

NATIONAL INTEGRITY SYSTEM ASSESSMENT

SRI LANKA 2010

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# **NATIONAL INTEGRITY SYSTEM ASSESSMENT**

## **SRI LANKA 2010**

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## TABLE OF CONTENTS

TABLE OF CONTENTS .....	II
LIST OF TABLES AND CHARTS .....	IV
CONTRIBUTORS TO THE STUDY .....	V
ABBREVIATIONS AND ACRONYMS .....	VI
FOREWORD .....	X
OVERVIEW OF THE PROCESS .....	XII
<b>I INTRODUCTION .....</b>	<b>1</b>
- Prof. Arjuna Parakrama	
<b>II EXECUTIVE SUMMARY .....</b>	<b>7</b>
- Prof. Arjuna Parakrama	
<b>III COUNTRY PROFILE .....</b>	<b>34</b>
- Prof. Arjuna Parakrama	
<b>IV CORRUPTION PROFILE .....</b>	<b>39</b>
- TISL Research Team	
<b>V ANTI CORRUPTION LAWS AND ACTIVITIES .....</b>	<b>45</b>
- TISL Research Team	
<b>VI THE NATIONAL INTEGRITY SYSTEM .....</b>	<b>50</b>
1. THE LEGISLATURE .....	50
- Dr. Mario Gomez	
2. THE EXECUTIVE .....	72
- Dr. Mario Gomez	
3. THE JUDICIARY .....	88
- Dr. Mario Gomez	
4. THE PUBLIC SECTOR .....	105
- TISL Research Team	
5. LAW ENFORCEMENT AGENCIES .....	128
- Ms Bettina Meier	
6. THE ELECTION COMMISSION .....	147
- Dr. Mario Gomez	
7. OMBUDSMAN / HUMAN RIGHTS COMMISSION .....	163
- Ms Bettina Meier	
8. AUDITOR GENERAL .....	181
- Dr. Mario Gomez	

9. ANTI-CORRUPTION COMMISSION .....	194
- <i>Ms Gareesha Wirithamulla</i>	
10. POLITICAL PARTIES .....	210
- <i>Ms Bettina Meier</i>	
11. THE MEDIA .....	223
- <i>Dr. Mario Gomez</i>	
12. CIVIL SOCIETY .....	243
- <i>Prof. Arjuna Parakrama</i>	
13. BUSINESS .....	261
- <i>TISL Research Team</i>	
<b>VII CONCLUSION .....</b>	<b>281</b>
<b>VIII REFERENCES .....</b>	<b>290</b>

## LIST OF TABLES AND CHARTS

TABLE 1: SCORING SCALES .....	4
TABLE 2: NIS ASSESSMENT FRAMEWORK .....	8
TABLE 3: INTEGRITY ACROSS NORMATIVE DIMENSIONS .....	16
TABLE 4: SRI LANKA SCORE IN THE CPI .....	40
TABLE 5: SCORES FOR LEGISLATURE .....	70
TABLE 6: SCORES FOR EXECUTIVE .....	87
TABLE 7: SCORES FOR JUDICIARY .....	103
TABLE 8: GOVERNMENT EMPLOYEES BY LANGUAGE PROFICIENCY .....	119
TABLE 9: SCORES FOR PUBLIC-SECTOR.....	126
TABLE 10: SCORES FOR LAW ENFORCEMENT AGENCIES .....	146
TABLE 11: SCORES FOR ELECTION COMMISSION.....	161
TABLE 12: SCORES FOR OMBUDSMAN .....	179
TABLE 13: SCORES FOR AUDITOR GENERAL .....	192
TABLE 14: CONVICTION RATE IN PROSECUTIONS FOR BRIBERY .....	207
TABLE 15: SCORES FOR ANTI-CORRUPTION COMMISSION .....	208
TABLE 16: SCORES FOR POLITICAL PARTIES.....	222
TABLE 17: SCORES FOR MEDIA .....	241
TABLE 18: SCORES FOR CIVIL SOCIETY .....	259
TABLE 19: SCORES FOR BUSINESS .....	278
TABLE 20: SUMMARY OF OVERALL PILLAR SCORES.....	282
CHART 1: OVERVIEW OF PILLAR SCORES.....	14
CHART 2: OVERALL PILLAR PERFORMANCE ACROSS DIMENSIONS .....	15
CHART 3: PSC STATISTICS ON APPEALS AGAINST ITS DECISIONS .....	117
CHART 4: DISCIPLINARY PROCEEDINGS BY PSC .....	121

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## **ABBREVIATIONS AND ACRONYMS**

AASMB	Accounting and Auditing Standards Monitoring Board
ACP	Anti Corruption Program
ADB	Asia Development Bank
AG	Attorney General
AG	Auditor General
ANCL	Associated Newspapers of Ceylon Limited
ARD	Associates in Rural Development
BOI	Board of Investments
CMEV	Centre for the Monitoring of Election Violence
CPA	Centre for Policy Alternatives
CWC	Ceylon Workers' Congress
CSO	Civil Society Organizations
CBO	Community Based Organizations
CHA	Consortium of Humanitarian Agencies
CIABOC	Commission to Investigate Allegation of Bribery or Corruption
COI	Commissions of Inquiry
COPA	Committee on Public Accounts
COPE	Committee on Public Enterprises
CPI	Corruption Perception Index
DIG	Deputy Inspector General
DG	Director General
DNA	Democratic National Alliance
FLICT	Facilitating Local Initiatives for Conflict Transformation
FOI	Freedom of Information
FORUM ASIA	Asia Forum for Human Rights and Development
FMM	Free Media Movement
GDP	Gross Domestic Product
GoSL	Government of Sri Lanka

## Abbreviations and Acronyms

HRC	Human Rights Commission
IBA	International Bar Association
IBAHRI	International Bar Association Human Rights Initiative
ICC	International Coordinating Committee
ICC-SCA	International Coordinating Committee - Sub-Committee on Accreditation
ICASL	Institute of Chartered Accountants of Sri Lanka
ICJ	International Commission of Jurists
IDEA	International Institute for Democracy and Electoral Assistance
IDP	Internally Displaced Person
IGP	Inspector General of Police
IFC	International Finance Corporation
IFI	International Financial Institutions
IMF	International Monetary Fund
INGO	International Non-governmental Organizations
IRED	Innovations et Reseaux pour le Developpement
ITN	Independent Television Network
JSC	Judicial Service Commission
JVP	Janatha Vimukthi Peramuna
LLRC	Lessons Learned and Reconciliation Commission
LTTE	Liberation Tigers of Tamil Eelam
MP	Member of Parliament
NGO	Non-governmental Organization
NIB	National Investigations Bureau
NIS	National Integrity System
NPA	National Procurement Agency
NPC	National Police Commission
OECD	Organization for Economic and Co-operation Development
PA	People's Alliance
PAC	Public Accounts Committee
PAFFREL	People's Action for Free and Fair Elections



PCC	Public Petitions Committee
PCCSL	Press Complaints Commission of Sri Lanka
PSO	Public Security Ordinance
PSC	Public Service Commission
PTA	Prevention of Terrorism Act
PTF	Presidential Task Force
RSF	Reporters Sans Frontiers
SAFA	South Asian Federation of Accountants
SEAC	Support Efforts and Action against Corruption in Sri Lanka
SEC	Securities and Exchange Commission
SOE	State Owned Enterprises
SLAS	Sri Lanka Administrative Service
SLEAS	Sri Lanka Education Administration Service
SLBC	Sri Lanka Broadcasting Corporation
SLIC	Sri Lanka Insurance Company
SLIDA	Sri Lanka Institute of Development Administration
SLFP	Sri Lanka Freedom Party
SLMC	Sri Lanka Muslim Congress
SLR	Sri Lankan Rupees
SLRC	Sri Lanka Rupavahini Corporation
SLWJA	Sri Lanka Working Journalists Association
SME	Small and Medium-size Enterprises
TISL	Transparency International Sri Lanka
TRC	Telecommunications Regulatory Commission
TMVP	Tamil Makkal Viduthalai Pulikal
TNA	Tamil National Alliance
UNCAC	United Nation Convention Against Corruption
UNDP	United Nations Development Programme
UNP	United National Party
UNSG	United Nations Secretary-General

## Abbreviations and Acronyms

UNF	United National Front
UPFA	United People's Front Alliance
USAID	United States Agency for International Development
USD	United States Dollar

## FOREWORD

Post independence literature and media reports capture the excitement and commitment the pioneering generations had in crafting a State that is democratic, inclusive and considerate of the needs of diverse people of the country. Statesmanship and a spirit of altruistic benevolence to a great extent characterized the early leaders and State institutions.

Managing the destiny of a culturally diverse nation with contested identities in a globalizing world is a great challenge that requires high levels of professionalism, technical know-how and a comprehensive world view anchored in a strong ethical and legal framework with adequate checks and balances on human frailties of greed and other imperfections.

Corruption is a serious problem threatening democratic and economic development in Sri Lanka. Corruption exists in all spheres of society, in the public, private and not-for-profit sectors alike. High tolerance of corruption, non-sanctioning of corrupt behavior and a culture that tends not to question authority all provide an environment in which corruption can flourish. Corruption is a systemic problem, and needs to be looked at in a systemic manner.

On behalf of Transparency International Sri Lanka (TISL), I am pleased to present the National Integrity System (NIS) Study, a comprehensive assessment of the legal basis for and actual practice of functioning of Sri Lanka's key institutions responsible for preventing and curbing corruption.

This report is meant to promote open dialogue and debate among a wide range of stakeholders, including policy-makers and civil society. It also provides specific proposals for reform as well as more long-term objectives for the strengthening of the integrity system in Sri Lanka. The study is based on extensive desk research and interviews with around 30 experts, both within the institutions examined and outside these institutions. Every attempt has been made throughout the process to engage diverse points of view as well as to provide the opportunity for critical feedback.

Though the methodology and rationale of the study are detailed elsewhere in this report, a few words need to be said about the cut-off date for information contained in it as well as recognizing subsequent national developments. Each chapter relied on available evidence, published reports, at least two interviews of key persons and

extensive reviews with an advisory panel of experts. Since the report covers 2010, November 20, 2010 was set as the last date beyond which data were not considered for inclusion. However, due to the inclusivity of the validation process which involved revisions based on multiple reviews and feedback from key stakeholders, it has taken six months for the report to come out in print.

In the period between the end of 2010 and June 2011, a number of welcome developments have taken place such as the appointment of the Human Rights Commission (HRC) and Commission for the Investigation of Allegations of Bribery or Corruption (CIABOC) commissioners. At the same time, the promise to repeal the Emergency Regulations has not been honoured. In another development, the former Chief Justice has been appointed as Senior Legal Advisor to the President raising concerns about the integrity and independence of the judiciary.

TISL appreciates the contributions of those who were involved in this study. The in-house research team, led by Bettina Meier, as well as Dr Mario Gomez, and the team members Garesha Wirthamulla, Nathasha Ariyadasa, Nilhan de Mel, Dhammika Herath and Anjana Bhattarai. Prof. Arjuna Parakrama, provided critical inputs and edited the report. The Secretariat of Transparency International, in particular Dr Finn Heinrich and Dr Suzanne Mulcahy, provided the financial support and critical reviews. The external reviewers provided useful pillar-specific and general feedback and the Advisory Group accompanied this study and the many experts who agreed to be interviewed.

This report can be read as a whole or in parts. Each pillar assessment is self-contained, allowing those interested in a particular pillar to study only the relevant chapter. Therefore, some degree of repetition was unavoidable.

The objective of the NIS Assessment will be fulfilled if it succeeds in stimulating an open public discourse on ways and means of enhancing integrity and transparency in Sri Lanka.

Wijaya Jayatilaka

Executive Director

## OVERVIEW OF THE PROCESS

- This Report is published in July 2011.
- The Report serves the year 2010 and includes information and materials up to November 20, 2010. Where relevant, it examines institutional histories over the past three to five years.
- The Sri Lanka report is led by an Advisory Committee and is managed by TISL.
- The methodology of the NIS Assessment follows the TI global template and is described in detail below. This includes a desk study complemented by interviews, provision of the right to response, and a scoring workshop, as well as an external review.
- The scores for each category within the 13 prioritized pillars are indicative assessments, which should not be taken as indisputable judgements. In every case, the narrative descriptions provide a more concrete evidence-based analysis.
- Among the limitations of this study are time and resource constraints, as well as elements of the inherited NIS methodology, that sets two interviews as a minimum requirement.
- Stakeholders and the general public are invited to write to TISL regarding errors and omissions, as well as make their observations on this report, the main purpose of which is to enable a broad public dialogue on enhancing national integrity in Sri Lanka.
- All conversions of Sri Lankan Rupees to US Dollars have been made at the exchange rate of Rs.111.48 = US\$01, which was the rate for 31 December 2010.

# I Introduction

The term “**National Integrity System**” (NIS) was coined by Transparency International in the 1990s. The NIS includes the principal actors and institutions which influence how a country is governed.

An NIS Assessment is an institutional assessment of the integrity, transparency and accountability of a set of “pillars” of integrity, and their contribution to the overall integrity of society at large. When these governance institutions function properly, they constitute a healthy and robust National Integrity System, one that is effective in combating corruption as part of the larger struggle against abuse of power, malfeasance and misappropriation in all its forms. However, when these institutions are characterized by a lack of appropriate regulations and by unaccountable behavior, and when they have a limited role to play, corruption is likely to thrive with negative ripple effects for equitable growth, sustainable development and social cohesion.

Corruption is rarely an isolated phenomenon found only within a specific institution, sector or group of actors. Rather, it is usually of a systemic nature, and therefore fighting it also requires a holistic and systemic strategy. The NIS Assessment offers a detailed analysis of the strengths and weaknesses of the key actors which make up a country’s anticorruption system. The assessment covers the legal provisions, institutional capacities, and actual practices of these actors, as well as the relationships among them.

The methodology of the NIS Assessment for Sri Lanka followed the generic global template, which comprised the following main elements: an initial series of discussions with an advisory panel determined the main pillars or sectors of the anticorruption system that were most appropriate for study in Sri Lanka; for each selected sector, a desk review was conducted to identify trends and issues which was then complemented by interviews. The draft report for each pillar was shared with all contributors and comments incorporated. The advisory panel and additional experts participated in a validation and scoring workshop where scores for each category within each pillar were confirmed. The revised report was again subjected to review, both externally and internally, before the final product was agreed.

The precise process is detailed below as it is crucial to a clear understanding of the report's findings.

- a) Appointment of Advisory Committee, training of NIS team, selection of pillars and agreement on process
- b) Formulation of analytical questions for each pillar
- c) Identification and analysis of background/reference material
- d) Selection of interviewees and conduct of interviews
- e) Preparation of draft pillar reports for comment by TI Secretariat, Advisory Committee, interviewees and selected experts
- f) Revised drafts prepared (in some cases multiple revisions were undertaken), including the filling of gaps and identification of additional evidence.
- g) Revised drafts shared with Advisory Committee and Scoring Workshop Panel, where detailed comments were made during a two-day discussion held in December 2010, and the scoring finalized.
- h) Subsequently, the report was revised and then shared with interviewees and relevant department heads for their feedback to enhance credibility through providing the right to respond.
- i) Two external reviewers of national eminence reviewed the revised draft.
- j) Finalization of report on the basis of all feedback received.

The present report presents the findings of an NIS Assessment carried out by Transparency International Sri Lanka (TISL) in 2010. This follows an earlier, shorter NIS Assessment that was published in 2005.<sup>1</sup> Initial research was conducted by Dr. Mario Gomez, and research was concluded by the TISL research team under the leadership of Bettina Meier. Prof. Arjuna Parakrama led the consultative process, authored the introductory and conclusion sections and edited the report.

In Sri Lanka, the NIS comprises 13 component pillars selected through initial consultations with the NIS Advisory Committee at the commencement of the study in mid-2009. These thirteen areas were identified to represent the most important

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<sup>1</sup> Transparency International Sri Lanka, National Integrity Systems Country Study Report Sri Lanka – 2003, Colombo 2005.

sectors for describing and assessing the integrity system in Sri Lanka today.<sup>2</sup> The prioritized pillars are

1. The Legislature
2. The Executive
3. The Judiciary
4. The Public Sector
5. Law Enforcement Agencies
6. The Ombudsman / Human Rights Commission
7. Anti-Corruption Commission
8. The Election Commission
9. The Auditor General
10. Political Parties
11. The Media
12. Civil Society
13. Business

Each of the pillars is assessed along three dimensions: (1) the institution's overall capacity to function, (2) its own internal governance in terms of integrity, transparency and accountability, and (3) its role in contributing to the overall integrity of the national governance system. For each dimension, a common set of indicators, namely resources and independence under capacity; transparency, accountability and integrity under governance; and pillar-specific indicators under role (since no common role exists for all pillars) has been used to guide the assessment. Most indicators are broken down into two components: (a) the situation pertaining to the formal framework governing these institutions ('law'), and (b) the situation regarding their actual institutional practice and behavior ('practice'). This makes an analysis of any gap between the formal framework and the actual practice possible.

Descriptions of the constitutive elements of each of the pillars and the individual analytical modalities followed in each case are contained in the separate chapters devoted to them. Suffice to state in this introduction that the ultimate objective in

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<sup>2</sup> It should be noted, however, that during the course of the NIS Assessment, additional areas were identified by various interlocutors as being central to assessing Sri Lanka's integrity system. Two of these are Religious Institutions and Professions, as reiterated by one of the external reviewers. Another is International Organisations, including Donors. While some elements of these categories are captured in other pillars, no holistic account was possible within the current framework. No selection will satisfy everyone, but the lack of a more rigorous set of criteria for inclusion as pillars is acknowledged as a shortcoming of this study.



each case was balance and constructive engagement to ensure that the assessment is well-contextualized and evidence-based. Information received was cross-checked as far as possible, and heads of the institutions evaluated were provided every opportunity to respond and set the record straight.

The numerical scoring of pillars is based on the following conceptual framework, which was agreed by the Advisory Committee, scoring workshop participants and independent expert reviewers.

**Table 1: Scoring scales**

NUMERICAL SCORE	NARRATIVE APPROXIMATION
00 [Very Weak]	No provisions / processes
25 [Weak]	Minimal provisions / processes
50 [Moderate]	Some provisions/processes, but key gaps exist
75 [Strong]	Provisions/processes exist with constraints
100 [Very Strong]	Provisions / processes and adequate resources available, providing effective safeguards

This is the understanding reflected in the scoring provided for each pillar and category within each pillar, so that while the assessments are not free of subjectivity, they retain descriptive uniformity and hence represent the broad concurrence of authors, reviewers, interviewers, scoring workshop participants and advisory board.

In relation to the vexed issue of absolute standards and normativity in general, the consensus of respondents to the NIS team was that while certain absolutes exist, both current context and historical transition need to be taken into account when assessing national integrity. Therefore, using the NIS reports for cross-country comparisons will not be useful because of the differences in political and administrative systems as well as in the stage of development. However, the scoring may provide a basis for determining trends over time for the same country.

Within the pillars, key elements for specific focus were identified. Two and sometimes more key informants were interviewed per pillar in order to ensure that there was representation of diverse perspectives, especially in relation to controversial

areas. Additional attempts were made to include evidence-based opinions from outside the mainstream metropolitan perspectives, as well as to include different realities that obtain in post-war areas of the country. The views of women and minorities were also obtained in order to expand the breadth and range of the NIS beyond the globally stipulated two-respondent norm.

However, time, space and resource constraints inevitably resulted in the study and report not being as complete and comprehensive as planned. While this limitation is universal, a concerted effort was made to remedy any possible shortcoming due to inadequate diversity of representation through a rigorous review and validation process, which included the sharing of pillar reports with government officers in charge of the relevant institutions under scrutiny, as well as through obtaining the support of a wide spectrum of readers to comment on the drafts.

Among the key issues that had to be resolved in completing the study was the cut-off date for reporting on events, which was agreed as Nov 20, 2010. The report focused on the years 2009/10 but also considered major developments which took place earlier but are still in force or relevant.

Another concern was to ensure a wide and diverse target audience of this report as well as the need to see its value as a constructive basis for national improvement and reflexivity, more than as an evaluation *per se*. To this end, a set of recommendations have been added to each pillar to generate discussion and promote sequenced solutions to existing issues that adversely affect the national integrity of Sri Lanka today. It is, therefore, in the belief that the NIS assessment of Sri Lanka has a constructive role to play in the contemporary milieu in which Transparency International Sri Lanka has undertaken this study and is presenting its findings for wide circulation and debate. The specific scores provided should be seen in this light to be more guidelines that reflect broad trends and not as absolute or incontrovertible judgments.

The absence of clear and unambiguous benchmarks, either from previous NIS reports or from similar studies done through other initiatives posed a difficulty for the study, since there was no firm basis for comparison across time. The previous NIS report on Sri Lanka completed in 2003 followed a different methodology and did not have a scoring system. Hence, while the present study focused on the period 2009/10, it did take into account a longer historical trajectory, especially in situations where key legislative and institutional milestones had not changed during the past two years.

It is also recognized that the NIS methodology is not without its concerns, as is natural for an evolving analytical tool. Comparison across countries may be unacceptable, given different historical and political trajectories of different countries. Also, the reduction of a particular pillar to a single number can be misleading since it oversimplifies complex and contextual information, requires an ultimately subjective judgment, and lends itself to misuse. The gender dimension, though not, alas, included in the methodology, has been addressed in the present study. Another significant shortcoming in the NIS methodology is the lack of provisions for identifying and factoring the relative importance of different pillars in a particular country context. Even within a specific pillar, there is no mechanism for providing greater weightage to a particular dimension (Capacity, Governance and Role) or to an indicator within it as opposed to others, which may lead to distortion. For instance, for CIABOC, its very limited role is of greater importance in assessing its performance than its integrity, but currently there is no means of demonstrating this in the overall scoring.

Individual pillar assessments also posed difficult problems since some of the categories remained ambiguous when scored in isolation, as required by NIS guidelines (e.g. Resources for the Executive). It was agreed that scoring will be done on the basis that the higher the score, the higher the potential of the pillar in question to safeguard the integrity system. It was suggested that rather than pursue contextually unrealistic ideals, the standards of governance should be extracted from the pillar narratives themselves. There was a general concern as to how to decide on what is the highest appropriate standard and what should Sri Lanka do to achieve those high standards.

Finally, it needs to be reiterated that the purpose of this study is to encourage a wide and open dialogue among key stakeholders, including government representatives, with a view to enhancing the system of integrity in the country. To achieve this end, parts of the Report will be translated and nationally disseminated, and should be seen as an open invitation to participate in furthering the crucial task of fostering national integrity in Sri Lanka.

## II Executive Summary

### Conceptual Framework, Methodology and Process

The “National Integrity System” (NIS), encompassing the principle actors and institutions that influence how a country is governed, was studied in Sri Lanka in 2010,<sup>1</sup> providing an assessment of the integrity, transparency and accountability of a set of 13 “pillars” – the legislature, the executive, the judiciary the public sector, law enforcement agencies, the ombudsman / the human rights commission, the anti-corruption commission, the elections commission, auditor general, political parties, the media, civil society, and business – which were identified in-country as the key institutions determining national integrity.

The NIS principle, as articulated by Transparency International, is that when these governance institutions function properly, they constitute a healthy and robust National Integrity System that is effective in combating corruption as part of the larger struggle against abuse of power, malfeasance and misappropriation in all its forms. When these institutions are characterized by a lack of appropriate regulations and by behaviour that is not accountable, and when they have a limited role to play, corruption is likely to thrive with negative ripple effects for equitable growth, sustainable development and social cohesion.

In the NIS Assessment each of the 13 pillars was assessed along three dimensions: (1) the institution’s overall capacity to function, (2) its own internal governance in terms of integrity, transparency and accountability, and (3) its role in contributing to the overall integrity of the national governance system. For each dimension, a common set of indicators, namely resources and independence under capacity; transparency, accountability and integrity under governance; and pillar-specific indicators under role (since no common role exists for all pillars) was used to guide the assessment. In order to analyze the extent, if any, of gaps between the formal framework and the actual practice of each of these institutions, a further division into (a) the situation pertaining to the formal framework governing these institutions (‘law’), and (b) the

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<sup>1</sup> This is the second study of its kind for Sri Lanka, as a shorter NIS report, which did not include a system of scoring, was published in 2005: *Transparency International Sri Lanka ,National Integrity Systems Country Study Report Sri Lanka – 2003*, Colombo 2005.

situation regarding their actual institutional practice and behavior ('practice') was made.

**Table 2: NIS Assessment Framework**

DIMENSIONS	INDICATORS	
1. Capacity	1.1 Resources	(a). Law
		(b). Practice
	1.2 Independence	(a). Law
		(b). Practice
2. Governance	2.1 Transparency	(a). Law
		(b). Practice
	2.2 Accountability	(a). Law
		(b). Practice
	2.3 Integrity	(a). Law
		(b). Practice
3. Role	3.1 Pillar-specific	(a). Practice

The ultimate objective of the study was balance and constructive engagement to ensure that the assessment is well-contextualized and evidence-based. Information received was cross-checked as far as possible, and heads of the institutions evaluated were provided every opportunity to respond and set the record straight. The process followed in compiling the NIS Report included working through an Advisory Committee, training of the NIS team, achieving broad consensus on the pillars to be studied and formulating relevant analytical questions for each pillar, analysis of a broad range of background material for each pillar, conducting interviews with experts and officials in each field, holding a two-day scoring workshop with experts, and undertaking comprehensive revision of numerous drafts based on feedback from officials, the advisory committee, the TI Secretariat, the scoring workshop panel, sector experts and independent reviewers of international eminence. The cut-off date for inclusion of information in the NIS report was 20 November 2010. The report focused on the years 2009/10, but it did take into account a longer historical trajectory, especially in situations where key legislative and institutional milestones had not changed during the past two years.

Within the pillars, key elements for specific focus were identified. Interviews ensured a representation of diverse perspectives, especially in relation to controversial areas.

Additional attempts were made to include evidence-based opinions from outside the mainstream metropolitan perspectives, as well as to include different realities that prevail in post-war areas of the country. The views of women and minorities were also obtained in order to expand the breadth and range of the NIS Assessment.

A key concern was to ensure a wide and diverse target audience of this report as well as the need to see its value as a constructive basis for national improvement and reflexivity, more than as an evaluation *per se*. To this end, a set of recommendations were added to each pillar to generate discussion and promote sequenced solutions to existing issues that adversely affect the national integrity of Sri Lanka today. Respondents felt strongly that the long-term value-education and awareness-raising required to enhance the national integrity system should begin in the schools and be nurtured in the public domain.

### **Overall Situation Analysis**

During the period under consideration, Sri Lanka has seen the end of the secessionist war in the North and East, presidential and parliamentary elections and a major constitutional amendment which required a two-third majority in Parliament. Thus, the absence of armed conflict since mid-2009, the presence of a powerful, even dominant, government leading to stability and security all augured well for the country. Yet, this potential for enhanced integrity and good governance has yet to be realised. A climate of fear and apprehension still persists, despite the fact that any rational reason for its existence has been long absent from the overall context. The persistence of Emergency Regulations and the Prevention of Terrorism Act, 18 months after the war was concluded is a clear indication that the return to normalcy has been retarded beyond credibility. Impunity and governance by favour still hold sway.

In 2001, the Legislature passed a major piece of legislation, through the 17<sup>th</sup> Amendment to the Constitution, aimed at promoting good governance and removing the unbridled power that the President had with regard to the making of key public appointments; the amendment established a multi-partisan Constitutional Council that would either recommend or approve key appointments. However, the Constitutional Council has been defunct since 2005 and in fact has been replaced by a Parliamentary Council through the 18<sup>th</sup> Amendment passed in September 2010. The Parliamentary Council consists of the Prime Minister, Speaker, Leader of the Opposition, a nominee

of the Prime Minister, who shall be a Member of Parliament, and a nominee of the Leader of the Opposition, who shall be a Member of Parliament. The Council *can* be consulted by the President when making appointments to important Commissions such as Police Commission, Election Commission, Judicial Service Commission and Bribery Commission. In practice, the 18<sup>th</sup> Amendment removes the last check on Presidential powers that Parliament still had (in theory) under the 17<sup>th</sup> Amendment.<sup>2</sup> The main argument adduced in favour of the 18<sup>th</sup> Amendment is that the Constitutional Council is an impractical and cumbersome mechanism, whereas the President will be able to appoint the independent commissions quickly. However, this promise had not been fulfilled at the time of finalising the NIS report.

The overarching social and institutional environment has also, over the years, not been conducive to enhanced systemic integrity, due in no small measure to the real and imagined constraints imposed by the protracted violent conflict. In terms of the over-arching cultural paradigm of shame-avoidance which acted as a deterrent against corruption, this barrier too appears to be losing its hold as political patronage and influence-peddling for financial gain have increasingly cast their shadow over all aspects of governance and accountability. Popular expectations of political leaders and their minions have become more cynical, with less effort being exerted to hold them accountable. In turn these perspectives and the discourse of apathy and disempowerment that they have generated translate into institutional non-responsiveness to the challenges of enhanced integrity.

In relation to the former conflict areas in the North, there remains widespread criticism of civilian casualties during the last phase of the war, as well as the treatment meted out to IDPs. Now, 18 months later, reconstruction has hardly begun, resettlement is beset with problems due to lack of political will, the overall governing logic still remains militaristic, resulting in curtailing of basic freedoms and lack of open accountability by the State. Language discrimination against the minorities in the form of the non-implementation of constitutional provisions and official language policy has exacerbated inequality and injustice.

Yet, there is also the position that certain human rights expectations are unrealistic in conflict and immediately-post-conflict situations where terrorism demands counter-terrorism. Wherever one stands on these issues, however, in the absence of any form

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<sup>2</sup> Transparency International Sri Lanka, 2010

of separatist violence for 18 months, it is clearly incumbent on the State to restore the rule of law across the country and hold its officials accountable for past violations.

In this context, the endless deferment of such investigations through creating perennial Commissions of Inquiry (COIs) needs to be remedied. COIs have become the dumping ground of difficult issues for which no resolution or redress is envisioned by the government. For example, no prosecutions have transpired despite years of investigation into disappearances and abductions during the conflict period. So too with attacks on media personnel and institutions, which has greatly eroded credibility in the State's *bona fides*.

Related but also distinct is an understanding of the principles and practices of governance of Sri Lanka. The basic tenets are still modeled on the British colonial administrative norms of secrecy, hierarchical authority and benevolent non-accountability. Administrative and financial regulations in operation in Sri Lanka remain basically colonial in provenance and design. Redress in these circumstances is best obtained through personal appeals and intercession by entrenched elites.

Bureaucratic delays and archaic procedures still serve as obstacles to good governance. The culture of accountable and transparent systems of authority has not yet taken root, and instead what is valued is unwavering loyalty bordering on sycophancy. Even where checks and balances are available in the form of grievance redress and appeals processes, these are seldom invoked. Decisions taken at every level, even when they are made on the basis of careful consideration of pros and cons, are hardly ever explained, and therefore remain poorly understood and non-credible. This situation obtains across the board, from the highest to the most everyday levels, creating "malgovernance" norms which lead to cynicism and apathy among the general population. The situation becomes worse when power and discretion are concentrated in the hands of a few, and this handful controls the media too, leading to further lack of transparency.

No serious assessment of public sector performance is undertaken, either individually or collectively. Uniform annual salary increments are approved as a formality. Departments and divisions even within the same ministry operate as silos. In short, accountability, transparency or any of the other principles of good governance are neither demanded nor provided as a matter of course. It is in such a climate of apathy that national integrity has to be measured, *sans* systematic benchmarks or documented best practice.



In fact, often whistleblowers and watchdogs are socially despised as ingrates or trouble-makers in the current governance context. Seniority is deemed the only safe indicator of merit, while accelerated promotions are invariably considered political appointments, which, in fact, they often are. Increasing political interference in the day-to-day functions of the State has become the norm in recent years, and “getting the job done” invariably requires the use of contacts and the calling-in of favours.

A key determiner of integrity is the impact of international development assistance (aid and loans) because it plays a crucial role, especially in a conflict/post-conflict context such as Sri Lanka. The country has depended on IFI credit arrangements to finance both the war and post-war reconstruction. These loans come with a price, vis-à-vis the welfare state. The large number of international, national and grassroots NGOs/CSOs which operate in Sri Lanka mainly depend on foreign donor funding. Thus, the aid architecture of Sri Lanka plays a significant role in determining integrity outcomes. Currently, there is tension and unease between government and (I)NGOs, with claims that strict legislation is soon to be introduced curtailing their activities. Visas for international staff are rigorously policed, with hardly any extensions being granted beyond two years. Especially in the North and East, permitted activities under foreign assistance are highly restricted. At the same time, aid effectiveness principles are not seriously monitored, expenditure is not transparent or open, and self-regulation is weak.

The required enabling environment for increased integrity faces additional setbacks from the cross-cutting factor of unprincipled and *ad hoc* decision-making on key issues at multiple levels across the politico-administrative spectrum. These decisions often involve either willful neglect or lack of understanding of core concerns such as gender equality, environmental sustainability or equitable resource allocation. In turn, this impacts on the overall tenor of the integrity system.

In summary, then, gains in security and safety during the past 18 months have not supported concomitant gains in governance and transparency since new legal and attitudinal regimes have not yet been enacted. Integrity systems and processes continue to be hampered by hierarchized cultures of apathy, servility and retaliation, as well as a re-emergence of selective personalized redress mechanisms to systemic problems and grievances.

## Corruption

Bribery and corruption are of great concern in Sri Lanka. The VAT scandal that was exposed by the Auditor General in 2004 allegedly led to a loss of 441 billion rupees [US\$3.96 billion].<sup>3</sup> Two reports by the Committee on Public Enterprises (COPE) released in 2007, both of which highlighted corruption, waste, and inefficiency in the public sector, received widespread public attention.<sup>4</sup> The reports found incompetence and leakages in state-owned enterprises (notably the Ceylon Petroleum Corporation, the Ceylon Electricity Board, the Bank of Ceylon, and the Ports Authority) to be a severe drain on public funds, and losses incurred in 26 public enterprises reviewed in 2006 were estimated to amount to Rs.100 billion [US\$0.90 billion].<sup>5</sup> In 2008, several scandals hit the financial services sector, with many depositors losing their assets and the regulatory bodies seen to be failing to protect them.<sup>6</sup>

Corruption is estimated to cost Sri Lanka 2% of its annual growth.<sup>7</sup> Other sources say that corruption costs Sri Lanka 2% of GDP every year.<sup>8</sup> Corruption affects both the public and private sector. It is perceived to be major problem for business, affecting investor confidence.<sup>9</sup> In 2009, an Advisor to the President estimated that fraud and corruption in big corporate companies have cost the public purse over Rs.1,000 billion [US\$9 billion] during the twenty years from 1985 to 2005.<sup>10</sup>

The TI Corruption Perception Index (CPI) ranked Sri Lanka 91<sup>st</sup> among 178 countries in 2010.<sup>11</sup> Sri Lanka's score has been at a low 3.1 or 3.2 since 2005, indicating high levels of corruption in the public sector.

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3 'VAT scam: state unfolds the big sham', The Sunday Times, 27, January 2008.

4 Parliamentary Committee on Public Enterprises (COPE) Reports of 12th January 2007 and 24th August 2007.

5 "Corruption in govt. amounts to Rs. 100 bn", The Nation, 17th December 2006.

6 "Governance Crisis in the Financial Services Sector", TISL Governance Report 2009

7 "Corruption costs Sri Lanka 2% economic growth: senior economist", August 2007; USAID, June 2007.

8 Business Anti-Corruption Portal, 2010.

9 Business Anti-Corruption Portal, 2010.

10 "Fraud, corruption cost SL Rs 1,000 bn in 20 yrs", The Island, 08 July 2009

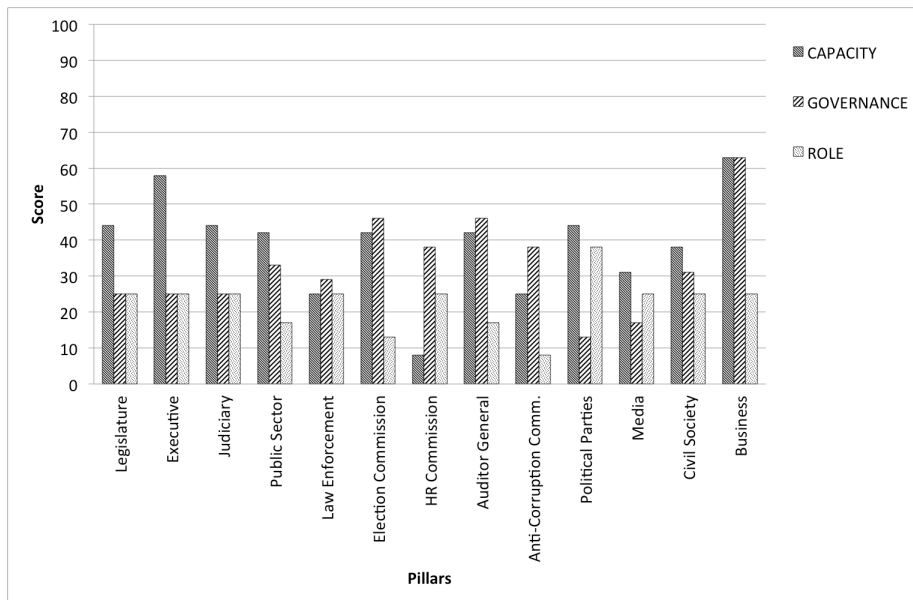
11 Transparency International, 2010

## Overview of Findings

The NIS Report does not claim to be the last word on the subject, and recognises that its primary task is fulfilled if the report forms the basis of a vibrant and open public discourse on ways and means of enhancing overall systemic integrity and transparency in post-war Sri Lanka. It is in this letter and spirit that the NIS Report’s findings are synthesised below.<sup>12</sup>

The summary scores of the 13 pillars of integrity are presented in the chart below.

**Chart 1: Overview of Pillar Scores**



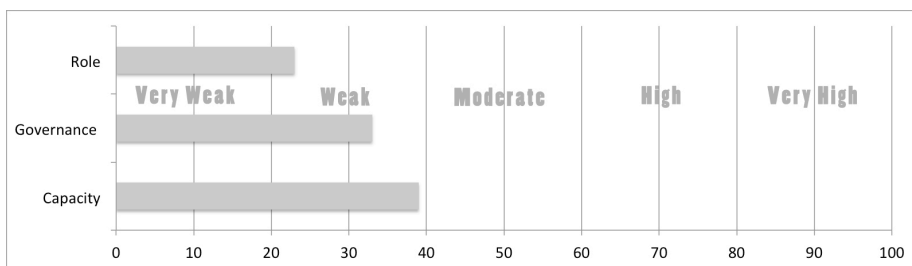
With the exception of business pillar, most of the pillars are scored in the range of medium-weak. While the Election Commission, the Auditor General and Civil Society receive a somewhat moderate score, political parties and media score

12 Scoring is based on five ranges, which have the following descriptive meanings: 00 (Very Low) = No provisions / processes; 25 (Low) = Minimal provisions/processes; 50 (Moderate) = Some provisions/processes, but key gaps exist; 75 (High) = Provisions/processes exist with constraints; 100 (Very High) = Provisions/processes and adequate resources available, providing effective safeguards.

particularly poorly. The key pillars Legislature, Executive and Judiciary all receive a low score in regard to governance and role.

The Chart above demonstrates clearly that, while all areas need improvement, the “role” of the pillars is the weakest element in the integrity equation, whereas “capacity” – with the notable exceptions of the Ombudsman/Human Rights Commission, Anti-Corruption Commission and Law Enforcement Agencies – is relatively higher than the other dimensions.

**Chart 2: Overall pillar performance across dimensions**



In fact, a crucial trend that the analysis has identified is that there is a systematic mismatch among the three normative dimensions, which corresponds to their social role and function within the polity. This is best brought out in the following summary table, which groups together the politico-administrative structure, the prosecution and enforcement arm, and the oversight institutions, in order to demonstrate the pattern of integrity that obtains.

**Table 3: Integrity across normative dimensions**

	CAPACITY	GOVERNANCE	ROLE
<p><b>Politico-Administrative Structure</b></p> <ul style="list-style-type: none"> <li>• Legislature</li> <li>• Executive</li> <li>• Judiciary</li> <li>• Public Sector</li> </ul>	<p><b>Moderate</b> [Some provisions but key gaps exist]</p>	<p><b>Weak</b> [Minimal provisions/processes]</p>	<p><b>Weak</b> [Minimal provisions/processes]</p>
<p><b>Prosecution &amp; Enforcement</b></p> <ul style="list-style-type: none"> <li>• Law Enforcement Agencies</li> <li>• Ombudsman/ HR Commission</li> <li>• Anti-Corruption Commission</li> </ul>	<p><b>Weak</b> [Minimal provisions/processes]</p>	<p><b>Medium-Low</b> [Some provisions but key gaps exist]</p>	<p><b>Weak</b> [Minimal provisions/processes]</p>
<p><b>Oversight Institutions</b></p> <ul style="list-style-type: none"> <li>• Election Commission</li> <li>• Auditor General</li> </ul>	<p><b>Medium-Low</b> [Some provisions but key gaps exist]</p>	<p><b>Moderate</b> [Some provisions but key gaps exist]</p>	<p><b>Very Weak</b> [Minimal provisions/processes]</p>

The overall trend to be discerned is one where existing capacities are not subject to adequate governance and the roles they play are not sufficient to ensure that basic

integrity requirements are met. In other words, while the potential for greater accountability and transparency exists, this promise is not realized due to diminished roles and less than optimal governance. In relation to the politico-administrative structure, then, it would appear that both improved internal governance and an enhanced role are pre-requisites for future gains. As concerns the prosecution and enforcement of integrity, however, both institutional capacity and assigned roles need drastic reform. For the key oversight institutions covered in the study, the crucial inhibiting factor is the lack of an adequate role within which they can operate effectively. Therefore, enhancing the integrity elements in the respective roles of these key institutions is an urgent systemic priority.

In addition, the main cross-cutting findings of the NIS Assessment underscore the strong negative influence of inappropriate and antiquated laws and regulations that promote secrecy, the reluctance of institutions to use the full gamut of their powers, good laws (such as asset declaration) which are observed in the breach, the absence of whistleblower, witness and victim protection legislation, the impunity enjoyed by the political elite and their cronies, and the absence of a broad public dialogue and anticorruption movement, all of which is compounded by huge capacity gaps in monitoring and enforcement by key institutions.

### **Pillar-based Summary**

The following section identifies key analytical insights from each of the pillars and summarizes the core recommendations made.

#### **LEGISLATURE**

The capacity of the legislature to provide checks and balances on the Executive is curtailed by the unbridled power of the latter. Although Parliament is the controller of public finance in theory, in Sri Lanka it is the Executive that determines how public funds are to be allocated and expended and Parliamentary approval of the Executive

allocation appears to be a mere formality<sup>13</sup> Parliamentary oversight committees are largely ineffective.

Transparency of parliamentary proceedings is quite good, while accountability of Members of Parliament (MPs) is weak. The use of violence in politics as well as lack of integrity in the behaviour of politicians and low quality of debate have led to disillusionment with regard to the capacity of the legislature to fulfill its role in a democracy. Crossing over of MPs is also an issue that erodes credibility in the multi-party democratic system.

Due to the conflict, the Provincial Council system was not operative in the North and East. In 2008, an election for the Eastern Provincial Council was held, but no elections have been held for the Northern Provincial Council at the time of writing this report. Sri Lankan women received the right to vote in 1931, but the number of women in positions of power has always been low and there have never been more than 6% of women at any level of government: national, provincial or local.<sup>14</sup>

## EXECUTIVE

Governance in the country has been dominated by a strong Executive Presidency introduced through the 1978 Constitution which impacts heavily on the country's integrity system. The Constitution vests extensive powers in the office of the President. The Presidency was established with the objective of bringing stability to the country, enabling quick decision-making and spearheading economic growth.<sup>15</sup> Paradoxically, the period since the introduction of the Executive Presidency has been one of the most violent in Sri Lanka's recent history. The 18<sup>th</sup> Amendment to the Constitution, enacted in September 2010, further widened the scope of the power of the Executive President, empowering him to appoint "independent commissions", senior judges and the Auditor General, among others.

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13 Interview with Wijeyadasa Rajapaksa, Member of Parliament and former Chair, Parliamentary Committee on Public Enterprises (COPE), 24 November 2009.

14 Social Scientists' Association, 2010.

15 See Constituent Assembly Debates Vol I, 2625 and National State Assembly Debates, Volume 23, 1219, cited in J.A.L. Cooray, *Constitutional and Administrative Law of Sri Lanka*, (Colombo: Sumathi, 1995) p. 106.

The President is Head of Cabinet and may take on any Ministerial portfolio.<sup>16</sup> The President appoints the Prime Minister, Ministers, and Deputy Ministers and “Non Cabinet” Ministers and allocates their functions.<sup>17</sup> At present almost half of the legislature is part of the Cabinet (92 Ministers, of which there are 61 Cabinet Ministers and 31 Deputy Ministers).<sup>18</sup> The President can declare a State of Emergency and promulgate Emergency Regulations under the Public Security Ordinance (PSO).<sup>19</sup> After the Thirteenth Amendment to the Constitution in 1987, a proclamation of the President under the PSO cannot be challenged in a court of law.<sup>20</sup> Every month, Parliament must by way of a simple majority approve the extension of the emergency.

The President also has the power to dissolve and prorogue Parliament any time after the expiration of a period of one year from the date of a General Election<sup>21</sup> (by which the members to the Parliament are elected) and he is not bound by the Constitution or any other law to give reasons for such decision. With the Executive enjoying almost unfettered powers, there is very limited accountability and transparency. However, the popularity of the current Presidency also provides a unique opportunity for fighting corruption and improving public sector management.

## JUDICIARY

The judiciary has played an important role in protecting human rights and upholding democratic values over the years. It has shown a willingness to review the exercise of Executive power and declare invalid actions of the Executive that are outside the law. One of its major challenges is to overcome the lengthy delays that plague the legal system. Both civil and criminal litigation can take several years and this has acted as a disincentive for those who wish to use the courts. Another challenge is to regain its independence. In recent years the institution has been affected by a loss of credibility.

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<sup>16</sup> Article 44 (2).

<sup>17</sup> Articles 44, 45 and 46 of the Constitution.

<sup>18</sup> Government Ministers, Website

<sup>19</sup> See Article 155 of the Constitution and the Public Security Ordinance, No 25 of 1947. See also Civil Rights Movement, ‘Emergency Law 5: An Annotated List of Emergency Regulations and other Notifications under the Public Security Ordinance, 13 August 2005 – 6 November 2009’ (2009) pp. v – viii.

<sup>20</sup> Article 154 (J) (2) of the Constitution.

<sup>21</sup> Article 70(1).



Allegations of politicization, lack of independence, and unprincipled decision-making have tarnished its image.

The courts do not have the power to review Acts of Parliament for their constitutionality, but may review Executive actions for their legality. Courts have not functioned in the conflict-affected areas in the Northern and the Eastern provinces of Sri Lanka over past decades. During this time the LTTE had established its own court system in the LTTE-controlled areas.<sup>22</sup> However, the Sri Lankan government is now in the process of establishing courts in the North and the East.<sup>23</sup>

## **PUBLIC SECTOR**

Sri Lanka's public service was one of the most sought after professions soon after the country obtained independence in 1948, and attracted some of the most talented products of the university system. However, since 1972 there has been a progressive decline in the efficacy and independence of the public service. Recruitment and promotions within the service were affected by political affiliations and the service became a way for politicians to provide patronage to their followers. Today, the public service is over-staffed, lacks motivation and provides poor quality services to the public. Legislation aimed at depoliticizing the public service, enacted in 2001 (17<sup>th</sup> Amendment to the Constitution), has been reversed in 2010 (18<sup>th</sup> Amendment).

Public procurement processes are sometimes not transparent and seldom open to competitive bidding. State-owned enterprises (SOEs) that are registered under the Companies Act are particularly vulnerable as their finances are not monitored by the Auditor General. Sri Lanka has 314 Statutory Boards<sup>24</sup> and 64 commercial public enterprises,<sup>25</sup> the heads of which are appointed by the relevant Ministers, reportedly on political affiliations rather than on merit.<sup>26</sup> State corporations registered under the Companies Act are not subject to government audit by the Auditor General's Department and thus not reviewable by any of the finance committees in Parliament.

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22 "Sri Lankan policemen further remanded by the LTTE court", Asia Tribune, 29 November 2005.

23 "Plans to recruit Attorneys as ASP", Daily News, 26 February 2011.

24 Government of Sri Lanka website

[http://www.gov.lk/gov/index.php?option=com\\_org&id=8&task=cat&Itemid=58&lang=en](http://www.gov.lk/gov/index.php?option=com_org&id=8&task=cat&Itemid=58&lang=en)

25 Ministry of Finance & Planning website 30 September 2010

<http://www.treasury.gov.lk/FPPFM/ped/commercialforward.htm>

26 "State Drags", Lanka Business Online, 20 April 2010.

## LAW ENFORCEMENT AGENCIES

Sri Lanka's 30 year-old history of political violence and protracted ethnic conflict has led to a situation where the rule of law and law enforcement are weak. Problems in law enforcement mainly stem from lack of effective oversight and independence. Public confidence in the rule of law is low, and law enforcement agencies are not generally seen to be impartial.

The credibility of the Attorney General (AG) has declined over the years, as the AG's department has shown an unwillingness to prosecute some of the more serious crimes, including the tens of thousands of disappearances in the 1980s, the many torture cases and extra-judicial killings allegedly committed by law enforcement agencies and paramilitary groups. In May 2010, the AG's Department, that used to be part of the Ministry of Justice, became directly answerable to the President through Gazette notification.

To counter allegations of police abuse and corruption, in 2001 the National Police Commission (NPC) was created to enhance the independence and credibility of the police force, and to provide an independent complaints mechanism. Since 2006 the NPC has been headed by the Inspector General of Police, and with the 18<sup>th</sup> Amendment to the Constitution in September 2010 its powers have been reduced, and its members and chairman are directly appointed by the President. The Constitutional provision for devolution of police powers to the Northern and Eastern Provincial Councils under the 13th Amendment has not been given effect.<sup>27</sup> The police are responsible for enforcing criminal and traffic law, enhancing public safety, maintaining law and order and peacekeeping in Sri Lanka.<sup>28</sup> In 2005, 8.8% of police personnel were female.<sup>29</sup>

The defence force consists of a regular force and reserve as well as a volunteer force and reserve. The President is the commander-in-chief of the armed forces, and appoints the chiefs for the army, navy, air force and police as well as other officers. In 2005, 1.2% of Navy personnel, 2.6% of Army personnel and 6.0% of Air Force personnel was female, including volunteers.<sup>30</sup>

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<sup>27</sup> 13th Amendment, Ninth Schedule, The Constitution of the Democratic Socialist Republic of Sri Lanka, 1978.

<sup>28</sup> Police Ordinance No.16, 1856.

<sup>29</sup> Department of Census and Statistics, 2007.

<sup>30</sup> Department of Census and Statistic, 2007.

Eighteen months after the end of the war, emergency laws are still in place,<sup>31</sup> although some elements such as restrictions on meetings and distributing certain literature were repealed in May 2010.<sup>32</sup> Other measures, such as the right to detain suspects without trial, remain. In September 2010, President Rajapaksa announced that the remainder of the Emergency Regulations would be repealed in the coming months.<sup>33</sup>

## ELECTION COMMISSION

In 2001 Parliament passed a constitutional amendment to set up a powerful and independent Election Commission. The five member commission was to be appointed by the President on the recommendation of the Constitutional Council. The Commission, however, was never established. In the absence of the Election Commission as required by the Constitution, the Commissioner of Elections has continued to discharge its functions, administering and supervising elections at Presidential, parliamentary, provincial and local government level. According to the Supreme Court the Commissioner of Elections would exercise all the powers of the Election Commission till such time as the Commission is established,<sup>34</sup> but in practice he has chosen not to do so.

The 18<sup>th</sup> Amendment to the Constitution, passed into law in September 2010 by a two-thirds majority in Parliament, has repealed the wide powers afforded to the Election Commission during a national election process, under the 17<sup>th</sup> Amendment, by restricting its purview to “matters which are directly connected with the holding of the respective election” and “not connected directly with any matter relating to the public service”<sup>35</sup> The main argument adduced in favour of the 18<sup>th</sup> Amendment is that the Constitutional Council is an impractical and cumbersome mechanism, whereas the President will be able to appoint the independent commissions, including the Election Commission immediately, since he only needs to seek observations from the Parliamentary Council.<sup>36</sup>

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31 International Commission of Jurists, March 2009.

32 “Sri Lanka government relaxes war-time emergency laws”, BBC News, 05 May 2010.

33 “President promises at UN to lift major part of Emergency Regulations” Sunday Times, 23 September 2010.

34 Article 28(4), The Constitution, 1978, (amended by the 18th Amendment).

35 Article 104A, The Constitution, 1978, (amended by the 18th Amendment).

36 Article 41 A (1), The Constitution, 1978, ( amended by the 18th Amendment)

## **OMBUDSMAN/ HUMAN RIGHTS COMMISSION**

Complaints mechanisms are important elements of the National Integrity System as they provide a means of redress for aggrieved citizens. In Sri Lanka, there are two institutions that have been created specifically for the purpose of handling public complaints and grievances against state institutions and state officials: the Ombudsman (or Parliamentary Commissioner for Administration) and the Human Rights Commission (HRC).

Regrettably, this study finds that both institutions are not able to exercise their functions. They are insufficiently resourced, and have limited credibility. While mechanisms for accountability and integrity within the institutions exist and are applied, both institutions have failed to provide an effective relief mechanism for citizens because of their lack of power and their proximity to the government.

The HRC is seen to be ineffective because of the lack of independence of the Commissioners as well as the apparent unwillingness of the HRC to exercise the full extent of its powers and to tackle the most serious human rights issues. Commissioners have not been appointed since May 2009 up to the time of writing this report. As a result of the constitutional changes of September 2010 the Commissioners are to be directly appointed by the President. The position of the Ombudsman has been vacant from 6 February to 23 June 2010.<sup>37</sup>

## **AUDITOR GENERAL**

The Auditor General is a constitutional office with the mandate to audit the accounts of all public institutions including local authorities.<sup>38</sup> Public enterprises that are registered under the Companies Act are not audited by the Auditor General, although the Constitution requires this.<sup>39</sup>

In an ideal situation, the Auditor General should assist Parliament to scrutinize the performance of all public enterprises and ensure that public funds are effectively and efficiently utilized. At the moment, the Auditor General's office functions with the Executive having control over many aspects of its operations, including the

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<sup>37</sup> Mr Tissa Ekanayake, a former high court judge, was appointed as Ombudsman on 23 June 2010.

<sup>38</sup> Articles 153 – 154, The Constitution of the Democratic Socialist Republic of Sri Lanka, 1978.

<sup>39</sup> Article 151.1, Constitution of Sri Lanka, 1978.

disbursement of funds to the institution. Every year the Auditor General submits a report to Parliament highlighting the audit outcome of public institutions. Some of the findings of the report are addressed by the two Parliamentary oversight committees (the Committee on Public Enterprises and the Committee on Public Accounts).

In 2005 a draft Audit Act and constitutional amendments were prepared to provide greater autonomy and to make the office more effective. Although Cabinet approval was obtained for these proposals, they have yet to be passed by Parliament. While many audit institutions in other parts of the world have embraced a wider array of auditing functions, including environmental, performance, investigative and ‘value for money’ audits, the Sri Lankan Auditor General tends to focus exclusively on financial auditing.

## **ANTI-CORRUPTION COMMISSION**

Sri Lanka’s Commission to Investigate Allegations of Bribery or Corruption (CIABOC) was set up in 1994 with the objective of investigating and prosecuting bribery, corruption and matters related to assets. The CIABOC is a reactive institution as it can only commence investigations upon receiving formal complaints which is a fundamental limitation in its mandate. Overall, the law which establishes the CIABOC appears to be weak and incomplete. Political interference has handicapped the performance of the CIABOC, including the non-appointment of the members of the CIABOC for long periods of time and transfers of key officials involved in investigations and prosecutions.

The CIABOC has few resources; it is unable to recruit and does not have disciplinary control over its own staff. Though well-known to the public, the CIABOC is seen to have failed to successfully prosecute large-scale corruption deals and assets-related issues. The tenure of the body of the last Commission lapsed in March 2010 and at the time of writing this report the new members have not yet been appointed.

A large number of complaints have piled up at the CIABOC without any provisions to investigate them since its term lapsed.<sup>40</sup> In the absence of Commissioners, the

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<sup>40</sup> Kamalendran, Chris, 2010.

Director General is unable to obtain the required directives under law.<sup>41</sup> As a consequence many complaints, (particularly during the Parliamentary elections of April 2010 where some candidates spent vast amounts of undeclared money) cannot be probed.<sup>42</sup>

## **POLITICAL PARTIES**

Sri Lanka currently has 67 registered parties that claim to represent various ethnic and social interests. While processes of electing political candidates to Parliament, Provincial Councils and to the post of President are spelt out in the Constitution and other laws,<sup>43</sup> Sri Lanka lacks regulation on political party financing and management. In general, Sri Lanka's political parties are structured and managed in a top-down, hierarchical way that does not allow the party members to influence decision-making. A healthy competition between parties that would provide a disincentive to corruption exists only to a limited extent.<sup>44</sup>

Rather than representing social diversity and citizens' aspirations, political parties are alliances for elite power-sharing. This is evidenced in numerous cross-overs throughout the political history of Sri Lanka.<sup>45</sup> Two parties, the centre-left Sri Lanka Freedom Party (SLFP) and the liberal United National Party (UNP) have alternated in government since independence in 1948.

## **MEDIA**

Media freedom has been an enduring concern in Sri Lanka. Over the years different governments have imposed censorship of news, sought to control the way news is presented and analyzed, and have harassed and intimidated journalists in a variety of ways. The last two years have been particularly challenging for the Sri Lankan media. Approximately 16 journalists have been killed or disappeared over these past two

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41 Section 2(a), (b), CIABOC Act. & proviso "upon receipt of a complaint, the Commission has to be satisfied that it is genuine to commence investigations or prosecutions."

42 Transparency International Sri Lanka, 20 May 2010.

43 Chapter XIV, The Constitution of the Democratic Socialist Republic of Sri Lanka, 1978.

44 Verena Blechinger, November 2002.

45 Satkunathan, Ambika, no date.

years and many more have fled the country.<sup>46</sup> This has compelled the non-state owned media to engage in the practice of self-censorship to avoid further intimidation,<sup>47</sup> and the overall situation has been described as “one of the darkest points in modern Sri Lanka” in terms of media freedom.<sup>48</sup>

According to the 2009 World Press Freedom index published by Reporters Sans Frontieres, Sri Lanka was ranked 162<sup>nd</sup> out of 175 countries.<sup>49</sup> In 2002 the same index had placed the country at the 51<sup>st</sup> position out of 139 countries, demonstrating the serious deterioration that has taken place. In March 2008, forty five organizations wrote a joint appeal to the President of Sri Lanka documenting numerous instances of physical and other forms of harassment against the media and requested the President to protect media workers and guarantee the right to free expression.<sup>50</sup>

In theory, the Constitution guarantees a right to free expression, speech and publication, and the courts have given important judgments in this area.<sup>51</sup> Some newspapers, websites and television stations continue to expose corruption and the abuse of public resources. However, investigative journalism has come with a heavy price and some journalists have even paid with their life.<sup>52</sup>

The state also impacts on the media in the way it chooses to advertise. Several state-owned institutions, including banks, tend to advertise in the state-owned media rather than in private media. This has a major impact on the commercial viability of media institutions, especially print and television. Advertising revenue, rather than sales, is the key to economic viability in the print media, and paid government notices (including signaling employment opportunities) are crucial to boost circulation.

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46 International Bar Association, May 2009, pp 57. According to Journalists for Democracy the number of journalists killed between 2004 and August 2009 was 34 and according to the News Safety Institute more than 50 journalists have left the country; Transparency International Sri Lanka, 2009, pp 50

47 See, for an overview of the challenges faced by the media, “Key Challenges for Media after war’s End”. The Report of the International Press Freedom Mission to Sri Lanka January 2010. This was the fourth International Press Freedom and Freedom of Expression Mission to Sri Lanka, the others taking place in October 2006, June 2007 and October 2008.

48 Interview with Lakshman Gunasekera, senior journalist and former Editor of the Sunday Observer, February 2010.

49 Press Freedom Index 2009, 2009.

50 See the joint letter “Stop the War on Journalists in Sri Lanka”, 27 March 2008), Free Media Sri Lanka, Freedom House 2010 and Committee to Protect Journalists, 2009.

51 Article 14 (1) (a) of the Constitution.

52 Wickrematunga, Lasantha, Editor of the Sunday Leader, known for its investigative journalism, was killed by unidentified men on his way to work on 08 January 2009.

Newspapers and magazines presenting alternative viewpoints have access to neither of the above, and therefore economic viability demands mainstreaming of content.<sup>53</sup>

## CIVIL SOCIETY

Civil Society encompasses a broad range of actors, including media, professional organizations, trade unions and Non-Governmental Organisations (NGOs), though this report focuses only on “voluntary bodies formed by groups of citizens for specific purposes of social service or social and policy intervention”.<sup>54</sup>

NGOs can be registered under various legal regimes in Sri Lanka, allowing for control by government to a varying degree.<sup>55</sup> In the past and present, issues of accountability and integrity have often been used to discredit NGOs. There is a widespread mistrust of NGOs, particularly those engaged in peacebuilding, human rights and governance issues, and recent government rhetoric has promised stringent regulations to curb perceived abuse. Foreign-funded NGOs are often seen to lack legitimacy and to pursue foreign agendas. Recently, NGOs and their activists have been threatened, physically attacked, and verbally abused in the state media and on government websites. The visible national face of civil society remains urban and elite, often with key figures appearing in multiple leadership roles. The inability of CSOs to inaugurate a process of self-regulation and accountability has hampered the struggle against State repression of even its genuine advocacy and awareness-raising role.

As a result of the diverse roles they play, CSOs have a range of relationships with the State. Those engaged in service delivery tend to have a close partnership, while other groups that monitor and challenge the State tend to have tense and confrontational relationships. CSOs in the country are dependent to a large extent on foreign donor funding. Voluntarism, which has always been high in comparison to western norms, is on the decline, in part because CSOs have not been able to effectively harness this resource.<sup>56</sup>

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53 Interview with newspaper editor, name withheld on request.

54 Fernando, Udan, July 2003.

55 Edrisinha, Rohan, May 2010.

56 Yet, “A report released last week (Sept. 12, 2010) by Gallup titled the World Giving Index, which measured the generosity of people around the world, ranked Sri Lanka in 8th place—tied with United Kingdom—and was the



## **BUSINESS**

Sri Lanka was among the first in South Asia to liberalize its economy in 1977. Since then, the role of the private sector has expanded even though state engagement in business activities through state-owned banks, state corporations and other entities remains significant. Several state-owned entities have been privatized over the years. However, in the last two years there appears to be a reversal of this trend with a number of the privatized entities returning to state ownership.

The business environment is rated positively in international ratings, particularly in comparison with other South Asian countries. The regulatory regime, including the standards on accounting and auditing, financial disclosure and for transactions in financial instruments and service is quite detailed. A new Companies Act (2007) as well as a set of mandatory and non-mandatory Codes of Corporate Governance for companies (listed and not listed) and banks have emerged in recent years, providing rules to achieve high standards of integrity.

Yet, implementation of this regime leaves much to be desired, and compliance with the regulation appears to be low. While many companies function independently and ethically, others have reportedly resorted to seeking state patronage in order to benefit from participation in infrastructure and other projects initiated by the State.

Corruption is seen to have a corrosive effect on the business climate, and raises the costs and risks of doing business. While integrity and ethics issues are part of corporate governance rhetoric, the private sector is not seen to be playing an active role in combating corruption. There is a diverse ownership structure in the private sector, with few non-state monopolies (such as Ceylon Tobacco), but there are many government-controlled monopolies, such as for example the Ceylon Petroleum Corporation.

Women in private sector senior management positions are far less than their male counterparts. A survey of 100 randomly picked companies registered with the Employers' Federation of Ceylon in 2007 found that only 4.3% of Chief Executive Officers in the surveyed sample were female.<sup>57</sup> This is in sharp contrast to the

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highest ranked developing country." <http://somahewa.wordpress.com/2010/09/14/sri-lanka%E2%80%99s-vibrant-civil-society/>

<sup>57</sup> Wickremasinghe, Maithree and, Jayatilaka, Wijaya, 2008, p 10.

proportion of women following different tertiary and professional educational/training programmes.

## **Core Recommendations**

The following core recommendations appear in many of the pillars as they are crucial to improving the national integrity system in Sri Lanka. If these proposed changes are implemented, in turn they will have a positive impact on other aspects of the integrity system, creating synergies and catalyzing greater overall transparency and accountability.

### *Self-Regulation*

- Codes of Conduct/Ethics for Members of Parliament (MPs), the Judiciary, the Media and other relevant professional bodies should be formulated, and where already formulated, should be rigorously implemented.
- Appropriate pro-active self-regulation mechanisms should be designed and followed by Media institutions, Civil Society Organisations, Chambers of Commerce and professional bodies, and where such mechanisms exist they should be rigorously enforced.

### *Appointments and Performance*

- Appointment to key positions that safeguard and enhance national integrity, such as members of the Human Rights Commission, the Public Service Commission, CIABOC and other Commissions, and offices such as the Ombudsman's office should be based on merit and integrity, and not party affiliations or personal relationships with the ruling regime.
- An effective and efficient performance appraisal process should be instituted for public servants.
- The Election Commission should be established as a matter of the highest priority.

*Processes*

- Public access should be provided to asset declarations of Parliament and Cabinet.
- Setting up a transparent and effective system of public complaints and ensuring that these complaints are investigated impartially.
- The Auditor General's Office should audit all public sector institutions not just for financial accountability but for efficiency and effectiveness as well.
- State media institutions (radio, television and print) should be freed from state control, and, if necessary, run as public trusts and administered by an independent and impartial Board of Directors.
- Advertising by state-owned entities in the media should be governed by criteria that are fair and transparent.
- Legislative and institutional change should be matched with the development of a set of strategic action steps to effectively leverage participatory community-led normative regimes which are committed to cultural values and societal norms that serve as a natural barrier to the crystallization of corrupt and unethical behaviour.
- The killing, disappearance and abduction of journalists must be investigated and the perpetrators brought to justice. The current status of ongoing investigations needs to be publicly disclosed.

*Institutional Strengthening*

- The Public Service Commission (PSC) should be strengthened and resourced to maintain oversight of public sector integrity.
- Restructuring the Attorney General's office so that AG represents the public interest and not the interests of the ruling regime.
- Institutional strengthening and capacity development of the Auditor General's office should be given the highest priority.

