# THE IMPEACHMENT

## Documenting the Rajapaksa Regime's Scheme

**Asian Human Rights Commission**

*'Liar' is just as ugly a word as 'thief,' because it implies the presence of just as ugly a sin in one case as in the other. If a man lies under oath or procures the lie of another under oath, if he perjures himself or suborns perjury, he is guilty under the statute law.*

-

*Theodore Roosevelt*

*At his best, man is the noblest of all animals; separated from law and justice he is the worst.*

-

*Aristotle*

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Compiled by

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Asian Human Rights Commission

Published by

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# PREFACE

To all persons whose support is solicited

An impeachment motion has been filed by 117 Members of Parliament who are members of the ruling alliance against the Chief Justice, Mrs. Shirani Bandaranayake.

The background to the filing was some judgements given by the Supreme Court bench of which the Chief Justice was the head declaring some bills submitted to them by the government were in conflict with the Constitution. These judgements have been seen by almost everyone as the reason behind the impeachment.

The lawyers for the Chief Justice have already issued a letter where the Chief Justice has denied the charges.

The provisions under the Constitution and the Standing Orders do not provide for a just and a fair inquiry by an impartial tribunal. This is the crux of the objections taken against the impeachment process.

The UN Rapporteur for the independence of lawyers and judges and many international authorities have expressed serious concern about the impeachment issue and requested the government to reconsider the matter.

This book consists of all these basic documents which will provide a comprehensive understanding of the matters involved in this discussion.

We hope you will give your support to this effort which is taken with the view to defend the independence of the judiciary and also the democracy which is under serious threat due to the executive president attempting to take all power into his hands.

*Bijo Francis*
*Interim Executive Director*
*Asian Human Rights Commission*

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# INTRODUCTION

The motion for the impeachment of Chief Justice Shirani Bandaranayake has caused the most important constitutional crisis experienced in Sri Lanka in the recent decades.

This is the third occasion in which such impeachments have been brought since the 1978 Constitution. In fact, prior to the 1978 Constitution there was no such attempted impeachments on superior court judges by any government.

This post 1978 experience relating to the impeachment of chief justices demonstrates a central issue inherent in the 1978 Constitution. It does not tolerate the independence of the judiciary. The support of the Supreme Court for the executive president is a fundamental requirement for the working of this constitution. It is exactly this issue that has led to the present conflict which has attracted the attention of the entire nation as well as the international community.

The government has made no attempt to justify the impeachment on any legitimate grounds. If it believed in legitimacy it could have appointed a reputed panel of jurists from Sri Lanka or abroad as the inquiring body into the allegations. This was how a similar inquiry into the (then) Lord President of the Supreme Court of Malayasia, Tun Salleh Abas during the time of Tun Dr. Mahathir Mohamad was conducted. In that instance a six member international tribunal was appointed which included a judge from Sri Lanka, The Hon. Mr. Justice K. A. P. Ranasinghe, CJ.

When amendments to the 1978 Constitution was suggested in the year 2000 there were proposed provisions for similar international tribunals from Commonwealth countries for any impeachment relating to the Chief Justice and other provisions for inquiries into other judges by judicial panels.

The core issue involved in the present impeachment controversy relates to the survival of the judiciary in Sri Lanka as a separate branch of governance. The predictions of some are that the judiciary will be brought under the Presidential Secretariat in the way that the Attorney General's Department and the Legal Draft Man's Department are being directly controlled by the Presidential Secretariat.

The matters relating to the present impeachment therefore will be of interest not only for the present moment but also for the future.

In order to assist those who wish to understand the present controversy and also those who wish to contribute their own ideas in a well-informed manner we have taken this initiative to collect important documents and articles relating to this controversy and make them available to the readers.

Our effort is totally non-commercial and done purely with the idea of public interest. We hope the readers will benefit from this publication.

# CHAPTER I

# OFFICIAL DOCUMENTS

**01**

# THE CONSTITUTION OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

## Chapter XV - The Judiciary

*(Article 105 to Article 117)*

**Independence of the Judiciary**

Appointment and removal of Judges of the Supreme Court and Court of Appeal.

107. (1) The Chief Justice, the President of the Court of Appeal and every other Judge, of the Supreme Court and Court of Appeal shall be appointed by the President of the Republic by warrant under his hand.

(2) Every such Judge shall hold office during good behaviour, and shall not be removed except by an order of the President made after an address of Parliament supported by a majority of the total number of Members of Parliament (including those not present) has been presented to the President for such removal on the ground of proved misbehaviour or incapacity :

Provided that no resolution for the presentation of such an address shall be entertained by the Speaker or placed on the Order Paper of Parliament, unless notice of such resolution is signed by not less than one-third of the total number of Members of Parliament and sets out full particulars of the alleged misbehaviour or incapacity.

(3) Parliament shall by law or by Standing Orders provide for all matters relating to the presentation of such an address, including the procedure for the passing of a such resolution, the investigation and proof of the alleged misbehaviour or incapacity and the right of such Judge to appear and to be heard in person or by representative.

(4) Every person appointed to be or to act as Chief Justice, President of the Court of Appeal or a Judge of the Supreme Court or Court of Appeal shall not enter upon the duties of his office until he takes and subscribes or makes and subscribes before the President, the oath or the affirmation set out in the Fourth Schedule.

(5) The age of retirement of Judges of the Supreme Court shall be sixty-five years and of Judges of the Court of Appeal shall be sixty-three years.

**FULL TEXT OF IMPEACHMENT MOTION AGAINST UPATISSA ATAPATTU BANDARANAYAKE WASALA MUDIYANSE RALAHAMILAGE SHIRANI ANSHUMALA BANDARANAYAKE AND SIGNED MPS**

Resolution as per Article 107(2) of the Constitution for a motion of Parliament to be presented to His Excellency the President for the removal of the Hon. (Dr.) (Mrs.) Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake from the office of the Chief Justice of the Supreme Court of the Democratic Socialist Republic of Sri Lanka,—

1. Whereas by purchasing, in the names of two individuals, i.e. Renuka Niranjali Bandaranayake and Kapila Ranjan Karunaratne using special power of attorney licence bearing No. 823 of Public Notary K.B. Aroshi Perera that was given by Renuka Niranjali Bandaranayake and Kapila Ranjan Karunaratne residing at No. 127, Ejina Street, Mount Hawthorn, Western Australia, 6016, Australia, the house bearing No. 2C/F2/P4 and assessment No. 153/1-2/4 from the housing scheme located at No. 153, Elvitigala Mawatha, Colombo 08 belonging to the company that was known as Ceylinco Housing and Property Company and City Housing and Real Estate Company Limited and Ceylinco Condominium Limited and is currently known as Trillium Residencies which is referred in the list of property in the case of fundamental rights application No. 262/2009, having removed another bench of the Supreme Court which was hearing the fundamental rights application cases bearing Nos. 262/2009, 191/2009 and 317/2009 filed respectively in the Supreme Court against Ceylinco Sri Ram Capital Management, Golden Key Credit Card Company and Finance and Guarantee Company Limited belonging to the Ceylinco Group of Companies and taking up further hearing of the aforesaid cases under her court and serving as the presiding judge of the benches hearing the said cases;

2. Whereas, in making the payment for the purchase of the above property, by paying a sum of Rs 19,362,500 in cash, the manner in which such sum of money was earned had not been disclosed, to the companies of City Housing and Real Estate Company Limited and Trillium Residencies prior to the purchase of the said property;

3. Whereas, by not declaring in the annual declaration of assets and liabilities that should be submitted by a judicial officer, the details of approximately Rs. 34 million in foreign currency deposited at the branch of NDB Bank located at Dharmalpala Mawatha, Colombo 07 in accounts 106450013024, 101000046737, 100002001360 and 100001014772 during the period from 18 April 2011 to 27 March 2012;

4. Whereas, by not declaring in the annual declaration of assets and liabilities that should be submitted by a judicial officer the details of more than twenty bank accounts maintained in various banks including nine accounts bearing numbers 106450013024, 101000046737, 100002001360, 100001014772, 100002001967,

100101001275, 100110000338, 100121001797 and 100124000238 in the aforesaid branch of NDB Bank;

5. Whereas, Mr. Pradeep Gamini Suraj Kariyawasam, the lawful husband of the said Hon. (Dr.) (Mrs.) Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake is a suspect in relation to legal action initiated at the Magistrate's Court of Colombo in connection with the offences regarding acts of bribery and/or corruption under the Commission to Investigate into Allegations of Bribery or Corruption Act, No 19 of 1994; Whereas, the post of Chairperson of the Judicial Service Commission which is vested with powers to transfer, disciplinary control and removal of the Magistrate of the said court which is due to hear the aforesaid bribery or corruption case is held by the said Hon. (Dr.) (Mrs.) Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake as per Article 111D (2) of the Constitution;

Whereas, the powers to examine the judicial records, registers and other documents maintained by the aforesaid court are vested with the said Hon. (Dr.) (Mrs.) Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake under Article 111H (3) by virtue of being the Chairperson of the Judicial Service Commission;

Whereas, the Hon. (Dr.) (Mrs.) Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake becomes unsuitable to continue in the office of the Chief Justice due to the legal action relevant to the allegations of bribery and corruption levelled against Mr. Pradeep Gamini Suraj Kariyawasam, the lawful husband of the said Hon. (Dr.) (Mrs.) Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake in the aforesaid manner, and as a result of her continuance in the office of the Chief Justice, administration of justice is hindered and the fundamentals of administration of justice are thereby violated and whereas not only administration of justice but visible administration of justice should take place;

6. Whereas, despite the provisions made by Article 111H of the Constitution that the Secretary of the Judicial Service Commission shall be appointed from among the senior judicial officers of the courts of first instance, the Hon. (Dr.) (Mrs.) Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake acting as the Chairperson of the Judicial Service Commission by virtue of being the Chief Justice, has violated Article 111H of the Constitution by disregarding the seniority of judicial officers in executing her duties as the Chairperson of the Judicial Service Commission through the appointment of Mr. Manjula Thilakaratne who is not a senior judicial officer of the courts of first instance, while there were such eligible officers;

7. Whereas, with respect to the Supreme Court special ruling Nos. 2/2012 and 3/2012 the said Hon. (Dr.) (Mrs.) Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake has disregarded and

/or violated Article 121 (1) of the Constitution by making a special ruling of the Supreme Court to the effect that the provisions set out in the Constitution are met by the handing over of a copy of the petition filed at the court to the Secretary General of Parliament despite the fact that it has been mentioned that a copy of a petition filed under Article 121 (1) of the Constitution shall at the same time be delivered to the Speaker of Parliament;

8. Whereas, Article 121(1) of the Constitution has been violated by the said Hon. (Dr.) (Mrs.) Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake despite the fact that it had been decided that the mandatory procedure set out in the said Article of the Constitution must be followed in accordance of the interpretation given by the Supreme Court in the special decisions of the Supreme Court bearing Nos. 5/91, 6/91, 7/91 and 13/91; 9. Whereas, irrespective of the absolute ruling stated by the Supreme Court in the fundamental rights violation case, President's Counsel Edward Francis William Silva and three others versus Shirani Bandaranayake (1992 New Law Reports of Sri Lanka 92) challenging the appointment of the Hon. (Dr.) (Mrs.) Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake, when she was appointed as a Supreme Court judge, she has acted in contradiction to the said ruling subsequent to being appointed to the office of the Supreme Court judge;

10.Whereas, the Supreme Court special rulings petition No. 02/2012 filed by the institution called Centre for Policy Alternatives to which the Media Publication Section 'Groundview' that had published an article of the Hon. (Dr.) (Mrs.) Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake, while she was a lecturer of the Law Faculty of the University of Colombo prior to becoming a Supreme Court judge, has been heard and a ruling given;

11. Whereas, in the case, President's Counsel Edward Francis William Silva and three others versus Shirani Bandaranayake (1992 New Law Reports of Sri Lanka 92) that challenged the suitability of the appointment of the Hon. (Dr.) (Mrs.) Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake who holds the office of the Chief Justice and thereby holds the office of the ex-officio Chairperson of the Judicial Service Commission in terms of the Constitution, Attorney-at-Law L.C.M. Swarnadhipathi, the brother of the Magistrate Kuruppuge Beeta Anne Warnasuriya Swarnadhipathi filed a petition against the appointment of the said Hon. (Dr.) (Mrs.) Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake owing to which the Hon. (Dr.) (Mrs.) Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake has harassed the said Magistrate Kuruppuge Beeta Anne Warnasuriya Swarnadhipathi;

12. Whereas, the Hon. (Dr.) (Mrs.) Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake who holds the office of the Chief Justice and thereby holds the office of the ex-officio Chairperson of the Judicial Service Commission in terms of Article 111D (2) of the Constitution has, by acting ultra vires the powers vested in her by the Article 111H of the Constitution ordered the Magistrate (Mrs.) Rangani Gamage's right to obtain legal protection for lodging a complaint in police against the harassment meted out to her by Mr. Manjula Thilakaratne, the Secretary of the Judicial Service Commission;

13. Whereas, the said Hon. (Dr.) (Mrs.) Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake being the Chief Justice and thereby being the Chairperson of the Judicial Service Commission, in terms of Article 111D (2) of the Constitution, has abused her powers by ordering the Magistrate (Mrs.) Rangani Gamage to obtain permission of the Judicial Service Commission prior to seeking police protection thereby preventing her from exercising her legal right to obtain legal protection;

14. Whereas, the Hon. (Dr.) (Mrs.) Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake by performing her duties as the Chairperson of the Judicial Service Commission has referred a letter through the Secretary of the Judicial Service Commission to the Magistrate (Mrs.) Rangani Gamage, calling for explanation from her as to why a disciplinary inquiry should not be conducted against her for seeking protection from the Inspector General of Police by exercising her legal right;
By acting in the aforesaid manner,-
(i) whereas it amounts to improper conduct or conduct unbecoming of a person holding the office of the Chief Justice;
(ii) whereas she had been involved in matters that could amount to causes of action or controversial matters,
(iii) whereas she had influenced the process of delivery of justice,
(iv) whereas there can be reasons for litigants to raise accusations of partiality/impartiality,
she has plunged the entire Supreme Court and specially the office of the Chief Justice into disrepute.

