other book such as the Minor Offence Information Book (MOIB) or the Complaints Information Book (CIB), the public perception is that the police are biased towards the government party and are reluctant to act on complaints. The CMEV has noted that the police refused to accept and record four complaints.

Transfer of police officers: Following the Presidential Election and prior to the Parliamentary Election, the print media reported that a number of senior police officers including 18 Deputy Inspectors General were transferred in a hitherto unprecedented move. Eight police officers had subsequently filed fundamental rights cases naming the Secretary of Defence, as one of the respondents in their plea against unjust interdiction from service.³⁷

34. Ibid page 3.

35. Parliamentary Elections 2010 Final Report (PAFFREL, Colombo 2010), page 5.

36. CMEV: Final Report on Election Related Violence, Presidential Election, January 2010, page 35.

37. CMEV: Final Report on Election Related Violence - Parliamentary Election, April 2010, page 4.

Perpetrators of violence and breach of the law

The political violence described above is but a repetition of patterns of inter-party and intra-party violence and intimidation that have evolved in recent decades during elections at all levels of government. The predominant perpetrators are groups and individuals who are members of contesting political parties – some even holding office in parties and others being supporters of individual party leaders, both local and national. Usually the bulk of the violence occurs during campaigning in the build-up to election day.

Data compiled by the CMEV, PAFFREL and other observer groups indicates that the pre-election violence entails a greater incidence of physical assault and even fatalities. On election day itself, the type of violence is more in the form of intimidation of voters and party activists and irregularities such as voter fraud, disruption of voting and raids on polling booths etc., although physical assault also occurs. The level of involvement of firearms has been pointed out by election monitors.

An aspect of the electoral system itself that contributes to the bitter and deadly intra-party violence is the preference voting system.³⁸

Party perpetrators of violence: The cumulative data gathered by election observers (including police data) based on allegations and witness information, attributes the bulk of the violence to the two main contesting political parties in the elections under discussion. In the 2010 Presidential Election, 452 incidents³⁹ are attributed to the governing UPFA and 71 to the main opposition NDF⁴⁰ (grouping the UNP and JVP). In the 2010 Parliamentary Election, 299 incidents⁴¹ are attributed to the UPFA and 23⁴² to the UNP.

38. CMEV: Monitoring election violence in Sri Lanka Parliamentary Election 2010: Media Communiqué 10 <http://cmev.wordpress.com/2010/04/05/monitoring-election-violence-in-sri-lanka-parliamentary-election-2010-media-communique-10/>

39. Ibid page 39

40. Ibid page 39

41. CMEV: Final Report on Election Related Violence, Presidential Election, January 2010, page 37.

42. Ibid page 37

The Commissioner of Elections and the 17th Amendment

Though the 17th Amendment was unanimously enacted by Parliament in October 2001, neither of the two Presidents serving since then has fully implemented it. The Elections Commission which is an integral part of the 17th Amendment was never established.

As such, public confidence in the electoral process has progressively diminished in the face of continued election period violence and malpractice and the failure to establish an independent, powerful institution to oversee and ensure that a free and fair election is conducted. The lack of such a strong mechanism has, instead, created the ideal environment for serious misuse of state resources, unfair election campaign practices and a tendency of police bias towards the ruling party.

As a stopgap measure, the SC ruled that the powers foreseen in the 17th Amendment for the Elections Commission could, in the interim, be assumed by the Commissioner of Elections. The Commissioner is to conduct “free and fair elections” and is charged with securing the enforcement of all laws relating to the holding of the election. These powers were explicitly vested in the person of the incumbent Commissioner of Elections, Dayananda Dissanayake, and not the office per se.⁴³

The Commissioner of Elections, however, seemed reluctant to exercise his powers – a case in point being the appointment and subsequent withdrawal of the Competent Authority charged with ensuring the non-partisan functioning of key state-owned mass media institutions. Furthermore, the Commissioner of Elections publicly stated that he was not receiving the full co-operation of certain state institutions, which were not complying with his guidelines and directives. Bias on the part of the state media and abuse of state resources by certain state institutions were two of the issues he specifically mentioned.⁴⁴

As a result, the credibility and independence of the office of the Elections Commissioner have suffered greatly.

43. Commonwealth Secretariat: Sri Lanka Presidential Election Report, January 26, 2010, page 8.

44. Ibid page 10

Casting and counting of votes

An observation made by the Commonwealth Secretariat’s Expert Team was that the secrecy of the vote is not adequately provided for, in many instances. The layout of the polling station and the location of the voting booths did not afford sufficient privacy to the voters. In addition, the presence of the police inside polling booths did not contribute to the integrity of the vote.

Given the experience of numerous allegations of malpractices and suspicion of fraud during the vote-count phase of the Presidential Election in January 2010, in the aftermath, various election observer groups and contesting political parties had requested the Elections Commissioner to, in future, allow election observers to be present at the counting centres to ensure the integrity of the counting process.⁴⁵ Permission had not been granted on the basis of lack of space. Monitoring access for observers during the counting phase, thereby, remained limited to the District Results Centres during the Parliamentary Election as well.

Abuse of election regulations

Political campaign posters, billboards and “cut-outs” depicting the candidates and their symbols are technically banned under electoral law except in the immediate vicinity of party offices. However, this prohibition was widely flouted in both elections – in terms of the scale of violations, particularly in relation to candidates of the party in power.

Under election law, during the Presidential Election, the Elections Department had stipulated that all permitted election posters had to be removed on January 23. But a department official was quoted in the press as saying that billboards and posters remained in place across the country and it was unlikely that any action could be taken regarding this.

45. CaFFE: Parliamentary Elections - Final Election Observation Report, 2010, page 36.

Abuse of public resources

During the Presidential Election, the Programme for the Protection of Public Resources (PPPR) documented instances of abuse or legally questionable use of public resources throughout the election campaign.

The prominent instances identified were:

- Use of the President's official residence for the entertainment of large numbers of people from different occupations/sectors.
- Use of government buildings, printing presses and transport (helicopters, trucks, buses) for campaign purposes.
- Use of public sector employees for campaign work.
- Use of the state mass media to almost exclusively promote the President's campaign. During the Parliamentary Election, even though the Elections Commissioner issued circular No. PE/2010/04 on February 17, 2010, to ensure that the news media gave balanced coverage to all the candidates and parties, it was generally observed that the state media did not follow the stipulated guidelines and acted in contravention.⁴⁶

46. TISL: Electoral Integrity 2010, page 91.

Need for equitable campaign financing

The continued absence of legislation on limits to and disclosure requirements on campaign financing results in extravagant expenditure on general political campaigning, a dependence on various interest groups that could then influence future governmental policy and does not ensure an equal playing field for all contestants.

For example, during the Presidential Election, the lack of any controls enabled the two main candidates to spend relatively large budgets on their campaigns. It has been estimated that the costs of direct advertising alone on behalf of the incumbent President totalled Rs. 378 million, while the Fonseka campaign spent Rs. 80 million.⁴⁷

Conclusions & recommendations

Some of the problems during both elections, notably abuses by state institutions, increasing politicization of the military and police and non-adherence to the rule of law, represent undesirable continuities from previous electoral exercises and are cause for concern. Furthermore, voter intimidation, non-compliance by the police and insufficient attention to full participation by the IDP community imply the denial of democratic freedoms and, as a result, undermine public trust in the integrity of the electoral process. Though the recommendations of election observers in 2010 focus on the full implementation of the 17th Amendment to the Constitution, in the current context, the introduction of the 18th Amendment is retrogressive in that it reduces the powers of the Elections Commission. However, it is important to view these recommendations in the spirit of the 17th Amendment and its intention to prevent election-related malpractices and abuse of power.

The recommendations below are a composite of those made by PAFFREL, the Commonwealth Secretariat (UK), CMEV and Transparency International Sri Lanka:

- The provisions in the 17th Amendment to the Constitution should be fully implemented to provide for the establishment of all the independent oversight commissions identified in the Amendment.

47. Commonwealth Secretariat: Sri Lanka Presidential Election Report - January 26, 2010, page 15.

- The Elections Commission has to be vested with the following additional powers through legislation:
 - (a) To regulate the abuse of resources.
 - (b) To recover the cost to the state of such abuse from the perpetrators.
 - (c) To effectively oversee editorial content and output of state media institutions to prevent the abuse of such institutions.
 - (d) To possess appropriate quasi judicial power to adjudicate whether an election malpractice has taken place during the election and to take action against errant candidates, their supporters and political parties.
- All national elections should be held under a caretaker government. For this purpose, special mechanisms should be evolved with the following guiding principles:
 - (a) During Presidential Elections, the incumbent President and the Cabinet of Ministers to be permitted to attend only to routine functions that have no bearing on the election.
 - (b) No public ceremonies of any magnitude to take place incurring public expenditure, where the President, the Cabinet of Ministers, the Members of Parliament or any candidate attends.
- The increasing politicization of the armed forces, police and civil service is a disturbing trend, which must be reversed.
- Public sector transfers, promotions, appointments, recruitments of every description, having regard to the exigencies of the service, should not be implemented without the permission of the Elections Commission.
- There should be a speedy and effective procedure for election petitions.

- Rules should be established by the Elections Commission for the public declaration of party campaign accounts, including campaign contributions and limits on campaign expenditure by individual candidates and political parties. The Fiscal Responsibilities Act can be amended to provide for a pre-election report of the Secretary to the Treasury.
- There should be an automatic audit system to monitor the use of public resources during elections.
- An effective Right to Information Law that allows citizens access to government records and data should be enacted.
- Laws relating to the declaration of assets by candidates should be revised to remove ambiguities and include the declaration of assets of family members and adequate compliance enforcement.
- A code of conduct for election campaigning that provides for sanctions against parties and candidates in breach of it, should be introduced. Political parties should demonstrate their commitment to elections free of violence and malpractice by denying nomination to known perpetrators.
- Internal guidelines and codes of conduct should govern the media on the coverage of elections.
- The democratization of publicly owned media would be greatly strengthened by the transfer of such state media institutions to management and control by a non-political statutory body.
- Paid advertising by political parties should be under the control and monitoring of an independent institution ensuring that messages are non-defamatory, within established financial limits and airtime/publication is evenly shared among all contestants.
- Voter-identity documentation information should be widely publicized well in advance of polling day and the cooperation of local officials ensured. Special attention should be given to IDP voters.