- The mandate of the CIABOC should be extended to permit pro-active investigation, and its composition should ensure gender representation. The progress of on-going complaint investigations should be made public.
- The Parliamentary oversight system must be strengthened.
- Representation of women in political parties, as provided for the Parliamentary Elections (Amendment) Act 2009, section 2(d), should be strengthened.
- Full implementation of the constitutional provisions on language and official language policy through adequate resource allocation and institutional strengthening, driven by the political will to end language-based discrimination, thereby enhancing State accountability towards minorities.

### *New Legislation*

- Legislation should be enacted to ensure that cross-overs require resignation from the political party concerned, and hence re-election since the public vote (under the PR system) for political parties primarily and not for individuals *per se*.
- Judicial review of legislation should be introduced.
- Legislation to ensure executive accountability which reviews executive immunity should be introduced, if the Executive Presidency is to be retained.
- The President's powers to dissolve Parliament should be curtailed.
- Review of contempt of court legislation to permit responsible academic criticism of the judiciary.
- Enact whistleblower, victim and witness protection legislation.
- Political parties should disclose sources of funding and election campaign spending, and present annual audited accounts for public scrutiny.
- Provision of voting right for non-resident citizens, including migrant workers.

- Enact the draft Audit Act that seeks to establish a more autonomous office of the Auditor General, a National Audit Office, a National Audit Service Commission, and a Constitutional Audit Council that will hear appeals.
- Right to Information legislation needs to be introduced as an urgent priority to ensure that the public can take informed and unfettered decisions. The right to free expression, publication and dissent must be respected and promoted by all actors: state and non-state stakeholders, political parties, business interests, professional organizations and civil society. Right of Association should be recognized and protected throughout the country, not least in the North and East.
- Develop legal and regulatory reforms to ensure that all corporates are effectively regulated and anyone operating outside this regulatory network is prosecuted.
- The abolishment of the Executive Presidency, in keeping with the election manifestos of the major political parties and presidential candidates.

## Way Forward

At one end, the analysis and recommendations provide suggestions for far-reaching constitutional changes that require time for implementation, transitional arrangements and strong bipartisan political will to drive them. Though some of these changes are crucial to create the enabling environment and safe space for enhanced integrity systems to thrive, it is recognised that such transformation is impossible to achieve overnight. Hence, at the other end of the analytical spectrum, the NIS report advocates for relatively smaller concrete tangible outcomes that can be immediately put in place without rhetoric or procrastination, which will, in turn, prepare the ground for the more fundamental transformations necessary.

Integrity in the Lankan context demands changes in entrenched attitudes and behaviour at all levels of society, but most significantly in institutional culture and in the individual's perceived role within this culture. This requires the nurturing of an enabling environment – legal, procedural, institutional, cultural – that is a pre-requisite and necessary pre-condition for enhanced integrity. To this end, recommendations have been made, which cut across a number of pillars, to include

processes that provide whistleblower, victim and witness protection. Without these safeguards no climate of openness and accountability can be effectively maintained within Sri Lanka's hierarchical institutions and polity.

As priority measures, the processes of parliamentary democracy should be reinforced through greater independence and autonomy (administrative and financial) of oversight institutions. The Emergency Regulations and the Prevention of Terrorism Act should be entirely revoked as a basic pre-condition of restoring democratic normalcy and the rule of law. The Right to Information Act is an urgent national integrity need, as is the across-the-board implementation of the Right of Association, especially in the North and East, where "security" rhetoric should not be allowed to interfere with basic freedoms in the post-war environment. In the absence of this over-arching democratic public space, no micro-level change will result in the reinvigoration of national integrity in Sri Lanka.

Finally, it needs to be reiterated that the purpose of this study is to encourage a wide and open dialogue among key stakeholders, including government representatives, with a view to enhancing the system of integrity in the country. To achieve this end, the report will be translated and nationally disseminated, and should be seen as an open invitation to participate in the crucial task of improving national integrity in Sri Lanka.

### III Country Profile

During the period under consideration, Sri Lanka has seen the end of the secessionist war in the North and East, presidential and parliamentary elections and a major constitutional amendment which required a two-third majority in Parliament. Thus, the absence of armed conflict since mid-2009, the presence of a powerful, even dominant, government leading to stability and security, all augured well for the country. Yet, in summary, this potential for enhanced integrity and good governance has yet to be realised.

A climate of fear and apprehension still persists, despite the fact that any rational reason for its existence has been long absent from the overall context. The persistence of Emergency Regulations and the Prevention of Terrorism Act, 18 months after the war was concluded is a clear indication that the return to normalcy has been retarded beyond credibility. Impunity and governance by favour still rule the day.

In 2001, the Legislature passed a major piece of legislation, through the 17<sup>th</sup> Amendment to the Constitution, aimed at promoting good governance and removing the unbridled power that the President had with regard to the making of key public appointments, and established a multi-partisan Constitutional Council that would either recommend or approve these appointments. However, the Constitutional Council has been defunct since 2005 and, in fact, has been replaced by a Parliamentary Council through the 18<sup>th</sup> Amendment passed in September 2010. The Parliamentary Council can be consulted by the President when making appointments to important Commissions such as the Police Commission, Election Commission, Judicial Service Commission and Bribery Commission. In practice, the Amendment removes the last check on Presidential powers that Parliament still had (in theory) under the 17<sup>th</sup> Amendment.<sup>1</sup> The main argument adduced in favour of the 18<sup>th</sup> Amendment is that the Constitutional Council is an impractical and cumbersome mechanism, whereas the President will be able to appoint the independent commissions quickly. However, this promise had not been fulfilled at the time of finalising the NIS report.

Public support for the ruling regime remains in the face of a weak and ineffectual opposition, though minorities seem disillusioned. In terms of the over-arching cultural

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<sup>1</sup> Transparency International Sri Lanka, 2010.

paradigm of shame-avoidance which acted as a deterrent against corruption, this barrier too appears to be losing its hold as political patronage and influence-peddling for financial gain have increasingly cast their shadow over all aspects of governance and accountability. Popular expectations of political leaders and their minions have become more cynical, with less effort being exerted to hold them accountable. In turn, these perspectives and the discourse of apathy and disempowerment that they have generated, translate into institutional non-responsiveness to the challenges of enhanced integrity.

In relation to the former conflict areas in the North, there remains widespread criticism of civilian casualties during the last phase of the war, as well as the treatment meted out to Internally Displaced People (IDPs). Now, 18 months later, the reconstruction has hardly begun, resettlement is beset with problems due to lack of political will, the overall governing logic still remains militaristic, resulting in curtailing of basic freedoms and lack of open accountability by the State. Language discrimination against the minorities in the form of the non-implementation of the Official Language Policy has exacerbated inequality and injustice.

At the other end of the spectrum, critics of human rights norms on the basis that they are western-centric and presuppose certain levels of historical development, allege that transitional standards are required for difficult third world contexts. The tradeoff between development and equity is represented a necessary if always unsatisfactory choice that has to be made in post-colonial and post-conflict situations such as Sri Lanka. While this is clearly not the position of the authors of this study, it needs to be acknowledged that this view is espoused by a significant segment of the population that cuts across location, ethnicity, occupation, class and language in Sri Lanka.

There is also the position that certain human rights expectations are unrealistic in conflict and immediately-post-conflict situations where terrorism demands counter-terrorism. Wherever one stands on these issues, however, in the absence of any form of separatist violence for 18 months, it is clearly incumbent on the State to restore the rule of law across the country and hold its officials accountable for past violations.

In this context, the endless deferment of such investigations through creating perennial Commissions of Inquiry (COIs) needs to be remedied. COIs have become the dumping ground of difficult issues for which no resolution or redress is envisioned by the government. For example, no prosecutions have transpired despite years of investigation into disappearances and abductions during the conflict period. So too



with attacks on media personnel and institutions, which has greatly eroded credibility in the State's *bona fides*.

Related but also distinct is an understanding of the principles and practices of governance of Sri Lanka. The basic tenets are still modeled on the British colonial administrative norms of secrecy, hierarchical authority and benevolent non-accountability. Administrative and financial regulations in operation in Sri Lanka remain basically colonial in provenance and design. Redress in these circumstances is best obtained through personal appeals and intercession by entrenched elites.

Bureaucratic delays and archaic procedures still serve as obstacles to good governance. The culture of accountable and transparent systems of authority has not yet taken root, and instead what is valued is unwavering loyalty bordering on sycophancy. Even where checks and balances are available in the form of grievance redress and appeals processes, these are seldom invoked. Decisions taken at every level, even when they are made on the basis of careful consideration of pros and cons, are hardly ever explained, and therefore remain poorly understood and non-credible. This situation obtains across the board, from the highest to the most everyday levels, creating "malgovernance" norms which lead to cynicism and apathy among the general population. The situation becomes worse when power and discretion are concentrated in the hands of a few, and this handful controls the media too, leading to further lack of transparency.

No serious assessment of public sector performance is undertaken, either individually or collectively. Uniform annual salary increments are approved as a formality. Departments and divisions even within the same ministry operate as silos. In short, accountability, transparency or any of the other principles of good governance are neither demanded nor provided as a matter of course. It is in such a climate of apathy that national integrity has to be measured, *sans* systematic benchmarks or documented best practice.

In fact, often whistleblowers and watchdogs are socially despised as ingrates or trouble-makers in the current governance context. Seniority is deemed the only safe indicator of merit, while accelerated promotions are invariably considered to be political appointments, which they often are. Increasing political interference in the day-to-day functions of the State has become the norm in recent years, and "getting the job done" invariably requires the use of contacts and the calling-in of favours.

A key determiner of integrity is the impact of international development assistance (aid and loans) because it plays a crucial role, especially in a conflict/post-conflict context such as Sri Lanka. The country has depended on IFI credit arrangements to finance both the war and post-war reconstruction. These loans come with a price, vis-à-vis the welfare state. Development assistance accounted for more than 10% of total expenditure in 2010, with key donors and lenders being the ADB, World Bank, Japan and China.<sup>2</sup> In addition, to bilateral arrangements, a large number of international and national NGOs operate in-country using foreign funding and other resources.

A Directory of Development NGOs produced by IRED in 1991, listed 50 international and 293 national NGOs<sup>3</sup>. A Presidential Commission found 25-30,000 grassroots organizations to be operating in Sri Lanka in 1993.<sup>4</sup> However, besides definitional problems, there is no reliable record of the total number of CSOs operating in Sri Lanka. At the time of writing this report, 1317 NGOs had been registered by the NGO Secretariat.<sup>5</sup> CSOs in the country are dependent to a large extent on foreign donor funding. The culture of local philanthropy mainly supports charity and welfare work, not longer-term empowerment or institutional strengthening of these organizations. To that extent they remain vulnerable and their priorities are sometimes determined by the priorities of donors.<sup>6</sup> Sustainability, in this context becomes an issue that does not receive the consideration it should. In contrast, it is the international community that appears to be most concerned about issues of inter-ethnic equity in the face of dominant Sinhala majoritarianism and persistent military logic.

For all these reasons, the aid architecture of Sri Lanka plays a significant role in determining integrity outcomes. Currently, there is a manifest tension and unease between Government and (I)NGOs, with claims that strict legislation is soon to be introduced curtailing their activities. At present, visas for international staff are rigorously policed, with hardly any extensions beyond two years being granted. Especially in the North and East, permitted activities under foreign assistance are highly restricted. At the same time, aid effectiveness principles are not seriously monitored, expenditure is not transparent or open. The international watchdog

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<sup>2</sup> Treasury, Budget Statement 2010 .

<sup>3</sup> IRED, 1991. IRED is a French acronym for "Development Innovations and Networks".

<sup>4</sup> Presidential Commission (1993), Inquiry on NGOs functioning in Sri Lanka, 13 December, Presidents House, Colombo.

<sup>5</sup> NGO Secretariat website: [www.ngosecretariat.gov.lk](http://www.ngosecretariat.gov.lk)

<sup>6</sup> Nanayakkara, Rukshana, 2009, pp 87-100,

organisations continue to take on the government on its human rights record, including in a number of high profile investigations, such as the UN SG's panel.

The required enabling environment for increased integrity faces additional setbacks from the cross-cutting factor of unprincipled and *ad hoc* decision-making on key issues at multiple levels across the politico-administrative spectrum. These decisions often involve either willful neglect or lack of understanding of core concerns such as gender equality, environmental sustainability or equitable resource allocation. In turn, this impacts on the overall tenor of the integrity system and inhibits positive outcomes.

In addition, the main cross-cutting findings of the NIS Assessment underscore the strong negative influence of inappropriate and antiquated laws and regulations that promote secrecy, the reluctance of institutions to use the full gamut of their powers, good laws (such as asset declaration) which are observed in the breach, the absence of whistleblower, witness and victim protection legislation, the impunity enjoyed by the political elite and their cronies, and the absence of a broad public dialogue and anticorruption movement, all of which is compounded by huge capacity gaps in monitoring and enforcement by key institutions.

In summary, then, gains in security and safety during the past 18 months have not supported concomitant gains in governance and transparency since new legal and attitudinal regimes have not yet been enacted. Integrity systems and processes continue to be hampered by hierarchized cultures of apathy and servility, as well as a re-emergence of selective personalized redress mechanisms to systemic problems and grievances.

## IV Corruption Profile

Corruption is defined by Transparency International (TI) as the abuse of entrusted power for private gain. Its benefits may be monetary or non-monetary. In addition to bribery and fraud, corrupt practice includes cronyism, favouritism, misuse of public property, extortion, and other forms of malpractice.<sup>1</sup>

Bribery and corruption are of great concern in Sri Lanka. The VAT scandal that was exposed by the Auditor General in 2004 allegedly led to a loss of Rs.441 billion [US\$3.96 billion].<sup>2</sup> Two reports by the Committee on Public Enterprises (COPE) released in 2007, both of which highlighted corruption, waste, and inefficiency in the public sector, received widespread public attention.<sup>3</sup> The reports found incompetence and leakages in state-owned enterprises (notably the Ceylon Petroleum Corporation, the Ceylon Electricity Board, the Bank of Ceylon, and the Ports Authority) to be a severe drain on public funds, and losses incurred in the 26 public enterprises reviewed in 2006 were estimated to amount to Rs.100 billion [US\$0.90 billion].<sup>4</sup> In 2008, several scandals hit the financial services sector, with many depositors losing their assets and the regulatory bodies seen to be failing to protect them.<sup>5</sup>

Corruption is estimated to cost Sri Lanka 2% of its annual growth.<sup>6</sup> Other sources say that corruption costs Sri Lanka 2% of GDP every year.<sup>7</sup>

Corruption affects both the public and private sector. It is perceived to be major problem for business, affecting investor confidence.<sup>8</sup> In 2009, an Advisor to the President estimated that fraud and corruption in big corporate companies have cost the public purse over Rs.1,000 billion [US\$9 billion] during the twenty years from 1985 to 2005.<sup>9</sup>

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1 Transparency International Sri Lanka, June 2009.

2 'VAT scam: state unfolds the big sham', Sunday Times, 27, January 2008.

3 Parliamentary Committee on Public Enterprises (COPE) Reports of 12th January 2007 and 24th August 2007.

4 "Corruption in govt. amounts to Rs. 100 bn", The Nation, 17th December 2006, pp 1

5 "Governance Crisis in the Financial Services Sector", TISL Governance Report 2009

6 "Corruption costs Sri Lanka 2% economic growth: senior economist", Lanka Business online, August 2007: USAID, June 2007.

7 Business Anti-Corruption Portal, 2010.

8 Business Anti-Corruption Portal, 2010.

9 "Fraud, corruption cost SL Rs 1,000 bn in 20 yrs", The Island, 08 July 2009.

The TI Corruption Perception Index (CPI) ranked Sri Lanka 91<sup>st</sup> among 178 countries in 2010.<sup>10</sup> Sri Lanka’s score has been at a low 3.1 or 3.2 since 2005 on a scale from 10 (highly clean) to 0 (highly corrupt), indicating high levels of corruption in the public sector.

**Table 4: Sri Lanka score in the CPI**

YEAR	SCORE	RANK	NUMBER OF COUNTRIES
2002	3.7	52	102
2003	3.4	66	133
2004	3.5	67	145
2005	3.2	78	158
2006	3.1	84	163
2007	3.2	94	179
2008	3.2	92	180
2009	3.1	97	180
2010	3.2	91	178

Source: [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/](http://www.transparency.org/policy_research/surveys_indices/cpi/)

Other international indices give a mixed picture. Sri Lanka’s score on the indicator *Control of Corruption* in the World Bank’s Worldwide Governance Indicators has been on the decline for Sri Lanka in the past 12 years, while *Government Effectiveness* has been improving.<sup>11</sup> The *Countries at the Crossroads Report 2010* lists Sri Lanka as a country in which democratic governance has deteriorated, together with Cambodia, Yemen, Uganda and others.<sup>12</sup> According to this report, three types of corruption prevail in the Sri Lankan political system: bribes paid to circumvent bureaucratic red tape, bribe solicitation by government officials, and nepotism or cronyism.<sup>13</sup> In the 2007 *Global Integrity Report* (latest available), Sri Lanka receives an overall rating of “very weak”, but Anti-Corruption laws are rated as “moderate” and some institutions are rated as strong, such as Auditor General and civil society. Political finance, access to information, legislative accountability and law enforcement agencies score poorly.

10 Transparency International, 2010

11 Worldwide Governance Indicators’ [www.govindicators.org](http://www.govindicators.org) accessed 11th Oct. 2010.

12 ‘Freedom House releases ‘Countries at the Crossroads’ 2010’  
[http://www.ifex.org/international/2010/04/08/crossroads\\_report/](http://www.ifex.org/international/2010/04/08/crossroads_report/)

13 Countries at the Crossroads 2010, Country Report Sri Lanka  
<http://freedomhouse.org/modules/publications/ccr/modPrintVersion.cfm?edition=9&ccrpage=43&ccrcountry=198>

A key feature of Sri Lanka's anti-corruption framework is the lack of whistleblower protection that contributes to low reporting of corruption. There is no Access to Information Law, and conservative regulations such as the antiquated Establishment Code coupled with the Official Secrecy Act and emergency regulations discourage disclosure of information to the public. The most striking trend in recent years is the deterioration in media freedom, with Sri Lanka being considered one of the most dangerous countries in the world for journalists; its position in the Press Freedom Index is 158 out of 178 countries.<sup>14</sup>

Sri Lanka has a comprehensive legislative framework to combat bribery and corruption, and it is a signatory to numerous international conventions. The legal framework has been studied extensively.<sup>15</sup> Bribery has been a criminal offence since 1883 under the Penal Code.

Deficiencies in Sri Lanka's Bribery Act of 1954 (amended in 1994) include the failure to cover the requisite modes of committing bribery (giving, offering, promising, accepting and soliciting a bribe), failure to expressly cover bribery through intermediaries or bribery for the benefit of third party beneficiaries, as well as problems in the definition of who is a public official.<sup>16</sup> Sri Lanka has enacted legislation on extradition and mutual legal assistance but it lacks efficiency in the implementation of these provisions.<sup>17</sup> The private sector, non-government and semi-government sectors are not under the purview of the Bribery Commission.

The Declaration of Assets and Liabilities Law of 1975 (amended 1985)<sup>18</sup> provides an important tool for transparency in the Executive, legislature and public sector. Under this law MPs, presidential appointees and high level officials must declare their assets, and complaints can be lodged upon suspicion of acquisition of illicit wealth by officials and MPs. However, there is no mechanism to monitor the filing of declarations and to assert their truthfulness, and declarations are not accessible to the public.<sup>19</sup>

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<sup>14</sup> Press Freedom Index 2010 <http://en.rsff.org/press-freedom-index-2010,1034.html>

<sup>15</sup> Lawyers for Human Rights and Development. November 2005; USAID, 2007.

<sup>16</sup> ADB/OECD Anti-Corruption Initiative for Asia and the Pacific, 2008 .

<sup>17</sup> ADB/OECD Anti-Corruption Initiative, 2008.

<sup>18</sup> The Declaration of Assets and Liabilities Law No.1,1975.

<sup>19</sup> Lawyers for Human Rights and Development, November 2005. Pinto-Jayawardena, Kishali and Karunatilaka, Navin., September 2010.

The Money Laundering Act and the Financial Transactions Reporting Act (both 2006) make it an offence to hide the identity or source of money generated from illegal activities and oblige institutions that accept money to verify the identity of the customer.<sup>20</sup>

The three tiers of democratic governance, Executive, Judiciary and Legislature are all considered weak. The 1978 Constitution gives the Executive large powers.<sup>21</sup> Sri Lanka's executive, legislative and judicial accountability mechanisms were seen to be very weak in the *Global Integrity Report on Sri Lanka* of 2007.<sup>22</sup>

Sri Lankan laws – if applied – could provide effective preventative and punitive measures to discourage corruption. However, laws are unevenly applied, measures to implement the law are severely flawed, and institutions that could spearhead the prevention and prosecution of corruption are toothless.<sup>23</sup> Key institutions such as the Auditor General's Department (AG), the Commission to Investigate Allegations of Bribery or Corruption (CIABOC or Bribery Commission) and the Parliamentary oversight committees such as the Committee on Public Accounts (COPA) and the Committee on Public Enterprises (COPE) are severely hampered by lack of support from senior politicians and government officials.<sup>24</sup> An "Anti-Corruption Needs Assessment in Sri Lanka" conducted as part of the government's (and USAID's) anti-corruption programme provides a detailed institutional assessment of the Bribery Commission, AG and Civil Society Organizations.<sup>25</sup> Lack of independence, adequate staff, skills and modern techniques as well as lack of resources was found to seriously hamper the effectiveness of these institutions.

Parliamentary oversight is particularly weak. Lack of follow-up on the COPE reports of 2007 and subsequent co-option of the Committee by appointing a Cabinet Minister as COPE Chairman in 2008, has left the Commission largely ineffective.<sup>26</sup> Parliamentary control is largely tokenistic, not least because almost half of the 225 Members of Parliament are part of the Cabinet. Sri Lanka has one of the largest Cabinets in the world.

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20 Prevention of Money Laundering Act No. 5 of 2006, Financial Transactions Reporting Act No. 6 of 2006.

21 Gomez, Mario, no date.

22 Global Integrity, 2007.

23 Pinto-Jayawardena, Kishali, 2010.

24 USAID, February 2006; USAID, August 2007.

25 USAID Sri Lanka, February 2006.

26 Transparency International Sri Lanka, 2009.

The third tier of governance, the Judiciary, has provided some checks and balances. The Supreme Court has ruled against the (former) government in a few high-profile privatisation cases. In the Water's Edge Case, the former President Chandrika Kumaratunge was fined for granting state-owned land to a private owner in 2008. In the same year, the Supreme Court found serious flaws in the sale of the former Sri Lanka Insurance Company (SLIC) and the Lanka Marine Services, whose buyer was ordered to return the company to the government. However, these rulings all refer to the previous administration. No high ranking politician or public servant has been prosecuted for abuse of power while in office in Sri Lanka.<sup>27</sup>

Despite this, rule of law has been rated quite positively over the past decade in international indices.<sup>28</sup> But the independence of the judiciary has been eroded recently. A report by the International Bar Association Human Rights Initiative (IBAHRI) on the independence of the legal profession and the rule of law in Sri Lanka finds that the capacity of lawyers and judges of Sri Lanka to carry out their functions independently is drastically shrinking.<sup>29</sup> A report by the International Commission of Jurists (ICJ) finds serious limitations to state accountability and in the investigative and prosecutorial systems.<sup>30</sup> It should also be said that the normal judicial process is incapacitated by the prevailing emergency regulations and the PTA. Political appointments to the courts have allegedly undermined confidence in the judiciary.<sup>31</sup>

A key feature of corruption in Sri Lanka is cronyism and nepotism in the appointment of civil servants at all levels of administration. Administrative weaknesses, including lack of appropriate internal controls, auditing, and oversight throughout the public service, provide an enabling environment for “top to bottom” political appointments that have eroded the effectiveness and efficiency of the public service. Small-value petty bribery transactions of high frequency, often act as the “scheduling mechanism” to speed up public service delivery.<sup>32</sup>

In the education sector, a household survey of 2009 found a strong perception that principals, teachers and officers in the education service were not always appointed or

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27 Bertelsmann Transformation Index, 2010.

28 Global Integrity, 2007; World Bank, 2010.

29 International Bar Association Human Rights Institute. May 2009.

30 ICJ Post war justice in Sri Lanka. The rule of law, criminal justice system and commissions of inquiry January 2010.

31 Bertelsmann Foundation, 2010.

32 USAID, 2006; Anti-corruption business portal, 2010.



transferred according to merit and in accordance with the relevant regulation.<sup>33</sup> The health sector also appears to be affected, with high levels of petty corruption in public hospitals whose services are free in Sri Lanka.<sup>34</sup> The Foreign Service has been affected by politicization, with an increasing and disproportionately high number of non-career diplomats, many of whom are believed to hold their positions because of political connections.<sup>35</sup> In a household survey conducted in 2007 on public perception of and experiences with regard to petty corruption in eight different sectors [Education, Health, Local Government, Land Administration, Public Utilities (water and electricity), Police, the Judiciary and NGOs] the Police was identified as the sector that was perceived to be most corrupt.<sup>36</sup>

Corruption in the public sector is influenced by the political culture that entrenches the use of informal channels of influence and support. Middle administrative levels are often bypassed, with politicians giving direct orders to public officials at local level.<sup>37</sup>

Corruption has come into the spotlight notably after the tsunami of December 2004 which resulted in a huge influx of foreign resources. Widespread allegations of corruption in the administration of tsunami relief, both by government and NGOs have resulted in a change in attitudes towards corruption, and loss of trust in aid delivery.<sup>38</sup> Lack of co-ordination and leadership by public institutions in the aftermath of the tsunami was seen to facilitate distorted allocation and inefficient use of resources.<sup>39</sup>

Corruption should be high on the agenda again with the end of the war in May 2009, due to the quantum of relief goods and international donor assistance for reconstruction flowing into the country.

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33 Transparency International Sri Lanka, July 2009.

34 Transparency International Sri Lanka, February 2009.

35 Transparency International Sri Lanka, 2009, pp 61 – 66.

36 Social Indicator – Centre for Policy Alternatives, 2007.

37 Samaratunge and Bennington, June 2002.

38 Elhawary and Aheeyar, August 2008

39 Samaratunge, Coghill & Hearth, 2008.

## V Anti Corruption Laws and Activities

This chapter describes the legal anti-corruption framework and reform efforts by the Government (GoSL) and other actors during the past five years.

Overall, Sri Lanka's legal framework to fight bribery and corruption is well developed. The country is a signatory to relevant international conventions.<sup>1</sup> Bribery is an offence under the Penal Code of 1883 and the Bribery Act. The Bribery Act No 20 of 1994, Section 19<sup>2</sup> covers giving, offering, promising and accepting a bribe whereas Section 158 of the Penal Code covers giving and offering a bribe. The ADB/OECD review of criminalization of bribery, however, finds various deficiencies in the legislation; for instance, it is not clear if this covers promising a bribe, and if a bribe offered but not received by the public servant is still considered to be an offence under the Penal Code. Section 2 of the Penal Code states "every person is liable to punishment under the Code". Public officials found guilty of bribery offences are imprisoned for three years under the Penal Code. Bribery offences defined in the Bribery Act are punishable by imprisonment of up to seven years and a fine up to LKR 50,000<sup>3</sup>.

Bribery is considered to be an extraditable offence under the Extradition Act and all crimes are applicable for mutual legal assistance under the Mutual Assistance in Criminal Matters Act No 25 of 2002.<sup>4</sup> Sri Lanka has signed four bilateral extradition treaties under the ADB/OECD Initiative with Hong Kong and China, the OECD Convention (Italy, United States) and with 8 members of the Initiative under the London Scheme (Bangladesh, Fiji, India, Malaysia, Papua New Guinea, Samoa, Singapore and Vanuatu).<sup>5</sup> However, according to the ADB/ OECD thematic review of 2007, extradition has been largely ineffective.<sup>6</sup> The Commission to Investigate Allegations of Bribery or Corruption Act, No. 19 of 1994 established the CIABOC as

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1 Pinto-Jayawardena Kishali, 15 December 2010.

2 Bribery Act, No. 19 of 1994.

3 ADB/OECD, 2008.

4 Criminal Matters Act No. 25 of 2002.

5 ADB/OECD, September 2007.

6 ADB/OECD, September 2007.

successor to the Department of Bribery.<sup>7</sup> This key institution will be discussed in chapter 9.

In recent years, new legislation has been passed improving the legal framework: Money Laundering Act No 5 of 2006 prohibits money laundering and provides measures to combat and prevent money laundering.<sup>8</sup> The Companies Act No 7 of 2007 is exceptional in that it entitles whistleblowers to a reimbursement of any kind of legal expenses from the fines levied in the action.<sup>9</sup> In April 2007, the Colombo Stock Exchange included Standards on Corporate Governance for mandatory compliance by companies into their listing rules as section 7.<sup>10</sup>

In December 2007, a Mandatory Code of Corporate Governance for licensed banks was issued by the Central Bank of Sri Lanka. The Code consists of a series of rules and principles to improve risk management and transparency in the activities of the banks. The responsibilities of the Board and its composition are regulated by the Code as well as criteria to assess the fitness and propriety of directors, appointment of Board committees and the disclosure of information.<sup>11</sup>

At the international level, Sri Lanka was the first country in Asia and the second in the world to sign the UN Convention Against Corruption (UNCAC) in 2004.<sup>12</sup> The Convention introduces a comprehensive set of standards, measures and rules to strengthen the legal and regulatory instruments to fight corruption, and means to detect the misuse of public funds and illegal acquisition of assets by corruption officials.<sup>13</sup>

Sri Lanka has been a member of Asia/Pacific Group on Money Laundering (APG) since its inception in 1997. Sri Lanka endorsed the Anti Corruption Action Plan for Asia and the Pacific in May 2006, a joint initiative by ADB and OECD. Through

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7 Lawyers for Human Rights, November 2005.

8 USAID, August 2007.

9 Business Anti-Corruption Portal, 2010.

10 Listing Rules. section 7, Colombo Stock Exchange, 07 October 2010.

11 Transparency International Sri Lanka, 2009.

12 UNODC website on the UNCAC; "A strategy to Combat Corruption", Sunday Times, 12 November 2006; "Taking a stand against Corruption". UNDP Sri Lanka, December 2009.

13 USAID Sri Lanka, February 2009.

signing the Plan, the government has committed to undertake meaningful reform to strengthen their safeguards against corruption.<sup>14</sup>

Besides improvements in the legal framework outlined above, the Government of Sri Lanka together with international donors has embarked on a reform programme to improve anti-corruption in practice. The 2004 tsunami and the subsequent influx of large amounts of resources and widespread allegations of waste and corruption in the management of those resources have strengthened the demand for corruption control, both within the country and within donor agencies. In 2005, an “Interim Audit Report on Tsunami Activities” by the Auditor General found gross irregularities, lack of internal controls and poor record-keeping in the use of tsunami relief funds.<sup>15</sup> Civil society organizations had made allegations of corruption claiming that US\$1bn in tsunami aid had not been accounted for.<sup>16</sup>

In 2005, the consultancy firm Associates in Rural Development (ARD) on behalf of USAID undertook a situation assessment on the use of 2004 tsunami relief funds, and published a draft Anti-corruption Assessment Report including recommendations in 2006.<sup>17</sup> From 2007-2009, USAID/ARD together with the GoSL carried out the Sri Lanka Anti Corruption Program (ACP).<sup>18</sup> A draft Action Plan was formulated by a Consultative Council consisting of academics, lawyers and government officials, with inputs received by participatory regional workshops held in 17 districts. The Plan was presented to the President, Chief Justice and Leader of the opposition in July 2007.<sup>19</sup>

The main objectives of the Program were to strengthen the capacity of Auditor General and Bribery Commission, to enhance monitoring and participatory capacity of civil society organizations, create public awareness and facilitate networking with public and private sectors and NGOs.<sup>20</sup> The Centre for Policy Alternatives (CPA), Transparency International Sri Lanka (TISL) and Free Media Movement (FMM) were

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14 “A strategy to Combat Corruption”, Sunday Times, 12 November 2006.

15 “AG’s Department clams up on tsunami fraud”, The Island, 10 February 2005; Elhawary, Samir and Aheeyar, MMM, 2008.

16 Elhawary Samir.& MMM Aheeyar, 2008.

17USAID, 2010.

18 USAID, December 2007.

19 “Anti-Corruption Action Plan ready for Presentation”, The Island, 25 July 2007.

20 USAID Sri Lanka “Sri Lanka: Anti Corruption Program, no date.

implementing partners of ACP, with Janawaboda Kendraya, Lawyers for Human Rights and Development also participating.<sup>21</sup>

In addition to the studies, ACP has assessed training and resource needs of the Bribery Commission and the Auditor General's Department, and developed an education and training curriculum.<sup>22</sup> At community level, TISL in collaboration with ACP conducted anti-corruption community awareness programmes in 2007-2009.<sup>23</sup>

While the ACP produced meaningful assessments and recommendations, there was apparently no follow-up on the programme.

From 2009, UNDP supported another anti-corruption programme "Support Efforts and Action against Corruption in Sri Lanka" (SEAC), from January 2009 to December 2011. The project works closely with the Bribery Commission to improve the legislative and institutional framework, build the operational capacity of the Commission, train public officials and conduct awareness campaigns.<sup>24</sup> SEAC also works towards creating a favorable regulatory environment and developing innovative integrity initiatives in selected organizations with an objective to minimize corruption.<sup>25</sup> CIABOC along with the SEAC project has so far conducted various activities engaging youth, such as inter-university street drama competitions, debate competitions and as well as events targeting school children and the general public.

Both the USAID and UNDP projects have been criticized for being ineffective and too costly. The ACP allegedly cost US\$ 2.3 million while the SEAC project is expected to cost US\$ 858,500.<sup>26</sup>

While follow-up on the anti-corruption action plan of 2007 appears to be nil, anti-corruption rhetoric of the government is strong. In his 2010 election manifesto, "Vision for the Future" (the Mahinda Chintanaya), President Mahinda Rajapaksa pledged "to appoint an independent board comprising of independent and politically

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21 USAID Sri Lanka, 2010.

22 "Sri Lanka:Anti Corruption Program". Tetra Tech ARD. No date.

23 USAID. September 2007

24 "Covering Gaps: Sri Lanka, UN in anti-corruption effort", Lanka Business online, 28 January 2009.

25 "Support efforts and action against corruption in Sri Lanka (SEAC)" UNDP Sri Lanka, No date.

26 "Two costly anti corruption plans gather dust as fresh USD 858,000 projects get underway", The Island, 02 February 2009.

unbiased intellectuals under a new constitutional amendment, to eliminate all forms of corruption, fraud and malpractices.”<sup>27</sup>

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<sup>27</sup> “A Brighter Future. Presidential Election 2010. Mahinda Chintanya”

[http://www.srilankanelections.com/userfiles/file/mahinda\\_chintana\\_vision\\_for\\_the\\_future\\_eng.pdf](http://www.srilankanelections.com/userfiles/file/mahinda_chintana_vision_for_the_future_eng.pdf)

## VI The National Integrity System

### 1. THE LEGISLATURE

#### SUMMARY

The Second Republican Constitution of 1978 broke with the previous Westminster tradition and introduced a strong Executive Presidency for the first time in Sri Lanka.<sup>1</sup> It drew from the constitutional experiences of Britain, France, and the United States and to some extent, India. Some refer to it as a mixed system, but power is concentrated to a large extent in the Executive and Parliament performs only a secondary role.

The capacity of the legislature to provide checks and balances on executive power is curtailed by the unbridled power of the latter. Although Parliament is the controller of public finance in theory, in Sri Lanka it is the Executive that determines how public funds are to be allocated and expended, and Parliamentary approval of the Executive allocation appears to be a mere formality.<sup>2</sup> Parliamentary oversight committees are largely ineffective.

Transparency of parliamentary proceedings is quite good, while accountability of Members of Parliament (MPs) is weak. The use of violence in politics as well as lack of integrity in the behaviour of politicians and low quality of debate have led to disillusionment with regard to the capacity of the legislature to fulfill its role in a democracy. Electoral integrity is another key issue that needs to be addressed in light of MPs crossing-over with impunity, often openly for financial gain, and thereby negating the democratic process.

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<sup>1</sup> Cooray, J.A.L 1995 and Wilson, A.J, 1978.

<sup>2</sup> Interview with Wjeyadasa Rajapaksa, Member of Parliament and former Chair, Parliamentary Committee on Public Enterprises (COPE), 24 November 2009.

## STRUCTURE

Sri Lanka's unicameral legislature consists of 225 members.<sup>3</sup> This is made up of 196 members elected from 25 electoral districts on a proportional representation voting system and 29 members elected from a national list, based on each party's performance at the national level.<sup>4</sup> Members are elected for a six year term. All those over the age of 18 have the right to vote. There are also regional legislatures consisting of nine Provincial Councils and within each province is a system of local government consisting of Municipal Councils, Urban Councils and Pradeshiya Sabhas.<sup>5</sup>

Due to the conflict, the Provincial Council system was not operative in the North and East. In 2008, an election for the Eastern Provincial Council was held, but no elections have been held for the Northern Provincial Council at the time of writing this report.

Parliament has control over public finance and in theory the executive is prohibited from using public funds unless such expenditure has been approved by Parliament. It is Parliament's role to approve the allocation of funds for projects and services and to supervise and scrutinize the expenditure of such public funds.<sup>6</sup>

Since independence in 1948, political power has alternated between the two main political parties, the United National party (UNP) and the Sri Lanka Freedom Party (SLFP) either on their own, or in coalition with other smaller parties. Sri Lankan women received the right to vote in 1931, but the number of women in positions of power has always been low and there have never been more than six per cent of women at any level of government: national, provincial or local.<sup>7</sup> The last Parliament had 13 women members (5.8%) and the current Parliament has 12 women members.

At the April 2004 parliamentary election the United People's Front Alliance (UPFA), a coalition consisting of the People's Alliance (PA) including the SLFP and the Marxist Janatha Vimukthi Peramuna (People's Liberation Front or JVP), won 46.4 percent of

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3 Article 62, The Constitution of the Democratic Socialist Republic of Sri Lanka (14th Amendment), 1978.

4 Articles 62 and 99A, The Constitution, 1978; Cooray, J.A.L, 1995, pp 242.

5 A system of Provincial Councils was introduced by the Thirteenth Amendment to the Constitution, certified on 14 November 1987; Provincial Councils' Act No 42, 1987; Edirisinha, Gomez, Thamilmaran, Welikala, 2008, pp 360 – 407.

6 Articles 148 – 151, The Constitution, 1978; Cooray J.A.L, 1995, pp.259 – 263.

7 Social Scientists' Association, 2010.



the vote and obtained 105 seats in the 225 member Parliament. In 2005, the JVP left the coalition and till Parliament was dissolved in February 2010 the Government governed through a coalition with a number of small parties, the support of 17 dissident UNP members, and a few JVP members who remained with the Government. At the recent Parliamentary elections held on 8<sup>th</sup> April 2010 the ruling UPFA won 144 seats, the UNP 60, The Tamil National Alliance (TNA) 14 and the Democratic National Alliance (DNA, a coalition of JVP and others) seven.

Prior to the legislature's vote on the 18<sup>th</sup> Constitutional Amendment in September 2010, six UNP MPs, one TNA MP and all eight Sri Lanka Muslim Congress MPs (that had been elected on a UNP ticket) crossed over to the ruling coalition, enabling the government to gain the necessary two thirds majority for constitutional change.<sup>8</sup>

## ASSESSMENT

### 1.1 Capacity

#### **1.1.1 Resources (law) - To what extent are there provisions in place that provide the legislature with adequate financial, human and infrastructure resources to effectively carry out its duties?**

The Constitution provides that Parliament by law or resolution shall determine the allowances and remuneration to be paid to its Members and to Ministers and Deputy Ministers.<sup>9</sup>

The Finance and Supplies Department prepares and controls the Annual Budget of Parliament. It is responsible for the payment of salaries, allowances and other entitlements to the Members of Parliament and Parliament Staff. The department also formulates the pension scheme of members and payment of monthly pensions to the ex-members of Parliament.<sup>10</sup>

Members of Parliament are provided with generous allowances and benefits. The monthly allowances of a Member of Parliament consist of a salary of Rs.54,285 [US\$487], a fuel allowance of Rs.30,000 [US\$269], a transport allowance of

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<sup>8</sup> "A Landmark achievement", Sunday Observer, 12 September 2010.

<sup>9</sup> Article 68 (1), The Constitution, 1978.

<sup>10</sup> "The parliament of Sri Lanka" [http://www.parliament.lk/secretariat/finance\\_supplies.jsp](http://www.parliament.lk/secretariat/finance_supplies.jsp)

Rs.10,000 [US\$90], an entertainment allowance of Rs.1,000 [US\$9], a hand phone allowance of Rs.500 [US\$4], and an allowance of Rs.500 [US\$4] for every Parliamentary session they attend.<sup>11</sup> The salary and allowances of approximately Rs.96,000 [US\$861] is comparatively higher than many other categories in the public service. Members are entitled to import vehicles by paying concessionary duty and are entitled to a non-contributory pension at state expense after five years. The Parliamentary secretariat provides additional support to Members. However, Members of Parliament do not have access to a legislative intern as is the practice in some other countries.

The government and opposition whips are responsible for preparing the list of speakers.<sup>12</sup> The parliament staff consists of approximately 850 employees appointed under Article 65 of the Constitution and functions under a Secretary General. The Staff Advisory Committee provides advice and guidance to the Parliamentary Secretariat regarding issues related to the staff.<sup>13</sup>

The Provincial and local Councils, however, are less resourced. Provincial Councils have no power to generate income or taxation revenue, and central government consent is required for provincial level recruitment and appointments. Allocations to Provincial Councils are often not released on time by the central Treasury, thus impacting on their capacity to deliver.<sup>14</sup>

### **1.1.2 Resources (practice) - To what extent does the legislature have adequate resources to carry out its duties in practice?**

In practice, resources for the legislature are determined by the Executive, principally the Treasury, and are contained in the Annual Budget. While Parliament does make

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11 "Thirty Key Bills Were Not Passed", Daily Mirror, 12 March 2010.

12 "The Parliament of Sri Lanka" <http://www.parliament.lk/ListContent.do?language=E>

13 Parliamentary Staff Act No. 9 , 1953 Parliament of Sri Lanka  
<http://www.parliament.lk/secretariat/administration.jsp>

14 Centre for Policy Alternatives, May 2008.

proposals for its financial allocation, the final decision is made by the Treasury.<sup>15</sup> According to two interviewees, the resources available to Parliament are adequate.<sup>16</sup>

The Library of the Parliament is well equipped with a wide range of books, periodicals, and newspapers of a general nature and reference material related to legal, political, economic, historical and social science concerns. Documents such as Parliamentary Debates, Legal Enactment, and Acts & Bills of Sri Lanka, Government Gazettes, Parliamentary Series, Sessional Papers, Administrative Reports and Annual Reports are also found in the library. The library also has access to internet with email facility.<sup>17</sup> Training and seminars on parliamentary practices and procedures are provided to MPs by Parliament and political Parties.<sup>18</sup>

However, it is not clear to what extent MPs make use of these resources and facilities. Information on educational levels of MPs is not available, unlike for example in India where the Parliament website features profiles of all MPs.<sup>19</sup>

As mentioned above, the capacity of provincial and local level legislatures to carry out their duties is drastically curtailed by constitutional, administrative and financial constraints. For example, foreign-funded infrastructure projects are usually handled by central government, regardless of provinces' jurisdiction and capacity to undertake their implementation. Similarly, multi-billion dollar reconstruction projects like *Maga Neguma*, *Gama Neguma*, *Nagenahira Navodaya*, *Uthuru Wasanthaya* are implemented by central government, enabling national-level politicians to take credit for these projects.

Women's representation in the political parties and decision-making bodies is also a major concern in Sri Lanka. There are no affirmative action laws and policies to eliminate the unequal representation of women in both politics as well as decision-making.<sup>20</sup> The representation of women in Parliament has not changed since 2004. In the 2004 and 2010 (April) Parliaments, there were only 13 female MPs (5.8%). In Provincial Councils, 4.1% of MPs are female (2009). Representation at local level is

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15 Interview with senior public official, name withheld on request, 17 December 2009.

16 Interviews with senior public official, name withheld on request, 17 December 2009 and Wijeyadasa Rajapaksa, Member of Parliament and former Chair, Committee on Public Enterprises (COPE), 24 November 2010.

17 The Parliament of Sri Lanka website, <http://www.priu.gov.lk/Parliament/Indexpa.html>

18 "Sri Lanka Parliament", Inter Parliamentary Union 3rd [http://www.ipu.org/parline/reports/2295\\_D.html](http://www.ipu.org/parline/reports/2295_D.html)

19 "The national portal of India" <http://india.gov.in/govt/rajyasabhambiopdata.php?mpcode=2157%28>

20 The Women and Media Collective, July 2010.

worse with only 1.8% of MPs being women (2006).<sup>21</sup> Despite inclusion of a progressive clause in the Parliamentary Elections Act No. 1 of 1981 (amended 2009), major political parties such as UPFA, UNP, SLFP are reluctant to nominate women. At the 2010 Parliamentary elections, only 5.7% of nominations filed by UPFA and UNP were women. Similarly, at the 2008 and 2009 Provincial Council elections, only 4.3% of nominations from UPFA were female, and 3.8% from UNP.<sup>22</sup>

Ethnic representation in the legislature “since 1947 indicate[s] a distinct disadvantage to the Plantation Tamil community of recent Indian origin until the late 1970s, yet fair representation to Sri Lankan Tamil and Muslim communities. . . . The real grievance of minorities concerning governance was not about the lack of representation, but the fact that even with adequate representation they had been excluded from the sphere of state power. The two main Sinhalese political parties who formed governments alternatively had essentially implemented a policy agenda that favoured the Sinhalese majority. Even on occasions when the support of the Tamil parties was obtained to form coalition governments, the majoritarian public policy regime had rarely changed.”<sup>23</sup>

### **1.1.3 Independence (law) - To what extent is the legislature independent and free from subordination to external actors by law?**

The continuation of Parliament is dependent on Executive discretion. The Constitution permits the President to dissolve Parliament without giving any reasons. According to Article 70 the President may dissolve a democratically elected Parliament at any time. The President is however precluded from dissolving Parliament for a year if Parliament was previously dissolved by the President before the expiry of its term and an election was subsequently held.<sup>24</sup> This unfettered power of the President has not been circumscribed through judicial interpretation even though in other areas of the law, the legal system of Sri Lanka recognizes the principle

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<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> Uyangoda, J. “Working and Outcome of Democracy in Sri Lanka” n.d. ([www.democracy-asia.org/qa/srilanka/Jayadeva%20Uyangoda.pdf](http://www.democracy-asia.org/qa/srilanka/Jayadeva%20Uyangoda.pdf))

<sup>24</sup> Article 70 (1) (a), The Constitution, 1978.

that there are no “unbridled” or “unfettered” discretions when public power is exercised.<sup>25</sup>

The Constitution also permits the President to summon or prorogue (suspend) Parliament.<sup>26</sup> No reasons need be provided by the President and prorogation has not been successfully challenged in court. When Parliament is prorogued, all bills and motions lapse and would need to be represented. Similarly, Parliamentary committees also cease to exist and would need to be re-appointed.

Under the Constitution, the President is permitted to hold any Ministerial portfolio and also assign Cabinet portfolios among other Ministers, including the Prime Minister.<sup>27</sup> Many of the Presidents, including the current incumbent, have held the Finance portfolio. This has enabled the Executive to exercise control over public finance by being in control over crucial financial decisions: budgets and resource allocations are decided within the Ministry of Finance and its several departments, particularly the Treasury.<sup>28</sup>

Parliament does set its own agenda though this tends to be guided by the political party in power.<sup>29</sup> The election of the Speaker is also guided by political considerations.

At provincial level, Councils cannot operate independently as their functions are partly replicated by central government ministries. The Concurrent List that sets out to divide powers and functions between the Central and Provincial levels provides ample room for ambiguity, effectively preventing Provincial Councils from enjoying their powers meaningfully.<sup>30</sup>

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25 There are numerous cases in which the courts of Sri Lanka have accepted the principle there that there is nothing called “unfettered discretion” in public law. Gomez, Mario, 2006; *Acta Juridica*, pp 451 – 477 and Gomez, Mario, 2001; Cooray, J.A.L, 1995, pp 371 – 378.

26 Article 70(1), The Constitution, 1978.

27 Articles 44 (2) and (3), The Constitution, 1978.

28 Interview with Wijeyadasa, Rajapakse, 24 November 2010; Rajapakse, Wijeyadasa, 2008 pp 101 – 112.

29 Cooray J.A.L, 1995, pp 277.

30 Centre for Policy Alternatives, 2007.

#### **1.1.4 Independence (practice) - To what extent is the legislature free from subordination to external actors in practice?**

The Parliament is not seen to be free from external interference. Instead, it is sometimes seen to have evolved into something akin to a rubber stamp and to be playing only a marginal role in the public life of the country.<sup>31</sup> The quality of parliamentary debate is low and the committee oversight system weak. Almost all legislation originates in the Executive or within the political party in power and very little appears to originate in the legislature.<sup>32</sup>

In 2002, the UNF government had sought to introduce the 18<sup>th</sup> Amendment to the Constitution that, *inter alia*, sought to curtail the power of the President to dissolve Parliament. The Supreme Court held that the amendment required a special majority in Parliament and the approval of the People at a referendum which in effect put an end to the amendment. However, the Court did observe that the one year restriction in the Constitution (that prohibits the President from dissolving Parliament in its first year) could be extended to three years and be passed by a special majority only, without a referendum.

The legislature is fettered by presidential power to dissolve Parliament as the following example illustrates. In 2001 the United National Front (UNF) won the Parliamentary elections of December that year. This was the first time that the country had to deal with the challenges of having a President from one party and a Prime Minister from another. In theory this should have provided another form of check and balance. But because the constitutional balance is tilted so heavily in favour of the President this did not happen. In November 2003, the then President Chandrika Kumaratunga took over three key Ministries and dissolved what was a democratically elected Parliament in February 2004, three years before its term was to expire.

The control that the President exercises over Members of Parliament as party members is strong. According to one academic commentator “(i)n practice the President, mainly through the Cabinet of Ministers, controls Parliament to a large extent. The Government exercises considerable power over its majority in Parliament

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31 Interview with senior public official, name withheld on request.

32 Interview with Wjeyadasa Rajapaksa, supported by interview with senior public official, name withheld on request.

through its Party organization.”<sup>33</sup> Control also comes by way of making half of Parliament part of the government. Just prior to the dissolution of the previous Parliament in February 2010, there were 58 Ministers and 31 Deputy Ministers, allegedly giving Sri Lanka “a world record for the largest cabinet”.<sup>34</sup> The Cabinet of November 2010 had 61 Ministers and 31 Deputy Ministers at the time of appointment.<sup>35</sup> The appointment of almost half the country’s legislature as members of the executive is probably unprecedented in the democratic world and enables the executive to exert a strong level of control over those Members of Parliament.

The Speaker of Parliament wields significant influence, as he/she controls all parliamentary proceedings and resolutions. On 22 April 2010, Chamal Rajapakse, the President’s brother, was appointed as Speaker of Parliament.<sup>36</sup>

One interviewee observed that the role of Parliament has been devalued to such an extent that the members themselves take little interest in the affairs of Parliament.<sup>37</sup>

Finally, the history of threats and physical violence against MPs has to be taken into account when discussing subordination of MPs. Three sitting members of the TNA have been assassinated since 2006: Joseph Pararajasingham, on 24 December 2005, Nadarajah Raviraj on 10 November 2006, and T Sevanesan in April 2008. UNP MP T. Maheswaran was assassinated by a gunman on 01 January 2008 and UPFA MP and Minister DM Dassanayake was killed in a bomb blast on 9 January 2008.

## 1.2 Governance

### 1.2.1 Transparency (Law)-To what extent are there provisions in place to ensure that the public can obtain relevant and timely information on the activities and decision-making processes of the legislature?

According to the Constitution, Parliamentary bills have to be published in the Government Gazette one week before the bill is introduced in Parliament,<sup>38</sup> except where the bill is designated as “urgent in the national interest”.

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33 See Cooray, J.A.N,1995, pp 277.

34 “Cabinet of Sri Lanka”, Wikipedia.

35 Government website, Cabinet of Ministers [http://www.priu.gov.lk/Govt\\_Ministers/Indexministers.html](http://www.priu.gov.lk/Govt_Ministers/Indexministers.html)

36 Interview with Wjeyadasa Rajapaksa.

37 Interview with senior public officer, name withheld on request.

Proposed legislation can be challenged for its constitutionality in the Supreme Court by any citizen within a week of it being placed on the order paper of Parliament.<sup>39</sup> The Supreme Court's opinion on such bills is transmitted to the President and to the Speaker of Parliament, but is not made public.<sup>40</sup> Separate provisions apply in the case of bills designated as "urgent in the national interest" where the Supreme Court has between one to three days to decide on the Bill's constitutionality.<sup>41</sup>

The Committee on Parliamentary Business which consists of the Speaker, Deputy Speaker, Leader of the House, Leader of the Opposition, the Chief Government Whip, the Chief Opposition Whip and other members, decides on the time that should be allocated for the discussion of Parliamentary business.<sup>42</sup> Proceedings of Parliamentary Committees are generally not open to the media although in exceptional cases a Committee may permit the media to sit in.<sup>43</sup> Voting records of the members are made public. The procedure to collect the votes is unique in Sri Lanka as compared to other South Asian countries like India and Bangladesh. Sri Lanka doesn't use an automatic vote recorder. MPs are asked by the Secretary General on how each wishes to vote on the question at hand. The duty of the Secretary is to collect and count the vote of every MP and to announce the result. However, only the number of votes cast and the net result are published in the *Hansard* and not the individual voting pattern.<sup>44</sup> Only the verbatim recordings of the proceedings of Parliament are recorded in the *Hansard*. The citizens can watch from the citizen gallery, but are not supposed to ask any questions. None of the TV and radio channels broadcast parliamentary proceedings.

Sri Lanka was the first country in South Asia to introduce a law that requires all MPs to file declarations of assets and liabilities including financial interests in the public and private sector.<sup>45</sup> Accordingly, the Speaker of Parliament, Cabinet ministers, deputy ministers, non-cabinet ministers and all other members of Parliament have to declare their assets and liabilities within three months of the date on which the law is

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38 Article 78, The Constitution, 1978.

39 Article 121, The Constitution, 1978.

40 Article 121, The Constitution, 1978.

41 Article 122, The Constitution, 1978.

42 Standing Order 124 f, The Standing Orders of Parliament of the Democratic Socialist Republic of Sri Lanka.

43 This happened in the case of the recent 'Select Committee of Parliament for investigation of the Operations of Non-Governmental Organizations and their Impact' where the media were permitted to observe proceedings.

44 South Asians for Human Rights, 2009.

45 South Asians for Human Rights, 2009.



applicable. Declarations should include assets and liabilities of spouses and children.<sup>46</sup> MPs are not required to declare their criminal background, if any. The law allows any person to obtain a certified copy of a Declaration from the Speaker of Parliament as described below.

“Any person shall, on payment of a prescribed fee to the appropriate authority, have the right to call for and refer to any declaration of assets and liabilities and on payment of a further fee to be prescribed, shall have the right to obtain a certified copy of such declaration”.<sup>47</sup>

On the negative side, there is no verification process, and MPs are only required to indicate the value of assets which consists of holdings in cash.<sup>48</sup> Failure to make declarations of assets and liabilities is considered an offence under the Act.<sup>49</sup>

There are no criteria in Sri Lanka to objectively determine which bills should be deemed “urgent” and which ones “ordinary”.

### **1.2.2 Transparency (Practice) - To what extent can the public obtain relevant and timely information on the activities and decision-making processes of the legislature in practice?**

Most Parliamentary sessions are open to the public. Security at the Parliamentary complex though is strict and this can act as a disincentive to a member of the public who wishes to observe Parliamentary proceedings.

Parliament does have a website ([www.Parliament.lk](http://www.Parliament.lk)) and recently won an award for the “best Sri Lankan Government website“ at the “most favorite Sri Lankan Website” competition.<sup>50</sup> The Parliamentary Hansard, which is the official record of Parliamentary proceedings, is published on the website.<sup>51</sup> The daily *Hansard* contains information about questions and answers provided in Parliament. The Parliament website also displays the business calendar for all sessions in Sinhala, Tamil and English

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46 Section 3(1) and (2), Declaration of Assets and Liabilities Law No.1, 1975.

47 Section 5(3), Declaration of Assets and Liabilities Law No.1 (amendment), 1975.

48 Lawyers for Human Rights and Development, 2005.

49 Lawyers for Human Rights and Development, 2005.

50 ‘The Parliament of Sri Lanka’ <http://www.parliament.lk/news/ViewNews.do?recID=NWS1986>

51 Interview with senior public officer, name withheld on request.

and is easily accessible to people who have access to internet. The calendar on the website is uploaded a week before each upcoming event.<sup>52</sup> However, the website does not display the attendance records of MPs.<sup>53</sup> All Parliamentary sessions are recorded on video by an “in-house” video team. An edited version of the video proceedings is made available to media organizations at the end of each day’s proceedings.<sup>54</sup>

Representatives from the media need accreditation to cover Parliamentary proceedings but once such accreditation is obtained they are provided with supporting facilities. However, reporting the proceedings of a committee without the prior approval of Parliament is an offence.<sup>55</sup>

As a matter of practice proposed legislation is hard to access. Although the Constitution requires Parliamentary bills to be published in the Government Gazette one week before the bill is introduced in Parliament, this does not always happen. The responsibility of publishing the bill lies with the relevant Ministry and often the Ministry fails to publish bills.<sup>56</sup>

However, the public has access to a wide range of timely information. Sri Lanka scores 67 in the Open Budget Index 2010, which means as compared to other countries it provides “significant financial information”.<sup>57</sup> The Ministry of Finance has a website that has links to diverse information, and data on revenues is timely. However, some sources maintain that more detailed information on government expenditure would improve transparency.<sup>58</sup>

Asset Declarations of MPs are not accessible to the citizens under ordinary circumstances.<sup>59</sup> There is no mechanism by which the truthfulness of the declarations can be verified, and few Parliamentarians appear to fill in the forms.<sup>60</sup> In the

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52 South Asians for Human Rights, 2009.

53 *ibid.*

54 Interview with senior public officer, name withheld on request.

55 Parliament (Powers and Privileges) Act No of 5,1978,( amended Acts No 17, 1980; 25 ,1984; 37, 1987 and 27, 1997).

56 Interview with senior public officer, name withheld on request.

57 International Budget Project, 2010.

58 Oxford Analytica, 2006.

59 South Asians for Human Rights, 2009.

60 The Declaration of Assets and Liabilities Law No.1,1975; The Citizens’ Movement for Good Governance (CIMOGG), 2005.

parliamentary elections which were held in April 2004, it was reported that 20% of UNP MPs and 60% of JVP MPs failed to declare their assets.<sup>61</sup> On 4<sup>th</sup> January 2010 Transparency International Sri Lanka wrote to the Speaker of Parliament seeking the asset declarations of MPs. On the 15<sup>th</sup> of January 2010 the Secretary-General of Parliament wrote to the organization stating that the organization should follow the procedure laid down in Section 5(3) of the Law and adding that '... the said Act states that secrecy be maintained regarding all matters relating to the affairs pertaining to Assets Declarations unless as provided by the said Law.'<sup>62</sup> A similar letter addressed to the Commissioner of Elections did not receive a response.<sup>63</sup>

In 2007 the Global Integrity Report gave Sri Lanka a zero score on the question of whether citizens could access asset declarations of Parliamentarians.<sup>64</sup>

In Sri Lanka, draft legislation remains secret until it has been approved by the Cabinet of Ministers. Once a Bill is published in the Gazette, a citizen gets a two-week period to obtain a copy of the Bill, scrutinize it and obtain legal advice or prepare a legal challenge before the court. This way, draft legislation is kept secret and inaccessible until late in the process of law-making. There has also been a practice where a bill is introduced to coincide with public holidays or court vacation, giving no time for the public to challenge it before the court. For example, the Media Authority Bill in April 1997 was introduced during the New Year holidays. This practice not only undermines the supremacy of the Constitution, it also provides incentives for government to enact unconstitutional legislation.<sup>65</sup> All the submissions and depositions made before a committee remain confidential until the report has been submitted. If the report doesn't contain any submission made, then it will remain confidential unless the Committee or the presiding officer grants permission to access.<sup>66</sup>

Another practice that runs counter to the principle of transparency is the fact that various bills have been rushed through as "urgent in the national interest" without giving an opportunity for the public to be informed and intervene. A recent example of lack of transparency on matters of vital importance for all citizens of the country is

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61 Lawyers for Human Rights and Development, 2005.

62 [www.tisirilanka.org](http://www.tisirilanka.org) (accessed 6th Nov 2010).

63 Interview with J.C Weliamuna, Attorney at Law and Executive Director, Transparency International Sri Lanka, 12 December 2009.

64 Global Integrity, 2007.

65 Edrisinha Rohan, no date.

66 South Asian for Human Rights, 2009.

the secretive way in which the 18<sup>th</sup> Amendment to the Constitution was enacted as an urgent bill in September 2010. Reportedly, even Members of Parliament did not know the content of the bill when it was debated.<sup>67</sup> There was no opportunity for the public to examine the proposed changes, as the Amendment was presented as an urgent bill.<sup>68</sup>

### **1.2.3 Accountability (Law) - To what extent are there provisions in place to ensure that the legislature has to report on and be answerable for its actions?**

Judicial review of legislation is not permitted under the constitution. Once a Speaker certifies a Bill has been duly passed by Parliament, no court has the power to question its legal validity.<sup>69</sup>

Parliament has established a Public Petitions Committee and any member of the public is entitled to forward a complaint to this committee.<sup>70</sup> Where the petition discloses an infringement of a fundamental right or other injustice the Public Petitions Committee may refer such a petition to the Ombudsman (Parliamentary Commissioner for Administration) for review and report (see chapter on Ombudsman of this report).<sup>71</sup>

There are no provisions compelling Parliament to consult with the public either before legislation is passed or on any other issue.

The law on Parliamentary Privileges provides Members of Parliament certain privileges in order for them to perform their functions effectively. Among the privileges that Members of Parliament enjoy is the freedom to make broad and unsubstantiated statements on the floor of the House and yet be immune from legal action.<sup>72</sup> Statements that may amount to defamation, if made in other forums, are permitted on the floor of the House by virtue of the immunity provided to a Member

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67 Hon. Sumanthiran, M.A, 08 September 2010.

68 Transparency International Sri Lanka, 2010.

69 Articles 80 (3) and 124, The Constitution, 1978.

70 Standing Orders 25A and 128 of the Parliament.

71 Standing Order 128. of the Parliament.

72 Article 67, The Constitution, 1978; Parliament (Powers and Privileges) Act No. 5, 1978, (amended by Acts No 17, 1980; 25 , 1984; 37, 1987 and 27, 1997).

of Parliament. However, the conduct of judges, the President, or Members of Parliament may not be raised except upon a substantive motion.<sup>73</sup>

The law on Parliamentary privilege protects Members of Parliament only from civil proceedings. Membership of Parliament will not prevent criminal proceedings being initiated against a Member.<sup>74</sup>

#### **1.2.4 Accountability (Practice) - To what extent does the legislature and its members report on and answer for their actions in practice?**

Parliament is by and large unanswerable and unaccountable for its actions.<sup>75</sup> The Global Integrity Index of 2007 assessed Sri Lanka as “very weak” on the question of Parliamentary accountability.<sup>76</sup> The only accountability is that exercised by the people at a Parliamentary election. The courts are unable to regulate Parliament and it is possible for Parliament to pass legislation that violates the constitution and still be protected from judicial review.<sup>77</sup>

While the media is allowed to cover Parliamentary proceedings and is allowed access to the Hansards, Parliament does not proactively attempt to encourage public oversight over its processes. Apart from the Public Petitions Committee system, which according to one interviewee has proved to be ineffective in practice,<sup>78</sup> there is no system of handling complaints against Members of Parliament.

There have been various reports of MPs not being held accountable for acts of violence and intimidation. For example, in December 2007 MP and Minister of Labour, Mervyn Silva, physically assaulted the News Director of a state television station, Rupahavini. The assault was recorded on video and aired on public television.<sup>79</sup> No action was taken against the MP. Instead, the News Director was subsequently removed from his post.<sup>80</sup> In August 2010, the same MP, now Deputy

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73 Standing Orders of the Parliament, (amended up to February 26, 1993).

74 Ibid.

75 Interview with senior public officer, name withheld on request.

76 Global Integrity, 2010.

77 Articles 80 (3) and 124, The Constitution, 1978.

78 Interview with senior public officer, name withheld on request.

79 ‘Eyewitness on assault on journalists’, BBC News, 28th December 2007.

80 See the statement by the Free Media Movement <http://freemediasrilanka.wordpress.com/tag/mervyn-de-silva/>

Minister of Highways, publicly tied a Samurdhi officer to a tree for failing to attend a dengue awareness programme.<sup>81</sup> Following public pressure, the SLFP conducted a disciplinary inquiry that found the MP to be not guilty.<sup>82</sup>

The 2008 Budget, presented in Parliament in November 2007, sought Parliamentary authority for the raising of loans on behalf of the government and for the Secretary to the Treasury to reallocate unutilized capital or recurrent expenditure without Parliamentary approval.<sup>83</sup> The broad discretionary power vested in the Secretary was challenged by way of a petition in Supreme Court but this did not result in significant changes to the Budget.<sup>84 85</sup>

The spate of crossovers of MPs from the Opposition to Government, often with direct and obvious pecuniary benefits, discussed in detail in the chapter on Political Parties of this report, is another serious indicator of the absence of accountability in practice. It is widely acknowledged by the public that MPs cross over for financial and other personal gains, and yet political parties do not even attempt to expel such MPs because they do not trust the Supreme Court.

### **1.2.5 Integrity (Law) - To what extent are there mechanisms in place to ensure the integrity of members of the legislature?**

There are no codes of conduct applicable to Members of Parliament. Political parties have their own processes for ensuring discipline within the party and sometimes Members of Parliament are subjected to these processes. Parliamentary Standing Orders (PSOs) regulate how Members must conduct themselves within the Chamber, and PSOs establish rules for Parliamentary debate.<sup>86</sup>

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<http://sundaytimes.lk/080316/News/news0021.html>

81 "Samurdhi officers at war", Daily Mirror, Sri, 03 August 2010.