Therefore we, the aforementioned Members of Parliament resolve that a Select Committee of Parliament be appointed in terms of Article 107 (3) of the Constitution read with the provisions of Article 107 (2) and Standing Order 78 A of Parliament enabling the submission of a resolution to His Excellency the President for the removal of the Hon. (Dr.) (Mrs.) Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake from the office of the Chief Justice of the Democratic Socialist Republic of Sri Lanka in the event the Select Committee reports to Parliament that one or more of the charges that have been levelled have been proved after the aforesaid charges of misconduct have been investigated.

Signed MPs are here

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Hon. T. Ranjith De Zoysa
Hon. Palany Thigambaram
Hon. Douglas Devananda
Hon. Mohan Lal Grero
Hon. V. S. Radhakrishnan
Hon. S. B. Dissanayake
Hon. Reginold Cooray
Hon. Nandimithra Ekanayake
Hon. Weerakumara Dissanayake
Hon. Gitanjana Gunawardena
Hon. Mahinda Amaraweera
Hon. Muthu Sivalingam
Hon. Lasantha Alagiyawanna
Hon. Sanath Jayasuriya
Hon. Lakshman Wasantha Perera
Hon. Jagath Balasuriya
Hon. (Al-Haj) A. H. M. Azwer
Hon. Dullas Alahapperuma
Hon. Mahindananda Aluthgamage
Hon. (Mrs.) Pavithradevi Wanniarachchi
Hon. Duleep Wijesekera
Hon. (Mrs) Sriyani Wijewickrama
Hon. (Mrs) Malani Fonseka
Hon. Dayasritha Thissera
Hon. Vinayagamoorthi Muralidaran
Hon. M. L. A. M. Hizbullah
Hon. A. L. M. Athaulla
Hon. M. K. A. D. S. Gunawardana
Hon. Bandula Gunawardane
Hon. Nirmala Kotalawala
Hon. Vijitha Berugoda
Hon. Janaka Wakkumbura
Hon. H.R. Mithrapala
Hon. Lalith Dissanayake
Hon. Wijaya Dahanayake
Hon. Sarana Gunawardena
Hon. Lakshman Senewiratne
Hon. Achala Jagodage
Hon. Salinda Dissanayake
Hon. Rohitha Abeygunawardana
Hon. (Miss) Kamala Ranathunga
Hon. Jayarathne Herath
Hon. Rohana Dissanayake
Hon. Lakshman Yapa Abeywardena

Hon. A. P. Jagath Pushpakumara
Hon. Arundika Fernando
Hon. Shantha Bandara
Hon. (Dr.) Ramesh Pathirana
Hon. Victor Antony
Hon. Sarath Kumara Gunaratne
Hon. S. M. Chandrasena
Hon. Manusha Nanayakkara
Hon. Janaka Bandara Tennakoon
Hon. Milroy Fernando
Hon. Lohan Ratwatte
Hon. Hunais Farook
Hon. (Mrs) Upeksha Swarnamali
Hon. (Mrs.) Sumedha G. Jayasena
Hon. Piyankara Jayaratne
Hon. Hemal Gunasekera
Hon. Thenuka Vidanagamage
Hon. Kumara Welgama
Hon. Janaka Bandara
Hon. Vidura Wickramanayaka
Hon. A. R. M. Abdul Cader
Hon. Ruwan Ranatunga
Hon. Felix Perera
Hon. Tharanath Basnayaka
Hon. (Dr.) Rohana Pushpa Kumara
Hon. Premalal Jayasekara
Hon. Sanee Rohana Kodithuvakku
Hon. Neranjan Wickremasinghe
Hon. C. B. Rathnayake
Hon. Duminda Dissanayake
Hon. Mahinda Yapa Abeywardena
Hon. Gamini Wijith Wijithamuni De Zoysa
Hon. P. Dayaratna
Hon. Thilanga Sumathipala
Hon. Gamini Lokuge
Hon. Earl Gunasekara
Hon. C. A. Suriyaarachchi
Hon. Udith Lokubandara
Hon. V. K. Indika
Hon. T. B. Ekanayake
Hon. P. Piyasena
Hon. Gunaratne Weerakoon
Hon. A. M. Chamika Buddhadasa
Hon. Siripala Gamalath
Hon. Indika Bandaranayake
Hon. Tissa Karalliyadda

Hon. Praba Ganesan
Hon. Susantha Punchinilame
Hon. (Dr.) (Mrs.) Sudarshini Fernandopulle
Hon. Jeewan Kumaranatunga
Hon. Ranjith Siyambalapitiya
Hon. S. B. Nawinne
Hon. (Dr.) Sarath Weerasekara
Hon. Sajin De Vass Gunawardena
Hon. J. R. P. Suriyapperuma
Hon. Shehan Semasinghe
Hon. Keheliya Rambukwella
Hon. Dilum Amunugama
Hon. Eric Prasanna Weerawardhana
Hon. W. B. Ekanayake
Hon. Roshan Ranasinghe
Hon. Nimal Wijesinghe
Hon. S.C. Mutukumarana
Hon. Nishantha Muthuhettigamage
Hon. (Ven.) Ellawala Medhananda Thero
Hon. Perumal Rajathurai
Hon. Silvastrie Alantin
Hon. (Mrs.) Nirupama Rajapaksa
Hon. Y. G. Padmasiri
Hon. Navin Dissanayake
Hon. Chandrasiri Gajadeera
Hon. Basheer Segu Dawood
Hon. H. M. M. Harees,

**03**

# FULL TEXT OF THE INTERIM REPLY GIVEN BY THE CHIEF JUSTICE

……
……

Dear Sir,

We regret that our client was not provided with more time.

The letter dated 14/11/2012 was delivered to our client's official residence at approximately 7 pm on 14/11/2012 asking her to respond to the 14 alleged charges by the 22/11/2012, which is approximately one week's time.

By letter dated 15/11/2012 sent by us on behalf of our client, and our client by our letters dated 16/11/2012 and 17/11/2012, requested further time to respond to the 14 alleged charges.

The request of our client for further time has not been permitted.

In the limited time available, we respond as hereinafter. We request that the details asked for be furnished, and request further time to respond morefully.

Our client denies the purported charges. Our client is totally innocent of the purported charges which are baseless, groundless and frivolous.

Our client has at all times been independent, and has refused to bow to pressure.

In the circumstances, I request that an inquiry be held by lawfully appointed body consisting of lawfully appointed body consisting of eminent and independent persons not politically affiliated.

Our client is convinced that she will be exonerated at such an inquiry.
We state that the select committee has no jurisdiction to hear and determine the impeachment motion for the following inter alia reasons:-

(1) The select committee has no jurisdiction to exercise judicial powers which in this instance it purports to do.

(2) Without prejudice to (1) above the purported inquiry violates the Rule of Law, which is the basis of governance and the gravamen/ foundation upon which the sovereign people have decided that they be governed and their judicial power exercised.

The aforesaid matters would be dealt with briefly hereinafter and more fully if necessary.2

**SOVEREIGNTY IS IN THE PEOPLE**

1. The people are the sovereign in the Democratic Socialist Republic of Sri Lanka.

2. The sovereignty of people is recognized by the constitution.

3. The sovereignty of the people is not granted / conferred / given by the constitution - it is merely recognized by the constitution.

The sovereign people, that is, the sovereign in the land, have determined the manner in which their sovereignty is to be exercised.

No one at all can interfere with such determination of the sovereign.

It should be pointed out that in Sri Lanka the sovereign are the people and not the president, parliament or judiciary. In this context, it is noted that parliament is not the sovereign of this country.

Article 4(c) of the constitution states as follows:-

> *"the judicial power of the People shall be exercised by parliaments through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law;" [emphasis ours]*

In the circumstances Parliament or a Select Committee of parliament cannot exercise the judicial power save and except in the exception set out in article 4(c) which is in regard to matters privileges, immunities and power of people and its members, which exception is not relevant to these proceedings.

The Select Committee purports to exercise judicial power in this instance.

Article 107(2) states that a judge can be removed only for proven misbehavior or incapacity. In this case the allegations are of misbehavior.

The decision or determination whether or not a person is guilty of misbehavior is clearly an exercise of judicial power.

In the circumstance it is only a court that can determine whether or not a judge is guilty of proven misbehavior.

Parliament or its Select Committee cannot determine whether a judge is guilty of proved misbehavior since such determination or decision is the exercise of judicial power.3
Parliament cannot by the enactment of standing orders confer to itself judicial power and/or usurp judicial power, which the sovereign (the people of Sri Lanka ) have vested in the courts (parliament through courts).

Thus it is submitted that the select committee has no jurisdiction to hold this purported inquiry.

RULE OF LAW

Sri Lanka is governed by the Rule of Law.

The gravamen/ foundation/ basis of the legal system of Sri Lanka is the Rule of Law.

The sovereign people have determined that all judicial power be exercised based on the principle of Rule of Law.

It is on that premise that Justice in the celebrated case of R v Sussex Justices ex parte McCarthy 1924- 1KB-256, 1923 All E R 233 laid down the maxim that "Not only must Justice be done; it must also be seen to be done."

The Rule of Law mandates that every person gets a fair and impartial hearing.

This maxim has been recognized by all civilized legal systems throughout the world and has been recognized and adopted without exception by the courts in Sri Lanka.

It is submitted that the aforesaid principles are violated in inter alia the following circumstances:-

(a) all members who signed the resolution come under purview of government whip

(b) the majority of select committee are members coming under the government whip

(c) the government whip at present is Hon. Dinesh Gunewardene who is a member of cabinet

(d) 07 members of the select committee, who constitute its majority, are either cabinet ministers or deputy ministers

(e) His Excellency the President is the head of government and the members who signed the impeachment motion and the majority of members of select committee are members under the government whip4

1. The following facts are relevant.

(i) The Select Committee was appointed on 14th November at approximately 10 a.m.
(ii) The Select Committee met at approximately 4 p.m. on 14th November.

(iii) The document said to contain a charge sheet was hand delivered at the residence of Hon. Dr. Bandaranayake at approximately 7 p.m.

(iv) Only approximately 1 week was given to reply the document which contained 14 purported charges.

2. We answer hereafter without prejudice to the aforesaid.

3. We further state that : -
(i) The document dated 14/11/2012 contains no charges in Law.

(ii) The purported charges even if proved do not constitute proved misbehavior within the meaning of Article 107(2) of the Constitution and therefore cannot result in the impeachment of our client.

(iii) The purported charges do not constitute charges within the meaning of the Law.

(iv) The purported Standing Orders have no legal validity in Law.

4. We further state that these purported charges have been made mala fide and the process followed up to now is evidence of such mala fide.

5. We provide our observations hereafter without prejudice to the aforesaid.

6. We object to the following members of the Select Committee for the following reasons.

1) Hon Dr. Rajitha Senaratne

a) Mrs. Sujatha Senaratne [wife of Hon. Senaratne] instituted a Fundamental Rights case concerning the appointment of the Director National Hospital and her right to make an application to that post, which was argued before a Bench presided over by our client over several days. Leave to proceed was refused which resulted in the dismissal of the case. The dismissal was approximately 7 Months ago. Thus, Mrs. Senaratne lost an opportunity to be considered for the post.5

b) As per news paper reports [uncontradicted] the Hon. Senaratne is a cogent supporter of the motion.

2) Hon. Wimal Weerawansa

a) An appeal to the Supreme Court filed by Hon Wimal Weerawansa was dismissed on or about 03/04/2010 months ago by a bench of Supreme Court, presided by our client.

b) Case No. SC Sp LA 59A/2006 [appeal filed by Hon. Weerawansa against Hon. Ravi Karunanayake] is pending in the Supreme Court and has come up before a Bench of which our client was a member.

c) Hon. Weerawansa has publicly announced that he intended instituting proceedings in the Supreme Court for the repeal of the 13th Amendment to the Constitution and is not filing it at present in view of the pending impeachment motion. It is alleged that our client was in favour of the 13th Amendment.

7. We make our observations hereafter without prejudice to the aforesaid.

8. The purported Charges cannot be fully answered without the following details;

(i) What are the annual declarations of assets and liabilities referred to in Charge 3.

