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GLOBAL CORRUPTION REPORT 2007

Corruption in
Judicial Systems



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Global Corruption Report 2007

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Judicial reform in PNG in need of political will <i>TI Papua New Guinea, Port Moresby</i>	263
Corruption and deficiencies in the Romanian justice system <i>Victor Alistar</i>	267
Misappropriations mar South Africa's courts <i>Judith February</i>	270
Corruption in Sri Lanka's judiciary <i>Kishali Pinto Jayawardana and J. C. Weliamuna</i>	275
Judiciary in Turkey: rooting out corruption <i>TI Turkey, Istanbul</i>	278
Refining accountability and transparency in UK judicial systems <i>Kyela Leakey</i>	282
Zambian judiciary struggles to modernise <i>Davies Chikalanga, Goodwell Lungu and Ngoza Yezi</i>	287
 Part three: Corruption research	
8 Introduction <i>Robin Hodess</i>	293
9 When are judges likely to be corrupt? <i>Stefan Voigt</i>	296
10 Bribes, punishment and judicial immunity <i>Ernesto Dal Bó, Pedro Dal Bó and Rafael Di Tella</i>	302
11 Informality, legal institutions and social norms <i>Åse Berit Grødeland</i>	306
12 Enforcement of anti-corruption laws: the need for performance monitoring <i>Tiernan Mennen, Eric Frye and Richard E. Messick</i>	310
13 The Global Corruption Barometer 2006 <i>Tom Lavers</i>	314
14 Measuring corruption: myths and realities <i>Daniel Kaufmann, Aart Kraay and Massimo Mastruzzi</i>	318
15 Corruption Perceptions Index 2006 <i>Johann Graf Lambsdorff</i>	324

Corruption in Sri Lanka's judiciary

Legal system: Common law, adversarial, plural (with elements of Islamic law)
Judges per 100,000 people: 1.4¹
Judge's salary at start of career: US \$4,038² *Supreme Court judge's salary:* US \$7,644³
GNI per capita: US \$1,160⁴ *Annual budget of judiciary:* US \$21.0 million⁵
Total annual budget: US \$8.2 billion⁶ *Percentage of annual budget:* 2.6
Are all court decisions open to appeal up to the highest level? Yes
Institution in charge of disciplinary and administrative oversight: Not independent
Are all rulings publicised? Yes *Code of conduct for judges:* No

1 Author's estimate 2 Information obtained from judicial officers (2007) 3 Informal data 4 World Bank Development Indicators (2005) 5 Budget 2005–06 6 Ibid.

Sri Lanka has reasonable legal provisions to guard against executive and legislative intrusions on the independence of the judiciary. However, experience shows that constitutional provisions alone cannot protect judicial independence without critical oversight by the media, professionals and academics, as well as public recognition of the need to protect the integrity of the institution. Corruption is one outcome of Sri Lanka's cowed judiciary. The situation has worsened since 1999 when Sarath De Silva was appointed Chief Justice over protests from national and international judiciary bodies, and attempts by two successive parliaments to impeach him for abuse of power and corruption.

Judicial structure

The Supreme Court is the highest court of the country, comprising between six and ten judges and headed by a chief justice. Among the Supreme Court's major jurisdictions are constitutional, final appellate and fundamental rights. Below the Supreme Court are the court of appeal, provincial high courts, district courts, magistrates' courts and primary courts. The Supreme Court has supervisory jurisdiction over all others.

Judges have fixed retirement ages of 65, 63 and 61 years in the Supreme Court, the court of appeal and high courts, respectively. Salaries are increased periodically and, although they earn less than lawyers in private practice, wages are adequate. Judges can only be removed by order of the president after an address in parliament based on proven misbehaviour or incapacity. Lower court judges, like other civil servants, retire at 55, subject to annual extensions to a maximum age of 60.

Until 2001 the president appointed the Chief Justice and other high court judges, and the judicial services commission, composed of the Chief Justice and two Supreme Court judges, exercised power of appointment, promotion and discipline over judges in lower courts. A constitutional amendment was introduced in 2001 to prevent political manipulation in appointments to important judicial positions, stimulated by the furore over the Chief Justice's appointment (see below). The amendment established the constitutional council to screen and ratify presidential nominations to positions in higher courts. The appointment procedure of members of the judicial services commission was also changed, requiring

ratification by the constitutional council before confirmation of their appointment. The effects of these reforms have been less impressive than was hoped due to the lack of political will to implement them.