82 "Mervyn Silva found not guilty for ordering to tie Samurdhi office", Sunday Times, 31 August 2010.

83 Wirithamulla, Gareesha, 2009, pp 42 – 43.

84 Wirithamulla, Gareesha, 2009, pp 43.

85 Reviewer's comment, supported by other interlocutors.

86 Standing Orders 72 – 78 and 84 – 85 of the Parliament.

There are no laws on Members of Parliament joining the private sector after their term is over, or on gifts and hospitality offered to Members.<sup>87</sup>

There is no independent body that oversees the behaviour of Members of Parliament and there are no post-parliament employment restrictions.

### **1.2.6 Integrity (Practice) - To what extent is the integrity of legislators ensured in practice?**

Crossing-over of MPs to the ruling coalition while remaining in opposition parties has been a frequent practice under various governments. Even Ministerial posts have been assigned to opposition party members.<sup>88</sup> This practice undermines the credibility of the political party system, as voters feel they have been deceived by the MPs they elected.

In 2007, nineteen UNP members crossed over to the ruling coalition.<sup>89</sup> Prior to the 2010 elections, several opposition MPs were brought over to tie up with the government, allegedly with promises of wealth.<sup>90</sup> In September 2010, seven UNP MPs, one TNA MP and eight SLMC MPs (who had been elected on the UNP ticket at the April Parliamentary elections) crossed over to the Government before they voted in favour of the 18<sup>th</sup> Amendment. The crossing over weakens the opposition and further strengthens the Executive, leading to a loss of trust in electoral processes and parliamentary democracy.

There are numerous reports of lack of integrity of MPs at national and provincial levels. MPs have been found to be involved in acts of violence and behavior unbecoming of a representative of the people.<sup>91</sup>

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87 Global Integrity, 2007.

88 "A remedy worse than the malady", *The Island*, 09 March 2009

89 "Sri Lanka govt. wins majority as opposition MPs defect", *Reuters*, 28 January 2007.

90 "Laundering Black Money", *Daily News*, 22 Jan 2010.

91 "Shooting had occurred against Former Minister C.B. Ratanayke", *The Colombo Times*, 11 April 2010.

## 1.3 Role

### 1.3.1 Role (Law and Practice) - To what extent does the legislature provide effective oversight of the executive?

Where an emergency has been proclaimed by the President under the Public Security Ordinance, Parliament must every month approve the continuation of the emergency.<sup>92</sup> Previously, an extension of the emergency beyond 90 days required a two thirds majority of Parliament. This was, however, changed by the Tenth Amendment to the Constitution.<sup>93</sup>

Parliament provides oversight mainly through Parliamentary Committees. The Committee on Public Enterprises (COPE) and the Public Accounts Committee (PAC), set up under Standing Orders 125 and 126, are key mechanisms for monitoring executive action and ensuring that public funds are not mismanaged. The COPE is a 31 member multi-party Parliamentary Committee that oversees the functioning of government corporations, boards, authorities, state-owned banks and state-owned companies and scrutinizes their budgets, accounts, financial procedures and management practices. The 31 member PAC on the other hand, scrutinizes the work of government departments and local authorities. COPE and the PAC in combination enable the legislature to keep track of public expenditure and ensure that public funds are used for a public purpose.<sup>94</sup> In 2007 COPE released two reports that drew public attention to the widespread corruption, waste, and inefficiencies in the public sector.<sup>95</sup>

Parliament took a decision to refer 16 public institutions that were identified in the COPE reports for further investigation to CIABOC (Commission to Investigate All Forms of Bribery and Corruption).<sup>96</sup> Soon after this the President transferred the Director General and two officers of CIABOC. Parliament was then prorogued on 6<sup>th</sup> May 2008 by the President without assigning a reason, providing an opportunity for the two key Parliamentary Committees to be reconstituted. The former Chairman of COPE, who had developed a strong public reputation for his willingness to tackle

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<sup>92</sup> Article 155, The Constitution, 1978.

<sup>93</sup> Article 155, The Constitution, 1978 (amended by the Tenth Amendment); Civil Rights Movement, 2009.

<sup>94</sup> Interview with Wjeyadasa Rajapaksa; Standing Orders 125 and 126.

<sup>95</sup> 12 January 2007 and 24th August 2007.

<sup>96</sup> Beling, Suzie, 2008, pp. 45 – 46.



corruption, was not re-appointed.<sup>97</sup> He was instead replaced by a government Minister and a member of the Executive. Similarly, the Chairman of the Public Accounts Committee was also replaced by a government Minister. In terms of previous Parliamentary practice (and practice throughout most of the Commonwealth) oversight committees were generally headed by a member of the opposition, even though the previous chair had been a member of the governing party. Having two members of the Executive head two important oversight committees that oversee public enterprises and public expenditure is a conflict of interest since the ministers chair committees that scrutinize their own conduct.<sup>98</sup>

Notably, the Sri Lankan legislature does not have a budget committee to check on revenue projections that – as some commentators say – are not realistic.<sup>99</sup> A budget committee would review the draft national budget, evaluate previous performance and ensure that allocation of resources for public institutions and for public projects are based on rational considerations. However, in Sri Lanka the national budget is prepared by the Treasury, approved by the Cabinet of Ministers and then rubber stamped by Parliament that plays no role in the budget preparation.<sup>100</sup> There is also a current practice of using the mechanism of supplementary estimates of expenditure to endorse additional expenditure beyond budgeted limits.<sup>101</sup>

Parliament also at times establishes Committees to provide checks on selected topics. For example, the High Posts Committee was established to examine the suitability of persons who have been appointed or nominated to public offices such as Ambassadors or Chairpersons of public institutions.<sup>102</sup> The Committee has the power to summon before it any person or examine any document in relation to the suitability of such a person. However, very rarely does the Committee overrule appointments made by the Executive in this regard.

Another important way in which the legislature exercises control over the executive is by way of questions, directed at government Ministers. According to Standing Orders the first 45 minutes of every Parliamentary session are reserved for questions that members may want to ask of government Ministers with regard to the institutions that

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97 Beling, Suzie, 2008. pp.46 – 47.

98 de Mel, Nishan, Wickremaratne, Eran, 2008, pp. 57 – 59.

99 Oxford Analytica, 2006.

100 Interview with Wijeyadasa Rajapaksa.

101 Sarvananthan, 2008.

102 Standing Order 128A. of the Parliament.

come within their purview. Questions are presented in advance and the Minister concerned has an opportunity to obtain the relevant information from his or her officials. Where a Member of Parliament is not satisfied by the Minister's response he or she could direct supplementary questions.<sup>103</sup> However, it appears that the legislature is not always able to use "question time" as an effective way of scrutinizing and monitoring executive action. Seldom are government Ministers present to answer questions from the Opposition; answers to questions are often delayed and often inadequate responses are offered to the questions posed.<sup>104</sup>

Overall, lack of parliamentary oversight appears to be linked to the weaknesses in the political party system (see chapter on political parties of this report). The role of the Opposition in a parliamentary democracy is to provide a constructive critique of the activities of the government in power. It should ideally use every opportunity to expose defects, deficiencies, and injustices in the running of government including those pertaining to corruption and the misuse of state resources.<sup>105</sup> However, in Sri Lanka the Opposition has failed to provide a vigorous critique of government activities. While the current scheme of government tilts the balance very heavily in favour of the Executive, the Opposition has not been able to make best use of even the limited powers available to the legislature under the present constitution.<sup>106</sup>

### **1.3.2 To what extent does the legislature prioritise anti-corruption and governance as a concern in the country?**

The last piece of important legislation on anti-corruption was in 1994. That year the Legislature passed a law that established the Bribery Commission. However, the Commission has failed to discharge its obligations effectively and has not lived up to the expectations that surrounded its creation. As discussed above [See Country Profile] the 17<sup>th</sup> Amendment which sought to promote multi-partisan governance was replaced by the 18<sup>th</sup> Amendment passed in September 2010, which in practice removes the last check on Presidential powers under the 17<sup>th</sup> Amendment.<sup>107</sup>

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103 Standing Orders No. 26-32 of the Parliament.

104 Interview with Wjeyadasa Rajapaksa; Cooray, J.A.N, 1995, pp.259 – 260.

105 Cooray, J.A.N, 1995, pp 285.

106 Interview with senior public official, name withheld on request.

107 Transparency International Sri Lanka, 2010.

Sri Lanka signed the UN Convention against Corruption (UNCAC) on 15<sup>th</sup> March 2004 and ratified it on 31<sup>st</sup> March 2004.<sup>108</sup> Under Sri Lanka’s legal system it is the Executive that signs or ratifies international legal instruments and there is no requirement for the instrument to be brought before Parliament for approval as in some other countries. Therefore, there is little ownership for implementing the UNCAC and no visible steps have been taken by Parliament to follow through on the Convention’s provisions.

**Table 5: Scores for Legislature**

LEGISLATURE			
DIMENSION	INDICATOR	LAW	PRACTICE
Capacity = <b>44</b>	Resources	50	75
	Independence	25	25
Governance = <b>25</b>	Transparency	25	25
	Accountability	50	25
	Integrity Mechanisms	25	0
Role = <b>25</b>	Effective oversight	25	
	Prioritise anti-corruption	25	

## Recommendations

1. A Code of Conduct for MPs should be established.
2. Parliament should exercise its role as the controller of public finance by:
  - a) Ensuring that there is no mismanagement of funds, no corruption in the public sector and no fraudulent use.
  - b) Ensuring that public funds are used efficiently and in ways that maximizes output.
3. Ensuring that public funds are used efficiently and in ways that maximizes output.

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108 United Nations Office on Drugs and Crime (UNODC) website  
<http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>

4. Parliament, through the oversight committees, should have the power to “sanction” those public institutions that mismanage or abuse public resources. External support should be available to Parliament to assist in this process.
5. After an assessment of the relevant public institution, Parliamentary oversight committees should submit two reports: one to the Ministry concerned under which the public institution functions, for relevant action. The other should be submitted to the President for submission to the Attorney General to decide whether *prima facie* evidence exists for the initiation of legal proceedings against those responsible for mismanagement, fraud or corruption.
6. Parliament should establish a transparent ‘Budget Office’ that is staffed by technical experts and reviews the performance of all public institutions, making allocations based on past performance and other relevant criteria. Rationale for budget allocations and monitoring of use of allocated funds should be publicly accessible.
7. The COPE and the PAC should be headed by members of the Opposition and should not include any Member of Parliament who is a member of the Executive.
8. Amendment of the Standing Orders should be made to permit the Media access to parliamentary debates, thereby opening the proceedings of Parliamentary committees, including the oversight committees, to public scrutiny. The law on Parliamentary Privileges should be amended to allow for media reporting of the proceedings of these committees without prior approval from Parliament.
9. Proposed legislation must be published promptly and made easily accessible to the public. The public must be given longer time to challenge proposed legislation on constitutional grounds. The provision for passing “urgent bills” in the constitution should be used only in exceptional circumstances such as a natural disaster or national emergency. “Exceptional circumstances” should be legally qualified to prevent abuse. Under no circumstances should a constitutional amendment be passed as an urgent bill.
10. If a Member of Parliament wishes to cross over from the party he/she represented when contesting the General Election to another, he/she should have to resign his/her seat.
11. Parliamentary legislation should be subject to judicial review.
12. The current practice of the legislature should be changed to make law-making a more transparent process and not one that is covered in secrecy.
13. The Minister of Finance should be a Member of Parliament and should be available to answer questions from members of the legislature.

## 2. THE EXECUTIVE

### SUMMARY

Governance in the country has been dominated by a strong Executive Presidency introduced through the 1978 Constitution which impacts heavily on the country's integrity system. The Constitution vests extensive powers in the office of the President. The Presidency was established with the objective of bringing stability to the country, enabling quick decision-making and spearheading economic growth.<sup>109</sup> Paradoxically, the period since the introduction of the Executive Presidency has been one of the most violent in Sri Lanka's recent history, due in large part to the escalation of the ethnic conflict. The 18<sup>th</sup> Amendment to the Constitution enacted in September 2010, further widened the scope of the power of the Executive President, empowering him to appoint the previously designated "independent commissions", senior judges and the Auditor General, among others.<sup>110</sup>

With the Executive enjoying almost unfettered powers, there is very limited accountability and transparency. However, the current Presidency is hugely popular and the public seems to approve its extensive powers which are deemed to be necessary to bring about development to the country that is recovering from 30 years of war. This popularity also provides a unique opportunity for fighting corruption and improving public sector management. Yet, corruption which has infected most areas of the administration continues unchecked.

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109 See Constituent Assembly Debates Vol I, 2625 and National State Assembly Debates, Volume 23, 1219, cited in J.A.L. Cooray, *Constitutional and Administrative Law of Sri Lanka*, 1995, p 106.

110 An alternative view is presented by Mr. Lalith Weeratunga, Secretary to the President as follows: "The 18th Amendment only altered a very short lived 9 year interlude of the Presidential power being kept under restraint, by means of provisions of the 17th Amendment. Prior to that for 22 years under the present constitution itself the President enjoyed untrammelled power in the appointment of the 'independent commissions'." Letter to TISL dated June 29 2011.

## STRUCTURE

The Executive consists of the President and the Cabinet of Ministers.<sup>111</sup> The Constitution also provides for the appointment of “Non Cabinet” Ministers and Deputy Ministers.<sup>112</sup> According to the Constitution the President is Head of State, Head of the Executive and Government, and Commander-in-Chief of the Armed Forces.<sup>113</sup> The President is elected directly by the people for a fixed term of six years.<sup>114</sup> Before the enactment of the 18<sup>th</sup> Amendment to the Constitution the President could serve a maximum of two terms.<sup>115</sup> However, with the subsequent enactment of the 18<sup>th</sup> Amendment the two-term limitation was removed whereby the President can seek re-election “any time after the expiration of 4 years from the commencement of his current.”<sup>116</sup>

The President is not a member of the legislature.<sup>117</sup> However, the 18<sup>th</sup> Amendment which was brought into the Constitution stipulates that the President shall attend Parliament once in every three months with the entitlement to all the privileges, immunities and powers of a Member of Parliament.<sup>118</sup>

The President also has the power to dissolve and prorogue Parliament any time after the expiration of a period of one year from the date of a General Election<sup>119</sup> (by which the members to the Parliament are elected) and he is not bound by the Constitution or any other law to give reasons for such decision.

The President is Head of Cabinet and may take on any Ministerial portfolio.<sup>120</sup> The President appoints the Prime Minister, Ministers, and Deputy Ministers and “Non Cabinet” Ministers and allocates their functions.<sup>121</sup> He or she is not bound to consult the Prime Minister on these appointments.<sup>122</sup> Ministers, Deputy Ministers and “Non

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111 Chapter VII and VIII of the Constitution of Sri Lanka.

112 Article 45 and 46 of the Constitution.

113 Article 30 of the Constitution of the Democratic Socialist Republic of Sri Lanka, 1978.

114 Article 30(2).

115 Article 31(2).

116 Article 31 (3A)(a)(i).

117 Article 30(2).

118 See Article 32(3) of the Constitution (18th Amendment).

119 Article 70(1).

120 Article 44 (2).

121 Articles 44, 45 and 46 of the Constitution.

122 Article 44.

Cabinet” Ministers have to be drawn from the legislature.<sup>123</sup> At present almost half of the legislature is part of the Cabinet. (92 Ministers, out of which there are 61 Cabinet Ministers and 31 Deputy Ministers.)<sup>124</sup>

The President can declare a state of emergency and proclaim emergency regulations under the Public Security Ordinance (PSO).<sup>125</sup> After the Thirteenth Amendment to the Constitution in 1987, a proclamation of the President under the PSO cannot be challenged in a court of law.<sup>126</sup> Every month, Parliament must by way of a simple majority approve the extension of the emergency. The courts have on a few occasions declared emergency regulations to be unconstitutional.<sup>127</sup>

## ASSESSMENT

### 2.1 Capacity

#### 2.1.1 Resources (practice) - To what extent does the executive have adequate resources to effectively carry out its duties?

The availability of resources has not been a concern. Rather, the issue has been that there are too many resources being allocated to the Executive with very little transparency and accountability.<sup>128</sup> Resource allocation for the maintenance of the

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123 See Articles 44, 45(1) etc.

124 Government Ministers, [http://www.priu.gov.lk/Govt\\_Ministers/Indexministers.html](http://www.priu.gov.lk/Govt_Ministers/Indexministers.html), accessed on 25.11.2010

125 The PSO is, of course, a much older piece of legislation. See Article 155 of the Constitution and the Public Security Ordinance, No 25 of 1947. See also Civil Rights Movement, ‘Emergency Law 5: An Annotated List of Emergency Regulations and other Notifications under the Public Security Ordinance, 13 August 2005 – 6 November 2009’ (2009) pp v – viii.

126 Article 154 (J) (2) of the Constitution.

127 See *Yasapala v Ranil Wickremesinghe*, Supreme Court Application No. 103 of 1980, reported in *Fundamental Rights*, Volume 1, Decisions of the Supreme Court (April 1977 – 1981) Colombo: Lake House Investments, 1984, 143 - 163; *Wickramabandu v Herath* (1990) 2 Sri LR 348 See also International Commission of Jurists, ‘Emergency Laws and International Standards’, (February 2009) and Pradeep Ratnam, above, at p 45.

128 Interview with Bradman Weerakoon, former Secretary to the Prime Minister and former Advisor to the President, Colombo, 17 February 2010. The Secretary to the President points out, however, that “(a) the Presidential Head of Expenditure in the Annual Estimates provide for a number of institutions and projects outside the Presidential Secretariat proper, (b) the number of these other locations of expenditure have grown over the years and (c) in fact this component of non-Presidential Secretariat financial provision now exceeds the Presidential Secretariat provision proper.” Weeratunga, *op. cit.*

Executive has raised concerns in Sri Lanka.<sup>129</sup> However, the Presidential Secretariat maintains that “Presidential expenditure is subject to the same constitutional and statutory measures of public expenditure surveillance (Audit, Parliamentary scrutiny etc) as any other.”<sup>130</sup>

The allocation of resources for all public institutions and major development projects is determined largely by the President, the Secretary of the Treasury and the Ministry of Finance. The President is also Minister of Finance. The Secretary to the President points out that “constitutional provisions that Parliament has ‘full control over public finance’ (Article 148 et seq.)” are in place. In addition, “other elements of the budgetary process including formulation of draft expenditure proposals by the spending agencies, negotiations between them and the Treasury, negotiations with donors, decisions by the Cabinet in regard to major projects etc. need also to be taken account of.”<sup>131</sup>

The President also has principal control over the Presidential Fund, though statutorily governance of the Fund is vested in a Board of Governors that includes the Speaker and Leader of the Opposition as members. This enables the President to disburse funds for a wide range of activities, including for the relief of poverty, for the advancement of education or knowledge, for the advancement of religion etc. which are deemed beneficial to the public.<sup>132</sup>

### **2.1.2 Independence (law) - To what extent is the Executive independent by law?**

**Score: 75**

The Executive has extensive powers. This power is given by the Constitution and creates an all-powerful Executive Presidency with very few checks and controls, largely independent of the other two branches of government.<sup>133</sup>

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129 “Executive Presidency – the cost of maintenance: Point of View”, Sunday Times, 10 January 2010.

130 Mr. Lalith Weeratunga, op.cit.

131 Weeratunga, ibid.

132 President’s Fund Act No.07 of 1978.

133 See also Pradeep Ratnam, 1998, pp 38 – 46.



The President enjoys complete legal immunity from suit. According to the Constitution, “while any person holds office as President, no proceeding shall be instituted or continued against him, in any court or tribunal in respect of anything done or omitted to be done by him either in his official capacity or private capacity”.<sup>134</sup> Acts of the President performed in the capacity of a Minister however, may be reviewed by the courts.<sup>135</sup>

The President cannot be removed by a vote of no confidence but can only be removed by way of an impeachment.<sup>136</sup> An impeachment requires a resolution in Parliament, followed by an inquiry by the Supreme Court, and a second resolution in Parliament.<sup>137</sup> The impeachment process is complex and quite difficult to implement in reality and has been attempted once, unsuccessfully, so far. According to one commentator it is a “practical impossibility”.<sup>138</sup>

Apart from the President, other parts of the Executive are subject to review by the courts. Acts by Ministers and their subordinates can be challenged in a court by way of a fundamental rights action or by way of a writ petition.<sup>139</sup> The President is responsible to Parliament for the “due exercise, performance and discharge of his powers, duties and functions...” but there are no mechanisms to enforce this responsibility.<sup>140</sup>

The President may assume any Ministerial responsibility, including that of Finance, and appoint members of the Cabinet with no obligation to consult the Prime Minister or the legislature on these appointments. He or she is immune from judicial review while in office and has the power to dissolve a democratically elected legislature, without assigning reasons, after the legislature has completed one year in office. The President may also declare an emergency, with the monthly approval of parliament, and govern by way of emergency regulations with minimal judicial oversight, subject to monthly parliamentary approval.

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134 Article 35(1) of the Constitution.

135 Article 35 (2) of the Constitution.

136 Article 38 (2) of the Constitution.

137 Ibid.

138 Pradeep Ratnam, 1998, p 46. See also J.A.L. Cooray, 1995, p. 106 footnote 16.

139 See Articles 17 & 126 of the Constitution on the Supreme Court’s fundamental rights jurisdiction and Article 140 on the Court of Appeal’s power to issue writs.

140 Article 42 of the Constitution and Cooray, above, pp 105 - 106.

### **2.1.3 Independence (practice) - To what extent is the executive independent in practice?**

The President is able by virtue of the enormous powers vested in the office to act independently of the other branches of government. One of the concerns is that too much independence is vested in the office and that there are no real safeguards to ensure that the vast discretionary powers reposed in the President are not abused. Major financial, policy and governance decisions are taken in the President's office and other actors such as the legislature have little capacity to interfere or influence.<sup>141</sup>

The independence enjoyed by the Executive President enables the incumbent to quite openly disregard the Constitution. For instance, President Chandrika Kumaratunga refused to comply with a Supreme Court order in which the Court had ordered the promotion of a senior military officer upon a Fundamental Rights case filed by him.<sup>142</sup> Further, the current President Mahinda Rajapaksa refused to constitute the multi-partisan Constitutional Council responsible for approving or recommending key public appointments, even though this was required under the Constitution, and he continued to make appointments in disregard of an explicit Constitutional provision.<sup>143</sup>

In another case, the Supreme Court directed the government to reduce the price of petrol from Rs.122 to Rs.100 per litre.<sup>144</sup> The government refused to comply, and the proceedings in this case were terminated by the Supreme Court as a result.<sup>145</sup>

While the Constitution states that the "President shall be responsible to Parliament for the due exercise, performance and discharge of his powers duties and functions" there is no way in which Parliament can ensure that this responsibility is discharged.<sup>146</sup>

There been many calls for the reform or abolishment of the Executive Presidency and two victorious Presidential candidates in their manifestos pledged to reform the

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141 Interview with Bradman Weerakoon, 17 February 2010.

142 Parry Liyanage case SCFR 506/99, See also <http://www.alrc.net/doc/doc/hrc04/ALRC-SHRC-04-14-2007-SrLanka-Impunity.pdf>, accessed on 25.11.2010.

143 Transparency International Sri Lanka, *The Forgotten Constitutional Council: Position Paper*. August 2008; TISL Governance Report 2008, pp 1 – 3 and pp 38 – 40; and Law and Society Trust, *State of Human Rights Report 2007*, pp 237 – 261.

144 *Wegapitiya v Fowzie*, Supreme Court Fundamental Rights Application No. 536/2008.

145 Sri Lanka: Governance Report 2009, pp 17 – 18.

146 Article 42 of the Constitution.

office.<sup>147</sup> However, this has not happened. Paradoxically, the most recent changes brought into the Constitution by the 18<sup>th</sup> Amendment have enhanced the powers of the Executive Presidency whilst removing some of the vital checks such as the limitation on the term of office as well as the Constitutional Council which sought to ensure independent appointments to key institutions, including the Public Service Commission, National Police Commission, Judges of the Supreme Courts etc.<sup>148</sup>

## 2.2 Governance

### 2.2.1 Transparency (Law) - To what extent are there regulations in place to ensure transparency in relevant activities of the executive?

Sri Lanka does not have an Access to Information Law. There are only a few provisions to compel disclosure of government information that should be in the public domain. The annual budget of the government is made public on the day it is presented in Parliament. There are no processes to enable the public to contribute to or challenge budgetary estimates in Sri Lanka,<sup>149</sup> though the appropriation bill (public expenditure estimates) must be presented to Parliament at least six weeks prior to budget day.<sup>150</sup> International ratings on the budget transparency in Sri Lanka vary. Whilst the Global Integrity Scorecard assessed the country's budget accountability processes at a score of 62 ("weak") in 2007,<sup>151</sup> the Open Budget Index 2010<sup>152</sup> rated Sri Lanka's public finances as significantly transparent.

According to law it is mandatory for Presidential candidates to declare their assets and liabilities to the Commissioner of Elections prior to the election. The assets of their spouses and children must also be declared.<sup>153</sup> However, where a Presidential

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147 Amaratunge, Chanaka (Ed.), 1989 pp 281 – 364. See also the manifestoes of Presidents Chandrika Bandaranaike Kumaratunge (1994) and Mahinda Rajapakse (2005 and 2010) before they were elected to office.

148 Transparency International Sri Lanka, Adverse Impact of the 18th Amendment on Governance: Position Paper, November 2010.

149 Global Integrity Report, 2007.

150 Sarvananthan, 2007.

151 Global Integrity Report, 2007.

152 International Budget Project, Sri Lanka Country Report, 2010. [internationalbudget.org/files/2010\\_Full\\_Report-English.pdf](http://internationalbudget.org/files/2010_Full_Report-English.pdf)

153 Section 3 and 4 of the Declaration of Assets and Liabilities Act of 1975 as amended by Acts Nos. 29 of 1985 and 74 of 1988

candidate is elected and it is later found that such candidate had not made a declaration there are no steps that could be taken to bring such a candidate before a court of law since the President is covered by the immunity provisions contained in the Constitution.<sup>154</sup>

Government Ministers are required by law to disclose their assets and the assets of their spouses and children as well. This declaration has to be made to the President and made before the 31<sup>st</sup> of March every year.<sup>155</sup> However, these declarations are neither accessible to the public nor subject to verification.<sup>156</sup>

### **2.2.2 Transparency (Practice) - To what extent is there transparency in relevant activities of the Executive in practice?**

The Government runs a comprehensive website that includes gazette notifications in Sinhala and Tamil, information on government Ministries as well as on Provincial Councils, and other relevant information.<sup>157</sup>

However, important decisions that impact on public life are very often made behind closed doors and the Executive is reluctant to share information on these decisions or the basis for these decisions. According to one interviewee, the culture of government (not confined to any particular regime) is weighted towards secrecy rather than transparency, which was endorsed throughout the validation process of this report.<sup>158</sup>

Sri Lanka lacks a Freedom of Information Law. Civil society has advocated for many years for the enactment of a freedom of information law. In 2001 the Law Commission of Sri Lanka presented a draft law on the freedom of information to the government. Subsequently civil society and the media group got involved in the

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154 Article 35 of the Constitution.

155 Sections 2 and 4 of the Declaration of Assets and Liabilities Act of 1975 as amended by Acts Nos. 29 of 1985 and 74 of 1988.

156 Mr Weeratunga maintains that this contention is “factually inaccurate” in terms of Section 5 (3) of the Declaration of Assets and Liabilities Act (as amended in 1988) since “any person on payment of the prescribed fee has the right to refer to and obtain a copy of an assets declaration. ... Has anyone thought of moving court to enforce the performance of what happens to be the statutory duty of a public official?” op.cit.

157 Government website, <http://www.priu.gov.lk/> (accessed 26th Oct 2010)

158 Interview with Mr. Bradman Weerakoon, 17 February.2010, validated in the Scoring Workshop and other discussions.

process and presented a more detailed draft law. The South Asia Free Media Association also presented government with a model law.<sup>159</sup> A draft law was approved by the Cabinet in 2003. However, as a result of tensions between the then President and Prime Minister, Parliament was dissolved in 2004 before the law could be passed. Thereafter there were a few attempts to legislate towards access to information in Sri Lanka without any success.

Although there is no “access to information” legislation in the country there has been at least one case in which the petitioner was able to compel a public entity to disclose information that should have been in the public domain.<sup>160</sup> In what is commonly referred to as the “Galle Face Case” in 2005 the Supreme Court interpreted the constitutional right to free speech, expression and publication as including within its ambit a right to information.<sup>161</sup>

The problem is compounded by a media that is largely compliant where Executive action is concerned.<sup>162</sup> The media also lacks the capacity to challenge official statistics and data.<sup>163</sup> Draconian laws, such as the Official Secrets Act, the Establishment Code and the Emergency Regulations, discourage officials from disclosing even statistical information to the public.<sup>164</sup> For example, the Establishment Code prevents officials from disclosing information “that may embarrass the government”,<sup>165</sup> while the Sri Lanka Press Council Law No 5 of 1973 makes it an offence to publish information which may “adversely affect the economy” without prior Ministerial approval. The cumulative effect of these regulations and the fear of repercussions is that alleged corruption at the highest levels is not discussed in the media or other forms of public discourse.

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159 Interview with Mr. Lakshman Gunasekera, senior journalist and former Editor of the Sunday Observer, 13 January 2010.

160 *Environmental Foundation v UDA*, (The ‘Galle Face’ Case), Supreme Court Minutes of 28th November 2005, where the Supreme Court held that the right to freedom of speech, expression and publication contained in Article 14 of the Constitution included by implication a right to receive information that should be in the public domain.

161 *Environmental Foundation v UDA*, (The ‘Galle Face’ Case), Supreme Court Minutes of 28 November 2005.

162 Interview with Mr. Bradman Weerakoon, 17 February 2010.

163 Interview with former public officer (name withheld on request), 04 November 2009.

164 See Kishali Pinto-Jayawardena “Right to Information in Sri Lanka – Critical Scrutiny of Existing Laws and Proposed Law Reform” December 2005 for an account of the relevant provisions of the Official Secrets Act.

165 Establishment Code, section 3, Chapter XXX1 of Volume 1 and section 6 of Chapter XLVII of Volume 2 - The Release of Official Information to the Press or the Public, section 6 (1) (3).

In the case of specialized information pertaining to the economy, there is a lack of capacity among civil society and media to understand official information and provide a constructive critique.<sup>166</sup> Further, the existing environment in Sri Lanka proves it difficult to criticize the Government. Several media personnel, rights activists etc. have been silenced by physical attacks, threats and imprisonment for having criticized the Government.<sup>167</sup>

Minutes of Cabinet meetings are not publicly available, though a press briefing is held after most Cabinet meetings where the major decisions of the Cabinet are publicly announced. A former senior civil servant who had worked under a range of political leaders was of the opinion that most Cabinet press briefings are a formality with there being no real disclosure of information and the Executive being reluctant to engage in a genuine dialogue with the media.<sup>168</sup>

The Law on the Declaration of Assets and Liabilities should in theory provide one way of enhancing transparency in government. However, the law is not enforced in practice and asset declarations of those in government are hard to obtain.

### **2.2.3 Accountability (Law) - To what extent are there provisions in place to ensure that members of the executive have to report and be answerable for their actions?**

Accountability of the executive is provided mainly through the courts, the Parliamentary oversight committees (COPE and PAC) and the annual audit done by the Auditor General. According to the Constitution the President is accountable to Parliament, but there are no provisions that explain how such accountability is to be

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<sup>166</sup> Interview with former public officer, 04 November 2009.

<sup>167</sup> See generally: <http://releasetissa.blogspot.com/>, <http://sunandadeshapriya.wordpress.com/2010/11/11/sri-lanka-blocks-bbc-from-travelling-to-war-commission/>, <http://sunandadeshapriya.wordpress.com/2010/11/14/sri-lanka-denies-visas-to-al-jazeera-as-reported-by-tdn-previously/>, <http://sunandadeshapriya.wordpress.com/2010/11/19/urgent-alert-sri-lanka-a-tamil-journalist-arrested-at-the-colombo-airport/> (all accessed on 25 November 2011)

<sup>168</sup> Interview with Mr. Bradman Weerakoon, 17.02.2010.

exercised.<sup>169</sup> In the case of the President, legal review is not possible because of an explicit constitutional prohibition.<sup>170</sup>

The Executive does not, as a general rule, provide reasons for its decisions although it may be possible to compel the Executive to disclose reasons in specific cases through legal action.<sup>171</sup> The President may be sued after his or her term of office has expired.<sup>172</sup>

Apart from the President, other parts of the Executive are subject to review by the courts. Acts by Ministers and their subordinates can be challenged in a court by way of a fundamental rights action or by way of a writ.<sup>173</sup> Given that currently the President also holds the position of Finance Minister, the laws regarding legal review appear to be conflicting.

#### **2.2.4 Accountability (Practice) - To what extent is there effective oversight of executive activities in practice?**

The scrutiny and review that the Parliamentary oversight committees and the Auditor General provide are inadequate to ensure that the Executive does not abuse its powers.<sup>174</sup> Both these institutions have only a limited impact on the activities of the Executive. In many cases the Executive is able to exercise control over the performance of the functions of the Auditor General.<sup>175</sup>

The purpose of COPE and the PAC is to enable Parliamentary oversight over government institutions that expend public funds. Currently COPE and PAC are headed by two members of the Executive. This arguably constitutes a conflict of

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169 Article 42 of the Constitution.

170 Article 35(1) of the Constitution.

171 Gomez, Mario, 2006, pp 451 – 477 and Gomez, Mario, 2001, pp. 581 – 612.

172 Sugathapala Mendis v Chandrika Bandaranaike Kumaratunge, Supreme Court Minutes of 8th October 2008. See also the Global Integrity Report 2007.

173 See Articles 17 and 126 of the Constitution on the Supreme Court's fundamental rights jurisdiction and Article 140 on the Court of Appeal's power to issue writs.

174 Interview with Mr. Bradman Weerakoon, 17 February.2010.

175 Interview with Mr. Bradman Weerakoon, supported by an interview with S.C. Mayadunne, former Auditor General.,Colombo. Mr. Lalith Weeratunga disagrees.

interest since the ministers sit in committees that scrutinize their own conduct, and this impacts on the effectiveness of the committees.<sup>176</sup>

In practice accountability by way of legal action is dependent on having a petitioner and the petitioner having access to evidence that can be presented in a court of law. The enormous discretion vested in the Executive makes it difficult to ensure that it acts according to principle and exercises discretionary power according to public need. The current environment does not enable civil society or the media to critique the exercise of public power without the fear of reprisals (see chapters on Media and Civil Society). The Global Integrity Report 2007 assessed Executive accountability as “very weak.”<sup>177</sup>

Though significant decisions are made without public consultation, the public appears to largely approve Presidential action. Public demand for accountability is weak, and this is seen to be a major contributing factor to the strength of the Executive. Therefore, some degree of accountability does exist as manifest in the express approval of Executive power by many stakeholders.

### **2.2.5 Integrity (Law) - To what extent are there mechanisms in place to ensure the integrity of members of the Executive?**

The oath and the affirmation subscribed to by the President and the Cabinet of Ministers provides that they are bound to perform their duties in accordance with the Constitution and the law.<sup>178</sup> In addition, there are no other codes of conduct for the President or the Cabinet of Ministers.<sup>179</sup> There are no restrictions on post-ministerial employment.

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176 de Mel, Nishan, and Wickremaratne, Eran, 2008. pp 57 – 59.

177 Global Integrity Report, 2007.

178 Articles 32(1), 53 and Schedule 4 to the Constitution of Sri Lanka.

179 Global Integrity Report, 2007.



## **2.2.6 Integrity (Practice) - To what extent is the integrity of members of the executive ensured in practice?**

**Score: 25**

The President and the Cabinet of Ministers function in a regulatory vacuum with no real controls over them. The courts, Parliament and the annual audit are the only forms of control, none of which is effective in controlling abuse of power and ensuring transparent and accountable governance. There have been many instances in which the judiciary has questioned the integrity of the Executive (see section on Judiciary), but this has not resulted in a tangible increase in accountability in practice.

## **2.3 Role**

### **2.3.1 Public Sector Management (law and practice) - To what extent is the executive committed to and engaged in developing a well-governed public sector?**

It is apparent that the executive sees the public sector rather as an accessory to be used to serve its interests, including its narrow political interests, than as a means to service the people. While there is a regulatory framework in place (principally Article 12 of the Constitution, the jurisprudence of the courts and the Establishments Code), there is little evidence of any interest on the part of the Executive in ensuring the emergence of a public sector that is committed to a principled exercise of public power and to a system of governance that is transparent and accountable.<sup>180</sup>

The Public Service Commission that is in charge of the “appointment, promotion, transfer, functions of disciplinary control and dismissal of public officers” has not carried out its functions independently since 2005, when the Cabinet decided to vest

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<sup>180</sup> Interview with Wjeyedasa Rajapaksa, former Member of Parliament and former Chair, Committee on Public Enterprises (COPE) supported by an interview with Bradman Weerakoon. Article 12 of the Constitution establishes a right to equality before the law and the equal protection of the law. There is a large body of case law that has established that public power is held in trust and must be exercised reasonably, fairly and in accordance with the principles of natural justice.

its responsibilities in the Secretaries of Ministries and Heads of Government Departments (see chapter on Public Sector).<sup>181</sup>

Since October 2010, the Commission is appointed directly by the President who should seek the observations of a Parliamentary Council that he may or may not consider.<sup>182</sup>

An Administrative Appeals Tribunal can vary or modify an order of the Public Service Commission.<sup>183</sup> However, key appointments in the public sector, especially Secretaries to the Ministries and Chairpersons of major public institutions, are allegedly often made according to political allegiances rather than on merit. Reportedly, many officers within the public sector who wish to take a principled stand are unable to do so because of the consequences they are likely to face.<sup>184</sup>

### **2.3.2 Legal system (law and practice) - To what extent does the executive prioritise public accountability and the fight against corruption as a concern in the country?**

Sri Lanka ratified the United Nations Convention against Corruption (UNCAC) in March 2004. However, no enabling legislation has been made to implement it since then.

The President in his address to the nation at his swearing-in ceremony on 19 November 2010, stated that: “we need a land free of a lawless underworld, racketeering, extortion and the carrying of illegal weapons or drugs, a land free of corruption and inefficiency.”<sup>185</sup> The Presidential manifesto (“Mahinda Chintanaya”) also identifies the fight against corruption as a priority of his government.

However, in the past, the Executive appears to have stymied efforts at dealing with corruption and abuse of power.<sup>186</sup> This is illustrated by the events that followed the publication of two important reports by COPE in 2007 (see section on the

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181 Transparency International Sri Lanka, ‘The Forgotten Constitutional Council’, August 2008.

182 Article 41A (1) of the Constitution (inserted by the 18th Amendment to the Constitution)

183 Article 59 of the Constitution.

184 Interview with former public officer, 04 November 2009, name withheld on request.

185 “Seniors kicked up”, Sunday Times, 28 November 2010.

186 See Transparency International Sri Lanka: Governance Reports 2008 and 2009.

Legislature). These reports highlighted the rampant corruption, waste, and inefficiencies in the public sector. Parliament resolved to refer 16 public institutions that were identified in the COPE reports for further investigation to CIABOC (Commission to Investigate Allegations of Bribery or Corruption).<sup>187</sup> However, soon after this the President transferred the Director General and two officers of CIABOC, bringing investigations to a halt. In 2008, with the prorogation of Parliament, COPE and PAC were reconstituted and their Chairmen were replaced with government Ministers.<sup>188</sup>

Other examples of lack of effort on the part of the Executive to investigate or provide information are three high profile incidents involving allegations of corruption and the misuse of state resources: The first of these relates to a contract that the Government of Sri Lanka signed in July 2006 with a firm owned by the Ukrainian government for the purchase of MIG 27 fighter aircraft for the Sri Lankan Air Force.<sup>189</sup> The second relates to a loan of US\$500 million that the government obtained in 2007 from three private banks, the purpose of which was not made entirely clear by the government.<sup>190</sup> The third relates to the running of a government-owned budget airline which has incurred heavy losses since it was launched in February 2007.<sup>191</sup> In none of these cases has the Executive provided information to establish that the transactions were legal and did not entail an abuse of public power or a misuse of state resources.

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187 Sri Lanka: Governance Report 2008. pp 12 – 13 and 45 - 46.

188 Sri Lanka: Governance Report 2008. pp 12 – 13 and 45 – 46.

189 “Big fraud and billion rupee scandal in latest MIG deal: Was Defence Ministry misled?”, Sunday Times, 03 December 2006 and “MIG Deal: More Twists, Turns and Threats”, Sunday Times, 19 August 2007.

190 TISL Governance Report 2008, p 16.

191 Ibid., p. 17f.

**Table 6: Scores for Executive**

<b>EXECUTIVE</b>			
<b>DIMENSION</b>	<b>INDICATOR</b>	<b>LAW</b>	<b>PRACTICE</b>
Capacity = <b>58</b>	Resources	-	50
	Independence	75	50
Governance = <b>25</b>	Transparency	25	25
	Accountability	25	25
	Integrity Mechanisms	25	25
Role = <b>25</b>	Public Sector management	25	
	Legal System	25	

## Recommendations

1. The agreement to either abolish or amend the Executive Presidency should be implemented expeditiously, leading to a more equitable balance of power amongst the three organs of State: the Executive, the Legislature and the Judiciary. When the Presidency is amended, the President should not be permitted to hold any ministerial portfolio. The Cabinet of Ministers should consist entirely of Members of Parliament. If a modified Executive Presidency is retained then there should be ways in which Parliament and the courts could ensure Executive accountability.
2. The independence of Parliament and the judiciary must be re-established as a countervailing force to the executive.
3. The President and the Cabinet must declare their assets and liabilities every year. Those declarations must be publicly accessible and any person should be able to obtain a copy of those declarations on the payment of a nominal fee.
4. There must be a limit on the number of Cabinet Ministers, “Non Cabinet” Ministers, and Deputy Ministers.
5. Presidential immunity should be reviewed and executive action should be justiciable.

### 3. THE JUDICIARY

#### SUMMARY

The judiciary has played an important role in protecting human rights and upholding democratic values over the years. It has shown a willingness to review the exercise of Executive power and declare invalid actions of the Executive that are outside the law. One of its major challenges is to overcome the lengthy delays that plague the legal system. Both civil and criminal litigation can take several years and this has acted as a disincentive for those who wish to use the courts. Another challenge is to regain its independence. In recent years the institution has been affected by a loss of credibility. Allegations of politicization, lack of independence, and unprincipled decision-making have tarnished its image.

#### STRUCTURE

The judiciary in Sri Lanka consists of a Supreme Court, a Court of Appeal, and several High Courts (including the Civil Appellate Courts) spread throughout the country. It also includes courts of first instance such as District Courts, Magistrate's Courts and Primary Courts.<sup>192</sup> The Supreme Court is the final court of appeal and is vested with the power to hear and determine human rights cases, and is also vested with the power to interpret all constitutional matters. The Court of Appeal has the power to decide on "writ applications" and hear appeals from High Courts and courts of first instance. The High Courts also exercise limited powers in the case of writs (challenging ultra vires actions of State Authorities) and have recently been vested with a limited jurisdiction in the case of appeals. The courts do not have the power to review Acts of Parliament for their constitutionality, but may review Executive actions for their legality.

Courts have not functioned in the conflict affected areas in the Northern and the Eastern provinces of Sri Lanka over past decades. During this time the LTTE had

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<sup>192</sup> Judicial Service Commission, Courts list of Sri Lanka.

established its own court system in the LTTE-controlled areas.<sup>193</sup> The Sri Lankan government is now in the process of establishing courts in the North and the East.<sup>194</sup>

The legal profession in Sri Lanka comprises Attorneys-at-Law who represent the Public and Private Bar. The Attorney General of Sri Lanka is the Sri Lankan government's chief legal advisor<sup>195</sup> and he heads the Attorney General's Department (the Public Bar, see chapter on law enforcement). The Attorney General's department is responsible for the prosecution of criminal cases representing the State and for appearing in the Supreme Court and Court of Appeal in proceedings where the constitutionality or legality of a statute or Executive action is called into doubt.<sup>196</sup> The private Bar comprises of over 10,000 lawyers across the country who have their own legal practice and represent private litigants.

## ASSESSMENT

### 3.1 Capacity

#### 3.1.1 Resources (Law) - To what extent are there laws seeking to ensure appropriate tenure policies, judicial salaries and working conditions?

According to the Constitution, the salaries and retirement benefits of the higher judiciary (Supreme Court and Court of Appeal) cannot be reduced during their tenure.<sup>197</sup> The salaries of the higher judiciary are determined by Parliament and charged to the Consolidated Fund.<sup>198</sup>

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193'Sri Lankan policemen further remanded by the LTTE courts', Asia Tribune, 29 November 2005.

194 'Plans to recruit Attorneys as ASP', Daily News, 26 February 2011.

195 International Bar Association, May 2009.

196 International Bar Association, May 2009, pp 28-31 and International Crisis Group, 30 June 2009.

197 Article 108, The Constitution of the Democratic Socialist Republic of Sri Lanka, 1978.

198 Article 108, The Constitution, 1978.

### **3.1.2 Resources (practice) - To what extent does the judiciary have adequate levels of financial resources, staffing, and infrastructure to operate effectively in practice?**

The annual budget for the judiciary is administered by the Ministry of Justice and other officials within each court.<sup>199</sup> From time to time different perks such as lands and salary specific increments are also given to judges. While judges earn less than lawyers in the private bar their salaries are not taxed and they are entitled to other benefits.<sup>200</sup> According to the Sri Lanka Judges Institute website the salaries and the other allowances of the judges are as follows:<sup>201</sup>

Gross Salary of the Supreme Court and the Court of Appeal Judges: Rs.98,500 to Rs.108,000-[ US\$940 to US\$1,028]; High Court Judges: Rs.54,285 to Rs.63,455 [US\$ 517 to US\$604]; Subordinate Court Judges: Rs.39,075 to Rs.50,365 [US\$372 to US\$480]; Other Benefits include Housing and property loans & grants, an official car and a driver, security services, a telephone allowance, fuel allowance, Special Judicial allowance of Rs.15,000 [US\$143], a cost of living allowance of Rs.1750 [US\$17]. Further, the judicial service is pensionable.

Members of the Superior Courts based in the capital city of Colombo have access to reasonable library facilities and other supporting resources. In the provinces, though, access to library resource is poor and so is access to online resources.<sup>202</sup>

Training offered for judges is inadequate. Although there are training programmes conducted by the Sri Lanka Judges' Institute, these training courses are more general in nature.<sup>203</sup>

There is generally a stark lack of resources in Court and the respective Court Registries, which contributes to delays in the judicial process. For instance, a majority of Magistrate's Courts lack photocopy machines needed to prepare briefs and Court proceedings.<sup>204</sup>

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199 Interview with Chief Justice J.A.N. de Silva, Colombo, 27 November 2009.

200 Interview with Chief Justice J.A.N de Silva, 27 November 2009.

201 Website of Sri Lanka Judges Institute, <http://sljti.org/>

202 Interview with Chief Justice J.A.N de Silva, 27 November 2009.

203 Sri Lanka Judges Institute, Report for the period of 01 January 2006 to 31 December 2006.

204 Ministry of Justice, Law Reform and National integration, Committee appointed to recommend Amendments to the Practice and Procedure in Investigations and Courts, final report 02 April 2004.

### **3.1.3 Independence (Law) - To what extent is the judiciary independent by law?**

Several provisions in the Constitution protect the independence of the judiciary. Chapter XV of the Constitution contains provisions on the independence of the judiciary and on the role, functions and powers of the different courts. Among these provisions is Article 116 which makes “interference with the judiciary” an offence.

Judges of the Supreme Court and Court of Appeal hold office “during good behavior” and may only be removed on the grounds of “proved misbehavior or incapacity” by an order of the President after an address of Parliament supported by more than half the MPs. Parliamentary Standing Orders have established a procedure for inquiry where allegations are brought against judges.<sup>205</sup>

The Constitution vests the supervision of the lower judiciary and High Courts in an independent body called the Judicial Service Commission (JSC) consisting of the Chief Justice and two Supreme Court judges, which has the task of supervising and controlling the lower judiciary and the High Court, including the promotion, transfer, disciplinary control and dismissal of High Court and lower court judges.<sup>206</sup> The JSC must ensure that judges are not subjected to external influences and victimization in judicial administration.<sup>207</sup> Interference with the work of the JSC is an offence.<sup>208</sup>

Upon the passage of the 18<sup>th</sup> Amendment to the Constitution, the President is mandated to directly appoint the Chief Justice and the Judges of the Supreme Court, the President and the Judges of the Court of Appeal, and the Members of the Judicial Services Commission, upon seeking observations from a Parliamentary Council comprising of the Prime Minister, Speaker, Leader of the Opposition, two nominees of the Prime Minister and the Leader of the Opposition, who are Members of the Parliament.<sup>209</sup>

The 18<sup>th</sup> Amendment has granted the President an unrestricted power vitiating the checks imposed under the 17<sup>th</sup> Amendment to the Constitution. Before the enactment of the 18<sup>th</sup> Amendment, the appointments of all judges of the Supreme Court

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205 Standing Order 78A, The Standing Order of Parliament of Democratic Socialist Republic of Sri Lanka.

206 Article 111 ,The Constitution ,1978.

207 Interview with J.C. Weliamuna, Executive Director, TISL and, Attorney at Law, 12 December 2009.

208 Article 111 L ,The Constitution, 1978.

209 Article 41A. (i), The Constitution, 1978.



including the Chief Justice, all judges of the Court of Appeal, including the President of the Court of Appeal, and all members of the Judicial Services Commission, were to be approved by a multi-party Constitutional Council established by the 17<sup>th</sup> Amendment.<sup>210</sup>

The Judicial Service Commission, which comprises the Chief Justice and two other Supreme Court judges, appoints Magistrates and Judges of the District Courts and High Courts.

Independence of the judiciary in Sri Lanka is affected by a few limitations inherent in the legal framework. These include limited checks on the legislature and even more minimal checks on the Executive.

Unlike in many constitutional democracies, Sri Lanka has no judicial review of legislation whereby a law enacted by Parliament can be challenged on questions of constitutionality, which is a judicial check of the exercise of legislative power. Instead, Sri Lanka has in place a system of pre-enactment review. Under pre-enactment review, proposed legislation in Sri Lanka can be challenged for its unconstitutionality in two different ways. If it is a normal Bill, it needs to be published in the Gazette notification and can be challenged before the Supreme Court within a period of one week from placing such Bill on the Order paper of Parliament as stipulated by the Constitution.<sup>211</sup>

Secondly, if the Cabinet of Ministers (which is a part of the Executive) decides that a Bill is “urgent in the national interest” such Bills are referred to the Supreme Court for mandatory determination. Upon receipt of such a Bill for determination, the Supreme Court is required to make its determination within twenty four hours or three days as decided by the President.<sup>212</sup> Such Urgent Bills are not required to be published.

The Constitution imposes absolute immunity against the incumbent President.<sup>213</sup> However, if the President acts as a Minister, such action can be challenged by making the Attorney General a party in a case.<sup>214</sup> Human rights groups have criticized the

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210 Article 41C, The Constitution, 1978.

211 Article 121, The Constitution, 1978.

212 Article 122, The Constitution, 1978.

213 Article 35, The Constitution, 1978; International Crisis Group, 30 June 2009.

214 Article 35(3), The Constitution, 1978.

presidential immunity provision as a device for “legitimizing illegal and unconstitutional acts.”<sup>215</sup>

### **3.1.4 Independence (Practice) - To what extent is the judiciary independent as a matter of practice?**

Chief Justice, Sarath N. Silva’s appointment in 1999 is viewed as a “turning point for the judiciary”.<sup>216</sup> During his ten-year period in office, Chief Justice Silva exercised a profound influence on the administration of justice in several ways. As Chief Justice he had the power to constitute benches to hear cases that came before the Supreme Court. In this way he was able to marginalize some of the more senior and independent judges from participating in cases that were politically or legally significant. For example, Justice Mark Fernando, who had played an important role in the development of the Court’s human rights jurisdiction in the 1990s, was sidelined and allocated very few sensitive or constitutionally important cases.<sup>217</sup>

Chief Justice Silva also exercised considerable influence on the minor judiciary through his position as the ex-officio chair of the JSC. There were several allegations of victimization by members of the lower judiciary, although none of these charges were proved.<sup>218</sup> According to an International Bar Association (IBA) delegation that visited the country in February 2009 there were several allegations that the Chief Justice had misused his power to dismiss and transfer judges and to bring about their resignations.<sup>219</sup> In early 2006 two senior judges of the Supreme Court resigned from their posts in the Judicial Service Commission over differences with the Chief Justice on the use of its disciplinary powers.<sup>220</sup>

In one case a High Court judge who was dismissed took his matter before the Human Rights Committee under the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR). The Committee found that the dismissal was

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215 “Sri Lanka: Presidential immunity an expression of legalized tyranny guaranteed by the 1978 Constitution”, Asian Human Rights Commission, 10 May 2006.

216 International Crisis Group, 20 June 2009.

217 Interview with J.C. Weliamuna, 12 December 2009.

218 International Bar Association, ‘May 2009, pp 28 – 31 and International Crisis Group, 30th June 2009, pp 14 – 15.

219 International Bar Association, May 2009, pp 28.

220 International Crisis Group, 30 June 2009, pp 13.

arbitrary, unreasonable and procedurally unfair and amounted to a violation of Article 25 (c) of the covenant.<sup>221</sup>

The Chief Justice Silva also had an important influence on the jurisprudence of the Supreme Court during this period. Just before he retired he was involved in three high profile public interest cases, two of which reversed the divestiture of two state enterprises and the third of which reversed the alienation of state land for the construction of a golf course.<sup>222</sup> However these judgments have later been disputed. Silva was also a part of the bench that decided on the date of commencement of the term of office of the former President<sup>223</sup> and in another which held that the merger of the Northern and Eastern provinces was unconstitutional.<sup>224</sup>

In September 2005 the Supreme Court held that the ratification of the First Optional Protocol to the International Covenant on Civil and Political Rights by the Executive was unconstitutional.<sup>225</sup> This decision was reached on a misconception of complaints procedure under the Optional Protocol.<sup>226</sup> The judicial reasoning deviated from the spirit of Article 27(15) of Sri Lanka's Constitution which requires the State to "endeavor to foster respect for international law and treaty obligations in dealings among nations."

On 19 November 2004 a senior high court judge, Sarath Ambepitiya, was assassinated in Colombo. This was the first assassination of a high court judge in the history of the judiciary in Sri Lanka. A few months earlier, another high court judge was reported to have been attacked in an attempted rape. Both instances highlight the lack of protection for judges in Sri Lanka. Judges also fear threats due to inadequate and sometimes questionable practices relating to the security of tenure.<sup>227</sup>

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221 Soratha Bandaranayake v Sri Lanka, United Nations Human Rights Committee, Communication No 1376/2005, 24 July 2008.

222 Vasudeva Nanyakkara v N.K. Choksy, Supreme Court Minutes of 21 July 2008 (Lanka Marine Services Ltd. Case); Vasudeva Nanyakkara v N.K. Choksy, Supreme Court Minutes of 4 June 2009 (Sri Lanka Insurance Corporation Case) and Sugathapala Mendis vy Chandrika Bandaranaike Kumaratunge, (Waters Edge Case) Supreme Court Minutes of 8 October 2009; International Crisis Group, 30 June 2009, p 26 – 28.

223 Venerable Dr Omalpe Sobitha Thero v Dayannanda Dissanayake, Commissioner of Elections, Supreme Court Minutes of 26 August 2005.

224 Jayantha Wijesekera v Attorney General, Supreme Court Minutes of 16 October 2006.

225 Nallaratnam Singarasa v Attorney General, Supreme Court Minutes of 15 September 2006.

226 Rodley Nigel, March 2009 and International Crisis Group, 30 June 2009, pp 22 - 24.

227 Asian Legal Resource Centre, Submission to UN Human Rights Commission, 17 February 2005.

The lawyers who would have ordinarily taken up the fight for the independence of the judiciary and the independence of their own profession have also been undermined in recent times. Further, there have been allegations that the Police are assigning which lawyers should appear for the accused when they are brought to court in criminal cases, and that they are receiving 50% of lawyers' fees when referring cases to selected lawyers.<sup>228</sup> These practices heavily impede the independence of the judicial system in Sri Lanka.

At local level, and particularly in the East of the country, there have been reports of magistrates being under pressure by politicians. A way of sanctioning independent magistrates is transfer to other parts of the country.<sup>229</sup>

## 3.2 Governance

### 3.2.1 Transparency (Law) - To what extent are there provisions in place to ensure that the public can obtain relevant information on the activities and decision-making processes of the judiciary?

Information on decision-making within the judiciary is not easily available to the public. There is no requirement that an annual report be published and there are no laws that require the judiciary or the Judicial Services Commission (JSC) to make information publicly available.

Proceedings of the JSC in relation to the appointments, transfer and disciplinary action, removal of judges are confidential and the JSC is not legally obliged to release this.<sup>230</sup> There are no laws that can compel court registrars or other officials to release statistics to the public.<sup>231</sup>

The law requires that court proceedings be conducted in public and this is the norm. In exceptional circumstances the court may decide to hold sittings “in camera”. There is no law that requires the publication of judicial decisions, although as a matter of practice most decisions of the Court of Appeal and Supreme Court are published in the Law Reports which are publicly accessible. These judgments are read out in open

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228 Ibid.

229 International Crisis Group, 2009; Danish Immigration Service, October 2010.

230 Interview with Chief Justice J.A.N de Silva, 27 November 2009.

231 Interview with Chief Justice J.A.N de Silva, 27 November 2009.

court except the determinations made on Bills. However, these decisions are usually written by the members of the judiciary in technical language and, therefore, ordinary citizens may not understand these judicial decisions.

### **3.2.2 Transparency (Practice) - To what extent does the public have access to judicial information and activities in practice?**

Information on governance of the judiciary is hard to access as a matter of practice.<sup>232</sup> Reports of the Judicial Service Commission and its proceedings are not made public. In previous years it was possible for academics or lawyers to obtain statistics on judicial decisions. However, recently this information has become increasingly hard to access. The International Bar Association in its visit to Sri Lanka in February 2009 was refused statistics on fundamental rights cases when they sought the information from the Registrar of the Supreme Court.<sup>233</sup>

Court proceedings are open in most cases and the public are permitted to observe how judges conduct judicial proceedings. Most decisions of the Court of Appeal and Supreme Court are published in the Sri Lanka Law Reports. The editorial team decides on those cases that should be published. The official law reports are also available online (<http://www.lawnet.lk>).

Electronic copies of some judgments may be accessed informally even before they are formally published. While there is a website for the judiciary, this is limited to the higher judiciary on the one hand, and on the other, the existing website provides only minimum information that is incomplete.<sup>234</sup>

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232 Interview with J.C. Weliamuna, 12 December 2009.

233 International Bar Association, May 2009, pp 35.

234 Ministry of Justice Sri Lanka,

<http://www.justiceministry.gov.lk/courts%20of%20Law/THE%20SUPREME%20COURT%20OF%20SRI%20LANKA.htm#Judgments>

### **3.2.3 Accountability (Law) - To what extent are there provisions in place to ensure that the judiciary has to report and be answerable for its actions?**

Judges of the Supreme Court and Court of Appeal hold office “during good behaviour” and may only be removed on the grounds of “proved misbehaviour or incapacity” by an order of the President after an address of Parliament supported by more than half the members of Parliament.<sup>235</sup> Parliamentary Standing Orders have established a procedure for inquiry where allegations are brought against judges.<sup>236</sup> There are no legal provisions requiring the giving of reasons for judgments.

Article 112 of the Constitution provides for the Judicial Service Commission, comprising the Chief Justice and two other judges of the Supreme Court, which has powers over all aspects of appointment, removal and disciplinary control of all judges and judicial officers except judges of the Supreme Court and Court of Appeal.<sup>237</sup> Article 115 of the Constitution prohibits interference with the Judicial Service Commission and further makes such interference an offense.<sup>238</sup>

Complaints against judges of the High Court and the lower judiciary must be made to the Judicial Services Commission (JSC).<sup>239</sup> Where complaints are received the JSC calls for an explanation from the judge and initiates an inquiry where appropriate.<sup>240</sup>

### **3.2.4 Accountability (Practice) - To what extent do members of the judiciary have to report and be answerable for its actions in practice?**

Minor Judiciary and High Court judges are accountable to the Judicial Service Commission. However, judges of the Supreme Court and the Court of Appeal are neither accountable to any authority nor are there any mechanisms to review performance or conduct of any judges of the higher courts. Only Parliament has the power to impeach these judges.

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235 Article 107(2), The Constitution, 1978.

236 Standing Order 78A, The Standing Order of Democratic Socialist Republic of Sri Lanka.

237 Global Integrity, 2007.

238 Ibid.

239 Interview with Chief Justice J.A.N de Silva, 27 November 2009.

240 Ibid.

Despite the fact that there have been allegations of serious bias, selectivity and arbitrariness in the treatment of some judicial officers<sup>241</sup> no Supreme Court justice has ever been removed on grounds of proved misbehavior or incapacity in the manner stipulated in the Constitution.

There were two efforts to impeach a Chief Justice based on alleged misconduct. The first attempt was vitiated with the then President Chandrika Kumaratunga proroguing Parliament in July 2001.<sup>242</sup> The second attempt failed when, once again, the President dissolved the legislature.<sup>243</sup> These illustrations clearly indicate that the judges can evade disciplinary action with political backing.

Further, there have been consistent complaints relating to improper judicial supervision under the auspices of the Judicial Services Commission and the Chief Justice and that the complaints against the judiciary are not always investigated.<sup>244</sup>

Academic criticism of judicial decisions in Sri Lanka has been *ad hoc*. By and large there is little criticism of judgments in the media and academic literature. There have been a few occasions when academics and lawyers have felt threatened by fear of contempt proceedings.<sup>245</sup> The Supreme Court's power to punish for contempt has been a source of concern, and civil society has called for a "statute on contempt" to ensure that the court's powers are exercised in a principled way.<sup>246</sup>

Elmore Perera, a public interest lawyer was suspended from his practice for seven years by the Supreme Court of Sri Lanka, by issuing a rule against him on the basis of "contempt of court" in 2006.<sup>247</sup> The use of contempt of court in Sri Lanka has been criticized by the United Nations Human Rights Committee in which the committee pointed out the lack of legislation in Sri Lanka regarding the matter. The alleged reasons for the suspension was that Elmore Perera continued to read from a petition

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241 Global Integrity, 2007.

242 International Bar Association, 10 June 2008, pp 13-14.

243 Ibid.

244 International Bar Association, 10 June 2008, pp 21.

245 Elmore Perera v Attorney General, Supreme Court Fundamental Rights Reference 108/2006; Anthony Michael Emmanuel Fernando v Sri Lanka, United Nations Human Rights Committee, Communication No 1189/2003, 29 April 2005, UN Doc CCPR/C/83/D/1189/2003, where the Human Rights Committee stated that the 'summary' imposition of a sentence of one year of 'rigorous imprisonment' by the Supreme Court for contempt of court, was a violation of Sri Lanka's obligations under the ICCPR.

246 Pinto- Jayawardena, Kishali, June 2004.

247 Asian Human Rights Commission, June 27 2008.

when he was told by the court to stop doing so and to address matters of law and for allegedly using severe language, which was regarded by court to have brought the proceedings of the court into ridicule and contempt.<sup>248</sup>

Most judicial decisions contain reasons for the decisions, although the quality of judicial decisions varies greatly. Reasons are seldom provided where “leave to proceed” or “leave to appeal” is refused by the Supreme Court or Court of Appeal.<sup>249</sup>

As noted above, there have been allegations during the tenure of the previous Chief Justice, that judges have been removed or asked to retire without a proper inquiry and without an opportunity to contest the allegations against them.<sup>250</sup>

### **3.2.5 Integrity Mechanisms (Law) - To what extent are there mechanisms in place to ensure the integrity of members of the judiciary?**

There is no Code of Conduct which deals with conflict of interest issues, gifts and hospitality, or post employment restrictions.<sup>251</sup>

Section 2(1)(b) of the Asset Declaration and Liabilities Law No. 1 of 1975 (as amended) provides for the declaration of assets and liabilities of national-level judges. Judges are required to declare their assets, either to the President (in the case of the Supreme Court and the Court of Appeal), or to the Judicial Service Commission, (in the case of the High Court and lower judiciary).<sup>252</sup>

While the law requires the declaration of assets and liabilities of the national-level judiciary, there is no requirement that these are independently audited in a timely and transparent manner, or for the audits to be made public. In practice, the audits of the Auditor General are delayed, not sufficiently or easily available, and parliamentary oversight is dilatory or non-existent.<sup>253</sup>

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248 Ibid.

249 Interview with J.C Weliamuna, 12 December 2009.

250 International Bar Association, May 2009, pp 28-31 and International Crisis Group, 30 June 2009 pp 14-15.

251 Interview with Chief Justice, J.A.N. de Silva, 27 November 2009.

252 Section 4(a) (iii) and 4(c), Declaration of Assets and Liabilities Law No. 1, 1975.

253 Global Integrity, 2007.



According to the Constitution, judges of the Supreme Court and Court of Appeal may practice law after retirement with the permission of the President.<sup>254</sup> However, retired judges may engage in “chamber” practice and often serve as arbitrators. A judge of the Supreme Court or Court of Appeal may be asked by the President to perform any other appropriate duty or function under any written law.<sup>255</sup>

### **3.2.6 Integrity Mechanisms (Practice) - To what extent is the integrity of members of the judiciary ensured in practice?**

It is not clear to what extent judges declare their assets as a matter of practice. In the absence of a code of conduct, there is no mechanism to enforce integrity mechanisms.<sup>256</sup> Further, in the absence of a code of conduct it is a grey area as to what constitutes judicial misconduct in Sri Lanka.

Superior Court judges are not known to take up private practice or other private-sector employment that involves influencing or lobbying of government and former colleagues. Some junior judges take up private practice after retirement from the judicial service, but this has not generally resulted in reported undue influence.<sup>257</sup>

In some cases, judges who have retired from the Supreme Court have accepted diplomatic postings with the Government of Sri Lanka.<sup>258</sup> Others have been appointed as Provincial Governors (the representative of the Executive in the Province) in different provinces across the country. Acceptance of appointments by the state after retirement may raise the perception that the judge’s performance while on the bench was coloured by the possibility of post-retirement benefits.

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254 Article 110(3), The Constitution, 1978.

255 Article 110(1), The Constitution, 1978.

256 Interview with Chief Justice J.A.N. de Silva, 27 November 2009.

257 Global Integrity, 2007.

258 For example the current High Commissioner to the United Kingdom is a retired Supreme Court judge.

### 3.3 Role

#### 3.3.1 Executive Oversight (Law and Practice) - To what extent does the judiciary provide effective oversight over the executive?