(ii) What are the details of the 34 Million [approximately] in foreign currency deposited in the branch of the N.D.B Bank as referred to in Charge 3.

(iii) What are the details of the more than twenty Bank accounts referred to in Charge 4, and what are the Banks.

(iv) What are annual declaration of accounts and liabilities referred to in Charge 4.

(v) What is the 'contradiction' referred to in Charge 9.

(vi) What is the article published by our client in Ground views in Charge 10.

(vii) In which issue of Ground views is the Article published.

(viii) What are the details of the harassment referred to in Charge 11.6

**PURPORTED CHARGE 1**

*Note: English translation of the purported charges, were obtained from the Parliament's website at www.parliament.lk*

"1. Whereas by purchasing, in the names of two individuals, i.e. Renuka Niranjali Bandaranayake and Kapila Ranjan Karunaratne using special power of attorney

licence bearing No. 823 of Public Notary K.B. Aroshi Perera that was given by Renuka Niranjali Bandaranayake and Kapila Ranjan Karunaratne residing at No. 127, Ejina Street, Mount Hawthorn, Western Australia, 6016, Australia, the house bearing No. 2C/F2/P4 and assessment No. 153/1-2/4 from the housing scheme located at No. 153, Elvitigala Mawatha, Colombo 08 belonging to the company that was known as Ceylinco Housing and Property Company and City Housing and Real Estate Company Limited and Ceylinco Condominium Limited and is currently known as Trillium Residencies which is referred in the list of property in the case of fundamental rights application No. 262/2009, having removed another bench of the Supreme Court which was hearing the fundamental rights application cases bearing Nos. 262/2009, 191/2009 and 317/2009 filed respectively in the Supreme Court against Ceylinco Sri Ram Capital Management, Golden Key Credit Card Company and Finance and Guarantee Company Limited belonging to the Ceylinco Group of Companies and taking up further hearing of the aforesaid cases under her court and serving as the presiding judge of the benches hearing the said cases"

1. The crux of the charge is that our client wrongfully took over the hearing of a case so that she could purchase using a power of attorney a housing unit in the Trillium Residencies in the name of her sister and her sister's husband.

2. The allegation is totally baseless and groundless.

3. Our client had a special power of attorney from her sister and her brother in law because her sister and sister's husband were the purchasers.

4. The housing unit was not purchased by our client in the name of her sister and her brother in law. It was in fact and in truth purchased by her sister and her sister's husband.

5. The total purchase consideration was remitted by our client's sister and her brother in
law as more fully set out hereinafter [vide paragraphs under charge 3 below].

Thus it is clear that our client's sister and brother in law provided the total consideration.
Our client did not provide a cent of the purchase consideration.
Thus the premises was in fact bought by our client's sister and her brother in law and not purchased in the names of our client's sister and brother in law.

Our client's sister or brother in law received no benefit whatever by the case being called or heard before our client.7

We may mention that our client and her sister are the only children of that family and our client had been looking after her sister's interest in Sri Lanka for the last 22 years whilst her sister was living in Australia; she held their general power of attorney from about 1990 when they left Sri Lanka.

Relevant dates
The proceedings of 6.5.2010:-

The Supreme court (consisting of Hon. Justice Thilakawardene, Hon. Justice Sripavan and Hon. Justice Imam) made inter alia the following order on 6.5.2010:-

" …The properties to be disposed would be:-

(1) pioneer tower (head office building)
(2) trillium residencies (sale of housing units)
(3) celestial residencies…"

In the circumstances there was no restriction for the sale of any of the housing units of Trillium from 6.5.2010.

In the circumstances from 6.5.2010 the housing units in Trillium residencies were in effect not a property in the list of properties in case 262-2009 that could not be alienated.

Our client became chief Justice on or about 18.5.2011, which is one year after the above order of the Supreme Court.

In the circumstances our client did not in any way participate in the order in which housing units in trillium residencies was permitted to be sold.

Cases bearing numbers 262-09, 191-09 and 317-09 referred to in the charge were meant to be taken up together. On 23.8.2011 a motion was filed asking that the matter be heard by a bench of 5 judges. This motion was submitted to our client, who made order that the motion be supported before the bench which sat on 29.6.2011, which was Hon. Justice Thilakawardene, Justice Ekanayake and Dep P.C J.

In the circumstances it is incorrect to allege that our client wrongfully took over the case.8 It may be relevant to note that after 6.5.2010 case No.262/2010 was taken up before the former Chief Justice Hon. Justice Asoka de Silva. The former Chief Justice Hon, Justice Asoka de Silva himself purchased a housing unit at trillium residencies demonstrating that there was no impediment to purchase such a housing unit.

In summary then,

(1) the sale /purchase of housing units of trillium residencies was permitted by order of the SC dated 6.5.2010 (Supreme Court bench consisting of Hon. Justice Thilakawardene, Hon. Justice Sripavan and Hon. Justice Imam);
(2) there was no restriction in the sale of housing units of Trillium Residences after 6.5.2010
(3) our client became Chief Justice on or about 18.5.2011;

(4) the case was mentioned before our client for the first time on 13.10.2011;
(5) there was nothing wrong in the manner in which the case came before our client;
(5) the properties were purchased by our client's sister and brother in law and not by our client; and
(6) our client's sister and brother in law did not receive any benefit whatsoever by our client hearing the case.

**PURPORTED CHARGE 3**

"3. Whereas, by not declaring in the annual declaration of assets and liabilities thatshould be submitted by a judicial officer, the details of approximately Rs. 34 million in foreign currency deposited at the branch of NDB Bank located at Dharmalpala Mawatha, Colombo 07 in accounts 106450013024, 101000046737, 100002001360 and 100001014772 during the period from 18 April 2011 to 27 March 2012."

The Charge is groundless and baseless.

In summary our client's position is as follows:-

There was no deposit of Rs. 34 million in foreign currency as alleged in the charge. Our client's sister remitted from Australia the equivalent of Rs.29,688,225.38 for the purchase of a housing unit at trillium residencies.

Out of such sum, a sum of Rs.27, 987,200/- was remitted to the vendor by cheques in connection with the purchase of the housing unit at trillium residencies.

The above sum of Rs.29,688,225.38 was not an asset of our client.

The balance Rs. 800,000/= was retained by our client to be used as per her sister's instructions to be utilized for other purposes including the annual almsgiving in memory of their parents.

In any event, in her declaration of assets and liabilities, our client declared a sum of Rs.10,061,819/31 as "holding on behalf of my sister to pay for the apartment" [this was the only sum held by our client for her sister as at 31.3.2012 and it had been declared].

In the circumstances,

(a) our client did not receive a sum of Rs.34 million as alleged in the charge;
(b) the only sums received from abroad aggregated to the equivalent of Rs.29,688,225.38
which she received from her sister for the purchase of the apartment..
(c) of this sum, a sum of Rs.27, 987,200/- was remitted to the vendor to purchase the

apartment;
(d) a sum of Rs 1,000,000/= was credited to her sister's account; the balance was
retained as per her sister's instructions for expenses.
(d) our client had declared the full sum held by her on account of her sister as at
31.3.2012 in her declaration of assets and liabilities [that is a sum of Rs.10,061,819.31].

In the circumstances the purported charge that she did not declare Rs.34 million in her declaration is groundless, baseless, frivolous and malicious.

PURPORTED CHARGE 2

"2. Whereas, in making the payment for the purchase of the above property, by paying a sum of Rs 19,362,500 in cash, the manner in which such sum of money was earned had not been disclosed, to the companies of City Housing and Real Estate Company Limited and Trillium Residencies prior to the purchase of the said property."

The Charge is groundless and baseless.

The sum of Rs.19,362,500/- was part of the purchase consideration of the housing unit referred to above.10

This sum (Rs.19,362,500/-) is included in the aforesaid sum of Rs.29,688,225.38 remitted to our client by her sister for the purchase of the housing unit referred to above.

This sum of Rs.19,362,500/- is also included in the sum remitted to the vendor for the purchase of housing unit.

This sum of Rs.19,362,500/- never belonged to our client.

**PURPORTED CHARGE 4.**

"4. Whereas, by not declaring in the annual declaration of assets and liabilities thatshould be submitted by a judicial officer the details of more than twenty bank accounts maintained in various banks including nine accounts bearing numbers 106450013024, 101000046737, 100002001360, 100001014772, 100002001967, 100101001275, 100110000338."

The Charge is groundless and baseless.

In summary our client's position is as follows:-

1. Our client has dealt exclusively with NDB Bank from 2010

2. Account number 100101001275 was closed on or about 9.10.2008.

3. Our client has been informed that the NDB as per its banking practice changed the account numbers by allocating new account numbers to its constituents.

4. In pursuance of that practice, Account numbers 100001014772, 100110000338, 100121001797, 100124000238, 100002001360 and 100002001967 had been changed and new account numbers had been allocated before 31.3.2012.

5. Consequently of the 9 account numbers mentioned in purported charge No.4 only 2 account numbers were in existence as at 31.3.2012 and those 2 account numbers have been declared.

6. All other operative accounts in NDB Bank having assets have been declared.

7. Our client has no operational accounts in any other bank.

8. Our client has not been provided with details of the other alleged 20 accounts and/or other banks in which these accounts are said to be.11

**PURPORTED CHARGES - 6, 11, 12, 13 & 14**

"6. Whereas, despite the provisions made by Article 111H of the Constitution that the Secretary of the Judicial Service Commission shall be appointed from among the senior judicial officers of the courts of first instance, the Hon. (Dr.) (Mrs.) Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake acting as the Chairperson of the Judicial Service Commission by virtue of being the Chief Justice, has violated Article 111H of the Constitution by disregarding the seniority of judicial officers in executing her duties as the Chairperson of the Judicial Service Commission through the appointment of Mr. Manjula Thilakaratne who is not a senior judicial officer of the courts of first instance, while there were such eligible officers."

"11. Whereas, in the case, President's Counsel Edward Francis William Silva and three others versus Shirani Bandaranayake (1992 New Law Reports of Sri Lanka 92) that challenged the suitability of the appointment of the Hon. (Dr.) (Mrs.) Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake who holds the office of the Chief Justice and thereby holds the office of the ex-officio Chairperson of the Judicial Service Commission in terms of the Constitution, Attorney-at-Law L.C.M. Swarnadhipathi, the brother of the Magistrate Kuruppuge Beeta Anne Warnasuriya Swarnadhipathi filed a petition against the appointment of the said Hon. (Dr.) (Mrs.) Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake owing to which the Hon. (Dr.) (Mrs.) Upatissa Atapattu Bandaranayake Wasala Mudiyanse

Ralahamilage Shirani Anshumala Bandaranayake has harassed the said Magistrate Kuruppuge Beeta Anne Warnasuriya Swarnadhipathi;"

"12. Whereas, the Hon. (Dr.) (Mrs.) Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake who holds the office of the Chief Justice and thereby holds the office of the ex-officio Chairperson of the Judicial Service Commission in terms of Article 111D (2) of the Constitution has, by acting ultra vires the powers vested in her by the Article 111H of the Constitution ordered the Magistrate (Mrs.) Rangani Gamage's right to obtain legal protection for lodging a complaint in police against the harassment meted out to her by Mr. Manjula Thilakaratne, the Secretary of the Judicial Service Commission."

"13. Whereas, the said Hon. (Dr.) (Mrs.) Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake being the Chief Justice and thereby being the Chairperson of the Judicial Service Commission, in terms of Article 111D (2) of the Constitution, has abused her powers by ordering the Magistrate (Mrs.) Rangani Gamage to obtain permission of the Judicial Service Commission prior to seeking police protection thereby preventing her from exercising her legal right to obtain legal protection."12 "14. Whereas, the Hon. (Dr.) (Mrs.) Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake by performing her duties as the Chairperson of the Judicial Service Commission has referred a letter through the Secretary of the Judicial Service Commission to the Magistrate (Mrs.) Rangani Gamage, calling for explanation from her as to why a disciplinary inquiry should not be conducted against her for seeking protection from the Inspector General of Police by exercising her legal right;

These Charges are groundless and baseless.

1. These purported charges deal with decisions taken by the Judicial Services Commission.

2. The Judicial Service Commission consists of the Chief Justice (the Chairperson) and two other judges of the Supreme Court as Commissioners.

3. All decisions are taken by the Judicial Service Commission.

4. All decisions of the Judicial Service Commission (after our client had become Chief Justice) had been unanimous.

5. In the circumstances no decision has been taken by our client alone.

6. The charges therefore deal with the decisions of the Judicial Service Commission and not of our client.

7. In the circumstances the purported charges cannot amount to misbehavior on

our client's part in terms of Article 107 of the Constitution.

