

# ARE LEGAL PROFESSIONALS SHIRKING THEIR RESPONSIBILITY? : THE REALITY OF CURBING CORRUPTION IN SRI LANKA

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## ***Introduction***

Approximately \$2 trillion are wasted on corruption in the world annually. This figure does not take into account consequences of corruption that are difficult to quantify, such as lost investments and a reduced tax base. It only factors in the amount paid as bribes.<sup>1</sup> Many countries in the world, especially in Asia, were embroiled in corruption in the mid 1900s'. These countries, much less developed than Sri Lanka at the time, held Sri Lanka as an example of what their systems should aspire to become. With a population density of 325 persons per square kilometre, Sri Lanka continues to enjoy an abundance of space and natural resources which have made us the envy of Asia. Many of these other nations with much higher population densities, lacked natural resources, and struggled to cater to their expanding populations, creating breeding grounds for corruption to thrive in.

*"We have to keep our own house clean. No one else can do it for us"*

-Lee Kuan Yew, Former Prime Minister of Singapore-

Lee Kuan Yew, the founder of modern Singapore, was a visionary who recognized the merits of a corruption-free society. A law graduate from Cambridge and a Barrister himself, as soon as he assumed office, executed a 5 year plan which called for urban renewal, construction of public housing, rights for women, educational reform and industrialization. He also ensured his cabinet of ministers included only highly qualified individuals. Together with K.M. Byrne, Lee's minister

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<sup>1</sup>World Economic Forum: *We waste \$2 trillion a year on corruption: Here are four better ways to spend that money* available at <<https://www.weforum.org/agenda/2017/01/we-waste-2-trillion-a-year-on-corruption-here-are-four-better-ways-to-spend-that-money/>>

of labour and law, Lee turned the course of Singapore's history and made it in to one of the most developed and cleanest economies in the world.

Likewise, many countries have successfully turned tables, mostly because their leaders recognized the necessity to eradicate bribery and corruption from their systems. They ensured the lack of natural resources was compensated for, by inculcating a culture of integrity in their societies. This instilled trust and confidence in the international community which in turn drew international investors to their shores. The service based economies which developed and sustained as a result of this culture of integrity ensured these nations have reached the highest echelons of development. Unfortunately, despite 70 years of independence during which Sri Lanka had the freedom to chart its own future, it has yet failed to muster a sustainable anti-corruption vision for the nation.

Against this backdrop, this article will discuss why it is important to address bribery and corruption?, What do these terms mean in the Sri Lankan context?, The different models adopted by countries to fight corruption, the challenges inherent in the law enforcement model of anti-corruption which Sri Lanka has adopted, where we stand as a country, and what we have done to address our corruption situation. In doing so, I will draw from comparative experiences, of alternative approaches to eradicate corruption, which have been successfully tested in other jurisdictions in the region. I will conclude with some thoughts on what is expected from young lawyers to address these issues.

### ***Why is it important to curb bribery or corruption?***

*"Yes the truth is that men's ambition and their desire to make money are among the most frequent causes of deliberate acts of injustice."*

— Aristotle, *Politics*

Most do not recognize the extent to which widespread corruption negatively impacts the country: from the reduction of both local and foreign investments to the diminishing of State revenues, increasing costs and diminishing access to essential services such as healthcare and education, increases in the costs of production, the breakdown in law and order which would eventually compromise the development of the country.<sup>2</sup>

Therefore, it is imperative that States adopt measures to eradicate bribery and corruption. It is generally accepted that the Constitutional framework of a country could promote and provide the framework for the anti-corruption efforts in that country. Therefore, countries have found means to ensure that their Constitutional frameworks include explicit or implicit anti-corruption clauses, at times even providing for the creation of specialized anti-corruption bodies within their Constitutions. Bhutan, a South Asian country ranking high on the world's anti-corruption indices<sup>3</sup>, constitutionally recognizes the duty to fight corruption<sup>4</sup> while, another clean state, Hong Kong provides for the establishment of an independent Commission Against Corruption in its Basic Law.<sup>5</sup>

However, until the 19<sup>th</sup> amendment to the Constitution, Sri Lanka did not have explicit anti-corruption provisions in the Constitution.<sup>6</sup> The only constitutional provisions referring to the misuse of public property were contained in the Directive Principles of State Policy<sup>7</sup> and Fundamental Duties provisions of the Constitution.<sup>8</sup> The legislative thinking behind Article

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<sup>2</sup> Ibid

<sup>3</sup> Bhutan ranked 25<sup>th</sup> out of 180 countries in the Corruption Perceptions Index 2018

<sup>4</sup> Article 8(9) of the Constitution of the Kingdom of Bhutan casts a "duty to uphold justice and to act against corruption" on all persons while Article 27 of the Constitution provides for the establishment of the Anti-Corruption Commission of Bhutan.

<sup>5</sup> Article 57 of the Basic Law of Hong Kong

<sup>6</sup> This lacuna was remedied by way of Article 156A introduced by the 19<sup>th</sup> amendment to the Constitution which provides for the establishment of a Commission to investigate into allegations of bribery or corruption and for the implementation of the obligations under UNCAC

<sup>7</sup> Article 27 (6) and (7) of the Constitution of Sri Lanka

<sup>8</sup> Article 28 (d) of the Constitution of Sri Lanka

27(6)<sup>9</sup> and (7)<sup>10</sup> of the Constitution was to protect public property and to create a level playing field for all citizens, without distincting higher levels of personal and economic development. Since protecting public property is not solely the responsibility of the State or Government, Article 28(d) of the Constitution also casts a duty upon citizens to preserve public property and prevent the misuse and waste of such property. Regrettably, unlike a criminal statute or fundamental rights,<sup>11</sup> the directive principles of state policy or fundamental duties contained in the Constitution are not enforceable in a court of law. Therefore, no person or body can be compelled to comply with these provisions but provide mere guidance for the different organs of state in the enactment of laws and governance, and aid the judiciary in interpreting legal provisions.<sup>12</sup>