- Polling stations should be laid out in a manner that ensures secrecy of the vote.
- The police should investigate complaints of election-related violence, take appropriate action under the law and provide the Elections Commissioner and the public with progress reports on their investigations.
- The role of police at the polling station needs to be clarified to both polling staff and police officers. Police should not be present inside a polling station unless required for the maintenance of order and should have no role in the conduct of the vote or count.
- Voter confidentiality and ballot secrecy should be safeguarded including supervision at polling centres for postal voting conducted by the staff of the Elections Department and not by the Officers-in-Charge of police stations or by Commanders of security camps.
- Ballot boxes should be made of translucent materials for greater transparency and credibility.
- Domestic election observers should be made a requirement under election law, including facilitation of observation of the vote-counting process.
- Counting of the ballots should be done at the polling station itself in order to enhance credibility of the results, avoid controversy and speed up the counting process. Systems audits of the pre- and post-electoral counting and recording process must be considered to ensure integrity.
- Comprehensive voter education is needed to reduce polling of spoiled ballots. Voter information at the polling station should be clearly displayed. It has been noted that the information on the definition of an invalid vote was somewhat misleading.
- The preference vote system based on the PR system should be revised to minimize intra-party rivalry.

- Misuse of government resources must stop. Independent review and reports by the Commissioner General of Inland Revenue, the Customs Department, the Financial Investigation Unit of the Central Bank and the Auditor General on the abuse of state resources and expenditure of campaign funds should be made mandatory.
- Inclusion of members of civil society as election officials (not only public servants) at regional level should be given serious consideration.
- Accurate voters' lists are indispensable to ensure that eligible voters exercise their franchise.
- There should be more efficient procedures to update electoral registers.
- The situation of IDPs needs to be normalized as far and as swiftly as possible. This will help facilitate the accurate registering of voters, notably in the Northern and Eastern Provinces and the issue of ID cards. If cluster polling stations are once again required at future elections, then adequate transport arrangements need to be put in place to ensure that all voters can enjoy their right to vote on par with the rest of the citizenry.

Chapter 5

How watchful are the watchdogs?

Regulatory and oversight bodies

R.M.B. Senanayake

A market-based economy will not provide maximum welfare services to society due to innate failures; this is where a strong and independent regulatory structure becomes a necessity.¹ A well-built regulatory mechanism will have the ability to balance the economic system by not merely protecting consumers but also serving investors and levelling the playing field. The Sri Lankan experience with a formal rules-based regulatory mechanism can be linked to the liberalization of the economy in 1977 and the privatization of state enterprises in the consequent years.² The objective stated for regulation by the succeeding policy regimes, was to ensure that distributional concerns are addressed in the reform process.

“Regulatory bodies are bodies which regulate or supervise financial corporations; they may be classified as financial or non-financial according to their status.”³

The OECD Glossary of Statistical Terms (We need to mention what OECD is)

Economic regulation and why it is necessary

Irrespective of ideology, the need for regulation of economic activity and financial activity in particular, is generally accepted because, when left to the market, these activities have tended to cause economic and financial crises with serious social implications. Markets may be self-regulating but that is often at significant social costs because market-based recipes involve unemployment, loss of output and other hardships especially for the economically weaker segments of the population. This is potentially politically de-stabilizing. A small country trading with the world finds it difficult to deal

1. Regulatory Impact Assessment: A tool for better regulatory governance in Sri Lanka?
http://www.ips.lk/publications/series/working_pap/regulatory_impact_a/regulatory_impact_a.html
accessed 19 August 2011

2. Applying Regulatory Impact Assessment (RIA) in Sri Lanka
http://www.ips.lk/percr/research/application_regulatory/application_regulatory.html accessed 19 August 2011

3. <http://stats.oecd.org/glossary/detail.asp?ID=2281> accessed 19 August 2011

with external factors that cause economic disequilibrium. Alternatively, a policy of isolation from the global economy is too costly because it would deprive the country of opportunities to have faster economic growth and higher living standards.

Both the state as well as the private sector as a whole must follow prudent policies in the conduct of their economic activities. Hard work and innovation are the factors that hasten economic growth. There is the 'money illusion' under which many people mistake the possession of large amounts of money as prosperity. It is the production of goods and services needed by the people and not the accumulation of money which enhances prosperity.

The state must conduct its activities with the same prudence as any other economic agent. It must, like individual households, live according to its income. So economists contend that the government budget should be balanced except in situations where the private sector has saved too much and the expansion of demand required for economic growth has been reduced. Macro-level economic management takes the form of fiscal responsibility laws, interest rate changes and exchange rate management. Wrong macro-economic policies may mean sacrificing the long term for the short term. Monetary policy falls into this category of economic policy and the authority in charge of monetary policy is the Central Bank. Regulation of finance in the narrower sense is another aspect of economic regulation and several institutions like the Central Bank, the Securities & Exchange Commission, the Accounting Standards Board and the Insurance Board are engaged in such regulation.

The Global Financial Meltdown in 2008-9 arising from the sub-prime mortgage crisis in the United States of America (USA), affected Sri Lanka in the second half of 2008 and in 2009. Foreign investors in the local stock, Treasury Bill and government bond markets pulled out their money to replenish their needs for cash in their home countries. In the third quarter of 2008, non-resident holdings of government Treasury Bills of more than US\$ 400 million were redeemed and some syndicated foreign loans not rolled over as new foreign borrowings were not available for the country from the international capital markets. Further outflows from the stock market were partly due to the liquidation of the share portfolio of Raj Rajaratnam, a prominent investor in the local market who faces trial in the USA for insider trading there. There were also large payments for the import of oil due to

the rise in oil prices. All these outflows of foreign exchange reduced the Official Foreign Exchange Reserves of the Central Bank from a peak of US\$ 3.5 billion in mid-2008 to a low of approximately US\$ 900 million in March 2009.⁴ There was a very real risk of default in foreign debt as well as an inability to fund the net imports which include food, fertilizer and petroleum required for power generation and transportation. In these circumstances, the government opted to go to the International Monetary Fund (IMF) for a standby credit, with the IMF approving SDR 1,653.6 million to be drawn over a two-year period.

The Sri Lankan authorities had previously restricted foreign capital inflows to the private sector and convertibility of currency was restricted to the current account. But there has been liberalization of foreign capital inflows to the government bills and bond and stock markets. Notwithstanding the risk involved in accepting such short-term foreign capital inflows, there was an insufficient build-up of Foreign Exchange Reserves to cope with a crisis arising from the sudden outflows of foreign capital.⁵

Monetary policy in the public interest

The meaning of bank independence

Central Bank independence refers to the freedom of monetary policymakers from direct political or governmental influence. The Central Bank was set up in 1950 under the Monetary Law Act. The legal relationships between the government and the Central Bank are set out therein. There are two key dimensions of independence:

- (a) Institutional and political independence.
- (b) Financial independence. While the Central Bank yet continues to enjoy financial independence because it is self-financing and does not depend on the government Budget, it severely lacks institutional and political independence.

4. Vide Monthly Bulletin for May 2010 Table 49 External Reserves of the Central Bank of Sri Lanka

5. Sri Lanka Asian Development Bank 2010.

<http://www.adb.org/documents/books/ado/2010/SRI.pdf> accessed on August 2011

Political independence encompasses those institutional characteristics that insulate the Central Bank from political influence in defining its policy objectives. This requires that the Central Bank Governor should not be a political appointee. The post was included in the posts to be filled only on the recommendation of the Constitutional Council set up under the 17th Amendment. But the President has, for a considerable period of time, failed to set up the Constitutional Council. Instead, 2010 saw the adoption of the 18th Amendment to the Constitution which gives the President the discretion to accept or reject the recommendations of the Constitutional Council. So the Governor of the Central Bank has been appointed entirely at the discretion of the President.

The Monetary Board is also appointed by the President at his sole discretion. The Monetary Law Act also provides for the ex-officio appointment of the Secretary to the Treasury to the Monetary Board which is the highest decision-making body on monetary policy. The result has been that the monetary policymaking body lacks independence to decide monetary policy. The Federal Reserve Act of USA, for example, specifically bans Treasury officials from membership of the Federal Reserve Board of Governors. This is because the Treasury could convert monetary policy to serve the needs of the Treasury which could be in conflict with the public interest. The presence of the Secretary to the Treasury on the Monetary Board of the Central Bank of Sri Lanka could cause bias in the decision-making process of the Monetary Board in favour of growth instead of inflation control which is the primary objective of the Central Bank.

‘Goal independence’ refers to the Central Bank’s ability to determine the goals of policy without the direct influence of the fiscal authority -- the President and the Secretary to the Treasury. Sri Lanka’s Monetary Law Act confers too many objectives on the Central Bank and this law should be amended to make the maintenance of price stability the only objective of the Central Bank.

‘Instrument independence’ refers to the Central Bank’s ability to freely adjust its policy tools in pursuit of the goals of monetary policy. The Central Bank should be free to raise interest rates or the statutory reserve ratio to check inflationary pressure -- measures which the Treasury and the government would not like. As the Central Bank lacks independence in both goal independence as well as instrument independence, this will have an adverse effect by way of higher inflation which is not in the public interest.

The Central Banks in other countries set inflation targets with a permissible allowance and the Governors are held accountable for failure to meet these targets. In New Zealand, if inflation rises above the target, the Governor loses her/his job. The Central Bank of Sri Lanka, however, has not set any inflation target in the period under review though it should do so in the public interest.

The role of the Central Bank

The Central Bank formulates and implements monetary policy. It should do so in the long-term public interest and not to serve the short-term interest of the government of the day. There is a conflict of interest between the government and segments of the public and the public as a whole in matters relating to the rate of interest, the rate of inflation and the rate of exchange. Whose interest should the Central Bank follow: The government or the public? The government likes to borrow cheap from its citizens and favours low interest rates although the public as lenders would prefer high interest rates. Similarly, the government when it borrows from foreign nationals would prefer not only low rates of interest but also low rates of exchange since it must repay foreign debt. It would prefer the rate of exchange to remain the same as when it borrowed originally. An appreciation of the rate would be even better for foreign debt repayment. But low interest rates and low exchange rates are justifiable only if the economy is both in internal and external equilibrium and not otherwise. Such disequilibrium manifests itself as high inflation and/or deficits in the current account of the country's balance of payments. So they are justifiable only if there is no inflation and no current account deficits in the balance of payments. Interest rate policy and exchange rate policy affect savers as well as borrowers. Exchange rate policy affects exporters' competitiveness. Both groups are better served by market-determined interest rates and exchange rates, except where there are factors causing disequilibria originating from the government, the private sector or from abroad.