PURPORTED CHARGE 5

"5. Whereas, Mr. Pradeep Gamini Suraj Kariyawasam, the lawful husband of the said Hon. (Dr.) (Mrs.) Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake is a suspect in relation to legal action initiated at the Magistrate's Court of Colombo in connection with the offences regarding acts of bribery and/or corruption under the Commission to Investigate into Allegations of Bribery or Corruption Act, No 19 of 1994.13

Whereas, the post of Chairperson of the Judicial Service Commission which is vested with powers to transfer, disciplinary control and removal of the Magistrate of the said court which is due to hear the aforesaid bribery or corruption case is held by the said Hon. (Dr.) (Mrs.) Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake as per Article 111D (2) of the Constitution;

Whereas, the powers to examine the judicial records, registers and other documents maintained by the aforesaid court are vested with the said Hon. (Dr.) (Mrs.) Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake under Article 111H (3) by virtue of being the Chairperson of the Judicial Service Commission;

Whereas, the Hon. (Dr.) (Mrs.) Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake becomes unsuitable to continue in the office of the Chief Justice due to the legal action relevant to the allegations of bribery and corruption levelled against Mr. Pradeep Gamini Suraj Kariyawasam, the lawful husband of the said Hon. (Dr.) (Mrs.) Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake in the aforesaid manner, and as a result of her continuance in the office of the Chief Justice, administration of Justice is hindered and the fundamentals of administration of Justice are thereby violated and whereas not only administration of Justice but visible administration of Justice should take place;"

1. It is ex facie not a charge in law.

2. There is not even an allegation that our client has done any wrong.

3. There is not even an allegation that our client has in any way or manner interfered in the proceedings in which plaint has been filed in the Magistrates against her husband.

4. Our client states that it is the practice amongst members of the JSC that a member declines to participate in the proceedings of the JSC if there is a conflict

of interest.

5. If this sort of charge can be maintained, any Judge, any member of the JSC can by removed by merely instituting proceedings against such Judge's spouse, or children, or relative, or close friend.

6. This purported charge is baseless, frivolous and malicious.

7. In the total circumstances, our client denies totally the purported charges and denies totally that she acted wrongfully and/or improperly.

PURPORTED CHARGE 6

"6. Whereas, despite the provisions made by Article 111H of the Constitution that the Secretary of the Judicial Service Commission shall be appointed from among the senior judicial officers of the courts of first instance, the Hon. (Dr.) (Mrs.) Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake acting as the Chairperson of the Judicial Service Commission by virtue of being the Chief Justice, has violated Article 111H of the Constitution by disregarding the seniority of judicial officers in executing her duties as the Chairperson of the Judicial Service Commission through the appointment of Mr. Manjula Thilakaratne who is not a senior judicial officer of the courts of first instance, while there were such eligible officers."

The Charge is groundless and baseless.

1. The following appointments as Secretary Judicial Services Commission [JSC] have been made in the past:-

Name Date Seniority Remarks

Mr. M. P. De Silva 4.12.2009 19 Appointed by the Judicial Commission chaired by J.A.N. de Silva,
CJ
Mr. R.A.P.W. de Silva
(brother of the then
Chief Justice J.A.N
Asoka de Silva)
15.07.2010 25
Appointed by the Judicial Commission chaired by
J.A.N. de Silva,
CJ

Mr.Manjula Thilakaratne

2. The officers of the JSC are

(i) Secretary to the JSC
(ii) Deputy Secretary to JSC.
(iii) Assistant Secretaries to JSC

3. 16/3/2010 – Mr. Thilakaratne was appointed as Senior Assistant Secretary by the Judicial Service Commission chaired by the then Chief Justice. Hon. J.A.N. de Silva.

4. 22/7/2010 - Mr. Thilakaratne was appointed as Deputy Secretary JSC by the JSC chaired by the then Chief Justice. Hon. J.A.N. de Silva.

5. 29/3/2012 - Mr. Thilakaratne was appointed as Acting Secretary JSC by the JSC chaired by our client.

6. 10/5/2012 - Mr. Thilakaratne was appointed Secretary JSC by the JSC chaired by our client.

Seniority

7. As at 10/5/2012 : -

(i) The JSC recommended 11 District Judges/Magistrates to be appointed as High Court Judges.

(ii) 3 District Judges/Magistrates were on long overseas leave.

(iii) 3 judges have been appointed as High Court commissioners and were functioning in the Eastern Province since they were conversant in the Tamil Language

8. In the circumstances the aforesaid 17 judges could not be considered as secretary JSC.

9. In addition, 3 judges have not been promoted as per the decision of the Judicial Service Commission chaired by the then Chief Justice. Hon. J.A.N. de Silva.

10. Thus in effect as per the judges available for appointment as Secretary, Mr.Thilakaratne was 6th in the order of seniority.

11. Unlike any of the aforesaid judges Mr. Thilakaratne had functioned as an officer of the Judicial Service Commission from 16/3/2010 and was familiar with the working of the JSC and consequently he was the most suitable candidate.

12. However, even if no Judge was excluded, Mr. Thilakaratne was 26th in the order of seniority. Whereas : -

(i) when Justice Asoka de Silva's brother was appointed Secretary JSC, he was 25th in order of seniority; and

(ii) the previous appointee was 19th in order of seniority.

PURPORTED CHARGE 11

"11. Whereas, in the case, President's Counsel Edward Francis William Silva and three others versus Shirani Bandaranayake (1992 New Law Reports of Sri Lanka 92) that challenged the suitability of the appointment of the Hon. (Dr.) (Mrs.) Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake who holds the office of the Chief Justice and thereby holds the office of the ex-officio Chairperson of the Judicial Service Commission in terms of the Constitution, Attorney-at-Law L.C.M. Swarnadhipathi, the brother of the Magistrate Kuruppuge Beeta Anne Warnasuriya Swarnadhipathi filed a petition against the appointment of the said Hon. (Dr.) (Mrs.) Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake owing to which the Hon. (Dr.) (Mrs.) Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake has harassed the said Magistrate Kuruppuge Beeta Anne Warnasuriya Swarnadhipathi;"

This Charge is groundless and baseless.

1. Our client denies that she ever harassed Ms. Swarnadipathy

2. The purported charge is groundless and baseless.

3. The details of the harassment are not set out in the charge, and thus our client cannot
answer any further.

PURPORTED CHARGES 12, 13 & 14

"12. Whereas, the Hon. (Dr.) (Mrs.) Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake who holds the office of the Chief Justice and thereby holds the office of the ex-officio Chairperson of the Judicial Service Commission in terms of Article 111D (2) of the Constitution has, by acting ultra vires the powers vested in her by the Article 111H of the Constitution ordered the Magistrate (Mrs.) Rangani Gamage's right to obtain legal protection for lodging a complaint in police against the harassment meted out to her by Mr. Manjula Thilakaratne, the Secretary of the Judicial Service Commission."
"13. Whereas, the said Hon. (Dr.) (Mrs.) Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake being the Chief Justice and thereby being the Chairperson of the Judicial Service

Commission, in terms of Article 111D (2) of the Constitution, has abused her powers by ordering the Magistrate (Mrs.) Rangani Gamage to obtain permission of the Judicial Service Commission prior to seeking police protection thereby preventing her from exercising her legal right to obtain legal protection."17
"14. Whereas, the Hon. (Dr.) (Mrs.) Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake by performing her duties as the Chairperson of the Judicial Service Commission has referred a letter through the Secretary of the Judicial Service Commission to the Magistrate (Mrs.) Rangani Gamage, calling for explanation from her as to why a disciplinary inquiry should not be conducted against her for seeking protection from the Inspector General of Police by exercising her legal right;

1. The purported charges relate to the JSC calling for explanation from Magistrate Ms.Gamage.

2. The facts are as follows.

(i) The Inspector General of Police issued a circular setting out the police personnel provided to different categories of Judicial officers.

(ii) The JSC issued circular no. 348 which was to the effect that requests concerning official matters should be directed to the JSC.

(iii) Ms Gamage in her capacity as Magistrate wrote directly to the Inspector General of Police, asking for police protection which she claimed she needed in view of her duties as a Magistrate.

(iv) The JSC asked for an explanation from Ms Gamage as to why the JSC circular No. 348 was not followed.

(v) Ms Gamage replied stating that she did not intend to violate the JSC's circular, but asked for forgiveness for any misunderstanding.

(vi) The matter was closed by the JSC.

PURPORTED CHARGES 7 & 8

"7. Whereas, with respect to the Supreme Court special ruling Nos. 2/2012 and 3/2012 the said Hon. (Dr.) (Mrs.) Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake has disregarded and /or violated Article 121 (1) of the Constitution by making a special ruling of the Supreme Court to the effect that the provisions set out in the Constitution are met by the handing over of a copy of the petition filed at the court to the Secretary General of Parliament despite the fact that it has been mentioned that a copy of a petition filed under Article 121 (1) of the Constitution shall at the same time be delivered to the Speaker of Parliament;"18

"8. Whereas, Article 121(1) of the Constitution has been violated by the said Hon. (Dr.) (Mrs.) Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake despite the fact that it had been decided that the mandatory procedure set out in the said Article of the Constitution must be followed in accordance of the interpretation given by the Supreme Court in the special decisions of the Supreme Court bearing Nos. 5/91, 6/91, 7/91 and 13/91;"

The Charges are groundless and baseless.

In any event, this is a decision of the Supreme Court consisting of 3 judges.

Further, a determination in respect of a bill is that of the 3 judges who heard it.

In contradistinction a judgment in other cases the judgment is that of the judge who wrote it and the other judges may (or may not) agree or may write a separate judgment.

A decision of the Supreme Court cannot be considered proven misbehaviour within the
meaning of Article 107.

A judge cannot be impeached on account of a difference of opinion regarding a judgment and any attempt to do so would impinge on the independence of the judiciary.

1. The above purported charges relate to judgments of the Supreme Court, and it is neither appropriate nor correct to comment on.

2. The Select Committee itself should not go into such matters.

PURPORTED CHARGE 9

"9. Whereas, irrespective of the absolute ruling stated by the Supreme Court in the fundamental rights violation case, President's Counsel Edward Francis William Silva and three others versus Shirani Bandaranayake (1992 New Law Reports of Sri Lanka 92) challenging the appointment of the Hon. (Dr.) (Mrs.) Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake, when she was appointed as a Supreme Court judge, she has acted in contradiction to the said ruling subsequent to being appointed to the office of the Supreme Court judge."

This purported charge is groundless and baseless.

1. No particulars have been given as to how our client acted in contradiction to the ruling in the case of Edward Francis William Silva v Shirani Bandaranayake.

2. Thus this purported charge cannot be answered.

3. Without such details, this purported charge has to be dismissed in limine and cannot
be considered a charge in law.

PURPORTED CHARGE 10

"10. Whereas, the Supreme Court special rulings petition No. 02/2012 filed by the institution called Centre for Policy Alternatives to which the Media Publication Section 'Groundview' that had published an article of the Hon. (Dr.) (Mrs.) UpatissaAtapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake, while she was a lecturer of the Law Faculty of the University of Colombo prior to becoming a Supreme Court judge, has been heard and a ruling given."

1. This purported charge is baseless, groundless and false.

2. Our client has been reliably informed that Groundviews, a media publication of the Centre for Policy Alternatives [CPA], came into existence in or about 2005-2006, long after our client ceased to be a lecturer of the Law Faculty.

3. Thus the purported charge is ex facie wrong.

4. Moreover, Groundview has not published an article written by our client.

5. Petition SCFR 2/2012 was not filed by the CPA.

6. It may be of interest to note that the bench presided by our client did not accept the submissions of the CPA in respect of the 18th Amendment.

**04**

# THE ORDER OF THE SUPREME COURT REQUESTING DELAY IN IMPEACHMENT PROCEEDING TILL THE COURT INQUIRE INTO THE REFERENCE MADE BY THE COURT OF APPEAL

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

S.C.Reference No.5/2012
C.A.
(Writ) Application No.3 62/20 12

In the matter of reference under and in terms of Article 125 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Ven.Maduluwawe Sobhitha,
Thero
Kotte Sri Naga Viharaya,
Pita Kotte,
Kotte.
Petitioner.
vs.
1. Hon.Anura Priyadarshana Yapa, M.P.
Eeriyagolla,
Yakwila.

2. Hon.Nima1 Siripala de Silva, M.P.
93/20, Elvitigala Mawatha,
Colombo 08.

3. Hon.A.D.Susi1 Premajayantha, M.P.
12311, Station Road,
Gangodawila,
Nugegoda.

4. Hon.Dr.Rajitha Senaratne, M.P.
C.D.85, Gregory's Road,
Colombo 07.

5. Hon. Wimal Weerawansa, M.P.
18, Rodney Place,
Cotta Road,
Colombo 08.

6. Hon.Dilan Perera M.P.
30, Bandaranayake Mawatha,
Badulla.

7. Hon.Neoma1 Perera, M.P.
313, Rockwood Place,
Colombo 07.

8. Hon.Lakshman Kiriella, M.P.
12111, Pahalawela Road,
Palawatta,
Battaramulla.

9. Hon.John Amaratunga M.P.
88, Negombo Road,
Kandana.

10. Hon.Rajavarothiam
Sampathan, M.P.
2D, Summit Flats,
Keppitipola Road,
Colombo 05.

11. Hon.Vijitha Herath, M.P.
4413, Medawaththa Road,
Mudungoda, Miriswaththa,
Gampaha.
Respondents.
22.11.2012
Before - AMARATUNGAY J.
SRIPAVAN, J.
DEP, P.C. J.