Integrity of chief justice an issue since 2001

In September 1999 the then attorney general Sarath De Silva was appointed Chief Justice by former president Chandrika Kumaratunga. This was an unusual promotion. The usual convention was to appoint the most senior judge on the Supreme Court, in this case Justice M. D. H. Fernando who was well regarded internationally and noted for delivering judgements that fettered executive and legislative power – to the chagrin of Kumaratunga.

De Silva's reputation was questioned at the time of his appointment. Two motions pending before the Supreme Court sought to strike him off the roll of attorneys at law on grounds of misconduct and abuse of authority. One of the petitions was lodged by Victor Ivan, editor of *Ravaya*, a Sinhala weekly newspaper. He accused De Silva of covering up a rape and embezzlement of funds by Lenin Ratnayake, a magistrate and relative, by suppressing documents and providing false information.¹ Experts also expressed concern at his appointment, including the UN Rapporteur on the Independence of Judges and Lawyers, who advised the government not to proceed until enquiries into De Silva's alleged misconduct had been concluded. Kumaratunga disregarded the advice.

A number of other measures were taken to block the appointment. Two parliamentary motions to impeach the new Chief Justice were submitted in 2001 and 2003 on charges of abuse of official power, case fixing for political interests, and

shielding subordinate judges and officials engaged in corruption. In both instances, Kumaratunga dissolved parliament before the motions could be examined. The allegations against the head of the judiciary led to great public dissatisfaction with the integrity of the institution.

Subsequent breaches of the new rules on the appointment of senior judges compounded this situation. According to the 1999 amendment, presidential nominations to the court of appeal and the Supreme Court need to be ratified by the constitutional council, a body comprised of six members appointed by parliament and four *ex officio* members. Since November 2005 the council has been defunct due to the refusal by Kumaratunga's successor, President Mahinda Rajapakse, to activate the body on the grounds that smaller political parties had not yet nominated the last remaining member. In June 2006, the president appointed a new judge to the Supreme Court and two others to the court of appeal on the recommendation of the Chief Justice, by-passing the council altogether.

Control of case listing sidelines experienced judges

The Chief Justice also controls which Supreme Court judge hears which case. The Court sits in benches of three for each case. It is the Chief Justice who approves the bench list, nominates judges for benches and appoints a fuller bench for matters warranting a divisional bench.

The counsel appearing in petitions challenging the Chief Justice's appointment sought a fuller bench in order of seniority, the normal course of action when constituting a divisional bench. Notwithstanding protests by lawyers and the public, De Silva appointed a bench of seven judges in ascending order of seniority, which excluded the four most senior judges.

¹ International Commission of Jurists, at www.icj.org/news.php3?id_article=2591&lang=en

The decision set a precedent and De Silva has controlled the listing of cases ever since. Prior to his appointment, the convention had been for the court registrar to list cases and the Chief Justice formally to approve it. From 1999 to 2003 the senior Supreme Court judge, Justice Fernando, was excluded from almost all important constitutional cases. This led to his retirement in early 2004, two and half years before the end of his tenure.

There does not presently seem to be a clear policy on conflict of interest in the listing of cases in the Supreme Court. Lay litigant Michael Fernando, who had made the Chief Justice a party in a case, was sentenced to one year's hard labour for criminal contempt by a bench consisting of the Chief Justice himself and two other judges. Fernando had raised his voice in court and 'filed applications'.² Sri Lanka does not have an act on contempt of court despite an ongoing campaign to codify the contempt laws. Instead, judge-made law has laid down strict principles that tilt the balance toward shielding judges from criticism, even when serious questions of integrity and independence are at issue. These laws have been invoked to silence journalists and other critics since 2002 when a media campaign led to the abolition of criminal defamation provisions in the Penal Code.

A corruptible judicial system

The judicial services commission consists of the Chief Justice and two other Supreme Court judges, generally the most senior. At the time of the People's Alliance government, which came into power in 1994, the two most senior judges were Justices Fernando and Dr. A. R. B. Amarasinghe. De Silva replaced them with two of the least experienced judges from the Court.