As mentioned above, the Sri Lankan judiciary does not have the power to strike down legislation inconsistent with the Constitution (judicial review of legislation). However, it does have the power to review, for constitutional validity, Parliamentary 'Bills' (proposed legislation) prior to their enactment as laws.<sup>259</sup>

In theory, the courts have the capacity to oversee the exercise of executive power and to ensure that the Executive acts according to law. Legal proceedings may be brought by way of a writ or by way of a fundamental rights application. In some cases a statute may also contain a relevant remedy. Public interest litigation has snowballed in recent years as a result of judicial interpretation and it is now possible for a citizen, acting *bona fide*, to petition court in the public interest to have the law enforced.

There have been a large number of cases where the courts have reviewed and then overturned executive action either on the ground that it violated a constitutionally recognized fundamental right or violated some other provision of the law.

In a June 2007, on the basis of a fundamental rights application filed by the Centre for Policy Alternatives (CPA), a local research and advocacy organisation, the Supreme Court granted a preliminary injunction against a decision by the Secretary to the Defence Ministry, to evict Tamil residents from lodges in Colombo and to deport them to Vavuniya.<sup>260</sup>

In 2008, the Supreme Court in a fundamental rights application<sup>261</sup> filed by a public interest litigant, ordered the Treasury Secretary Dr. P.B. Jayasundara to pay Rs.500,000/- to the State, and ordered that Lanka Marine Services Limited, a Company which was privatized in 2002 to be handed over to the Government upon which the Secretary of the Treasury extended his letter of resignation seeking to be

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259 Articles 120-123, The Constitution, 1978

260 "Sri Lanka Supreme Court restrains eviction of Tamils from Colombo", The Hind, 09 June 2007.

261 SC (FR) 209/2007 decided on 21 July 2008.

relinquished from his position as Secretary to the Ministry of Finance.<sup>262</sup> However, this judgment was later reversed.

The highest water mark of judicial review of Executive action in the recent past has been the case in which the Supreme Court reviewed the acts of the former President Chandrika Kumaratunge. In October 2008 the Supreme Court<sup>263</sup> upholding the petition said that, “the former President had failed to function in a manner consistent with the expectations of a public officer, much less an Executive President, and in doing so, had completely betrayed the position of trust bestowed upon her by the Constitution and by the people of Sri Lanka.” The Court held that the former President stood in infringement of Article 12(1) of the Constitution, and she was fined Rs.3 million.

However, the above have been some isolated examples of judicial pronouncements reviewing the action of the Executive. It is argued the jurisprudence of the courts in relation to Executive oversight lacks consistency and coherence.<sup>264</sup>

### **3.3.2 Corruption Prosecution (practice) - To what extent is the judiciary committed to fighting corruption through prosecution and other activities?**

Prosecutions of bribery and corruption in Sri Lanka are rare. The Bribery Commission filed 91 cases in 2007, and 63 in 2008 (latest data available), resulting in 28 and 23 convictions respectively. It had referred 1354 (2007) and 1351 (2008) cases for investigation (see chapter on Anti-Corruption Commission), out of the *circa* 3,000 complaints that it received each year.<sup>265</sup> These rates are low in a country where corruption levels are perceived to be high.

Although the Supreme Court has ruled against previous governments in the few high-profile privatization cases outlined above, corruption appears to continue generally

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262 “Treasury Secretary Dr. P.B. Jayasundara tenders resignation which yet to be accepted”, Colombopage, 28 July 2008.

263 S.C. (F/R) No. 352/2007.

264 Interview with J.C Weliamuna, 12 December 2009.

265 Commission to Investigate Allegations of Bribery or Corruption, 2009.

unpunished.<sup>266</sup> There is a widespread perception “of sprats being caught by the commission while the actual crooks escape unscathed”.<sup>267</sup>

**Table 7: Scores for Judiciary**

JUDICIARY			
DIMENSION	INDICATOR	LAW	PRACTICE
Capacity = 44	Resources	50	50
	Independence	50	25
Governance = 25	Transparency	25	25
	Accountability	25	25
	Integrity Mechanisms	25	25
Role = 25	Executive Oversight	25	
	Corruption Prosecution	-	25

### Recommendations

1. A Code of Conduct for Judges should be established and enforced.
2. The Judges should provide reasons for all decisions, even in the instance of refusing leave to proceed.
3. The contempt of court legislation that prevents academics and lawyers from speaking freely about judgments should be reviewed to provide space for academic criticism of the judiciary.
4. The President should adopt the same criteria adopted by the Constitutional Council to appoint persons with high integrity to the Supreme Court and Court of Appeal.
5. The proceedings of the Judicial Services Commission should be open and transparent and its records publicly accessible. There should be a transparent recruitment and disciplinary processes for minor judiciary.

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<sup>266</sup> Freedom House, 2010.

<sup>267</sup> Pinto-Jayawardena, Kishali and de Almeida Guneratne, Jayantha, 29 March 2010.

6. The due process governing the removal of judges should be strengthened. Judges of the Court of Appeal and Supreme Court should be removed only after an inquiry before a panel of three judges, or after inquiry before an independent panel of the Judicial Services Commission set up specifically for that purpose.
7. Retired judges should not be appointed to any public office, except as members of independent commissions.
8. The Constitution must be amended to enable the Supreme Court to review the constitutional validity of legislation passed by Parliament (Judicial Review)

## 4. THE PUBLIC SECTOR

### SUMMARY

This chapter deals with the public sector including state-owned enterprises and statutory boards.

Sri Lanka's public service was one of the most sought after professions soon after the country obtained independence in 1948, and attracted some of the most talented products of the university system.

However, since 1972 there has been a progressive decline in the efficacy and independence of the public service. Recruitment and promotions within the service were affected by political affiliation and the service became a way for politicians to provide patronage to their followers. Today, the public service is over-staffed, lacks motivation and provides poor quality services to the public. This is especially so in the plantation areas and sections of the Eastern and North-western provinces, where language issues exacerbate discrimination against minorities.

Legislation aimed at depoliticizing the public service, enacted in 2001 (17<sup>th</sup> Amendment to the Constitution), has been reversed in 2010 (18<sup>th</sup> Amendment), but the consequences of this regression have yet to be manifested.

Public procurement processes are sometimes not transparent and seldom open to competitive bidding. State-owned enterprises (SOEs) that are registered under the Companies Act are particularly susceptible as their finances are not monitored by the Auditor General.

The Establishment Code prohibits public officers from giving out public information to the media or the public. It also prevents public officials from giving out information where its publication may embarrass the government. In addition, the Official Secrets Act prohibits officers to give out any information that is classified as an official secret. These regulations against making public statements or providing information can be considered a root cause for the lack of accountability and transparency in the public sector, as they discourage honest and committed public servants from disclosing information to citizens, and nurture a culture of secrecy that runs counter to principles of accountability and transparency.

Lack of prosecution, except in instances where the accused is a political opponent of the ruling regime, has led to public apathy and cynicism, so much so that education/awareness alone will not change attitudes unless the vicious cycle of impunity and patronage is broken.

## STRUCTURE

The public sector in this section is taken to refer to those institutions that deliver goods and services on behalf of the government. As depicted in the official web portal of the Government of Sri Lanka (GoSL), there are ministries, government departments, provincial councils, public offices, statutory boards and state-owned enterprises (SOEs), which are engaged in the performance of duties for the Government.<sup>268</sup> Sri Lanka is administratively divided into nine provinces and 25 districts. In the North and East of the country that was formerly occupied by the LTTE, civilian administration is still to function at full capacity. At the time of writing, the Governors of the Eastern and Northern Province and the Trincomalee District Secretary are ex-military men.

The public sector consists of a national level service and a provincial service. At national level, various professional services exist: The Sri Lanka Administrative Service (SLAS), the Sri Lanka Education Administration Service (SLEAS), the Accountant Service, the Sri Lanka Audit Service, the Management Assistant Service, and the Sri Lanka Planning Service. Much of the central administration is carried out by government departments led by a Head of Department. The assignment of subjects, functions and departments is determined by the President and can be changed at any time.<sup>269</sup>

A nine-member Public Service Commission (PSC) is constitutionally vested with the powers of appointment, promotion, transfer and disciplinary control of all national level officers.<sup>270</sup> Those in the provincial service come under the control and supervision of the respective Provincial Public Service Commissions or the Governors of the Province. The employees of state corporations, statutory bodies and state-

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<sup>268</sup> The Government of Sri Lanka website

[http://www.gov.lk/gov/index.php?option=com\\_org&Itemid=57&id=1&task=cat&lang=en](http://www.gov.lk/gov/index.php?option=com_org&Itemid=57&id=1&task=cat&lang=en)

<sup>269</sup> Cooray, J.A.L., 1995, p 209 – 210.

<sup>270</sup> Article 55, The Constitution of the Democratic Socialist Republic of Sri Lanka, 1978.

owned companies are not subject to the control of the PSC.<sup>271</sup> Secretaries of Ministries, the administrative Heads of Ministries and their Chief Accounting Officers, are appointed by the President. Since the 18<sup>th</sup> Amendment to the Constitution, Heads of Government Departments are appointed by the Cabinet, without obtaining the views of the PSC.<sup>272</sup>

Sri Lanka has 314 Statutory Boards according to the government website.<sup>273</sup> The Department of Public Enterprises lists 64 SOEs on their website (data from 2005).<sup>274</sup> Directors of these public corporations are appointed by the Ministers, reportedly on political affiliation rather than on merit.<sup>275</sup> State corporations registered under the Companies Act are not subject to government audit by the Auditor General's Department and thus not reviewable by any of the finance committees in Parliament.

## ASSESSMENT

### 4.1 Capacity

#### 4.1.1 Resources (Practice) - To what extent does the public sector have adequate resources to effectively carry out its duties?

Public sector salaries are generally below those in comparable services in the private sector: 26.1% percent of public sector employees have a monthly wage of more than Rs.25,000 [US\$224], while 59.1 % of private sector employees earn more than Rs.25,000 [US\$224].<sup>276</sup> Low salary levels against rising cost of living have led to increasing discontentment amongst public officials. For example, on the 16th of March, 2010, Sri Lankan public sector workers held a one-day token strike demanding a wage hike of 65%. The workers argued that their living standards have gone down and prices of goods have increased.<sup>277</sup> Real wages have not increased

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271 Public Service Commission, 2008.

272 Article 55(1), The Constitution, 1978 (amended 18th Amendment).

273 Government of Sri Lanka website

[http://www.gov.lk/gov/index.php?option=com\\_org&id=8&task=cat&Itemid=58&lang=en](http://www.gov.lk/gov/index.php?option=com_org&id=8&task=cat&Itemid=58&lang=en)

274 Ministry of Finance & Planning website <http://www.treasury.gov.lk/FPPFM/ped/commercialforward.htm>

275 State Drags', Lanka Business online, 20 April 2010.

276 Arunatilake Nisha, IPS, no date.

277 "Sri Lanka: 300,000 public sector workers strike for higher pay", World Socialist website, 20 March 2006.



significantly in recent years.<sup>278</sup> The minimum wage for the public sector is Rs.11,630 [US\$104].<sup>279</sup>

On the other hand, public sector salaries are not taxed and public sector employees are entitled to other benefits such as transport and housing benefits and non-contributory pensions for life. However, salary discrepancies are greatest at the higher levels of administration, which in turn is both a disincentive to remain in the service as well as an incentive to seek other avenues of remuneration and benefits (e.g. corruption).

Public sector capacity suffers from the brain drain that poses a severe challenge to Sri Lanka's economy. Although there are more job seekers now compared to the past, there are fewer highly-qualified individuals as those with in-demand talents and skills are attracted to jobs in the developed countries.<sup>280</sup> Compared to some Southeast Asian countries, it is argued that the public sector in Sri Lanka lacks performance-based pay and a promotion system; it is difficult to introduce such a system due to the prevalence of a particular bureaucratic culture which emphasizes seniority over performance.<sup>281</sup> According to one respondent, the fact that the scheme of rewards is not linked to performance and promotions within the service are not based on merit has deterred talented people from entering the service.<sup>282</sup>

While the civil service does not seem to be able to attract and retain the best qualified and motivated individuals, it represents a severe strain on Sri Lanka's government expenditure.<sup>283</sup> Sri Lanka's public sector employs 14% of the country's 7.5 million-strong labour force.<sup>284</sup> The share of public employees to population is among the highest in the world.<sup>285</sup> Approximately one third of the annual budget of the public sector goes to pay salaries.<sup>286</sup> In 2009, state workers took home 57.6% of every tax

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278 World Bank, April 2010.

279 "Sri Lanka trade union makes headway in fight for wage increase", War on Want website, 11 March 2010.

280 "Brain drain could wreck our economic potential", Daily Mirror, 28 July 2007.

281 Amaratunge, Ramanie, Quamrul Alam, Teicher. Julian, 2008.

282 Interview with Mr.W.A. Jayasundara, Director Sri Lanka Institute of Development, 20 January 2010.

283 Interviews with Mr.D. Dissanayake, Commissioner of Elections Commission; Mr.P.B. Abeykoon, Secretary Ministry of Public Reforms, 22 June 2010; Mr.Tissa Devendra, Former Chairman of the Public Service Commission and Chairman of the Salaries Commission, 16 February 2010; Mr.W.A. Jayasundara, Director Sri Lanka Institute of Development, 20 January 2010.

284 Department of Census and Statistics, Sri Lanka Labour Force Survey, 2010.

285 Oxford Analytica, Sri Lanka Fiscal Transparency Country Report, 2006.

286 Interview with Mr.D. Dissanayake.

rupee as salaries and pensions as against 53.6% in 2008. The percentage of the public sector as a share of the total employed grew from 13.2% to 15.2% over a five-year period.<sup>287</sup>

The public sector appears to be heavily overstaffed as a result of changing government policies. Examples include absorption of Samurdhi (welfare) officers into the public service, unemployed graduate schemes, and absorbing temporary staff into the permanent cadre.<sup>288</sup>

There is a perception that the quality of public service delivery has declined since the 1970s, when the 1972 Constitution weakened the separation of powers and gave legislators powers over the public service.<sup>289</sup> When functioning, the PSC did not always work at maximum efficiency; delay in decision-making due to infrequent sittings is one example.<sup>290</sup> In its annual report in 2008 the PSC noted that it had an inadequate number of staff, and that staff was inadequately trained.<sup>291</sup> The PSC also identified the lack of a comprehensive database on the public sector as a factor that constrained its work.<sup>292</sup>

The Central Bank Annual Report 2010 notes that many of the state enterprises (statutory boards or companies) provide key economic infrastructure services but their services are below the optimum level, although many of them are state monopolies. These entities often operate with government assistance rather than being commercially viable.<sup>293</sup>

In comparison to other countries, Sri Lanka's public sector is rated between weak and average in international ratings.<sup>294</sup>

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287 Central Bank of Sri Lanka, 2010.

288 Oxford Analytica 2006, supported by interview with official on condition of anonymity.

289 'Hail Caesar', Sunday Times, 05 September 2010.

290 Interview W.A. Jayasundera, 20 January 2010.

291 Annual Report of the Public Service Commission, 2008. section 4.1

292 Annual Report of the Public Service Commission, 2008, section 4.6

293 Central Bank of Sri Lanka, Annual Report 2010.

294 In 2008 Sri Lanka received a ranking of .30 in the World Bank IDA IRAI index "Quality of Public Administration" which is the average of all IDA borrowing countries. In 2007 Sri Lanka was rated as 'very weak' in the category IV: Administration and Civil Service of the Global Integrity Report. World Bank (2008), Global Integrity (2007).

#### **4.1.2 Independence (Law) - To what extent is the independence of the public sector safeguarded by law?**

In the 1970s the PSC was abolished and the control and supervision of the public sector was vested in the Cabinet of Ministers. This seriously undermined the independence of the public service. The 1978 Constitution made the Cabinet responsible for the appointments of Heads of Departments and Secretaries to Ministries. All these changes narrowly politicized the public service, and a culture of political patronage emerged soon after.<sup>295</sup> Chapter IX of the Constitution, introduced by the 17<sup>th</sup> Amendment in 2001 aimed at strengthening the independence of the public sector by providing for a Constitutional Council that would then recommend appointments to the PSC. According to the Amendment, the members of the PSC were to be appointed by the President on the recommendations of the Constitutional Council.<sup>296</sup> The appointment, promotion, transfer, disciplinary control and dismissal of public officers were vested in the Commission, thus safeguarding the independence of the public service.<sup>297</sup> This framework became redundant as the Constitutional Council was not constituted since 2005, rendering the 17<sup>th</sup> Amendment itself inoperative. From April 2009, the PSC has become defunct when its term lapsed and its powers were usurped by Cabinet. In September 2010, with the enactment of the 18<sup>th</sup> Amendment, the independence of the PSC has been further reduced, while it was also given the responsibility to oversee recruitment to the 75,000-strong police force. Now the President directly appoints the Commissioners of the PSC, thus effectively controlling the public service.

According to the law, public officers aggrieved by an order relating to a promotion, transfer, dismissal etc can appeal to the PSC and then refer a further appeal to the Administrative Appeals Tribunal, established by the 17<sup>th</sup> Amendment.<sup>298</sup> The matter may also be litigated in a court of law. Anyone who attempts to interfere or influence the work of the PSC is guilty of an offence.<sup>299</sup>

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<sup>295</sup> Ibid.

<sup>296</sup> Article 54 (1), The Constitution, 1978.

<sup>297</sup> Article 55 (1) The Constitution, 1978.

<sup>298</sup> Article 58 and 59, The Constitution, 1978.

<sup>299</sup> Article 61 (C.) The Constitution, 1978.

The Establishment Code contains detailed standards on the fair treatment of public sector employees and on their professional impartiality.<sup>300</sup> It also regulates membership in political parties, and political activity (see section on integrity-law in this chapter). However, the Establishment Code hails from the colonial period and in its spirit protects the Government rather than citizens' civil rights.

Independence of the public sector is much less visible in the North and East of the country, where institutions are weak and civil administration is yet to return fully, and where paramilitary groups have undermined the rule of law over many years.

#### **4.1.3 Independence (Practice) - To what extent is the public sector free from external interference in its activities?**

In practice, high level public officials are almost always political appointments. Secretaries to Ministries are appointed by the President and subject to dismissal at short notice.<sup>301</sup> Another impediment to the public service's independence is the practice that after elections, the political party in power usually changes all Heads of Department and government agencies.<sup>302</sup> Therefore, career prospects often depend on loyalty to political parties.<sup>303</sup>

Recruitment to the professional services is done through recruitment schemes that are gazetted. Appointments to the SLAS, and also to lower level positions such as *Grama Niladharis* (village officers), are done through competitive exams.<sup>304</sup> However, at the lower levels, political patronage is often a *sine qua non* for recruitment. Other recruitment schemes are done through internal promotions or based on seniority.

Reportedly, patronage relationships and nepotism strongly influence the appointment of Heads of Departments and other positions. Ministers allegedly have a culture of

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300 Chapter XLVII, Establishments Code of the Government of Sri Lanka, Volume II, 1999; Interview with Mr.D. Dissanayake..

301 Interview with D. Dissanayake, 18 February 2010.

302 Raymond, Jeanette, 2008.

303 M.C. M. Iqbal, 2002.

304 Interview with D. Dissanayake, 18 February.2010.

appointing their close relatives or friends as heads of department and other government institutions, where possible.<sup>305</sup>

According to the Bertelsmann Transformation Index, political interference in the administration is routine and recruitment to state agencies (except in the case of professionals such as doctors) is carried out almost entirely through political recommendations.<sup>306</sup> According to one of the respondents, only few of the laws and regulations that sought to ensure the independence of the public service have been implemented in practice.<sup>307</sup> For example, a District Secretary or Divisional Secretary (representative of the Central Government at District and local level) may be appointed only if the local Member of Parliament approves such appointment, and their career progress depends on political patronage.<sup>308</sup> However, other interviewees were of the opinion that there is no political interference, or that interference only occurs when civil servants do not perform satisfactorily.<sup>309</sup>

## 4.2 Governance

### 4.2.1 Transparency (Law) - To what extent are there provisions in place to ensure transparency in financial, human resource and information management of the public sector?

Employment opportunities in the middle and higher levels are advertised in the Government Gazette. The Establishment Code contains guidelines on recruitment to the public sector.<sup>310</sup>

An important tool for ensuring transparency is the Assets and Liabilities Law of 1975 (amended 1988) that provides a strong standard for the public sector. Public officials above a certain rank are required to make a declaration of their assets and liabilities every year.<sup>311</sup> These include public officers appointed by the President, public officers

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305 Raymond, Jeanette, 2008.

306 Bertelsmann Foundation, 2010.

307 Interview with Tissa Devendra, 16 February 2010.

308 Ibid.

309 Interviews with Abeykoon and W.A. Jayasundara.

310 Interviews with Mr.D. Dissanayake and Mr.W.A. Jayasundara.

311 Section 2(1) and Section 4(a), Assets and Liabilities Act, 1975 (amended 1988); Lawyers for Human Rights and Development 2005; Mario Gomez et al, 2007.

appointed by the Cabinet of Ministers, judicial officers and scheduled public officers appointed by the Judicial Services Commission as well as staff officers in Ministries and Government Departments, Chairmen, Directors, members of the Boards and staff officers of public corporations among others. They are required to submit their declaration every year.<sup>312</sup> Declarations by Heads of Government Departments have to be submitted to the Secretary of their respective Ministry, by staff officers to the Head of their Department, by officers of State Corporations to the Chairman of the Corporation, etc. Declarations should include assets and liabilities of spouses and children.<sup>313</sup> The law provides the right for authorities to call for Asset Declarations, but also allows any person to obtain a certified copy of a Declaration from the appropriate Authority.<sup>314</sup> On the downside, there is no verification process, and persons declaring their assets do not have to show their value.<sup>315</sup> Also, in the absence of a central body to review the declarations, the law cannot be seen to be managed adequately.

However, other laws are more prohibitive. The Establishment Code prohibits public officers from giving out public information to the media or the public. It also prevents public officials from giving out information where its publication may embarrass the government.<sup>316</sup> In addition, the Official Secrets Act prohibits officers to give out any information that is classified as an official secret.<sup>317</sup> These regulations against making public statements or providing information can be considered a root cause for the lack of accountability and transparency in the public sector, as they discourage honest and committed public servants from disclosing information to citizens, and nurture a culture of secrecy that runs counter to principles of accountability and transparency

There are no specific regulations about the way in which records are managed. The National Procurement Guidelines do not provide for public access to information related to the bidding process, or disclosure of information on major procurements. It specifically prohibits disclosure of information on the evaluation of bids to any person

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312 Section 3 (3), Declaration of Assets and Liabilities Law.

313 Section 3(1)(2) and(4), Declaration of Assets and Liabilities Law.

314 Section 5(3), Declaration of Assets and Liabilities Law, (amendment).

315 Lawyers for Human Rights, 2005.

316 Section 6.1.3, Establishment Code, Chapter XLVII.

317 Official Secrets Act No 32, 1955.

other than those officially involved in the process.<sup>318</sup> However, an internal procedure is in place to deal with complaints from bidders, suppliers and contractors.<sup>319</sup>

A notable feature in the case of SOEs (state-owned enterprises) and Statutory Boards is that these entities are not under the purview of the Auditor General and consequently the financial transactions of these institutions suffer from the absence of strong monitoring. The Auditor General's report of the 2009, recommends that laws be enacted to bring these entities under the purview of his office.<sup>320</sup>

#### **4.2.2 Transparency (Practice) - To what extent are the provisions on transparency in financial, human resource and information management in the public sector effectively implemented?**

In practice, the public has very limited access to decision-making and management processes within the public sector.<sup>321</sup>

Although Asset Declarations of officials are accessible to the public by law, there appear to be no examples where a member of the public actually obtained access to any specific declaration.<sup>322</sup> On the other hand, authorities do not seem to make use of their right to call for Declarations.<sup>323</sup> Also, only a few officials appear to fill in their declarations, and there is no verification process.<sup>324</sup> There is no mechanism by which the truthfulness of the declarations is assessed.<sup>325</sup>

Records are usually not accessible to the public. However, at local level, there are institutions that voluntarily make reports and minutes available to some members of the public.<sup>326</sup>

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318 National Procurement Agency, National Procurement Guidelines, 2006 p 2.

319 Ibid. p 107.

320 Auditor General Report, 2009.

321 Interview with Mr.W.A. Jayasundara.

322 Global Integrity, 2007.

323 Lawyers for Human Rights and Development, 2005.

324 Interview with D. Dissanayake.

325 The Citizens' Movement for Good Governance (CIMOGG) website, <http://cimogg-srilanka.org/2006/03/the-declaration-of-assets-and-liabilities-law/> (accessed 26 August 2010)

326 Transparency International Sri Lanka, July 2010.

While public procurements are advertised, the decision-making processes leading to such procurements are not made transparent.<sup>327</sup> Several recent procurement decisions have not been open and transparent and have not been open to competitive bidding (see the last section of this chapter). As most of the current infrastructure projects are country-to-country projects with external financing, procurement guidelines do not apply and there is no scrutiny of those projects.

A thematic paper issued by the Asian Development Bank in 2007, notes that during the first wave of privatization of SOEs (1977-88), an effective regulatory Framework did not exist. This created opportunities for rent extraction for vested interests and instances of under-pricing of SOEs such as in the case of privatization of airline, gas and telecommunication companies. The establishment of the Public Reform Commission in 1996, improved transparency, and access to information increased mainly through the dissemination of relevant data.<sup>328</sup>

While the public is aware of overstaffing and budgetary burdens due to the inflated public sector, no figures are publicly available that show the number of authorized civil service positions (the approved cadre for each professional service) and the number of positions actually filled (which is higher than the approved cadre).<sup>329</sup>

#### **4.2.3 Accountability (Law) - To what extent are there provisions in place to ensure that public sector employees have to report and be answerable for their actions?**

Besides the regular judicial review processes, various complaint and accountability mechanisms are in place for public sector employees: the Ministry of Public Administration has an investigations unit, and complaints against public officers may be directed to this unit.<sup>330</sup> The Commission on Investigating All Forms of Bribery and Corruption (CIABOC) has a mandate to investigate bribery and corruption within the public sector. The Public Service Commission, the Human Rights Commission, the Ombudsman, the Administrative Appeals Tribunal and the courts are theoretically available as mechanisms of redress for public officers aggrieved by decisions taken by

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327 Interview with Mr.W.A. Jayasundara.

328 Asian Development Bank, 2007.

329 Global Integrity, 2007; Transparency International Sri Lanka, 2009.

330 Interview with Mr.D. Dissanayake.



their superior officers. However, a major shortcoming in providing accountability is the absence of any whistleblower protection. Sri Lanka has no legal provisions on whistle-blowing.

With regard to financial transparency, ministries, departments, and constitutional bodies, including the Auditor General's Department, non-revenue-earning statutory bodies and public enterprises are required to report in accordance with the Financial Regulations (1992) issued by the Public Finance Department of the Ministry of Finance. Revenue-earning statutory bodies and public enterprises are required to report in accordance with Sri Lanka Accounting Standards.<sup>331</sup>

By law, the Chief Accounting Officer of a public institution is responsible for recovery of lost assets.

#### **4.2.4 Accountability (Practice) - To what extent do public sector employees have to report and be answerable for their actions in practice?**

Accountability requirements are unevenly enforced. In the North and East of Sri Lanka, normal processes and standards do not apply due to the weak institutional set-up and problems in law enforcement.

Public sector employees who violate the Establishments Code or other applicable standards do face sanctions for their misbehaviour. There have been several instances where allegations against public sector employees have been investigated and appropriate punishments imposed.<sup>332</sup> It was reported in 2004 that out of 859 complaints received by CIABOC, 10 resulted in convictions by the Courts.<sup>333</sup> In the years 2005-2009, between 2000 and 4000 complaints were received annually. Most complaints were in relation to school admissions, village officers (Grama Sevaka), police and Samurdhi officers.<sup>334</sup> There are no statistics on follow-up to the complaints [See Chapter 9 on CIABOC for more details].

The PSC publishes statistics on appeals against its decisions in its annual report. For example, in 2008, out of 186 appeals (including the backlog from previous years)

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331 Sri Lankan Accounting and Auditing Standards Act No. 15; The World Bank, 2007.

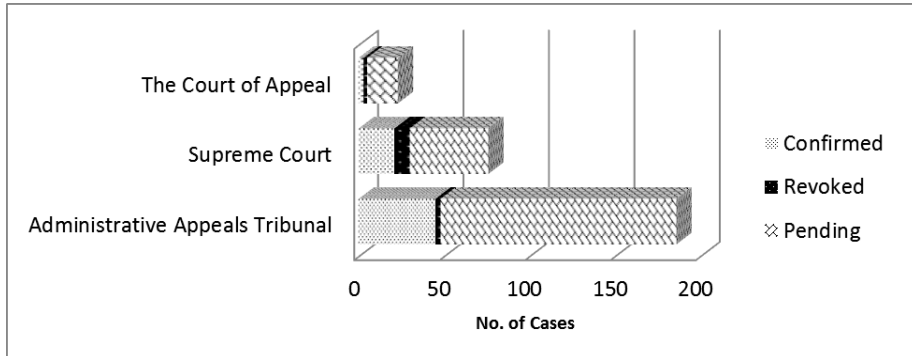
332 Interview with Mr.D. Dissanayake.

333 Daily News Legal Aid page, 08 December 2006.

334 Interview with Chairman of CIABOC in: Transparency International Sri Lanka Governance Report 2009.

received by the Administrative Appeals Tribunal, in 45 cases the PSC decision was confirmed and in three cases revoked, 138 appeals remained pending. At the Supreme Court, of 76 appeals received (including backlogs), 21 confirmed the PSC decision and nine revoked them, with 46 remaining pending. The Court of Appeal received 23 appeals, and confirmed PSC decisions in three cases and revoked two, with 18 pending.<sup>335</sup>

**Chart 3: PSC statistics on appeals against its decisions**



One of the most widely-known cases of public sector officials being held accountable for malpractices is that regarding the former Secretary of Finance. The Supreme Court of Sri Lanka judged that the former Secretary was guilty regarding a land deal and that he caused loss of revenue to the State. The Secretary had to resign from his post after this judgment. However, a subsequent Judgment by the Supreme Court (under a new Chief Justice) allowed him to reassume duty as the Secretary of Finance.

Overall, it should be stated that many of the accountability mechanisms do not work in practice. The annual audit process by the Auditor General and the oversight provided by the Parliamentary committees do not function effectively. There is wide public perception that present tender procedures provide room for rampant corruption and that institutions such as the CIABOC are ineffective in preventing abuse. It is alleged that large-scale corruption has occurred specially in defence procurement.<sup>336</sup>

<sup>335</sup> Public Service Commission Report, 2008, Annex 11.

<sup>336</sup> Raymond, Jeanette, 2008. pp. 782-793.

Also, the fact that promotions in the public sector are usually done based on seniority instead of performance limits the degree to which officials feel that they are answerable for their actions, and accountable to the public. Compared to other Asian countries, Sri Lanka's working culture reportedly does not promote performance, and performance-related issues are the most difficult element in public sector management. Tenure-track jobs instead of fixed term contracts for public managers apparently contribute to inefficient and unaccountable public service delivery.<sup>337</sup>

With regard to public sector accountability vis-a-vis the citizenry, the public service is often seen as authoritarian and distant from the people. Centralised administrative structures and a civil service law that reflects the country's colonial past are seen not to be in keeping with the aspirations of a modern State.<sup>338</sup>

Also, the prevailing culture of influence means that formal structures and regulations are seldom used by citizens who instead tend to use informal channels to get services done.<sup>339</sup>

Accountability in SOEs and Statutory Boards is particularly weak. Politicians often overstaff these bodies with their political supporters as recruitment to these entities does not fall within the responsibility of the PSC. Moreover, conflicts of interest prevail. For example, the Ceylon Petroleum Corporation reportedly obtained loans worth Rs.25 billion from the Bank of Ceylon, a state bank. There is also the practice of subsidising and borrowing among these institutions and thus hiding actual losses from the public.<sup>340</sup>

Another key element of accountability to the public is through providing services in the first language of those who seek such services. Though statutory provisions exist for equal access to Sinhala and Tamil,<sup>341</sup> this is generally observed in the breach in most parts of the country. The following Table clarifies succinctly the problems

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337 Samaratunge et al, 2008.

338 UNPAN Public Administration Country Profile Sri Lanka, 2004; M.C.M. Iqbal, 2002.

339 Samaratunge, Ramanie and Bennington, Lynne, June 2002 pp 87-109.

340 Fixing Sri Lanka State Enterprises 'urgent priority': Lanka Business online, 20 April 2010.

341 16th Amendment to the Constitution 1988, Articles 2 -5, Official Languages Commission Act, No 18 of 1991, and Public Administration Circulars No 03 & 07 of 2007.

encountered by Tamil-speakers who are confronted by a dearth of public officers able to conduct business in Tamil.<sup>342</sup>

**Table 8: Government employees by Language Proficiency**

DISTRIBUTION OF GOVERNMENT EMPLOYEES BY LANGUAGE PROFICIENCY				
SECTOR	TOTAL NUMBER OF EMPLOYEES	LANGUAGE PROFICIENCY		
		Sinhala	Tamil	English
State sector	325,272	94.8%	13.9%	32.0%
Provincial Public	279,924	85.3%	21.8%	28.5%
Semi-government	207,834	93.7%	10.4%	36.3%
<b>Total</b>	<b>813,030</b>	<b>91.3%</b>	<b>15.7%</b>	<b>32.0%</b>

**4.2.5 Integrity Mechanisms (Law) - To what extent are there provisions in place to ensure the integrity of public sector employees?**

The Bribery Act prohibits the acceptance of gifts and hospitality if these constitute bribes.<sup>343</sup> The Establishment Code contains detailed standards on the behavior of public sector employees,<sup>344</sup> including provisions on conflict of interest, acts which bring the public service into disrepute, private use of government labour and property, and rules on receiving gifts.<sup>345</sup> It states that officers shall not do anything that will bring their private interest into conflict with their public duty. However, recusal is not mentioned in the Code, nor does the Code restrict civil servants from entering the private sector after leaving the service. The Bribery Act of 1954 makes the giving and receiving of gifts, loans, fees and rewards by a public body a criminal

342 See Selvakkumaran, N. "Reality Check and Recommendations on Language Rights" in: Language Rights in Sri Lanka Colombo: LST, 2008.

343 Bribery Act (No 20 of 1994) Section 19, inter alia.

344 Chapter XLVII, Establishments Code of the Government of Sri Lanka, Volume II, 1999.

345 Id. Sec 1:5, 1:4, 1:11 and 3.

offense.<sup>346</sup> Bribery by a public sector employee is considered an offense and the employee is liable to investigation and punishment in the event of an act of bribery.<sup>347</sup> However, a single, publicly available Code of ethical standards does not exist for public servants, except for sector-specific Codes such as the “Code of Ethics and Conduct” for tax officials that was introduced in 2005.<sup>348</sup>

While public officers enjoy security of service, they do not have legal safeguards against arbitrary transfers or degrading positions, except for fundamental rights jurisdiction at the Supreme Court.<sup>349</sup> This makes them vulnerable to interference. Also, the fact that the appointment and dismissal of the Secretaries and Heads of Departments rests in the hand of the President forces them to be highly loyal to the political leaders, possibly at the expense of integrity.<sup>350</sup>

Finally, the restoration of accountability mechanisms in the North and East of Sri Lanka is hampered by the delays in demilitarization of these areas. Public institutions that are led by military men lack legitimacy, as fear and mistrust sometimes characterize the relationship between citizens and government institutions rather than principles of accountability and service-orientation.<sup>351</sup>

#### **4.2.6 Integrity Mechanisms (Practice) - To what extent is the integrity of civil servants ensured in practice?**

In practice, senior civil servants often face conflicts of interest. To advance in their career, they need to be loyal to the political party in power, as all senior positions are appointed by Cabinet.

At District and Divisional level, senior civil servants owe allegiance to both National Government and Provincial Council. These dual functions put them into conflict, particularly when the political party in power in the Province is different from the

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346 Article 16, Bribery Act, 1954.

347 Interview with Mr. D. Dissanayake.

348 Oxford Analytica, Sri Lanka Fiscal Transparency Report 2006.

349 M.C.M. Iqbal The Public Service of Sri Lanka, 2002 p5.

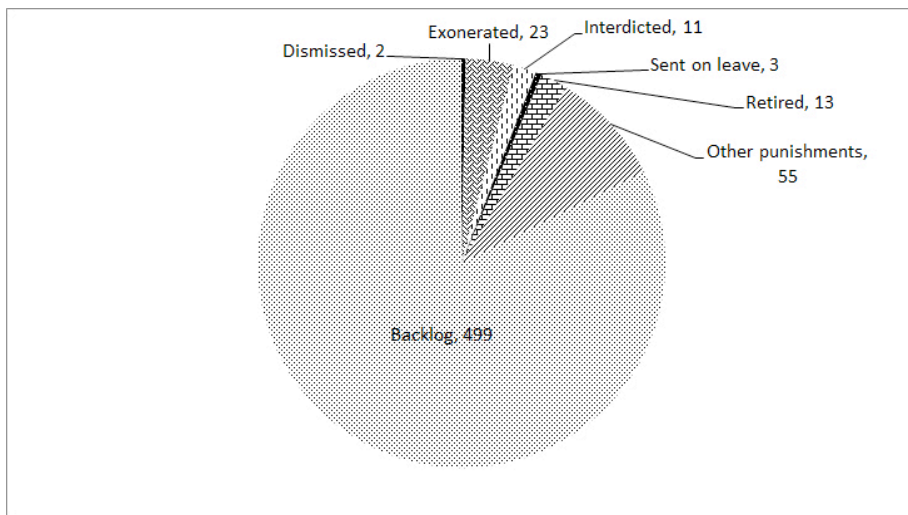
350 M.C. M. Iqbal, 2002.

351 Bulathsinghala, Frances and Parakrama, Arjuna, 2009.

party in power at the centre.<sup>352</sup> Such conflict can also arise when military men assume public service positions, as is currently the case in the North and East of Sri Lanka.

Disciplinary proceedings are initiated in some cases, but many of the disciplinary proceedings are characterized by long delays and sometimes result in the abandonment of the entire inquiry.<sup>353</sup> In 2008, the PSC issued 113 charge sheets to accused officers, and had a backlog of 499 cases from the previous year. Two Officers were dismissed, 23 exonerated, 11 interdicted, 3 sent on compulsory leave, 13 compulsorily retired and 55 were given “other punishments”.<sup>354</sup> Given the size of the public sector, these actions appear to be largely inadequate.

**Chart 4: Disciplinary proceedings by PSC**



An important tool to address issues of integrity and capacity is training. The Sri Lanka Institute of Development Administration (SLIDA) trains all SLAS officers on public financial control, including on the role of parliamentary oversight, the Auditor General and provisions in the Financial Regulations and the Establishment Code, as well as Good Governance. UNDP, USAID and Transparency International have also run anti-corruption seminars for the public sector.<sup>355</sup>

352 M.C.M. Iqbal, 2002.

353 Public Service Commission Report, 2008, sections 4.3 and 4.5

354 Public Service Commission Report, 2008, annex 12.

355 Interview with. W.A. Jayasundera.

In practice, standards of behaviour of public sector employees are not evenly enforced. While petty offenders get caught at times, powerful politicians may not be indicted while in power – to date, no high level official has been prosecuted or convicted for corruption. For example, it is very common for high-level bureaucrats to join politics, possibly using their insider-knowledge for personal gain.<sup>356</sup> Also, there are many instances where public officials participated in political activities, particularly prior to elections. Prior to the Presidential Election in January 2010, people from various backgrounds, including police officers (on 13 December 2009) and education officials (on 10 December 2009) as well as workers in national banks (on 3 January 2010) were entertained at Temple Trees, the Presidential residence.<sup>357</sup> Also, the state-owned Ports Authority allegedly was used to print election material for the President, and provided manpower, vehicles, public meeting stages and buildings.<sup>358</sup> Provisions in the 18<sup>th</sup> Amendment have made it even more difficult to check this tendency of narrowly politicizing the public service, since the Elections Commission no longer has jurisdiction over such matters even during an election campaign.

## 4.3 Role

### 4.3.1 Public Education (Practice) - To what extent does the public sector inform and educate the public on its role in fighting corruption?

In 2007 an informal network of public sector officials called the “Clean Hands Campaign” was set up by a group of senior public officials. The goal of the network is to reduce corruption within the public service. By 2009 it had attracted 2,000 members from within the public service.<sup>359</sup> One of the successes of the Alliance was the introduction of Citizens’/Clients’ Charters in 2008.<sup>360</sup> These charters introduce standards for service delivery within public institutions, by specifying how long it will take to get a specific service done. At the end of 2009, 35 institutions had developed

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356 Samaratunge et al, 2008.

357 Desilva Ravindra, 24 January 2010; “President addresses police officers”, Colombopage, 13 December 2009.

358 Transparency International Sri Lanka, 2010.

359 Interview with President of Clean Hands Alliance, in: Transparency International Sri Lanka Governance Report 2009. pp 67 – 69.

360 Public Administration Circular No. 05/2008.

their own charter.<sup>361</sup> However, the effectiveness of the charters still has to be assessed.

Members of the Alliance have complained that they had received threats as a result of their work.<sup>362</sup> Anti-corruption programmes by SLIDA and international agencies appear to have limited high-level support.<sup>363</sup>

Lack of prosecution, except in instances where the accused is a political opponent of the ruling regime, has led to public apathy and cynicism, so much so that education/awareness alone will not change attitudes unless the vicious cycle of impunity and patronage is broken.

#### **4.3.2 Cooperate with public institutions, CSOs and private agencies in preventing/ addressing corruption (Practice) - To what extent does the public sector work with public watchdog agencies, business and civil society on anticorruption initiatives?**

There are few instances where public sector organisations and civil society organisations have cooperated on anti-corruption initiatives [See also Chapter VI].

International agencies have carried out a number of programmes together with the Government of Sri Lanka. From 2006-2008, USAID together with the Auditor General's Department, the Bribery Commission and several civil society organisations conducted an anti-corruption program and developed an Anti-Corruption Action Plan. The Sri Lanka Institute of Local Governance as well as SLIDA participated in the programme.<sup>364</sup>

TISL has carried out awareness-raising programs with SLIDA, the Department of Immigration and Emigration, with Divisional Secretariats, and for village officers (Grama Niladharis) since 2007.

However, overall there is increasing reluctance by state institutions to work with civil society. For example, the UNDP-funded review of Sri Lanka's adherence to the

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361 Transparency International Sri Lanka, 2009.

362 Interview with public officer, name withheld on request, Colombo, 18 February 2010.

363 Interview with W.A.Jayasundera.

364 USAID, 2007.



UNCAC is being carried out without stakeholder consultation, unlike the practice in other countries.

**4.3.3 Reduce Corruption Risks by Safeguarding Integrity in Public Procurement - To what extent is there an effective framework in place to safeguard integrity in public procurement procedures, including meaningful sanctions for improper conduct by both suppliers and public officials, and review and complaint mechanisms?**

Public procurement is regulated in the Procurement Guidelines that were issued by the National Procurement Agency (NPA) in 2006.<sup>365</sup> The purpose of the Guidelines and NPA (set up in 2004) was to ensure that a fair, transparent and efficient process was applied for the procurement of goods, works and services in the public sector.<sup>366</sup> The Guidelines are easily accessible to the public on the internet.<sup>367</sup>

Major procurements require competitive bidding. However, military purchases are not advertised, are often done as limited quotations and treated as confidential expenses. According to Financial Regulation 237 (1992), secret expenses cannot be divulged to the public and are not subject to scrutiny if the Minister of Finance and the President certify that the money has been properly expended.

The Procurement Guideline also sets out the formal requirement to limit the extent of sole-sourcing. There are a number of provisions designed to safeguard the independence of the decision-making process. These include a provision preventing conflict of interest: officers have to disassociate themselves from the process if a conflict arises. For instance, if the Head of the Department or Chief Executive officer is a member of the technical evaluation committees, there are provisions which stipulate that their subordinates should not serve as members of the same committee.<sup>368</sup> Further, it provides that under no circumstances should the details of the members of the evaluation committees be divulged to the bidders.

Further, the Guidelines stipulate a format for the evaluations in the bidding process which require reasons / details for the decisions. For instance, the format for the bid

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365 .National Procurement Agency Circular No:09, 01, March 2006.

366 Gomez, Mario et al, 2007.

367 National Procurement Guidelines, 2006.

368 Ibid. section g, p.22.

evaluation summary report requires, among other details, the reasons for the decision which ensures the rationality of the decision-making process.<sup>369</sup> At the time of opening of the tender, bidders are allowed to be present and can raise objections at this point. Although there is no specific complaint mechanism, bidders are not prohibited from making complaints under the Common Law.

Companies guilty of major violations of procurement regulations are not prohibited from participating in future procurement bids.<sup>370</sup> In addition, citizens, while having access to the regulations, cannot access the results of major bids.

The NPA was suddenly closed in 01 March 2008 without reasons being provided, and brought under the control of the Ministry of Finance.<sup>371</sup> Procurement is now handled by the Department of Procurement Services within the Department of Finance & Planning. With the closure of the NPA a key element of ensuring the integrity of the procurement process has been abolished. The World Bank had agreed to finance the establishing of a training and research centre related to public procurement management in Sri Lanka but after the closure of the NPA, abandoned the plans.<sup>372</sup>

To date, much of the public procurement process remains shrouded in secrecy. The public perception is that large-scale corruption occurs in the awarding of tenders.<sup>373</sup> This is also the view of international actors and procurement experts: for instance, an ADB study of 2004 found that corruption is most rampant in the area of procurement.<sup>374</sup> The Global Integrity Report 2007 rates Sri Lanka's performance in procurement as weak, emphasizing the ineffectiveness of the procurement process.

Secrecy prevails, particularly in the large infrastructure projects that are financed by China, including the Hambantota port, the Puttalam coal power plant, the reconstruction of Northern roads, the Mattala airport and the Colombo-Katunayake expressway. China-Sri Lanka project agreements are not revealed to the public, and costs and terms of repayment of loans are not known.<sup>375</sup>

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369 Ibid. Bid Evaluation summary Report, p 37.

370 Global Integrity, 2007: Sri Lanka's score in the category "Procurement" is 'weak'.

371 Public Finance Circular P/F 429, 17 March, 2008.

372 Gunaratne, Nathasha, 04 May 2008.

373 Raymond, Jeanette. 2008.

374 Asian Development Bank 2004, Global Integrity 2007, Business Anti-Corruption Portal 2010.

375 Wijedasa, Namini, 24 October 2010.

Irregularities have been alleged in a number of large-scale procurement contracts in the last years: In 2006, the controversial multi-million-rupee MiG-27 deal was apparently ridden with corruption.<sup>376</sup> In 2007, irregularities were reported regarding a major tender for the construction of a Container terminal under the Colombo Port Expansion Project.<sup>377</sup>

In summary, a legal framework exists for ensuring integrity in public procurement. However, the framework does not appear to be adhered to, and its validity is limited by other restrictive laws such as the Official Secrets Act and the Establishment Code. Also, it appears that the legislation is not evenly enforced, and that it is selectively used for political purposes. An example is the military trial of the former Army Commander and Presidential Candidate, Sarath Fonseka, for granting corrupt arms procurement contracts while in command.<sup>378</sup>

The absence of effective parliamentary oversight in the form of COPE, for instance, has added to this problem. Bureaucratic delays and waste are also issues that lend themselves to corruption and mismanagement.

**Table 9: Scores for Public-sector**

PUBLIC SECTOR			
DIMENSION	INDICATOR	LAW	PRACTICE
Capacity = 42	Resources	-	50
	Independence	50	25
Governance = 33	Transparency	50	25
	Accountability	25	25
	Integrity Mechanisms	50	25
Role = 17	Public Education	-	00
	Addressing Corruption in Public Institutions	-	25
	Reduction of Corruption in Public Procurement	25	

376 Transparency International Sri Lanka ,2009. Raymond,2008.

377 Samarasinghe Sonali, 18 February 2007.

378 BBC, 13 August 2010.

## Recommendations

1. While the independence of the PSC has been compromised with the 18<sup>th</sup> Amendment to the Constitution, it still has an oversight function in regard to public sector integrity. Presidential appointments to the PSC should, therefore, be based on merit only. Similarly, appointments of Heads of Departments (by Cabinet) and Secretaries to the Ministries (by the President) should be based on merit. In addition, the PSC should be given adequate resources and training to enable it to effectively fulfill its functions.
2. Impunity is the biggest deterrent to integrity. Therefore, corruption and unethical behaviour should be prosecuted and sanctions administered. The law must be enforced evenly, to small and big offenders alike.
3. The procurement process must be transparent and open to competitive bidding. The National Procurement Agency should be re-established.
4. Whistleblower and witness protection must be enacted.
5. All public sector training programmes must have an anti-corruption module with a focus on public procurement. A comprehensive Code of Conduct should be developed and implemented within a compliance programme.
6. Existing laws and statutes, including the procurement guidelines, should be strictly implemented.
7. The Chief Accounting Officer should be held responsible for recovering lost assets within each institution.
8. A performance appraisal process should be instituted for public servants.
9. Defaulted contractors should be identified in a blacklist that should be publicly circulated in order
10. To prevent further corruption.
11. Full implementation of the constitutional provisions on language and official language policy through adequate resource allocation and institutional strengthening, driven by the political will to end language-based discrimination, thereby enhancing State accountability towards minorities.

## 5. LAW ENFORCEMENT AGENCIES

### SUMMARY

This chapter deals with the Attorney General's Department and the police force as the two main law enforcement agencies, to which is added the defence force. Sri Lanka's 30 year old history of political violence and protracted ethnic conflict has led to a situation where the rule of law and law enforcement is weak. Problems in law enforcement mainly stem from lack of effective oversight and independence. Public confidence in the rule of law is low, and law enforcement agencies are not generally seen to be impartial in implementing the law.

The credibility of the Attorney General (AG) has declined over the years, as the AG's department has shown an unwillingness to prosecute some of the more serious crimes, including the tens of thousands of disappearances in the 1980s, as well as the many torture cases and extra-judicial killings, allegedly committed by law enforcement agencies and paramilitary groups. In May 2010, the AG's Department, that used to be part of the Ministry of Justice, became directly answerable to the President through Gazette notification, resulting in a further centralization of power.

To counter allegations of police abuse and corruption, in 2001 the National Police Commission (NPC) was created to enhance the independence and credibility of the police force, and to provide an independent complaints mechanism. Since 2006, the NPC has been headed by the Inspector General of Police, and with the 18<sup>th</sup> Amendment to the Constitution in September 2010 its powers have been reduced.

### STRUCTURE

The AG of Sri Lanka is the Government's chief legal advisor, represents government in litigation, and is its primary lawyer in the Supreme Court of Sri Lanka.<sup>379</sup> At the same time the AG is custodian of the public interest in its role as prosecutor and enforcer of criminal law.<sup>380</sup> The AG's Department was traditionally assigned to the

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379 International Bar Association Human Rights Institute Report, May 2009.

380 Cooray, J.A.L.1995, p 210 – 21.

Ministry of Justice but in April 2010 it was moved to be directly under the President.<sup>381</sup>

The major functions of the Department include the institution and defence of civil actions for and on behalf of the Republic, Ministers and public officers, institution and conduct of criminal proceedings for and on behalf of the Republic, examination of Bills for their consistency with the provisions of the Constitution, providing, on request, legal advice or opinions to State institutions, appearance before the Supreme Court in proceedings in its exercise of jurisdiction in relation to constitutional matters, fundamental rights, consultative and breach of parliamentary privilege issues, appearance in court and assisting court in respect of disciplinary proceedings against members of the Bar.<sup>382</sup> The Constitution requires that the AG be notified in any fundamental rights case filed against the State. The AG also provides advice to the State on constitutional issues and matters of international law, and is required to examine proposed Bills and constitutional amendments, providing an opinion on their constitutional validity.

The Sri Lanka Police Service is the civilian national police force of Sri Lanka engaged in law enforcement. Sri Lanka does not have provincial or municipal police, but only a national Police Department that functions under the Ministry of Defence, though previously from time to time it came under the Ministry of Home Affairs or Internal Security. The constitutional provision for devolution of police powers to the Northern and Eastern Provincial Councils under the 13<sup>th</sup> Amendment has not been given effect.<sup>383</sup> The Police is headed by the Inspector General of Police (IGP), appointed by the President, who is also the Minister of Defence.<sup>384</sup> The IGP is supported by several Deputy Inspectors General (DIGs), and the police force includes Superintendents, Inspectors, Sub-Inspectors, Sergeants and Constables.

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381 Under Government Gazette Extraordinary No.1651/20 dated 30 April 2010, the AG's Department was not allocated to a ministry and therefore by virtue of Article 44(2) of the Constitution, the President is deemed to have assigned to himself the Attorney General's Department.

382 Ministry of Justice of Sri Lanka <http://www.justiceministry.gov.lk/>

383 13th Amendment, Ninth Schedule, The Constitution of the Democratic Socialist Republic of Sri Lanka, 1978.

384 Article 41C. The Constitution, 1978.

The Police are responsible for enforcing criminal and traffic law, enhancing public safety, maintaining law and order and peacekeeping in Sri Lanka.<sup>385</sup> In 2005, 8.8% of police personnel were female.<sup>386</sup>

The defence force consists of a regular force and reserve as well as a volunteer force and reserve. The President is the commander-in-chief of the armed forces, and appoints his choices of chiefs for the Army, Navy, Air Force and Police as well as other officers. In 2005, 1.2% of Navy personnel, 2.6% of Army personnel and 6.0% of Air Force personnel were female, including volunteers.<sup>387</sup>

At the time of writing this report, emergency law is still in place,<sup>388</sup> although some components, such as restrictions on meetings and distributing certain literature, were repealed in May 2010.<sup>389</sup> Other measures (e.g. the right to detain suspects without trial) remain. In September 2010, President Rajapaksa announced that the remainder of the Emergency Regulations would be repealed in the coming months.<sup>390</sup>

## ASSESSMENT

### 5.1 Capacity

#### 5.1.1 Resources (Practice) - To what extent do law enforcement agencies have adequate levels of financial resources, staffing, and infrastructure to operate effectively in practice?

The AG's Department is relatively well resourced. The budget allocation for the AG's Department was Rs.412 million (US\$3.7 million) in 2010.<sup>391</sup>

The AG's Department functions with a cadre of 199 professionals which includes the AG, the Solicitor General, five Additional Solicitors General, 20 Deputy Solicitors General, 40 Senior State Counsel, and 100 State Counsel, two State Attorneys, five

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385 Police Ordinance No.16, 1856.

386 Department of Census and Statistics, 2007.

387 Department of Census and Statistics, 2007.

388 International Commission of Jurists, March 2009.

389 "Sri Lanka government relaxes war-time emergency laws", BBC News, May 2010.

390 "President promises at UN to lift major part of Emergency Regulations", Sunday Times, 23 September 2010.

391 Presentation of the Appropriation Bill, 2010

Senior State Attorneys, 10 Assistant State Attorneys and one Accountant.<sup>392</sup> It has district-level branch offices. The Department also has special units divided on a functional basis such as the Missing Persons Unit (which handles matters relating to persons who are alleged to have disappeared), Non-summary Unit (which was set up to expedite non-summary inquiries in Magistrate's Courts), the ER Unit (which handles cases under Emergency Regulations), the Habeas Corpus Unit (which handles cases filed in relation to missing persons) Child Abuse Unit and the Public Petitions Unit (which handles public petitions).<sup>393</sup> The AG Department does not have a separate Investigations Unit, however, as is the case in many other countries.

Salary scales and other benefits are attractive for young lawyers and opportunities for training and career advancement are generous in comparison with the rest of the public service. The library within the department is well resourced. A career in the AG's department is sometimes seen as a stepping stone to a career in the judiciary.

There are several units within the police force including the Criminal Investigations Department, the Police Narcotics Bureau, and the Women and Children's Desk.<sup>394</sup> In 1983 the Special Task Force was established as a paramilitary arm within the police force to provide security to VIPs and engage in counter-insurgency operations.<sup>395</sup> The Special Task Force is said to have a strength of 5,850 members and sometimes carries out joint operations with the military.<sup>396</sup> There are 39 police divisions and 411 police stations in the country.<sup>397</sup> Salaries of police officers are low, ranging from minimum of Rs.68,160 (US\$612) per year for a Police Constable to a maximum of Rs.161,940 (US\$1453) for an Inspector of Police in 2004. In addition, a special allowance and a subsistence allowance are paid to all ranks.<sup>398</sup>

A survey conducted in 2003 revealed that the police officers' satisfaction at all salary levels is low -- a majority across all the ranks stated that their salary is inadequate to meet living expenses.<sup>399</sup>

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392 Justice Ministry website <http://www.justiceministry.gov.lk/dept/attorney.htm>

393 Ibid.

394 Sri Lanka Police Service website [www.police.lk](http://www.police.lk)

395 Transparency International Sri Lanka, 2006

396 US Department of State, Human Rights Report Sri Lanka, 2009.

397 Human Rights Commission, National Protection and Durable Solution for Internally Displaced Persons, no date

398 Transparency International Sri Lanka, 2006 p. 43.

399 Transparency International Sri Lanka, 2006.



According to a former secretary of the National Police Commission, financial and human resources for the police and the Police Commission are adequate, but skills especially with regard to the investigation of crimes could be enhanced.<sup>400</sup> Other sources report that most police officers have never received significant training in criminal detection and investigation.<sup>401</sup> Another lacuna is the lack of language skills that prove to be a serious obstacle to effective policing in the Tamil speaking North and East. A positive step is a programme to enhance capacity in civilian policing and crime scene investigation funded with Swedish assistance that was launched in 2005.<sup>402</sup>

While salaries of the police officers fall within the range of other government servants, the salaries of the three armed forces (Army, Air Force and Navy) are higher. Soldiers also benefit from specific schemes such as the “Api Wenuwen Api” housing programme. The Ministry of Defence receives a major share of Sri Lanka’s annual budget. In the past years, Sri Lanka’s defence expenditures as a proportion of the national income, has been the highest in the region (barring Pakistan), and since 1995, defence expenditures far exceeded total social expenditures.<sup>403</sup> Defence expenditure amounted to 5% of GDP in 2008.<sup>404</sup> In 2010, the Appropriation Bill presented to Parliament allocated Rs.201 billion [US\$1.8 billion] (2009: Rs.177 billion) to the Ministry of Defence, a significant increase in comparison to previous years, despite the fact that the LTTE was militarily defeated in May 2009. The Army was allocated Rs.105 billion [US\$0.94 billion], the Navy Rs.26 billion [US\$0.24 billion], the Air Force Rs.20 billion [US\$0.18 billion] and the police department Rs.37 billion [US\$0.33 billion].<sup>405</sup> In comparison, Rs.52 billion was allocated for Health, and only Rs.2 billion was directed toward rehabilitation of IDPs in 2010 (2009: Rs.4 billion). The armed forces are a major employer and recruit mostly unemployed Sinhalese male youth.<sup>406</sup> In addition to the Army, Navy and Air Force, a separate Home Guard Service, protecting “border villages” [that demarcated government and LTTE-held areas during the conflict], established under the

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400 Interview with K.C. Logeswaran, former Chairman of the National Police Commission, 27 July 2010.

401 UN General Assembly Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary of arbitrary executions, 14 May 2008.

402 Sri Lanka submission to UN Economic and Social Council, 27 January 2010.

403 Sarvananthan, M., 2008, pp177-184.

404 Q&A: Post War Sri Lanka, BBC News, April 2010.

405 Parliament of Sri Lanka, Presentation of the Appropriate Bill, 2010.

406 Kulatunga STK, Lakshman R W D, May 2010.

provisions on the Mobilization of Supplementary Force Act in the year 1984, had 20,260 members at the end of 2002, according to the Ministry of Defence.<sup>407</sup>

At the end of 2010, there were about 450,000 persons in uniform (including Air force, army, Navy, Police, Civil Defence Force and Special Task Force) according to the Secretary to the Ministry of Defence.<sup>408</sup> This is an average ratio of one armed personnel to 46 citizens in the country.<sup>409</sup> Comparatively, the ratio had been estimated at 1:62 in 2008, equalling 300,000 persons in uniform.<sup>410</sup>

The capacity of law enforcement agencies to prosecute corruption varies. While the Attorney General's Department does not have a special unit to prosecute corruption, the Police Department has several units which investigate corruption. The Fraud Investigations Unit, Special Investigations Unit, the Criminal Investigations Division or the Investigations Division of the Commission to Investigate Allegations of Bribery or Corruption (comprising serving police officers) are involved in corruption investigations.

### **5.1.2 Independence (Law) - To what extent are law enforcement agencies independent by law?**

The AG was directly appointed by President according to clear criteria adopted by the previous Constitutional Council<sup>411</sup>, under which only the following category of persons are eligible to be the AG, but the Constitutional Council itself has been dysfunctional since 2005:

A judge of the supreme court

The Solicitor General

An officer who has held the post of Additional Solicitor General

Practitioner at the unofficial bar, with 30 years of successful practice and is held in high esteem by the judges and legal profession.

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407 Ministry of Defence, website on Home Guard Service, [http://www.defence.lk/main\\_abt.asp?fname=homeguard](http://www.defence.lk/main_abt.asp?fname=homeguard) (accessed 20 Oct 2010)

408 Sarvananthan, M., 2011, pp. 205-213.

409 Of this, the ratio of police officer to population is estimated at 1:250.

410 Sarvananthan, M., 2008.

411 Parliamentary Sessional Paper Series No.14 , 20 November, 2002.

The AG has different and sometimes contradictory functions to perform. He is a necessary party in all fundamental rights cases and is entitled to be heard in any public law cases. Though the President is immune from prosecutions and other legal actions, when the President discharges ministerial functions, cases can be filed and such cases must be filed against the AG compelling the AG to defend the President. This is particularly relevant in the current context where the President is also Minister of Finance. The traditional function of the AG is prosecutorial, which also includes *nolle prosequi* (drop a prosecution). There are no ascertainable statutory laws preventing political interference into the functions of the AG. In April 2010, the AG's Department was assigned to fall under the control of the President.<sup>412</sup>

With regard to the Police, a significant step towards re-instating its independence was the establishment of the National Police Commission (NPC) that was unanimously voted for by all parties in Parliament in 2001, with the 17<sup>th</sup> Amendment to the Constitution. The seven members of the NPC have supervisory and disciplinary powers over the police force. It was meant to enhance the independence of the police force and its members were to be independently appointed on the recommendation of the Constitutional Council.<sup>413</sup> The NPC was required to perform four functions:<sup>414</sup>

To supervise the appointment, transfer, disciplinary control and dismissal of all police officers, except the Inspector General of Police.

To establish a process to receive and investigate public complaints against the police and provide relief.

To formulate schemes of recruitment and promotions; adopt appropriate codes of conduct; and oversee the training of police officers, with a view to enhancing the efficiency and independence of the police force.

To hear appeals from any police officer who has been aggrieved by a promotion, transfer or other order.

In 2006, the NPC ceased to be independent when its term expired and its functions were assigned to the Inspector General of Police, who has acted as its head from then onwards. The IGP is directly appointed by the President. The IGP is legally required to be consulted at the time of appointments. In retrospect, there has never been a strong constituency supporting the independence of the NPC. In September 2010, the

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412 Gazette Extraordinary No.1651/20, 30 April 2010.

413 Article 155A, The Constitution, 1978.

414 Article 155G and 155K, The Constitution, 1978.

18<sup>th</sup> Amendment to the Constitution legalised the de-facto situation and brought the NPC under exclusive Presidential control. It also limited the role of the NPC to handling complaints, while the administration of the Police Service was brought under the Public Service Commission.

According to Police Departmental Orders, undue interference in matters concerning promotions, transfers and internal police discipline is misconduct and requires disciplinary action.<sup>415</sup>

The power of the police and defence force is significantly enhanced through the Emergency Regulations that have been in place since the 1970s, with a few interruptions.<sup>416</sup> The 2005 Emergency Regulations give the Secretary to the Ministry of Defence powers to order detention for up to one year and this order cannot be subject to “question in any court on any ground whatsoever”.<sup>417</sup> Emergency regulations were partially lifted in June 2010, but this did not affect the regulations affecting detentions, and the PTA is still in place.

The Defence Force is governed by the Army, Navy and Air Force Acts. It comes directly under the President.<sup>418</sup>

### **5.1.3 Independence (Practice) - To what extent are law enforcement agencies independent in practice?**

The current AG was appointed outside the constitutional process since the Constitutional Council has not been functioning since March 2005; he was a member of the private bar at the time of his appointment. The AG’s position has not been perceived to be independent in the past, but rather as a kind of spokesperson of the Government.<sup>419</sup> This is also a result of the conflicting functions assigned to him. There is the concern that the enforcement of criminal law is not independent and impartial and that prosecution of serious human rights crimes have not been launched despite

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415 Departmental Order No E 4; Administrative Regulation No 204: "Canvassing by officers for appointments, promotions or transfers in the Public Service, whether done directly or indirectly, will be regarded as an act of misconduct and the officer will be liable to disciplinary action."

416 Pavey, Eleanor and Smith, Chris, 2009.

417 UNCHR, Refworld website, <http://www.unhcr.org/refworld/docid/471712342.html>

418 Ministry Of Defense Sri Lanka, Army Act, [http://www.defence.lk/main\\_pub.asp?fname=armyact](http://www.defence.lk/main_pub.asp?fname=armyact)

419 Asian Legal Resource Centre, February 2008.

the evidence being available. Amnesty International in its 2010 report states: “The government failed to address impunity for past human rights violations, and continued to carry out enforced disappearances and torture. ... Police killings of criminal suspects intensified. Investigations into human rights violations by the military and police stalled. Court cases did not proceed as witnesses refused to come forward for fear of reprisals.”<sup>420</sup> There are many examples of failures to investigate, particularly cases that implicate law enforcement agencies. In 2007, the Asian Human Rights Commission lodged 47 complaints on police torture with the AG (as well as with the IGP, and the Human Rights Commission). Yet, none of these allegations were investigated.<sup>421</sup> The statistics on the performance of the AG (available on the Ministry of Justice website) show that in 2005 (most recent data available), only 63 cases of missing persons were concluded out of 205 new cases opened in 2004, and only four cases were dealt with by the Emergency Regulation unit. Given the number of reported cases of disappearance, torture, and extra-judicial killings this appears grossly inadequate.

Another concern arising from the conflicting functions of the AG is that the AG has emerged as a spokesperson and legal adviser for the State in the case of the State’s engagement with international human rights bodies and is therefore forced to defend the government’s human rights record in international forums. The AG’s independence has been finally and unequivocally compromised with the Department’s moving out of the purview of the Minister of Justice, and under direct Presidential control in June 2010.