Counsel : K. Kanag-Isvaran P.C. with Buddhike Illangatillake and Thishya Weragoda for the Petitioner in 03/20 12.
Sanjeewa Jayawardena P.C. with Senany Dayaratna for Petitioner in 4/20 12

G.Alagaratnam P.C: with Ranjith Coomaraswamy, Chanaka de Silva ., M.IM. Adamaly and L..Gurusinghe ,for Petitioner in 05/2012.

Shibly Aziz P.C. with U. Egalahewa P.C. and Chishrnal Warnasuriya for Petitioner in 06/20 12
Uditha Egalahewa P.C. with Gihan Galabadge R. Dayananda and Amaranath Fernando for the Petitioner in 7/20 12

Chrishmal Warnasuriya with Reven Weerasinghe, Wardani Karunarathne and D. Kularathne in 0812012.

Pulasthi Hewamanne for Petitioner in 09/20 1 2.

Palitha Fernando P.C. A.G. with A. Gnanathasan P.C. ASG, Shavindra Fernando DSG., S .Rajarathnarn DSG, Janak de Silva DSG, A.H.M.D. Nawaz DSG and N.Pulle SSC. for A.G.

Argued &
Decided on : 22.11.2012

AMARATUNGA, J

We have heard the learned President's Counsel who appeared in support of the Reference Nos. 312012, 412012, 512012, 612012, 712012 and the learned counsel who appeared in support of the Reference Nos. 8120 1 2 & 9/20 12- and we have also heard the Hon. the Attorney-General who appeared on very short notice. The Court of Appeal acting in terms of Article 125 of the Constitution has referred the following question relating to the interpretation of the Constitution.

"Is it mandatory under Article 107(3)of the Constitution for the Parliament to provide for matters relating to the forum before which the allegations are to be proved, the mode of proof, the burden of proof, the standard of proof etc. of any alleged misbehavior or incapacity in addition to the matters relating to the investigation of the alleged misbehavior or incapacity?."

Article 125(2) of the Constitution mandates that the question referred to the Supreme Court shall be determined within 2 months of the date of the reference. In terms of Rule 64(1) of the Supreme Court Rules of 1978 certain procedural steps have to be followed before a determination is made by this Court.

It was the submission of all Learned President's Counsel and the learned counsel who appeared in support of the motion that the inquiry before the Select Committee of Parliament would commence at 10.30 am tomorrow, i.e. 23.1 1.20 12 and irreparable damage would be caused to the person noticed that is the Hon. the Chief Justice if proceedings before the Select Committee are not stayed by this Court . According to the pleadings filed in the Court of Appeal and the submissions made by all learned counsel in this Court, standing order 78(A) of the Parliament contravenes Article 4(c) read with Article 3 , Article 12(1) and 13(5) of the Constitution and are also contrary to the accepted norms relating to the burden of proof. These questions will be addressed once the procedural rules are complied with.

However, at this stage, this Court whilst reiterating that there has to be mutual respect and understanding founded upon the rule' of law between Parliament and the Judiciary for the smooth functioning of both the institutions, wishes to recommend to the members of the Select Committee of Parliament that it is prudent to defer the inquiry to be held against .the Hon. the Chief Justice until this Court makes its determination on the question of law referred to by the Court of Appeal. The desirability and paramount importance of acceding to the suggestions made by this Court would be based on mutual respect and trust and as something essential for the safe guarding of the rule of law and the interest of all persons concerned and ensuring that justice is not only be done but is manifestly and undoubtedly seem to be done.

We direct the Court of Appeal to inform the Respondents to file written submissions in terms of the Rule 64(l)(b) of the Supreme Court Rules.

The Registrar of the Supreme Court is also directed to send copies of the written submissions lodged under the aforesaid Rule to the Hon. the Attorney-General and the written submissions of the Hon. the Attorney- General could be filed in terms of the aforesaid rules.

The Registrar is directed to serve certified copies of this order to all Respondent members of the Select Committee of the Parliament together with the certified copy of the Petition and affidavit filed in the Court of Appeal and also a copy of the order of reference made by the Court of Appeal.

A copy of today's order is to be served on the Hon. the Attorney-General as well.

The Registrar is also directed to send a certified copy of today's order to the Registrar of the Court of Appeal. Petitioners are also entitled to obtain certified copies of this order on payment of usual charges. Mention on 28.1 1.20 1 2, before the same bench.

The Registrar is also directed to send a certified copy of today's order to the Registrar of the Court of Appeal. Petitioners are also entitled to obtain certified copies of this order on payment of usual charges.

Mention on 28.1 1.20 1 2, before the same bench.

Sgd
JUDGE OF THE SUPREME COURT

SRIPAVAN, J.
I agree.
Sgd
JUDGE OF THE SUPREME COURT

DEP, PC, J.
Sgd
JUDGE OF THE SUPREME COURT

I do hereby certify that the foregoing is a- true copy of the judgment dated 22.1 1.20 12, filed of record in SC Reference No.05/20 12.

Typed by :- Sgd

Compared with:-

**05**

## List of the Parliamentary Select Committee on impeachment against CJ

The Speaker of the Parliament appoints 11 member select committee headed by Minister Anura Priyadarshana Yapa to the Parliamentary Select Committee (PSC) to probe the 14 charges contained in the impeachment motion against Sri Lanka's Chief Justice Dr.Shirani Bandaranayake.

Ministers Nimal Siripala de Silva, Anura Priyadarshana Yapa, Susil Premajayantha, Rajitha Senaratne, Dilan Perera, Wimal Weerawansa and Deputy Minister Neomal Perera have been appointed as the government representatives.

Lakshman Kiriella, John Amaratunga, Vijitha Herath and R.Sampanthan has been appointed as the opposition party representatives.

*(Courtesy: news.lk)*

06

# SPEAKER REJECTS SUPREME COURT DECISION

Speaker Chamal Rajapaksa announcing his ruling on the Supreme Court decision to issue notice on Parliamentary Select Committee members hearing the Impeachment motion against Chief Justice Shirani Bandaranayake held that the Court decision has 'no effect' and is 'not recognised'.

The Speaker was referring to the Supreme Court ruling on a number of Writ Applications filed in the Court of Appeal and later referred to them.

One of the relief sought by the applicants was to issue notice on the Respondents.
Full text of the Speaker's ruling:

"The Honourable Nimal Siripala de Silva, Leader of the House, raised an issue relating to Privilege on the floor of the House this morning. This arose from an event which occurred yesterday.

I found exceedingly helpful the detailed observations which were made on this issue by fifteen Hounourable Members on both sides of the House today. The range and depth of the views expressed during the debate, which I have reflected on, greatly facilitated my task in reaching my decision on the matters brought to my notice by the Honourable Leader of the House.

Notice was served on me yesterday, as Speaker of Parliament and on the Members of the Select Committee appointed by me on 14th of November 2012 to inquire into allegations against the Honourable Chief Justice under Article 107 of the Constitution. I, as the Speaker of Parliament, and the Members of the Select Committee appointed by me have been cited as Respondents in these proceedings.

These were Notices issued by the Court of Appeal, on the direction of the Supreme Court, in the matter of an application for mandates in the nature of Writs of Certiorari, Mandamus, Quo Warranto and Prohibition in terms of Article 140 of the Constitution.

The relief sought in these proceedings includes the following;

a) Issue notice on the Respondents in the first instance

b) Grant and issue a Writ of Certiorari quashing the determination and/or decision of the 1st Respondent to place the said alleged impeachment motion against the Chief Justice dated 01.11.2012 in the Order Paper of Parliament on 06.11.2012

c) Grant and issue a Writ of Certiorari quashing the decision and/or determination of the 1st Respondent to appoint and/or assign a committee made up of the 2nd to 12th Respondents to embark upon a judicial/quazi judicial process of inquiring into the charges against the Chief Justice.

d) Grant and issue a Writ of Certiorari quashing the order and/or decision and/or determination of the 1st Respondent directing the Chief Justice to present herself before the 2nd to 12th Respondents for inquiry by way of a judicial/quazi judicial process.

e) Grant and issue a Writ of Prohibition preventing 1st to 12th Respondents from taking any further actions or steps in connection with the impunged Motion dated 01.11.2012.

f) Grant and issue a Writ of Quo Warranto requiring the 2nd to 12th Respondents to display under what legal warrant or authority they intend to embark upon a judicial/quazi judicial process of inquiring into the alleged charges against the Chief Justice.

g) Grant and issue a Writ of Mandamus directing the 1st Respondent to act in terms of the Law contained in Article 107 (3) to formulate and adopt Laws/Standing Orders establishing a lawful and constitutional process governing the impeachment of a judge of the Appellate Courts, that is not in violation of specifically Article 4 ( c ) of the Constitution.

h) Grant and issue Interim Orders;

I. Restraining the 1st Respondent and/or agents and/or officers serving under him from taking any further steps in connection with the said impeachment motion dated 01.11.2012.

II. Restraining the 2nd to 12th Respondents and/or agents and/or officers serving under them from taking any further steps pursuant to the notice summoning the Chief Justice dated 15.11.2012.

I wish to explain to the House the basis of my ruling.

In appointing this Committee, I have acted as Speaker in pursuance of the powers vested by me by Article 107 of the Constitution.

The Members of the Committee appointed by me are responsible solely and exclusively to me as the Speaker. No person, or institution outside Parliament has any authority whatsoever to issue any directive either to me as Speaker or to Members of the Committee appointed by me.

This is a mater which falls exclusively within the purview of Parliament's authority. The established law in this regard was exhaustively surveyed by my distuingished predecessor, the late Honourable Anura Bandaranaike, in his historic ruling delivered in this august House on 20th June,2001.

It is clear from this rurling that the matters concerned fall within the exclusive domain of Parliament, and that no intervention in any form by any external agency is consistent with the established principles of law, and is therefore to be rejected unreservedly as an unacceptable erosion of the powers and responsibilities of Parliament.

I am happy to note that a broad consensus emerged in the course of debate on the central issue requiring my decision. I would like to make particular mention of the view, clearly expressed by the Honourable Leader of the Opposition in the course of his intervention, that the purported Notices constitute an unwarranted interference with the powers and procedures of Parliament, and are invalid. This was stated with great clarity by the Honourable Joseph Michael Perera as well.

On careful consideration of this matter, I wish to convey to the House my ruling that the Notices issued on me, as Speaker of Parliament, and on the Members of the Select Committee appointed by me, have no effect whatever and are not recognized in any manner.

I declare that the purported Notices, issued to me and to the Members of Select Committee are a nullity and entail no legal consequences.

I wish to make is clear that this ruling of mine as Speaker of Parliament, will apply to any similar purported Notice, Order of Determination in respect of the proceedings of the Committee which will continue solely and exclusively under the authority of Parliament.

07

# THE JOINT STATEMENT OF THE JUDGES

*(A translation from Sinhala)*
December 3, 2012

As judicial officers our attention has been drawn to the manner in which inquiries are being conducted about the charges in the impeachment motion brought against the Chief Justice. As it appears to us there is behaviour in the media which is disrespectful of the Chief Justice as well as the judiciary.

Therefore we recommend that all the defamatory statements made by such media against the judiciary should stop.

We request that attention must be paid to the great harm that such defamatory statements will cause to the Chief Justice and also collectively to the judiciary thereby causing the rule of law to break down which will result in serious harm.

We also propose that the inquiries conducted against the Chief Justice should be made impartially and with transparency.

We would also like to draw attention to the fact that the appointment of a committee consisting of seven persons from the group that made the charges and four persons from another party for inquiring into charges violates the principles of natural justice and in no country does the party that makes the charges themselves inquire into the same charges.

We would have to raise the question as to what examples do we provide to the world through the removal of the Chief Justice of this country in this manner.

Signed

The Judges Association of the High Court
The Judges Association of the District Court
The Association of the Magistrates, and
The Association of the Labour Tribunals

08

# SENIOR MOST JUDGE SEEKS FAIR TRIAL FOR CJ

Justice C. G. Weeramantry, former senior vice president of the International Court of Justice and the Senior Most Retired Judge in Sri Lanka, said yesterday it was essential that a tribunal deciding on the rights of any citizen must consist of persons who are totally uncommitted before the hearing, the Sunday Times reported today.

If any members of the tribunal have directly or indirectly indicated their views upon the matter in advance of the hearing, that tribunal ceases to be impartial, Justice Weeramantry said in a statement amidst a growing controversy over the impeachment of Chief Justice Shirani Bandaranayake.