Therefore, despite these provisions, the State has often been accused of rampant corruption in every corner of the society, leading to the unequal distribution of wealth, slower development, and inequality. As a citizenry which aspires for a developed country and a country which honour its international obligations, it is imperative that we as a nation join hands to end corruption in Sri Lanka. Eradicating corruption requires a collective effort. It requires: the political will of the elected representatives; proactive conscientious efforts of the public service; an ethically conscious private sector; a robust and morally upright legal profession; and the understanding and simultaneous agitation of the general public. However, the sole responsibility to fight corruption in Sri Lanka is unfortunately pinned on one single institution: the Commission to Investigate Allegations of Bribery or Corruption (CIABOC). The Commission is constantly plagued by the common rhetoric-

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<sup>9</sup> Article 27(6) of the Constitution of Sri Lanka states “The State shall ensure equality of opportunity to citizens, so that no citizen shall suffer any disability on the ground of race, religion, language, caste, sex, political opinion or occupation”

<sup>10</sup> Article 27(7) of the Constitution of Sri Lanka states “The State shall eliminate economic and social privilege and disparity and the exploitation of man by man or by the State”

<sup>11</sup> See Note 52

<sup>12</sup> See *Bulankulama v. Secretary, Ministry of Industrial Development* (Eppawala Case), *Sugathapala Mendis and another v. Chandrika Bandaranaike Kumarathunga and others* (Water’s Edge Case), and *Vasudeva Nanayakkara v. Choksy and others* (John Keells Case) for instances where the judiciary has employed Articles 27 and 28 to interpret Fundamental Rights provisions in the Constitution. However, these principles have not contributed to the development of the Criminal Law at all.

## “Have you caught the thieves yet?”

-churned out by the media, which is often instigated by certain quarters for political expediency. It is my view that law enforcement should not be the sole model to fight corruption, but be coupled with other models of anti-corruption for the most effective response to corruption in the country. The fight against corruption requires a multi-pronged approach, of which law enforcement is one method.

### *What does bribery, presumption of bribery, and corruption mean?*

In simple terms bribery is the giving or accepting of a gratification by a public servant in return for doing or refraining from doing ordinary government business.<sup>13</sup> In the aftermath of the Second World War due to the scarcity of most commodities, the government was required to bring in price controls and regulations for the commodities. As a result, public servants in charge of issuing permits and those responsible for enforcing regulations wielded great power, which created opportunities for bribery. At the same time, elected representatives who were responsible for appointments and involved in other decision making processes too were exposed to opportunities of bribery.

Therefore, the **Bribery Act No. 11 of 1954** was introduced to respond to allegations of bribery against public servants including members of parliament, judicial officers, and the police.<sup>14</sup> The Bribery Act sought to criminalize all forms of bribery within the public sector. Sections 14 to 23<sup>15</sup>

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<sup>13</sup> Black's Law Dictionary defines 'bribery' as the offering, giving, receiving, or soliciting of any item of value to influence the actions of an official or other person in charge of a public or legal duty.

<sup>14</sup> See Section 90 of the Bribery Act No. 11 of 1954 for the definition of Bribery.

<sup>15</sup> Section 14- Bribery of judicial officers and Members of Parliament, Section 15- Acceptance of gratification by Senators and Members of Parliament for interviewing public servants, Section 16- Bribery of police officers, peace officers and other public servants, Section 17- Bribery for giving assistance or using influence in regard to contracts, Section 18- Bribery for procuring withdrawal of tenders, Section 19- Bribery in respect of Government business, Section 20- Bribery in connection with payment of claims, appointments, employments, grants, leases, and other benefits, Section 21- Bribery of public servants by persons having dealings with the Government, Section 22- Bribery of member of local authority, or of scheduled institution, or of governing body of scheduled institution, and bribery

of the Bribery Act contain the forms of bribery that are prohibited by law. While private sector bribery<sup>16</sup> is not generally criminalized, a deviation is made in Section 20<sup>17</sup> which criminalizes the conduct of even private persons who may accept a bribe in order to secure services from the government. This provision impacts the conduct of the private sector which depend and benefit from public services belonging to the State and therefore to the people.<sup>18</sup>

As time went by, shrewd public servants found ways of concealing the illicit wealth accumulated through bribery and devised other means of evading detection. Such illicitly gained assets were sometimes converted into other forms of assets. As a response to this, the legislature introduced a presumption by way of Section 23A to the Bribery Act.<sup>19</sup> The presumption is that any unexplainable wealth in the possession of a public servant is deemed to have been acquired by way of bribery.

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of officer or employee of local authority or of such institution, and Section 23- Use of threats or fraud to influence vote of member of local authority, or of scheduled institution, or of governing body of scheduled institution.

<sup>16</sup> Private sector bribery is private-to-private or commercial bribery. Black's law dictionary defines commercial bribery as "the corrupt dealing with the agents or employees of prospective buyers in order to secure an advantage over business competitors". The transactions therefore transpire wholly within the private sector, often with no involvement of the government or public sector. Jurisdictions have adopted different approaches to the offence of private sector bribery or corporate bribery. In certain jurisdictions the offence binds both the individual and the company he/she represents, unless the company can prove that it has adequate preventive procedures in place to dissuade persons from engaging in such conduct. In other jurisdictions (eg.India) the offence is committed vis-a-vis public officials by employees/agents of commercial organizations. However, it carries both personal liability and corporate liability.

<sup>17</sup> Section 20 of the Bribery Act reads "A person-

- (a) who offers any gratification to any person as an inducement or a reward for-
- (i) his procuring from the Government the payment of the whole or a part of any claim, or
- (ii) his procuring or furthering the appointment of the first-mentioned person or of any other person to any office, or
- (iii) his preventing the appointment of any other person to any office, or
- (iv) his procuring, or furthering the securing of, any employment for the first-mentioned person or for any other person in any department, office or establishment of the Government, or
- (v) his preventing the securing of any employment for any other person in any department, office or establishment of the Government, or
- (vi) his procuring, or furthering the securing of, any grant, lease or other benefit from the Government for the first-mentioned person or for any other person, or
- (vii) his preventing the securing of any such grant, lease or benefit for any other person, or

(b) who solicits or accepts any gratification as an inducement or a reward for his doing any of the acts specified in sub-paragraphs (i), (ii), (iii), (iv), (v), (vi) and (vii) of paragraph (a) of this section, shall be guilty of an offence punishable with rigorous imprisonment for a term of not more than seven years and a fine not exceeding five thousand rupees."