Public interest requires economic growth with macro-economic equilibrium which means price stability or minimum inflation and balance in the current account of the balance of payments. But growth and price stability and current account equilibrium do not always converge. A policy to promote growth may increase inflation and also cause current account deficits in the balance of payments. Then the Central Bank has to decide between growth and inflation control and/or current account balance. It is possible to fund growth through high borrowings from citizens or foreigners. Monetary and exchange rate policies have implications for both inflation and current

account balance in the balance of payments. They also have implications for the stability of banks and financial institutions. It has repercussions particularly for the financial stability of banks and finance companies. It has repercussions on asset markets like the stock market, the market for land and property and even the market for consumer durables like vehicles. Low-interest policy with excessive money printing creates economic bubbles and when they burst they wipe away people's wealth and disrupt the real economy. The small man is the person who suffers most. So it is necessary for the Central Bank to be guided by these factors in formulating monetary policy instead of following policies deemed suitable for the government. The interests of the government in certain economic circumstances may be in conflict with these factors. So the Central Bank must be free from governmental pressure in taking decisions on such matters of policy.

Research elsewhere has shown that Central Bank independence was negatively correlated with average inflation in developed economies vide Cuckierman Alex, Steven B. Webb and Bilin Neyapti, 'Measuring the Independence of Central Banks and its Effects on Policy Outcomes'.⁶ Many countries have, therefore, implemented reforms designed to grant their monetary authorities greater independence from direct political influence.

The policy instruments required for the control of inflation and the protection of the balance of payments may also incur a conflict between public and government interests. The Treasury wants low interest rates in order to borrow cheaply. The Central Bank can continue to do so only by creating enough new money. It does so by lending to the government directly by way of loans and advances or indirectly by subscribing to Treasury securities. When the Central Bank creates too much money it contributes to higher inflation, as such it should not be lending to the government at all. There are legal prohibitions on the Central Bank lending to the government in some countries. Others have restrictions on such lending.

6. World Bank Economic Review (September 1992), pages 353-398.

Inflation management

The present government ran large Budget deficits which caused high inflation during the period under review. The point to point inflation reached 30% and average inflation 25% in 2007. In the period under review, the government continued to run massive Budget deficits and borrowed more and more money both from the Central Bank and the Bank of Ceylon, while other commercial banks subscribed to Treasury securities. When the government spends such borrowed money it creates inflationary pressure.

The government has also continued to borrow in foreign currencies for various infrastructure projects. This requires repayment in foreign currency which must be bought with rupees by the Treasury at the time of repayment. A fixed exchange rate would fit such Treasury needs and an appreciating rupee would be a bonus. A depreciating rupee would mean that the government has to set apart more rupees for debt repayment and foreign interest payment. Such money has to be found either from higher taxation or from more borrowing. Since our taxation is largely from taxes on goods, this raises prices and increases inflationary pressure. Higher borrowing requires higher interest rates if the borrowing is from public savings. Thus, maintaining low interest rates requires the Central Bank to subscribe more and more to Treasury securities. But such action causes more inflation. This phenomenon is called monetizing the public debt. If the Central Bank does not resort to this measure, the government would not have the rupees to buy foreign currency to service the foreign debt. The Central Bank may also be called upon to hold the rupee stable in relation to the US dollar to help the government to repay the foreign debt falling due for repayment.

In the period under review, the Central Bank continued to peg the rupee at an appreciated value, far above its Real Effective Exchange Rate. This is at the expense of the exporters, tourists and migrant workers who send remittances to the country. It is against the long-term interests of the country since only a growth in export earnings will enable the country to repay its foreign debt. This failure to depreciate the rupee to correct previous inflation, of course, helps to keep current inflation down in respect of imported goods.⁷ This may be politically useful in terms of immediate popularity, but such a policy sacrifices the long-term economic interest of the country. Under rational expectations, the public then anticipates that the Central Bank will attempt to expand the economy, rather than control inflation and, as a consequence, average inflation is left too high.

7. Sri Lanka Economic Update, World Bank, April 2010: Page 5
http://siteresources.worldbank.org/SRILANKAEXTN/Resources/233046-1267051087828/SriLanka_Economic_Brief_May_3_2010.pdf accessed 22 August 2011

Although the Monetary Law Act places a limit on government borrowing from the Central Bank of 10% of total government revenue, this has been subverted by the latter misinterpreting the limitation and subscribing to government securities beyond this prescribed percentage. Furthermore while the Central Bank has the power to issue its own securities to carry out open market operations as part of its monetary operations, it should be prohibited from acquiring securities issued by the Treasury.⁸ It should also be forbidden from providing financing, directly or indirectly, to the government and state institutions or enterprises.

Regulating banks and finance companies

Banks

Monetary policy which seeks price stability, requires that money and financial markets work well while financial stability requires, among other conditions, that inflation remains low and stable. Banks can face two types of problems -- lack of liquidity or insolvency. A bank may suffer a liquidity shock because of an unusually high rate of withdrawals as depositors doubt that the bank has enough money to repay its depositors. This happened with the Seylan Bank during the Golden Key credit card crisis in 2009. It happened also with several finance companies but it is not so with depositors in the case of insolvency. Recently the Central Bank made this clear in a press communiqué. After the Golden Key credit card crisis, the Central Bank introduced deposit insurance to guarantee small deposits.

Finance companies

The Central Bank's supervision and regulation of finance companies have been found wanting. There is a Director in the Central Bank for the supervision of non-bank financial institutions such as finance companies and financial institutions registered with it. The Central Bank failed to enforce its prohibition against non-registered financial institutions accepting deposits in January 2009 which, in turn, gave birth to a series of issues that remained unresolved in the months that followed. Several unregistered deposit-taking institutions have defaulted on monies taken from depositors. It is no doubt difficult to enforce a blanket prohibition on deposit-taking since it is part of normal commercial activities. For example, mineral water companies and LP gas companies require deposits to be kept with them. Although a blanket

8. 2011 Index of Economic Freedom, Financial Freedom
<http://www.heritage.org/index/country/SriLanka#government-spending> accessed 23 August 2011

ban on deposit-taking is not possible yet the provisions against unregistered institutions accepting deposits and paying interest on them can be enforced through the police. Of course, Sakvithi, the unregistered deposit-taker who defaulted on several millions apparently had the police in his pay as they were themselves depositors receiving preferential treatment. The rule of law has collapsed in our country and it is difficult to enforce any laws. It would seem to be better to register all deposit-takers, prescribe various prudential requirements and enforce them instead.

Sri Lanka recently experienced a run on several registered finance companies, the contagion effect from the collapse of the Golden Key credit card company. It had its adverse effects on finance companies and deposit-taking institutions of the Ceylinco Group as well as on several other registered finance companies. Some of them then collapsed and the Central Bank is seeking to restructure them after freezing their deposits.

The Central Bank has taken control of these failed finance companies like The Finance Co., Finance & Guarantee and Industrial Finance Co., and proposes to restructure them and nurse them back to profitability. But it is not clear whether the Central Bank has the power to enforce its restructuring decisions against shareholders. In other countries they are transferred to separate rescue organizations which are legally empowered to restructure them. An example is the Resolution Trust Corporation in USA.

Securities & Exchange Commission

The Securities & Exchange Commission licenses firms engaged in running a stock exchange, a unit trust or a market intermediary. Market intermediaries include stockbrokerage firms, under-writers and investment funds. It also issues licences to individuals to practise as investment advisors and investment managers. It regulates stockbrokerage firms by determining the minimum capital requirements and the permitted extent of leverage. The government has generally avoided interference in the actual operations of the market except to lay down conditions for market players like stock brokers and listed companies which are required to comply with the rules of good corporate governance. But in recent years, the government has made forays into the stock market. The Employees' Provident Fund has invested at least Rs. 32 billion⁹ in 77 companies, buying their shares on the market.

9. Monthly Bulletin, Central Bank of Sri Lanka, March 2011
http://www.cbsl.gov.lk/pics_n_docs/10_pub/_docs/statistics/monthly_bulletin/Monthly_Bulletin_2011/bulletin_mar11e.pdf accessed 23 August 2011

When a large buyer descends on the market it is natural for shares they buy to shoot up. The stock market has seen unusual growth in prices in 2010. Some government banks have also entered the market. The Apollo Hospital reverted to the Sri Lanka Insurance Corporation when the Supreme Court held that the previous privatization was vitiated by corruption. The Secretary to the Ministry of Defence is now Chairman of the Board of Directors of the hospital. This situation raises concern about the possibility of the government's ability to control of stakes or significant stakes to demand seats on the Board of Directors. The state is an abstraction and the power of the state is exercised by those in power who could use power for their own personal, economic and political interests.

Conclusion

In conclusion, independence from operators and the government is seen as the most critical factor for regulatory agency effectiveness. The Central Bank, the Securities & Exchange Commission and other regulatory agencies that exist to regulate economic activity must function to satisfy long-term public interest, instead of seeking to satisfy short-term interests of the government in power. A need for greater professionalism, transparency and public accountability exists in the financial regulatory framework of Sri Lanka. Regulatory agencies must be accountable to the public by creating more avenues for verification and access to information.

Chapter 6

Need for good fiscal governance

Public debt and macro-economic outcomes

Nimal Sanderatne

Sri Lanka's growing public debt is a serious economic problem. The amount of government debt, the large foreign funding, the lack of full disclosure of government liabilities, the massive debt servicing costs and the excess of public expenditure over revenue by a large margin, all have serious long-term economic and social consequences. The debt servicing cost, as at the end of 2010, continues to be the highest expenditure of the government and is a severe burden on the economy and a serious constraint on economic development. This heavy debt servicing cost increases the annual fiscal deficit and is a concern owing to its impact on macro-economic fundamentals that have adverse effects on long term economic development. The sharp increase in foreign debt between 2008 and 2010 is another concern. Recent increases in commercial borrowings have also tilted the debt profile more towards commercial borrowing from the earlier bias towards concessionary loans from bilateral and multilateral sources.

Sri Lanka's huge accumulated debt is a result of persistent deficits over the years. The massive public debt and crippling debt servicing costs distort public expenditure priorities and hamper economic development. Government borrowing to service the debt results in inflationary pressures that destabilize the economy. Inflationary pressures generated by large fiscal deficits increase the cost of living and cause severe hardships, especially to the lower wage earners, pensioners and fixed income earners. This, in turn, leads to labour pressures for higher wages and industrial unrest. Wage increases raise the costs of production and reduce export competitiveness. The depreciation of the currency to restore export competitiveness would lead to further inflation and increased hardships to the people.