Justice Weeramantry said:

"As the senior-most retired judge in the country and as one who has been associated with the law both locally and internationally for 65 years I feel compelled to make some observations in regard to the current crisis facing the Sri Lankan Judiciary. It is a judiciary which has been a great pride to the country and has been highly esteemed both domestically and internationally.
"An independent judiciary is vital to democracy, for without it citizens lack the basic protections, without which a democracy cannot exist.
"The concept of judicial independence is not a one way street depending on the judges alone. It needs not only strictly independent judges but also a commitment by the state to respect and protect the independence and security of tenure of judges.
"The independence of the judiciary and their security of tenure are hard won rights secured after centuries of struggle against authoritarian regimes. Such hard won rights need considered attention and protection by citizens and governments alike. An independent judiciary is the last bastion of protection of the rights and liberties and the equality and freedom of every citizen.
"The following propositions, which are associated with the independence of the judiciary, are unassailable and require observance and protection in any democratic state.
"In the first place there can be no democracy in a country unless the rule of law prevails at every level from the humblest to the most exalted citizen.
"In the second place the rule of law is not present unless a fair hearing is available to every citizen who is called upon to defend himself or herself before a tribunal on a matter affecting his or her rights.
"In the third place there cannot be a fair hearing unless the tribunal is totally and patently impartial. It is essential that a tribunal deciding on the rights of any citizen must consist of persons who are totally uncommitted before the hearing to any conclusion on the matter.
"In the fourth place if any members of the tribunal have directly or indirectly indicated their views upon the matter in advance of the hearing that tribunal ceases

to be impartial. It follows that such a tribunal is not functioning according to the rule of law.
"In the fifth place the rule of law demands that every person investigated by a tribunal has a right;
to be informed of the charges
to know the evidence against him or her
to have a full and fair opportunity to scrutinize that evidence and to respond to it.
"A denial of any of the above factors vitiates the inquiry and its findings. Such an inquiry is a violation of the rule of law, a denial of basic human rights and a negation of democratic principles.
"So fundamental and universal are these principles that even the Universal Declaration of Human Rights spells out in Article 10, that 'everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations …' Since the Universal Declaration asserted this principle in 1948, there has been extensive development of it over the years in all jurisdictions committed to human rights and the rule of law.

"Where the issues involved are as grave as misconduct of the Chief Justice of a country these general principles of law need to be applied with the greatest strictness that is possible and it is the duty of the inquiring authority to ensure these basic safeguards which human rights demand.

"Traditional constitutional law depends heavily on the principle of separation of powers which gives each of the three organs of government a province of its own, with authority which is to be exercised without fear or favour.

"It is a prerequisite to the rule of law that each of the three organs of government – Executive, Legislature and Judiciary – must act according to the rules and principles set out earlier.

"As I have said in many of my writings and lectures, all three branches of government – Executive, Legislature and Judiciary – rest upon the bedrock concept of the rule of law. If the rule of law is not observed, the work of all three organs of government is impaired, with resulting damage to equality and freedom. Every citizen from the lowest to the highest has the right to defend himself or herself before a patently impartial tribunal and with full knowledge of the evidence against him or her and with a full opportunity of scrutinizing and refuting it.

"In short unless all these principles are observed in an inquiry where security of judicial tenure is involved, there is profound damage to the independence of the judiciary with a resulting undermining of the rule of law and of democracy itself.

"This should be a cause of concern to every citizen and every institution in the country."

09

# THE JUDICIAL SERVICE ASSOCIATION (JSA) ON THE PARLIAMENTARY SELECT COMMITTEE

**A Statement from Judicial Service Association (JSA) of Sri Lanka forwarded by the Asian Human Rights Commission**

The Government members of the Parliamentary Select Committee (PSC) appointed to probe the charges contained in the impeachment motion have found the Chief Justice Dr. Shirani Bandaranayake guilty of three charges.

We, the Judicial Service Association (JSA),as the sole representative body of the judicial officers of Sri Lanka, strongly feeland record its considerable concern that the Chief Justice Dr. Shirani Bandaranayake did not get a fair hearing at the Parliamentary Select Committee (PSC) proceedings in terms natural justice and fair trial in coming to the above finding.

We are of the view that the PSC did not qualify in terms of the constitutional requirements to conduct an inquiry for the removal of a Chief Justice as a genuine tribunal. Such a tribunal must be an impartial judicial body. The composition, procedure and the very conduct of some members of the PSC failed to meet the basic standards expected of an impartial tribunal.

The JSA is extremely concerned and shocked about the fact that the Chief Justice was insulted and humiliated by two members of the PSC forcing the Chief Justice and her lawyers to walk out in protest against this outrageous situation. We are also concerned about the behavior of certain media institutions maintained by tax payer's money and their conduct in contempt of PSC proceedings and also in contempt of the entire judiciary.

Security of tenure of office of judges is of paramount importance to safeguard the independence of the judiciary. United Nations Basic Principles of the Independence of the Judiciary guarantees to every judge the right to a fair hearing and an independent review of removal proceedings (Item 17 and 20). Article 12(1) of the Constitution guarantees equality and equal protection of the law and, Article 13(5) the presumption of innocence. In the PSC proceedings, the Chief Justice was not allowed to exercise the basic fundamental rights enjoyed by ordinary civilians of this country as enshrined in the Constitution. Chief Justice and her lawyers were not given fair trial guarantees enshrined in the International Covenant on Civil and Political Rights (ICCPR) to which Sri Lanka is a party.

The impeachment process has proceeded against the Chief Justice irrespective of the request made by the Supreme Court to delay proceedings until they make a determination on the question for reference made by the Court of Appeal on constitutionality of Standing Order 78A. The PSC has been appointed disregarding the objections taken on the basis of serious legal grounds – that the removal of a superior court judge should be preceded by an inquiry of an impartial tribunal consisting of judicial officers.

The Mahanayakes and the other religious dignitaries, the academics, professionals, and people from many other walks of life who, in the recent weeks, have expressed considerable concern over the impeachment process and has come under severe attack in Sri Lanka, as well as by authoritative statements from important international sources such as the Commonwealth Secretariat, Commonwealth Association of Judges and Lawyers, the United Nations, International Committee of Jurists, Law Asia and from persons of high international repute, including Sri Lanka's most senior judge Dr. C. G. Weeramantry.

We urge His Excellency the President not to act on the findings of the PSC. We urge the Parliament to enactnecessary legislation or amend the existing Standing Orders in terms of Article 107(3) to ensure setting up of fair, transparent, and impartial tribunal which would guarantee due process to probe the allegations of misbehavior of the Chief Justice and other Apex Court Judges.

Judicial Services Association
14th December 2012

**10**

# CHIEF JUSTICE FILED ACTION AGAINST PSC REPORT FULL TEXT OF THE PETITION

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA**

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA**

*In the matter of an application for mandates in the nature of writs of Certiorari and Prohibition under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka*

**HON.**
**(DR.)**
**UPATISSA ATAPATTU BANDARANAYAKE WASALA MUDIYANSE RALAHAMILAGE SHIRANI ANSHUMALA BANDARANAYAKE,**

Chief Justice of the Supreme Court of Sri Lanka,
Residence of the Chief Justice of Sri Lanka,
129, Wijerama Mawatha,
Colombo 07.
**PETITIONER**
**Vs**
1.
**HON. CHAMAL RAJAPAKSE,**
Hon. Speaker of Parliament,
Speakers Residence,
Sri Jayawardanepura Kotte.
2.
**HON. ANURA PRIYADARSHANA YAPA,**
**MP**
Eeriyagolla,
Yakwila.
3.
**HON. NIMAL SIRIPALA DE SILVA, MP**
93/20, Elvitigala Mawatha,
Colombo 08.
4.
**HON. A. D. SUSIL PREMAJAYANTHA,**
**MP**
123/1, Station Road,
Gangodawila,
Nugegoda.
5.
**HON. DR. RAJITHA SENARATNE, MP**
CD 85, Gregory's Road,
Colombo 07.
6.

**HON. WIMAL WEERAWANSA, MP**
18, Rodney Place,
Cotta Road,
Colombo 08.
**7.**
**HON. DILAN PERERA, MP**
30, Bandaranayake Mawatha,
Badulla.
8.
**HON. NEOMAL PERERA, MP**
3/3, Rockwood Place,
Colombo 07.
9.
**HON. LAKSHMAN KIRIELLA, MP**
121/1, Pahalawela Road,
Palawatta,
Battaramulla.
10.
**HON. JOHN AMARATUNGA, MP**
88, Negombo Road,
Kandana.
11.
**HON. RAJAVAROTHIAM SAMPATHAN, MP**
2D, Summit Flats,
Keppitipola Road,
Colombo 05.
12.
**HON. VIJITHA HERATH, MP**
44/3, Medawaththa Road, Mudungoda,
Miriswaththa,
Gampaha.
All of the above Respondents also of the
Parliament of Sri Lanka, Sri Jayawardanepura
Kotte.
13.
**W.B.D. DASSANAYAKE,**
Secretary General of Parliament,
Parliament Secretariat,
Parliament of Sri Lanka,
Sri Jayawardanepura Kotte

**RESPONDENTS**

**TO: HIS LORDSHIP THE PRESIDENT AND OTHER HONOURABLE JUDGES OF THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA On this 19th day of December 2012**

The **PETITION** of the **PETITIONER** above-named appearing by Kandiah Neelakandan, Sashidevi Neelakandan and Saravanan Neelakandan practising in partnership under the name style and firm of

**NEELAKANDAN & NEELAKANDAN**
and their Assistants Mohottige Don Raja Mannapperuma, Asurappuli Hewage Sumathipala, Shehani Niranji Ratnaweerage, Mohamed Kaleel Mohamed Irshad, Gnanapragasam Pushpa

Angelin, Sriskandarajah Pratheepa and Pranavan Neelakandan, her Registered Attorneys, statesas follows:-1.The Petitioner is the 43 rd and the incumbent Chief Justice of Democratic Socialist Republic of Sri Lanka. The Petitioner was appointed as a Judge of the Supreme Court ofSri Lanka in October 1996 and was appointed as the Chief Justice of Sri Lanka on 18 th May 2011.2.The 1 st Respondent is the Hon. Speaker of the Parliament of the Democratic SocialistRepublic of Sri Lanka.3.(a)The Petitioner states that:(a)the 2 nd Respondent is a Member of Parliament for the Kurunegala District representing the United People's Freedom Alliance and a member of the Cabinet of Ministers holding the portfolio of Minister of Environment.(b)the 3 rd Respondent is a Member of Parliament for the Badulla District representing the United People's Freedom Alliance and a member of the Cabinet of Ministers holding the portfolio of Minister of Irrigationand Water Resources Management and is the leader of the House of the Parliament. (c)the 4 th Respondent is a Member of Parliament for the ColomboDistrict representing the United People's Freedom Alliance and a member of the Cabinet of Ministers holding the portfolio of Minister of Petroleum Industries.(d)the 5 th Respondent is a Member of Parliament for the Kalutara Districtrepresenting the United People's Freedom Alliance and a member of the Cabinet of Ministers holding the portfolio of Minister of Fisheries and Aquatic Resources Development.(e)the 6 th Respondent is a Member of Parliament for the ColomboDistrict representing the United People's Freedom Alliance and a member of the Cabinet of Ministers holding the portfolio of Minister of Construction, Engineering Services, Housing and Common Amenities.(f)the 7 th Respondent is a Member of Parliament for the Badulla Districtrepresenting the United People's Freedom Alliance and a member of the Cabinet of Ministers holding the portfolio of Minister of ForeignEmployment Promotion and Welfare.

(g)the 8 th Respondent is a Member of Parliament for the Puttlam Districtrepresenting the United People's Freedom Alliance and the DeputyMinister of External Affairs.(h)the 9 th Respondent is a Member of Parliament for the Kandy District representing the United National Party. (i)the 10 th Respondent is a Member of Parliament for the Gampaha District representing the United National Party.(j)the 11 th Respondent is a Member of Parliament for the Trincomalee District representing the Illankai Tamil Arasu Kadchi. (k)the 12 th Respondent is a Member of Parliament for the Gampaha District representing the Democratic National Alliance. (b) The Petitioner states that the aforesaid 2 nd to 12 th Respondents were appointed bythe 1st Respondent to a Select Committee under a purported Standing Order 78Aof the Parliament to investigate into alleged acts of misconduct or incapacity of the Petitioner, pursuant to a Resolution presented to the 1 st Respondent in terms of Article 107(2) of the Constitution as morefully set forth hereinafter. (c) The 3 rd Respondent was the Chairman of the Select Committee purportedlyappointed by the 1 st Respondent in order to investigate purported charges againstthe Petitioner in order to impeach the Petitioner.(d) The Petitioner states that there is no provision in the Standing Orders of theParliament, for a Select Committee appointed under the purported Standing Order78A to continue functioning notwithstanding any vacancy created in such SelectCommittee. 4.The 13 th Respondent is the Secretary General of the Parliament and the Secretary to the purported Select Committee appointed under Standing Order 78A of the Parliament. 5.The Petitioner states that (a)the Government of Sri Lanka addressed the attached periodic report to theHuman Rights Committee appointed under and in terms of the InternationalCovenant on Civil & Political

Rights a treaty to which Sri Lanka is a signatory. Atrue copy of the said document is filed herewith marked P1 and pleaded as partand parcel hereof.(b)the Petitioner has been reliably informed that the said report was presented to thesaid Committee by a high profile delegation including the PermanentRepresentative to the UN Mr Prasad Kariyawasam, Dr. Rohan Perera, Ms.LalaniPerera and the then Solicitor General of Sri Lanka Mr. C R De Silva, President'sCounsel.