<sup>18</sup> Private sector bribery undermines public trust, leading to companies incurring high costs, which harms the economy of the country, ultimately burdening the tax-payer.

<sup>19</sup> Bribery (Amendment) Act No. 40 of 1958

With the introduction of the open economy in the 1970s, Sri Lanka saw the growth of an extremely powerful public service, far surpassing that of the colonial times. Due to the many commercial and development activities, the open economy paved way for many avenues to the public service to engage in bribery and illicit accumulation of wealth. Therefore, the **Declaration of Assets and Liabilities Law, No. 01 of 1975** was introduced to regulate the accumulation of wealth by public servants. This law was a useful investigative and a preventive tool to detect illicit accumulation of wealth. Firstly, it was introduced to assist in identifying unexplained additions of wealth thus making it a valuable investigative tool. Secondly, the necessity to declare all assets of a person morally compels the person to refrain from amassing wealth through dishonest means, therefore acting as an effective preventive tool.

As time went by, it appeared that some public servants did not engage in bribery or illicit accumulation of wealth. However, they still abused their office or functions in order to gain benefits from it for themselves or for others or to cause a loss to the government. This conduct was not captured within any of the Provisions of the Bribery Act, making it difficult to hold these persons responsible for their actions. As a result, the offence of Corruption<sup>20</sup> was introduced as an amendment to the Bribery Act in 1994. The offence of Corruption entails the abuse of functions or office with a criminal intent. The intent is to either benefit themselves or others or to cause a loss to the Government. While Corruption is synonymous with bribery in other countries and is used in its generic sense to capture all bribery offences including embezzlement, misappropriation etc, Sri Lanka makes a legal distinction between corruption and bribery. The ingredients of the offence of corruption in Sri Lanka are captured in other offences in comparative jurisdictions.

### ***Anti-corruption Approaches***

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<sup>20</sup> Section 70 of the Bribery Act

Different countries around the world use diverse approaches to fight corruption. While, in the early days stringent **law enforcement** was the preferred approach to corruption, it was found to be costlier than other approaches. It was also a time consuming process with disheartening results due to the complex nature of the offences and the ingenuity of offenders who did everything within their power to evade authorities. Even when they were apprehended, evidence was scarce. Also, because the law enforcement approach is based on the theories of retribution<sup>21</sup> and deterrence<sup>22</sup>, the burden of proof was high. Guilt was required to be proved beyond a reasonable doubt. The strict law enforcement approach sometimes combines detection, investigation and prosecution in one body such as CIABOC in Sri Lanka and the Permanent Commission against Corruption in Malta. In other instances, it has a separate detection and investigation body while the prosecutions are conducted by the public prosecutor. An example for this model is the Department of Internal Investigations in Germany.

However, due to the inherent challenges in a strict law enforcement approach, in 1950s, when Singapore established the Corrupt Practices Investigations Bureau (CPIB), it avoided introducing law enforcement as the sole method of fighting corruption. Following the footsteps of Singapore, Hong Kong too shunned from the exclusively law enforcement model and incorporated elements of **prevention**<sup>23</sup> and **value-based education**<sup>24</sup> in to their anti-corruption law.<sup>25</sup> The Hong Kong model was closely followed by Malaysia, Mauritius, and recently Bhutan, in establishing their anti-corruption regimes.<sup>26</sup>

These jurisdictions approach corruption from the punitive angle as well as the preventive angle. In addition to law investigations and prosecutions, they also coordinate anti-corruption strategies, assess corruption risks, assist in the development of integrity plans for public and

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<sup>21</sup> The theory of retribution requires the wrongdoer to pay back or suffer by way of retaliation even if no benefit accrues to the victim.

<sup>22</sup> The objective of deterrence is to prevent future crimes from occurring.

<sup>23</sup> The role of preventive measures is to assess the risks of corruption and minimize or eliminate the opportunities for corruption

<sup>24</sup> Value-Based Education is the process by which a person develops positive human values.

<sup>25</sup> See Hong Kong Independent Commission Against Corruption Ordinance of 1974

<sup>26</sup> See Malaysian Anti-Corruption Commission Act 2009 Act 694 and Anti-Corruption Act of Bhutan 2011



private institutions, conduct awareness raising and education, advise government institutions on compliance with anti-corruption standards, and review laws for compliance with anti-corruption norms in order to ensure a comprehensive corruption eradication strategy. While in some of these jurisdictions prosecutions may remain separate from the main anti-corruption body such as in Singapore, Malaysia, Bhutan, and Hong Kong, some other jurisdictions such as the Corruption Eradication Commission (KPK) in Indonesia conduct its own prosecutions.

The culmination of these individual efforts was the adoption of the United Nations Convention against Corruption<sup>27</sup> (UNCAC) in 2003. UNCAC was adopted in recognition of the importance of a global response to fight corruption in order to establish a corruption free world. Sri Lanka became a party to UNCAC in 2004 and hence is bound to honour the obligations incurred under UNCAC.<sup>28</sup> This Convention is the only legally binding multilateral treaty on anti-corruption. The global community came together to deliberate best practices adopted by different jurisdictions in their responses to overcome challenges posed by corruption. As a result, the drafters incorporated preventive<sup>29</sup> as well as punitive (law enforcement)<sup>30</sup> measures within the Convention. At the same time, recognizing that the effects of corruption are not confined to one jurisdiction but has cross-border ramifications, UNCAC also contains provisions on international cooperation<sup>31</sup> and on the return of proceeds of crime<sup>32</sup> which are in foreign jurisdictions.<sup>33</sup> The Convention also emphasizes the importance of the participation of citizens and civil society organizations in anti-corruption efforts.<sup>34</sup>

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<sup>27</sup> UN General Assembly, United Nations Convention Against Corruption, 31 October 2003, United Nations, *Treaty Series*, vol. 2349, p. 41; Doc. A/58/422

<sup>28</sup> Sri Lanka also completed the first and second review cycles of UNCAC implementation in 2016 and 2018 respectively. CIABOC has implemented many of the recommendations made therein and currently is in the process of addressing the remainder of recommendations.