The servicing of the large public debt is itself a factor that increases the deficit and public debt. There is, therefore, a need to break the cyclic debt burden. Management of the fiscal deficit is vital for stabilization of the economy and economic growth. The containment of the public debt is crucial in reducing

the fiscal deficit, as debt servicing costs are the highest item of government expenditure.

Thus, the management of public debt and the overall fiscal deficit are key economic dimensions of good governance. The lack of transparency in the borrowed funds and their terms of borrowing is a key concern in the management of public finances. The government does not disclose many off-Budget liabilities at the time they are incurred, such as government purchases on credit and the financing of government expenditure by state-owned enterprises.

The focus of this chapter is the macro-economic impact of the large public debt and its servicing cost. It examines the extent of the total public debt, its foreign and domestic debt components, the debt servicing costs and the implications at the end of 2010 of Sri Lanka's public debt for macro-economic policy, economic growth and development. The next section discusses the broad issues of the impact of public debt.

Budget deficit 2010	7.9 % of the Gross Domestic Product (GDP) ¹
Debt	81.9 Million rupees ²

Growing burden of debt

Sri Lanka's accumulation of a large public debt, comprising both foreign and domestic borrowing, is a result of cumulative fiscal deficits. In the late 1970s and early 1980s, fiscal deficits were high. However, much of the deficits were incurred for highly productive development activities such as the Accelerated Mahaweli Development Programme. In contrast, in the last decade, war expenditure was a significant component of public expenditure and contributor to the rising debt.

1. The summary of the Annual Report of the Central Bank of Sri Lanka for 2010, 11 April 2011
http://www.cbsl.gov.lk/pics_n_docs/latest_news/press_20110411e.pdf accessed 23 August 2011

2. Annual Report 2010, Ministry of Finance and Planning, Sri Lanka
<http://www.treasury.gov.lk/reports/annualreport/AnnualReport2010-eng.pdf> accessed 6 September 2011

Among the reasons for the large fiscal deficits is the limited revenue base of only about 15-17% of GDP, huge expenditure on public service salaries and pensions, big losses in public enterprises, wasteful conspicuous state consumption, expenditure on subsidies and welfare costs and the large debt servicing cost itself (see Table 1). Current revenue is inadequate to even meet the costs of servicing this debt (see Table 1). The government has to resort to further borrowing to meet its recurrent as well as capital expenditure. This results in further increases in debt servicing costs. Consequently, the country is caught up in a vicious circle of debt.

In 2002, the public debt was 105% of GDP. In subsequent years it was brought down as a proportion of GDP (Table 1). In 2009, it was 86.2% of GDP. In 2010, the public debt as a proportion of GDP is expected to be in the region of 80%. Although the public debt increased substantially, the debt to GDP ratio declined owing to the GDP increasing. The appreciation of the rupee too leads to a lowering of the debt/GDP ratio as the debt is in rupees. The rupee appreciation that is made possible owing to the large foreign reserves accumulated with foreign borrowing gives a misleading indicator of the country's indebtedness. Furthermore, GDP estimates are considered to be over-estimated. Therefore, the size of the public debt as a proportion of GDP does not convey the full extent of the national debt burden.

The debt servicing cost as a proportion of revenue is a better indicator of the crippling effect of the large public debt. In 2009, the debt servicing cost was 117.5% of the revenue: 17.5% more than the revenue (Table 1). In 2010, it is likely to be around the same level. This means that funds are not available for other essential expenditures. Nevertheless, the government has undertaken an ambitious programme of infrastructure development through foreign borrowing.

Table 1: Public debt indicators

Year	Debt/GDP	Debt/Revenue	Debt Servicing/ Export Earnings
2006	87.9	93.0	7.1
2007	85.0	88.6	8.2
2008	81.4	90.5	13.9
2009	86.2	117.5	14.6

Source: Central Bank of Sri Lanka Annual Report 2009.

The reduction of the public debt and its servicing cost is a prerequisite for economic stabilization and growth. This has been stressed ever so often and accepted by the Central Bank and the multilateral agencies such as the International Monetary Fund (IMF), World Bank and Asian Development Bank (ADB) and repeatedly stressed by the Institute of Policy Studies (IPS). The IMF required the government to bring down the fiscal deficit to 7% of GDP in 2009, when it gave the stand-by facility of US\$ 2.6 billion, but the fiscal outcome was a deficit of 9.8% of GDP. The fiscal deficit is expected to be 7.5 to 8% of GDP in 2010.

The containment of the fiscal deficit to a reasonable level is not a controversial issue. It has been recognized as important in Central Bank Annual Reports and in Budget speeches. In December 2002, the Fiscal Management Responsibility Act (FMRA) passed in Parliament made it mandatory for the government to take measures to ensure that the fiscal deficit is brought down to 5% of GDP in 2006 and kept at that level thereafter. As it turned out, the fiscal deficit was 8% of GDP that year and averaged 8% of GDP in the five years (2004-2008). The FMRA also required the public debt to be brought down to 60% of GDP by 2013. Reducing the proportion of public debt to 60% of GDP by 2013 may now be considered as unrealistic since foreign borrowing has increased substantially in the last two years.

Foreign debt: Danger to economic fundamentals

Foreign borrowing can assist in resolving constraints in foreign resources for development, supplementing inadequate domestic savings for investment and undertaking large infrastructure projects. Foreign borrowing can spur an economy to higher levels of economic growth than its own resources permit. It can also assist in overcoming temporary balance of payments difficulties. However, the extent, costs, terms of borrowing and use of funds have significant implications for macro-economic fundamentals. Foreign borrowing could have either beneficial or adverse impacts on economic stability and development.

Sri Lanka's foreign debt increased significantly in the last decade as revealed in Table 2. The foreign debt component of the public debt was 45% in 2009.³ It is likely to be more in 2010. The increase in foreign debt is particularly

3. Central Bank of Sri Lanka, Annual Report 2009.

sharp between 2008 and 2009 when it increased by 10%. Furthermore, recent increases in commercial borrowings have tilted the debt profile more towards commercial borrowing from the earlier bias towards concessionary loans from bilateral and multilateral sources. By the end of 2009, foreign debt had more than doubled what it was in 2000 to reach US\$ 18 billion and 19% of export earnings were required for capital and interest repayments. By the end of 2010, foreign debt is likely to have increased significantly and its servicing likely to have absorbed a still higher proportion of export earnings. The high proportion of export earnings needed for servicing the debt is a strain on the balance of payments and raises the issue of foreign debt sustainability.

Table 2: Foreign debt and debt service ratio

Year	Total debt (US\$ Mn)	Debt service ratio
2000	9,031	14.7
2001	8,372	13.2
2002	9,333	13.2
2003	10,735	11.6
2004	11,346	11.6
2005	11,354	7.9
2006	11,981	12.7
2007	13,989	13.1
2008	15,107	15.1
2009	18,662	19.0

Source: Central Bank of Sri Lanka, Annual Reports

External debt servicing costs and debt sustainability

The large increase in the country's foreign debt in recent years and increasing foreign debt servicing costs are a serious concern. The Ministry of Finance estimates Sri Lanka's foreign debt servicing costs comprising both principal and interest payments for 2010 at US\$ 810 million. The debt service payments are expected to be US\$ 954.5 million in 2011 and nearly double in 2012 to an estimated US\$ 1,539.4 million (Ministry of Finance and Planning website). The sharp increases in debt servicing costs are due to increased borrowing in recent years, especially those in 2009. Foreign debt has been sustainable owing to the large inflows of foreign remittances. When these are taken into account, the external debt servicing ratio falls to much lower levels.

Foreign debt should be incurred mainly for developmental purposes. According to the Ministry of Finance, 75% of recent foreign borrowing has been for infrastructure development such as power and energy, ports, roads, bridges, water supply, agriculture, fisheries and irrigation among others. However, all infrastructure development per se is not always easily justified and should be within a framework of national economic needs. Infrastructure projects that either save or earn foreign exchange are the least burdensome cost and should be the priority. Prioritization of infrastructure development according to this criterion is a prudent economic strategy.

Economic and social impacts of debt

Sri Lanka's large fiscal deficits over the years have increased the public debt and its high servicing cost generates inflationary pressures. Inflationary pressures increase the costs of production and erode the country's competitiveness in international markets. This has necessitated the depreciation of the Sri Lanka Rupee in order to remain competitive with other countries. The depreciation of the currency leads to further inflation and increased hardships especially at the lower end of wage earners and could lead to industrial and social unrest.

War expenditure is especially inflationary because of its sheer magnitude and also because such expenditure does not produce goods and services for consumption. When such expenditure is spread over a long period the inflationary impact is endemic. A huge volume of debt, however incurred, nullifies whatever justification for the borrowing by destabilizing the economy, adversely affecting the macro-economic fundamentals and retarding economic development. Large fiscal deficits lead to borrowing and, in turn, to huge debt servicing costs. The country's accumulated debt is the result of persistent deficits over the years. The massive public debt and crippling debt servicing costs distort public expenditure priorities and hamper economic development.

The extent of borrowing, costs and terms of borrowing, especially of foreign funds and the use of funds have significant implications for macro-economic fundamentals. These could have either beneficial or adverse impacts on long-term economic development. Therefore, containing the public debt, reducing fiscal deficits and decreasing debt servicing costs are vital for economic stabilization and Sri Lanka's economic development.

Strategies to reduce fiscal deficit and debt burden

The containment of large fiscal deficits is undoubtedly difficult to achieve in the current fiscal context. Yet, it is a fundamental requirement for Sri Lanka's economic stabilization and economic growth. The cyclic nature of the problem makes it imperative to put in place immediate measures for decreasing the fiscal deficit.

Fiscal consolidation in Sri Lanka is difficult for many reasons due to:

- Limited revenue base of only 15% of GDP.
- Large debt servicing costs.
- Huge expenditure on public service salaries and pensions.
- Big losses by public enterprises.
- A large defence expenditure (that has been increased for 2011).
- Wasteful conspicuous state consumption and expenditure on subsidies and welfare.

Thus, effective policy and strategies are essential to address public debt.

Re-prioritizing expenditures

Many of these expenditures have rigidity and are difficult to reduce. Paradoxically, these large expenditures provide the opportunities for expenditure reductions that would trim overall government expenditure. The very difficulties in bringing down the fiscal deficit are pointers to where the resolution of the problem lies.