With regard to the independence of the police force, this has been a concern for many decades.<sup>422</sup> There is political interference in the way people are recruited, transferred and promoted, especially appointments to high posts within the force, in the way police investigations are launched or conducted, and the way police are deployed to prevent a breach of the peace.<sup>423</sup> Security forces appear to be actively involved in political affairs, particularly during local and provincial government elections, where officers who failed to obey ruling party politicians are allegedly facing transfer or dismissal. Also, security personnel appear to be told to leave shortly before incidents

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420 Amnesty International Report, 2010.

421 Asian Legal Resource Centre, February 2008.

422 Interviews with K.C. Logeswaran, 27 July 2010 and Austin Fernando, 21 July 2010.

423 Asian Legal Resource Centre, February 2008.

of ballot-box stuffing or electoral fraud occur.<sup>424</sup> Another example of political involvement is actions against members of the opposition and other critics of the government, for example the attack by a dozen out-of-uniform policemen on the television station Max TV in February 2009.<sup>425</sup> Other attacks, such as the assault on Sirasa TV in January 2009, when a heavily armed gang had stormed the premises and destroyed the main control room without being apprehended in spite of Colombo being under heavy police protection at that time, and the attack against Sirasa TV studios by unknown assailants with stones in March 2010,<sup>426</sup> have not been resolved.

According to a former Chairman of the NPC, political interference into appointments, transfers and promotion within the police force is usual practice. This is possible because the IGP is legally required to be consulted at the time of appointments, and usually gives his recommendation as requested by local or national politicians.<sup>427</sup> The NPC allegedly lacked concrete evidence to reject the recommendation, and was unable to ascertain the level of political influence.<sup>428</sup>

After strong public criticism for being ineffective – mainly because the NPC merely acted as a ‘post box’, receiving complaints and referring them to the police for investigation – in mid-2004, the NPC decided to assume more substantive control as mandated by the 17<sup>th</sup> Amendment. Hostility between the IGP and the NPC soon surfaced as the IGP felt that the NPC restricted his powers.<sup>429</sup> With all flaws taken into consideration, the NPC has been credited for preventing politically-motivated transfers of police officers prior to elections, and for interdicting police officers found culpable in human rights violations.<sup>430</sup>

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424 Freedom House, 2010.

425 "Armed Group That Raided Max TV Had Police Backing–UNP," The Island, 23 February 2009.

426 "Attack on Sirasa TV is attack on democracy", IFEX website, 25 March 2010.

427 Interview with K. C. Logeswaran, 27 July 2010.

428 Interview with K. C. Logeswaran, 27 July 2010.

429 Pinto-Jayawardena, Kishali, 2005.

430 Pinto-Jayawardena, Kishali, 2005.

## 5.2 GOVERNANCE

### 5.2.1 Transparency (Law) - To what extent are there provisions in place to ensure that the public can access the relevant information on law enforcement agency activities?

By law there is very little scope for transparency in law enforcement. There are no specific legal provisions permitting the public to access any information from law enforcement officials including the AG. Victims of crimes can access their case files upon permission of the Court, but they are not legally entitled to access. Officers above a certain rank in the police force and in the AG's department are required to make an annual asset declaration.<sup>431</sup> In addition to this, there are no other specific internal mechanisms subjecting law enforcement officials to integrity disclosures.

Parliamentarians can ask for information; however, in the absence of an access to information law, the public is not entitled to information.

Expenditures under the defence budget are sometimes treated as confidential and thus not subject to audit by the Auditor General. This is possible if the President together with the Minister of Finance (both functions exercised by the same person) certifies that secret expenditure has been properly expended.<sup>432</sup> Given the magnitude of the defence budget – 215 billion Rupees in 2010 [US\$1.93 billion], more than a fourth of the total budget allocation, despite the war being over – this means that there are significant parts of the expenditure on law enforcement which cannot be traced by the public as well as Parliament.

### 5.2.2 Transparency (Practice) - To what extent is there transparency in the activities and decision-making processes of law enforcement agencies in practice?

The official website of the Sri Lanka Police Service ([www.police.lk](http://www.police.lk)) provides key information on its divisions, organisational chart and crime statistics. It also publishes the Government Gazette Notification when vacancies in the police force occur.<sup>433</sup> However, neither the AG nor the Police Department give details of cases,

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431 Assets and Liabilities Act 1975, amended 1988.

432 Financial Regulation 237.

433 Sri Lanka Police Service website at [http://www.police.lk/divisions/recruitment\\_new.asp](http://www.police.lk/divisions/recruitment_new.asp)

prosecutions or decisions not to prosecute. Case records are of a public nature and courts generally permit parties, victims of crime or lawyers to obtain copies of most parts of the case records. In criminal cases, the victim or the virtual complainant is only entitled to the first complaint made to the police and the defence is entitled to other statements made by witnesses after the trial starts. The prosecution has virtual monopoly to call or not to call any witness to give evidence and, therefore, witnesses favourable to the defence may not be called by the prosecution, even if it prevents disclosure of the truth.

The police force and AG's Department are not required to, and do not disclose information on their decision-making to the public. They provide reasons to courts if challenged, and not otherwise. Whether their officers are following the disclosure requirement regarding assets and liabilities in practice is not clear.

### **5.2.3 Accountability (Law) - To what extent are there provisions in place to ensure that law enforcement agencies have to report and be answerable for their actions?**

There is no strong legal requirement for accountability. There are no legal provisions to compel the police force or the AG's department to share decisions with the public, nor is there an independent complaint mechanism available to the public regarding AG's decisions on prosecutions. Within the Police Department, accountability is exercised through senior officers at local level. At national level, a Special Investigations Unit within the Police Department has been set up to investigate against police excesses. Other means to hold officers accountable are through representations at the Human Rights Commission, or through Fundamental Rights petitions to the Supreme Court.

Law enforcement officers are not legally compelled to give reasons to stakeholders, except when required by courts. For example, victims of crime are not entitled in law to know the reasons when the AG or Police decides not to proceed with a prosecution.



In terms of internal accountability within the police force, the NPC had put in place an appeal process whereby police officers could complain about unfair transfers, promotions and dismissals.<sup>434</sup>

In terms of external accountability towards the public, the NPC in October 2004 put into place a public Police Complaints Division. While the NPC had powers to investigate into complaints, it had no power to prosecute in Court. Also, senior officials in the police force handled complaints against the police.<sup>435</sup>

According to the Constitution, the NPC is accountable to Parliament<sup>436</sup>. With the constitutional changes of September 2010 (18<sup>th</sup> Amendment), the administration of police comes under the Public Service Commission (and not under NPC) and the NPC will only handle complaints.

The emergency regulations provide for immunity for officials and officers who commit wrongful acts in the implementation of the regulations. Law enforcement officers are not immune from criminal proceedings. However, when they discharge their functions in a bona fide manner, such actions against police officers, whether civil or criminal, are required to be filed within three months from the impugned action.<sup>437</sup>

“No action or other legal proceeding, whether civil or criminal, shall be instituted in any court of law in respect of any matter or thing done in good faith, under any provisions of any emergency or of any order or direction made or given thereunder, except by, or with the written consent of, the Attorney-General.”<sup>438</sup>

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434 Extraordinary Gazette No 1495/4 of 30 April 2007.

435 Commonwealth Human Rights Initiative, 2007; and Pinto-Jayawardena, Kishali, 2005.

436 Article 155N, The Constitution.1987.

437 Section 88, The Police Ordinance.

438 Public Security Ordinance, Article 73, section 5, Chapter 40, 13 August 2005.

#### **5.2.4 Accountability (Practice) - To what extent do law enforcement agencies have to report and be answerable for their actions in practice?**

There is little accountability of the police or AG in the discharge of their functions. Prosecutors do not usually inform the public about their decision to prosecute or not, about their activities and priorities.

As documented in the section on CIABOC, the commission has failed to make a significant impact with regard to the investigation and prosecution of corruption. Internationally, the Sri Lankan government has since decades been under criticism for failing to provide accountability within its law enforcement agencies.<sup>439</sup> Successive governments have explained abuses by the police and defence work as side effects of the fight against LTTE terrorism.

In the police force, accountability appears to be weak. There is an urgent need for enforcement of disciplinary mechanism.<sup>440</sup> Even where the Supreme Court ordered the police hierarchy to discipline police officers, directions have been ignored.<sup>441</sup> Regarding the internal appeal process addressing police officers' complaints about unfair transfers, promotions and dismissals, the NPC heard about 40-45 appeals per week and in 2007, and made 1,500 decisions.<sup>442</sup> The former Chairman of the NPC described the Complaints Committee as a success.<sup>443</sup> However, other voices ascertain that the public complaint mechanism lacked credibility, as the NPC failed to establish clear procedures on how to monitor serious cases, and also entrusted senior police officers to deal with the complaints. As the police was alleged to be involved in some cases, investigations should have been conducted by independent bodies.<sup>444</sup> In 2009 it was reported that no independent authority to investigate complaints existed, and that senior officials in the police force handled complaints against the police.<sup>445</sup>

Impunity for serious human rights violations is the rule rather than the exception.<sup>446</sup> One recent example is the killing of a number of leading underworld criminals while

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439 International Commission of Jurists, January 2010.

440 Commonwealth Human Rights Initiative, November 2007, and Dewey, Gudrun, 2007.

441 Tsung, Sandra, August 2009.

442 Interview with KC Logeswaran, 27 July 2010.

443 Interview with KC Logeswaran, 27 July 2010.

444 Commonwealth Human Rights Initiative 2007, Jayawardena, Kishali-Pinto, 2005.

445 US Department of State, 2009.

446 US Department of State, 2009.

in custody. No investigations have taken place into these killings.<sup>447</sup> Another example is torture that is frequently not investigated and perpetrators are allegedly not prosecuted. One reason is that the AG who is responsible for investigating allegations of torture relies on police investigations. Another reason is the absence of a witness and victim protection programme.<sup>448</sup>

However, public pressure can lead to some accountability being instigated. For example, public outrage over the killing of two suspects in the Angulana Police Station in August 2009 resulted in the arrest of nine policemen. Similarly, investigations were opened into the abduction and torture of a student by police officers following a dispute with a senior police officer, also in August 2009.<sup>449</sup>

Although little information on internal accountability within the Armed Forces is available, it can be reported that in 2008, 23 Sri Lankan UN peacekeepers were convicted of sexual abuse of children when stationed in Haiti under the UN in 2007.<sup>450</sup>

It must also be mentioned that in the parts of the country that have been under LTTE control, summary justice was executed by the LTTE with no accountability mechanism at all. In liberated areas, armed gangs continued to operate, with no accountability being applied. In the East that had been liberated from the LTTE in 2007, paramilitary groups allegedly committed various human rights abuses including rape of women, without accountability. After the end of the war in May 2009, those groups allegedly continued their activities in the North.<sup>451</sup>

While not explicitly looking into accountability issues within law enforcement agencies, the government's Lessons Learnt and Reconciliation Commission (LLRC)<sup>452</sup> established in May 2010 has a mandate to identify responsibility for the events between 2002 and 2009. The LLRC runs island wide public hearings and issues recommendations that are implemented by an Inter-Agency Committee under the Chairmanship of the Attorney General. At the time of writing this report, the LLRC's

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447 UK Foreign and Commonwealth Office, 2009.

448 Organisation Mondiale Contre la Torture, Sri Lanka, 26 June 2010.

449 CORI Country Report, April 2010, p 90.

450 US Department of State, Trafficking in Persons Report 2010, 14 June 2010.

451 "Paramilitaries abducting Tamil children from Sri Lanka camps", Sunday Times, 22 May 2009; and International Crisis Group, May 2010.

452 Lesson Learnt and Reconciliation Commission <http://www.llrc.lk/>

mandate had been extended until May 2011.<sup>453</sup> However, the LLRC's independence has been questioned.<sup>454</sup>

### **5.2.5 Integrity (Law) - To what extent is the integrity of law enforcement agencies ensured by law?**

The authors of this study believe that integrity of law enforcement agencies should be assessed in the context of their role in the national governance system. As described above, both the police department and the AG are controlled by the Executive, and are generally not seen to be impartially enforcing the law. Sri Lanka with its history of protracted conflict and political violence is widely seen as a country where the rule of law is weak.<sup>455</sup> Throughout the past 30 years, law enforcement agencies have been implicated in extra-judicial killings, torture, disappearances and other grave human rights abuses.<sup>456</sup> In 2007, Sri Lanka came second only to Iraq in number of involuntary disappearances.<sup>457</sup> Reports of commissions of inquiry, studies by international and local groups, and media reports have highlighted the rampant bribery and corruption within the police force; the systemic use of torture; and other forms of police brutality including deaths, while in police custody.<sup>458</sup> Police officers allegedly are used to conducting themselves according to the broad powers provided to them under the Emergency Regulations rather than under the Code of Criminal Procedure, therefore failing to ensure the constitutionally enshrined fundamental right to life.<sup>459</sup>

Therefore, the assessment of internal rules on integrity and practices should ideally be complemented by an assessment of the role that law enforcement agencies play within the current governance framework. This, regrettably, is beyond the scope of this study.

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453 "LLRC extends date for representations plans more visits to affected areas", Government website, 12 November 2010,

[http://www.priu.gov.lk/news\\_update/Current\\_Affairs/ca201011/20101112llrc\\_extends\\_date\\_representations.htm](http://www.priu.gov.lk/news_update/Current_Affairs/ca201011/20101112llrc_extends_date_representations.htm)

454 'International HR bodies refuse attending LLRC', BBC News, 14 October 2010.

455 Freedom House, 2010: Sri Lanka scores a low 3.01 in the Rule of Law indicator; Global Integrity, 2007: Sri Lanka scores weak in the 'law enforcement' category.

456 Amnesty International World Report, 2010.

457 UN Human Rights Council, Annual Report of the Working Group on Enforced or Involuntary Disappearances, 06 February 2009, pp. 95-97.

458 Pinto-Jayawardena, Kishali and Kois, Lisa, 2008.

459 UN Report of the Special Rapporteur Philip Alston, 14 May 2008.

There is no Code of Conduct either for the police force or the AG's department. Staff of both institutions are governed by the provisions of the Establishments Code,<sup>460</sup> other internal regulations apply to the Police Force. The Establishments Code contains provisions on conflict of interest, acts which bring the public service into disrepute, private use of government labour and property, and rules on receiving gifts.<sup>461</sup> There are no legal restrictions on post-retirement employment.

Acceptance of gifts and hospitality is prohibited under the Bribery Act, if they are considered bribes. There are no legal provisions for holding accountable those law enforcement officials who have not accurately declared their assets and property.<sup>462</sup>

### **5.2.6 Integrity (Practice) - To what extent is the integrity of members of law enforcement agencies ensured in practice?**

With few regulations in place to enhance integrity of law enforcement officials, behaviour of law enforcement personnel does not necessarily follow high standards in practice. Disciplinary mechanisms within the police force below the rank of superintendent are purely within the department and covered by a blue veil.<sup>463</sup> There are clear instances of police abuses where police have not taken any remedial steps.<sup>464</sup> When the Police Complaints Division existed, the majority of complaints arose from police inaction.<sup>465</sup> As discussed above, police actions and inactions have led to serious human rights violations such as torture. If law enforcement officers are implicated, the AG does not undertake defence of such officers. Internal disciplinary procedures are part of police officers' training.

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460 Chapter XLVII, Volume II, Establishment Code of the Government of Sri Lanka, 1999.

461 Id. Sec1:5, 1:4, 1:11 and 3.

462 Bribery Act No 11 of 1954 (amended No. 20 of 1994), section 19.

463 Interview with KC Logeswaran, 27 July 2010.

464 Commonwealth Human Rights Initiative, 2007.

465 Interview with KC Logeswaran, 27 July 2010.

## 5.3 ROLE

### 5.3.1 Corruption prosecution (Law and Practice) - To what extent do law enforcement agencies detect and investigate corruption cases in the country?

Law enforcement agencies do have adequate legal power to prosecute and detect corruption. However, the AG and police force are not generally seen to be enforcing the law in an impartial manner.<sup>466</sup> The criminal investigation system has been seen to have become dysfunctional, with investigations into cases where state agencies are involved perceived as an act of disloyalty to the State. Out of the more than 30,000 acknowledged disappearances in the south in the late 1980s, none has been successfully prosecuted.<sup>467</sup> Moral credibility of the AG is therefore low. The alleged continuing use of torture in Sri Lanka's detention facilities that could be prevented if the AG investigated allegations according to the Convention Against Torture Act of Sri Lanka (Act no 22 of 1994) is another example of the AG's apparent failure to enforce the law.

Against this backdrop, it appears that prosecution of corruption largely depends on political convenience. The Police do not address corruption of high officials who invariably act with political impunity. The narrow politicization of the Police force has led to skewed prosecution which tends to target opposition figures or those who are seen as critics of government.<sup>468</sup>

Efforts by the government to counter some forms of corruption need to be acknowledged. For instance, in regard to trafficking of persons, the Government has passed legislation (Amendment to Penal Code in 2006 and Amendment to Foreign Employment Act in 2009) and trained police officers to protect Sri Lankans from being trafficked. However, there has been no evidence of any convictions.<sup>469</sup>

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<sup>466</sup> For example, there have been no prosecutions under the Convention Against Torture Act No. 22 of 1994 further to issuing 47 urgent appeals by the Asian Human Rights Commission in 2007, and formal complaints made to the IGP, HRC, and Attorney General. Asian Legal Resource Centre submission to Human Rights Council, 2008.

<sup>467</sup> Asian Legal Resource Centre, February 2008.

<sup>468</sup> Freedom House, 2010.

<sup>469</sup> US Department of State, Trafficking in Persons Report, 14 June 2010.

**Table 10: Scores for Law Enforcement Agencies**

<b>LAW ENFORCEMENT AGENCIES</b>			
<b>DIMENSION</b>	<b>INDICATOR</b>	<b>LAW</b>	<b>PRACTICE</b>
Capacity = <b>25</b>	Resources	-	50
	Independence	25	0
Governance = <b>29</b>	Transparency	25	25
	Accountability	50	25
	Integrity Mechanisms	25	25
Role = <b>25</b>	Corruption Prosecution	25	

### Recommendations

1. Mechanisms must be put in place to ensure appointment of people with integrity to the Public Service Commission (that now handles administration of the police force). Criteria for selecting the persons to the PSC should be objective and transparent.
2. A transparent and effective system of public complaints needs to be set up and implemented.
3. Within the AG’s Department, an independent prosecutor’s office should be established.
4. The AG should always act in the public interest. Where there is a conflict between the public interest and the interests of the ruling regime the AG should represent the public interest. The AG must not be forced to defend the state’s human rights record in international forums.
5. A new office, separate from the AG’s Department, must be established to provide legal advice to the state. It is not possible for a single institution to be legal advisor to the state and custodian of the public interest.
6. Both institutions should take steps to enhance the transparency of their operations and make publicly available the basis of major decisions within each institution.
7. A victim and whistleblower protection programme should be developed.

## 6. THE ELECTION COMMISSION

### SUMMARY

In 2001 Parliament passed a constitutional amendment to set up a powerful and independent Election Commission. The five member commission was to be appointed by the President on the recommendation of the Constitutional Council. The Commission, however, was never established because, as explained before, a previous President objected to one of the nominees of the Constitutional Council.

In the absence of the Election Commission as required by the Constitution, the Commissioner of Elections has continued to discharge its functions, administering and supervising elections at Presidential, Parliamentary, provincial and local government level. This chapter, therefore, considers the work of the Commissioner of Elections although reference is made at several points to the powers and functions of the Election Commission. The 18<sup>th</sup> Amendment to the Constitution, passed into law in September 2010 by a two-thirds majority in Parliament, has repealed the wide powers afforded to the Election Commission during a national election process, under the 17<sup>th</sup> Amendment, by restricting its purview to “matters which are directly connected with the holding of the respective election” and “not connected directly with any matter relating to the public service”<sup>470</sup> The Election Law should also be revised to enable migrant workers and other citizens who are non-resident in Sri Lanka to exercise their franchise.

### STRUCTURE

The Constitution envisages a three member Election Commission and a Commissioner General of Elections.<sup>471</sup> The Commission may also appoint other officers to assist it. The Election Commission is to be appointed by the President upon seeking observations from the Prime Minister; Speaker; Leader of the Opposition; a

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<sup>470</sup> Article 104A, The Constitution of the Democratic Socialist Republic of Sri Lanka, 1978, (amended by the 18th Amendment).

<sup>471</sup> Article 103, The Constitution, 1978, (amended by the 18th Amendment).



nominee of the Prime Minister, who shall be a Member of Parliament; and a nominee of the Leader of the Opposition, who shall be a Member of Parliament.<sup>472</sup>

Since the Election Commission has not been appointed, the current Commissioner of Elections has discharged its functions. In 2003 he applied to the Supreme Court seeking permission of the Court to retire.<sup>473</sup> The Court however, turning down his application said that he could not retire till a new Election Commission is established.<sup>474</sup> According to the Constitution, the Commissioner of Elections would exercise all the powers of the Election Commission till such time as the Commission is established.<sup>475</sup>

At the time of writing, in the absence of the Election Commission, the Commissioner of Elections oversees the conduct of elections. He operates out of the Elections Secretariat in Colombo. He is assisted by two Additional Commissioners, one Deputy Commissioner, and several Assistant Commissioners based both in Colombo and in the 25 administrative districts covering the 22 electoral districts.<sup>476</sup>

## Assessment

### 6.1 Capacity

#### 6.1.1 Resources (practice) - To what extent does the Election Commission (EMB) have adequate resources to achieve its goals in practice?

Every year the Commissioner of Elections is provided with resources through an annual budget and where an election is to be held additional resources are provided to his Department. The amounts spent by the Commissioner are not contained in his annual report to the Parliament.<sup>477</sup>

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472 Article 41 A (1), The Constitution, 1978, (amended by the 18th Amendment).

473 Basil Fernando, UPI Asia, 29 January 2010.

474 "Sri Lanka ex-chief justice says constitutional violations like cancer", Lanka Business online, 9 January 2010; Transparency International Sri Lanka, 'The Forgotten Constitutional Council' – Position Paper, 28 May 2008; Article 104B(4), The Constitution, 1978.

475 Article 28(4), The Constitution, 1978, (amended by the 18th Amendment).

476 Department of Elections, <http://www.slections.gov.lk/contact.html>

477 Government of Sri Lanka, 'Administration Report of the Commissioner of Elections for the Year 2006', June 2007.

The information on resources is mixed. In an interview the Commissioner of Elections observed that the money generally allocated for the conduct of elections is adequate although the sums allocated annually for recurring and capital expenditure is not sufficient.<sup>478</sup> He observed that a recent initiative to computerize the electoral register was hampered by the lack of funds to purchase the necessary equipment.<sup>479</sup> In his 2006 report, though, the Commissioner of Elections notes the substantial support provided by USAID to help computerize the electoral register.

Another respondent, however, suggested that resources for conduct of an election need to be enhanced.<sup>480</sup> He also suggested that a more sophisticated voter data base will help reduce fraud at elections, and higher levels of voter education would also be useful.<sup>481</sup>

According to the Commissioner of Elections there were 72 vacancies in the Department at the end of 2009.<sup>482</sup> Most of the employees of the Department are permanent. In his 2006 report to Parliament, the Commissioner complained about the dearth of experienced senior staff in the department due to a lack of internal opportunities.<sup>483</sup> According to the Commissioner, minorities and women have equal opportunities within the Department.<sup>484</sup> In sum, more than financial constraints, the key obstacle affecting the performance of the Department is the lack of skilled and experienced staff due to a lack of incentives and opportunities to attract the best recruits.

### **6.1.2 Independence (law) - To what extent is the Election Commission independent by law?**

The 17<sup>th</sup> Amendment to the Constitution which was passed in 2001 envisaged the creation of an independent five member Election Commission with wide ranging

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478 Interview with Dayananda Dissanayake, Commissioner of Elections, 20 November 2009.

479 Interview with Dayananda Dissanayake, 20 November 2009.

480 Interview with D.M Dissanayake, National Coordinator, Centre for the Monitoring of Election Violence (CMEV), 26 March 2010.

481 Interview with D.M Dissanayake, 26 March 2010.

482 Interview with Dayananda Dissanayake, 20 November 2009.

483 Government of Sri Lanka, 'Administration Report of the Commissioner of Elections for the Year 2006', June 2007, Section 11.

484 Interview with Dayananda Dissanayake, 20 November 2009.

powers, which was subsequently changed to three members through the 18<sup>th</sup> Amendment.<sup>485</sup> The Commission was to be appointed by the President on the recommendation of the Constitutional Council which was abolished by the 18<sup>th</sup> Amendment, giving the President much wider powers since he now needs only to seek the observations of a Parliamentary Committee.<sup>486</sup> No safeguards to ensure independence of the Commission are in place, with the only disqualifications being elected political office, current government employment or conviction on the grounds of moral turpitude.<sup>487</sup> The Commission's mandate is to ensure that elections and referenda are free and fair. In addition to the Commission, the Constitution also envisages a Commissioner General of Elections who functions under the supervision of the Commission.

The Commission is given wide-ranging powers to ensure that elections are free and fair. It is given the power to prohibit the use of state property either in favor or against a particular candidate. Those in possession of such property are bound to comply with the order of the Commission.<sup>488</sup> The Commission is given the power to issue guidelines to radio, television and newspapers to ensure the conduct of a free and fair election.<sup>489</sup> Specific obligations are imposed on the state-owned Sri Lanka Rupavahini Corporation and the Sri Lanka Broadcasting Corporation to conform to such guidelines issued by the Commission. Where such guidelines are violated, then the Commission may appoint a Competent Authority to take over the management of either corporation in relation to broadcasts that impinge on the election. The duties and functions of the Competent Authority are detailed in the Competent Authority (Powers and Functions) Act No 3 of 2002.

After an election is called, the Commission may notify the Inspector General of Police (IGP) of the police officers required for such election and IGP must ensure that such police officers and other facilities are made available to the Commission.<sup>490</sup>

In its report on the 2010 Presidential election, the Commonwealth expert team commented on the lack of independence of the Commissioner which had serious consequences for the conduct of that election. It helped create conditions for the

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485 Article 103 and 104, The Constitution, 1978, (amended by the 17th and 18th Amendments)

486 Article 103, The Constitution, 1978, (amended by the 17th and 18th Amendments)

487 Article 103, The Constitution, (amended by the 17th Amendment)

488 Article 104B(4), The Constitution, 1978.

489 Article 104b(5), The Constitution, 1978.

490 Article 104C, The Constitution, 1978.

abuse of state resources and a distinctly “unfair environment” during the election campaign.<sup>491</sup>

The provisions in the Constitution that apply for the removal of judges of the Supreme Court and Court of Appeal apply to the removal of a member of the Election Commission.<sup>492</sup> Parliament must provide by Standing Orders for the procedures to investigate allegations of misbehavior or incapacity against a member of the Commission and provide an opportunity for the member to be heard in defence.<sup>493</sup>

The staff at the Commissioner of Elections is recruited by the Ministry of Public Administration and comes under administrative control of the Public Service Commission. The Commissioner himself can only appoint or transfer with the concurrence of the Constitutional Council.

### **6.1.3 Independence (practice) - To what extent does the Election Commission function independently in practice?**

The Commissioner of Elections has complained on occasions that he did not receive the full cooperation of state institutions which were not complying with his guidelines.<sup>494</sup> He has also complained about the failure of state media organizations to comply with his guidelines and the abuse of state resources by state institutions. “The Commissioner has no power to compel the authorities to adhere to the prohibitions, nor to take any punitive action against the offenders. Even the Police Department cannot be asked to ensure that the prohibition orders are complied with.”<sup>495</sup> However, in the run-up to the January 2010 Presidential Election, the Commissioner was successful in preventing the transfer of police and military personnel after the announcement of the election.<sup>496</sup> The Commissioner states that during the war period he did not interfere with the appointment or transfers of military personnel.

According to one of the respondents for this study, while the Commissioner has generally functioned independently there were some issues that recently raised

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491 Commonwealth Secretariat, 2010, pp 10.

492 Article 103(4), The Constitution, 1978.

493 Article 104E (7) and (8), The Constitution, 1978.

494 Commonwealth Secretariat, 2010, pp10.

495 Commonwealth Secretariat, 2010, p.10..

496 Commonwealth Secretariat 2010, pp 20.

concerns about his independence.<sup>497</sup> For example, when the Centre for the Monitoring of Election Violence (CMEV), sought permission to have monitors at counting centres, this was refused by the Commissioner on the basis that there was no space at such centres. The Commonwealth Observer Report also recommended that national observers be permitted to observe the count.<sup>498</sup>

According to the same respondent there are some other practices of the Commissioner that need strengthening. For example, during the conduct of an election there is a high level of reliance on public officers and public resources such as vehicles.<sup>499</sup> The Commissioner acts on complaints provided to him by the officials on duty on the day of the election and if the officials are not independent then all complaints do not get recorded.<sup>500</sup> Similarly, the use of state resources tends to favor those in power, thus providing an unfair advantage.

During the run-up to the January 2010 Presidential election the Commissioner issued several guidelines to the state-owned Sri Lanka Rupavahini Corporation (SLRC) and the Sri Lanka Broadcasting Corporation (SLBC) to provide balanced and impartial coverage to the several candidates contesting the election.<sup>501</sup> After the guidelines were not observed the Commissioner, acting under Article 104 B (5) of the Constitution, appointed a Competent Authority to manage the broadcast of political and other programmes that had an impact on the election.<sup>502</sup> However, the Competent Authority had no impact and the Commissioner subsequently withdrew the Competent Authority. Where the Commissioner could have gone to the Supreme Court to enforce his guidelines he sought not to do so and thereby lost credibility in this regard.<sup>503</sup> The specific obligations imposed on the SLRC and the SLBC have been removed by the 18<sup>th</sup> Amendment, as has the power to appoint the Competent Authority.

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497 Interview with D.M Dissanayake, 26 March 2010.

498 Commonwealth Secretariat, 2010, pp 25-27.

499 Interview with D.M Dissanayake, 26 March 2010; Freedom House, 2010.

500 Interview with D.M Dissanayake, 26 March 2010.

501 Commonwealth Secretariat, 2010, pp 17-19.

502 The Competent Authority (Powers and Functions) Act No 3, 2002.

503 Interview with D.M Dissanayake, 26 March 2010. Centre for Monitoring Election Violence (CMEV), 14 January 2010; "Flip-flops of Elections Commissioner: From Tragedy to Farce", Sunday Times, 7 February 2010.

## 6.2 Governance

### 6.2.1 Transparency (Law) - To what extent are there provisions in place to ensure that the public can obtain relevant information on the activities and decision-making processes of the EMB?

The law stipulates that election results must be made public as soon as they are available.<sup>504</sup> Disclosure of party financing was previously not required by law.<sup>505</sup> However, an amendment passed in 2009 has imposed new obligations on political parties requiring them to submit an audited statement of accounts every year to the Commissioner [See also Chapter 10 of this report].<sup>506</sup> Yet these statements may not include all transactions and may not include all donations given to political parties. Since the statements are to be submitted once a year, they will be available only after the elections are concluded.

While a member of the public may have access to the constitution of a political party on the payment of a fee, there is no provision for the public to access the statement of accounts.<sup>507</sup> However, there is no restriction on the amounts that a candidate may spend on a campaign and no process for monitoring this. According to the Commissioner of Elections, this is a significant gap in the electoral laws of the country.<sup>508</sup>

The Constitution requires the Commissioner to publish in the Government Gazette the number of members for each electoral district soon after the electoral registers for each district is finalized.<sup>509</sup>

### 6.2.2 Transparency (Practice) - To what extent are reports and decisions of the Election Commission made public in practice?

Election results are generally released promptly through live coverage. The current Commissioner holds regular press conferences during an election campaign and is

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504 Parliamentary Elections Act No 1 of 1981, Section 62.

505 Interview with Dayananda Dissanayake, 20 November 2009.

506 Section 8, Parliamentary Elections Act No 1, 1981, (amended by Parliamentary Elections Act No.58,2009).

507 Section 8(7) Parliamentary Elections Act No.1, 1981.

508 Interview with Dayananda Dissanayake, 20 November 2009.

509 Article 98(8), The Constitution, 1978.

accessible to the media.<sup>510</sup> At other times he has been critical of electoral laws and processes and has identified areas of reform. There is an official website that is updated regularly during the period leading up to an election.<sup>511</sup> Every year a draft register of all eligible electors is published and the public is given the opportunity to make corrections. One of the respondents interviewed suggested that there should be a greater level of public awareness when the draft electoral registers are released and the public should be actively encouraged to verify the information.<sup>512</sup>

Dates of elections, acceptance of nomination papers by candidates and other processes in connection with elections are announced in advance and are transparent. There is no dedicated call centre. However, written complaints may be sent to the Commissioner. Overall, there is a high level of transparency within the Department during the period leading up to an election.

In regard to the January 2010 Presidential Election, the counting process was professionally conducted and transparent as candidates' agents were present throughout.<sup>513</sup> However, as mentioned above, the request by several national observers to have monitors at the counting centres (in addition to those at the voting centres) was not accepted by the Commissioner.<sup>514</sup>

Transparency International Sri Lanka, wrote to the Commissioner of Elections in January 2010 seeking the asset declarations of the candidates contesting the January 2010 Presidential Election. There was no response from the Commissioner.

The Election Department website is well-maintained and regularly accessed during election periods. It provides useful and impartial information to those who have access to internet.

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510 Interview with D.M Dissanayake, 26 March 2010.

511 Department of Elections website <http://www.slections.gov.lk>

512 Interview with D.M Dissanayake, 26 March 2010.

513 Commonwealth Secretariat, 2010, pp 25.

514 Interview with D.M Dissanayake, 26 March 2010.

### **6.2.3 Accountability (Law) - To what extent are there provisions in place to ensure that the Election Commission has to report and be answerable for its actions?**

The Election Commission is responsible and answerable to Parliament, and Parliament must provide by way of Standing Orders how this accountability should be exercised.<sup>515</sup> Every year the EC must submit a report to Parliament on its activities. The decisions of the Election Commission (and the Commissioner of Elections) and all irregularities regarding the conduct of a Presidential, Parliamentary, Provincial or local government election may be challenged in the courts. However, the legal burden of proof in the case of an election petition is so high that no petitioner has ever won.

The accounts of the Department are audited every year by the Auditor General. However, these audits do not evaluate performance, but only assess financial conformity.

The Election Commission is required to ensure the enforcement of all laws pertaining to elections and the conduct of referenda. All state entities charged with the enforcement of such laws must cooperate to ensure enforcement.<sup>516</sup>

### **6.2.4 Accountability (Practice) - To what extent does the Election Commission have to report and be answerable for its actions in practice?**

The Election Commission is responsible and answerable to Parliament and Parliament must provide by way of Standing Orders how this accountability should be exercised.<sup>517</sup> The Commissioner of Elections generally has periodic meetings with press, representatives of political parties and others in the period leading up to an

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515 Article 104(3), The Constitution, 1978; Interview with Dayananda Dissanayake, 20 November 2009.

516 Article 104B(2), The Constitution, 1978.

517 Article 104B(3), The Constitution, 1978; Interview with Dayananda Dissanayake, 20 November 2009.



election.<sup>518</sup> Where elections are annulled this is done only after consultation with representatives from political parties.<sup>519</sup>

As relates to the conduct of elections on polling day, reports from Returning Officers avoid identifying problems, as this may lead to political victimization and worse. This results in a discrepancy between the incidents of alleged violations and violence identified by independent observers and election officials.<sup>520</sup> Even at the level of the Commissioner, polling centres are annulled only “if the poll could not commence at the scheduled hour, or if the poll commenced at the scheduled hour but could not be continued until the hour fixed for the closing hour, or if any ballot boxes could not be delivered to the counting officer.”<sup>521</sup>

Alternate dispute mechanisms are not in place during elections, and hence the Police becomes the only means of resolving rival claims. Violence in the run-up to elections is high, but remains concentrated in keenly contested electorates, with opposition candidates alleging that the law enforcement agencies are biased in favour of the ruling party.<sup>522</sup> In this context, the 18<sup>th</sup> Amendment signals even less potential for deterrence on the ground, since the Commission has now no jurisdiction over the Police to ensure a free and fair election.

### **6.2.5 Integrity (Law) - To what extent are there mechanisms in place to ensure the integrity of the Election Commission?**

The Establishment Code contains detailed provisions on the conduct of public sector officers on the receiving of gifts, the use of government funds for private purposes, the release of official information, and participation in political activities.<sup>523</sup> Its provisions would apply to the staff of the Commissioner of Elections. A violation of the Establishment Code could result in an internal inquiry and possibly sanctions

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518 Interview with Dayananda Dissanayake, 20 November 2009.

519 Ibid. This condition, required under section 48 (A) of the Elections (Special Provisions) Act No 3 of 1988 is not adhered to in view of the decision in Supreme Court Fundamental Rights Applications 412/1999 and 640/2000, according to the Commissioner.

520 Centre for Monitoring Election Violence, April 2010.

521 Ibid.

522 Ibid.

523 Chapter XLVII, Volume II, Establishments Code of the Government of the Democratic Socialist Republic of Sri Lanka.

against the public officer concerned. There is no specific Code of Ethics for the Commissioner of Elections or the Election Commission, and the Establishment Code itself is a superannuated document that speaks to an earlier dispensation where public information-sharing and accountability were less important than internal confidentiality, even secrecy.

### **6.2.6 Integrity (Practice) - To what extent is the integrity of the Election Commission ensured in practice?**

In the absence of an independent Election Commission as required under the constitution, the Commissioner of Elections is stretched considerably to ensure that elections are conducted freely and fairly. He is ineffective in controlling the systematic and widespread abuse of the panoply of state resources in campaigning and influencing voters. As observed above, many of his directions to the media, or on the use of state resources, are not complied with. He has failed to seek the assistance of the courts to enforce his directives.

While election staff is generally perceived as impartial, due to the widespread nature of politicization of law enforcement and public service delivery, they are unable to ensure that national and provincial regimes do not enjoy undue advantages in the run-off period. This inability to make any headway with the entrenchment of narrow political agendas has led to apathy and disillusionment of staff, most strikingly expressed in the Commissioner's own public pronouncements.<sup>524</sup>

## **6.3 Role**

### **6.3.1 Campaign regulation (law and practice) - Does the Election Commission effectively regulate candidate and political party finance?**

There is no law that regulates campaign finances and the Elections Commission is not required to play a role in this regard. This is one of the big gaps in the legal framework in Sri Lanka (see chapter on Political Parties).<sup>525</sup> In 2009 an amendment to the elections laws makes it mandatory for political parties to submit an annual audited

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<sup>524</sup> Fernando, Basil, UPI Asia, 29 January 2010.

<sup>525</sup> Interview with Dayananda Disسانayake, 20 November 2009.

statement of accounts. However, there is no restriction on the amounts spent at elections. The Commissioner himself is of the view that “all candidates, both winning and unsuccessful, should be compelled to declare to the Commission the[ir] campaign expenses with under-receipts for donations received and expenses incurred within 60 days after declaration of results of an election.”<sup>526</sup>

### **6.3.2 Election Administration (law and practice) - Does the Election Commission effectively oversee and administer free and fair elections and ensure the integrity of the electoral process?**

The record of the Commissioner of Elections in administering free and fair elections has been a good one. However, a concern is his inability to enforce directions he makes to the state media to ensure that its coverage is unbiased and does not favour any party or candidate. His appointment of a Competent Authority for the state media at the January 2010 election was ineffective and he was unwilling to go to court to enforce his directions.

According to the Competent Authority (Powers and Functions) Act, No 3 of 2002, the Competent Authority has ‘the discretion to advise the relevant Minister of the extent to which the guidelines have been contravened, as well as to seize broadcasting apparatus, acquire property and prohibit the broadcasting of any material considered to be counter to the public interest.’<sup>527</sup> The Authority also possesses general powers to take any action it deems necessary to ensure a free and fair election. However on the contrary the Elections Commissioner opted to dissolve the Competent Authority instead of resorting to legally mandated processes.<sup>528</sup>

His directions on the misuse of state resources have also been largely ignored by public officials. These included non-implementation of election regulations in relation to public posters and cut-outs, the use of government vehicles and buses for campaigning by the incumbents, the use of public media as propaganda tools, and the misuse of official security details.

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<sup>526</sup> Dayananda Dissanayake, Commissioner of Elections, written submission, 09 March 2011.

<sup>527</sup> Pinto-Jayawardene, 08 February 2010.

<sup>528</sup> Ibid.

The electoral register is updated every year and voters are given an opportunity to peruse the register before it is finalized. However, at every election there are allegations from voters that either their vote had been cast by someone else or that their name was not on the register when they went to vote.<sup>529</sup> In 2010 there have been several problems with regard to the votes of the large number of Internally Displaced Persons (IDPs), many of whom do not possess ID cards and/ or are living in camps. At the recent Presidential and Parliamentary elections ‘cluster booths’ were established by the Commissioner of Elections and the IDPs were transported in buses to the polling stations to cast their vote. However, according to the Commonwealth team that monitored the Presidential Elections the transport facilities were inadequate and there were considerable delays in the transportation of IDPs.<sup>530</sup>

Many of the estimated 200,000 displaced persons were not on the electoral list. A large number did not register to vote at the recent Presidential and Parliamentary elections, since many of them were unaware that they had the right to vote.<sup>531</sup> The Commissioner of Elections states that “it is not correct that 200,000 displaced persons are not on the register. Names of those who were registered in the voters’ list before they were displaced were not deleted but remained in the register. However, due to the situation in the North and the East, displaced persons who qualified to be registered after becoming displaced and continuing to live in the war-torn areas in the North and the East may not have had the opportunity to be enumerated at the subsequent annual revisions.”<sup>532</sup> Voter turnout in Mullaitivu and Kilinochchi districts in the Northern Province of Sri Lanka, comprised largely of resettled IDPs was below 17%.<sup>533</sup> Outdated voter registration lists resulted in many voters being denied their right to vote. According to Mr. Keerthi Thennakoon, the Executive Director of the Campaign for Free and Fair Elections, a national election monitoring body, “many IDPs in camps in the North did not have the right documentation for voting as the election officials were unable to give the IDPs clear directions about what to do when their camp identification was not accepted.”<sup>534</sup>

National observers are permitted to observe the voting process. However, they were not allowed into the counting centres at the 2010 Presidential and Parliamentary

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529 Jayasekera, A Sandun and Perera Yohan, 09 April 2010.

530 Commonwealth Secretariat, 2010, pp 25.

531 Centre for the Monitoring of Election Violence, 22 January 2010.

532 Dayananda Dissanayake, *op. cit.*

533 “Low voter turn-out among IDPs”, Integrated Regional Information Network, 12 April 2010.

534 *Ibid.*

Elections. A specific request was made by polls monitors for a presence at counting centres during the April Parliamentary elections, but this was turned down by the Commissioner.<sup>535</sup> Representatives of the candidates are, however, permitted to observe the counting process.

At the January 2010 Presidential Election there were several allegations levelled against the Commissioner of Elections. It was alleged that there was a delay between the final tabulation of results and its release to the media and a lack of transparency in relation to this particular part of the electoral process. The Commonwealth Report, however, found that the counting process was professional and transparent.<sup>536</sup>

It was also alleged that the Commissioner did not fully utilize the powers vested in him by the Constitution especially in the way the State media misused its resources to support the incumbent candidate. His appointment of a Competent Authority to oversee the work of the Sri Lanka Rupavahini Corporation and the Sri Lanka Broadcasting Corporation and his subsequent revocation of this appointment drew criticism from civil society as being a weak response to what was a clear abuse of State media resources.<sup>537</sup>

In its report on the 2010 Presidential Election, the Commonwealth Team found that the State media was biased heavily in favour of the incumbent.<sup>538</sup> It cited a report by Reporters Sans Frontiers (RSF) which found that during a seven-day period ending on 24<sup>th</sup> January 2010, 96.7% of the news and current affairs coverage on the state-owned television stations Rupavahini and the Independent Television Network (ITN), were favourable to the incumbent President. The major opposition candidate received only 3.3% of the coverage.<sup>539</sup> The Report also found that senior positions at three state-owned broadcast stations were held by political organisers of the ruling party.<sup>540</sup>

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535 Interview with D.M Dissanayake, 26 March 2010.

536 Commonwealth Secretariat, 2010, pp 25.

537 Interview with D.M Dissanayake, 26 March 2010.

538 Commonwealth Secretariat, 2010, pp 17-19.

539 Commonwealth Secretariat, 2010, pp 18.

540 Commonwealth Secretariat, 2010, pp 17.

**Table 11: Scores for Election Commission**

<b>ELECTION COMMISSION</b>			
<b>DIMENSION</b>	<b>INDICATOR</b>	<b>LAW</b>	<b>PRACTICE</b>
Capacity = <b>42</b>	Resources	-	50
	Independence	50	25
Governance = <b>46</b>	Transparency	50	50
	Accountability	50	50
	Integrity Mechanisms	50	25
Role = <b>13</b>	Campaign Regulation	0	
	Election Administration	25	

## Recommendations

1. The Election Commission should be established as a matter of the highest priority. The wide powers granted to the Commission during elections as contained in the 17<sup>th</sup> Amendment and removed in the 18<sup>th</sup> Amendment should be restored. Selected Police personnel should be released to the Commission to implement the relevant laws during national elections.
2. Political parties should disclose their sources of funding. The audited statements of accounts that parties must submit to the Election Commission should disclose their sources of funding and the amounts spent on campaign financing. Members of the public should be able to access such statements of accounts on the payment of a nominal fee.
3. Elections should be conducted under a neutral caretaker government that will ensure that state resources are not misused and the state media are not partial to any particular party or candidate.
4. There must be a ceiling on campaign finance and this must be monitored by the Election Commission.
5. The State media should be freed from state control and placed under the control of an independent Board of Trustees.
6. Human and financial resources for the Commissioner of Elections (and the Commission when it is established) must be increased. Financial independence should be ensured without having to depend on the Treasury for funds.

7. Recruitment of staff for the Commission should be from the State Services. Selections should be made by the Commission.
8. The Commissioner of Elections (and the Commission when it is established) must engage in voter education. And greater public awareness campaigns at the time the draft electoral register is released and during the period leading up to an election.
9. The voting system should be modernised. The system should provide more data on candidates in an easily accessible form.
10. Migrant workers and others not resident in Sri Lanka at the time of elections should be permitted to vote.
11. Asset declaration legislation covering election candidates should be enforced. Declaration of assets and liabilities of candidates should be provided at the time of submission of nominations

## 7. OMBUDSMAN / HUMAN RIGHTS COMMISSION

### SUMMARY

Complaints mechanisms are important elements of the National Integrity System as they provide a means of redress for aggrieved citizens. In Sri Lanka, there are two institutions that have been created specifically for the purpose of handling public complaints and grievances against state institutions and state officials:

The ombudsman (or Parliamentary Commissioner for Administration – we will use the term ombudsman) and the Human Rights Commission (HRC). While both institutions receive complaints about maladministration, the HRC also conducts inquiries (suo moto and upon complaints) into human rights violations caused by the State. In addition, the HRC can initiate litigation in case of infringement of fundamental rights; and has a pro-active role in monitoring, reviewing of procedures, advising government and human rights education. The Ombudsman entertains complaints both from the public and from the Parliamentary Petitions Committee (PPC).

Regrettably, this study finds that both institutions are not able to exercise their functions. They are insufficiently resourced, and have limited credibility. While mechanisms for accountability and integrity within the institutions exist and are applied, both institutions have failed to provide an effective relief mechanism for citizens, because of their lack of power and influence as well as their proximity to the Government.

The HRC is seen to be ineffective because of the lack of independence of the Commissioners as well as the apparent unwillingness of the HRC to exercise the full extent of its powers and to tackle the most serious human rights issues. Additionally, commissioners have not been appointed since May 2009 up to the time of writing this report. Since the constitutional changes of September 2010, the Commissioners are to be directly appointed by the President. The Secretary to the Commission refused to be interviewed for the NIS Assessment.<sup>541</sup> No reasons were given.

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<sup>541</sup> Telephone conversation with Chandra Ellawala, Secretary of the Human Rights Commission, Colombo, 15 June 2010.



The position of the Ombudsman was vacant from 6 February to 23 June 2010.<sup>542</sup> The previous Ombudsman had been in office since 2001, and has been interviewed for this study.

## STRUCTURE

The HRC's mandate is to prevent human rights abuse, to advise Government, to monitor detention centres and prisons, to deal with complaints including conducting inquiries suo moto upon complaints by petitioners or upon request by the Supreme Court, and to record arrests under the Prevention of Terrorism Act. The HRC has a Head Office in Colombo and ten regional offices throughout the country. It is headed by five Commissioners and has four units: The Inquiries and Investigations Division, the Monitoring and Review Division, The Education and Special Programmes Division as well as foreign-funded projects for disaster relief and for Internally Displaced Persons (IDPs).<sup>543</sup> The Commissioners work part-time only. The Commission has a total staff of 208.<sup>544</sup> In May 2009, the term of office of the Commissioners had elapsed, and no Commissioners have been appointed at the time of writing of this report. The Commission is currently headed by its Secretary.

The Ombudsman deals with complaints by the public and by the Parliamentary Petition Committee. He has powers to acquire information but cannot conduct investigations.<sup>545</sup> The Ombudsman's office is located in Colombo and has a staff of ten, consisting of the Ombudsman, and administrative officer, six clerical assistants and three minor staff.<sup>546</sup> This means the Ombudsman has no qualified technical staff to support his work.

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542 Mr Tissa Ekanayake, a former high court judge, has been appointed as Ombudsman on 23 June 2010.

543 Human Rights Commission, 2008.

544 Ellawala, Chandra, no date.

545 Section 15(3) and 16, Parliamentary Commissioner for Administration Act No 17, 1981.

546 Office of the Parliamentary Commissioner for Administration, 2008 p.16. For an overview on Ombudsman's functions, powers, structures and rules see website of the Asian Ombudsman Association at <http://asianombudsman.com/>

## ASSESSMENT

### 7.1 Capacity

#### 7.1.1. Resources (practice) - Scoring question: To what extent do the Ombudsman and the HRC have adequate resources to achieve their goals in practice?

By law, the state shall provide adequate funds to enable the HRC to discharge its functions.<sup>547</sup> However, the HRC appears to be chronically underfunded. In 2006, the HRC had received Rs.74 million [US\$0.66 million] from the Sri Lankan government and 55 million [US\$0.49 million] from (foreign) donors, whereas in 2007 it received Rs.94 million [US\$0.84 million] from government and 54 million [US\$0.48 million] from donors.<sup>548</sup> In 2008, the government grant remained at the same level while the income from donors declined.<sup>549</sup> According to a previous Commissioner, the Commission receives only 30-40% of what is necessary, and Commissioners spend most of their time fundraising.<sup>550</sup> Lack of human, financial and infrastructural resources, especially in the regional offices and particularly in conflict-affected areas, hampers the capacity of the HRC.<sup>551</sup> Tensions between the Colombo Head office and the regional offices reportedly led to the latter being prevented from disclosing information to the public.<sup>552</sup> None of the five Commissioners works full-time, and staff cadre is below strength. Low budget for rent means that regional offices are often situated outside of city centres, thus hampering accessibility, and limited availability of official transport results in low capacity to perform monitoring functions.<sup>553</sup>

None of the Commissioners appointed for the last regular term (2006-2009) had a human rights background, a fact that reportedly hampered capacity to follow through on the Commission's mandate and to guide its staff. Staff competency is mixed, and a significant number of external consultants are hired for projects.<sup>554</sup>

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547 Section 29(1), Human Rights Commission of Sri Lanka Act No. 21,1996.

548 Human Rights Commission, 2008.

549 Human Rights Commission, 2008, pp. 40f.

550 Interview with Deepika Udagama, Academic, Former Commissioner of the Human Rights Commission, 18 June 2010.

551 Law & Society Trust, August 2009.

552 International Crisis Group, 14 June 2007.

553 Law & Society Trust, 2009, pp 15.

554 Interview with Deepika Udagama, 18 June 2010.

Compared to the HRC, the ombudsman office's resources are very modest. The ombudsman's allocation was Rs.6 million [US\$538,213] in 2009, of which 4,9 million [US\$43,954] has been spent.<sup>555</sup> In 2008, 6,1 million were allocated and 5,7 million spent.<sup>556</sup> The Ombudsman does not have branch offices, thus accessibility is limited. Though the approved cadre is 30, the Ombudsman's office currently only has a staff of 10 (excluding the Commissioner), of which 9 are assistants or minor staff. Vacancies are difficult to fill as there are no extra allowances paid, as in other Commissions.<sup>557</sup> Importantly, the position of Deputy Ombudsman could not be filled, and, therefore, all complaints have to be handled by the Ombudsman himself. Staff competency is below optimum, and as in other pillars, training opportunities are provided through the State Management Assistant Service.<sup>558</sup>

### **7.1.2 Independence (law) - Scoring question: To what extent are the Ombudsman and Human Rights Commission independent by law?**

The HRC of Sri Lanka is a statutory institution created by an Act of Parliament in August 1996.<sup>559</sup> The principle of independence of the HRC was enshrined in the Sri Lankan Constitution in 2001, with the 17<sup>th</sup> Amendment that put in place a mechanism (through a Constitutional Council) to ensure that appointments to the Commission are done without interference from the Executive.<sup>560</sup> However, this legislation has been overruled by the 18<sup>th</sup> Amendment of September 2010 that gives the Executive power to appoint Commissioners, with the option to consult an ineffectual Parliamentary Council.

The HRC can hire its own staff; recruitment is done through open advertisement and competition, and public servants may be seconded from government service. The term of office of the commissioners is three years, commissioners are eligible for re-appointment and removal is only possible on qualified criteria such as insolvency, conflict of interest through paid employment, infirmity etc, by the President or

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555 Interview with Dr. R.B. Ranarajah Former Ombudsman, 06 January 2010.

556 Office of the Parliamentary Commissioner for Administration, 2008, p.17.

557 Office of the Parliamentary Commissioner for Administration, 2008, p.16.

558 Interview with R.B Ranarajah, 06 January 2010.

559 Human Rights Commission of Sri Lanka Act No. 21, 1996.

560 Article 41B, The Constitution of the Democratic Socialist Republic of Sri Lanka Sri Lanka, 1978.

Parliament.<sup>561</sup> Commissioners' salaries are voted by Parliament and charged to the Consolidated Fund – not to any department or Ministry.<sup>562</sup> Salaries are usually complemented by other sources of income, as Commissioners are not appointed on a full-time basis. Commissioners and officers are immune from criminal and civil prosecutions for acts done in good faith while discharging their function, except for contempt.<sup>563</sup>

By law, the Ombudsman's Office is less independent than the HRC. The Office was created through the Sri Lanka's Constitution of 1978. According to the Act of 1981, amended in 1994, the Ombudsman can entertain petitions referred to him by the Public Petitions Committee (PPC) of the Parliament, or from members of the public directly.<sup>564</sup> The Ombudsman is appointed by the President<sup>565</sup> and has no fixed term of office. He can hold office until turning 70 years of age.<sup>566</sup> Removal procedures and immunity are stipulated in the law in same way as for the HRC officers.<sup>567</sup> The Ombudsman has no control over his staff as they are recruited by the State Management Assistant Service and belong – administratively – to the Ministry of Public Administration, i.e. they can be transferred to other departments at any time.<sup>568</sup>

### **7.1.3 Independence (practice) - To what extent are the Human Rights Commission and Ombudsman independent in practice?**

The HRC and ombudsman are not independent in practice. In case of the HRC, the chairman and commissioners were directly appointed by the Sri Lankan President in May 2006, contrary to the Constitutional stipulation that their appointments should be approved by the Constitutional Council. This practice has been a major reason for the downgrading of Sri Lanka's HRC status from A to B by the International Coordinating Committee (ICC) of the UN National Institutions for the Promotion

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561 Human Rights Commission of Sri Lanka Act No 21, 1996.

562 Section 8, HRC Act, 1996.

563 Section 26, HRC Act, 1996.

564 Parliamentary Commissioner for Administration Act No 17, 1981; Amendment Act No 26, 1994.

565 Article 156(2), The Constitution, 1978.

566 Section 3, Parliamentary Commissioner for Administration Act, 1981.

567 Article 156(4), The Constitution, 1978; Section 21, Parliamentary Commissioner for Administration Act, 1981.

568 Iqbal, M.C.M, No date.

and Protection of Human Rights<sup>569</sup> in 2007. The B status means that Sri Lanka's HRC does not fully comply with the UN Paris Principles that lay out standards of competence, independence and methods of operation for Human Rights Commissions<sup>570</sup>, and that it cannot vote in international meetings. The second reason for the downgrading has been that "the Commission did not take measures to ensure its independent character and political objectivity, as required by the Paris Principles", and the third reason was the failure to issue reports.<sup>571</sup> The B status has been reconfirmed in 2009.<sup>572</sup>

Another factor that potentially compromises the Commission's independence is its financial dependency on foreign donors that may have an influence on the priorities of the HRC.<sup>573</sup> The lack of independence of the HRC is seen as a major reason for its lack of effectiveness and credibility, and for its apparent unwillingness to acknowledge and deal with gross human rights abuses that are reported by other organizations.<sup>574</sup> It is also seen to be a reason for its inability to implicate law enforcement entities in its investigations.<sup>575</sup>

Lack of independence is manifest in the HRC's unwillingness to exercise the full gamut of power and confront the state in the case of sensitive issues, for example where security forces are involved in human rights abuses.<sup>576</sup> This attitude might also be a result of obstruction by the security forces and insufficient support from the government.<sup>577</sup>

Whether complaints are filed or not depends largely on the local political situation. For example, abductions are unlikely to be reported to the HRC if perpetrators are

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569 This international body regulates national human rights organizations. It is attached to the UN Office of the High Commissioner for Human Rights in Geneva.

570 Paris Principles. UN General Assembly: 85th plenary meeting 20 December 1993.

571 Briefing Note for the Sub-Committee to Consider the Accreditation Status of the Sri Lanka Human Rights Commission, March 2009.

572 Law & Society Trust, 2009: 15; Amnesty International, 2009, UN, May 2008.

573 Law and Society Trust, 2009, pp 15.

574 Human Rights Watch, March 2008; US Department of State, Human Rights Report Sri Lanka, 2009; Amnesty International, Human Rights Report, 2009.

575 Law & Society Trust 2009, pp 38.

576 Interview with Deepika Udagama, 18 June 2010.

577 Human Rights Watch, 2008, pp. 103.

politically connected. Obviously, victims of abuse will only lodge a complaint if they feel that the HRC will institute an impartial investigation.<sup>578</sup>

These issues affect the Ombudsman's Office to a reduced extent, due to the less controversial nature of complaints. Complaints can be lodged without fear – however, lack of responsiveness by relevant Departments and Ministries indirectly affects the independence of the Ombudsman's Office.<sup>579</sup> Also, the lack of control over its own staff severely hampers its independence.<sup>580</sup> The Ombudsman is not considered independent, neither by law nor in practice.

## 7.2 Governance

### **7.2.1 Transparency (law) - To what extent are there provisions in place to ensure that the public can obtain relevant information on the activities and decision-making processes of the Human Rights Commission and Ombudsman?**

There is no Right to Information Law in Sri Lanka, and the relevant Acts have no explicit provisions that ensure access to information on decision-making processes and activities, other than through the annual reports. Both the HRC and the Ombudsman have to submit an annual report to Parliament, with details about action taken in respect to all matters referred to them in the preceding calendar year. There is no legal requirement for the Ombudsman's report and HRC reports to be published.

In addition, the HRC may submit periodic or special reports to Parliament in respect of other particular matters.<sup>581</sup> While the duty to maintain secrecy is enshrined in the Ombudsman Act,<sup>582</sup> there is no clause on confidentiality in the HRC Act. There is no regulation that requires the involvement of the public in the HRC and Ombudsman affairs, which effectively means that public scrutiny is not possible. Members of the

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578 Interview with Deepika Udagama, 18 June 2010.

579 Interview with R.B. Ranarajah, 06 January 2010.

580 Interview with R.B. Ranarajah, 06 January 2010.

581 Section 30, HRC Act, 1996; Section 18, Parliamentary Commissioner for Administration Act, 1981.

582 Section 6, Parliamentary Commissioner for Administration Act 1981.

HRC that are appointed by the President, and - as well as the Ombudsman - are bound to declare their assets under the Assets Declaration Law.<sup>583</sup>

### **7.2.2 Transparency (practice) - To what extent is there transparency in the activities and decision-making processes of the Human Rights Commission and Ombudsman in practice?**

The latest annual report of the HRC covering the year 2008 was published in late 2010; the previous annual report to Parliament was issued in 2008 and covered the years 2006-2007.<sup>584</sup> The 2008 annual report has a greater level of detail in comparison to earlier reports, and is very user friendly. Annual reports have been criticized for their primary focus on activities and exclusion of analyses. In its review of the accreditation of the HRC in 2009, the Law & Society Trust (Sri Lanka) and FORUM ASIA (Thailand) while welcoming the publication of the 2008 report, raised their concerns about the HRC's "unwillingness to even acknowledge the scale and seriousness of the human rights crisis in Sri Lanka".<sup>585</sup> Another weakness of the report is that it only gives aggregated figures on complaints, so that the proportion of administrative complaints against complaints on torture, disappearances etc cannot be ascertained.<sup>586</sup> Some key reports, such as the findings of the inquiry into the massacre of 17 aid workers in Muttur in 2006 have not been made available to the public.<sup>587</sup>

The HRC website, revamped in 2010, provides very good access to reports, information on training programmes, statistics of complaints and well complaint procedures.<sup>588</sup> Those Sri Lankans that have internet access are therefore provided a good opportunity to access HRC documents. Sinhala and Tamil versions could not be accessed at the time of writing this report. Sri Lankans without access to internet

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583 Section 2, Declaration of Assets and Liabilities, Act no 1, 1975 (amended 1988).

584 Human Rights Commission of Sri Lanka website at [http://hrcls.lk/english/?page\\_id=135](http://hrcls.lk/english/?page_id=135)

585, Law and Society Trust and FORUM ASIA submission to the Sub-committee on accreditation (SCA) of International Coordinating Committee (ICC) of National Institutions for the Promotion and Protection of Human Rights, March 2009.

586 Law and Society Trust and FORUM ASIA, March 2009.

587 Law and Society Trust, 2009, p 39.

588 Human Rights Commission of Sri Lanka website at <http://www.hrcls.lk/>

appear to have limited access to HRC documents, due to poor filing practices and poor service orientation.<sup>589</sup>

To what extent the public and civil society are involved in designing activities of the Commission depends on the Commissioners. Overall, consultation and cooperation with civil society organizations has been poor in recent years. The strained relationship between the HRC and human rights organizations since 2006 has been described as “the direct result of (the Commissioners’) unconstitutional appointment”.<sup>590</sup> The need for maintaining “consistent relationships with civil society”, in line with the Paris principles had been flagged in the General Observations of the ICC-SCA in June 2009.<sup>591</sup>

The annual report of the Ombudsman has a detailed breakdown of complaints by region, gender and month, and shows how complaints have been resolved. The report also provides a detailed analysis of the nature of the complaints and the institutions against which complaints were lodged.<sup>592</sup> However, the report is not published and cannot be accessed by the public, except for academic purposes if the Commissioner so agrees.<sup>593</sup> The Ombudsman Office does not have a website.

To improve access to his services, the Ombudsman holds circuit hearings in the provinces. Seventeen circuit hearings were held in 2008, enabling the hearing of complaints and arbitration on the spot, with public officers being available as respondents.<sup>594</sup>

### **7.2.3 Accountability (law) – To what extent are there provisions in place to ensure that the Human Rights Commission and Ombudsman has to report and be answerable for its actions?**

By law, both HRC and the Ombudsman are answerable to Parliament. However, there is no legal obligation for Parliament to debate the reports of HRC and the Ombudsman. There is no special appeal process, but if a petitioner is not satisfied

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589 Interview with Deepika Udagama,, 18 June 2010.

590 Law & Society Trust, 2009, pp.23.

591 ICC SCA, June 2009.

592 Office of the Parliamentary Commissioner, 2008.

593 Interview with RB Ranarajah, 6 January 2010.

594 Office of the Parliamentary Commissioner, 2008, p. 4.



with the HRC recommendations, he/she can file a separate case before the courts.<sup>595</sup> If the Ombudsman decides not to take up a case, or to discontinue an investigation, no appeal is possible.<sup>596</sup> There is no regulation providing whistleblower protection in Sri Lanka.

#### **7.2.4 Accountability (practice) - To what extent do the Human Rights Commission and Ombudsman have to report and be answerable for their actions in practice?**

In practice, there appears to be little interest both by the legislature and the public in the activities of HRC and Ombudsman.<sup>597</sup> The HRC reports to Parliament by submitting its annual reports. However, there is no parliamentary record of a debate of this report. Recommendations and reports on special inquiries are mostly not accessible to the public. According to an earlier Commissioner, little interest was shown by policy makers in the HRC reports.<sup>598</sup>

The HRC's engagement with the United Nations has been limited, it has not submitted reports to the Human Rights Council's Universal Periodic Review in 2008 and has not submitted any report to UN Special Procedures Mandate Holders.<sup>599</sup>

The Ombudsman annual reports have been submitted in time and have a higher level of detail and analysis than the HRC report. The report gives statistics of complaints by month, gender, district, subject of complaint, etc. For example, the 2008 annual report shows that the highest number of complaints was made against the officers of the Ministry of Public Administration and of the Ministries of Education and Higher Education.<sup>600</sup> However, there is no track record of this report being acknowledged or debated, and the report is not accessible to the public.

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595 Interview with Deepika Udagama, 18 June 2010.

596 Section 14, Parliamentary Commissioner for Administration Act, 1981.

597 Interview with Deepika Udagama, 18 June 2010.

598 Interview with Deepika Udagama, 18 June 2010.

599 Law and Society Trust, 2009, pp 17.

600 Office of the Parliamentary Commissioner for Administration, 2008.

### **7.2.5 Integrity mechanisms (law) - To what extent are there provisions in place to ensure the integrity of the Human Rights Commission and Ombudsman?**

Integrity can be defined in narrow administrative terms, and in terms of its broader ethical dimensions. Administratively, commissioners as well as HRC and ombudsman staff are bound by the Establishment Code that regulates acts such as receiving gifts and hospitality, conflict of interest, political activities etc. Also, officers are bound by their Official Oath.<sup>601</sup> The Code however does not specify sanctions for non-compliance. A specific Code of Conduct or ethical guidelines exists neither for HRC nor for the Ombudsman. HRC officers have an obligation to communicate the recommendations of the Commission to the aggrieved party and the relevant public institution, while the Ombudsman does not.<sup>602</sup> Confidentiality is not guaranteed by law for HRC, but the Ombudsman is bound to maintain secrecy and not to divulge any information in the exercise of his duties under the Act.<sup>603</sup>

### **7.2.6 Integrity mechanisms (practice) - To what extent is the integrity of the Human Rights Commission and Ombudsman ensured in practice?**

As outlined above, integrity within the institutions of HRC and Ombudsman appears to be less relevant in the light of the limited role that both institutions play in the National Integrity System.