<sup>29</sup> Articles 5-12 of UNCAC

<sup>30</sup> Articles 15-42 of UNCAC

<sup>31</sup> Articles 43-50 of UNCAC

<sup>32</sup> Proceeds of crime are the financial or other assets which are received as a result of criminal conduct.

<sup>33</sup> Articles 51-59 of UNCAC

<sup>34</sup> Article 13 of UNCAC

### ***Challenges inherent in the law enforcement model- The Sri Lankan experience***

One of the foremost fallacies of the fight against corruption is the undue reliance placed on law enforcement to address corruption effectively. This is true for Sri Lanka as well. This over-reliance often yields unsatisfactory results. It is short-lived and provides only a momentary distraction to the public. For law enforcement to be effective, detection of crime is important. At the same time, timely and effective investigations and expeditious and rigorous prosecutions are mandatory in order for the impact of the Law Enforcement approach to be successful. Further, swift punishment is necessary to be meted out to the offenders in order to deter them from committing future offences.

**Detection of crimes** frequently occurs as a result of victims of crime or their family or friends alerting law enforcement authorities of the commission of an offence. Unfortunately, unlike in most traditional criminal offences such as murder or rape, where a clearly disadvantaged or aggrieved victim would come forth, in offences relating to bribery and corruption, both parties are often beneficiaries. This mutually beneficial relationship effectively brings investigations to a grinding halt as both parties go to excessive lengths to conceal or destroy evidence.

**Timely and effective investigations** require the services of independent investigators who possess expertise beyond traditional law enforcement training, with specialized knowledge and expertise in accounting, forensic auditing, criminology etc. in order to conduct complex and challenging investigations. It is also necessary to employ cutting edge technology for evidence gathering and to ensure investigators possess up to date knowledge and skills necessary to meet the demands of investigations and adequate financial resources to sustain these services.

Also, for investigations to be successful, accurate evidence is important. Eye-witnesses, rarely come forward in bribery or corruption offences. Therefore, often the investigators and prosecutors have to rely on the giver of the gratification (who is often the complainant) as a witness and on documentary evidence. In instances where there is no practice of maintaining electronic records, documentary evidence could be destroyed as a result of the passage of time. Documents tend to be misplaced with change of regimes or when officers in charge of such documents vacate office. Further, Sri Lanka does not have procedures or systems in place to clearly identify the whereabouts of documentation.

**Expeditious and rigorous prosecutions** are dependent on a criminal justice system which does not have law delays. At the same time, it is reliant on an independent judiciary, highly qualified prosecutors well versed in the subject matter, and a substantive body of jurisprudence to aid the bench and the bar in understanding and applying the law accurately.

A successful prosecution often hinges on sufficient and solid evidence. However, as stated above, evidence in bribery or corruption related offences are not easily obtainable. While CIABOC is often queried on its low numbers of successful prosecutions in high level bribery and corruption cases, it has often had to rely on foreign complainants who come from high value systems to assist the Commission in detecting and apprehending offenders.

As such, the law enforcement approach will not be successful unless other approaches are simultaneously used in a comprehensive anti-corruption response.

***Where does Sri Lanka stand?***

Unfortunately, Sri Lanka continues to adhere to only the law enforcement model of combating corruption, despite having proved itself to be a failed model when used exclusively. Several issues are highlighted in relation to the anti-corruption practices of Sri Lanka:

- *The need for law reform*

Since the introduction of the CIABOC Act in 1994, none of the anti-corruption legislation has undergone significant amendments to keep abreast of new developments both in the domestic law and practice. While other jurisdictions in the world have introduced new offences in relation to bribery and corruption such as private sector bribery<sup>35</sup>, bribery of foreign public officials<sup>36</sup>, non-declaration of conflicts of interest<sup>37</sup>, trading in influence<sup>38</sup> etc. to give effect to UNCAC obligations as well as to effectively respond to the changing landscape of bribery and corruption, Sri Lanka has not done the same.

- *Necessity for Institutional Strengthening*

CIABOC was established under Act No.19 of 1994 as a permanent independent Commission to replace the office of the Bribery Commissioner (which was established in 1958). The Bribery Commissioner's Department only conducted investigations. The investigation reports were then

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<sup>35</sup> Article 21 of UNCAC recommends state parties to criminalize Private sector bribery. Private sector bribery is defined as “(a) The promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting;

(b) The solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting;” when committed intentionally in the course of economic, financial or commercial activities.

<sup>36</sup> Article 16 of UNCAC defines Bribery of foreign public officials and officials of public international organizations as the intentional “1....promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.

2. ...the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties”

<sup>37</sup> See Note 49

<sup>38</sup> Article 18 of UNCAC defines Trading in Influence as “(a) Promising, offering, or giving a public official an undue advantage in exchange for that person abusing his or her influence with an administration, public authority or State authority in order to gain an advantage for the instigator;

(b) Solicitation or acceptance by a public official, of an undue advantage in exchange for that official abusing his or her influence in order to obtain an undue advantage from an administration, public authority, or State authority”.

forwarded to the Attorney General to decide, on an evaluation of the material available, and to initiate prosecutions if necessary. With the advent of the Commission, this practice completely changed as the Commission was given prosecutorial power.<sup>39</sup> This was a unique mandate where the Commission is one amongst the few anti-corruption agencies in the world that prosecutes offenders in addition to carrying out investigations into alleged offences. However, the Commission grapples with several issues:

**Firstly**, the Commission does not have autonomy over its finances or human resources as required by Articles 6<sup>40</sup> and 36<sup>41</sup> of UNCAC to ensure an efficient, independent, and effective anti-corruption agency.<sup>42</sup> Resource constraints due to relying on the national budget for financial allocations,<sup>43</sup> and having to rely on the recruitment criteria set out by the public administration, CIABOC grapples with its inability to attract qualified prosecutors and specialized investigators as much as it requires to effectively carry out its mandate.