Some possible major expenditure adjustments are:

- (a) Defence expenditure: Now that the war is over, there should be a curtailment of defence expenditure. In spite of the end of the war, defence expenditure has increased, partly owing to obligations such as deferred payments on armaments purchases in the past. Military hardware expenditure could be brought down and fresh recruitment of personnel should be minimal. If the expenditure on defence can be brought down by even 1% of GDP, then its burden on the public finances could be eased significantly.
- (b) Loss-making state enterprises: The other item of huge expenditure is losses incurred by public enterprises like the Ceylon Electricity Board (CEB), the Ceylon Petroleum Corporation (CPC) and

other state-owned enterprises. Without reforms to these public enterprises an important option for state expenditure cuts would be unavailable. In the past, the privatization of loss-making enterprises, such as the estates, provided both relief to public expenditure as well as revenue from the privatization proceeds to offset the deficit. This option is no longer available due to the ideological position of the government that it will not sell public enterprises. In fact, the government has increased expenditure by purchasing shares of loss-making enterprises previously handed over to private sector management. The danger is that the government will defer reform of public enterprises and, instead, expand public ownership such as in SriLankan Airlines, thereby incurring further losses.

- (c) State sector salaries, welfare subsidies, poverty hand-outs: The government faces the challenge of reducing expenditures on the numerous social welfare subsidies and its own salaries' bill. These include, in addition to public servants' salaries and pensions, such welfare subsidies as the fertilizer subsidy and the 'Samurdhi' poverty handout. Given the social pressures, such reductions are also unlikely. In fact, the salaries' bill of the state may once again increase due to both salary increases and further recruitment. Increasing unemployment among the educated youth would probably result in another wave of public service recruitment. The government resisted both these in the Budget for 2011 due to fiscal stringency and the need to keep government expenditure down. How long it could hold out is left to be seen.
- (d) General tax reform: The other area of fiscal consolidation is in increasing government revenue. Much is expected in this direction from tax reforms in the last Budget. The revenue to GDP ratio of 15% is below levels of countries with per capita incomes similar to Sri Lanka's. Tax avoidance and tax evasion are important reasons for this shortfall in revenue. The expectation is that tax reforms would significantly reduce past fiscal slippages and increase revenue. The reform in trade and excise taxes, a broader tax base and more effective tax collection are expected to achieve higher revenue collection that would reduce the fiscal deficit. Increasing revenue depends very much on the realistic nature of tax reforms, the administrative capacity of the Department of Inland Revenue and the integrity of its officers.

There is a need to increase revenue as well as curtail wasteful expenditure to achieve a lower fiscal deficit. Regrettably, there have been no signs of fiscal prudence. The government continues to spend on non-essential and sometimes wasteful expenses. It requires a strong political resolve on the part of the government to undertake reforms and to spend public money far more carefully. The road to the realization of a reduced fiscal deficit is not an easy one.

Summary and conclusions

Containing the fiscal deficit is vital for stabilization of the economy and economic growth. Inflationary pressures generated by large fiscal deficits increase the cost of living and cause severe hardships, especially to the lower wage earners, pensioners and fixed income earners. This, in turn, leads to industrial unrest and pressures to raise wages. Wage hikes increase the costs of production and reduce export competitiveness. The depreciation of the rupee to restore export competitiveness would lead to further inflation and increased hardships to the people. Large fiscal deficits harm the economy in other ways too. They lead to further borrowing, thereby, increasing already huge debt servicing costs. The massive public debt and crippling debt servicing costs distort public expenditure priorities and hamper economic development.

Therefore, a disciplined policy posture to contain public debt is crucial in reducing the fiscal deficit, as debt servicing costs are the highest item of government expenditure. Fiscal consolidation and reduction of public debt are both important for good economic management and good governance. Successive governments have paid lip service to the need to contain the fiscal deficit but not had the political will, courage and resolve to follow prudent fiscal policies for this purpose. Consequently, current macro-economic outcomes are not conducive to economic development. By not containing the fiscal deficit and reducing the public debt, the country is on a dangerous course, especially as public expenditure includes a high proportion of unproductive and wasteful expenditure.

Chapter 7

Black marks on report card

What the international indices give for governance

Dhammika Herath

Scholars and practitioners in the field of governance point to the causal link between good governance and human well-being, although there is debate over which is the cause of the other. While some believe that good governance promotes human well-being, others believe that economic and social development creates better functioning democracies. Irrespective of the direction of causality, modern thinking about well-being considers good governance as an essential component of human well-being and not just as a means to that goal.¹

Although there is a broad understanding of what ‘governance’ means, various scholars, practitioners and institutions tend to adopt divergent, precise definitions depending on their specific interests. However, this issue is somewhat overcome by disaggregating the concept of governance into measurable indicators, which hypothetically capture the reality behind the concept. Measurable indicators are open to interpretation, so that even those having divergent conceptions about governance could make sense of data. This chapter discusses and explains a selection of international ‘governance indices’, that is, quantitative indexes which use indicators to measure performance and progress in various aspects of governance. Where these indexes position Sri Lanka on the global map of governance measurement is then examined.

1. Przeworski, A. and F. Limongi (1993): “Political Regimes and Economic Growth” *Journal of Economic Perspectives* 7(3): 51-69. Welzel, C. and Inglehart R. (2008): “The Role of Ordinary People in Democratization” *Journal of Democracy* 19(1): 126-140. World Bank (2008): *World Development Report*.

The indexes discussed are:

Index	Producing institution
Empowerment Index	United Nations Development Programme
Corruption Perception Index	Transparency International
Failed States Index	The Fund for Peace, USA
Worldwide Governance Indicators	World Bank
Countries at the Crossroads Survey	Freedom House, USA
Index of State Weakness in the Developing World	Brookings Institution, USA

Due to space and time constraints, only a selection of the most relevant indexes for Sri Lanka are examined, excluding several other indices. We begin with a look at the Human Development Index of the United Nations Development Programme (UNDP) in order to position Sri Lanka on the world's development map before focusing on the more specialized index indicators of the country's governance situation.

Limitations of indexes

Most of the above-mentioned indexes provide both quantitative and qualitative data for many countries around the world, that data being relevant from fixed base years leading up to the present day – thereby making it possible to compare data across time and territories. However, they also have limitations, which require certain precautions in the interpretation of these indexes. Statistics usually give a false sense of precision, although in fact, they must be considered as rough estimates describing approximate conditions. However, time has proved that irrespective of these complexities, governance indicators are able to reflect governance situations in different countries accurately due to triangulation of data² and the use of sophisticated statistical techniques.

In some indexes, data is about perceptions rather than actual occurrence due to unavailability of concrete data on incidents and processes. Indexes draw on various sources of data but most rely on opinion surveys of business people, country experts or analysts rather than on data collected from household surveys.

2. Co-relation of data from two or more other indexes or components of indexes and between different country data.

Further, all the indexes except the Empowerment Index of the UN, are in fact, products of institutions based in Western countries, thereby posing the risk of biases in cultural values, attitudes and, indeed, geo-political interests consciously or unconsciously influencing interpretations of data and findings.³ Similar indexes are yet to be produced by centres in Asian or other non-Western countries. Hence, irrespective of these limitations, scholars and practitioners have to use the above indexes to understand the governance situation in Sri Lanka.

Empowerment Index – UN Human Development Report (HDR)

Empowerment – ‘people’s ability’

According to the UNDP, ‘human development’ is about “*creating an environment in which people can develop their full potential and lead productive, creative lives in accord with their needs and interests*”.⁴ The UN’s Human Development Report (HDR) tries to capture critical aspects of human development, ranging from political freedoms and empowerment to sustainability and human security. Over the years, the HDR has been improving and broadening its scope to include both material and non-material aspects of development such as gender inequality, empowerment, human security, perceptions of individuals’ well-being and happiness and civic and community well-being.

The concept of ‘empowerment’ is of special significance to a study of governance. HDR mentions that “*empowerment is an increase in people’s ability to bring about change*”. HDR develops an Empowerment Index constituted by four dimensions, namely agency, political freedom, civil liberties and accountability, which are also critical dimensions of governance. Table 1 shows the scores for three selected countries in the Empowerment Index including those for Sri Lanka.

3. ‘Western’ - i.e. the advanced industrialized democracies of Europe and North America.

4. Website of UNDP accessed 8 March 2011: <http://hdr.undp.org/en/humandev/>

Table 1: Empowerment

	Agency		Political freedom	Civil liberties			Accountability		
	Satisfaction with freedom of choice %		Democracy ⁵	Human rights violations ⁶	Press freedom ⁷	Journalists imprisoned ⁸	Corruption victims	Democratic decentralization ⁹	Political engagement
HDI	Total 2009	Female 2009	Score (0-2) 2008	Score (1-5) 2008	Index 2009	Number 2009	% of people who faced a bribe situation last year-2008	Score (0-2) 2008	% of people who voiced opinion to public officials
Norway	93	93	2	-	0.0	0	5	2	30
Sri Lanka	74	74	2	4	75	1	5	2	12
India	66	60	2	4	29.3	1	15	1	12

Sri Lanka’s score -- ‘medium’

Table 1 displays scores relating to various aspects of empowerment as defined by the HDI for Norway, the country with the highest human development rating in the world, and Sri Lanka and India, both of which have medium human development scores. In Norway, 93%t of the people are satisfied with freedom of choice while in Sri Lanka and India, it is 74 and 66% respectively. All these three countries are considered ‘democratic’ by the Empowerment Index. Yet, here a weakness of the index is that the quality of democracy is not looked at but only whether countries have a democratic form of government

5. 0 is non-democratic, 1 is democratic with no alternation, 2 is democratic.

6. 1 = fewest human rights violations and 5 = most human rights violations.

7. A lower score indicates more freedom of the press.

8. Data refers to verified cases of journalists having been imprisoned as of December 1, 2009. Countries with a value of 0 did not have any verified cases as of that date.

9. 0 is no local elections, 1 is legislature elected but Executive appointed and 2 is legislature and Executive locally elected.

in the formal sense. While Norway has no human rights violations, both Sri Lanka and India report very high human rights violations. Norway has a very high level of press freedom and India a high level as well, while Sri Lanka has a very weak score for this indicator. The index shows similarity in Norway and Sri Lanka in terms of experiencing corruption and holding elections to elect the Executive and legislature. However, although the index looks at the question of whether the legislature and Executive are elected, it does not consider the quality standards of democratic practice – i.e. whether the conduct of elections is free and fair. Further, the percentage of people who express their opinion is higher in Norway compared to Sri Lanka and India.