(c)the Petitioner states that the said document in Clauses 298, 299, 300, 301 and 302 dealt with Standing Order 78A, and more particularly Clause 302 states as follows:On the previous occasion the Human Rights Committee examined Sri Lanka'speriodic report, it express concern on the compatibility of the impeachment process with the scope and spirit of Article 14, since it would compromise theindependence of the judiciary. As stated above Article 107 a judge can be removed only on "proved grounds of misbehaviour or incapacity" and thestanding orders allows for the judge in question defend himself either on his own or retaining a legal counsel, non adherence to the rules of natural justiceby the inquiry committee would attract judicial review. Indeed nowhere eitherin the relevant constitutional provisions or the standing orders seek to excludejudicial scrutiny of the decisions of the inquiring committee. Thus, it is envisaged that if the inquiring committee were to misdirect itself in orbreached the rules of natural justice its decisions could be subject to judicial review.A true copy of the Standing Order 78A is filed herewith marked P1(a) andpleaded as part and parcel hereof.(d) in the circumstances the Government of Sri Lanka has represented that thedecisions of the Select Committee appointed under Standing Order 78A wouldattract judicial scrutiny. 6.The Petitioner further states that the Respondents are estopped from denying that thedecisions of the select committee are subject to judicial review and are estopped from denying that the Respondents are bound by judgments of competent courts exercisingjudicial review of the decision of the Select Committee.B ACKGROUND F ACTS 7.The Petitioner states that(a)on or about 1 st November 2012, a Notice of a Resolution purportedly under Article107(2) of the Constitution signed by 117 Members of Parliament was handed overto the 1 st Respondent seeking inter alia the removal of the Petitioner on the allegedgrounds of misbehavior and/or incapacity. A true copy of the said resolution isfiled herewith marked P2 and pleaded as part and parcel hereof.(b)on or about 6 th November 2012, the 1 st Respondent caused the said Resolution tobe published in the Order Paper of the Parliament of Sri Lanka and announced that a Select Committee comprising of 11 Members of Parliament will be appointed toinvestigate into the purported allegations contained in the said Resolution. (c)pursuant to the nominations made by the respective constituent parties of the Parliament, the following 11 members were appointed by the 1 st Respondent to the said Select Committee on 14 th November 2012

(a)the 2 nd to 8 th Respondents representing the ruling United People's Freedom Alliance; (b)the 9 th and 10 th Respondents representing the United National Party;(c)the 11 th Respondent representing the Illankai Tamil Arasu Kachchi;and(d)the 12 th Respondent representing the Democratic National Alliance. 8.The Petitioner states that(a)at about 7.00 p.m. on 14 th November 2012, the Petitioner received a letter dated 14 th November, 2012 under the hand of the 13 th Respondent informing the Petitioner of the aforesaid Notice of Resolution received by the 1 st Respondent, theappointment of the 2 nd to 12 th Respondents to the purported Select Committee on14 th November 2012 to try the said charges and report to the Parliament and themeeting of the said purported Select Committee on 14 th November 2012 and informing the Petitioner:(a)to submit the Statement of Defence to the said purported charges contained in the Notice of Resolution on or before 22 nd November 2012;(b)to appear before the said purported Select Committee at 10.30 a.m. on 23 rd November 2012 either

personally or by representative.(b)the said letter dated 14 th November 2012 had the purported charges included in theNotice of the Resolution as Attachment 1 and a copy of the Standing Order 78A asAttachment 2. A true copy of the said letter dated 14 th November 2012 togetherwith the said attachments are filed herewith marked P3 and pleaded as part andparcel hereof.9.The Petitioner states that the Petitioner appointed Messrs Neelakandan & Neelakandan asthe Instructing Attorneys for the Petitioner and on the instructions of the Petitioner, thesaid Messrs Neelakandan & Neelakandan, without prejudice to the rights of the Petitionerincluding the right to object to the jurisdiction of the Select Committee, wrote to the 13 th Respondent on 15 th November, 2012, drawing attention to the fact that the Petitioner has only been given approximately a week's time to answer the purported charges and considering that there are fourteen purported charges, requesting six weeks time in order to enable the Petitioner to answer the said purported charges. A true copy of theaforesaid letter is filed herewith marked P4 and pleaded as part and parcel hereof.10.The Petitioner states by letter dated 16 th November, 2012 the Petitioner requested the 13 th Respondent to respond to the letter of Messrs Neelakandan & Neelakandan, nominated asthe registered Attorneys of the Petitioner. A true copy of this letter is filed herewithmarked P5 and pleaded as part and parcel hereof.11.Pursuant thereto on 17 th November 2012, the Petitioner personally wrote to the 13 th Respondent informing that the Petitioner received the letter dated 14 th November 2012 of13 th Respondent only around 7 p.m. on 14 th November 2012 allocating the Petitioner onlyapproximately week's time to answer 14 purported charges and in the circumstancesrequesting six weeks time be granted in order to enable the Petitioner to answer the 14purported charges. The Petitioner further requested 13 th Respondent to respond to the

letters and grant the time requested. A true copy of this letter is filed herewith markedP6 and pleaded as part and parcel hereof.12.The Petitioner states that pursuant thereto the Petitioner received a letter dated 17 th November 2012 from 13 th Respondent informing the Petitioner that the Select Committeehas ordered 13 th Respondent to inform the Petitioner that -(a)the Petitioner must personally inform the Select Committee whether the Petitioneris appearing personally or by representative;(b)if there is any request the Petitioner can forward such request after appearing before the Select Committee at 10.30 a.m. on 23 rd November 2012;(c)the Select Committee has decided not to accept the letter dated 15 th November2012 sent by Messrs Neelakandan & Neelakandan A true copy of the said letter dated 17 th November 2012 is filed herewith marked P7 andpleaded as part and parcel hereof.13.The 13 th Respondent further by letter dated 19 th November, 2012 informed the Petitioner,to forward any request after appearing before the Select Committee at 10.30 a.m. on 23 rd November 2012. A true copy of which is filed herewith marked P8 and pleaded as partand parcel hereof.T HE P ETITIONER NOT AFFORDED SUFFICIENT TIME TO RESPOND TO THE PURPORTEDCHARGES OR TO PREPARE HER DEFENCE 14.The Petitioner states that the purported Select Committee comprising of 2 nd to 12 th Respondents, as communicated by the letter of the 13 th Respondent of 14 th November2012, received by the Petitioner approximately at 7.00 p.m. on 14 th November 2012,arbitrarily and unreasonably only allowed the Petitioner time till 22 nd November 2012 torespond to 14 purported charges.15.The Petitioner states that all of the said 14 purported charges contained several factualmatters on which the Petitioner had to instruct her lawyers for the preparation of theStatement of Defence and the approximate week's time allowed was grosslyunreasonable and arbitrary.16.The Petitioner states that repeated requests made by the Petitioner personally and throughher lawyers for a reasonable extension time was arbitrarily disregarded by the purportedSelect Committee, who required the Petitioner to appear before the Select Committee on 23 rd November 2012 and make the request personally.17.The Petitioner states that in view of no proper procedure laid down for proceedingsbefore the purported Select

Committee, the Petitioner faced the risk of not havingpresented a defence in the event the 2 nd to 12 th Respondents refused the request of thePetitioner for further time and in the circumstances through abundance of caution the Petitioner was compelled to send a limited response to the purported charges. True copy

of the said limited response dated 20 th November 2012 is filed herewith marked P9 andpleaded as part and parcel hereof.18.The Petitioner states that on the 23 rd of November, 2012 the Petitioner appeared beforethe purported Select Committee and requested for further time and was given only a further week's time despite strong objection of her lawyers who steadfastly maintainedthat one week's time was not sufficient and that it was impossible to respond within suchperiod.19.The Petitioner states that the Petitioner only requested a reasonable time to adequatelyand fully answer the purported charges demonstrating that there was no factual or legal basis for the maintenance of the said purported charges and the farcical nature thereof. In the circumstances, the Attorneys-at-Law for the Petitioner sent another letter dated 29 th November 2012 requesting further time. A true copy of the same is filed herewithmarked P9(a) and pleaded as part and parcel hereof.20.The Petitioner states that on 4 th December, 2012, which was the next date of inquiry, therequest of the Petitioner for further time was refused by the 2 nd Respondent. 21.The Petitioner states that pursuant thereto on 6 th December 2012, which was the next dateat about 4 p.m. during the course of the proceedings of the purported Select Committee, abundle of (over 80) documents which contained over 1,000 pages was handed over to theCounsel of the Petitioner. The Petitioner states that the request of the Counsel for the Petitioner for a reasonable time to study the said documents and prepare for the inquirywas wrongfully, unlawfully and arbitrarily refused by the 2 nd to 8 th Respondents and the Petitioner was informed that the inquiry into the charges 1 and 2 would be taken up forinquiry on the next day, namely 7 th December, 2012 at 1.30 p.m. True copies of the proceedings of 23 rd November 2012, 4 th December 2012, 6 th December 2012 and 7 th December 2012 and the aforesaid documents handed over to the Petitioner are markedP10(a), P10(b), P10(c), P10(d) and P11 respectively and are filed and pleaded as partand parcel of this petition.22.The Petitioner states that in the circumstances, the Petitioner was not given sufficienttime to prepare her defence and that the 2 nd to 8 th Respondents acted wrongfully, unlawfully and arbitrarily and in breach of the principles of natural justice. B IAS 23.The Petitioner states that Hon. Dr. Rajitha Senaratne (the 5 th Respondent) and Hon. Wimal Weerawansa (the 6 th Respondent) were apparently biased against the Petitioner and therefore the Petitioner in her limited Response objected to the said 5 th and 6 th Respondents sitting in the Select Committee.Hon. Rajitha Senaratne (the 5 th Respondent) 24.The Petitioner states that (a)on or about 26/08/2011, Dr. Sujatha Senaratne, the spouse of the 5 th Respondent,instituted a Fundamental Rights Application in the Supreme Court bearing No. SCFR 357/2011;

(b)after hearing the parties, the said application of Dr. Sujatha Senaratne was dismissed on 26 th March 2012 by a bench of the Supreme Court presided by thePetitioner. True copy of the said proceedings in SCFR 357/2011 is filed herewith marked P12 andpleaded as part and parcel hereof.25.The Petitioner states that during the proceedings of the Select Committee there wasapparent bias on the part of the 5 th Respondent and consequently the Counsel for the Petitioner during the proceedings of 4 th December 2012 vehemently objected to the 5 th Respondent taking part in the Select Committee proceedings. 26.The Petitioner states that after such submissions were made by the Counsel on behalf ofthe Petitioner, the 5 th Respondent made the following observations which are set out in summary, during the course of the proceedings(a)the Petitioner has heard another case when the 5 th Respondent was the Minister of Lands and held that case also against the 5 th Respondent;(b)the 5 th Respondent

as a Member of Parliament objected to the appointment of the Petitioner as a Judge of the Supreme Court;(c)the 5 th Respondent criticized not only the appointment of the Petitioner but alsothe person who backed her – the Hon. (Prof.) G.L. Peiris;(d)the 5 th Respondent reminded Hon. (Prof.) G.L. Peiris at the Parliamentary Groupmeeting about the criticism;27.The Petitioner states that in the circumstances the 5 th Respondent was clearly and patentlybiased against the Petitioner.Hon. Wimal Weerawansa (the 6 th Respondent) 28.The Petitioner states that the Petitioner objected to the 6 th Respondent on the ground of bias as set out in her limited statement of defence and also during the proceedings of theSelect Committee there was apparent bias also on the part of the 6 th Respondent andconsequently the Counsel for the Petitioner during the proceedings of 4 th December 2012 objected to the 6 th Respondent taking part in the Select Committee proceedings. 29.The Petitioner states that the 6 th Respondent has made statements in the media thatunequivocally demonstrate that the 6 th Respondent is clearly predisposed towards an adverse finding against the Petitioner including(a)report in the Sri Lanka Mirror citing the 6 th Respondent as stating that theimpeachment motion was brought against the Petitioner in order to end a clashbetween the executive and the legislature, which clash was precipitated by theSupreme Court communicating a Determination of the Court to the 13 th Respondent, the Secretary General of Parliament, instead of the 1 st Respondent and the said allegation forms part and parcel of the charges against the Petitioner.