The remuneration packages offered to prosecutors of CIABOC fall behind in the competition with those offered by the Attorney General's Department or the Legal Draftsman's Department, making CIABOC a less attractive option. It is noteworthy that CIABOC was on par with the Attorney General's Department when it was first established in 1994. However, at present, the salaries of the Commission are one third (1/3) of the remuneration drawn by the officers of the Attorney General's Department. Therefore, there is urgency to the call to strengthen the

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<sup>39</sup> However, Section 13 of the CIABOC Act authorizes any Attorney-at-Law specially authorized by the Commission to conduct the prosecution at a trial of an offence held in a High Court on an indictment signed by the Director-General.

<sup>40</sup> Article 6 requires state parties to establish preventive anti-corruption bodies with the necessary independence "to enable the body or bodies to carry out its or their functions effectively and free from any undue influence. The necessary material resources and specialized staff, as well as the training that such staff may require to carry out their functions, should be provided"

<sup>41</sup> Article 36 requires state parties to "ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks."

<sup>42</sup> See The Jakarta Statement on Principles for Anti-Corruption Agencies 2012 which contains 16 recommendations to ensure the independence and effectiveness of Anti-Corruption Agencies.

<sup>43</sup> Sri Lanka allocates only 0.14% of the total national budget annually for CIABOC in contrast to 0.82% in Hong Kong, 0.54% in Malaysia, and 0.29% in Bhutan towards their respective anti-corruption agencies.

Commission to respond effectively to complaints of bribery or corruption, which has been overlooked by successive governments. This begs the important question of whether there exists a genuine political will to strengthen the anti-corruption regime in Sri Lanka?

**Secondly**, in order to ensure effective and timely investigations, the Commission requires the services of an adequate number of investigators who possess expertise beyond traditional law enforcement training, but reaching areas such as human behavior, information technology, law, forensic auditing and other interdisciplinary expertise in order to conduct complex and challenging investigations. At present, the investigators of the Commission are deputed from the Police with only regular law enforcement training. This practice is in stark contrast to that of Hong Kong, Malaysia, or Singapore which do not have police officers as investigators. Their investigators are persons with expertise in different fields such as auditing, engineering, criminology etc, recruited directly to the antic-corruption agency and are independent to the police force.

Additionally, CIABOC has only 200 investigators to cater to a population of 22 million. This ratio is to be compared with the 1400 officers of the Hong Kong Independent Commission Against Corruption (ICAC)<sup>44</sup> to a population of approximately 7.3 million,<sup>45</sup> or with the 60 investigators<sup>46</sup> of the Anti-Corruption Commission of Bhutan to a population of 750,000.<sup>47</sup>

**Thirdly**, it is also necessary to employ cutting edge technology for evidence gathering and to ensure investigators possess up to date knowledge and skills necessary to meet the demands of investigations. All of the foregoing requires phenomenal financial resources, the lack of which challenges the efficacy of the Commission and the timeliness of its response. CIABOC faces many

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<sup>44</sup> ICAC, Organization Structure, available at <<https://www.icac.org.hk/en/about/struct/index.html>>

<sup>45</sup> Hong Kong, the Facts, available at <<https://www.gov.hk/en/about/abouthk/factsheets/docs/population.pdf>>

<sup>46</sup> ACC Bhutan, ACC Staffing Pattern & Staff Strength, available at <<https://www.acc.org.bt/sites/default/files/ApprovedACCStaffing.pdf>>

<sup>47</sup> BBC, Bhutan country profile, available at <<https://www.bbc.com/news/world-south-asia-12480707>>

difficulties in obtaining the requisite financial resources. I have personally had to make many requests for adequate finances, which often are not accommodated.

- *Law Delays*

Expeditious and rigorous prosecutions have also been problematic in the Sri Lankan context. Law delays are a perennial issue that plagues the criminal justice system in Sri Lanka, leading to inordinate delays in prosecutions. These delays have created a sense of distrust in the minds of victims of justice not being served. It therefore discourages victims from seeking justice. As you well know, counsel and instructing attorneys too play a role in unnecessarily prolonged prosecutions.

- *Dearth of Jurisprudence*

A specifically important consideration for the legal profession in regard to the quality of the prosecution is the scarcity of legal literature and a body of rich jurisprudence on anti-corruption. The law on anti-corruption in Sri Lanka has not undergone significant development in the recent past. Until recently, even the most serious Corruption offence related proceedings were instituted in the Magistrates Court,<sup>48</sup> which did not have the time or the opportunity to go into the complexities of such white collar crimes. All significant jurisprudence pertaining to the offence of corruption in Sri Lanka has been with regard to the maintainability of the action on technical grounds such as whether all 3 Commissioners have signed the direction to initiate prosecutions?, or whether the particular court has the jurisdiction to entertain the action?, rather than on substantive merits of the matter. This is not a surprise as Sri Lanka is an extremely litigious country. However, it has led to technicalities trumping the spirit of the law. The only important judgments regarding the misuse of public property such as the judgments in **Bulankulama v. Secretary, Ministry of Industrial Development**<sup>49</sup> (Eppawala Case),

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<sup>48</sup> See Bribery (Amendment) Act No.22 of 2018  
<sup>49</sup> (2000) 3 SLR 243

**Sugathapala Mendis and another v. Chandrika Bandaranaike Kumarathunga and others**

(Water's Edge Case)<sup>50</sup>, and **Vasudeva Nanayakkara v. Choksy and others** (John Keells Case)<sup>51</sup> were cases agitated through the fundamental rights jurisdiction of the Supreme Court rather than invoking the criminal jurisdiction on bribery and corruption.<sup>52</sup>