The Empowerment Index of the UN is a good, neutral tool to examine the governance situation in Sri Lanka. As depicted above, Sri Lanka shows weak press freedom and a high level of human rights violations. Public satisfaction with freedom of choice and public political activism is at a medium level.

Corruption Perception Index (CPI)

Index methodology

The Corruption Perception Index (CPI), produced annually by Transparency International (TI) based in Germany, is the only global index which specifically measures corruption. According to TI “*corruption is the abuse of entrusted power for private gain*”.¹⁰ CPI ranks countries according to the perceptions about the prevalence of corruption in the public sector, that is, the overall frequency of corruption and/or the size of bribes.¹¹ The 2010 CPI covers 178 countries around the world and rates them on a scale from 10 (very clean) to 0 (highly corrupt).¹²

10. See Transparency International website at: http://www.transparency.org/news_room/faq/corruption_faq

11. http://www.transparency.org/policy_research/surveys_indices/cpi/2010/in_detail, Transparency International: Corruption Perception Index 2010 Report. http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results

12. CPI 2010 uses data from 13 sources generated by 10 independent institutions which cover the years 2009 and 2010. For Sri Lanka, data is derived from the Asian Development Bank, Bertelsmann Foundation, Bertelsmann Transformation Index, Economist Intelligence Unit, Global Insights and the World Economic Forum. These institutions carry out different surveys, assessments and business opinions which collect information relating to bribery of public officials, kickbacks in public procurement, embezzlement of public funds etc.

The CPI uses perceptions because it is very difficult to measure the actual incidence of corruption, which is mostly a hidden activity. Moreover, 'non-perception' data about corruption is not available in many countries including Sri Lanka. Even when such data is available, they cannot effectively be indicators of the prevalence of corruption as other factors such as the freedom of the press or the efficiency of the judicial system affect the availability of such data. Nevertheless, perceptions have proved to be a reliable estimate of corruption.

Figure 1: Corruption Perception Index



Sri Lanka rating -- public sector scores low

Sri Lanka, with a score of 3.2, finds itself in the same group as Bosnia and Herzegovina, Djibouti, Gambia, Guatemala, Kiribati and Swaziland. The fact that Sri Lanka finds itself placed among countries which are not considered well-governed even in common parlance let alone by any systematic index, should be an eye-opener for concerned citizens. Sri Lanka's rating marked a marginal improvement with a move from 97th position among 180 countries in 2009 to 91st among 178 countries in 2010.¹³ The present score indicates that Sri Lanka continues to face a severe problem of corruption in the public

13. See Corruption Perception Index 2010, Transparency International website: http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results

sector. In South Asia, Bhutan (5.7) and India (3.3) received higher scores than Sri Lanka, but other South Asian countries have lower scores. These results demand that Sri Lanka puts in place more transparent and stricter mechanisms for controlling corruption in the public sector in order to make sure that public tax revenue and international aid are effectively used to improve public services and enhance development.

The Failed States Index (FSI)

Index method

The Failed States Index (FSI) captures state stability or vulnerability to violence. FSI in 2008 and 2007 included 177 countries while in 2006 and 2005 it included 148 and 75 countries respectively. The FSI is produced each year by The Fund for Peace, an independent, non-partisan research and educational organization based in the United States of America that works to prevent war and alleviate the conditions that cause conflict.¹⁴

Figure 2: Failed States Index



14. <http://www.foreignpolicy.com/failedstates>

The FSI rates 177 countries as measured by 12 indicators of 'state decay': Demographic Pressures, Refugees/IDPs (Internally Displaced Persons), Group Grievance, Human Flight, Uneven Development, Economic Decline, De-legitimization of the State, Public Services, Human Rights, Security Apparatus, Factionalized Elites and External Intervention.¹⁵ Scoring according to these 12 indicators determines the ranking of a given state in relation to other states. For the indicators, the ratings are placed on a scale of 0 to 10, with 0 being the lowest intensity (most stable) and 10 being the highest intensity (failed). The total score for a particular country is the sum of the 12 indicators and is on a scale of 0-120. In this index, higher scores (scores closer to 120) indicate greater state vulnerability. Somalia with a score of 114.3 tops this year's list of failed states as it did in the three previous years, while Norway with a score of 18.7 takes the 177th position as the most stable state among the 177 countries assessed in this year.

Sri Lanka rated 'in danger'

Sri Lanka has a score of 95.7, which places it in the 25th position and is in the cluster of countries named as 'in danger'. Sri Lanka has particularly poor scores on some indicators: Refugees/IDPs (9.4), Group Grievance (9.6), Uneven Development (8.7), De-legitimization of the State (8.6), Human Rights (8.8), Security Apparatus (8.5) and Factionalized Elites (9.4). Sri Lanka's position has seen marginal ups and downs -- 25th in 2007, 20th in 2008 and 22nd in 2009 respectively. Table 2 shows the scores of the top five (most failed) countries and countries occupying the positions from 20-25 including Sri Lanka.

FSI 2010 is based on data collected in 2009 and it may be the case that conditions in Sri Lanka may have improved in 2010. However, as the index scoring for Sri Lanka indicates, FSI has found that there were serious issues relating to IDPs, specific grievances affecting particular communities, violations of human rights and political divisions within the country and various other similar issues.

15. http://www.foreignpolicy.com/articles/2009/06/22/2009_failed_states_index_faq_methodology. The data used in each index is collected from May to December of the preceding year. FSI in 2010 draws on some 90,000 publicly available sources, which include media reports, analyses from universities, think-tanks, reports of independent organizations, reports from governments etc., to analyse 177 countries. More information on the methodology is available at the above web link.

Table 2: Scores for the Failed States Index

Country	Rank	Total	Demographic Pressures	Refugees and IDPs	Group Grievance	Human Flight	Uneven Economic Development	Economic Decline	De-legitimization of the State	Public Services	Human Rights	Security Apparatus	Factionalized Elites	External Intervention
Somalia	1	114.7	9.8	9.9	9.7	8.5	7.7	9.5	10.0	9.9	9.9	10.0	10.0	9.8
Zimbabwe	2	114.0	9.8	9.1	9.1	10.0	9.7	10.0	9.8	9.8	9.9	9.7	9.5	7.6
Sudan	3	112.4	9.0	9.8	9.9	9.0	9.6	7.0	9.8	9.5	9.8	9.7	9.5	9.8
Chad	4	112.2	9.3	9.4	9.8	7.8	9.3	8.3	9.8	9.6	9.5	9.9	9.8	9.7
Dem. Rep. of the Congo	5	108.7	9.7	9.6	8.9	8.1	9.3	8.3	8.6	9.2	9.0	9.7	8.7	9.6
East Timor	20	97.2	8.4	9.0	7.3	5.7	6.8	8.4	9.4	8.4	7.0	9.0	8.8	9.0
Uganda	21	96.9	8.7	9.3	8.0	6.5	8.7	7.6	8.0	8.0	7.7	8.2	8.2	8.0
Sri Lanka	22	96.7	7.5	9.3	9.8	6.9	8.5	6.1	9.0	6.6	8.5	9.2	9.2	6.1
Niger	23	96.5	9.5	6.4	8.5	6.3	7.6	9.2	8.7	9.5	8.2	7.4	7.1	8.1
Burundi	24	95.7	9.2	8.1	7.5	6.5	8.4	8.0	7.5	9.0	7.6	7.3	7.7	8.9
Nepal	25	95.4	8.3	6.8	8.7	6.0	9.3	8.5	8.0	7.4	8.7	8.1	8.4	7.2

Worldwide Governance Indicators (WGI)

Areas monitored by WGI

The World Bank annually produces the Worldwide Governance Indicators (WGI), which can be considered as the most extensive and systematic source of information about governance in the world. The WGI covers 213 economies for 2009 and for the period 1996–2009. The WGI draws data from a large number of enterprise, citizen and expert survey respondents, survey institutes, think-tanks, non-governmental organizations and international organizations in industrial and developing countries.¹⁶ The WGI does not rank countries although its data and findings enable comparison among any select set of countries as well as comparison over time.¹⁷

The WGI examines the following categories of governance:

1. Voice and Accountability -- perceptions of citizens' participation in selecting government, freedom of expression, freedom of association and a free media.
2. Political Stability and Absence of Violence -- perceptions of the likelihood for destabilization or overthrow of government by unconstitutional or violent means.
3. Government Effectiveness -- perceptions of the quality of public services, the civil service and its independence from political pressures, the quality of policy formulation and implementation.
4. Regulatory Quality -- perceptions of capacity of the government to formulate and implement sound policies and regulations that permit and promote private sector development.
5. Rule of Law -- perceptions of the quality of contract enforcement, property rights, the police, the courts and the likelihood of crime and violence.
6. Control of Corruption -- perceptions of petty and grand forms of corruption and "capture" of the state by elites and private interests.¹⁸

16. <http://info.worldbank.org/governance/wgi/index.asp>

17. Data sources can be found from the following link:

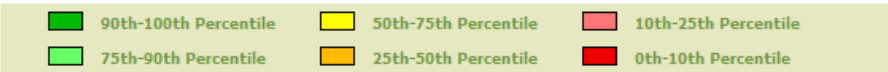
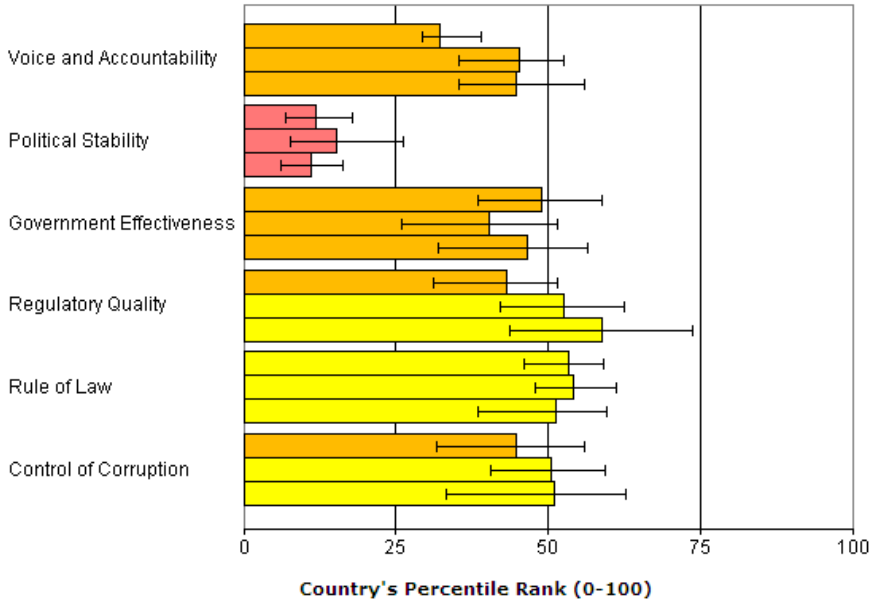
<http://info.worldbank.org/governance/wgi/pdf/table1.pdf> A detailed account on the methodology http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1682130