In the broader ethical framework, a lack of moral commitment to human rights by the HRC officers has been observed. According to a former Commissioner, the lack of human rights orientation of HRC officers has been a major reason for its lack of effectiveness. Lack of human rights orientation and reluctance to implicate some authorities may have led to a number of cases not being entertained, and in other cases there have been allegations that due to close relationship with law enforcement authorities, certain staff officers have covered up violations.<sup>604</sup> Also, there have been allegations of HRC officers wittingly or knowingly divulging the identity of complainants to the police, with potentially serious consequences for the complainant,

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601 Article 61A, The Constitution, fourth schedule.

602 Section 15, HRC Act, 1996.

603 Section 6, Parliamentary Commissioner for Administration Act, 1981.

604 Interview with Deepika Udagama, 18 June 2010.

especially when the perpetrator is a law enforcement officer.<sup>605</sup> In some cases internal inquiries have been held and disciplinary action has been taken,<sup>606</sup>

To address these attitudinal challenges, the HRC has conducted a number of human rights training courses for its staff prior to 2006.<sup>607</sup>

The Ombudsman's office has not been subject of such criticism. Rather than its integrity, it is the lack of influence and power that has been identified as the cause of ineffectiveness.

## 7.3 Role

### 7.3.1 Investigation (law and practice) - To what extent is the Human Rights Commission and Ombudsman active and effective in dealing with complaints from the public?

The HRC's mandate is broader than just dealing with complaints; thus, effectiveness must be assessed against all its powers, i.e. conducting inquiries suo moto, upon complaints by petitioners or upon request by the Supreme Court, advising Government, recording arrests under the Prevention of Terrorism Act, monitoring detention centres and prisons and preventing human rights abuse. Some of the weaknesses of the HRC appear to originate from the mandate itself that is not entirely in line with the responsibilities for Human Rights Institutions identified in the Paris Principles. For example, the Commission is not required to publicise its recommendations and opinions.<sup>608</sup> The Commission's mandate is not confined to fundamental rights as defined in the Sri Lankan Constitution but in practice the Commission generally deals only with the rights guaranteed under the Constitution. Another shortcoming is the lack of power for the Commission to enforce its own recommendations.<sup>609</sup> Also, there is no statutory requirement for public authorities to cooperate with the HRC.

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605 Law and Society Trust, 2009, p.19.

606 Interview with Deepika Udagama, 18 June 2010.

607 Interview with Deepika Udagama, 18 June 2010.

608 Law and Society Trust, 2009, p.16.

609 Law and Society Trust, 2009, p.21.

The process of lodging complaints is straightforward: Complaints to the HRC can be made by filling in a questionnaire that is then screened by an investigating officer who ascertains whether other government institutions might deal with the complaint. If not, the case is registered and forwarded to a legal officer (Inquiries and Investigations). Issues are settled, framed toward inquiry and determination by the Commission, or referred to the relevant governmental institution or official for necessary action. The regional offices conduct preliminary investigations, but the final determination remains the prerogative of the central Commission.<sup>610</sup> The HRC runs a 24-hour hotline that people can call if they have concerns about someone who has been taken into custody.<sup>611</sup> In 2008, the hotline has received approximately 8,000 complaints.<sup>612</sup>

In 2006 the HRC registered 13,723 complaints; in 2007, the number of complaints was 15,526, but these figures include a significant number of backlog cases.<sup>613</sup> In 2008 the Commission received 6,574 Human Rights-related complaints.<sup>614</sup> In the past two years, the HRC has observed a significant drop in the number of human rights violation complaints according to the Commission's Secretary.<sup>615</sup> The drop in complaints could be attributed to a decline in human rights violations after the victory of the Sri Lankan Army over the Tamil Tigers in May 2009, or to the declining public faith in the Commission. In the first quarter of 2010, the Head Office in Colombo received 1,492 complaints that could not be dealt with in the absence of Commissioners and Chairman.<sup>616</sup> The biggest issue with regard to the effectiveness of the HRC is, in its own words, the "non-implementation of recommendations".<sup>617</sup>

Under the HRC Act, the Supreme Court of Sri Lanka can refer fundamental rights applications to the HRC. In 2006-2007, the HRC concluded 23 recommendations to

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610 Human Rights Commission, 2008.

611 Ellawala, Chandra, no date.

612 Human Rights Commission, 2010.

613 Human Rights Commission, 2008, p. 4.

614 Human Rights Commission, 2010.

615 "Human Rights Commission reports: Steep drop in HRV", Daily News, 05 April 2010.

616 "Operations of Sri Lanka's key independent commissions hampered" Colombopage, 02 May 2010.

617 Human Rights Commission, 2010, p. 9.

the Supreme Court.<sup>618</sup> Recommendations should be in the public domain but are mostly not traceable.<sup>619</sup>

The Commission also initiated inquiries, namely into the massacre of 17 aid workers in 2006 in Muttur, and into complaints by detainees of the Boossa Army camp. On 15 October 2007, the Commission submitted a report on 2210 cases of disappearances from 1980-1991 to the Presidential Secretariat.<sup>620</sup> None of these reports have been made public.

In addition, the HRC reportedly monitored police stations and prisons, children's homes and detention centres, and made numerous recommendations to the authorities. Defaulters who failed to act on the recommendation (66 in 2007) were reported to the President.<sup>621</sup> However, there appears to be no record of action taken, or of referral to Parliament.<sup>622</sup>

An important aspect of the HRC is education and training, with a focus on child rights, migrant workers rights, women's rights and prevention of torture. Major training programs have been conducted for army personnel and police officers, as well as with IDPs.<sup>623</sup> Human rights awareness programmes have focused on children and women's rights, human trafficking, disaster management and sexual abuse.<sup>624</sup>

Effectiveness of the HRC appears to be stronger at regional level, with some committed officers trying to assist families of the 'disappeared' and other victims.<sup>625</sup> Tensions reportedly exist between the HRC Colombo office and regional branches in the North and East, with staff of regional offices allegedly being instructed not to release any statistics and information to NGOs without written approval of the head office.<sup>626</sup>

Overall, the law is quite strong and gives the HRC a large number of powers. However, the key problem appears to be that the HRC (including previous HRCs)

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618 Human Rights Commission, 2010, p 4.

619 Interview with Deepika Udagama, 18 June 2010.

620 Human Rights Commission, 2010, p. 5.

621 Human Rights Commission, 2010, p.4.

622 Interview with Deepika Udagama, 18 June 2010.

623 Ellawala , Chandra, no date.

624 Human Rights Commission, 2010, p. 4

625 Interview with Deepika Udagama, 18 June 2010.

626 International Crisis Group, 14 June 2007.

does not implement the full gamut of its powers. The Commission apparently does not use its powers to the maximum, and sometimes deliberately curtails the scope of its interventions. For example, it appears that the Commission is not being informed about arrests and detentions made under the Prevention of Terrorism Act, as required by law.<sup>627</sup> According to its statutes, those who arrest under Emergency Regulations and the Prevention of Terrorism Act and fail to report to the HRC are guilty of an offence and can be fined or imprisoned. However, the law does not appear to be enforced. Another example is the HRC's decision to drop investigations into 2,127 complaints of past allegations of disappearances in the midst of fresh allegations of disappearances being made in the North and East of Sri Lanka.<sup>628</sup> The UN Working Group on Enforced or Involuntary Disappearances noted in its 2007 report that the commission had reportedly "completely abdicated" from its responsibility to "inquire into infringement of fundamental rights and to make appropriate redress".<sup>629</sup>

Also, in 2007 the Commission determined that complaints would only be entertained within three months of the alleged abuse, even though there is no such time limit in the statute. This regulation has been criticized for being arbitrary and "unjust to the powerless having nowhere to run for relief and redress."<sup>630</sup>

But there are also cases where the Commission has been prevented in carrying out its duties by the Government, e.g. HRC officers were denied access to Menik Farm IDP camp in 2008.<sup>631</sup>

Overall, the Commission is perceived to be close to the State and to be reluctant to tackle cases that may involve the police or military. Clearly, the HRC avoids confrontation with the Government. The HRC report 2006-2007 fails to acknowledge the scale of human rights abuses, particularly enforced disappearances, extra-judicial killings, torture, abductions and attacks on journalists and human rights defenders, and instead dwells on its educational activities, including quiz competitions etc. In contrast to frequent and voluminous reports on Sri Lanka's human rights crisis by international watchdogs, the HRC has not issued a single report or press release on killings, abductions or disappearances in recent years. Public faith in the Commission

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627 Society and Law Trust, 2009. p. 18.

628 Asian Human Rights Commission, 17 July 2006.

629 United Nations Human Rights Council, January 2007.

630 Law and Society Trust, 2008, p. 20, Consortium of Humanitarian Agencies, no date.

631 "Investigations into HRC officials being denied access to visit the displaced", Center for Human Rights and Development, 15 November 2008.

is declining and this impacts on the ability of the HRC to deliver on their mandate.<sup>632</sup> According to a previous Commissioner, the public can hardly be said to have faith in the HRC today as a proactive institution that comes forward to actively protect victims of human rights violations; rather, it is seen as a politicized entity that is very cautious about investigating any human rights violation that is of a politically sensitive nature.<sup>633</sup>

The effectiveness of the Ombudsman's office is hampered mostly by its lack of capacity. The Ombudsman has received 2,277 complaints from the public in 2008, and 181 from the Public Petitions Committee (PPC). Compared to the previous year, the Office registered a slight decrease in complaints. Out of the 2,710 complaints received in 2008 (including a backlog carried over from the previous year), the Ombudsman was able to dispose of 2,419 complaints.<sup>634</sup> The report registers an increase of complaints regarding school admission, transfers, construction permits etc, and a decrease of complaints about appointments, termination of employment, salary anomalies etc.<sup>635</sup>

The Ombudsman estimates that approximately 75% of these recommendations are given effect to by the relevant departments.<sup>636</sup> The annual report 2008 records several such cases; for example, it says that the number of complaints on irregularities in teacher transfers at provincial/ zonal level has decreased after the Ombudsman issued a guideline to the Secretary of a Provincial Ministry of Education. However, the report also cites cases where his recommendations were not followed; for example, local authorities usually ignore the Ombudsman's recommendation to demolish unauthorized buildings within their limits.<sup>637</sup> Also, police officers apparently show lack of interest in defending themselves against complaints by not replying to the Ombudsman's letters and not attending inquiries.<sup>638</sup> Compliance is very low where the complaint was lodged against a statutory board, corporation or state enterprise.<sup>639</sup>

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632 Amnesty International, 2010.

633 Interview with Deepika Udagama 18, June 2010.

634 Office of the Parliamentary Commissioner, 2008, p. 2f.

635 Office of the Parliamentary Commissioner, 2008, p. 10.

636 Interview with R.B. Ranarajah: Brief overview, no date, document on file with author.

637 Office of the Parliamentary Commissioner, 2008, p. 11.

638 Office of the Parliamentary Commissioner, 2008, p. 14.

639 R.B. Ranarajah: Brief overview, no date.

### 7.3.2 Promoting good practice (law and practice) - To what extent are the Human Rights Commission and Ombudsman active and effective in raising awareness within government and the public about standards of ethical behaviour?

The HRC has carried out various rights-awareness programmes for IDPs, public officials and Army officers. The Disaster Relief Monitoring Unit has implemented a multifaceted programme aimed at strengthening the human rights dimension of the tsunami recovery, including setting up field offices, dissemination of information, radio programmes, poster and leaflet distribution etc.<sup>640</sup>

Public awareness and outreach of the Ombudsman's office has been done through the circuit in provinces, through distributing a pamphlet and addressing officers at conferences.<sup>641</sup> However, the extent and quality of these awareness programmes are not known. Lack of publicity, reluctance to publicize reports and absence of public debate on human rights and administrative abuse of power obviously hamper the effectiveness of the work of both Ombudsman and HRC.

**Table 12: Scores for Ombudsman**

OMBUDSMAN			
DIMENSION	INDICATOR	LAW	PRACTICE
Capacity = 8	Resources	-	25
	Independence	0	0
Governance = 38	Transparency	25	25
	Accountability	50	25
	Integrity Mechanisms	50	50
Role = 25	Investigation	25	
	Promoting good practice	25	

<sup>640</sup> Human Rights Commission, 2008 p. 34.

<sup>641</sup> Parliamentary Commission for Administration Sri Lanka, 08 April 2010.



**Recommendations:**

1. Appointments to be HRC and Ombudsman office should be made based on merit and integrity.
2. Reports of the HRC and Ombudsman should be made public.
3. The Ombudsman's Office should be adequately staffed, and its cadre filled with immediate effect.
4. The HRC must use its powers to its full potential, and not turn a blind eye on human rights abuses if state institutions are involved.
5. The HRC should adhere to the Paris Principles.
6. The backlog of unresolved cases, including disappearances, should be urgently addressed in order to reinstate public trust

## 8. AUDITOR GENERAL

### SUMMARY

The Auditor General is a constitutional office with the mandate to audit the accounts of all public institutions including local authorities.<sup>642</sup> Public enterprises that are registered under the Companies Act are not audited by the Auditor General. Although the Constitution requires the Auditor General to audit all government bodies, in reality, state-owned enterprises are usually audited by private accounting firms and are seldom reviewed by the AG Department<sup>643</sup>.

In an ideal situation, the Auditor General should assist Parliament to scrutinize the performance of all public enterprises and ensure that public funds are effectively and efficiently utilized. At the moment, the Auditor General's office functions with the Executive having control over many aspects of its operations, including the disbursement of funds to the institution. Every year the Auditor General submits a report to Parliament highlighting the audit outcome of public institutions. Some of the findings of the report are addressed by the two Parliamentary oversight committees (the Committee on Public Enterprises and the Committee on Public Accounts).

In 2005 a draft Audit Act and constitutional amendments were prepared to provide greater autonomy and to make the office more effective. Although Cabinet approval was obtained for these proposals, they have yet to be passed by Parliament.

While many audit institutions in other parts of the world have embraced a wider array of auditing functions, including environmental, performance, investigative and 'value for money' audits, the Sri Lankan Auditor General tends to focus exclusively on financial auditing.

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<sup>642</sup> Articles 153 – 154, The Constitution of the Democratic Socialist Republic of Sri Lanka, 1978.

<sup>643</sup> World Bank, May 2007.

## STRUCTURE

The office of the Auditor General consists of an Auditor General, six Deputy Auditors General, 26 Assistant Auditors General, 123 Superintendents of Audit, 734 Audit Examiners and 114 Public Management assistants. The staff totals 1156 in 2007<sup>644</sup>

The Auditor General focuses mainly on financial auditing rather than a wider range of auditing methodologies, like environmental, performance, investigative or value for money audits<sup>645</sup>. There is little or no focus on examining audit controls, financial management aspects, issues of economy etc<sup>646</sup>. The Auditor General's Department lays little emphasis on forensic and performance audits.

## ASSESSMENT

### 8.1 Capacity

#### 8.1.1 Resources (Practice) - To what extent does the Auditor General have adequate resources to achieve its goals in practice?

According to a former Auditor General, the Auditor General's office lacks financial, human and physical resources to perform its functions effectively.<sup>647</sup> Current staff is not adequately equipped to administer modern auditing techniques, including the use of computer-assisted audit techniques. According to this former Auditor General a modern audit office must possess a variety of skills which include accounting, managerial, engineering, IT and administrative skills. While in many other countries the majority of the staff is from non-accounting backgrounds, in Sri Lanka the primary human resource skill within the office is in accounting.<sup>648</sup> The Auditor General Department lacks basic facilities for training, research and development and also, there is no quality assurance program.<sup>649</sup>

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644 Website of the Auditor General. Personnel database

[http://www.auditorgeneral.lk/front\\_controller.php?requested\\_act=viewStaff](http://www.auditorgeneral.lk/front_controller.php?requested_act=viewStaff); Hemaratne, WD, October 2005.

645 World Bank, May 2007.

646 USAID, September 2006.

647 Interview with S.C. Mayadunne, former Auditor General, 09 February 2010.

648 Interview with S.C. Mayadunne, 09 February 2010.

649 World Bank. May 2007.

Another shortcoming is the lack of personnel. According to the Annual Report of the Auditor General there were 730 vacancies out of an approved cadre of 1,777 of the Auditor General Department at the end of August 2008.<sup>650</sup> Of the positions that remained vacant, 44% are with regard to Audit Superintendents and Audit Examiners who are directly involved in the execution of audits. As the Auditor General observes this has affected the ‘smooth functioning’ of the office.<sup>651</sup>

Physical resources especially in the branches are poor. The office building is old and difficult to maintain. IT resources are also lacking. Better IT resources and better physical resources would enhance the capacity of the office considerably.<sup>652</sup> Salary scales in the Auditor General’s office are not attractive enough to retain skilled staff.<sup>653</sup>

In practice, it is the Executive through the Treasury that determines the budget of the Auditor General, and Parliament “rubber stamps” it.<sup>654</sup> The practice in some countries is for a Parliamentary committee to analyze and adjust the budget of the Auditor General to ensure that the office is provided with sufficient resources and remains independent.<sup>655</sup> This was among the recommendations of the Public Accounts Committee in its report of 1985.<sup>656</sup>

### **8.1.2 Independence (Law) - To what extent is there formal operational independence of the audit institution?**

The Auditor General is an office anchored in the Constitution.<sup>657</sup> There is no Audit Act specifically focused on the Auditor General. Other laws provide additional legal authority for the exercise of the mandate.<sup>658</sup> The Auditor General is appointed by the

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650 Auditor General Department, 2008, pp 25 – 26.

651 Ibid.

652 Interview with S.C. Mayadunne, 09 February 2010.

653 Interview with S.C. Mayadunne, 09 February 2010.

654 Auditor General Department, 2008, pp 13 -14 and interview with S.C. Mayadunne, 09 February 2010.

655 Auditor General Department, 2008, pp 13- 14 and interview with S.C. Mayadunne, 09 February 2010.

656 Interview with S.C. Mayadunne, 09 February 2010.

657 Articles 153 and 154, The Constitution, 1978.

658 Part II, Finance Act No 38, 1971; Section 23, The Provincial Council Acts No 42, 1987; Section 219, The Municipal Councils Ordinance; Section 181, The Urban Councils Ordinance; Section 172, Act No 15, 1987; Section 58, Act No 46, 2000.

President. Although the Parliamentary Council is entitled to recommend, the President is not obliged to accept the recommendation.

The Auditor General may be removed on account of “ill health or physical or mental infirmity” or subsequent to an address of Parliament.<sup>659</sup> The salary cannot be diminished during the term of office.<sup>660</sup> The Auditor General is listed as a public officer in the Constitution and prohibitions of releasing information and speaking to media apply to him as to all officers.<sup>661</sup>

### **8.1.3 Independence (Practice) - To what extent is the audit institution free from external interference in the performance of its work in practice?**

While the legal provisions provide for the independence of the Auditor General, the Department depends on the Executive for financial and human resources.<sup>662</sup> The legislation does not provide the Auditor General with adequate administrative authority to be independent of any Executive branch.<sup>663</sup> The Executive has full control over its operations, including the disbursement of funds to the institution.<sup>664</sup>

The Auditor General, while being the head of the institution, does not have complete control over his or her staff. Up to September 2010, the Public Service Commission was responsible for the recruitment and disciplinary control of audit staff, and this feature continues after the 18<sup>th</sup> Amendment.<sup>665</sup> The most significant change brought about through the 18<sup>th</sup> Amendment to the Constitution vis-à-vis the Auditor General’s office is the fact that the President has sole responsibility in appointing the Auditor General now.<sup>666</sup> This further compromises the independence of the AG’s office.

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659 Article 153 (3), The Constitution, 1978.

660 Article 153 (2), The Constitution, 1978.

661 Article 170, The Constitution, 1978; Chapter XLVII, Establishments Code of the Government of Sri Lanka, Volume II, 1999.

662 Auditor General Department, 2008, p 14.

663 World Bank, May 2007.

664 USAID, August 2007.

665 Hemaratne, WD, October 2005.

666 Section 41(A), The Constitution, 1978, whereby the Constitutional Council instituted by the 17th Amendment is repealed and replaced by a Committee, whose “observations” need to be sought and must be provided within a one-week timeframe, but are not binding.

Any misuse or misappropriations identified by the Auditor General is informed to the higher authorities before the Auditor General reports to Parliament. The Auditor General has no authority whatsoever to take any action against any person held responsible except for local authorities.<sup>667</sup> The Auditor General does not have the authority to ensure that his/her recommendations are implemented even though he identifies issues in public financial management in his reports.<sup>668</sup>

In 2006, the Secretary of the Treasury publicly criticized the Auditor General on his reports of the public sector. Transparency International and the Asian Human Rights Commission commented adversely on this public criticism of the Auditor General.<sup>669</sup> Active involvement of Parliament and its Committees would help to strengthen the independence of the office.<sup>670</sup>

## 8.2 Governance

### 8.2.1 Transparency (Law) - To what extent are there provisions in place to ensure that the public can obtain relevant information on the relevant activities and decisions by the Auditor General?

The Auditor General's relationship is primarily with Parliament and he or she is not required to submit information to the larger public. The Auditor General is constitutionally obliged to report to Parliament on the "performance and discharge of his duties" within ten months of the end of each financial year.<sup>671</sup> The Constitution does not specify the required structure of such a report. In the case of state corporations, the Auditor General should forward his observations which he thinks should be published to be included in the annual report of such corporations.<sup>672</sup> There is no legal requirement for the Auditor General to publish his report. However, once the report is tabled in Parliament, Parliament itself orders the report to be printed and it becomes a public document. In addition, the Auditor General can report as and

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667 USAID, February 2006.

668 World Bank, May 2007.

669 Asian Human Rights Commission, 23 March 2006.

670 Interview with S.C. Mayadunne, 09 February 2010.

671 Article 154 (6), The Constitution, 1978.

672 Finance Act No 38, 1971.

when necessary. The public can access the report only after it has been presented in Parliament.

### **8.2.2 Transparency (Practice) - To what extent is there transparency in the activities and decisions of the Auditor General in practice?**

The Auditor General presents several reports to Parliament each of which deals with a specific sector. In 2008 seven such reports were presented. The report is then printed and in theory available to the public.<sup>673</sup> According a former Auditor General, the reports to Parliament are generally comprehensive and provide an account of the several public institutions that the office has audited.<sup>674</sup> They form the basis for the work of the two Parliamentary oversight committees, the Committee on Public Enterprises (COPE) and the Committee on Public Accounts (COPA or PAC). However, there appears to be no debate of the reports in Parliament.

The annual audit reports have been criticised for not being timely, for lack of materiality, and for not being up to the best of international practices.<sup>675</sup>

An assessment on The Auditor General's Department was made in 2003 by the Netherlands Supreme Audit Institution. In the report, a need for a National Audit Act, a need to make AG status equivalent to that of Supreme Court Judge, budget to be sent to Parliamentary committee and the necessity of the audit reports to be submitted to the media were highlighted.<sup>676</sup> In 2005 a new Audit Act was drafted to provide greater autonomy and to make the office more effective. However, the Act has still not been passed by Parliament, though Cabinet approval was obtained.

Obtaining a copy of the Auditor General's report has proved very difficult in practice. Transparency International was able to obtain a copy of the 2008 report only after numerous calls to the Auditor General's office. The report was not available at the Government Publications Bureau which is the distribution centre for official documentation published by the State. During the course of an interview with the Deputy Auditor General, he called the Government Publications Bureau and was told

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673 Interview with Nimal Perera, Deputy Auditor General, 07 June 2010.

674 Interview with S.C. Mayadunne, 09 February 2010.

675 World Bank, May 2007.

676 World Bank, May 2007.

that they did not have any copies available.<sup>677</sup> Only a limited number of copies are printed and tabled in Parliament, hence it is difficult to obtain one. The office has a website which contains limited information. The 2008 report has in the meantime been partially posted on the Auditor General's office website.<sup>678</sup>

### **8.2.3 Accountability (Law) - To what extent are there provisions in place to ensure that the Auditor General has to report and be answerable for his actions?**

The Auditor General is accountable to Parliament and is constitutionally obliged to report to Parliament on the “performance and discharge of his duties” within ten months of the end of each financial year.<sup>679</sup> The contents of the report are not laid down in the law. In addition to this requirement he or she can report as and when necessary. The finances of the Auditor General office are being audited by a separate section within the same office; therefore, the Auditor General is not audited by an independent external entity.<sup>680</sup> This information is published along with the audit report which is submitted to Parliament, and PAC scrutinizes these findings as well.

### **8.2.4 Accountability (Practice) - To what extent does the Auditor General have to report and be answerable for its actions in practice?**

The Auditor General's reports in general receive little attention. Because of delays in presenting the reports, and because of the limited scope of the audit, these audit reports are often perceived as merely fulfilling the legal requirements. Their usefulness in regard to providing detailed information on issues of economy, efficiency, effectiveness, systematic weaknesses, in management practices, operations and internal controls is limited.<sup>681</sup>

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677 Interview with Nimal Perera, 07 June 2010.

678 Auditor General Department website at <http://www.auditorgeneral.lk>

679 Article 154 (6), The Constitution, 1978.

680 Interview with S.C. Mayadunne, 9 February 2010.

681 USAID, September 2006.



### **8.2.5 Integrity Mechanisms (Law) - To what extent are there mechanisms in place to ensure the integrity of the Auditor General?**

There is no code of conduct that applies specifically to the office of the Auditor General. Staff, however, are governed by the provisions of the Establishment Code which apply to all public officers.<sup>682</sup> The Establishment Code contains provisions on conflict of interest, acts which bring the public service into disrepute, private use of government labour and property, and rules on receiving gifts.<sup>683</sup> There are no legal restrictions on post-retirement employment.

### **8.2.6 Integrity Mechanisms (Practice) - To what extent is the integrity of the audit institution ensured in practice?**

Staff members of the Auditor's General's Department are required to sit the Efficiency Bar examination which tests, among others things, their knowledge of the Establishment Code and its provisions on conflict of interest, gifts and hospitality, etc.<sup>684</sup> Disciplinary action is taken in those cases where a staff member breaches the Establishment Code.<sup>685</sup> There is no programme for training on a Code of Ethics.

## **8.3 Role**

### **8.3.1 Effective Financial Audits - To what extent does the audit institution provide effective audits of public expenditure?**

Unlike in other countries, the Auditor General appears to have little impact. The office has been described as a “sleeping giant” working at only 10% of its potential capacity.<sup>686</sup>

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682 Chapter XLVII, Establishments Code, Volume II, 1999.

683 Ibid. Section 1:5; Section 1:4; Section 1:11; Section 3

684 Interview with Nimal Perera, 07 June 2010.

685 Interview with Nimal Perera, 07 June 2010.

686 USAID. August 2007.

As outlined above, lack of trained staff and lack of access to modern auditing techniques such as computer-assisted auditing hampers the effectiveness of the audit.<sup>687</sup>

Another problem is the scope of the audits undertaken. In other parts of the world, environmental, performance, investigative and “value for money audits” are used by the audit institution. In Sri Lanka, the Auditor General does not possess the capacity for these more sophisticated audits. As the Auditor General observes, a lack of capacity has resulted in the Office “clinging to the traditional approach” even though ideally the institution should be performing value for money audits and focusing on issues of economy, efficiency and effectiveness.<sup>688</sup>

Also, The Auditor General prepares annual reports solely based on information sent to his officials posted to various government entities, without the capacity for proper verification.<sup>689</sup>

The Auditor General in his most recent report refers to delays in the chain of accountability. As he observes there is a considerable “time gap” between the completion of the audit reports and its consideration by the Parliamentary oversight committees.<sup>690</sup> He goes on to observe:

“I believe the Auditor General department (sic) should be able to exercise a proactive role and not a post mortem role in achieving our development efforts. We should therefore shift from compliance audit to risk based audit specially to focus value for money audit (sic) in the case of development projects launched by the government to assess all the required aspects of the planning, designing, implementation/ construction and completion stages ...<sup>691</sup>”

While the Auditor General’s reports provide the basis for some public and legislative oversight of public expenditures, many aspects of public spending are outside the AG’s purview. State-owned enterprises that are registered as Companies are excluded. This limit in the mandate of the AG means that not all public expenditure is audited effectively.

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687 Interview with S.C. Mayadunne, 09 February 2010.

688 Annual Report of the Auditor General 2008, p 5.

689 Ibid.

690 Auditor General Department, 2008, p 5.

691 Ibid.

The AG currently does not audit budget performance reports, which would be an important element of effective oversight. These reports have been specified under the Fiscal Management Responsibility Act No 3 of 2003 and are currently not audited by the AG.

Another impediment to complete oversight could be self-imposed restraint on the part of the AG who does not appear to use the full gamut of his powers.

In addition, the capacity and independence of the Parliamentary oversight system also needs strengthening. The Auditor General depends wholly on Parliamentary action for follow up to his reports. If public funds are to be managed effectively and honestly then Parliament must begin to show a willingness to scrutinize public entities independently and scrupulously and to take action where appropriate. The Auditor General should ideally partner with Parliament in the scrutiny of public enterprises and public finance. Active participation of Parliament will strengthen the effectiveness of the state audit.<sup>692</sup>

### **8.3.2 Detecting and Sanctioning Misbehaviour - Does the Auditor General detect and investigate misbehaviour of public officeholders?**

Auditor General's reports appear to have little impact and lack follow-up. The Bribery Commission does not appear to have close links to the Auditor General.<sup>693</sup>

The Auditor General conducts financial audits only and therefore does not pronounce on questions of economy, efficiency or effectiveness in relation to any institution. As observed above, in his 2008 report, the Auditor General noted that there was a need for the office to become more proactive and shift from "compliance audits" to "value for money" audits.<sup>694</sup>

The Auditor General may sanction "misbehaviour" only in the case of universities and local authorities. In circumstances where there has been illegal payments, a loss caused to the institution through misbehaviour, or unaccounted revenue, the Auditor General may "surcharge" the persons concerned with the unlawful or unaccounted

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692 Interview with S.C. Mayadunne, 09 February 2010.

693 Ibid.

694 Auditor General Department, 2008, p 5.

expenditure.<sup>695</sup> However, the 2003 Auditor General Activity report states that the recoveries from surcharges were small and more than half of the remaining surcharges had not been collected for more than four years.<sup>696</sup>

### **8.3.3 Improving Financial Management - To what extent is the Auditor General effective in improving the financial management of government?**

Audit planning is not tailored to meet the needs of the audit client as most of the audits focus merely on identifying regulatory breaches.<sup>697</sup> Audit planning does not include identification of key management systems and controls, and instead only identifies staff requirements and a team for the audit.<sup>698</sup> As a result, audit reports do not cover essential aspects of financial performance.<sup>699</sup>

Where the two Parliamentary committees do not follow up on the most of the reports, the recommendations of the Auditor General have little impact. Parliament is not obliged to consider the recommendations presented by the Auditor General. However, Parliament should provide justification as to why the recommendations were not accepted. It appears that Parliament does not take adequate actions on the reports produced by the two relevant Parliamentary Committees. In very few cases is action taken against public entities or public officials as a result of the Auditor General's reports.<sup>700</sup>

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695 Auditor General Department, 2008, pp 15 -16 and interview with S.C. Mayadunne, 09 February 2010.

696 World Bank, May 2007.

697 World Bank, May 2007.

698 Ibid.

699 Ibid.

700 Interview with S.C. Mayadunne, 09 February 2010; Auditor General Department, 2008, p 5.

**Table 13: Scores for Auditor General**

<b>AUDITOR GENERAL</b>			
<b>DIMENSION</b>	<b>INDICATOR</b>	<b>LAW</b>	<b>PRACTICE</b>
Capacity = <b>42</b>	Resources	-	50
	Independence	50	25
Governance = <b>46</b>	Transparency	50	25
	Accountability	50	50
	Integrity Mechanisms	50	50
Role = <b>17</b>	Effective Financial Audits	25	
	Detecting and Sanctioning Behaviour	25	
	Improving Financial Management	0	

### Recommendations

1. The Auditor General’s office should have the administrative and financial independence to develop its own staff recruitment and promotional policies. Vacant cadre positions should be filled, while capacity of current staff should be enhanced. The institutional strengthening and capacity development of the Auditor General’s office should be given the highest priority.
2. The Auditor General’s Office should audit all public sector institutions, not just for financial accountability but for efficiency and effectiveness as well. It should be capable of conducting a wide variety of audits such as environmental, performance, investigative and “value for money” audits.
3. The scope of government audits should be expanded beyond purely financial audits to include substantive elements such as gender and environment (e.g. gender audits, environmental audits).
4. In the case of significant spending, a post-audit should be conducted.
5. Every institution in which government has an interest or stake, and which administers public funds, should be audited by the Auditor General, including state corporations.
6. Reports issued under fiscal Management Responsibility Act No 3 of 2003 (budget performance) should also be audited by the AG.

7. Every year the Auditor General should present a countrywide assessment of all public institutions in which the government has an interest.
8. There should be greater collaboration and partnership between Parliament and the Auditor General. The Parliamentary oversight system must be strengthened.
9. Parliament should, as a matter of urgency, enact the draft Audit Act that seeks to establish a more autonomous office of the Auditor General, a National Audit Office, a National Audit Service Commission, and a Constitutional Audit Council that will hear appeals against surcharges imposed by the Auditor General.

## 9. ANTI-CORRUPTION COMMISSION

### SUMMARY

Sri Lanka's Commission to Investigate Allegations of Bribery or Corruption (CIABOC) was set up in 1994 with the objective of investigating and prosecuting bribery, corruption and matters related to assets. The CIABOC is a reactive institution as it can only commence investigations upon receiving formal complaints which is a fundamental limitation in its mandate.

Overall, the law which establishes the CIABOC appears to be weak and incomplete. Political interferences have handicapped the performance of the CIABOC, including the non-appointment of the members of the CIABOC for long periods of time and transfers of key officials involved in investigations and prosecutions.

The CIABOC has few resources; it is unable to recruit and does not have disciplinary control over its own staff. Though well known to the public, the CIABOC is seen to have failed to successfully prosecute large scale corruption deals and assets related issues.

The tenure of the last Commission lapsed in March 2010, and at the time of writing this report the new members have not yet been appointed.

### STRUCTURE

The Commission to Investigate Allegations of Bribery or Corruption (CIABOC) was established in 1994<sup>701</sup>, to direct prosecutions under the Bribery Act and the Declaration of Assets and Liabilities Act.<sup>702</sup> It comprises three Commissioners or members (inclusive of the Chairman) appointed for a period of 5 years.<sup>703</sup> The Chief Executive Officer of the CIABOC is the Director General who reports to the

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701 Commission to Investigate Allegations of Bribery or Corruption Act No 19 (CIABOC Act), 1994.

702 Ibid. Section 2

703 Ibid. Section 6

members of the CIABOC.<sup>704</sup>The CIABOC (colloquially referred to as the Bribery Commission) operates from Colombo, and had 128 administrative staff members and 86 investigating officers in 2005 (latest data available).<sup>705</sup>

The main functions of the CIABOC are investigation and prosecution of bribery, corruption and assets related matters.<sup>706</sup> Although not expressly stated in its mandate, it performs a limited preventive and an awareness-raising role as well. All public sector institutions including the ministries, departments, statutory bodies, local government bodies and public officials and Members of Parliament and the members of the judiciary are subject to the Charter of the Commission.<sup>707</sup>

The most recently appointed members to the CIABOC (appointed in 2005) completed their 5 year term on 29<sup>th</sup> March 2010 and the new appointments have not yet been made.<sup>708</sup>

A large number of complaints have piled up at the CIABOC without any provisions to investigate them since its term lapsed.<sup>709</sup> In the absence of Commissioners, the Director General is unable to obtain the required directives under law.<sup>710</sup> As a consequence, many complaints (particularly during the Parliamentary elections of April 2010 where some candidates spent vast amounts of undeclared money) cannot be probed.<sup>711</sup>

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704 Ibid. Section 16(1)

705 Commission to Investigate Allegations of Bribery or Corruption, 2005, p 25.

706 Section 5(1), CIABOC Act, 1994.

707 Section 14-23,(amended) Bribery Act No. 11, 1954.

708 Transparency International Sri Lanka, 20 May 2010.

709 "DG says no probe possible without commissioners", Sunday Times, 02 May 2010.

710 Section 2(a), (b), CIABOC Act, 1994 & proviso "upon receipt of a complaint, the Commission has to be satisfied that it is genuine to commence investigations or prosecutions".

711 Transparency International Sri Lanka, 20 May 2010.



## ASSESSMENT

### 9.1 Capacity

#### 9.1.1 Resources (law) -To what extent are there provisions in place that provide the CIABOC with adequate resources to effectively carry out its duties?

Funds for the CIABOC are determined by Parliament and are charged to the consolidated fund.<sup>712</sup> Funds are administered by the Treasury.<sup>713</sup> The CIABOC is consulted before allocating the annual budget at which point it could submit estimates for the coming year. However, budgetary changes are not determined by objective indicators. (i.e. performance or problem-based). Under the CIABOC Act there is no leeway for it to acquire further funding from its work (such as by confiscating assets).

The CIABOC does not have the mandate to recruit its own staff. The Act only refers to “officers appointed to assist the Commission”.<sup>714</sup> CIABOC does not have disciplinary control over its staff, including investigating officers.

The CIABOC does not commence investigations on its own (proactive investigations) as the CIABOC Act insists on complaints being made as a precondition to commence investigations.<sup>715</sup> As a result investigations cannot be commenced until a complaint is made which is a limitation on the scope of the investigative powers of the CIABOC.  
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#### 9.1.2 Resources (practice) - To what extent does the CIABOC have adequate resources to achieve its goals in practice?

CIABOC receives resources from the Treasury and from donors. The Treasury allocated a sum of Rs.48 million [US\$0.43 million] in 2004, Rs.97 million [US\$0.87

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712 Section 7 & 16(2), CIABOC Act; Article 149. (1) & (2),The Constitution of the Democratic Socialist Republic of Sri Lanka,1978-Consolidated Fund.

713 Interview with Justice Ameer Ismail, Chairman of the CIABOC, 22 January 2010.

714 Section 7(1), CIABOC Act, 1994.

715 Section 4, CIABOC Act, 1994.

716 Global Integrity, 2007, p 94.

million] in 2005<sup>717</sup> and 176 million [US\$1.58 million] in 2009.<sup>718</sup> According to the former Chairperson of the CIABOC there are often delays in releasing funds by the Treasury which affects the functioning of the CIABOC.

Although there is no leeway for the CIABOC to acquire income from its work, it has not been prevented from seeking funds from other sources. For instance, in 2005 a US\$125,000/- grant was secured from the UNDP for the strengthening and capacity building of the CIABOC.<sup>719</sup> Further, the Sri Lanka Anti-Corruption Program by USAID and the SEAC programme by UNDP have given substantial support to the CIABOC (see also chapter on anti-corruption activities).<sup>720</sup>

The funds appear to be inadequate to carry out its functions effectively. The latest annual report available reveals several resource-related problems which hamper its performance. The CIABOC has only 20 vehicles, 8 of which have been allocated for the use of the Commissioners, the Secretary to the Commission and some of the Legal officers. The remaining 12 vehicles are used by the investigating unit for country-wide operations.<sup>721</sup> Some of these vehicles have been used for nearly 12 years.

The CIABOC does not have branch offices, which compels it to function from Colombo covering the entire country. This not only impacts on discouraging complainants, and results in their losing faith in the CIABOC, but the complainants as well as the witnesses lose interest after some time due to travelling and other practical difficulties.

The staff at CIABOC includes administrative and investigative personnel. The administrative staff is recruited and subject to disciplinary control of the Ministry of Public Administration and are transferrable, every 5 years.<sup>722</sup> The investigating officers are a part of the Police cadre (temporarily released) and subject to the disciplinary control of the Police Department. CIABOC interviews the Police officers and calls for reports from the National Investigations Bureau (NIB) prior to their placement at the CIABOC. These investigating officers hold office unless transferred

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717 CIABOC Annual Report, 2005.

718 The Gazette of the Democratic Socialist Republic of Sri Lanka, Part II of September 19, 2008.

719 CIABOC Annual Report, 2005.

720 Sri Lanka Anti Corruption Program, 2007.

721 CIABOC Annual Report, 2005.

722 Interview with Justice Ameer Ismail, 22 January 2010.

by the Police Department or found unfit by the CIABOC. The CIABOC therefore has limited control over its own staff.

CIABOC appears to be understaffed. According to the Annual Report of 2005 the approved cadre of the investigations unit was 103 with only 86 vacancies filled.<sup>723</sup>

Several past examples reveal that it has not been able to function for long periods of time due to existent vacancies. For example, a former member of the first appointed CIABOC, Siva Selliah died in 1996. The vacancy was not filled till the term ended in 1999, which resulted in the CIABOC functioning with a full complement of commissioners only for a period of 2 years out of its 5 year term.<sup>724</sup>

In 2005, 2118 complaints were received by CIABOC.<sup>725</sup> The statistics reveal that each investigating officer has to handle an average of 24 cases per annum. According to the officials of CIABOC the maximum number of cases an investigator can handle per annum is around 5 cases.<sup>726</sup> This flags the issue of inadequacy of investigators.

It does not have a competent team of investigators comprising experts in technical fields. (i.e., audit officers, accountants, forensic accountants, engineers, banking or IT experts) which are essential to carry out the investigations smoothly, effectively and independently.

No specialized induction training programmes are carried out for the staff of CIABOC. According to the Former Chairman, career development and training opportunities are inadequate as they do not cater to the requirements of the CIABOC.<sup>727</sup> No consistent training is offered. Particularly the investigating officers lack adequate training and capacity to understand and investigate complex forms of corruption.<sup>728</sup>

The Annual Report of the CIABOC for 2005 reveals that the majority of the training programmes carried out to enhance the capacity of the staff were of a general nature such as training on e-mail and internet, time management, language training, training

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723 Ibid., p 25.

724 Lawyers for Human Rights and Development, 2005, p28.

725 Ibid.

726 "Sri Lanka's Bribery Commission needs more fire-power", Sunday Times, 28 February 2010.

727 Interview with Justice Ameer Ismail, 22 Jan.2010.

728 USAID, 2007.

on Computer and IT, positive attitude, public management etc.<sup>729</sup> Although some training programmes were carried out for the legal officers and investigating officers,<sup>730</sup> directly relevant to their work, these were few and far between. The CIABOC does not appear to have a staff training strategy aimed at improving its performance on investigations, prosecutions and prevention of corruption.

Salaries of the Commissioners as well as the Director General are determined by Parliament and not diminished during their terms of office.<sup>731</sup> The salary of the Chairman of the CIABOC at the time of appointment was Rs.31,715/- (US\$285) which was increased to Rs.66, 000/- (US\$592) by Parliament in 2009. Other benefits include an official vehicle and a fuel allowance.<sup>732</sup> Given the responsible function the Chairman and the Commissioners are expected to perform, the salaries appear to be inadequate. However, the members appointed to the CIABOC are mostly retired members of the judiciary and other retired public officers who also draw a government pension. The salaries of the administrative staff are similar to the salaries received by other public officials of similar ranks. The investigating officers serving at the CIABOC receive an additional risk allowance of 33%.<sup>733</sup>

### **9.1.3 Independence (law) - To what extent is the CIABOC independent by law?**

CIABOC was established to function independently, and to be accountable only to Parliament and to the Supreme Court.<sup>734</sup> However, since 2005 appointments have been made outside of the constitutional process, and even before this CIABOC's functioning was interrupted because of non-appointment of its members. Since the constitutional changes of September 2010, the members of the CIABOC are to be appointed by the President, who may seek the non-binding observations of the Parliamentary Council.<sup>735</sup>

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729 Ibid., p17.

730 Ibid., p18.

731 Section 5(7), CIABOC Act, 1994.

732 "Bribery Commission winds up amidst salary row", Sunday Times, 21 March 2010.

733 USAID, 2007.

734 Lawyers for Human Rights and Development, 2005.

735 Article 41A(1),The Constitution,1978.

By law, the tenure of the Commissioners is secure unless a Commissioner resigns or dies. They can only be removed by an order of the President supported by the majority of members of the Parliament on grounds of proven misconduct or incapacity following the procedure similar to removing a judge of the Supreme Court.<sup>736</sup>

However, no procedure for the removal or transfer of the Director General has been stipulated by the Act which has led to many controversies. In 2008, “the Director General of the CIABOC, Piyasena Ranasinghe was arbitrarily removed by the President”.<sup>737</sup> When the media requested an explanation on this from the President’s Secretary, the non-existence of a procedure for the removal of the DG was cited which raised critical issues on the independence of CIABOC itself.

According to Section 4(1) of the CIABOC Act “an allegation of bribery or corruption may be made against a person ...by a communication to the Commission.” The provision indicates the need to communicate an allegation to the Commission by a complainant. CIABOC does not therefore have an explicit mandate to initiate corruption investigations on its own without a complaint.

#### **9.1.4 Independence (practice) -To what extent is the ACA independent in practice?**

CIABOC’s inability to investigate into corruption issues on its own is a severe limitation of its powers, as corruption is by its very nature secretive and most often unreported. As a consequence, despite many media reports exposing large scale corrupt deals, CIABOC has failed to take action based on the media reports.<sup>738</sup> Further, the media reporters who disclose corrupt deals in the public interest cannot be expected to pursue complaints to CIABOC due to threats and other risks involved, particularly in the absence of witness and whistle blower protection schemes.

Most junior officers are reluctant to investigate complaints against their senior officers. This is quite evident where investigations of Police officers are involved.<sup>739</sup>

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736 Section 4 and 5, CIABOC Act 19, 1994.

737 “Sri Lanka President slammed by anti-corruption watchdog”, Lanka Business online, 29 February 2008.

738 Lawyers for Human Rights and Development, 2005, p. 44.

739 Interview with Justice Ameer Ismail, 22 January 2010.

The present situation of non-appointment of the members of the CIABOC whose term of office lapsed in March 2010 and the piling up of a large number of complaints without provisions to investigate<sup>740</sup> due to the inability of the Director General to obtain the required directives from its members, as required by law, also points towards the lack of independence of the CIABOC.

There are several examples of Executive interference in relation to the CIABOC. In November 2007, C.A. Premashantha, the Officer in Charge of the Asset Division of the CIABOC was transferred out of the Commission without any consultation with the Commission.<sup>741</sup> The above-mentioned transfer of the CIABOC DG to the Presidential Secretariat in February 2008 is another example. Subsequently a Deputy Director General was appointed as the Acting Director General who lacked the legislative authority to serve indictments.<sup>742</sup> The time of the transfer coincided with probes on the complaints made on the massive corruption scandal in purchasing MiG 27 aircrafts<sup>743</sup> and several other investigations including the corruption scandals revealed by the COPE report.

## 9.2 Governance

### 9.2.1 Transparency (law) - To what extent are there provisions in place to ensure that the public can obtain relevant information on the activities and decision-making processes of the CIABOC?

Section 26 of the Act provides that the Commission shall prepare reports of its activities as often as it may consider necessary and it shall prepare at least one report each calendar year which should be sent to the President who shall place it before the Parliament. However, the Law does not require the CIABOC to disclose any information to the public.

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740 "DG says no probe possible without commissioners", The Sunday Times, 02 May 2010.

741 "IGP under fire from Bribery Commission", Sunday Leader, 23 December 2007.

742 Morning Leader, 20th February 2008.

743 Raymond, 2008.

### **9.2.2 Transparency (practice) -To what extent is there transparency in the activities and decision-making processes of CIABOC in practice?**

In practice the annual reports of the CIABOC are not easily accessible to the public. Publishing of Annual reports is generally unduly delayed. For the purpose of this study in 2010, the latest (published) Annual Report TISL could obtain was the report of 2005. The 2006 report could not be obtained as it had not been presented to the President up to date.

Activities and decision-making on pending cases of the CIABOC are reported in the newspapers and thereby gain publicity.<sup>744</sup> Sometimes press briefings are held in which the head of the Investigations unit or the Director General speaks to the media on the pending investigations subject to rules on secrecy.<sup>745</sup>

Generally, private media report corruption issues and there is a huge interest among the media to report on the progress of pending investigations. However, reporting corruption and obtaining information from the CIABOC is difficult, partly due to the culture of secrecy and the threats the media personnel suffer on exposing corruption issues, absence of a Right to Information Law in Sri Lanka and most importantly due to the fact that the secrecy clause contained in the CIABOC Act itself (discussed above) can be used by the officials of the CIABOC to refrain from giving out information (including administrative details). This was experienced by the researchers in conducting the present study as well.

### **9.2.3 Accountability (law) - To what extent are there provisions in place to ensure that the CIABOC has to report and be answerable for its actions?**

The CIABOC is accountable to the Parliament.<sup>746</sup> In addition to the Annual Report, the CIABOC can “prepare reports of its activities as often as it considers necessary.”<sup>747</sup> Reports on individual investigations are neither mandatory nor done in practice.

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744 “Bribery Commission questions Minister Rohitha over questionable earnings”, Lanka enews, 14 September 2008.

745 “Bribery Commission commences investigations on Mig deal”, Lanka enews, 30 October 2007.

746 According to Sec 5(a) of the Act the members of the CIABOC although appointed by the President they can only be removed upon receiving a majority vote in favor of such removal in Parliament and the salaries of the members of the CIABOC shall be determined by the Parliament.

747 Section 26, CIABOC Act, 1994.

The CIABOC is subject to annual government audit by the Auditor General<sup>748</sup> and it can be made a respondent in a court case.<sup>749</sup> There are neither judicial review mechanisms on the work of the CIABOC nor citizen oversight committees required by law.

#### **9.2.4 Accountability (practice)-To what extent does the ACA have to report and be answerable for its actions in practice?**

The annual reports are available in print in all three official languages of the country. Although the Annual Reports carry facts and figures relating to complaints received, investigations and prosecutions as well as its own capacity and achievements, it is difficult to clearly understand the facts and the figures in the manner in which it is presented. In 2005 the CIABOC received 2118 complaints out of which 701 complaints have been referred for investigation. The annual report does not provide clear figures on the number of convictions out of 2118 complaints it had received in 2005. Instead, it provides the figures of convictions of all its prosecutions (including the complaints received before 2005)<sup>750</sup>

The public can communicate allegations of bribery or corruption or assets-related complaints to CIABOC either in writing, by telephone or personally. CIABOC maintains a 24-hour hotline which is operative in spite of the present absence of the commissioners.<sup>751</sup>

According to the former Chairman of the CIABOC, complaints can generally be filed without fear of retaliation. However, there are serious threats.<sup>752</sup> One recent example in this regard is the case of Sugath Nisantha Fernando who was a complainant in a corruption case at the CIABOC, against a police inspector, charged with taking bribes from him. He was allegedly assaulted by the police and warned not to give evidence in court. Sugath subsequently filed a torture complaint at the Supreme Court against the

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748 Interview with Justice Ameer Ismail, 22 January 2010.

749 Ibid.

750 CIABOC, 2005.

751 Checked by TISL on 03 July 2010.

752 Interview with Justice Ameer Ismail, 22 January 2010.



police officers.<sup>753</sup> He was shot dead by two unknown gunmen in 2008. Nearly 2 years since the incident occurred, no arrests have been made up to date in connection with the killing.<sup>754</sup>

### **9.2.5 Integrity Mechanisms (law) - To what extent are there mechanisms in place to ensure the integrity of members of the CIABOC?**

There is no specific code of conduct for the Commissioners, Director General or the staff of CIABOC. The staff of CIABOC are subject to the provisions on General Conduct and Discipline of the Establishment Code which include rules on conflict of interest, acts which bring the public service into disrepute, private use of government labour and property, rules on gifts<sup>755</sup> etc.. Commissioners, Director General and the staff officers of the CIABOC should declare their assets and liabilities.<sup>756</sup>

According to Sec 17 of the Act every member of the Commission, the Director General and every officer or servant, appointed to assist the Commission shall before taking up duties sign a declaration not to disclose any information received by him / her in the exercise of powers and functions under the Act except for the purpose of giving effect to the provisions of the Act, violation of which involve heavy penalties.<sup>757</sup>

There is no specific statutory requirement for integrity screening in appointing members of the CIABOC or the staff.

Section 6 of the Act provides that a member appointed shall not be eligible for re-appointment. In addition to this provision there are no post-employment restrictions for the members of the CIABOC or for the staff or investigators.

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753 "Setbacks in criminal justice due to Sri Lanka's political conflicts", Asian Human Rights Commission, 12 April 2010.

754 "Litigation aimed at improving criminal justice: An interview with Basil Fernando", Asian Human Rights Commission, 12 April 2010.

755 Sections 1:4,1,3,1:11, Chapter XLVII, Establishments Code, Volume II, 1999.

756 Section 2(c) and (j) ,The Declaration of Assets and Liabilities Act No 1, 1975.

757 Section 22, CIABOC Act, 1994.

### **9.2.6 Integrity Mechanisms (practice) - To what extent is the integrity of members of the CIABOC ensured in practice?**

There have been only a few instances in which the integrity of the members or persons who have been nominated has been questioned. For example, in 2004, the Constitutional Council nominated the Mr. T. E. Anandarajah, a retired IGP, for appointment to the Commission who allegedly had links to a known drug dealer. Due to objections raised, the President refused to appoint Mr. Anandarajah.<sup>758</sup>

Once members are appointed, however, there has been no public scrutiny of their integrity and no public accountability. In fact, the secrecy clause, though important in the pursuance of their duties, serves also as a deterrent for transparency and accountability. Every member of the Commission, the Director General and every officer or servant is bound to maintain secrecy with regard to information received in the exercise of powers and functions, breach of which is a punishable offence.

## **9.3 Role**

### **9.3.1 Prevention (law and practice) - To what extent does the CIABOC engage in preventive activities regarding fighting corruption?**

Although CIABOC carries out programmes to prevent corruption,<sup>759</sup> the CIABOC Act does not recognize "prevention" as one of its functions. The only reference to "prevention" is found in Section 16(1) of the CIABOC Act which stipulates that a Director General is appointed for the Prevention of Bribery & Corruption to assist CIABOC in the discharge of the functions assigned to it by the Act.<sup>760</sup> As outlined above, CIABOC has been given extensive assistance by agencies such as the UNDP, the Asian Development Bank and USAID to implement prevention programmes.

The CIABOC does not have a research unit, nor has it conducted research on corruption issues.

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758 "Bribery Commission going Elections Commission's way?" Lankanewspaper, 6 March 2005.

759 Commission to Investigate Allegations of Bribery or Corruption, 2005, p 5.

760 Jayawickrama, Luckshmi, UNDP, no date.

### **9.3.2 Education (law and practice) - To what extent does the CIABOC engage in educational activities regarding fighting corruption?**

CIABOC conducts awareness-raising programmes on corruption and the work of CIABOC through lectures, distribution of hand-outs etc., for politicians at the provincial and local government level, public officials, journalists and the members of the public including school children across the country. For example, in 2005 a total of 1500 public officials were trained by CIABOC.<sup>761</sup> The duration of the training course is one day. The training programs are usually not tailor made to different groups who are trained. The CIABOC does not appear to have a long-term training strategy.

The CIABOC works with civil society groups and other key organizations to prevent corruption.<sup>762</sup> The impact of the educational activities conducted by the CIABOC is not measured which makes it difficult to assess the effectiveness of these educational programmes.

### **9.3.3 Investigation (law and practice) - To what extent does the CIABOC engage in investigation regarding alleged corruption?**

As outlined above, the CIABOC commences investigations only upon receiving communications and if it is satisfied that it is a genuine complaint.<sup>763</sup> The investigations are conducted by specially trained police officers under the supervision of a Superintendent of Police and assisted by legal officers of the CIABOC<sup>764</sup>

The investigation powers of the CIABOC include power to search bank accounts, examine business and private documents to unravel hidden corrupt assets. The CIABOC is empowered to arrest and detain suspects without warrant, grant bail and seize travel documents or restrain a suspect's property through a court order.<sup>765</sup> The CIABOC may institute legal action for offences under the Bribery Act and the Declaration of Assets and Liabilities Law.

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<sup>761</sup> Ibid.

<sup>762</sup> USAID, 2007.

<sup>763</sup> Section 4, CIABOC Act, 1994.

<sup>764</sup> Justice P. Edussuriya, no date.

<sup>765</sup> Ibid.

The Act stipulates the privileges and immunities of the persons appearing before the CIABOC. According to Sec 9(1) no person shall in respect of a statement made, information given or any document produced before the CIABOC be liable to any action, prosecution or other proceeding.

Apart from the privileges there are no provisions to protect whistleblowers in the CIABOC Act. Whilst there is a growing consensus in Sri Lanka that legal protection of whistleblowers must be encouraged, no laws or amendments to protect whistleblowers have been introduced to date.<sup>766</sup>

The conviction rate in prosecutions for bribery and corruption has been very low.<sup>767</sup> The statistics presented by the CIABOC itself (analysed in the table below) stands as evidence in proof of this proposition.

**Table 14: Conviction rate in prosecutions for bribery**

DESCRIPTION	2007	2008
Complaints received	3985	2668
Referred for Investigations	1354	1351
Prosecutions	91 (filed in 2007) and 307 (pending)	63 (filed in 2008) and 303 (pending)
Convictions	28	23

*Source: CIABOC, Fact Sheet 2009 (unpublished)*

The CIABOC has largely failed to prosecute large-scale corruption. Although hundreds of cases are under investigation by CIABOC, no current or former politician has been sentenced. Up to 2005 only one investigation has been carried out against a former Minister and only one Member of Parliament (who was also from the Opposition) has been taken into custody on bribery and corruption related issues.<sup>768</sup>

<sup>766</sup> Transparency International Sri Lanka, 22 July 2003.

<sup>767</sup> Pinto-Jayawardena, Kishali, 29 March 2010.

<sup>768</sup> Commission to Investigate Bribery and Corruption, 2005, p13.

When complaints are made against politicians, they are usually covered up by the government-controlled media, as well as the police authorities, who are under the control of politicians.<sup>769</sup> For instance, when the Parliament was dissolved in 2004 several Members of Parliament handed over to the CIABOC 17 files containing allegations of bribery or corruption against the Ministers of the former government.<sup>770</sup> Some of the complaints were withdrawn during the elections.<sup>771</sup>

Further to the constraints faced by the CIABOC (discussed above), the existing culture of silencing dissent and rampant impunity prevents individuals coming forward to make complaints on bribery and corruption issues.<sup>772</sup>

**Table 15: Scores for Anti-corruption Commission**

ANTI-CORRUPTION COMMISSION			
DIMENSION	INDICATOR	LAW	PRACTICE
Capacity = 25	Resources	25	25
	Independence	25	25
Governance = 38	Transparency	50	25
	Accountability	50	25
	Integrity Mechanisms	50	25
Role = 8	Prevention	00	
	Education	25	
	Investigation	00	

## Recommendations

1. Legal changes should be brought in to prevent delays in appointing the members of CIABOC.

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<sup>769</sup> Countries at the Cross Roads, 2006.

<sup>770</sup> Lawyers for Human Rights and Development, 2005, p. 54.

<sup>771</sup> Ibid.

<sup>772</sup> Countries at the Crossroads, 2010.

2. Strengthen the independence and the financial autonomy of the CIABOC. Fund allocations should be decided on by a Standing Committee in Parliament, based on estimated budgets provided by the Commission.
3. The CIABOC Act to be amended enhancing its capacity to recruit and have control over its staff, including a competent and independent team of investigators. CIABOC should have sufficient finances and administrative independence to employ people from different professional disciplines. Staff capacity should also be enhanced via a targeted training strategy.
4. Mandate of the CIABOC should be extended to permit pro-active investigation.
5. Composition of CIABOC to be changed. Gender representation in the CIABOC is necessary. Also the current requirement that the Commissioner has to be a retired judge should be changed.
6. Collective action is needed to support the CIABOC (business standards / integrity pacts etc.).
7. The progress of ongoing complaint investigations should be made public.
8. Introduce victim, whistleblower and witness protection legislation

## 10. POLITICAL PARTIES

### SUMMARY

Sri Lanka currently has 67 registered parties that effectively represent various ethnic and social interests. While processes of electing political candidates to Parliament, Provincial Councils and to the post of President are spelt out in the Constitution and other laws,<sup>773</sup> Sri Lanka lacks regulation on political party financing and management. In general, Sri Lanka's political parties are structured and managed in a top-down, hierarchical way that does not allow the party members to influence decision-making. A healthy competition between parties that would provide a disincentive to corruption exists only to a limited extent.<sup>774</sup> This chapter is largely based on secondary data, as it has been extremely difficult to find interview partners.<sup>775</sup>

### STRUCTURE

Sri Lanka is a multi-party democracy whose political parties embrace democratic values and international nonalignment.<sup>776</sup> Rather than representing social diversity and citizens' aspirations, political parties are alliances for power sharing. This is evidenced in numerous cross-overs throughout the political history of Sri Lanka.<sup>777</sup>

Two parties, the centre-left Sri Lanka Freedom Party (SLFP) and the liberal United National Party (UNP) have alternated in government since independence in 1948. Currently 67 political parties are listed on the website of the Elections Department.<sup>778</sup> The incumbent government coalition United People's Freedom Alliance (UPFA) comprises the SLFP plus eight other parties, while the UNP,, the

<sup>773</sup> Chapter XIV, The Constitution of the Democratic Socialist Republic of Sri Lanka, 1978.

<sup>774</sup> Blechinger, Verena, November 2002.

<sup>775</sup> While the UNP Secretary General was interviewed, a representative of the SLFP could not be interviewed. Ministers Sarath Amunugama, AHM Fowzie, and Ratnasiri Wickremanayke were approached repeatedly but none was finally available for an interview. While this lack of representation is acknowledged as a weakness of this chapter, it is reiterated that repeated attempts were made to include the perspectives of the SLFP to no avail.

<sup>776</sup> US Department of State, July 2009.

<sup>777</sup> Satkunanathan, Ambika, no date.

<sup>778</sup> Official website of the Department of Elections at <http://www.slelections.gov.lk/pp.html>

Tamil National Alliance (TNA) and the Janatha Vimukthi Peramuna (JVP – People’s Liberation Front) and other parties constitute the opposition – though opposition MPs have crossed over to government at various occasions (see chapter on legislature).

All major parties are characterised by centralised, top-down structure with little accountability to the membership. Major parties have youth organisations and rural party branches as well as university branches. The SLFP’s supreme body is the Central Committee, chaired by the Party Chairman to which the Executive Committee is answerable. Party branches exist at local level, answerable to district organisations. There are also twelve powerful affiliated organisations such as the Youth and Women’s organisations. All the local branches/ organisations report to the Executive Committee. In the UNP, the highest body is the Party Convention, to which the National Executive Committee, the Working Committee and local and district level branches are answerable. The party leader has absolute authority to appoint and replace office bearers.<sup>779</sup> In the SLMC, the 24 member High Command (of which the party leader is a member) is the supreme decision-making body. It is elected annually by the 60 member Politburo, whose members are mostly selected by the Party leader. The Politburo also has ex-officio members and representation from most administrative districts. A 750 member Working Committee is elected at the Annual Delegates Conference by Party members. Politburo and High Command members are drawn from the Working Committee.

## ASSESSMENT

### 10.1 Capacity

#### 10.1.1 Resources (law) – To what extent does the legal framework provide a conducive environment for the formation and operations of political parties?

Overall, the legal framework is conducive to the formation of political parties. Freedom of association is guaranteed in the Constitution.<sup>780</sup>

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779 Friedrich Ebert Stiftung, 2008; UNP website at <http://www.unp.lk/portal/images/stories/static/mechanism.gif>

780 Article(1)(C), Chapter III, The Constitution, 1978.



The formation of political parties is partially governed by the Parliamentary Elections Act No. 1 of 1981 (amended in 2009) that sets out the requirements of recognition as a political party for the purpose of elections. Under this Act (section 4, as amended), the Commissioner of Elections recognises a political party upon submission of an application by the party secretary in writing. A copy of the party constitution, a list of office-bearers of the party, and audited statement of accounts and a contemporary policy statement need to be attached to the application. Further, parties must hold general meetings once a year; notify the Commissioner of amendments to the party constitution or the appointment of new office bearers (section 8, as amended). In the case of dispute, the Commissioner has the power to decide which faction within a party will be recognised (section 13).<sup>781</sup>

The Provincial Councils Elections Act No. 2 of 1988, and the Local Authorities Elections Ordinance of 1947, amended by No 24 of 1977 and No 20 of 1987, regulate the recognition of political parties for the local and provincial elections.

In the event of applications for elections being rejected by the Election Commissioner, parties can appeal to the courts.

However, neither the Sri Lankan Constitution nor the legislative enactments state under what circumstances of within which rights and obligations political parties must function, and there are no described procedures that elaborate on inner-party management.<sup>782</sup> As in other countries, the absence of specific party legislation is indicative of a situation that fails to recognise political parties as important pillars of democratic politics whose activities goes beyond election campaigning.<sup>783</sup> It is the absence of any guideline or statutory norm that permits quasi-feudal and undemocratic structures within the main political parties, with no accountability or transparency even to its membership.

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<sup>781</sup> Parliamentary Elections (Amendment) Act, No. 58, 2009.

<sup>782</sup> Friedrich Ebert Stiftung, 2008.

<sup>783</sup> Blechinger, Verena, November 2002.

**10.1.2 Resources (practice) - To what extent do the financial resources available to political parties allow for effective political competition?**

Parties do not publish their accounts, thus information on political party funding is not available to the public. There are no state allocations for election campaign or political party funding. Parties obtain funds through membership fees and donations by individuals and corporations. There is no ceiling on donations, nor are donors and amounts disclosed.

Public perceptions of party expenditure, particularly during elections, are that campaign costs are extremely high. For example, costs of advertising at the January 2010 Presidential election have been estimated to be Rs.823,809,000 (USD 7,389,747).<sup>784</sup> It is generally understood that the ruling party is able to mobilise more resources than the opposition, because of its access to state resources.<sup>785</sup> Also, in-kind resources such as time allocated for advertising on state TV are not evenly distributed to the parties, leaving the ruling party at a strong advantage.<sup>786</sup> It has been alleged that the state-owned TV stations Rupavahini and ITN openly favoured President Mahinda Rajapaksa’s campaign in the Presidential election on 26 January. Detailed monitoring established that 98.5% of the news and current affairs air-time on these two stations on 18 and 19 January was given over to the President and his supporters.<sup>787</sup> Therefore, a level playing field for effective competition of political parties does not appear to exist.