A driving factor behind this phenomenon is the lack of anti-corruption legal education in the country as well as limited access to electronically available legal material. No specific or comprehensive modules on anti-corruption are offered by public higher education institutions in Sri Lanka, i.e. the law faculties, departments of law, and the Sri Lanka Law College unlike in countries such as the UK, the USA, Hong Kong, Singapore, Australia etc. In fact, I was surprised to find not a single article on anti-corruption in the Judge's Journal of Sri Lanka or the BASL Law Journal in the last decade. This dearth of knowledge has resulted in a breed of legal professionals not in a position to assist the bench to make a significant contribution to jurisprudence and has left a significant gap in qualitative anti-corruption research in the country. Jurisdictions such as Hong Kong have ensured a robust legal system not only through legal education but also through the judiciary. Hong Kong invites eminent foreign judges from common law jurisdictions such as Canada, the United Kingdom, Australia and New Zealand to sit in the Court of Final Appeal as non-permanent judges whose experiences and knowledge enrich Hong Kong's jurisprudence. The Malaysian Anti-Corruption Academy is renowned as a hub for anti-corruption training, not only in Malaysia but also in the region. It was established to share Malaysia's expertise in eradicating corruption with others.

Anti-corruption legal education and electronically accessible knowledge bases would provide enhanced understanding of the theoretical underpinnings of anti-corruption. Such

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<sup>50</sup> (2008) 1 SLR 339

<sup>51</sup> (2008) 1 SLR 134

<sup>52</sup> The infringement of a Fundamental Right does not attract criminal sanctions. In criminal proceedings, the ingredients of the offence of corruption and bribery need to be proved beyond a reasonable doubt and the alleged perpetrator needs to be identified. A Fundamental Rights application is decided on affidavit evidence while the culpability of the respondent/s is decided on a balance of probabilities. Often, the actual offender will not be penalized as the institution or the head of the institution is held responsible for the infringement.



understanding will assist in increased application of substantive legal norms in prosecutions and the development of jurisprudence. It will also enable the accumulation of a repository of knowledge/research in relation to anti-corruption. If I may share a personal anecdote on the alarming proportions of this issue, when CIABOC was searching for legal researchers to assist it in the ambitious law reform project it undertook in 2017, to the dismay of the Commission it could not find a single junior lawyer competent in anti-corruption research. I could not but compare this scenario with that of the Hong Kong Independent Commission Against Corruption (ICAC) which has its own research arm staffed with qualified legal researchers or the research arm of the Department of Justice in Canada which has dedicated lawyers to carry out research on areas of interest for Canada.

- *Absence of Corruption Prevention*

Another, most glaring omissions in addressing corruption in Sri Lanka has been the near absence of preventive measures which has already gained traction in other parts of the world with more robust anti-corruption regimes. Prevention encompasses not only value-based education, but also the introduction of systemic as well as systematic changes to governance and administrative structures with a view to minimize if not eliminate the potential for corruption. Prevention is the forerunner of investigations and prosecutions, which, if effective, often dispenses of the need for investigations. Prevention is a sustainable alternative to the colonial adversarial heritage of our country with its strong emphasis on penal sanctions as a means of effective deterrence, which has proved to be costlier than ever foreseen.

- *Need for Value-Based Education*

A sub-set of 'Prevention', value-based education plays a significant role in corruption prevention. Value-Based Education could take the form of formal education as well as informal. The values and learnt from one's elders or from the family are informal methods of value-based education. It instils in the citizenry from younger days the notion that the misuse of state assets

or taking of anything that does not rightfully belong to oneself is wrong. Formal value-based education is imparted in schools and universities. Subjects such as Civics and Ethics offered by schools and universities are examples of formal value-based education. Value-Based Education is expected to cultivate positive values such as honesty, mutual respect, non-consumerist lifestyles, and self-discipline. These are the forerunners of sustainable development. Unfortunately, at present, value-based education is not part of the primary or secondary level education in Sri Lanka. Nor is there any concerted effort to raise awareness of such values in all segments of society.

- *Need for vigorous Civic Engagement*

The fight against bribery and corruption must reach beyond law and policy and thus requires vigorous civic engagement. For example, Hong Kong, which hails as one of the most developed economies in the world, established ICAC in response to the public outcry that arose against the Peter Godber bribery scandal. The Chief Superintendent of the Royal Hong Kong Police Force when Hong Kong was still a British colony, Godber was a British National who fled to Britain to escape investigations into his unexplained wealth. This escape led to a large public outcry over the integrity of investigations of the police into their own conduct and called for reforms in the Government's anti-corruption efforts. Godber was later extradited to Hong Kong and tried and sentenced for bribery. This public outcry led to Governor Sir Murray MacLehose establishing the ICAC in 1974. Such civic engagement could only be expected through an ideological change within the citizenry impacted by no small measure through value-based education.

***Sri Lanka, the way forward- A multi-pronged approach***

Taking note of the many challenges discussed above, CIABOC has forged ahead with a multi-pronged approach to combat corruption.

▪ **National Action Plan for Combatting Bribery and Corruption in Sri Lanka 2019 – 2023 (NAP)**<sup>53</sup>

The most significant step taken by the Commission is developing the National Action Plan for Combatting Bribery and Corruption in Sri Lanka 2019 – 2023 (NAP) subsequent to lengthy consultations, which was ceremonially launched in March 2019. The launch of the NAP was in recognition of Sri Lanka’s obligations under UNCAC, which was constitutionally recognized in the 19th Amendment to the Constitution. Furthermore, the compulsory recommendations of UNCAC and Sri Lanka’s commitments as per the Open Government Partnership warranted the formulation of a comprehensive plan to combat bribery and corruption in Sri Lanka. The NAP integrates a multi-pronged strategy, premised on the four pillars of Prevention, Value Based Education, Institutional Strengthening, and Law and Policy reforms as the foundation of the country’s anti-corruption plan over the next five-year period, i.e. from 2019 to 2023.