18. Quoted directly from the website of the Worldwide Governance Indicators accessed 3 January 2011: <http://info.worldbank.org/governance/wgi/resources.htm>

Figure 3: Worldwide Governance Indicators

SRI LANKA

Comparison between 2009, 2004, 1998 (top-bottom order)



Source: Kaufmann D., A. Kraay, and M. Mastruzzi (2010), *The Worldwide Governance Indicators: Methodology and Analytical Issues*

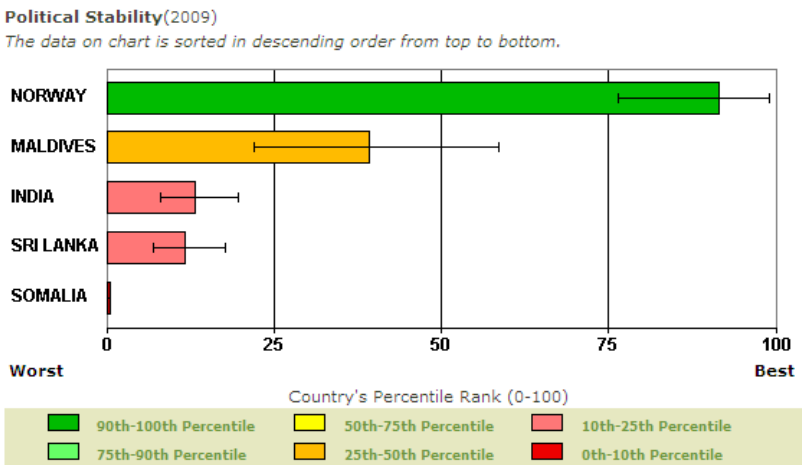
Figure 3 displays Sri Lanka’s percentile ranking for each governance indicator, which signifies the percentage of countries worldwide that falls below Sri Lanka on those governance indicators. Higher values denote a better governance situation. For instance, Sri Lanka’s score for ‘Voice and accountability’ for 2009 is 32%, which means an estimated 32% of the countries rate worse and 68% better than Sri Lanka.¹⁹ The fact that Sri Lanka does better than the 50th percentile only in two of the six indicators is evidence of a weak governance situation. Sri Lanka has become worse in 2009 in terms of ‘Voice and accountability’, ‘Regulatory quality’, ‘Rule of law’ and ‘Control of corruption’ when compared with 2008.

19. The exact percentiles can be viewed at the following table: http://info.worldbank.org/governance/wgi/sc_chart.asp The percentiles are given at the 90% confidence interval.

Political stability -- Sri Lanka lowest

Sri Lanka records the poorest score on ‘Political Stability’ with 12% for 2009. This means that a mere estimated 12% of the countries rate worse than Sri Lanka while an estimated 88% rate better. Figure 4 depicts the situation of a sample of countries selected to show how Sri Lanka compares to other countries. Even India and Maldives do not get a high rating while Somalia, a country ravaged by violence, has little ‘Political Stability’. Given that data for the 2009 index is collected from 2008 onwards, it is possible that conditions in the last stages of the war against the Liberation Tigers of Tamil Eelam (LTTE) may have contributed to this poor image of ‘Political Stability’ and that it may have improved in 2009 and 2010.

Figure 4: Political stability



Source: Kaufmann D., A. Kraay, and M. Mastruzzi (2010). *The Worldwide Governance Indicators: Methodology and Analytical Issues*

Rule of Law -- major improvement needed

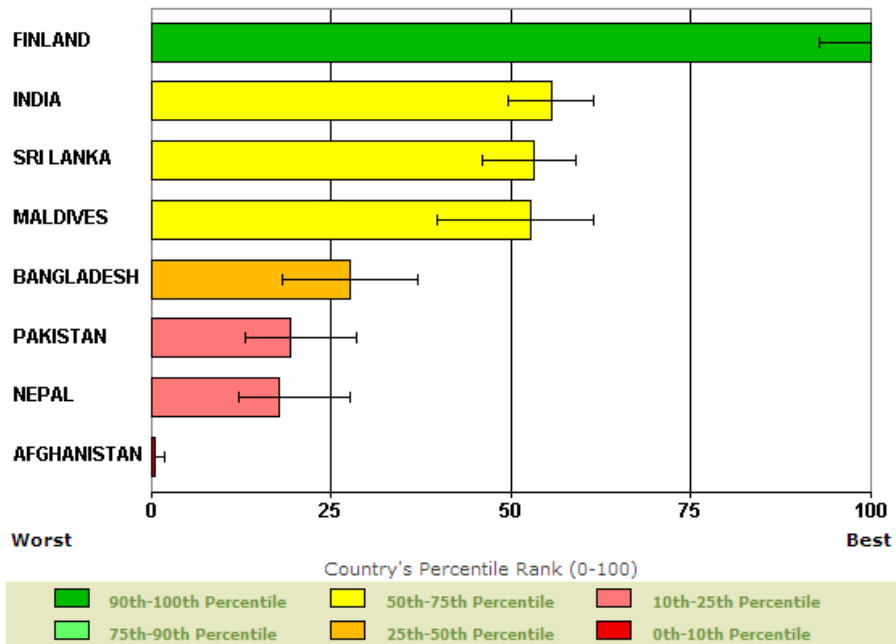
Sri Lanka’s best performance in 2009 is in ‘Rule of Law’, which is only one of the two indicators crossing the 50th percentile score. Figure 5 compares the situation in Sri Lanka with countries in South Asia and also Finland, a country with the highest score (100). India and Sri Lanka have 56 and 53 scores respectively, while no country in South Asia marks the 60th percentile. This shows that even in terms of the best performing indicator, all South Asian countries including Sri Lanka do not get high ratings and, therefore, require significant improvement in ‘Rule of law’ too. The lack of confidence in

'Rule of Law' can have severe implications for Sri Lanka both from the point of view of its citizens and in terms of global perceptions. Low performance implies that citizens may resort to other unofficial means of justice on the one hand, while foreigners, especially potential investors, could lose trust in the judicial system in Sri Lanka.

Figure 5: Rule of Law

Rule of Law(2009)

The data on chart is sorted in descending order from top to bottom.



Source: Kaufmann D., A. Kraay, and M. Mastruzzi (2010), *The Worldwide Governance Indicators: Methodology and Analytical Issues*

Countries at the Crossroads Survey (CCS) -- Sri Lanka below standard

Survey method

Produced annually since 2004 by Freedom House, a US-based civil society organization, Countries at the Crossroads Survey (CCS) investigates government performance in 70 countries considered to be “at a critical crossroads in determining their political future”. The CCS provides both

detailed narrative reports and quantitative data to compare over time. It looks at several aspects of governance including *government accountability, civil liberties, rule of law and anti-corruption and transparency efforts*.²⁰ The country narratives, authored by prominent scholars and analysts, contribute to further explain and reinforce the quantitative data.²¹ For the country scores in the CCS 2010, data pertains to events that have occurred from December 1, 2005 to May 31, 2009.

CCS rates the countries' performance on each methodology question on a scale of 0-7, with 0 representing the weakest and 7 the strongest performance. According to Freedom House, the scoring scale is as follows:²²

- 0–2: very few adequate protections, legal standards or rights in the rated category. Laws are insufficient, while legal protections and enforcement are weak.
- 3–4: 'some' adequate protections, legal standards or rights in the rated category. Legal protections are weak and enforcement of the law is inconsistent or corrupt.
- 5: many adequate protections, legal standards or rights in the rated category. Rights and political standards are protected, but enforcement is affected by uncertainty and abuses. The basic standard of democratic performance, however, prevails.
- 6–7: all or nearly all adequate protections, legal standards or rights in the rated category. Legal protections are strong and enforced fairly. Access to legal redress is good and the political system functions smoothly.

Survey results

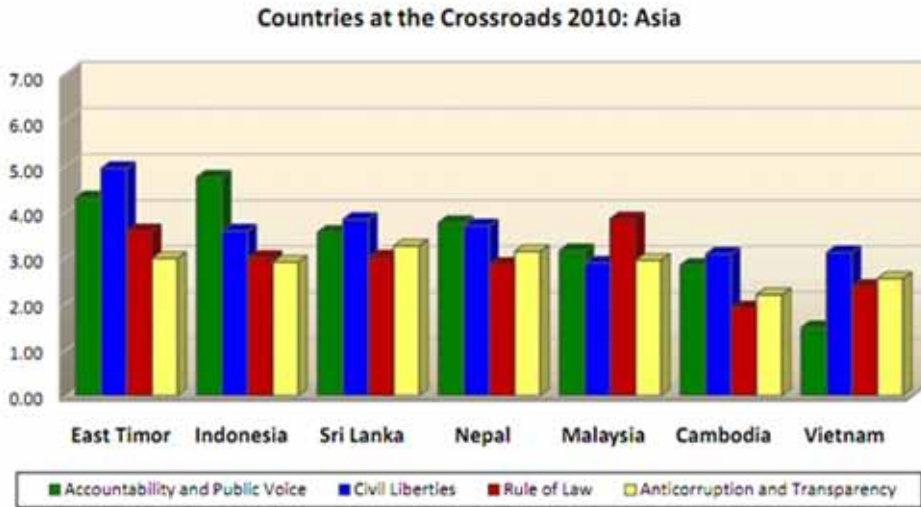
Figure 6 shows that among the Asian countries assessed, no country reaches a score of 5 in any of the four dimensions of governance. Sri Lanka and Nepal have more or less similar scores, while East Timor and Indonesia do slightly better than Sri Lanka on the whole. According to CCS, scores below 5 indicate absence of basic standards of democracy. Thus, Sri Lanka falls below the basic standard of democratic performance and is a country in which protections are inadequate and the enforcement of law is unreliable and liable to abuse.