**10.1.3 Independence (law) - To what extent are there legal safeguards to prevent unwarranted external interference in the activities of political parties?**

There is no specific legislation regarding the monitoring of political party operations. Party responsibilities are not defined, and there are no government bodies empowered with oversight and enforcement other than the Election Commission at

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784 Transparency International Sri Lanka, 2010.

785 Commonwealth Secretariat, 2010.

786 Interview with Tissa Attanayake, Secretary General UNP, 14 February 2011.

787 Reporters without Borders, 21 January 2010.

the time of elections. This lacuna in the law contributes to the lack of legitimacy, and reinforces the perception that the political party in power is identical with the state.<sup>788</sup>

Section 9 of Parliamentary Elections (Amendment) Act of 2009 spells out regulation for the cessation of recognition of a political party, e.g. on grounds of inactivity and failure to comply with the provisions of the Act. The Act gives the Election Commission the right to issue directions to the political parties as necessary for the effective implementation of the Act, to solicit information from the party Secretary and to issue a Code of Conduct to be observed by parties and candidates during elections (section 3, amended). Sections 79 and 80 of the Parliamentary Elections Act of 1981 make bribery and undue influence during elections a punishable offense. The public can petition against candidates for corrupt and illegal practice with the Court of Appeal.<sup>789</sup>

#### **10.1.4 Independence (practice) - To what extent are political parties free from unwarranted external interference in their activities in practice?**

State interference is an issue only for the parties that are not part of the governing party. There have been few occasions in Sri Lanka's history of violent uprisings where political parties have been banned. The Marxist JVP had been banned in the 1970s and again from 1983 – 1988, when, together with the Ceylon Communist Party it was banned on charges of playing a role in the ethnic riots.<sup>790</sup>

Interferences of political parties in each others' activities is high, particularly during election time. In the 2010 elections, both UNP and UPFA have been involved in acts of intimidation, threats and smear campaigns.<sup>791</sup> The party in power has been accused of widespread abuse of state resources, including state media. There have also been complaints against the police for alleged intimidation of opposition supporters and for the non-removal of posters of the President, as ordered by the Elections Commissioner.<sup>792</sup> At the recent Presidential election in January 2010, the Police

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788 Satkunathan, Ambika, no date.

789 Sections 93-104, Parliamentary Elections Act No 1, 1981.

790 Nations Encyclopedia, "Political parties - Sri Lanka - issues, system, power, policy", no date.

791 People's Actions for Free and Fair Elections (PAFFREL), 2010; Campaign for Free and Fair Elections (CaFFE), 2010; Centre for Monitoring Election Violence (CMEV), January 2010.

792 Commonwealth Secretariat, 2010.

Elections Desk registered 809 incidents, including five murders, 99 acts of assault and 108 instances of threat and intimidation.<sup>793</sup> During the Parliamentary elections in April 2010, the election monitoring organisation PAFFREL reported 348 (312 confirmed) violations of election law, including the burning of party offices, assaults and intimidation.<sup>794</sup> The Election Commissioner, though legally empowered to prevent interference, has little clout and his directions have been repeatedly ignored.<sup>795</sup>

In the North and East of Sri Lanka, opposition parties have problems to find nominees for elections because of the prevailing culture of fear and threats. Candidates for elections may fear harassment. Political self-censorship of minority parties and refraining of active participation in political life can be seen as a result of undue interference, and poses a threat to participatory democracy.

## 10.2 Governance

### 10.2.1 Transparency (Law) - To what extent are there regulations in place that require parties to make their financial information publicly available?

Sri Lanka does not regulate political finance and lacks campaign finance regulation. Under the Elections Act, parties must submit accounts to the Elections Commissioner, but there is no requirement to publish them, nor are they tabled in Parliament.<sup>796</sup> There is no system of public subsidies for political parties during election.

### 10.2.2 Transparency (Practice) - To what extent do political parties make their financial and other information publicly available?

While parties do not make their accounts available to the general public, members do have a right to examine them. According to a study done by the International Institute for Democracy and Electoral Assistance (IDEA) in 2005, the decision of who may see

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<sup>793</sup> Commonwealth Secretariat, 2010, p 15.

<sup>794</sup> PAFFREL, July 2010.

<sup>795</sup> "Elections Commissioner says he wants to quit", Sunday Times, 27 January 2010.

<sup>796</sup> Section 3 (4), The Parliamentary Elections Act, 2009 (amended).

the accounts is made at the discretion of the treasurer, and may depend on the clout and influence of the respective member.<sup>797</sup> At the annual party convention, time is allocated for presentation of a financial report. However, according to the same study, financial records are not necessarily comprehensive and may not reflect the actual funding.<sup>798</sup> One reason for not disclosing party funding appears to be fear of victimisation of party donors by rival parties.<sup>799</sup>

With regard to the UNP, its income received from party members in Sri Lanka and abroad is being audited, and copies are available to the public on request. Campaign funding is being submitted to an internal Finance Committee and is not publicly disclosed.<sup>800</sup>

Though parties do have websites, none of the major parties has posted its party constitution or its manifestos on the web. These key documents are not readily available even to the party members. One way for the public to access the party constitutions is through the Election Commissioner.<sup>801</sup> According to the UNP Secretary General, the UNP's constitution and manifestos are available to whoever asks for them.<sup>802</sup>

### **10.2.3 Accountability (Law) - To what extent are there provisions governing financial oversight of political parties?**

There are no legislation or disclosure requirements on campaign financing. There are no special provisions for financial management within the political parties. In the 2007 Global Integrity Index, Sri Lanka receives a zero score in the category "political financing".<sup>803</sup> There are no limits to donations by individuals or corporations to political parties, nor are there limits on party campaign expenditures.

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797 IDEA and CPA, Sri Lanka Country Report based on Research and Dialogue with Political Parties, Colombo, 2005.

798 IDEA and CPA, 2005.

799 IDEA and CPA, 2005.

800 Interview with Tissa Attanayake, 14 February 2011.

801 Section 3(7), Parliamentary Elections Act, 2009 (amended).

802 Interview with Tissa Attanayake, 14 February 2011.

803 Global Integrity, 2007.

A study on political finance in the Commonwealth classified Sri Lanka as a country that controls party funding through subsidies rather through on regulation, e.g. grants to legislators or party groups, tax reliefs and other in-kind subsidies.<sup>804</sup>

#### **10.2.4 Accountability (Practice) - To what extent is there effective financial oversight of political parties in practice?**

As explained above, financial accounts of political parties are not accessible to the general public. Financial statements presented at the party conventions appear to be not always comprehensive and accurate.

In the SLPF, the party chairman and the committee appointed by him has total power over the handling party funds.<sup>805</sup> The situation is the same in the UNP and the SLMC where financial and asset management is under the control of the party leader and the people and groups appointed by him.<sup>806</sup>

Lack of financial transparency and accountability is a major concern for the public. In the light of rising cost of living and economic hardships faced by the majority of the population, high campaign spending is perceived as waste and as abuse of public resources. At the 2010 Presidential elections, it has been alleged that the costs of direct advertising alone on behalf of the incumbent totalled SLR 378 million (USD 3.39 million), while the opposition candidate spent SLR 80 million (USD 0.72 million).<sup>807</sup>

#### **10.2.5 Integrity (Law) - To what extent are there organisational regulations regarding the internal democratic governance of the main political parties?**

Currently, internal party regulations in all major parties give unlimited powers to the party leader or chairman, with members having little or no say in decision-making. In the SLFP constitution, no procedures for the selection or expulsion of the party leader

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804 Michael Pinto-Duschinsky, no date.

805 Friedrich Ebert Stiftung, 2008.

806 Friedrich Ebert Stiftung, 2008.

807 Commonwealth Secretariat, 26 January 2010.

are stated. In 2008 the SLFP amended its constitution, automatically appointing the elected President of the country as Party Leader.

The SLMC constitution (Article 8.4) sets out that the High Command, including the Party Leader, be elected by the Politburo. The Leader of the SLMC is liable and amenable to internal disciplinary process like any other party member.<sup>808</sup> The UNP constitution provides for the party leader to be elected by the National Executive Committee, and gives the party leader unbridled powers.<sup>809</sup> The leader is accountable to the Working Committee, whose 87 members are partly directly appointed by the leader, or by an Advisory Committee of which the leader is also a member.<sup>810</sup> However, the UNP constitution is likely to be changed soon (see below).

### **10.2.6 Integrity (Practice) - To what extent is there effective internal democratic governance of political parties in practice?**

Sri Lanka's political parties are not organised in a democratic manner. Party leaders are selected rather than elected. Quota for women, though encouraged in the Parliamentary Elections (Amended) Act 2009, do not exist. The UNP is about to put quota for women into their new constitution.<sup>811</sup> The SLMC invites women affiliated bodies to be ex-officio members of the Politburo upon approval by the High Command.<sup>812</sup>

A study on inner-party democracy of 2008 finds that “after the introduction of the Executive Presidential system, party structures have become increasingly centralised and top-down.”<sup>813</sup> Decisions are taken in a top-down way, with few possibilities of the party rank and file to influence party decisions. Nomination and appointment of party leaders is usually limited to the participation of key groups. However, leaders to lower levels and branches are selected by way of voting by the party membership.<sup>814</sup>

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808 Letter from Rauff Hakeem Leader SLMC, 28 March 2011.

809 Constitution of the United National Party, 06 December 2008, Article 8.

810 Interview with Tissa Attanayake, 14 February 2011.

811 Interview with Tissa Attanayake, 14 February 2011.

812 Letter from Rauff Hakeem, 28 March 2011.

813 Friedrich Ebert Stiftung, 2008, p 52.

814 Friedrich Ebert Stiftung, 2008, p 9.

At present, reforms are underway at least in one political party, the UNP. This party currently faces a severe leadership crisis due to its failure to secure a victory in any poll within the last nine years and poor results at the 2010 elections. As outlined above, the party leader is appointed for life under the current constitution. In the second half of 2010, a reform movement led by Dayasiri Jayasekara and Sajith Premadasa initiated a process of democratisation, whereby a new party constitution has been drafted that will make the posts of Chairman, Leader, Deputy Leader, Assistant Leader and National Organiser, subject to an election, in the event a consensus cannot be reached.<sup>815</sup> The Constitution will be voted for at an extraordinary party convention at the end of 2010. If the reform succeeds, the UNP will be the first Sri Lankan party to institutionalise democratic processes.

Overall, parties appear to center on personalities and patronage, and family influences on party politics are still strong.<sup>816</sup> There appears to be little participation and consultation in policy-making, as well as lack of knowledge of party rules.<sup>817</sup>

Another aspect of integrity is the acceptance of political violence as a means of campaigning. Political parties are seemingly tolerant of violence used by the supporters against each other, particularly at election times. At the recent Presidential election in January 2010, the Police Elections Desk registered 809 incidents, including five murders, 99 acts of assault and 108 instances of threat and intimidation.<sup>818</sup> During the Parliamentary elections in April 2010, the election monitoring NGO PAFFREL reported 348 (312 confirmed) violations of election law, including the burning of party offices, assaults and intimidation.<sup>819</sup> Enforcement of party discipline is weak, and there are instances where those accused and commonly believed or perceived to have been involved in political violence and promoted.<sup>820</sup>

For example, in August 2010, UPFA MP Mervyn Silva was found not guilty by a UPFA disciplinary inquiry, for ordering to tie up an official to a tree because the latter had failed to turn up for a Dengue control programme.<sup>821</sup> This is despite evidence that

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<sup>815</sup> "UNP draft constitution ready", *The Island*, 09 November 2010.

<sup>816</sup> Bertelsmann Foundation(BTI), 2010; FES, 2008.

<sup>817</sup> IDEA, 2005.

<sup>818</sup> Police Elections desk and CMEV, quoted in Commonwealth Secretariat report, 26 January 2010.

<sup>819</sup> PAFFREL, July 2010.

<sup>820</sup> IDEA, 2005, p. 12.

<sup>821</sup> "Mervyn Silva found not guilty for ordering to tie Samudhi officer to tree", *Sunday Times*, 31 August 2010.



the incident had happened.<sup>822</sup> He was re-instated as Deputy Minister of Highways, making a mockery of the entire disciplinary process.

Finally, upholding party discipline is a problem for all parties. Frequent party crossovers, mostly from the opposition to the party in power, are weakening public trust in electoral promises. In the current cabinet, out of the 92 senior, Cabinet and Deputy Ministers there are at least 10 that have been elected into Parliament on an opposition ticket in April 2010, and several others that have crossed over in the past three years.<sup>823</sup>

### 10.3 Role

#### 1.3.1 Interest aggregation and representation (practice) - To what extent do political parties aggregate and represent relevant social interests in the political sphere?

Overall, parties are not seen to be coherently representing social interests. Political parties' manifestos receive scant attention from voters.<sup>824</sup> Party branches become active only at election time and act mostly to mobilize voters.<sup>825</sup> As mentioned above, the major parties are partially dominated by family interests, with the UNP seen to accommodate minority interest groups and business interests and the SLFP representing the rural, Sinhala vote. The SLFP has been dominated by the Bandaranaike family since its inception in 1951. Since Mahinda Rajapaksa emerged as party leader in 2005, the Rajapakse family plays a dominant role. On the other hand, the UNP, founded in 1946, is linked to the Senanayake and J.R. Jayawardene families, current party leader Ranil Wickremesinghe is a nephew of President J.R. Jayawardene who created a President-centric Constitution in 1978 and centered all party powers in the party leadership.<sup>826</sup>

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822 "Mervyn explains reasons for tying up Samurधि officer to tree", Sunday Times, 03 August 2010.

823 Website of the GOSL, Government Ministers, 23 November 2010

[http://www.priu.gov.lk/Govt\\_Ministers/Indexministers.html](http://www.priu.gov.lk/Govt_Ministers/Indexministers.html)

824 Asian Development Bank, March 2004.

825 Bertelsmann Foundation, 2010.

826 Friedrich Ebert Stiftung, Colombo 2008.

Some parties do ostensibly represent minorities, e.g. the Tamil community is represented by the TNA, the Muslim community by the SLMC and the Upcountry Tamil community by the CWC.

However, frequent cross-overs of opposition MPs to the Government mean that voters cannot trust that candidates they vote for will effectively represent them once they have been voted into Parliament or Provincial or Local Councils. This leads to a loss of trust in the vote (see chapter on legislature). Public confidence in political parties is exacerbated by the lack of transparency and accountability within the parties, and by the acceptance of political violence as a means to do politics.<sup>827</sup>

### **10.3.2 Anti-corruption commitment - To what extent do political parties give due attention to public accountability and the fight against corruption?**

Anti-corruption rhetoric is high in both the UNP and SLFP. Mahinda Rakapaksa, President of the country and President of the SLFP stated in a widely publicised speech prior to being re-elected in early 2010: “After January 27, I will devote all my time and energy towards achieving one objective. That is to build a strong and efficient country devoid of bribery and corruption. This will be a battle of the highest magnitude.”<sup>828</sup>

Similar pledges have been made by opposition leader Ranil Wickremesinghe. In 2007, he said that his goal was to “stamp out corruption within the first three years of the UNP coming into power. ... This is UNP’s long term and primary plan to completely eradicate corruption in this country.”<sup>829</sup>The UNP’s programme ‘Anagatha Abiyoga’ (challenges for the future) has a section on anti-corruption, including enabling legislation to implement the UN Convention against Corruption.<sup>830</sup>

The UNP website features a category “corruption”, and accusations of corruption are frequently brought forward against the government. While corruption features prominently in speeches by party leaders, there is a noted absence of concrete

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827 IDEA, 2005 p. 12.

828 “President says at launch of Mahinda Chintana Manifesto: My aim country sans bribery, corruption”, Daily News, 12 January 2010.

829 Wickeremesinghe, Ranil, 15 May 2007.

830 Wickremesinghe Ranil, no date.

proposals as to how to tackle the problem. The concept of accountability is less used in the political debate, as it may run counter to cultural notions of leadership.

**Table 16: Scores for Political Parties**

POLITICAL PARTIES			
DIMENSION	INDICATOR	LAW	PRACTICE
Capacity = <b>44</b>	Resources	50	25
	Independence	75	25
Governance = <b>13</b>	Transparency	25	25
	Accountability	00	00
	Integrity Mechanisms	00	25
Role = <b>38</b>	Interest aggregation and Representation	25	
	Anti-corruption Commitment	50	

## Recommendations

1. Legislation should be introduced to define the scope and authority of political parties and to control campaign spending. For example, parties should be required to submit financial accounts for official and public scrutiny, and limits on campaign expenditure and contribution limits may be imposed.
2. There should be greater transparency in regard to party rules. Members and the general public should have easy access to party constitutions and manifestos.
3. Representation of women in political parties, as provided for the Parliamentary Elections (Amendment) Act 2009, section 2(d), should be strengthened.
4. The membership should be more involved in party policy-making. Increased participation and engagement of local branches beyond the mere nomination of candidates will enhance ownership and representation.
5. Cross-overs should require resignation from the political party concerned, and hence re-election since the public vote (under the PR system) for political parties primarily and not for individuals *per se*.

## 11. THE MEDIA

### SUMMARY

Media freedom has been an enduring concern in Sri Lanka. Over the years different governments have imposed censorship of news, sought to control the way news is presented and analyzed, and have harassed and intimidated journalists in a variety of ways.

The last two years though have been particularly challenging for the Sri Lankan media. Approximately 16 journalists have been killed or disappeared over these past two years and many more have fled the country.<sup>831</sup> This has compelled the non-state owned media to engage in the practice of self-censorship to avoid further intimidation.<sup>832</sup> A senior journalist and journalism trainer, who has worked in both the state and private media, described the current environment on the media as ‘one of the darkest points in modern Sri Lanka’.<sup>833</sup>

According to the 2009 World Press Freedom index published by Reporters Sans Frontieres, Sri Lanka was ranked 162<sup>nd</sup> out of 175 countries.<sup>834</sup> In 2002 the same index had placed the country at 51<sup>st</sup> position out of 139 countries. In March 2008, forty five organizations wrote a joint appeal to the President of Sri Lanka documenting numerous instances of physical and other forms of harassment against the media and requested the President to protect media workers and guarantee the right to free expression.<sup>835</sup>

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831 International Bar Association, May 2009, pp 57. According to Journalists for Democracy the number of journalists killed between 2004 and August 2009 was 34 and according to the News Safety Institute more than 50 journalists have left the country; Transparency International Sri Lanka, 2009, pp 50.

832 See for an overview of the challenges faced by the media ‘Key Challenges for Media after war’s End’. The Report of the International Press Freedom Mission to Sri Lanka January 2010. This was the fourth International Press Freedom and Freedom of Expression Mission to Sri Lanka; the others taking place in October 2006, June 2007 and October 2008.

833 Interview with Lakshman Gunasekera, senior journalist and former Editor of the Sunday Observer, February 2010.

834 Press Freedom Index 2009, 2009.

835 Joint letter ‘Stop the War on Journalists in Sri Lanka’, 27 March 2008, Free Media Sri Lanka; Freedom House, 2010 and Committee to Protect Journalists, 2009.

In theory, the Constitution guarantees a right to free expression, speech and publication, and the courts have given important judgments in this area.<sup>836</sup> Some newspapers, websites and television stations continue to expose corruption and the abuse of public resources. However, investigative journalism has come with a heavy price and some journalists have even paid with their life.<sup>837</sup> It should be noted, moreover, that despite censorship and intimidation, some media institutions and individuals continue to inform the public courageously.

During the conflict, the LTTE (Liberation Tigers of Tamil Eelam) suppressed media freedom in those areas under its control and was said to be responsible for threats, harassment and the killing of journalists.<sup>838</sup> It is alleged that the TMVP (Tamil Makkal Viduthalai Pulikal), the breakaway faction of the LTTE, has also been responsible for intimidating journalists and preventing the distribution of newspapers in the Eastern province.<sup>839</sup>

While creative expression in the form of cinema and theatre do not traditionally come under the classification of media, it is relevant to note that these areas are also subjected to different pressures through censorship and control via public performance licensing. Another area of growing concern is the lack of gender sensitivity of the media because this issue is not one that can be blamed on government, but on the contrary reflects the need for awareness-raising and capacity building within the profession itself.<sup>840</sup>

## STRUCTURE

The media consists of print, radio, television and websites. These function in Sinhala, Tamil and English with the Sinhala media being the most widely accessed. The media institutions with the widest outreach are state-owned. The Associated Newspapers of Ceylon Limited is the largest print based media organization and is owned by the state. The state also owns and manages Rupavahini (Sri Lanka Rupavahini

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836 Article 14 (1) (a), The Constitution, 1978.

837 Wickrematunga, Lasantha, Editor of the Sunday Leader, known for its investigative journalism, was killed by unidentified men on his way to work on 08 January 2009.

838 Abeysekera, Sunila, 2007, pp 301-329 and International Crisis Group, June 2007, p 14.

839 International Crisis Group, June 2007, p. 14; International Press Freedom Mission to Sri Lanka, January 2010, pp 18 – 20; For an overview of developments in the media since 1948, see Gunewardena, Victor, 2006, pp. 33 – 52.

840 The media ranks very low in terms of conventional gender indicators such as women in leadership roles.

Corporation) which is the television station with the biggest outreach and Radio Sri Lanka (the Sri Lanka Broadcasting Corporation), the radio station with the widest outreach. Appointments to the managerial tiers of these state institutions are based on political affiliation which is an indication that the media is seen as a political propaganda tool rather than as facilitating the public's right to information.<sup>841</sup>

Privately-owned newspapers, radio stations, television stations and websites (including blogs) do operate, some of them quite effectively. Some of the non-state-owned media organizations are owned by commercial interests, and the interests of the owners are sometimes reflected in the way news is presented and analyzed. Yet, on the whole, private media is less vulnerable to direct interference than state-owned media.

The state also impacts on the media in the way it chooses to advertise. Several state-owned institutions, including banks, tend to advertise in the state-owned media rather than in private media. This has a major impact on the commercial viability of media institutions, especially print and television. Advertising revenue, rather than sales, is the key to economic viability in the print media, and paid government notices (including signaling employment opportunities) are crucial to boost circulation. Newspapers and magazines presenting alternative viewpoints have access to neither of the above, and therefore economic viability demands mainstreaming of content.<sup>842</sup>

## ASSESSMENT

### 11.1 Capacity

#### 11.1.1 Resources (Law) - To what extent does the legal framework provide an environment conducive to a diverse independent media?

The overall legal framework is conducive for a broad range of media organisations to function. However, the Emergency Regulations of 2005 and 2006 and the Prevention of Terrorism Act, discussed below, create vague and ambiguous offences, while the

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<sup>841</sup> Interview with university academic, name withheld on request.

<sup>842</sup> Interview with newspaper editor, name withheld on request.

Official Secrets Act allows the state to harass journalists, making the legal regime selectively oppressive.<sup>843</sup>

Entry into print journalism is not governed by law, which means that anyone can begin and operate a newspaper or magazine. However, the establishment of radio and television stations requires the prior approval of the Telecommunications Regulatory Commission (TRC) and the allocation of a transmission bandwidth. In theory, it is possible for anyone to apply for a license to engage in radio or television broadcasting. However, in practice the TRC tends to take its time in reviewing new applications. Unlike state electronic media, private media organizations need to apply every year for a renewal of their license to broadcast over radio or television, and this has been cited as a potential impediment to independence and continuity.<sup>844</sup> In addition, this process does not provide a conducive environment for the functioning of community broadcasting, where resources are small and range of operation is restricted. There are no regulations to ensure or even facilitate diversity of opinions, but no impediment to this either.

Print journalists generally apply for and obtain accreditation from the Ministry of Mass Media and Information through their respective institutions.<sup>845</sup> Such accreditation needs to be renewed every year. While media accreditation with the Ministry is not essential, it enables journalists to access documents, attend press briefings, gain entry to institutions such as Parliament and access other sources of information more easily. However, even possession of the accreditation card does not guarantee admission, since “it all depends on the personal relationship between the journalists and the officials.”<sup>846</sup>

### **11.1.2 Resources (Practice) - To what extent is there a diverse independent media providing a variety of perspectives?**

The state-owned media dominates the mass media sector in Sri Lanka. While independent media organizations do function, state-owned television, state-owned

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843 Interviews with Lakshman Gunasekera, 15 February 2010 and Dilrukshi Handunnetti, Political Commentator and an Investigative Journalist, 11 February 2010.

844 Interviews with Lakshman Gunasekera, 15 February 2010 and Dilrukshi Handunnetti, 11 February 2010.

845 Interview with Dilrukshi Handunnetti, 11 February 2010.

846 Janadasa Peiris, former Secretary, Ministry of Information & Media, written submission, 18 April 2011.

radio and state-owned newspapers have the largest public reach. As a result, news and what passes for social and political analysis, are largely partial to the government of the day.<sup>847</sup> Some independent media institutions attempt to present alternative perspectives but this has become increasingly hard to do in recent times due to extra-legal repression.<sup>848</sup> There is a wider diversity of perspectives represented in the print media and on blogs because of the absence of a regulatory framework with regard to print and web-based journalism, though blog readership is still confined to an urban minority due to restricted internet access<sup>849</sup>, and on occasion oppositional websites have been blocked by the state, including during the 2010 Presidential Election. At the level of individual redress for erroneous reporting, the Press Complaints Commission (PCCSL) is an attempt at self-regulation that has limited success because of its voluntary and non-punitive nature [See below].

The decision of the state, in the 1990s, to permit private radio and television stations to broadcast news has facilitated the airing of multiple perspectives.<sup>850</sup> However, virtual TV channels operating under Dialog and PEO TV networks are not permitted to broadcast local news though they can present international news.<sup>851</sup> Some level of diversity has been achieved as a result of publication and broadcast in the three language media: Sinhala, Tamil and English. Some of the larger private media establishments though tend to reflect the interests of those that own the institutions.<sup>852</sup> The impact of community radio has been mixed.<sup>853</sup> According to a leading media personality and newspaper editor, however, the allocation of licenses to broadcast is not transparent, and the resale of licenses had led to corruption<sup>854</sup>.

Extra-legal repercussions for presenting reports critical of key persons holding political and economic power have resulted in self-censorship and avoidance even by alternative media institutions.<sup>855</sup> An additional deterrent against independent news reporting is the influence exerted by advertising revenue, especially from large state-

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847 Interview with Lakshman Gunasekera, 15 February 2010 and Dilrukshi Handunnetti, 11 February 2010.

848 Interview with Dilrukshi Handunnetti, 11 February 2010.

849 Freedom House, 2009: "Just 3.7 percent of the population used the internet in 2008, with most residents deterred by the high costs involved."

850 Interview with Lakshman Gunasekera, 15 February 2010.

851 Janadasa Peiris, *ibid.*

852 Interviews with Lakshman Gunasekera, 15 February 2010 and Dilrukshi Handunnetti, 11 February 2010.

853 *Ibid.*

854 Interview with Victor Ivan, 21 July 2010, Chief Editor, Ravaya newspaper and member Editor's Guild of Sri Lanka.

855 Interview with journalist, name is withheld on request.



owned enterprises, which is withheld from media institutions perceived to be antagonistic to the current regime.

During the war, Tamil media establishments functioned under extremely difficult circumstances.<sup>856</sup> They were subjected to harassment from the state and the LTTE. As one commentator observes, during the conflict, the majority of the journalists who were killed were working in the Tamil language; the majority of those subjected to intimidation were Tamil; and the majority of the media institutions that were bombed, set on fire or attacked, were those institutions engaged in publishing or broadcasting in Tamil.<sup>857</sup> Despite the end of the conflict 18 months before the completion of this report, unequal restrictions still remain for Tamil language reporting, and the war-related legislation has not been repealed (see below).

Journalists do not require a qualification to enter the industry and practice their profession. As a result of the non-competitive salaries that journalism generally attracts, the quality of journalists has tended to be poor.<sup>858</sup> Proposals have been submitted to the authorities to introduce a grading system, including minimum qualifications and salary scales but these have not been implemented.<sup>859</sup> According to a senior journalist, who also functions as a journalism trainer, because of the high level of intimidation and threats in the recent past there has been a decline in the number of people seeking entry into the profession.<sup>860</sup> He observed that it is becoming increasingly difficult to find new recruits.<sup>861</sup> Another senior media professional reiterates that the quality of media personnel leaves much to be desired, especially in relation to their general knowledge, understanding of issues and competence in English and IT.<sup>862</sup>

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856 See the incidents documented by Sunila Abeysekera, 2007, pp. 301 at pp. 313-317; Abeysekera, Sunila, October 2006.

857 Abeysekera, above, pp 314.

858 Interview with Lakshman Gunasekera, 15 February 2010.

859 Interview with Dilrukshi Handunnetti, 11 February 2010.

860 Interview with Lakshman Gunasekera, 15 February 2010.

861 Interview with Lakshman Gunasekera, 15 February 2010.

862 Janadasa Peiris, *ibid*.

### **11.1.3 Independence (Law) - To what extent are there legal safeguards to prevent unwarranted external interference in the activities of the media?**

The right to free speech and expression, including publication is protected by the Constitution.<sup>863</sup> Restriction of this right however, is permitted on broad grounds. The right may be restricted in the interests of racial and religious harmony, or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence.<sup>864</sup> The right may also be restricted in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society.<sup>865</sup>

According to the Constitution, existing law is valid even if such law conflicts with the Bill of Rights in the Constitution.<sup>866</sup> There is a substantial body of case law from the Supreme Court interpreting this right and the legality of restrictions imposed by the State.<sup>867</sup>

Emergency Regulations issued by the President under the Public Security Ordinance and the provisions of the Prevention of Terrorism Act (PTA) contained several restrictions on the right to free expression.<sup>868</sup> Both the Emergency Regulations and the PTA contained provisions that restricted the right to free expression and created criminal offences for the possession or distribution of information which may be prejudicial to national security, public order or the maintenance of essential

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863 Article 14 (1) (a), The Constitution, 1978.

864 Article 15 (2), The Constitution, 1978.

865 Article 17 (7), The Constitution, 1978.

866 Article 16, The Constitution, 1978.

867 Wickremeratne, Jayampathy, 2006, pp. 603-691.

868 The Emergency (Miscellaneous Provisions and Powers) Regulation No 1, 2005; the Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulations No 7, 2006; and the Prevention of Terrorism (Temporary Provisions) Act No 48, 1979; Edirisinghe, Saliya 2007, pp. 122-166; and Edirisinghe, Saliya, 2006, pp. 167-221 for an analysis of these regulations. See also Civil Rights Movement, 'Emergency Law 5: An Annotated List of Emergency Regulations and other Notifications under the Public Security Ordinance, 13 August 2005 – 6 November 2009', 2009.

services.<sup>869</sup> Emergency regulations also enabled the state to exercise “prior censorship”.<sup>870</sup>

These provisions in the Emergency Regulations and the PTA have been criticized by the International Bar Association and the International Commission of Jurists for being “unduly broad and vague” and having a “detrimental effect on the rule of law in Sri Lanka”.<sup>871</sup> According to the International Commission of Jurists vaguely worded provisions in the Emergency Regulations of 2005 and 2006 “undermine legitimate political and social dissent and media discussion”.<sup>872</sup>

In May 2010 some changes were introduced to the Emergency Regulations.<sup>873</sup> Some of the provisions that infringed freedom of expression were repealed although new provisions that may potentially impact on trade union activity were introduced.<sup>874</sup>

There is no access to information legislation in the country although civil society and media organizations have advocated for such legislation for many years. In 2003 the Cabinet of Ministers approved a draft bill but Parliament was dissolved before the legislation could be enacted.<sup>875</sup>

An action for defamation may be pursued by an injured party in a civil court. Previously the criminal law of the country permitted the Attorney General to sue on the basis of criminal defamation. This provision however, was removed from the Penal Code in June 2002.<sup>876</sup>

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869 International Commission of Jurists, February 2009, pp. 23 – 27 and International Bar Association, May 2009, pp. 58 – 62.

870 International Commission of Jurists, February 2009, p. 26.

871 See International Commission of Jurists, February 2009, pp 4, 9-12 and International Bar Association, May 2009, pp. 58 – 62.

872 International Commission of Jurists, February 2009, p. 23; Welikala, Asanga, 2008.

873 The Gazette Extraordinary, 2 May 2010, 1651/24 which amended the Emergency (Miscellaneous Provisions and Powers) Regulation No 1,2005 in some respects.

874 The statement of the Civil Rights Movement, 15 May 2010.

875 This is discussed more fully in the sections on the Legislature and the Executive.

876 Section 479, The Penal Code, dealing with criminal defamation was repealed in 2002.

#### **11.1.4 Independence (Practice) - To what extent is the media free from unwarranted external interference in its work in practice?**

The Constitution guarantees the right to free expression, speech and publication, yet harassment of journalists and interference in the media is a regular occurrence and has increased significantly over the past two years.<sup>877</sup> It has been observed that laws are only as good as the judiciary that upholds and enforces them and that the Sri Lankan judiciary urgently needs reform in this respect.<sup>878</sup> The net result has been the creation of a climate intimidation and fear.

Independence of the media is compromised by two main factors: firstly, by interference from a variety of external sources and secondly, by state control over major print, radio and television establishments. In addition, according to a senior journalist, media institutions are invariably political in that they support either the government or the opposition, and rarely toe an impartial line.<sup>879</sup>

Interference comes from the state, from the underworld, from business and from other political actors.<sup>880</sup> The level of interference in radio and television is higher than in the print media.<sup>881</sup> More subtle forms of interference come from the way state-owned institutions choose to advertise (or not to advertise) in the private media; in the way frequencies are allocated (or not) for private radio and television stations; in the way the state controls the issue of newsprint; and in the way the state taxes newsprint.<sup>882</sup> For example many state institutions tend to advertise in the publications of the state owned Associated Newspapers of Ceylon Limited (ANCL). This enables ANCL to access a large advertising base with relative ease.

Journalists cannot be compelled to disclose their sources, yet no legal support is provided to journalists in this regard. So far no journalist has been jailed for refusing to divulge sources.<sup>883</sup> Yet, extra-legal means are employed for this purpose. For

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877 International Press Freedom Mission to Sri Lanka, January 2010 supported by interviews with Lakshman Gunasekera, 15 February 2010 and Dilrukshi Handunnetti, 11 February 2010.

878 Interview with Victor Ivan, 21 July 2010.

879 Interview with Victor Ivan, 21 July 2010.

880 Interviews with Lakshman Gunasekera, and Dilrukshi Handunnetti, February 2010.

881 Interview with Lakshman Gunasekera, 15 February 2010.

882 Interviews with Lakshman Gunasekera, 15 February 2010 and Dilrukshi Handunnetti, 11 February 2010.

883 Interview with Lakshman Gunasekera, 15 February 2010.

instance, in 2008 a defence correspondent was compelled to divulge two of his sources and as a result two of those who provided information were assaulted.<sup>884</sup>

Over the past two years at least 16 journalists have been killed or disappeared.<sup>885</sup> In addition, journalists and media establishments have been attacked and intimidated. In none of these cases have the offenders been prosecuted.<sup>886</sup> The only exception was in regard to the murder of Dharmaratnam Sivaram in April 2005 where the alleged perpetrator has been indicted.<sup>887</sup>

In its report of May 2009 the International Bar Association (IBA) observed that the lack of prosecutions was surprising given that there is considerable security presence in Colombo and several checkpoints.<sup>888</sup> The IBA added that the spate of unresolved murders of journalists had led to the loss of public confidence in the criminal justice system and even to the speculation that the perpetrators must be enjoying some immunity courtesy of those in positions of authority.<sup>889</sup>

As a result of killings, disappearances, physical attacks, threats and other forms of intimidation, many journalists have left the country while others have begun to engage in self-censorship.<sup>890</sup> Self-censorship however, is practiced not solely because of political intimidation but also because of intervention from business and commercial interests.<sup>891</sup>

The following are a few key examples of attacks on media freedom over the past two years:

One of the most prominent killings was that of Lasantha Wickrematunge, Editor of The Sunday Leader. Wickrematunge was killed on the 8<sup>th</sup> of January 2009 during

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884 Interview, name withheld on request.

885 International Bar Association, May 2009, p 57.

886 International Bar Association, May 2009, p 57.

887 International Crisis Group, 14 June 2007, p 14.

888 International Bar Association, May 2009, p 57.

889 International Bar Association, May 2009, p 57.

890 Interviews with Lakshman Gunasekera, 15 February 2010 and Dilrukshi Handunnetti, 11 February 2010.

891 Interview with Lakshman Gunasekera, 15 February 2010. On self-censorship see also Freedom House, 2009.

daylight hours on his way to work and within half a kilometre of a major Air Force camp.<sup>892</sup> Until today, his killers have not been prosecuted.<sup>893</sup>

Wickrematunge's paper, *The Sunday Leader* was known for its investigative journalism, its frequent exposure of corruption, nepotism and the misuse of public power, as well as its confrontational style.

Just two days before Wickrematunge's death, on 6<sup>th</sup> January 2008, a dozen heavily armed men badly damaged the studios of a private television station, Sirasa/MTV on the outskirts of Colombo by detonating claymore landmines and grenades. The private television station had telecast programmes critical of the government and was labelled by the Defence Ministry website as being a supporter of the LTTE (Liberation Tigers of Tamil Eelam).<sup>894</sup>

On the 1<sup>st</sup> of June 2009, Poddala Jayantha, an independent journalist and Secretary – General of the Sri Lanka Working Journalists' Association was brutally attacked in a suburb of Colombo.<sup>895</sup> His abductors have yet to be charged.

N. Vithyatharan, Editor of the *Sudar Oli* paper was abducted on 26 February 2009 by three policemen and three men in civilian clothes while he was attending the funeral of a relative. He was later produced in court and released.<sup>896</sup> On 24<sup>th</sup> June 2009 newsagents distributing the sister paper of the group, *Uthayan*, and two other papers *Valampuri* and *Thinakkural*, were attacked and the newspapers set on fire.<sup>897</sup>

Other incidents included the attacks on Keith Noyar, Deputy Editor of *The Nation* on 22<sup>nd</sup> May 2008; Namal Perera of the Sri Lanka Press Institute and the Press Secretary of the British High Commission, Mahendra Ratnaveera, on 30<sup>th</sup> June 2008; and the attack on Upali Tennekoon and his wife on 23<sup>rd</sup> January 2009.<sup>898</sup>

The Tissainayagam Case raised considerable public interest, both in Sri Lanka and abroad, because it raised some fundamental issues with regard to free expression and

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892 See joint press release by Human Rights Watch and the International Commission of Jurists, 8 January 2009 and Jayasekara, Ananda, 2009, pp. 50-51.

893 International Press Freedom Mission to Sri Lanka, January 2010 pp 9 – 10.

894 Jayasekara, Ananda, 2009, p 52.

895 International Press Freedom Mission to Sri Lanka, January 2010, pp 14-16; Jayasekara, Ananda, 2009, p 53.

896 International Press Freedom Mission to Sri Lanka, January 2010, pp 17-18 and Jayasekara, Ananda, 2009 p. 55.

897 Report of the International Press Freedom Mission to Sri Lanka, January 2010, p 17.

898 Jayasekara, Ananda, 2009, pp 53-54.

the right to dissent. The arrest, trial and subsequent conviction of J. S. Tissainayagam drew criticism from a broad range of national and international groups.<sup>899</sup> Tissainayagam, a columnist with The Sunday Times and editor of the Outreach website, was taken into custody on 7<sup>th</sup> March 2008.

In August 2008, Tissainayagam was charged under the Prevention of Terrorism Act (PTA) and Emergency Regulations for editing, printing and publishing the North Eastern Monthly magazine, which he at one time edited, and for aiding and abetting terrorist organisations, by raising money for the magazine.<sup>900</sup> He was convicted on three counts by the High Court on 31<sup>st</sup> August 2009 and was sentenced to 20 years rigorous imprisonment. His conviction was based largely on a confession he was supposed to have made to the Terrorist Investigation Department soon after being detained. At his trial his lawyer argued that the confession was not voluntary and there had been alterations to the statement he made, but the Court overruled this objection.<sup>901</sup>

According to the PTA, where a confession is made to a person above a certain rank, it is admissible as evidence and the burden shifts on to the accused to prove that it was made under duress.<sup>902</sup> Tissainayagam filed an appeal in the Court of Appeal against his conviction and was released by the Court on bail pending the determination of his appeal. In May 2010 Tissainayagam was pardoned by the President and has now gone into exile.

To Amnesty International Tissainayagam was a prisoner of conscience jailed solely for exercising his right to free expression in carrying out his profession.<sup>903</sup> The organisation denounced the verdict as a direct violation of Tissainayagam's right to free expression and 'as an assault on press freedom in Sri Lanka.'<sup>904</sup>

Attacks on private television and radio stations have also been recorded in the past two years. For example, Shakthi TV, a Tamil language station which is part of the

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899 Report of the International Press Freedom Mission to Sri Lanka, January 2010, pp 14-16.

900 International Bar Association, May 2009, p 53 and Report of the International Press Freedom Mission to Sri Lanka, January 2010, pp 14 – 16.

901 Report of the International Press Freedom Mission to Sri Lanka, January 2010, pp 14-16.

902 Section 16(2) of the Prevention of Terrorism Act.

903 Amnesty International, Press Release, 31 August 2009.

904 Amnesty International, Press Release, 31st August 2009.

MTV Group, whose studio complex was attacked in January 2009, was targeted again in March 2010 when its city office was attacked.<sup>905</sup>

## **11.2 Governance**

### **11.2.1 Transparency (Law) - To what extent are there provisions to ensure transparency in the activities of the media?**

Company law requires shareholder information to be disclosed as part of the company registration process.<sup>906</sup> Beyond this there is no requirement in law for media institutions to disclose their ownership structure. Most media institutions do not have disclosure policies.<sup>907</sup> Again, by virtue of being registered companies, annually audited statements of accounts need to be on record. In the case of government-owned media institutions shareholder provisions are not applicable, and public accountability is not mandated in any verifiable way.

### **11.2.2 Transparency (Practice) - To what extent is there transparency in the media in practice?**

Media owners as a general rule tend to be reclusive.<sup>908</sup> While some media establishments do provide information on ownership, many others do not. In some cases it is difficult to find out who the controlling owners are.<sup>909</sup> In practice, media institutions tend to align themselves with political parties, power blocs and/or economic interests, and this alignment reflects news content and analysis<sup>910</sup>. Even in the case of individual media professionals, they too have political interests and new

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905 Interview with Dilrukshi Handunnetti, 11 February 2010.

906 Interview with Lakshman Gunasekera, 15 February 2010, The Registrar-General of Companies is the regulatory institution for private business, see the Companies Act No 7 of 2007.

907 Interview with Lakshman Gunasekera, 15 February 2010.

908 Interview with Lakshman Gunasekera, 15 February 2010.

909 Interview with Lakshman Gunasekera, 15 February 2010.

910 Interview with Victor Ivan, 21 July 2010.



sources that mirror these interests, and hence transparency in practice is difficult to find in Sri Lanka.<sup>911</sup>

### **11.2.3 Accountability (Law) - To what extent are there legal provisions to ensure that media outlets are answerable for their activities?**

The Press Complaints Commission of Sri Lanka was established in October 2003 and is the main accountability mechanism that currently exists. It applies only to the print media. The Telecommunications Regulatory Authority (administered by the state) oversees television stations and radio stations. There is no regulatory body for websites.

The Press Complaints Commission (PCCSL) is administered by the Editors' Guild of Sri Lanka. The Board of Directors of PCCSL comprise 08 members, all men representing owners and editors of non-government newspapers. In terms of its structure anyone who is aggrieved by anything published in any of the participating newspapers may lodge an appeal with the Dispute Resolution Council of the PCCSL.

The advantage of the PCCSL is that it is a self-regulatory mechanism and is operated by the media as a mechanism for ensuring accountable and responsible journalism. Its biggest drawback is that it is binding only to a limited number of organisations that subscribe to its mandate and processes<sup>912</sup>, even though its website claims that "The PCCSL handles complaints against all Sri Lankan newspapers: in Sinhala, Tamil and English."<sup>913</sup> Though most major media establishments were part of the PCC process in the initial years, some national newspapers have either not joined or withdrawn. The Sunday Leader group joined initially, subsequently quit due to differences of opinion, rejoined under the new editor and quit again in October 2010. One senior journalist called for the establishment of a regulatory body that represents a wider body of social interests and ensures greater public participation.<sup>914</sup>

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911 Ibid.

912 Interview with Lakshman Gunasekera, 15 February 2010.

913 Press Complaints Commission of Sri Lank website at <http://www.pccsl.lk/faq.php>

914 Interview with Lakshman Gunasekera, 15 February 2010.

The PCCSL was preceded by the Press Council.<sup>915</sup> In June 2009 the government announced that it intended to revive the Press Council which gives the state a greater role in regulating media accountability. Since this announcement media organisations have reaffirmed their support of the PCCSL and asked that the Press Council continue to be kept in abeyance.<sup>916</sup>

#### **11.2.4 Accountability (Practice) - To what extent can media outlets be held accountable in practice?**

The right of reply is most often given to someone who may want to disagree with what is published in a newspaper. Similarly, newspapers sometimes do carry a correction and an apology. However, in most cases the apology or correction does not carry the same degree of prominence as the original article.<sup>917</sup> Accountability in the electronic media is virtually non-existent, except in situations where there is an attempt to avoid imminent litigation.<sup>918</sup>

Structured electronic forums such as Groundviews, which are less susceptible to government regulation provide opportunities for open discussion, but participation and readership are restricted by virtue of the fact that all communication is in English.<sup>919</sup> However, Groundviews remains influential in today's context, and provides an important alternative forum for public opinion, with other media channels reproducing its content to a wider audience.

The situation in the North and East remains even less accountable though the armed conflict ended in May 2009. As a general rule, reporting from these areas is from a Government perspective only, and the remit of the law is weakened by military and administrative regulations that impose additional constraints on civilians in the name of curbing a possible resurgence of the LTTE. The Emergency Regulations are still invoked to circumscribe media freedom, especially on reporting on the North and

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915 Press Council Law, No 5 of 1973. See Gunewardene, above, pp. 44-46 and Report of the International Press Freedom Mission to Sri Lanka January 2010, pp. 20-21 for a critique of the Press Council Law.

916 International Press Freedom Mission to Sri Lanka, January 2010, pp. 20-21.

917 Interview with Lakshman Gunasekera, 15 February 2010.

918 Interview with Dilrukshi Handunnetti, 11 February 2010.

919 Though direct readership may be limited due to language, the fact that its articles get reproduced/ translated into other media formats increases its accessibility considerably.

East, and there remains a cloak of secrecy around the area, which adds to public fear and apprehension.<sup>920</sup>

### **11.2.5 Integrity (Law) - To what extent are there provisions in place to ensure the integrity of media employees?**

A Code of Professional Practice for the print media does exist and instructions on the Code forms part of the several training programmes for the media.<sup>921</sup> The Press Complaints Commission Sri Lanka oversees the implementation of the Code and investigates breaches.

The Code sets standards for accuracy and professional integrity and commits journalists to work in the public interest, and to further social responsibility. Public interest is defined to include protecting democracy, good governance, freedom of expression, detecting or exposing crime, corruption, maladministration or a serious misdemeanor.<sup>922</sup> Media institutions do not as a general rule have internal ombudsmen.<sup>923</sup>

There is no code of ethics for the electronic media. An effort initiated in 2005 by the Sri Lanka Press Institute and five other professional organizations to develop a Code did not materialize.<sup>924</sup> Media outlets do not usually have their own codes of ethics or ethics committees.

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920 This information has been summarized from numerous sources, including comments by persons wishing to remain anonymous, websites and blogs. Symptomatic of the remnant climate of fear is that Tamil citizens in these areas cannot openly express any view seen as oppositional to the prevailing regime for fear of being identified as a terrorist.

921 Interview with Lakshman Gunasekera, 15 February 2010.

922 Code of Professional Practice (Code of Ethics) of the Editors Guild of Sri Lanka and Free Media Movement Adopted by the Sri Lanka Press Institute <http://freemediasrilanka.wordpress.com/code-of-ethics/>

923 Interview with Lakshman Gunasekera, February 2010. The tabloid Ravaya did have an ombudsman at one time.

924 Interview with Shan Wijetunge, Director Communications, Transparency International Sri Lanka, 24 February 2010.

### **11.2.6 Integrity (Practice) - To what extent is the integrity of media employees ensured in practice?**

A survey conducted by the International Federation of Journalists in 2006 revealed that only half of the 106 print journalists interviewed were aware of the Code of Ethics and that only 11 per cent had a copy of the Code. Less than half of the journalists surveyed had received any training in ethics.<sup>925</sup> While the training on Investigative Journalism provided by the Sri Lanka Press Institute includes a session on ethics, the curriculum leaves out important aspects such as ethical challenges for undercover journalists.<sup>926</sup> The training provided by the state-owned Sri Lanka Rupavahini Training Institute tellingly does not include a component on ethics.

There are several professional organisations defending journalists. The Free Media Movement (FMM), the Sri Lanka Working Journalists' Association (SLWJA) and the Sri Lanka Press Institute are among the most prominent.<sup>927</sup> According to a journalist, the key challenge for ethical reporting in the current context is the protection of sources and source material.<sup>928</sup>

Bribery and intimidation are used frequently to influence journalists, either to report a particular topic or to refrain from reporting. Journalists' own agendas are also a factor that negativity influences integrity in practice.<sup>929</sup>

## **11.3 Role**

### **11.3.1 (Practice) - To what extent is the media active and successful in investigating and exposing cases of corruption?**

The media in Sri Lanka is currently facing one of its most challenging times. The space for dissent and critical opinion has shrunk considerably in the past two years. The

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<sup>925</sup> International Federation of Journalists, 2006.

<sup>926</sup> Interview with Dilrukshi Handunetti, 11 February 2010.

<sup>927</sup> Other organizations are the Sri Lanka Muslim Media Forum (SLMMF) and Sri Lanka Tamil Journalists' Alliance (SLTJA).

<sup>928</sup> Interview with Dilrukshi Handunetti, 11 February 2010.

<sup>929</sup> Interview with Victor Ivan, 21 July 2010.

International Press Freedom Mission described the current environment as “a climate of intolerance”.<sup>930</sup>

The media has had some level of success in exposing cases of corruption. While there appears to be a selective exposure of corruption, the media has been able to perform its watchdog role with a degree of credibility. This has happened even in the face of intimidation and threats.<sup>931</sup> Specialized training on investigative journalism is not available in the country.<sup>932</sup>

However, recently as a result of the increasing levels of intimidation in the recent past the exposure of corruption in the media has declined appreciably.<sup>933</sup> High profile exposes of alleged government corruption and mismanagement such as relating to the second national airline Mihin Air and the purchase of military aircraft led to targeting of journalists. As noted above, investigative journalism has come with a heavy price and some journalists have even paid with their lives.

2010 has seen a significant decline in investigative journalism that focuses on alleged corruption, abuse of power and mismanagement/waste at the highest echelons of power due to a combination of legal and extra-legal repercussions, the fact that some key journalists are either in exile or have been traumatized, and the fact that alleged perpetrators of intimidation and violence operate with impunity. For instance, The Sunday Leader which pioneered investigative print journalism in recent times in Sri Lanka alleges that it has been continuously targeted by the State.

This climate of fear, intimidation and intolerance had had an impact on the way the media reports and analyses events. It has had an impact on the frequency and intensity of investigative reporting especially where such reports highlight corruption or a misuse of power on the part of those in positions of authority. An important challenge at the moment is to remove the culture of fear and intolerance that now exists; enable media workers to practice their profession freely; and provide effective guarantees for their safety and security.

At the same time, there is a lack of training and, indeed understanding, of the nature of investigative journalism in Sri Lanka today, which is exacerbated by capacity issues

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930 International Press Freedom Mission to Sri Lanka, January 2010, p. 3.

931 Interview with Lakshman Gunasekera, 15 February 2010.

932 Interview with Dilrukshi Handunetti, 11 February 2010.

933 Interview with Lakshman Gunasekera, 15 February 2010.

relating to journalists themselves. This constraint has hampered the production of high quality investigative reports.<sup>934</sup>

**Table 17: Scores for Media**

<b>MEDIA</b>			
<b>DIMENSION</b>	<b>INDICATOR</b>	<b>LAW</b>	<b>PRACTICE</b>
Capacity = <b>31</b>	Resources	50	25
	Independence	50	00
Governance = <b>17</b>	Transparency	25	00
	Accountability	25	00
	Integrity Mechanisms	25	25
Role = <b>25</b>	Inform public about corruption	-	25

### Recommendations

1. Right to Information legislation needs to be introduced as an urgent priority to ensure that the media can report more openly, and the public can take informed and unfettered decisions.
2. The right to free expression, publication and dissent must be respected and promoted by all actors: state and non-state stakeholders, political parties, business interests, professional organizations and civil society
3. All media workers who sought exile abroad should be encouraged to return through the provision of credible guarantees: their right to free speech and to practice their profession should be guaranteed.
4. Training institutes and capacity building initiatives for the media should be strengthened; in parallel, working conditions need to be enhanced.
5. Media institutions in the country should cooperate to establish an effective self-regulatory body for all forms of public media. Such a body must be representative of a broad range of social interests (including from outside the media) and provide for public participation in the processes of media accountability. This mechanism should apply to the print, electronic and web-based media.

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<sup>934</sup> Interview with Victor Ivan, 21 July 2010.

6. Codes of Ethics should be followed within radio, television print and web-based media.
7. State media institutions (radio, television and print) should be freed from state control. They should be run as public trusts and administered by an independent and impartial Board of Directors.
8. Advertising by state owned entities in the media should be governed by criteria that are fair and transparent.
9. The killing, disappearance and abduction of journalists must be investigated and the perpetrators brought to justice. The current status of ongoing investigations needs to be publicly disclosed.
10. The Emergency Regulations and the Prevention of Terrorism Act should be revoked.

## 12. CIVIL SOCIETY

### SUMMARY

Civil Society encompasses a broad range of actors, including media, professional organizations, trade unions and Non-Governmental Organisations (NGOs). This chapter deals only with NGOs, and uses both the term Civil Society Organisation (CSO) and NGO to refer to ‘voluntary bodies formed by groups of citizens for specific purposes of social service or social and policy intervention’.<sup>935</sup>

NGOs can be registered under various legal regimes in Sri Lanka, allowing for control by government to a varying degree.<sup>936</sup> In the past and present, issues of accountability and integrity have often been used to discredit NGOs. There is a widespread mistrust of NGOs, particularly those engaged in peace building, human rights and governance issues, and recent government rhetoric has promised stringent regulations to curb perceived abuse. Foreign-funded NGOs are often seen to lack legitimacy and to pursue foreign agendas. Recently, NGOs, and their activists have been threatened, physically attacked, and verbally abused in the state media and on government websites. The visible national face of Civil Society remains urban and elite, often with key figures appearing in multiple leadership roles. The inability of CSOs to inaugurate a process of self-regulation and accountability has hampered the struggle against state repression of even its genuine advocacy and awareness-raising role.

### STRUCTURE

Civil Society is a broad concept which can include a range of outfits from academic institutes to business associations, community-based organisations, consumer associations, farmers’ groups, human rights advocates, to labour unions and many others.<sup>937</sup> In Sri Lanka, a plethora of national and international CSOs exist, as well as local and village level community based organizations. Traditionally, the idea of social services and village-level self-help groups have always existed in Sri Lanka, for

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<sup>935</sup> Fernando, Udan, July 2003.

<sup>936</sup> Edrisinha, Rohan, May 2010.

<sup>937</sup> Scholte, Jan Aart, 1999.



example the *maranaadara samithiya*, (death donation society), or *Shramadana* (collective work for a common good). Voluntary service organizations include religious organizations, orphanages, homes for elders, credit societies and peasant movements.<sup>938</sup> Since independence, and particularly since the 1990s, when international development funding was increasingly channeled through civil society, the CSO sector has seen tremendous growth.

A Directory of Development NGOs produced by IRED in 1991, listed 50 international and 293 national NGOs<sup>939</sup>. A Presidential Commission found 25-30,000 grass-roots organizations to be operating in Sri Lanka in 1993.<sup>940</sup> However, besides the definitional problems, there is no reliable record of the total number of CSOs operating in Sri Lanka. At the time of writing this report, 1317 NGOs had been registered by the NGO Secretariat.<sup>941</sup>

While development CSOs tend to focus on issues of health, education, agriculture, economic development, etc, other CSOs focus on women's and children issues, minority rights, peace and reconciliation, governance etc. In addition, professional bodies such as the Chambers' of Commerce, the Bar Association, etc and Trade Unions, are also part of civil society. However, Trade Unions are connected to political parties and function in the interest of the political parties rather than of the workers.<sup>942</sup> Both professional bodies and Trade Unions are therefore not dealt with in this chapter, but in the other relevant chapters.

As a result of the diverse roles they play, CSOs have diverse relationships with the state. Those engaged in service delivery tend to have a close partnership with the state while other groups that monitor and challenge the state tend to have tense and confrontational relationships with the state.

CSOs in the country are dependent to a large extent on foreign donor funding. The culture of local philanthropy mainly supports charity and welfare work, not longer-term empowerment or institutional strengthening of these organizations. To that

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938 Asian Development Bank, 1999.

939 IRED, 1991. IRED is a French acronym for "Development Innovations and Networks".

940 Presidential Commission (1993), Inquiry on NGOs functioning in Sri Lanka, 13 December, Presidents House, Colombo.

941 NGO Secretariat website at

[http://www.ngosecretariat.gov.lk/web/index.php?option=com\\_statistics&Itemid=49&lang=en](http://www.ngosecretariat.gov.lk/web/index.php?option=com_statistics&Itemid=49&lang=en)

942 Global Integrity, Sri Lanka, 2007, p 10.

extent CSOs remain vulnerable and their priorities are sometimes determined by the priorities of donors.<sup>943</sup> Voluntarism, which has always been high in comparison to western norms, is on the decline, in part because CSOs have not been able to effectively harness this resource.<sup>944</sup>

## ASSESSMENT

### 12.1 Capacity

#### 12.1.1 Resources (Law) - To what extent does the legal framework provide an environment conducive to civil society?

The right to freedom of association is part of the constitutional bill of rights.<sup>945</sup> This right has been upheld by the Supreme Court in several cases. However, the complex, even convoluted, legal environment around the registration process for some CSOs is not conducive to transparency and uniformity. As described by Edrisinha, “NGOs generally seek legal incorporation through one of five laws or mechanisms: (1) Registration under the Societies Ordinance of 1891; (2) Registration under the Companies Act 2007; (3) Registration under the Cooperative Societies Act of 1992; (4) Registration under the Voluntary Social Service Organisations Act of 1980; or (5) Legal incorporation by an Act of Parliament sponsored by a Member of Parliament through the mechanism of a Private Members Bill”.<sup>946</sup> However, each of these requires its own pre-requisites and processes, which are difficult for small localised organisations to comply with. Hence, most CBOs and sub-district level CSOs remain unregistered.

For instance, registration under the Voluntary Social Service Organisations Act of 1980 (amended 1998) requires CSOs to submit detailed information before they can

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943 Nanayakkara, Rukshana, 2009, pp 87-100.

944 Yet, “A report released last week (Sept. 12, 2010) by Gallup titled the World Giving Index, which measured the generosity of people around the world, ranked Sri Lanka 8th place—tied with United Kingdom—and was the highest ranked developing country.” <http://somahewa.wordpress.com/2010/09/14/sri-lanka%E2%80%99s-vibrant-civil-society/>

945 Article 14(1), The Constitution of the Democratic Socialist Republic Sri Lanka, 1978.

946 Edrisinha, Rohan, 2010.

register.<sup>947</sup> Recommendations are required from the Ministries of Defence and Foreign Affairs. The law also enables the NGO Secretariat, which administers the Act, and the Minister of Social Services, to interfere in the work of CSOs in certain circumstances.<sup>948</sup> This statutory framework is considered unduly intrusive and inconsistent with international standards relating to freedom of association.<sup>949</sup>

Registration as a non-profit entity under the Companies Act of 2007 is also possible.<sup>950</sup> CSOs that register under this law are required to submit an annual narrative report and an annual statement of accounts to the Registrar of Companies.

CSOs may also establish themselves under a Special Act of Parliament, register under the Co-operative Societies Act of 1972<sup>951</sup>, register as a trust and under other laws.<sup>952</sup> At the local level, CSOs have to be registered with the Divisional Secretaries of each respective geographical division. Registration here is simple and non-complicated. Once registered, CSOs have legal authority to engage in various socio-economic and other activities and to engage with government services on behalf of members.<sup>953</sup>

The Appropriation Bill for 2005 introduced a tax on foreign funding received by certain NGOs. According to the Inland Revenue (Amendment) Act of 2005 three percent of the aggregate amount that was received by an NGO is deemed the profit and income subject to tax. However, the Minister of Finance has the power to enable the Commissioner General of Inland Revenue to reduce or remove entirely such tax in certain circumstances meaning there is scope for manipulating this new regulation.<sup>954</sup>

Recently, Government representatives have announced plans to provide more restrictive CSO legislation. It has been suggested that all grants from foreign countries should be channeled through government, and that all INGOs and NGOs would have to be registered with a central agency. Sri Lanka has been seen as aiming at the

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947 Voluntary Social Service Organizations [Registration and Supervision] Act No 31, 1980 (amended Act No 8, 1998); The regulations issued under the Act, Government Gazette 1101/14, 15th October 1999.

948 Interview with Dr. Paikiasothy Saravanamuttu, Executive Director, Centre for Policy Alternatives, 26 July 2010.

949 Global Integrity, 2007, p 7.

950 Companies Act No 7, 2007.

951 Co-operative Societies Act No 5, 1972.

952 Agrarian Development Act, No 46, 2000; The Rural Development; the Protection of the Rights of Elders Act, No 9 of 2000; and the Consumer Affairs Authority Act, No 9, 2003.

953 Interview with the divisional secretaries in Mawathagama and Polpithigama held in June 27 and 28, 2010.

954 Edrisinha, Rohan, May, 2010.

Venezuelan model of controlling civil society by routing all funding through the government.<sup>955</sup>

### **12.1.2 Resources (Practice) - To what extent do CSOs have adequate financial and human resources to function and operate effectively?**

Sri Lankan CSOs draw their funds from several sources such as foreign governments, UN, INGOs, or private donors and to some extent voluntary (labor) contributions from the local population.

Many CSOs, especially those working in human rights or governance are dependent on foreign donors for funding.<sup>956</sup> The availability of funding has decreased in recent years as a result of the global financial crisis, and because of Sri Lanka's move from a low income country to a middle income country.<sup>957</sup>

There are small CBOs such as welfare societies or sports organizations, which receive local funding directly in the form of government grants. CBOs also benefit from voluntary labor. Private domestic contributions and income from sales or assets play only a marginal role in sustaining the civil society sector. There are also civil society organizations such as Sri Lanka Mahabodhi Society, Buddhist Theosophical society and other religious/cultural organizations, which depend solely on local funding sources.<sup>958</sup>

Many CSOs face difficulties in attracting and retaining human resources. Salary scales tend to be low, and there is an exodus of trained CSO personnel to international organizations (like the UN) offering more attractive rewards. A lack of professionalism is another challenge that CSOs will have to overcome.<sup>959</sup> The Government has begun to exert strong indirect control over international NGOs through the visa process for non-Sri Lankan staff.

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955 The International Centre for Not-for-Profit Law, May 2009

956 Interview with Paikiasothy Saravanamuttu, 26 July 2010.

957 Interview with Paikiasothy Saravanamuttu, 26 July 2010.

958 James, Estelle, 1989, pp. 289-318.

959 Interview with Paikiasothy Saravanamuttu, 26 July 2010.

### **12.1.3 Independence (Law) - To what extent are there legal safeguards to prevent unwarranted external interference in the activities of CSOs?**

The various legal regimes allow for interference to a varying degree. Government oversight is unreasonably strong under the Voluntary Social Services Act that enables the Minister of Social Services to appoint a Board of Inquiry in situations where there is an allegation of fraud or misappropriation made by any person.<sup>960</sup> This provision could be used as an excuse to interfere in the work of CSOs registered under the Act. The Companies Act on the other hand does not easily permit political interference. As a result most CSOs that engage in human rights work, anti-corruption or other activities that entail contesting the views of government or monitoring the activities of government, tend to register under the Companies Act.

A new bill is apparently underway, with the intent of tightening government control over CSOS.<sup>961</sup> However, at the time of writing this report, the bill had not been tabled in Parliament, nor had its contents become public.

In the aftermath of the war, CSOs cannot operate freely in some parts of Sri Lanka. Presently, CSOs need approval and permission from the Ministry of Defence and the Presidential Task Force (PTF) to operate in certain parts of the Northern and Eastern provinces.<sup>962</sup> According to NGO representatives, many of the local and international NGOs apart from UN organizations have effectively been barred from operating in the areas which were recaptured from the LTTE.<sup>963</sup> Some signs of relaxing these restrictions have emerged towards the latter months of 2010.

### **12.1.4 Independence (Practice) - To what extent can civil society exist and function without undue external interference?**

For decades, the term “NGO” has been used in Sri Lanka in a derogatory way to attack and discredit organizations that express dissent with government policies. CSOs who suffer from attacks are typically advocating for minority rights, peace, federalism and

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960 Sections 10, 11, 12, 13 and 14, The Voluntary Social Service Organizations (Registration and Supervision) Act; Section No 31,1980 (amended Act No 8, 1998).

961 Samath, Feizal, 29 September 2010.

962 Ministry of Defense, “New procedure for granting approval to operate projects in Northern Province”, 17 July 2010.

963 “Aid workers barred in north Lanka”, TamilNewsNetwork, 15 July 2010.

reconciliation.<sup>964</sup> Overall, it appears that restrictions on CSOs are politically motivated and not necessarily derived from the legal or regulatory framework.<sup>965</sup> In the 1990s for example, a Presidential Commission was pointed to investigate alleged malpractice, fraud and proselytism, mainly motivated by the fear of political aspirations of the Sarvodaya Movement.<sup>966</sup>

However, there has been a significant deterioration and space for civil society work. Space has shrunk considerably since the Rajapaksa Administration came into power in 2005.<sup>967</sup> This is especially the case where the work of CSOs has involved contesting the policies or actions of the government or monitoring the activities of political actors. In such cases, CSOs have had to face threats and acts of intimidation (see chapter on Media). As in the case of the media, these acts of harassment and intimidation have generated a culture of self-censorship on the part of the CSOs, with many organizations and activists being reluctant to speak out.<sup>968</sup>

In 2006 Parliament established a Select Committee to investigate the activities and funding sources of CSOs.<sup>969</sup> Several CSOs involved in promoting human rights, peace and anti-corruption were summoned before the committee and subjected to questioning.<sup>970</sup> Many in civil society perceived the appointment of the committee as a hostile act, a way of harassing CSOs and a precursor to the introduction of tighter controls on the activities of CSOs.<sup>971</sup> However, the Committee's proposed new bill for the regulation and supervision of CSOs has not been passed.