In addition to the NAP, four (04) Handbooks too were published, exploring certain identified areas which would shape the course of the drive against bribery and corruption in the nation. The 04 Handbooks are:

- i. Draft proposal on Gift Rules<sup>54</sup>
- ii. Draft proposal on Conflict of Interest Rules<sup>55</sup>
- iii. Integrity Handbook for State Officials

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<sup>53</sup> See <https://ciaboc.gov.lk/media-centre/resources/national-action-plan-2019-2023> for the full version of the NAP

<sup>54</sup> Sets out guidelines in relation to the instances in which gifts are allowed to be accepted and instances in which gifts are not allowed to be accepted by public officials.

<sup>55</sup> Conflict of interest is premised on the principle that one’s private interests should not override one’s official interests. A Conflict of interest occurs when a public officer’s ability to make an impartial decision with regard to his/her public responsibility is affected by his/her personal interests. These guidelines aim to raise awareness on taking necessary precautionary steps to prevent conflicts of interests.

iv. Proposed amendments to laws related to bribery, declaration of assets and liabilities, CIABOC, regulation of election campaign finances, and whistle-blower protection.

- **Comprehensive law reform**

, Since the beginning of 2018, CIABOC has been steadfastly engaged in effecting comprehensive amendments to the laws relating to bribery and corruption. It has also supported related initiatives of other institutions in order to increase anti-corruption efforts and expedite prosecutions relating to bribery or corruption in Sri Lanka.

Commissions of Inquiry are a unique fact-finding process in Sri Lanka established by presidential warrant.<sup>56</sup> However, despite recording evidence of witnesses, these Commissions are not investigative or judicial bodies. Previously, CIABOC was required to record evidence and statements of witnesses afresh before instituting proceedings in a matter despite the fact that a Commission of inquiry may have already recorded such evidence. Therefore, the Commissions of Inquiry (Amendment) Act, No. 3 of 2019 was introduced which enables CIABOC to initiate proceedings based on material which has already been obtained by a Commission of Inquiry, without recording evidence afresh. This amendment improved the efficacy and the timelines of the prosecutions.

Further, the strange legal provision which allowed for proceedings in even the most serious of corruption offences to be instituted in the Magistrates Court while lesser

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<sup>56</sup>

Commissions of Inquiry Act No. 17 of 1948

bribery offences were prosecuted in the High Court was amended, by way of the Bribery (Amendment) Act, No. 22 of 2018 to allow proceedings relating to the offence of Corruption to be instituted in the High Court in addition to the Magistrates Court.

While this measure gave due regard to the severity of the offences, it led to the high Court being overwhelmed with cases. Therefore, Judicature (Amendment) Act, No. 9 of 2018 established permanent High Courts-at-Bar to try the most serious of financial and economic offences including offences relating to bribery and corruption as well as money laundering in order to expedite the process of criminal prosecutions and ensure a timely criminal justice response.

CIABOC has also initiated introducing fresh legislation on anti-corruption. The proposed draft Composite Anti-Corruption Act is an amalgam of the content of the Bribery Act No. 11 of 1954, Commission to Investigate Allegations of Bribery or Corruption Act No. 19 of 1994, and the Declaration of Assets and Liabilities Law, No. 01 of 1975. However, key changes have been proposed to the above legislation and included in the Composite Act to strengthen the anti-corruption regime and to ensure the proposed legislation is in line with international standards. In keeping with international obligations such as UNCAC, the Open Government Partnership (OGP), and the GSP+ trade concessions, and the Jakarta Statement on Principles for Anti-Corruption Agencies<sup>57</sup> the draft Composite Act contains extremely progressive provisions. Some of the key provisions are:

- Expanding the mandate of CIABOC to include prevention measures;

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<sup>57</sup> See Note 36. Adopted by experts and practitioners at a meeting in Jakarta, Indonesia in 2012, the Jakarta Principles aim to strengthen the effectiveness and independence of anti-corruption authorities around the world. CIABOC was invited to co-host the Global Expert Group Meeting (EGM) on the Jakarta Principles in July 2018. The EGM was convened to develop a “Commentary on the Jakarta Statement on Principles for Anti-Corruption Agencies”. The Commentary, which will be known as the Colombo Commentary to the Jakarta Principles (COCO) has been finalized by the UNODC and will be launched in December 2019 at the Eighth session of the Conference of the States Parties to UNCAC in Abu Dhabi. It provides guidance and clarity on the Jakarta Principles as requested by state parties to UNCAC in order to strengthen the effectiveness and independence of national anti-corruption authorities.

- Strengthening investigations<sup>58</sup> and prosecution powers<sup>59</sup>;
- Powers of recruitment without relying on the criteria laid down by the public Service;
- To receive finances directly from the Parliament
- Introduction of new offences such as private sector bribery, bribery of foreign officials, trading in influence, and conflicts of interest, offences relating to sporting events, money-laundering, and procedural offences with appropriate sanctions;
- Whistle-blower<sup>60</sup> and Witness Protection<sup>61</sup>;
- Enhancing the existing asset declaration regime including the introduction of an Electronic Assets Declaration system and the setting up of a central agency for the collection and verification of asset declarations

▪ **Strengthening investigations and prosecutions**

As stated in the preceding section, a strong investigative and prosecutorial regime is indispensable to effectively fight corruption. Fully recognizing this reality, CIABOC is in the last stages of recruiting 200 graduate independent investigators to the Commission for the first time in its history. These investigators possess expertise in accountancy, auditing and finance, criminology, engineering, law etc. It is expected that an investigations arm, independent of regular law enforcement personnel i.e. police

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<sup>58</sup> For instance, obtaining the assistance of Experts, taking of finger impressions, photographs, non-intimate samples, prohibition of dealing with property outside Sri Lanka, employing special investigation techniques, obtaining information from service providers, protection and preservation of information, joint investigations, international cooperation.

<sup>59</sup> For instance, entering into Deferred Prosecution Agreements(DPA) with the accused

<sup>60</sup> Whistleblowers are persons reporting on corruption within their organization. Protection is proposed to be provided for both private as well as public sector whistle-blowers. Whistle-blowers are to be protected from disclosure of identity, civil or criminal liability, as well as disciplinary action within the organization and adverse conditions of employment that may be imposed on them.