20. <http://www.freedomhouse.org/template.cfm?page=139&edition=9>

21. For a detailed description of the methodology, see <http://freedomhouse.org/template.cfm?page=140&edition=9&ccrpage=45>

22. Ibid

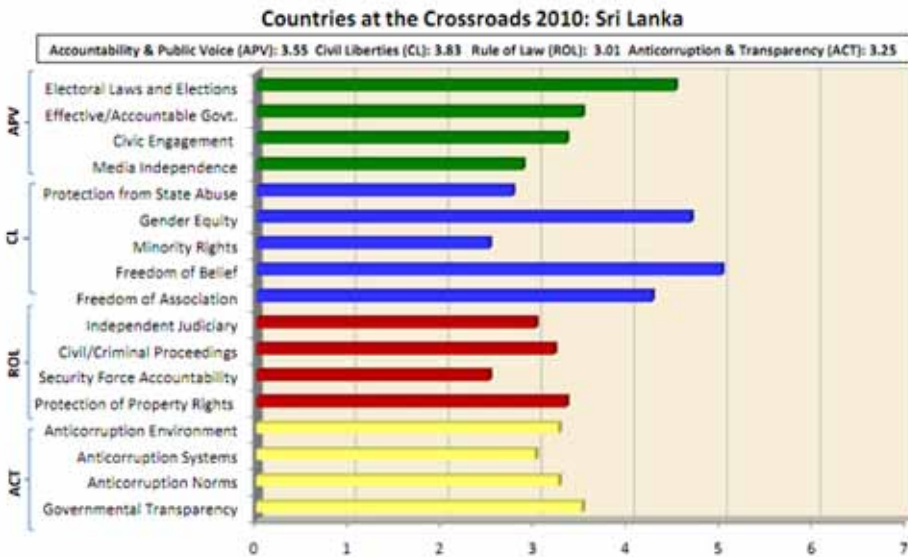
Figure 6: Countries at the Crossroads



Sri Lanka poor in many categories

Figure 7 presents a disaggregated profile of the 17 sub-categories of governance examined in the CCS. Sri Lanka has poor scores particularly for media independence (2.86), protection from state abuse (2.75), minority rights (2.5), independence of the judiciary (3), security forces’ accountability (2.5) and anti-corruption systems (3). Sri Lanka has a score of 5 for freedom of belief.

Figure 7: CCS Sri Lanka



The CCS country (narrative) report of 2010²³ highlights the malpractices at recent elections as well as the failure of the government to respect rulings of the Supreme Court and appoint the Constitutional Council in fulfilment of the 17th Amendment. It refers to issues such as nepotism, hostility towards non-governmental organizations, attacks on media institutions and personnel and misuse of the state media as issues *undermining accountability and public voice*. *Civil liberties* were affected by conflict-related killings and disappearances, torture both by the government and the LTTE and the lack of political will to investigate crimes and enforce laws.

The report also refers to the Anti-conversion (Religion) Bill and strictures against public assembly and political demonstrations organized by opposition parties. The rule of law suffers due to interference in the judiciary by the Executive, lack of an independent Judicial Services Commission, long delays in the court system and extreme politicization of the security apparatus. Under the theme anti-corruption and transparency, the report mentions practices of bribes among government officials, nepotism or cronyism and lack of effort to control corruption. It describes interference by the President in the Commission to Investigate Allegations of Bribery and Corruption (CIABOC), the Committee on Public Enterprises (COPE) and in the powers of the Auditor General. The lack of a 'freedom of information' law is also noted and also that procedures for government contracts remain less transparent.

Index of State Weakness in the Developing World (ISW) -- Sri Lanka 'weak state'

Index method

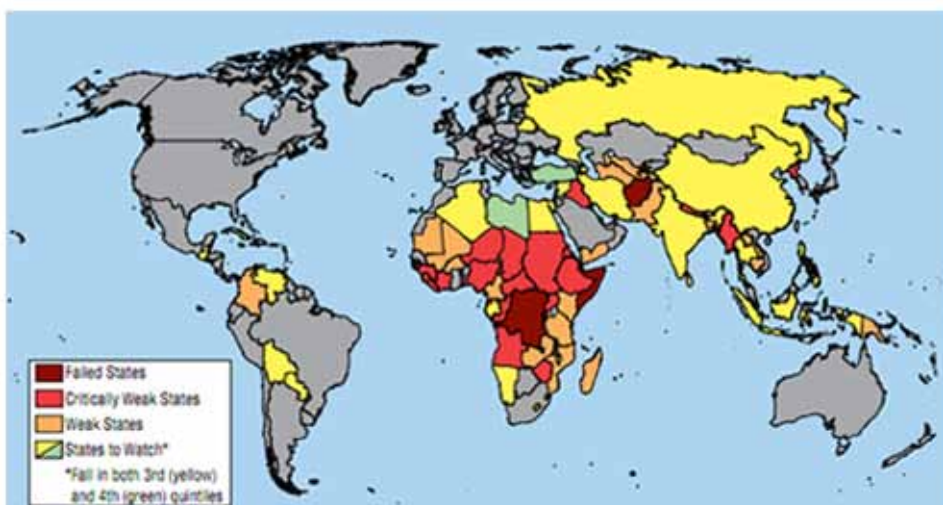
The Index of State Weakness in the Developing World (ISW) compiled by the Brookings Institution, USA, ranks and assesses 141 developing nations according to their relative performance in four important aspects: Economic, political, security and social welfare. 'Weak states' are those countries lacking the capacity or will to:

- Facilitate sustainable and equitable economic growth.
- Establish and maintain legitimate, transparent and accountable political institutions.
- Secure populations from violent conflict and control territory.
- Meet basic human needs of the population.

23. Oberst, Robert C: "Countries at Crossroads." Country Report, Sri Lanka, Freedom House: <http://www.freedomhouse.org/template.cfm?page=140&edition=9&ccrpage=43&ccrcountry=198>

The ISW is built on four 'baskets', each of which contains five indicators that are proxies for one core aspect of state function. Thus ISW uses 20 sub-indicators in total.²⁴ Indicators in the economic basket measure the ability of the state to foster a stable economic environment conducive to sustainable and equitable growth. The political indicators are about the standard of political institutions and legitimacy of the system of governance as perceived by people. The security indicators examine physical security for citizens while social welfare indicators measure the ability of the state to meet human development needs.

Figure 8: Index of State Weakness in the Developing World



ISW rating

The ISW uses standardized and aggregated scores, which vary between 0.0 (worst) to 10.0 (best). ISW 2010 assesses 141 developing countries among which Somalia occupies the 1st position as the weakest performer, while the Slovak Republic occupies the 141st position as the best performer. Sri Lanka occupies the 56th position.²⁵ ISW shows that Sri Lanka has good performance in social welfare but very poor performance in security. Repercussions of the long-drawn out conflict and deteriorating democracy may have been behind such poor performance. On the whole, Sri Lanka falls into the 'weak states' category in the ISW.

24. See full report for more details on the methodology: http://www.brookings.edu/~media/Files/rc/reports/2008/02_weak_states_index/02_weak_states_index.pdf.

25. Somalia scores a mere 0.52 while Slovak Republic scores 9.41. Sri Lanka has an overall score of 5.94 and basket scores of 6.32 (economic), 5.47 (political), 3.38 (security) and 8.59 (social welfare).

Conclusion -- generally gloomy picture

This chapter has examined six international governance indices in order to understand the position of Sri Lanka in the world's governance map. The Empowerment Index of the UN brings out a mixed picture about governance in Sri Lanka which fares well in certain dimensions such as having democracy in a formal sense and holding local elections etc., but has poor performance in some dimensions such as human rights and press freedom. The Corruption Perception Index (CPI) shows that Sri Lanka, along with other South Asian countries, confront a severe problem of corruption in the public sector. Although Sri Lanka's rank records a marginal improvement, changes effected to the methodology of CPI are largely responsible for this improvement and not a lowering of corruption per se. However, the Empowerment Index of UN places Sri Lanka and Norway at the same level of corruption experience for which differences in methodology or sources of data can be responsible. The Failed State Index puts Sri Lanka in the 'danger zone' at the 25th position out of 177 countries (ranking in which the most failed state is at position 1). According to the Worldwide Governance Indicator Survey, Sri Lanka exceeds the 50th percentile only in two of the six indicators, showing a weak governance situation. Political stability and rule of law appear to be seriously weak in Sri Lanka according to this index. Countries at the Crossroads Survey paints a similar picture about Sri Lanka with regard to dimensions of governance. The Index of State Weakness shows that Sri Lanka has performed well in social welfare and reasonably in economy but the poor overall score puts it in the category of 'weak states'.

Accordingly, all of the six governance indices generate a more or less gloomy picture with regard to the governance situation in Sri Lanka although it shows satisfactory performance in a few categories when an index considers the formal legalistic situation rather than actual experiences. As mentioned in the introduction, various political ideologies, cultural differences and institutional outlooks underpin these international indices. Therefore, these need to be interpreted with caution. Further, most of these indexes are compiled in Western countries although sources of data are from the countries assessed. Practitioners and scholars make use of these indexes in the absence of parallel systematic indexes in Asian countries. Moreover, Sri Lanka as a developing country needs to attract foreign investment and, thus, a poor image in these global indexes may affect Sri Lanka's chances of attracting investment. Nevertheless, the very fact that six of the major and most globally known governance indices, reflecting different approaches

and methodology, come to the same conclusion is remarkable and, therefore, their findings must be taken seriously. They point out that Sri Lanka needs to move forward and improve its governance situation significantly.

Overall, the conflict in Sri Lanka and its consequences have had a significant impact on various indicators of governance for which, in many cases, data were calculated in 2008 or 2009. It is, nevertheless, possible that in the future, governance indexes may show an improvement in Sri Lanka in certain dimensions such as disappearances, rule of law, physical and human security, war-related death, displacement and instability, refugees, threat of violence, minority rights etc. While the end of the war itself would improve some of the above categories, deliberate state initiatives might be required to improve others. Nonetheless, there are other dimensions of governance which are either unrelated or not strongly related to conflict, such as corruption, transparency of government, press freedom, quality of elections, independence of the judiciary, quality of the civil service, gender equity etc. Sri Lanka may need concerted action to improve along these lines as well. As stated in the beginning of this chapter, future economic development and the social and political well-being of the population may largely depend on Sri Lanka's performance in governance.

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- See Article 41A(1) of the 18th Amendment.
- See Article 41B of the Constitution and the Schedule.
- See Article 41C and Schedule 1 under the 17th Amendment
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- See election manifesto of the UNF.
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