Another important change in the relationship between government and civil society is the increasingly restrictive handling of visas. Recently, foreign employees of several CSOs have been asked to leave the country at short notice, their visas were cancelled or failed to get their work permits renewed.<sup>972</sup> For example, the head of FORUT, a number of those working for Save the Children, Care International, the head of

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964 "NGOs and hate politics must end", Tamil Week, 01 May, 2005.

965 Edrisinha, Rohan, 2010.

966 Edrisinha, Rohan, 2010.

967 Interview with Paikiasothy Saravanamuttu, 26 July 2010; Freedom House, 2010; Edrisinha, Rohan, 2010.

968 Interview with Paikiasothy Saravanamuttu, 26 July 2010.

969 Parliament of Sri Lanka, 'Select Committee of Parliament for investigations of the Operations of Non-Governmental Organisations and their Impact', 08 December 2008.

970 See the response by Transparency International Sri Lanka to the Interim Report of the Select Committee.

971 See also the letter by the International Commission of Jurists (ICJ) to the President of Sri Lanka, 05 September 2006.

972 Samath, Feizal, 29 April 2010.

Solidar, the programme manager of Zoa Refugee Care were among those who were asked to leave or were deported in 2009.<sup>973</sup>

However, it appears that as long as CSOs are in line with government policies, do not raise any structural issues, or question real or perceived injustice, they can operate “freely”, though paradoxically, the end of the war has led to tightening of controls. CSOs engaging in peace/human rights, governance or equity issues, as well as those identified with perceived enemies of the current regime are seen to be pursuing anti-Sri Lankan interests. Issues of wastage, as some INGOs allegedly use large parts of their funds to cover overheads and expat salaries, and concerns about erosion of national sovereignty, dominate the State-led public discourse. Hence, these reasons and the assertion that all INGO activity should be in line with government policies, have been cited to justify more control over INGOs.<sup>974</sup> There have been several articles in the state-owned press that have labelled civil society activists as “traitors”.<sup>975</sup>

A few prominent CSO activists have been subjected to attacks. In August 2009, Paikiasothy Saravanamuttu, a prominent civil society activist and one of the respondents in this study, received a death threat.<sup>976</sup> In September 2009, the house of J.C Weliamuna, lawyer and (at the time) Executive Director of Transparency International Sri Lanka, was attacked with a grenade in close vicinity to a police station. No one has been charged in either of these incidents.<sup>977</sup>

In 2010, the Government blamed NGOs for the loss of GSP+ tax concessions as the NGOs were accused of spreading information critical of the Government’s human rights record.<sup>978</sup>

In regard to the war affected North, new regulations – such as the requirement to obtain permission from the Presidential Task Force (PTF) and to re-register with the Ministry of Defence – effectively prevent many CSOs from operating in those areas. According to CSO circles in the North, securing the required approval is difficult as

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973 Page, Jeremy, 03 June 2009.

974 “Sri Lanka government expects transparency from NGOs”, *Colombopage*, 06 March 2009.

975 Interview with Paikiasothy Saravanamuttu, 26 July 2010.

976 “Top Sri Lanka academic threatened”, *BBC News*, 20 August 2009.

977 Wickremesinghe, Nanda, 22 March 2010.

978 “Homosexuality, cabaret and GSP”, *Lankanewspaper*, 28 September 2009.

Sri Lanka government generally views the local NGOs as agencies of foreign elements opposed to it.<sup>979</sup>

## 12.2 Governance

### 12.2.1 Transparency (Practice) - To what extent is there transparency in CSOs?

According to the former Head of the Secretariat for Coordinating the Peace Process, lack of transparency with regard to funding and performance is the main problem in regard to the strained relationship between government and civil society. He reiterates that “Many NGOs have simply ignored required procedures. Very few of those registered as Companies for instance have complied with requirements.”<sup>980</sup>

The level of internal transparency of CSOs varies significantly. Many CSOs provide details of the work they do and financial statements by way of an annual report.<sup>981</sup> In some cases details of their work are available on CSO web sites. According to one of the respondents, CSOs would do well to adopt a self-regulatory scheme that would enhance the transparency of their operations rather than allow the government to impose one.<sup>982</sup> NGOs that are registered under the Companies Act need to be more transparent in regard to adherence to accounting standards, tax compliance etc, as legal compliance is ensured through the Registrar of Companies whose website also has information on the registration process and a list of companies.<sup>983</sup>

In 2006 the Institute of Chartered Accountants introduced an accountability standard for NGOs, the “SAFA Standard and Guideline for Not-for-Profit Organisations (including Non-Governmental Organisations)”.<sup>984</sup> Meant to provide a clear guideline

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979 “Sri Lanka government imposes restrictions on local NGOs in North, East”, Tamilnewsnetwork, 23 September 2010.

980 Email interview with Rajiva Wijesinha, Member of Parliament, Former Secretary-General of the Sri Lankan Secretariat for Coordinating the Peace Process and the Secretary to the Ministry of Disaster Management and Human Rights, 08 August 2010, and follow-up email of 09 March 2011.

981 Interview with Paikiasothy Saravanamuttu, 26 July 2010.

982 Ibid.

983 Registrar of Companies website at <http://www.drc.gov.lk/App/ComReg.nsf?Open>

984 South Asian Federation of Accountants, Standard and Guideline Not-for-Profit Organisations (including Non-Governmental Organisations).



for NGOs on how to conduct their affairs, this tool mainly focuses on the preparation of financial statements. It is not clear, however, what impact the standards have had.<sup>985</sup>

The website of the NGO Secretariat has all relevant information for NGOs seeking registration. CSOs must submit their progress reports, information on inflow of funding, sources and amounts, expenditures, salaries of staff and number of staff, etc to the NGO Secretariat on a quarterly basis.<sup>986</sup> When TISL asked the NGO Secretariat in July 2010 for financial information on NGOs, it was told that information could be made available upon a specific request. However, a comprehensive database with key information on all registered NGOs does not appear to exist in the Secretariat.

In practice, there is little transparency in the way in which CSOs are managed. Public perceptions of waste and mismanagement are fuelled by repeated calls for tougher regulation and monitoring of CSOs' finances. For example, on the 10<sup>th</sup> March 2009, then Export Development and International Trade Minister, G.L. Peiris told media that there was a need to introduce a surveillance mechanism to monitor sources of funds and how funds are spent. He also said that there must be transparency in the expenditure of NGOs and that presently the Government is unaware of where NGOs spend money.<sup>987</sup>

These calls for transparency are, however, not new. After the Tsunami in December 2004, an estimated amount of USD 750 million was in the hands of CSOs for relief and reconstruction. Some were concerned that "the overall environment has potential for waste, corruption, leakages and possibly a loss of credibility and confidence".<sup>988</sup> Other groups also made proposals that CSOs disclose their accounts to allow for public scrutiny.<sup>989</sup> However, as of today, civil society has not found a way to proactively address this issue.

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985 "ICASL issues good governance document for NGOs", Financial Times, 18 June 2006.

986 See the notice on the web site of the NGO Secretariat at [http://www.ngosecretariat.gov.lk/web/index.php?option=com\\_content&task=view&id=65&Itemid=&lang=en](http://www.ngosecretariat.gov.lk/web/index.php?option=com_content&task=view&id=65&Itemid=&lang=en)

987 Reported in the Daily Mirror, 11 March 2010.

988 Thiagarajah, Jeevan, 2005.

989 "Civil rights groups in Sri Lanka are calling for transparency in tsunami relief", Lanka Business online, 13 January 2005.

In this backdrop, it is not surprising that a public perception survey conducted in 2007 found that NGOs were perceived as highly corrupt by one third of survey respondents.<sup>990</sup>

### **12.2.2 Accountability (Practice) - To what extent are CSOs answerable to their constituencies?**

Accountability can be defined in various ways: It can refer to institutional oversight exercised by a Board of Directors and/ or CSO members, or it can refer to the larger social responsibility of CSOs to work for the good of their constituencies, or for the public good. In Sri Lanka, public perception of CSO accountability often includes the responsibility of CSOs to act within the national policy framework of the country.<sup>991</sup> CSOs that are critical of government, particularly those that are foreign-funded, are therefore often described as unaccountable and anti-government, including supporting terrorism and being inimical to the sovereignty of Sri Lanka.<sup>992</sup>

As in most countries, economic and social elites tend to dominate civil society organisations. The concept of social accountability is subverted by the patronage relationships that govern CSOs, particularly at local level. Downward accountability towards beneficiaries, often expected by donors, is weak.<sup>993</sup> The flow of information is invariably upwards; beneficiaries and community organizations are expected to provide full disclosure, whereas, donors and national CSOs/NGOs do not share their decision-making and salary structures downwards. Even in determining projects and programmes, as well as in monitoring and evaluation, there is no equal partnership.<sup>994</sup> Leading positions in CSOs are typically held by elderly males, with women being poorly represented. Also, as in public life in general, civil society is dominated by some influential families, rather than being based on membership. Second level CSO

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990 Centre for Policy Alternatives, 2007, p 35.

991 This is one of the objectives of the NGO Secretariat <http://www.ngosecretariat.gov.lk/web/index.php?lang=en>

992 "NGOs as saviours of LTTE terrorism. Stabbing Sri Lanka in the back with a vengeance". Asiantribune, 17 June 2008.

993 Jayasinghe, Kelum and Wickramasinghe, Danture, no date.

994 Interview with INGO representative, name withheld on request.

leadership is markedly lacking in the present Sri Lankan context, but this is a phenomenon that predates the assessment timeframe of this report.<sup>995</sup>

Overall, the concept of accountability appears to be inadequately embraced and understood within civil society. The former director of the Secretariat for Coordinating the Peace Process felt that some CSO activists' cultural conditioning is based on the assumption that governments are necessarily the problem, and that disjunction exists between these activists and the people they are meant to serve.<sup>996</sup>

In the narrow sense, it is argued that CSOs registered under the Companies Act are more accountable, as they have to legally comply with financial regulations.<sup>997</sup> National and regional CSOs prepare annual reports and financial statements, but this is less true of community-based organisations (CBOs). However, the mere submission of accounts does not guarantee accuracy, and, as has been emphasized by one interviewee, the Government has been lax in following up and keeping effective track of CBOs<sup>998</sup>, except in cases where there is political mileage to be gained.<sup>999</sup>

### **12.2.3 Integrity (Law)-To what extent are there mechanisms in place to ensure the integrity of CSOs?**

There is no sector-wide code of conduct for CSOs in Sri Lanka. Transparency International Sri Lanka in 2008 developed a set of "Golden Rules" aimed at promoting principles of accountability, transparency and integrity in the management of CSOs.<sup>1000</sup> The Consortium of Humanitarian Agencies (CHA) has obtained certification under the ISO 9001-2001 Standard for Quality Management Systems for Not-for-Profit Organisations.<sup>1001</sup> Other organisations such as FLICT have also received SGS benchmark certification, but these and a handful of other CSOs remain the exception rather than the norm.

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995 Interview with INGO representative, name withheld on request.

996 Interview with Rajiva Wijesinha, 08 August 2010.

997 Interview with Paikiasothy Saravanamuttu, 26 July 2010.

998 Email submission of Prof. Rajiva Wijesinha.

999 Interview with INGO representative, name withheld on request.

1000 Rukshana Nanayakkara, 2008.

1001 Consortium of Humanitarian Agencies [http://www.humanitarian-srilanka.org/new/Professional\\_Standard.htm](http://www.humanitarian-srilanka.org/new/Professional_Standard.htm)

Financial integrity is regulated in the various Acts under which CSOs can register. While the Companies Act requires a high level of disclosure and compliance with financial and tax regulation, other regimes are less strict.

As outlined above, there have been a number of attempts by the Government to “streamline” legislation on CSOs, with the stated aim of enhancing integrity and improving oversight and co-ordination. One example is the Presidential Circular numbered RAD/99/01 issued by the Secretary to the President on 26 February, 1999 which required all voluntary social services organizations/NGOs registered under different acts under different institutions to re-register with the NGO Secretariat so that there would be systematic monitoring of all such organizations by one institution and better coordination. Organizations were asked to provide information of the type of activities undertaken, financial information, employees, localities in which they operated and so on.

According to the NGO Secretariat, the Minister of Social Services has the power to appoint a board of inquiry if any alleged fraud or misappropriation is reported in a civil society organization registered under the Voluntary Social Services Act of 1980.<sup>1002</sup>

#### **12.2.4 Integrity (Practice) - To what extent is the integrity of CSOs ensured in practice?**

CSO “integrity” is a concept which is subject to various interpretations in the Sri Lankan context. Some sections of the government believe that many foreign-funded CSOs lack integrity because they pursue a Western agenda and have a hostile attitude to Sri Lankan values and the Sri Lankan State. These CSOs are seen to engage in activities prejudicial to the sovereignty and territorial integrity of the country, showing a lack of integrity.<sup>1003</sup> Foreign-funded CSOs have been accused of wasting financial resources and of financing LTTE activities.<sup>1004</sup> The influx of large amounts of money in the wake of the 2004 Tsunami, and subsequent alleged embezzlement and waste by CSOs, have often been quoted as a proof of lack of integrity of the sector at

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<sup>1002</sup> See website of the NGO Secretariat on its legal authority.

<sup>1003</sup> Edrisinha, Rohan, 2010.

<sup>1004</sup> “NGOs as saviours of LTTE terrorism. Stabbing Sri Lanka in the back with a vengeance”. Asiantribune, 17 June 2008.

large. High administrative expenses and huge amounts spent on expatriate staff, as well as the poor quality of work done by aid agencies, both local and foreign, have been cited as a reason for closer scrutiny by the Ministry of Defense of CSOs operating in the war-affected North of Sri Lanka.<sup>1005</sup>

The current government has repeatedly pledged to introduce new legislation to monitor and control NGOs, but no specific timetable has been presented yet, though in the interim this threat hangs over CSOs like the sword of Damocles. At the field level and especially in the North and East, CSO operation is strictly controlled, and in the Wanni even community meetings of over five persons requires prior military permission 18 months after the end of the war. Though security concerns are adduced to justify this curtailment of the right of association, in the absence of even a single shred of evidence that the LTTE or its sympathisers are operating in the area, this rationalization is less than credible.<sup>1006</sup>

Foreign-funded Advocacy NGOs have also been accused of being overtly involved in political campaigns (at the recent Presidential and Parliamentary elections),<sup>1007</sup> and of disrupting reform efforts by the Government rather than being constructive.<sup>1008</sup>

Financial integrity might be ensured through compliance with financial or audit regulations as well as with donor regulations (such as anti-corruption clauses in contracts).<sup>1009</sup> Some CSOs do have internal processes that aim to check fraud and mismanagement, though the majority of CSOs do not. However, in the absence of a credible self-regulation mechanism, and given the lack of clear standards of accountability, CSOs will continue to face the challenge of improving public perceptions about their integrity.

Integrity is often linked to legitimacy of CSOs. In this regard, it appears that professional rivalry and lack of coordination among the CSOs contributes to inefficiency and public mistrust, particularly at the local level.<sup>1010</sup>

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1005, "Aid workers barred in north Lanka", TamilNewsNetwork, 15 July 2010.

1006 Interview with civil society activist, name withheld on request.

1007 "NGOs under fire – including Transparency International funds", Lakbima news, 07 March 2010.

1008 Interview with Rajiva Wijesinha, 09 August 2010.

1009 Interview with Paikiasothy Saravanamuttu, 26 July 2010.

1010 Jayasinghe, Kelum and Wickramasinghe, Danture, no date.

## 12.3 Role

### 12.3.1 Hold government accountable - To what extent is civil society active and successful in holding government accountable for its actions?

It is difficult to measure the “success” of civil society work.<sup>1011</sup> Given the strained relationship between the Government and sections of civil society, only a few CSOs have been involved in advocacy and public education campaigns while others have adopted a low profile role.

Civil society’s influence over government’s decision-making is dependent on the latter’s openness to CSOs and their work. As the current administration is not considered to be open to CSO input into the political process, scope for success is limited.<sup>1012</sup> It has been argued, however, that the inclusion of an “anti-corruption” agenda in the Opposition election campaign is a small measure of the inroads CSOs and other concerned entities have made towards broadening the national dialogue with respect to corruption issues.<sup>1013</sup>

Moreover, a number of concerns pertaining to human rights, corruption, governance and constitutional reform have been documented and placed in the public domain as a result of civil society action. CSOs have also highlighted the misuse of public resources by the incumbent government during national elections and the violations of international humanitarian law that took place during the last stages of the war. While the government has mostly denied allegations, it has been forced to respond to civil society advocacy.<sup>1014</sup>

A particular success of civil society in recent times is the initiation of the Right to Information Bill. Several governments have made attempts to introduce a Bill from 1996 when the Law Commission of Sri Lanka proposed a conservative Bill, to 2003 when another Bill was proposed by the government of co-habitation of President Chandrika Bandaranaike Kumaratunge and Prime Minister Ranil Wickremesinghe. As the 1996 Bill was considered to have serious flaws and was not up to international standards,<sup>1015</sup> a coalition of media and CSOs (The Editors Guild, Free Media

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1011 Interview with Paikiasothy Saravanamuttu, 26 July 2010.

1012 Global Integrity, 2007, p 8.

1013 Reviewer’s comments on draft report.

1014 Interview with Dr Paikiasothy Saravanamuttu, 26 July 2010.

1015 Commonwealth Human Rights Initiative, 2000.

Movement and the Centre for Policy Alternatives) presented an alternative draft in 2001 which was more in keeping with international best practice.<sup>1016</sup> However, it did not receive full approval and subsequently a compromise third draft was agreed upon. It was presented to and approved by the Cabinet of Ministers in December 2003. The draft Act has been evaluated as the most liberal FOI draft yet to come out of any South Asian country.<sup>1017</sup>

Though progress on the enactment of this important piece of legislation came to a standstill soon after the co-habitation government collapsed in 2004, it has again been taken up by the opposition party UNP in 2010. If the bill is passed, this will be an important contribution to anti-corruption and good governance in Sri Lanka.

Another example is the area of election monitoring during the presidential and parliamentary elections of 2010, in which several civil society organizations were engaged. Election monitoring highlighted large-scale misuse of state property by the Government, as well as the use of violence against the Opposition. It also focused on limitations imposed on the constitutionally-guaranteed freedom of expression.<sup>1018</sup> The Government had to respond to the allegations by the election monitoring bodies, although violations of elections laws continued unabated, and there are controversies over costs involved in monitoring.

### **12.3.1 Policy reform - To what extent is civil society actively engaged in policy reform initiatives on anti-corruption?**

Three recent examples of civil society action are presented here in relation to the Constitutional Council, access to information, and the draft Audit Act. In the case of the Constitutional Council, Parliament passed the necessary constitutional amendment even though it is not being implemented right now. In the case of the draft Audit Act, the legislation was approved by Cabinet but not enacted by Parliament. The draft Bill formed part of a wider action plan that was drafted through extensive civil society participation to address bribery and corruption in the public sector.

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<sup>1016</sup> Draft Freedom of Information Act, 2001 prepared by the Editors Guild of Sri Lanka.

<sup>1017</sup> Law & Society Trust, 2003.

<sup>1018</sup> CaFFE, 2010; CMEV, 2010.

The development of an action plan by Sri Lankan civil society with help from USAID's Anti-Corruption Program (ACP) in mid-2007 to counter corruption is another achievement by civil society, mainly through the efforts of the Center for Policy Alternatives (CPA), Transparency International Sri Lanka (TISL), Janawaboda Kendraya, and Lawyers for Human Rights. The action plan was developed with input from a series of regional workshops in 17 districts conducted for the ACP by the aforementioned organizations,<sup>1019</sup> However, there has been no follow up on the plan after the funding for the programme ended, and apparently the plan has not resulted in any policy changes (see chapters 'Anti-Corruption Activities' and 'Anti-Corruption Commission').

There is also the view that Sri Lankan CSOs have generally been ineffective in contributing to the drafting of new legislation as they have limited access to Parliament. It is argued that even when CSOs did have an opportunity to influence Parliament, it was achieved only through personal relationships with politicians.

Overall, the influence of CSOs on policy-making has been marginal.<sup>1020</sup>

**Table 18: Scores for Civil Society**

CIVIL SOCIETY			
DIMENSION	INDICATOR	LAW	PRACTICE
Capacity = 38	Resources	25	50
	Independence	50	25
Governance = 31	Transparency	-	25
	Accountability	-	25
	Integrity Mechanisms	50	25
Role = 25	Hold government accountable	25	
	Policy reform	25	

1019 "Sri Lankan activists draw up anti-corruption plan with US help", 06 July 2007.

1020 Freedom House, 2010.



## Recommendations

1. The right to free expression, publication and dissent must be respected and promoted by all actors: state and non-state stakeholders, political parties, business interests, professional organizations and civil society.
2. Civil society organisations should be more open and pro-active, and should work cooperatively together. CSOs should improve their internal and external transparency and accountability through the setting up of guidelines for self-regulation.
3. Right to Information legislation needs to be introduced as an urgent priority to ensure that the media can report openly and the public can take informed and unfettered decisions.
4. Right of Association should be recognized and protected throughout the country.
5. The Emergency Regulations and the Prevention of Terrorism Act must be revoked.

## 13. BUSINESS

### SUMMARY

Sri Lanka was one of the first countries in South Asia to liberalize its economy in 1977. Since then the role of the private sector has expanded even though state engagement in business activities through state-owned banks, state corporations and other entities remains significant. Several state-owned entities have been privatized over the years. However, in the last two years there appears to be a reversal of this trend with most of the privatized entities returning to state-ownership.

The business environment is rated positively in international ratings, particularly in comparison with most other South Asian countries. The regulatory regime covering the standards on accounting and auditing, financial disclosure and transactions in financial instruments and service are quite detailed. A new Companies Act (2007) as well as a set of mandatory and non-mandatory Codes of Corporate Governance for companies (listed and not listed) and banks have emerged in recent years, providing rules to achieve high standards of integrity. Yet, implementation of this regime leaves much to be desired, and compliance with the regulation appears to be low. While many companies function independently and ethically, others have reportedly resorted to seek state patronage in order to benefit from participation in infrastructure and other projects initiated by the State.

Corruption is seen to have a corrosive effect on the business climate, and raises the costs and risks of doing business. While integrity and ethical issues are part of corporate governance rhetoric, the private sector is not seen to be playing an active role in combating corruption; rather, there is a tendency to align itself to political power blocs and seek patronage from them, which raises the spectre of crony capitalism.

## STRUCTURE

At the end of May 2009 there were 75,447 private businesses registered with the Registrar of Companies.<sup>1021</sup> Of this figure 66,986 (88.8%) were private companies and 3,280 (4.3%) were public companies, out of which 232 were publicly-quoted companies. There were 5,181 (6.9%) “total guarantee, foreign and off shore companies”.<sup>1022</sup>

The banking sector, dominated by two state-owned banks, has 23 commercial banks, 12 of which are foreign.<sup>1023</sup>

There is a diverse ownership structure in the private sector, with few monopolies (Ceylon Tobacco), but there are some state monopolies, such as for example the Ceylon Petroleum Corporation.

More than 60% of jobs in Sri Lanka are in the informal sector, mostly in agriculture.<sup>1024</sup> 7.6 million persons were employed during the year 2009 (no data for the Northern Province) in both the formal and informal sectors; 65% were males and 35% were females. This is despite a high number of female-headed households: the latest census data of 2001 shows 20% of households being headed by females, and this data excludes the North and East. After the war, the number of female-headed households will have gone up significantly. The highest share of employment is reported under the Services sector (42%), followed by 33% employed in the Agriculture sector and 25% in the Industries sector.<sup>1025</sup> This data is, however, incomplete as it does not include the North and East of Sri Lanka.

The economy has been liberalised since 1977. However, the current administration’s policy programme, the Mahinda Chintana, has put a halt to privatisation of state-owned enterprises, and promotes small and medium enterprises as well as rural development. Sales of public companies such as the Sri Lanka Insurance Company have been reversed and shares of privatised companies have been bought back, e.g. Shell Gas, Sri Lankan Airlines and Apollo Hospitals. Public/private partnerships are being promoted by the government, but nothing significant has materialised so far

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1021 Transparency International Sri Lanka, October, 2009 p 3.

1022 Ibid.

1023 Heritage Foundation, 2010.

1024 Asian Development Bank, August 2007.

1025 Department of Census and Statistics, 2009, p 24.

Overall, the productivity of Sri Lanka's economy is perceived to be following an upward trend. The World Economic Forum's Global Competitiveness ranking upgraded Sri Lanka from 79<sup>th</sup> in 2009 to 62<sup>nd</sup> place among 139 nations for the year 2010-2011. Sri Lanka is second only to India in the South Asian region in this regard. Notably, public institutions, security, business sophistication and innovation received much better ratings than in previous years.<sup>1026</sup>

Women in private sector senior management positions are far less than their male counterparts. A survey of 100 randomly picked companies registered with the Employers' Federation of Ceylon in 2007 found that only 4.3% of Chief Executive Officers in the surveyed sample were female.<sup>1027</sup> This is in sharp contrast to the proportion of women following different tertiary and professional educational/training programs.

## ASSESSMENT

### 13.1 Capacity

#### 13.1.1 Resources (Law) - To what extent does the legal framework offer an enabling environment for the formation and operations of individual businesses?

The formation and registration of private companies is governed largely by the Companies Act of 2007.<sup>1028</sup> Companies can be registered only with the Registrar of Companies, whilst the Board of Investments (BOI) can grant to business entities some special advantages, tax and duty concession and protection by international treaty arrangements. The BOI has been set up primarily to encourage Foreign Direct Investment in identified areas of activity. The IMF has recently criticised the arbitrary nature of granting concessions to BOI firms.<sup>1029</sup>

In addition to BOI approval, foreign companies have to seek some approvals from other Statutory Boards outside the BOI. A Statutory Corporation can be enacted via

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<sup>1026</sup> "Sri Lanka Moves up in Global Competitiveness Report 2010-2011", Government of Sri Lanka website, Newslines, 13 September 2010.

<sup>1027</sup> Wickremasinghe, Maithree and Jayatilaka, Wijaya, 2008, p 10.

<sup>1028</sup> Companies Act No. 7, 2007.

<sup>1029</sup> International Monetary Fund, October 2010.

an act of Parliament. Where the Registrar of Companies retains final authority, the law provides mechanisms of appeal and reapplication if the license is not granted.

Intellectual property rights and contracts are protected by law.<sup>1030</sup> Competition law deals with monopolies, mergers and anti-competitive practices, and has been revised in the Consumer Protection Authority Act of 1979, as amended in 1980, 1992 and 1995.<sup>1031</sup> A Consumer Affairs Authority was formed in 2003.<sup>1032</sup>

Laws and regulations governing the formation, operation and winding-up of business are on par in comparison to other countries. The Ease of Doing Business Index 2011 compiled by the International Finance Corporation (IFC) and the World Bank and that measures business regulation, places Sri Lanka in 102<sup>nd</sup> position of 183 economies. While aspects of registering property, paying taxes, and dealing with construction permits receive very low rating (in the range of the 150<sup>th</sup> position), other aspects, such as starting a business and closing a business receive higher ratings (in the range of the 40<sup>th</sup> position).<sup>1033</sup> Labour regulations are very restrictive. Sri Lanka is ranked as fourth most expensive country in terms of costs of dismissing formal workers.<sup>1034</sup> In the South Asian region, Sri Lanka fares quite well (23<sup>rd</sup> out of 8 countries).

### **13.1.2 Resources (Practice) - To what extent are individual businesses able in practice to form and operate effectively?**

According to the 2010 Index of Economic Freedom, the overall freedom to start, operate and close a business was relatively well-protected.<sup>1035</sup> However, the Fraser Institute's Economic Freedom Index ranked Sri Lanka 111 out of 141 countries in 2008 (the latest reported year) with a score of 6.0 out of 10.<sup>1036</sup> Starting a business (the total number of procedures required to register a firm) takes around 35 days (the

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1030 Ibid. See also the Intellectual Property Act, No 36 of 2003. Sri Lanka is a party to the Convention establishing the World Intellectual Property Organisation (WIPO), and a party to the Trade Related Intellectual Property Rights agreement (TRIPS) of the World Trade Organisation.

1031 Wickramaratne, Rupesinghe Pubidini, no date.

1032 Established under the Consumer Affairs Authority Act No. 9 of 2003 "to protect consumers' interests and ensure fair market competition in Sri Lanka."

1033 International Finance Corporation and World Bank 2011.

1034 International Finance Corporation and World Bank, 2007.

1035 Heritage Foundation and the Wall Street Journal, 2010.

1036 Frazer Institute, Economic Freedom Network at [www.freetheworld.com](http://www.freetheworld.com)

world average) and obtaining a business license takes less than the world average.<sup>1037</sup> Starting a business is also assessed positively in the Ease of Doing Business Index 2011, where Sri Lanka comes out 34<sup>th</sup> out of 183 economies, 2<sup>nd</sup> in South Asia. A minimum of four separate procedures need to be followed in Sri Lanka when incorporating a company with the Registrar of Companies.<sup>1038</sup>

The Department of the Registrar of Companies runs a website with information about the registration procedures and application forms that can be downloaded.<sup>1039</sup>

Somewhat in contrast to the positive ratings by international indices, both respondents interviewed for this study were of the view that, in practice, the formation of a new business is a cumbersome process that takes time – in some cases the approval process may take as long as two years.<sup>1040</sup> The BOI, though, functions as a “one stop shop” and processes applications much faster than other government agencies.<sup>1041</sup> Simpler and more transparent processes would generate higher levels of compliance on the part of private business and reduce the levels of corruption and fraud.<sup>1042</sup> Getting access to state land is reportedly cumbersome, and validating legal titles to land is difficult and time-consuming.<sup>1043</sup>

Property rights are reportedly secure, however, cumbersome legal and administrative procedures constitute a challenge to the enforcement of rights.<sup>1044</sup> Extensive delays in court cases lead investors to pursue out-of-court settlements.<sup>1045</sup> Registering property took on average 83 days and cost around 5% of the property value, which is high in comparison to other countries.<sup>1046</sup> The procedure of dealing with construction permits is rated as particularly cumbersome, requiring many approvals from many different authorities. According to the Ease of Doing Business Index, enforcing a contract takes on average 1,318 days and costs 22.8% of the claim, involving 40

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1037 International Finance Corporation and World Bank, 2010.

1038 International Finance Corporation, World Bank, 2011.

1039 Registrar of Companies website at <http://www.drc.gov.lk/App/ComReg.nsf?Open>

1040 Interviews with Feizal Samath, Journalist, 26 July 2010 and Anura Ekanayake, Journalist Editor, Financial Times, 27 July 2010.

1041 Ibid.

1042 Interview with Anura Ekanayake, 27 July 2010.

1043 International Finance Corporation and World Bank, 2011.

1044 Bertelsmann Foundation, 2010, pp. 12.

1045 Heritage Foundation and the Wall Street Journal, 2010.

1046 International Finance Corporation and World Bank, 2011.

different procedures.<sup>1047</sup> The “Investment Climate Statement” by the U.S State Department states that “Sri Lanka's courts cannot be relied upon to uphold the sanctity of contracts.”<sup>1048</sup>

Instances when licenses have been cancelled, not granted or unduly delayed do exist. According to one interviewee, access to licences and permits, especially where various levels of governance from the centre to the periphery are involved, is often accomplished by “greasing the wheel” types of payment and network corruption that poses a significant barrier to effective business operations.<sup>1049</sup>

### **13.1.3 Independence (law) - To what extent are there legal safeguards to prevent unwarranted external interference in activities of private businesses?**

The process of registration with the Registrar of Companies is clearly set forth in the law. Applications for registering business entities are checked by the Registrar of Companies only for legal conformity in terms of the entities form and name, with minimal involvement of public officials. Setting up of semi governmental organizations, charities, or tax exempt business entities involve a higher degree of involvement with public officials and is much more complicated. Interferences in the operations of companies are not legally allowed.

It is possible for private businesses to seek a remedy in court where they have been treated unfairly or where there has been undue influence by public officials in the activities of the company. Where a legal remedy is sought by way of a fundamental rights application, it is then possible for the courts to award compensation to an aggrieved company.<sup>1050</sup>

The Companies Act established a Companies Dispute Board to settle disputes by way of mediation.<sup>1051</sup> Court may also refer disputes to the Companies Mediation Board with the consent of the parties concerned.

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1047 International Finance Corporation and World Bank, 2011.

1048 US Department of State, 2010 Investment Climate Statement-Sri Lanka.

1049 International Finance Corporation and World Bank, 2010.

1050 Article 17 and 126, The Constitution of the Democratic Socialist Republic of Sri Lanka, 1978.

1051 Sections 507 – 510, Companies Act, 2007.

Legal safeguards have not been effective in the North and East of the country due to military conflict. In a situation of massive internal displacements, that has – e.g. for the Muslims – lasted for more than two decades, property rights cannot be enforced.

#### **13.1.4 Independence (Practice) - To what extent is the business sector free from unwarranted external interference in its work in practice?**

There is no level playing field for businesses in Sri Lanka. The state engages in business activities through a variety of entities such as statutory boards; corporations, banks and state owned companies. A large part of the economy is controlled by the state, with state companies controlling some sectors.<sup>1052</sup> Business opportunities arising from the end of the war in 2009 are not available to all businesses, as state and military enterprises tend to get most contracts.<sup>1053</sup>

In the North and East of Sri Lanka however, businesses cannot operate freely. Property rights are difficult to enforce. Internal displacement during the past 3 decades has brought private initiatives to a halt, impacting particularly on the Muslim and Tamil communities. Occupation of large parts of the land by the military also means that businesses cannot operate as they would like.<sup>1054</sup>

Any private entity can easily complain or file a lawsuit against a public servant and an administrative arm of the government. However in practice this procedure is not time and cost effective. Political influence has reportedly not been evident in commercial litigation so far.<sup>1055</sup>

External interference in business operations appears to be frequent. In the Economic Freedom Index, investment and financial freedom as well as property rights and freedom from corruption are rated as weak.<sup>1056</sup> According to the interviewees to this study, private business tends to operate in ways that do not offend the ruling regime.<sup>1057</sup> There are known cases of pressure, threats and even cancellation of contracts post licensing. The reversals of tender awards and wrongful tender awards

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1052 Bertelsmann Foundation, 2010.

1053 See Sarvananthan 2011 for more details.

1054 Fonseka, Bavani and Raheem, Mirak May 2010; International Crisis Group, 29 May 2007.

1055 U.S State Department, 2009.

1056 Heritage Foundation and the Wall Street Journal, 2010.

1057 Interview with Feizal Samath. 26 July 2010.



have been challenged in court. Many private companies allegedly engage in bribery to obtain contracts, tax exemptions or other benefits.<sup>1058</sup> Some private entrepreneurs openly acknowledge that they have to bribe public officials to obtain approvals for projects and other initiatives. The extent to which a private business seeks political patronage to improve its business varies from company to company, but most companies appear to engage with political actors and institutions in order “to survive” in the market. For this reason private business is reluctant to take public officials to court even in those cases where there has been unfair treatment by the public sector.<sup>1059</sup> Private business funds political parties although this is done discretely and there is no transparency with regard to how political parties are funded (see also chapter on Political Parties).<sup>1060</sup>

## 13.2 Governance

### 13.2.1 Transparency (Law) - To what extent are there provisions to ensure transparency in the activities of the business sector?

Companies are required to submit accounts for every financial year. The Companies Act of 2007 includes provisions with regard to the auditing of accounts by an external auditor and the access that a shareholder or a member of the public may have to the records of a company. Accounts of public companies must be audited by an external auditor affiliated with the Institute of Chartered Accountants of Sri Lanka (ICASL). Every year companies must submit an annual return to the Registrar of Companies, but only public company returns are open to the public.<sup>1061</sup>

Sri Lanka’s Company Law has been reformed in mid-2000 to bring it on par with international standards with regard to transparency and accountability. The new Act of 2007 strengthened the role of independent directors and made them liable for their acts. It has detailed provisions on the management and administration of companies.<sup>1062</sup> According to the Act, Directors must act in good faith and in the

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<sup>1058</sup> Interview with Feizal Samath. 26 July 2010.

<sup>1059</sup> Ibid.

<sup>1060</sup> Ibid. See also the chapters on the Election Commission and Political Parties.

<sup>1061</sup> Section 13, Companies Act, 2007 and the Fifth Schedule to the Act.

<sup>1062</sup> Companies Act 2007.

interests of the company and in a manner that is not reckless or grossly negligent.<sup>1063</sup> Directors' interests must be registered in an "Interest Register" and failure to do so could result in a fine.<sup>1064</sup> Publicly-quoted companies are required to ensure higher levels of transparency than privately-owned companies.<sup>1065</sup>

Financial auditing and accounting standards are high. The ICASL as the body that regulates accounting in Sri Lanka has a detailed list of accounting standards that are continuously updated.<sup>1066</sup> Adherence to the standards is mandatory for all companies listed on the Colombo Stock Exchange. Compliance with the standards is monitored by the Accounting and Auditing Standards Monitoring Board (AASMB), established under the Sri Lanka Accounting and Auditing Standards Act, No. 15 of 1995. The Act applies to all quoted companies, companies carrying on business which are important for the purpose of monitoring (such as banking, finance, insurance, and leasing), other large companies (public and private), and Public Corporations.<sup>1067</sup> They are required to send their Annual Audited Financial Statements to the AASMB in addition to the Registrar of Companies. The Board is empowered to call for documents, information and explanations from Directors, Managers and Auditors, and to ask companies to correct their Financial Statements if they are found not to be in accordance with Sri Lanka Accounting Standards. The Board has the power to compound an offence for a sum of money not exceeding 1/23<sup>rd</sup> the maximum fine. In cases where non-compliance was done deliberately to mislead the public the courts may impose penalties extending up to 5 years imprisonment.<sup>1068</sup> A simplified standard applies to small and medium-size enterprises (SMEs) with accounting and disclosure requirements applicable to them.<sup>1069</sup>

The ICASL is currently aligning its accounting and auditing practices to the standards adopted by the International Accounting Standards Board, and has committed to fully adopting International Financial Regulation Standards by 2011. In 2006 and 2008, the ICASL substantially revised numerous standards and added several new ones.<sup>1070</sup>

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1063 Transparency International, 2009, p 300.

1064 Ibid.

1065 Interview with Feizal Samath. 26 July 2010.

1066 Institute of Chartered Accountants of Sri Lanka website

1067 Sri Lanka Accounting and Auditing Standards Monitoring Board website.

1068 Sri Lanka Accounting and Auditing Standards Monitoring Board website.

1069 Financial Standards Foundation, October 2010.

1070 Financial Standards Foundation, October 2010.

In 2006, the ICASL together with the Securities and Exchange Commission and the Colombo Stock Exchange formulated Rules on Corporate Governance with strong provisions for transparency and financial disclosure.<sup>1071</sup> The standards were incorporated in the listing rules of Colombo Stock Exchange, making adherence mandatory to all 240 listed companies. This was seen as a major step towards enhanced transparency.

### **13.2.2 Transparency (practice)-To what extent is there transparency in the business sector in practice?**

There appears to be a strong commitment to principles of transparency in the sector. In a survey on corporate governance conducted by KPMG in 2007, the large majority of Executives and Directors interviewed strongly supported financial reporting. Stronger audit committees (as foreseen in the Companies Act), full disclosure of off-balance sheet transactions and CEO certification of the accuracy of accounts were seen to be key principles of corporate governance.<sup>1072</sup>

The website of the Department of the Registrar of Companies has a list of all registered companies.<sup>1073</sup>

Listed companies publish annual reports which are made available to all shareholders. They are accessible to the public and some of the reports are published online. The reports contain data on the performance of the company in the year under review in addition to details on ownership and management. Most large companies in their reporting include a reference to corporate responsibility, corporate governance and sustainability. There is however a much lesser degree of transparency in the companies that are not listed in the Stock Exchange.

The AASMB provides information on incidences of non-compliance with Auditing and Accounting Standards on its website.<sup>1074</sup> It is however not clear how exhaustive this list is.

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<sup>1071</sup> Wickramasignhe, Gamini, October 2006.

<sup>1072</sup> KPMG, 2007.

<sup>1073</sup> Registrar of Companies <http://www.drc.gov.lk>

<sup>1074</sup> Sri Lanka Accounting and Auditing Standards Monitoring Board website.

The ICASL conducts an Annual Reports Competition every year where companies are judged based on their compliance with Sri Lanka Accounting Standards, including recognition, recording and reporting of transactions and disclosure. It also gives an annual Best Corporate Governance Disclosure Award.<sup>1075</sup> The Ceylon Chamber of Commerce and the National Chamber of Commerce give out Business Excellence Awards, one of their criteria is ethical corporate governance.

While there is some level of transparency, financial statements do not always meet quality and reliability standards. This is mainly due to the lack of adequate enforcement mechanisms.<sup>1076</sup> A survey conducted by SEC in 2005 had found that many listed companies did not have audit committees, and that many audit committees did not have an independent chairman.<sup>1077</sup> Also, compliance with the Stock Exchange' Corporate Governance Code is reportedly low. In September 2010 it was reported that less than 120 of the 240 listed firms follow the guidelines.<sup>1078</sup>

### **13.2.3 Accountability (Law) - To what extent are there rules and laws governing oversight of the business sector and governing corporate governance of individual companies?**

A number of laws and regulations that strengthen accountability have been enacted recently, notably the Prevention of Money Laundering Act (2006), Finance Leasing Act (2006), Financial Transaction Reporting Act, Companies Act (2007), and Corporate Governance for Licensed Commercial Banks in Sri Lanka (2007).<sup>1079</sup>

Several initiatives by the Government, supported by donors, have aimed at strengthening regulators to support private sector development and competition. The Consumer Affairs Authority was created in 2003 to protect investors and consumers from unfair competition, the Insurance Board of Sri Lanka was established in 2001<sup>1080</sup> to handle independent regulation of insurance companies and integrity in the sector,

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1075 Prof. Watawala, R Lakshman, no date.

1076 US Department of State, 2010 Investment Climate Statement Sri Lanka.

1077 Wickramasinghe Gamini, October 2006.

1078 "Sri Lanka listed firms seen ignoring good governance code", Lanka Business online, 30 September 2010.

1079 Bertelsmann Foundation, 2010, p 16.

1080 Regulation of Insurance Industry Act, No. 43 of 2000.

and the jurisdiction of the SEC over securities-related industries has been broadened.<sup>1081</sup>

The Companies Act of 2007 strengthens external oversight by the auditor and thus compliance with laws and observance of standards and rules. It also sets out clear rules for directors and obliges them to disclose their interests and shares in the company in an Interest Register, failure of which results in a fine. The law entitles minority shareholders (who hold less than 5% of the shareholding) to bring an action to prevent the affairs of the company being conducted in an oppressive way or in a manner prejudicial to the interests of the company.<sup>1082</sup> The Companies Act is seen to bring greater transparency and empower shareholders to hold directors accountable.<sup>1083</sup>

In addition to the laws, various voluntary or mandatory Codes of Governance have been adopted by the regulators in recent years. In 2003, the ICASL together with the Securities and Exchange Commission issued the Code of Best Practice on Corporate Governance for Finance Companies. Another benchmark for accountability is the mandatory Rules on Corporate Governance of the Stock Exchange, discussed above. Both Codes include minimum number of non-executive and independent directors, audit committees, criteria for determining independence, remuneration and disclosure requirements. In 2004, the SEC issued Guidelines for Listed Companies (Finance & Audit Committees) that provide rules for dealing with conflict of interest and other issues related to external auditors. In 2006, the ICASL issued a voluntary Code of Best Practice on Corporate Governance that included best practice from OECD, Australia and Singapore. This Code includes provisions performance evaluation for Board Committees, Board related disclosure and criteria for the independence of directors.<sup>1084</sup> The Code addresses conflict of interest of directors, and highlights the need for audit, remunerations and nominations committees. The role of the audit committee is to verify authenticity and integrity of financial statements and of internal controls, to liaise with external auditors and to ensure issues raised by them are followed up. In 2008, the Mandatory Code of Corporate Governance for Licensed Banks came into force, regulating responsibilities of the Board and its composition and putting up appointment criteria and mechanisms for

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1081 Asian Development Bank, 2007 p 16.

1082 Sections 224–233, Companies Act, 2007.

1083 Transparency International, Global Corruption Report 2009, p 303.

1084 Lakshman, RW, no date.

disclosure of information.<sup>1085</sup> The Central Bank is overseeing the implementation of this Code.

The Ceylon Chamber of Commerce has a voluntary Code of Ethics that outlines basic principles of corporate ethics that all members are expected to observe.<sup>1086</sup> This Code has been endorsed by a large number of companies.

#### **13.2.4 Accountability (Practice) - To what extent is there effective corporate governance in companies in practice?**

While the regulatory framework for strong corporate governance exists, there are mixed views in regard to implementation. The KPMG survey of 2007 revealed that Board and director performance is not seen to be optimal. A majority of the respondents pointed out that the commitment of the board was the most critical factor in regard to implementing corporate governance standards.<sup>1087</sup>

The scandals in the finance sector that saw many depositors losing their money in 2008 have highlighted the need for more control.<sup>1088</sup>

The major shortcoming appears to be inadequate compliance and enforcement. With regard to the Rules on Corporate Governance for listed companies (2007), it had been envisaged that companies that were found to be in breach in of the Rules would have their names published, transferred to a default board and subject to delisting as a final option.<sup>1089</sup> However, this compliance mechanism does not seem to be operational, as half of the companies reportedly did not comply even three years after they were included in the listing rules.<sup>1090</sup>

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1085 Transparency International, 2009.

1086 Ceylon Chamber of Commerce Code of Ethics.

1087 KPMG, 2007.

1088 Transparency International Sri Lanka, 2009.

1089 Wickremasinghe, Gamini, October 2006.

1090 "Sri Lanka listed firms seen ignoring good governance code", Lanka Business online, 30 September 2010.

The Code of Best Practice on Corporate Governance that was initiated by ICASL in 2006 remains voluntary. No mechanism is in place to check the overall compliance of this Code and deal with defaulters.<sup>1091</sup>

The Insurance Monitoring Board has a blacklist of faulting insurance companies.<sup>1092</sup>

Investors' protection, taken as an indicator of accountable corporate governance, is ranked average in the IFC/ World Bank Ease of Doing Business Index. The report finds that there are no requirements to disclose transactions with conflicts of interest to shareholders or the general public, nor are inside dealings required to be reviewed by an outside body. Director liability also scores weak, showing that investors have little power to hold a director liable for misconduct.<sup>1093</sup>

Codes have been criticised for being counterproductive, e.g. the Mandatory Code of Corporate Governance for Licensed Banks has been criticised for allowing the Central Bank to interfere in Banks' management, and – by limiting the term of office for directors - to deprive experienced professionals from being eligible for director positions, thus destabilising the sector.<sup>1094</sup>

Oversight bodies are not always effective. For example, the COPE found in 2006 that 27 unlicensed finance companies were operating in the country. However, no action was taken despite notice being brought to the Governor of the Central Bank.<sup>1095</sup> The fact that the Central Bank is not fully independent hampers oversight, allowing government to influence allocation of credit and use of domestic finance resources.<sup>1096</sup>

However, it is generally accepted, particularly among the larger companies that high standards of corporate governance are a market driven requirement; as compliance with these standards attracts more investors, employees and clients. This trend is expected to keep rising as market forces continue to demand higher standards of corporate governance.<sup>1097</sup>

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1091 Telephone interview with Ms. Surana Fernando, Director Corporate Affairs, Security and Exchange Commission, 29 October 2010.

1092 Insurance Board of Sri Lanka website at <http://www.ibsl.gov.lk/index.asp>

1093 International Finance Corporation and World Bank, 2010.

1094 "Corporate Governance Code for Banks – make or break period?", Financial Times, 25 November 2007.

1095 "Need for whistle-blowing hotline facilities emphasized", Sunday Times, 28 June 2009.

1096 Heritage Foundation and the Wall Street Journal, 2010.

1097 Interview with Anura Ekanayake, 27 July 2010.

### **13.2.5 Integrity mechanisms (Law) - To what extent are there mechanisms in place to ensure the integrity of all those acting in the business sector?**

The Ceylon Chamber of Commerce has a voluntary Code of Ethics that outlines basic principles of corporate ethics that all members are expected to observe.<sup>1098</sup> Other sector-based organisations also have similar Codes. However, the general lack of enforceability of these Codes, leaves much room for the continuation of poor corporate governance.<sup>1099</sup>

The Companies Act provides a strong framework for integrity. Members of the Board of Directors are required to disclose any contracts with companies in which they have an interest. The Companies Act also has a provision for rewarding whistleblowers by entitling them to reimbursement of legal expenses from fines levied in the action.<sup>1100</sup> Large corporations do have professional chief compliance officers.

In the procurement guidelines, there are no provisions on anti-corruption clauses or integrity principles being made mandatory in the bidding process for public contracts.

### **13.2.6 Integrity Mechanisms (Practice) - To what extent is the integrity of those working in the business sector ensured in practice?**

Integrity and accountability in the business sector are unanimously recognised as important and as increasing shareholder value. In the 2007 KPMG survey, 80% of respondents said that corporate governance compliance was as important as compliance with regulatory requirements. Also, 87% of respondents said that ethical values were strongly promoted by their board of directors, but some conceded that better enforcement mechanisms are needed.<sup>1101</sup>

Several of the MBA programmes that are offered by Sri Lankan universities offer a module on corporate ethics. The module however is not specifically addressing issues of conflict of interest, bribery etc that are important in corruption prevention.

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1098 Ceylon Chamber of Commerce, 19 February 1982.

1099 "Proper Corporate Governance and Risk Managing Process needed", Sunday Times, 09 May 2010.

1100 Transparency International, Global Corruption Report, 2009.

1101 KPMG, 2007.



Large companies sometimes have Value Statements and Codes of Ethics in place, especially the multinationals most of which have specific anti-bribery policies and compliance guidelines.

However, these mechanisms do little to ensure the integrity of the business sector. The informal business sector suffers more from the problems of integrity than the formal sector.<sup>1102</sup> The Index of Economic Freedom for 2010, gives Sri Lanka a low score of 32 for ‘Freedom from corruption, stating that ‘anti-corruption laws and regulations are unevenly enforced’.<sup>1103</sup>

In February 2009, Attorney General Mohan Peiris publicly said that Sri Lanka’s failure to tackle corruption was due to lack of mechanisms to tackle private sector corruption, and that the public sector could not engage in corruption without private sector participation.<sup>1104</sup>

As in other sectors, lack of whistleblower and witness protection laws prevents timely detection of wrongdoings and effective prosecution. The Companies Act provision on whistleblower rewards appears to be ineffective. It has been argued that major scandals such as the collapse of the Golden Key Credit Card Company could have been prevented had whistleblowers been able to expose unethical business practice.<sup>1105</sup>

Low levels of compliance and awareness might also be a result of low stakeholder engagement in the law reform process, and in the development of the Codes and Rules. For example, when the Companies Act was designed, Chambers of Commerce and professional associations organised meetings that were attended by a select group of higher ranks of larger companies only, mainly resident in Colombo.<sup>1106</sup>

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1102 Interview with Faizal Samath, 26 July 2010.

1103 Heritage Foundation and the Wall Street Journal, 2010.

1104 “Battle private sector corruption”, UNDP in the news, 03 February 2009.

1105 “Need for whistle-blowing hotline facilities emphasized”, Sunday Times, 28 June 2009.

1106 Transparency International Sri Lanka, October 2009, p 3.

### 13.3 Role

#### 13.3.1 Anti-corruption policy engagement (Law & Practice) - To what extent is the business sector active in engaging the government on anti-corruption?

Little has been done by the business sector to engage the Government on corruption issues. The lacuna in this regard may be attributed to the culture of political patronage which exerts significant influence on the business sector. The current culture based on fear and rewards makes the effective pressure group emerging from the civil society. The business sector could be seen as reluctant to broach the subject of corruption in the public sector as the major players in the sector depend on political patronage for their advancement. Further, the government is also seen as discouraging any efforts on these lines based on the idea that there is no public sector corruption in the first place.<sup>1107</sup> Private business tycoons are usually close to government, with regulations sometimes being violated.<sup>1108</sup>

However, business organisations do promote corporate governance, and have been instrumental in putting some of the Rules and Codes into practice. Thirty-six of the larger companies have also signed up as members of the United Nations Global Compact.<sup>1109</sup> The Ceylon Chamber of Commerce and the Organisation of Professional Associations have anti-corruption programmes that aim at providing tools and standards to their members.

The Ceylon Chamber of Commerce has repeatedly been calling on the government to improve accountability and transparency. Concrete proposals have been put forward by the Chamber, for example establishing online databases that would provide information on public procurements and infrastructure projects, publishing a Code of Ethics for the Executive, constituting independent commissions and making Cabinet and Parliamentary sub-committees more effective.<sup>1110</sup>

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1107 Interview with Faizal Samath, 26 July 2010.

1108 For example, Harry Jayawardena, the owner of Aitken Spence and one of the most powerful businessmen in the country, was appointed to the post of Chairman of the Ceylon Petroleum Corporation in violation of CPC regulations. Lankaenews 15 May 2010.

1109 United Nations Global Compact, 2009.

1110 "Ceylon Chamber of Commerce, Strategies for growth, leveraging the private sector", The Island, 27 December 2001.

Policy engagement however is increasingly hampered by freedom of expression being curtailed. The 18<sup>th</sup> Amendment also affects independence, integrity and good governance in the private sector.

**13.3.2 Support for/engagement with civil society (law & practice) - To what extent does the business sector engage with/provide support to civil society on its task of combating corruption?**

The business sector has shown interest in several areas such as providing disaster relief, and working towards alliances for peace. The culture of corporate social responsibility has also grown significantly. However, very little has been done towards curbing corruption. The lack of enthusiasm in this regard is seen to be linked with a fear of political marginalization for businesses that attempt to push the anti-corruption agenda.<sup>1111</sup>

In 2010, Transparency International Sri Lanka, has commenced a Private Sector Integrity Coalition in which several chambers of commerce and professional associations have enlisted.<sup>1112</sup>

**Table 19: Scores for Business**

BUSINESS			
DIMENSION	INDICATOR	LAW	PRACTICE
Capacity = <b>63</b>	Resources	75	50
	Independence	75	50
Governance = <b>63</b>	Transparency	75	50
	Accountability	75	50
	Integrity Mechanisms	75	50
Role = <b>25</b>	Anti-corruption policy engagement	25	
	Engagement with civil society	25	

<sup>1111</sup> Interview with Faizal Samath 26 July 2010.

<sup>1112</sup> Transparency International Sri Lanka, 23 September 2010.

## Recommendations

### *Policy Makers:*

1. Strengthen victim, whistleblower and witness protection.
2. Develop a set of recommendations for legal and regulatory reforms to ensure that all corporates are effectively regulated and any persons or institutions operating or attempting to operate outside this regulatory network are dealt with.
3. Improve knowledge, skill sets, attitudes and leadership capability of key regulators and law enforcement officials in effectively discharging their role in curbing corporate corruption.

### *Business Community*

1. Chambers and professional bodies in particular should be more pro-active and open to self-regulation.
2. Improve the effectiveness of External Audits, Rating Agencies and Financial Analysts, Institutional Investor-leveraged Governance enhancement options, Accounting and Auditing Standards Monitoring Board-leveraged Governance enhancement options, with special emphasis on related party and conflict of interest disclosures.
3. Develop a set of strategic action steps to effectively leverage participatory community-led normative regimes which are committed to cultural values and societal norms that serve as a natural barrier to the crystallization of bad business behaviour.
4. Enhance collective action commitment of all societal and market participants within the corporate and financial sector (including Regulators, Institutional Investors, Investor Associations, Professionals, Media, and Civil Society Groups).
5. The quality and timeliness of public information should be enhanced through strengthened financial journalism and the support of key institutional investors



## VII Conclusion

### Overview

This conclusion provides an analytical summary of the common and distinctive elements contained in the 13 pillars that comprise the National Integrity Study for Sri Lanka. First, however, key caveats and explanations need to be reiterated. The NIS seeks to provide an impartial and constructive assessment of integrity systems, processes and practices in Sri Lanka, taking into account both the country's present historical juncture as well as globally agreed paradigms. Thus, comparisons across countries may be misleading or even mischievous. The Report has been undertaken as a vehicle for open dialogue and debate among a wide range of stakeholders, including policy-makers and civil society. Every attempt has been made throughout the process to engage diverse points of view as well as to provide the opportunity for response. It must be reiterated, however, that the NIS Report does not claim to be the last word on the subject, and to recognize that its primary task is fulfilled if the report forms the basis of a vibrant and open public discourse on ways and means of enhancing overall systemic integrity and transparency in post-war Sri Lanka. It is in this letter and spirit that the NIS Report's findings are synthesized below.

**Table 20: Summary of overall pillar scores**

<b>PILLAR</b>	<b>CAPACITY</b>	<b>GOVERNANCE</b>	<b>ROLE</b>	<b>OVERALL</b>
The Legislature	44	25	25	<b>31</b>
The Executive	58	25	25	<b>36</b>
The Judiciary	44	25	25	<b>31</b>
The Public Sector	42	33	17	<b>30</b>
Law Enforcement Agencies	25	29	25	<b>26</b>
The Election Commission	42	46	13	<b>33</b>
Ombudsman / Human Rights Commission	8	38	25	<b>24</b>
Auditor General	42	46	17	<b>35</b>
Anti-Corruption Commission	25	38	8	<b>24</b>
Political Parties	44	13	38	<b>32</b>
Media	31	17	25	<b>24</b>
Civil Society	38	31	25	<b>31</b>
Business	63	63	25	<b>50</b>
<b>OVERALL</b>	39 (Medium-low)	33 (Medium-low)	23 (Weak)	<b>31</b> <b>(Medium-low)</b>

The Table above demonstrates clearly that, while, all areas need improvement, the “role” of the pillars is the weakest element in the integrity equation, whereas “capacity” – with the notable exceptions of the Ombudsman/Human Rights Commission, Anti-Corruption Commission and Law Enforcement Agencies – is relatively higher than the other areas.

In fact, a crucial trend that the analysis has identified is that there is a systematic mismatch among the three normative categories, which corresponds to their social role and function within the polity. This is best brought out in the following summary Table, which groups together the politico-administrative structure, the prosecution and enforcement arm, and the oversight institutions, in order to demonstrate the pattern of integrity that obtains.

	CAPACITY	GOVERNANCE	ROLE
<b>Politico-Administrative Structure</b> <ul style="list-style-type: none"> <li>• Legislature</li> <li>• Executive</li> <li>• Judiciary</li> <li>• Public Sector</li> </ul>	<b>Moderate</b> [Some provisions but key gaps exist]	<b>Weak</b> [Minimal provisions/processes]	<b>Weak</b> [Minimal provisions/processes]
<b>Prosecution &amp; Enforcement</b> <ul style="list-style-type: none"> <li>• Law Enforcement Agencies</li> <li>• Ombudsman/HR Commission</li> <li>• Anti-Corruption Commission</li> </ul>	<b>Weak</b> [Minimal provisions/processes]	<b>Medium-Low</b> [Some provisions but key gaps exist]	<b>Weak</b> [Minimal provisions/processes]
<b>Oversight Institutions</b> <ul style="list-style-type: none"> <li>• Election Commission</li> <li>• Auditor General</li> </ul>	<b>Medium-Low</b> [Some provisions but key gaps exist]	<b>Moderate</b> [Some provisions but key gaps exist]	<b>Very Weak</b> [Minimal provisions/processes]



The overall trend to be discerned is one where existing capacities are not subject to adequate governance and the roles they play are not sufficient to ensure that basic integrity requirements are met. In other words, while the potential for greater accountability and transparency exists, this promise is not realized due to diminished roles and less than optimal governance. In relation to the politico-administrative structure, then, it would appear that both improved internal governance and an enhanced role are pre-requisites for future gains.

As concerns the prosecution and enforcement of integrity, however, both institutional capacity and assigned roles need drastic reform. For the key oversight institutions covered in the study, the crucial inhibiting factor is the lack of an adequate role within which they can operate effectively.

On the positive side, information technology has provided a platform for greater transparency through increased access to information provided by some government websites (such as the Election Commission and the Human Rights Commission), but since internet use in the country is very low (3.8% of population in 2008) and very much an urban phenomenon, this is inadequate to serve vast swathes of the Lankan population.

By and large however, there is a mismatch between laws and their effective implementation: where key legislation and regulations exist, such as in the case of asset declaration, they are not enforced, or at best selectively implemented. Information that is available is not widely disseminated or publicly debated. The culture of public engagement and dialogue, which is necessary to ensure active accountability on the ground, is denuded and devalued. This has led to citizen apathy and cynicism, both dangerous precedents for undermining the democratic process. A capacity gap cuts across institutions that are mandated to combat corruption and abuse, with the Auditor General, HRC, CIABOC, all appealing for greater resources and more skilled staff to fulfill their roles.

In addition, the main cross-cutting findings of the NIS Assessment underscore the strong negative influence of inappropriate and antiquated laws and regulations that promote secrecy, the reluctance of institutions to use the full gamut of their powers, the absence of whistleblower, witness and victim protection legislation, compounded by the impunity enjoyed by the political elite and their cronies.

## Core Recommendations

The following core recommendations appear in many of the pillars as they are crucial to improving the national integrity system in Sri Lanka. If these proposed changes are implemented, in turn they will have a positive impact on other aspects of the integrity system, creating synergies and catalyzing greater transparency and accountability.

### *Self-Regulation*

- Codes of Conduct/Ethics for Members of Parliament (MPs), the Judiciary, the Media and other relevant professional bodies should be formulated, and where already formulated, should be rigorously implemented.
- Appropriate pro-active self-regulation mechanisms should be designed and followed by Media institutions, Civil Society Organisations, Chambers of Commerce and professional bodies, and where such mechanisms exist they should be rigorously enforced.

### *Appointments and Performance*

- Appointment to key positions that safeguard and enhance national integrity, such as members of the Human Rights Commission, the Public Service Commission, CIABOC and other Commissions, and offices such as the Ombudsman's office should be based on merit and integrity, and not party affiliations or personal relationships with the ruling regime.
- A performance appraisal process should be instituted for public servants.
- The Election Commission should be established as a matter of the highest priority.

### *Processes*

- Public access to asset declarations of Parliament and Cabinet.
- Setting up a transparent and effective system of public complaints and ensuring that these complaints are investigated impartially.
- The Auditor General's Office should audit all public sector institutions not just for financial accountability but for efficiency and effectiveness as well.

- State media institutions (radio, television and print) should be freed from state control, and, if necessary, run as public trusts and administered by an independent and impartial Board of Directors.
- Advertising by state-owned entities in the media should be governed by criteria that are fair and transparent.
- Matching legislative and institutional change with the development of a set of strategic action steps to effectively leverage participatory community-led normative regimes which are committed to cultural values and societal norms that serve as a natural barrier to the crystallization of corrupt and unethical behaviour.
- The killing, disappearance and abduction of journalists must be investigated and the perpetrators brought to justice. The current status of ongoing investigations needs to be publicly disclosed.

#### *Institutional Strengthening*

- The Public Service Commission (PSC) should be strengthened and resourced to maintain oversight of public sector integrity.
- Restructuring the Attorney General's office so that AG represents the public interest and not the interests of the ruling regime.
- The institutional strengthening and capacity development of the Auditor General's office should be given the highest priority.
- The mandate of the CIABOC should be extended to permit pro-active investigation, and its composition should ensure gender representation. The progress of on-going complaint investigations should be made public.
- The Parliamentary oversight system must be strengthened.
- Representation of women in political parties, as provided for the Parliamentary Elections (Amendment) Act 2009, section 2(d), should be strengthened.
- Full implementation of the Official Language Policy and other relevant legislation through adequate resource allocation and institutional

strengthening, driven by the political will to end language-based discrimination, thereby enhancing State accountability towards minorities.

### *New Legislation*

- Legislation should be enacted to ensure that cross-overs require resignation from the political party concerned, and hence re-election since the public vote (under the PR system) is for political parties primarily and not for individuals per se.
- Judicial review of legislation should be introduced.
- Legislation to ensure executive accountability which reviews executive immunity should be introduced, if the Executive Presidency is to be retained.
- President's powers to dissolve Parliament should be curtailed.
- Review of contempt of court legislation to permit responsible academic criticism of judiciary.
- Enact whistle-blower, victim and witness protection legislation.
- Political parties should disclose sources of funding and election campaign spending, and present annual audited accounts for public scrutiny.
- Provision of voting right for non-resident citizens, including migrant workers.
- Enact the draft Audit Act that seeks to establish a more autonomous office of the Auditor General, a National Audit Office, a National Audit Service Commission, and a Constitutional Audit Council that will hear appeals.
- Right to Information legislation needs to be introduced as an urgent priority to ensure that the public can take informed and unfettered decisions. The right to free expression, publication and dissent must be respected and promoted by all actors: state and non-state stakeholders, political parties, business interests, professional organizations and civil society. Right of Association should be recognized and protected throughout the country, not least in in the North and East.

- Develop legal and regulatory reforms to ensure that all corporates are effectively regulated and anyone operating outside this regulatory network is prosecuted.
- The abolishment of the Executive Presidency, in keeping with the election manifestos of the major political parties and presidential candidates.

## Way Forward

At one end of the analytical spectrum, the analysis and recommendations provide suggestions for far-reaching constitutional change that requires time for implementation, transitional arrangements and strong bipartisan political will to drive them. Though some of these changes are crucial to create the enabling environment and safe space for enhanced integrity systems to thrive, it is recognised that such transformation is impossible to demand overnight. Hence, at the other end, the NIS report advocates for relatively smaller concrete tangible outcomes that can be immediately put in place without rhetoric or procrastination, that will in turn prepare the ground for the more fundamental changes necessary.

As described in detail in the Introduction, integrity in the Lankan context demands changes in entrenched attitudes and behaviour at all levels of society, but most significantly in institutional culture and in the individual's perceived role within this culture. This requires the nurturing of an enabling environment – legal, procedural, institutional, cultural – that is a pre-requisite and necessary condition for enhanced integrity. To this end, recommendations have been made, which cut across a number of pillars, to include processes that provide whistleblower, victim and witness protection. Without these safeguards no climate of openness and accountability can be effectively maintained within Sri Lanka's hierarchical institutions and polity.

As priority measures, the processes of parliamentary democracy should be reinforced through greater independence and autonomy (administrative and financial) of oversight institutions. The Emergency Regulations and the Prevention of Terrorism Act should be revoked as a basic pre-condition of restoring democratic normalcy and the rule of law. The Right to Information Act is an urgent national integrity need, as is the across-the-board implementation of the Right of Association, especially in the North and East, where “security” rhetoric should not be allowed to interfere with basic freedoms in the post-war environment. In the absence of this over-arching

democratic public space, no micro-level change will result in the reinvigoration of national integrity in Sri Lanka.

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