<sup>61</sup> Witnesses are interpreted similarly to the definition contained in the Assistance to and protection of victims of crime and witnesses Act. Such persons will be protected from civil or criminal liability, physical harm, harassment, threats to life or liberty etc.

investigators and staffed with investigators possessing expertise in different fields will optimize investigations leading to successful prosecutions.

The independence of the investigation branch of any anti-corruption agency is important as highlighted in the Report of Sir Alastair Blair-Kerr, Chairman of the Hong Kong Commission of Inquiry into Godber's escape. In his report he pointed out that;

*"responsible bodies generally feel that the public will never be convinced that Government really intends to fight corruption unless the Anti-Corruption Office is separated from the Police..."*

At the same time, Article 36 of UNCAC requires member states to have separate agencies specialized in combating corruption through law enforcement and that these agencies should have necessary independence, resources, and training. In addition, fully recognizing the importance of information and communication technology in criminal investigations, the Commission is preparing to use latest technology in its investigations by employing electronic investigation tools and training for its investigators.

The Commission has also made representations to the highest levels of government to provide commensurate remuneration packages for prosecutors of the Commission in order to strengthen the prosecuting arm of the Commission. For comparison, in Fiji the prosecutors of the Fiji Independent Commission Against Corruption (FICAC) are remunerated at a higher rate than the prosecutors of the Office of the Director of Public Prosecutions in Fiji. While, in Bhutan, the Anti-Corruption Commission does not have its own prosecutors, the other officers of the Commission as well as the prosecutors of the Public Prosecutor's Office receive salaries which are 25% higher than that of the public service. Singapore's meritocratic recruitment processes and commensurately higher remuneration has ensured efficient and knowledgeable public prosecutors. The rationale for competitive salaries for the officers of the anti-corruption agencies is to ensure the

agencies are always staffed with highly sought-after personnel equipped to respond effectively in order to combat corruption.

- **Introducing and strengthening prevention mechanisms**

While a robust legal framework and rigorous law enforcement maybe the preferred methods of addressing corruption, Preventive measures go a long way in effectively uprooting corruption. Article 5 of UNCAC requires state parties to develop and implement effective and coordinated anti-corruption policies and practices while Article 6 requires state parties to ensure separate bodies with the necessary independence to function effective for prevention activities. At the same time, comparative experiences illustrate the indispensable need for formal prevention mechanisms within anti-corruption agencies. ICAC in Hong Kong, the Anti-Corruption Commission of Bhutan, and the Malaysian Anti-Corruption Commission have been structured to include formal prevention as well as community education units within their structures. These units ensure public institutions establish transparent and accountable procedures, assists in improving system controls and safeguards, monitors developments in the law, public policy, and government initiatives to advice their governments to comply with anti-corruption measures, and even provide free and confidential advice to private sector organizations on preventing corruption.

In this regard, as an initial step, CIABOC has established a formal prevention unit within its institutional structure and has recruited 50 prevention officers who will be appointed shortly. Their role is to guide and assist the integrity officers appointed to government institutions in terms of the NAP. The proposed prevention activities include educating the public on corruption risks, advising and assisting government departments on



compliance including of public procurement and finance guidelines, reviewing legislation, and collecting and verifying declarations of assets.

- **Introducing value-based education and legal education on anti-corruption**

In recognition of the importance of value-based education and anti-corruption education in curbing corruption, CIABOC has conducted discussions with the National Institute of Education (NIE), public higher education institutions in Sri Lanka, and specifically public law schools in the country, outcome of which has been positive. As a result of a series of discussions held with the NIE, it has undertaken to include anti-corruption as a component of “good habits” in the school curriculum. I fervently hope that these measures will ensure that integrity is injected into the DNA of our younger generations.

Discussions with public higher education institutions including law schools highlighted several approaches in introducing anti-corruption education in to the curricular, such as: orientation programmes; undergraduate courses; post-graduate programmes; continuing professional education seminars, workshops and debates; intern and apprenticeships. Therefore, as a next step, CIABOC envisages providing technical expertise and other necessary assistance for higher education institutions and professional bodies in revamping and revising their curricula to include anti-corruption education employing one or more of these different approaches.

### ***Conclusion***

An effective anti-corruption response requires adopting a multi-pronged approach to anti-corruption. To date, Sri Lanka has only the law enforcement model of anti-corruption. Regrettably, we have failed to master even that. Fortunately, this is an era where the CIABOC is in a state of positive transformation and reformation. Therefore, I reiterate that all citizens,

irrespective of age or profession, are necessarily obligated to fight corruption in order to establish a just and free society leading to a developed country. Young legal professionals are not mere spectators in these efforts. Their role is not merely to observe their seniors' presentations in court. A much larger role awaits them. These young lawyers may go on to become private sector executives, private practitioners, state prosecutors, and judicial officers. CIABOC has carved out a special role for those who will join the public sector. Public Sector institutions will henceforth have compliance officers to guide the integrity officers appointed in terms of the NAP. These compliance officers will play a vital role through the study of the processes within their institutions and making suggestions to the government to plug those loopholes. The professional competence of these officers will ensure they reach high offices in their careers.

As Lee Kuan Yew stated, it is up to us to clean our own house. As legal professionals these young lawyers are bound to encounter corruption in their daily lives. It may be in the court registry, amongst their colleagues, or even their clients. The most heinous act a lawyer could do is to turn a blind eye to these corrupt practices. They must be proactive. At the same time as they must not engage in these practices, they must not encourage corrupt practices. It is the duty of every young lawyer to be armed with relevant knowledge on anti-corruption, to equip themselves with adequate skills, to not ignore corruption they may become privy to, and to confront corruption fearlessly. Therefore, I place especial emphasis on the obligation of young legal professionals to take this responsibility seriously. While it is easier to blame the politicians for the state of the country, the legal profession and the judiciary play a vital role in ensuring a corruption free society. If you ensure public assets are conserved for the generations to come and serve your country with passion and dedication, you will have the satisfaction of a noble professional.