The judicial services commission manages the large workforce employed in courts and its purpose is to ensure integrity in judicial administration, the independence of judges in the lower judiciary and the prevention of corruption. Though the commission exercises the powers of appointment, promotion, dismissal and disciplinary control in lower courts, there are no disclosed criteria. Judges who do not toe the political line are warned and, if incorrigible, are dismissed on one pretext or another. Conversely, judges who are politically in line with the administration are shielded from disciplinary action despite evidence of corrupt practices, including bribe taking and the procurement of sexual favours from litigants and junior court staff.³

Survey data from the Marga Institute⁴ is helpful in displaying the breadth and depth of corruption in the lower judiciary. An in-depth survey in 2002 of 441 legal professionals and litigants, all with experience with the judiciary, revealed that 84 per cent did not think that the judicial system was 'always' fair and impartial, and one in five thought it was 'never' fair and impartial. Among judges, lawyers and court staff, 80 per cent considered the judicial system was 'not always' fair and impartial. Among respondents as a whole, 83 per cent held that the judicial system was corruptible with a mere 17 per cent holding that it was never corruptible.

The same survey showed that of 226 incidents of bribes reported by judges, the largest single bloc of officials who benefited were court clerks (32 per cent). Bribes were typically offered to influence the issuance of a summons and choice of the trial date. Other beneficiaries were public prosecutors, police and lawyers. The lowest incidence of bribe taking was among judges. It is worth

² See brcsproject.gn.apc.org/slmonitor/March2003/chief.html

³ International Bar Association, *Sri Lanka: Failing to Protect the Rule of Law and the Independence of the Judiciary* (London: IBA, 2001), available at www.ibanet.org/humanrights/Sri_Lanka.cfm; and Victor Ivan, *An Unfinished Struggle: An Investigative Exposure of Sri Lanka's Judiciary and the Chief Justice* (Colombo: Ravaya, 2003).

⁴ www.margasrilanka.org

noting, however, that it was judges who identified at least five of their colleagues as bribe takers.

Recommendations

- Random listing of cases in higher courts plays a key role in protecting judicial integrity and prevents abuse by judges or officers for private gain. No judge should be able to access a case record except in the exercise of judicial duties. Rules guiding listing of cases must be published.
- An effective system should be designed to review the functions of the judiciary and hold judges accountable for their actions. The absence of a process for reviewing judgments and other judicial orders is unhelpful, as is judges' excessive involvement with administrative matters.
- The impeachment of judges cannot be fairly and effectively achieved by parliament because a judge with political affiliations can prevent such a move. An independent panel of Commonwealth judges should be convened to probe allegations against Sri Lankan judges.
- The behaviour of the Chief Justice is crucial to the integrity of a judiciary. The government should take the longstanding allegations of impropriety against the current incumbent before an independent panel of inquiry.
- The lower judiciary should be protected from the arbitrary and *mala fide* decisions of the judicial services commission.
- A code of judicial ethics, covering conflict of interest, general social comportment and pending cases against judges, must be adopted and published.
- Judges' associations should be free to function without direct or indirect interference from the judicial services commission or the Chief Justice.
- Any aid or financial assistance to the judicial branch must be transparent and any personal benefit that accrues to a judge should be based on disclosed criteria.

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Judiciary in Turkey: rooting out corruption

Legal system: Civil law, inquisitorial, prosecution part of the judiciary

Judges per 100,000 people: 7.0¹

Judge's salary at start of career: US \$16,505² *Supreme Court judge's salary:* US \$34,660³

GNI per capita: US \$4,710⁴ *Annual budget of judiciary:* US \$1.2 billion⁵

Total annual public budget: US \$115.3 billion⁶

Percentage of total annual public budget: 1.0

Are all court decisions open to appeal up to the highest level? Yes

Institution in charge of disciplinary and administrative oversight: Not independent

Are all rulings publicised? No *Code of conduct for judges:* No

1 Ministry of Justice (2006) 2 Ibid. 3 Ibid. 4 World Bank Development Indicators (2005) 5 Ministry of Finance (2006) 6 CIA World Factbook (2005)