(b)an interview given to the Rivira newspaper, wherein the 6 th Respondent indicatesthat the executive would have to take steps to neutralize a perceived conflict between the judiciary and the executive.(c)media reports that the 6 th Respondent and/or the political party of the 6 th Respondent has delayed preferring an application to the Supreme Courtchallenging the 13 th Amendment in view of the pending impeachment motion True copies of the said newspaper reports are filed herewith collectively marked P13and pleaded as part and parcel hereof.30.In the circumstances Hon. Wimal Weerawansa was clearly and patently biased againstthe Petitioner.31.The Petitioner states that on 6 th December 2012, the 2 nd Respondent informed thePetitioner that the Committee is not accepting the objection against the 5 th and 6 th Respondents on the grounds of bias, without giving any reasons for the said decision. The Petitioner states that though the 2 nd Respondent indicated that he would be giving thereasons for the decision subsequently, no reasons have been given to the Petitioner for thesaid decision thus far. 32.The Petitioner further states that the 9 th to 12 th Respondents expressly states that theywere not consulted regarding the said decision and in the circumstances it is apparent thatthe 2 nd to 8 th Respondents have on their own made the said decision disregarding and without consulting the 9 th to 12 th Respondents who are members of the purported Select Committee. N O PROCEDURE LAID DOWN 33.The Petitioner states that the Petitioner was not informed of the procedure intended to be followed by the Select Committee despite repeated requests of the Counsel for thePetitioner.34.The Petitioner states that the 2 nd to 8 th Respondent, without consulting or the concurrence of the 9 th to 12 th Respondents, were adopting ad hoc and arbitrary procedure unknown to law with regard to (a)the production and admission of the documents; (b)proof of such documents; (c)burden of proof; (d)lists of witnesses ;(e)admission of evidence etc.35.The Petitioner states that the 2 nd to 8 th Respondents were consistently taking decisions without even consulting the 9 th to 12 th Respondents who were also members of thepurported Select Committee and the said 9 th to 12 th Respondents were openly critical ofsuch behavior of 2 nd to 8 th Respondents.
N O L IST OF W ITNESSES 36.The Petitioner states that (a)the lawyers representing the Petitioner repeatedly requested the purported Select Committee for a list of witnesses and documents for the Petitioner to prepare forthe examination of such witnesses and but were not given. (b)despite such repeated requests the list of witnesses was not provided to thePetitioner

and as far as the Petitioner gathered from the proceedings the 9 th to 12 th Respondent were also unaware as to whether any witnesses were being called togive evidence.(c)during the course of the proceedings of the purported Select Committee on 6 th December 2012, at about 4 p.m., a bundle of (over 80) documents which containedover 1000 pages was handed over to the Counsel of the Petitioner and despite the request of the Counsel for the Petitioner for a reasonable time to study the saiddocuments and prepare for the inquiry, the Petitioner was informed that theinquiry into the charges 1 and 2 would be taken up for inquiry on the very nextdate, namely 7 th December, 2012 at 1.30 p.m.(d)the Petitioner was further informed that there would be no oral testimony inrespect of the above documents and despite the objection of the Counsel for the Petitioner that documents has to be produced through witnesses and from propercustody the said submission was disregarded by the 2 nd to 8 th Respondents.B URDEN OF P ROOF 37.The Petitioner states that the Petitioner was not given the right or the opportunity of cross examining the accusers or any of the witnesses by producing the documents through the13 th Respondent.38.The Petitioner further states that the 2 nd to 8 th Respondents in clear violation of Article13(5) of the Constitution informed the Petitioner citing Standing Order 78A(5) that the burden of disproving was on the Petitioner.R EQUEST FOR P UBLIC H EARING 39.The Petitioner states that the Counsel for the Petitioner in view of the ad hoc and arbitrarymanner in which the 2 nd to 8 th Respondent were conducting the proceedings of thepurported Select Committee requested a public hearing, waiving the secrecy provision contained in Standing Order 78A(8) drawing the attention to the fact that the said provision is so included to protect the Respondent Judge.40.The Petitioner states that the said request of the Petitioner was refused by the 2 nd Respondent.

41.(a)The Petitioner then requested that there should be observers present at the inquiryand that the presence of the observers will not violate the secrecy provision. (b)The Petitioner further submitted that the Select Committee could use its discretionin deciding who the observers should be and suggested that the observers shouldinclude inter alia the Bar Association of Sri Lanka and the International BarAssociation.42.The Petitioner states that the said request for observers was also refused by the 2 nd Respondent.43.The Petitioner states that it was important that the proceedings be open to the public sothat the public and interested parties will be able to gauge or determine the manner and procedure followed.D ECISIONS TAKEN BY THE C HAIRMAN ( THE 2 ND R ESPONDENT )44.The Petitioner states that decisions were taken by the 2 nd Respondent sometimes withoutproper consultation and in some instances without the knowledge of the members of theSelect Committee, especially the 9 th to 12 th Respondents.45.The Petitioner further states that the Chairman has instructed the 13 th Respondent to call for documents which instructions have been made without the knowledge of all the members of the Select Committee.46.The Petitioner pleads that in the circumstances the procedure followed is unlawful,unreasonable, arbitrary and capricious.T HE P ETITIONER WAS INSULTED 47.The Petitioner states that the Petitioner was insulted by several Government members ofthe PSC, and the Petitioner files herewith a true copy of the letter dated 14/12/2012 sentby her lawyers to the Hon. Speaker marked P14 and pleads as part and parcel hereof.48.The Petitioner pleads that the statements made by the Government members of the PSC were clearly actuated by a prejudged mind and were clearly manifested such prejudgedstate by the conduct and utterances made.W ALK OUT BY THE P ETITIONER 49.The Petitioner states that –(a)117 members who signed the impeachment motion come under the jurisdiction ofthe government whip;(b)2 nd to 8 th Respondents who constituted a majority of the Select Committee comeunder the government whip ;(c)the government whip is a member of the cabinet which is under His Excellencythe President to whom the motion for impeachment would be submitted;

(d)majority of the Members of the Parliament come under the government whip.50.The Petitioner states that the 2 nd to 8 th Respondents were conducting the proceedings of the purported Select Committee in an unreasonable, unlawful, ad hoc, manifestly unfairand an arbitrary manner in beach of the principles of natural justice. 51.The Petitioner states that it was apparent that the 2 nd to 8 th Respondents had prejudged thecase and were in a hurry to find the Petitioner guilty. 52.The Petitioner states that it became apparent that the Petitioner would not receive justicein the Select Committee and in the circumstances set out above the Petitioner and herlawyers walked out of the proceedings of the purported Select Committee on 6 th December 2012 at approximately 5.50 p.m.A FTER THE WALK OUT 53.The Petitioners Attorneys at Law sent a letter dated 7 th December 2012 to the 1 st Respondent inter-alia, requesting that further action be deferred until an independent andimpartial panel is appointed to inquire into the allegations. The Petitioner further reiterated that the Petitioner is absolutely innocent of the allegations and is convinced that the Petitioner will be exonerated of any wrongdoing by an independent and impartialtribunal. A true copy of the same is filed herewith marked P15 and pleaded as part andparcel hereof.54.The Petitioner states that the Petitioner is made aware that the purported SelectCommittee has met as scheduled at 1.30 p.m. on 7 th December, 2012 and that at the said meeting the 9 th to 12 th Respondents have stated tabling a letter to the Select Committeethat(a)the Petitioner was not afforded the courtesies and privileges due to the office of Chief Justice;(b)it is the duty of the Select Committee to maintain the highest standards of fairnessin conducting the inquiry;(c)the treatment meted out to the Petitioner was insulting and intimidatory and the remarks made were very clearly indicative of preconceived findings of guilt(d)the 9 th to 12 th Respondents are of the view that the Committee should beforeproceeding any further lay down the procedure the Committee intends to follow inthis inquiry;(e)give adequate time for the Petitioner and her lawyers to study and review the documents tabled(f)afford the Petitioner privileges necessary to uphold the dignity of the office of Chief Justice 55.The Petitioner states that the Petitioner learnt from newspaper reports that pursuantthereto the 9 th to 12 th Respondents have withdrawn from the Select Committee due to the refusal of the 2 nd to 8 th Respondents to accede to the aforesaid request made by the 9 th to

12 th Respondents. A true copy of the press statement issued by the Opposition membersis filed herewith marked P16 and pleaded as part and parcel hereof.56.The Petitioner states that after the Petitioner walked out of the proceedings, and after the withdrawal of the 9 th to 12 th Respondents from the proceedings, the 2 nd to 8 th Respondents in an about face hurriedly summoned and examined 16 witnesses during thecourse of 7 th December 2012 sitting till 8.50 p.m. 57.The Petitioner states that upon the withdrawal of the 9 th to 12 th Respondents, four vacancies are created in the purported Select Committee appointed by the 1 st Respondentand in the circumstances the said purported Select Committee became functus officio. The Petitioner reiterates that there is no provision in the Standing Orders of theParliament for a purported Select Committee appointed under Standing Order 78A tocontinue functioning notwithstanding any vacancy created in such Committee.58.The Petitioner states that notwithstanding the vacancy created by the withdrawal of the9 th to 12 th Respondents as aforesaid the 2 nd to 8 th Respondents wrongfully, unlawfullycontinued to function ultra vires of the Standing Orders of the Parliament.C ALLING OF W ITNESSES BY THE 2 ND TO 8 TH R ESPONDENTS 59.The Petitioner states that the Petitioner was not informed of any decision by the purportedSelect Committee to call any witnesses during the proceedings of 6 th December 2012 until the withdrawal of the Petitioner from the said proceedings at approximately 5.50p.m. The Petitioner states that despite the repeated requests of the Counsel for the Petitioner, even on 6 th December 2012, the purported Select Committee or the 2 nd to 8 th Respondents did not inform the Petitioner that the Select

Committee was calling anywitnesses on 7 th December 2012 and did not provide the Petitioner with a list ofwitnesses. The Petitioner states that the Petitioner was in fact specifically informed thatno witnesses would be called by the purported Select Committee since all evidence are documentary and that the burden was on the Petitioner to disprove the charges by callingwitnesses. 60.The Petitioner verily believes that 9 th to 12 th Respondents were unaware of any suchdecision by the 2 nd to 8 th Respondents to call witnesses prior to their withdrawal from the proceedings on 7 th December 2012 despite being members of the said purported Select Committee.61.In fact, the Petitioner verily believes that these witnesses were summoned at the eleventh hour knowing well that they will not be cross-examined, because the Petitioner had walked out of the proceedings. 62.The Petitioner states that on 8 th December 2012 the 2 nd to 8 th Respondents have compiled a purported report wrongfully, unlawfully and unconstitutionally finding the Petitionerguilty of charges 1, 4 and 5. A true copy of the said Purported Report is filed herewithmarked P17 and pleaded as part and parcel hereof. The Report was available only on the 17/12/2012 in the afternoon. The Petitioner specifically pleads that the Petitioner was notgiven what was called the minutes of the tribunal and /or the deliberations of theCommittee at any given time while the Petitioner was participating at the inquiry.

63.The Petitioner states that the said purported finding of guilt of the Petitioner by the 2 nd to8 th Respondents of charges 1, 4 and 5 is wrongful, unlawful, against the weight of theevidence and without any legal or factual basis.64.The petitioner states in her response she asked for details/particulars of the several charges which the Respondents refused to give.C HARGE N UMBER 165.The Petitioner states that the Charge No. 1 against the Petitioner reads as follows;"Whereas by purchasing, in the names of two individuals, i.e. Renuka NiranjaliBandaranayake and Kapila Ranjan Karunaratne using special power of attorneylicence bearing No. 823 of Public Notary K.B. Aroshi Perera that was given byRenuka Niranjali Bandaranayake and Kapila Ranjan Karunaratne residing at No. 127, Ejina Street, Mount Hawthorn, Western Australia, 6016, Australia, the housebearing No. 2C/F2/P4 and assessment No. 153/1-2/4 from the housing scheme located at No. 153, Elvitigala Mawatha, Colombo 08 belonging to the company thatwas known as Ceylinco Housing and Property Company and City Housing and Real Estate Company Limited and Ceylinco Condominium Limited and is currently knownas Trillium Residencies which is referred in the list of property in the case offundamental rights application No. 262/2009, having removed another bench of theSupreme Court which was hearing the fundamental rights application cases bearingNos. 262/2009, 191/2009 and 317/2009 filed respectively in the Supreme Court against Ceylinco Sri Ram Capital Management, Golden Key Credit Card Companyand Finance and Guarantee Company Limited belonging to the Ceylinco Group ofCompanies and taking up further hearing of the aforesaid cases under her court andserving as the presiding judge of the benches hearing the said cases" 66.The Petitioner states that:(a)(i)the aforesaid housing unit bearing No. 2C/F2/P4 and assessment No. 153/1-2/4 Trillium Residencies was not purchased by the Petitioner and/or using the special power of attorney bearing No. 823 of Public Notary K.B. Aroshi Perera;(ii)the said property was purchased by Renuka Niranjali Bandaranayake and Kapila Ranjan Karunaratne by the monies remitted by Renuka NiranjaliBandaranayake and Kapila Ranjan Karunaratne from Australia.The Petitioner files herewith the documentation from the bank in evidence thereofmarked P17(c) to P17(o) respectively and pleads as part and parcel hereof.(b)(i)as far back as 6 th May 2010, (i.e. nearly 16 months prior to the Petitioner hearing the case) the sale of housing units of the Trillium Residencies had been excluded from the Fundamental Rights Application bearing No. 262/2009.

The Petitioner sets out hereunder an extract of the proceedings of 6 th May2010 which reads as follows-“ The Court also directs the Committee of Chartered Accountants topursue all negotiations for the sale of other properties by advertising and calling for quotations with a view to obtaining the highest goingprices on these properties.No properties to be alienated without the express permission of this Court. For the moment, …the properties to bedisposed would be:-(1) pioneer tower (head office building)(2) trillium residencies (sale of housing units)(3) celestial residencies…”(ii)no permission of Court has been sought in relation to sale of the saidhousing units of Trillium Residencies after 6 th May 2010, despite a number of such housing units of Trillium Residencies being sold.(c) the Petitioner did not remove another bench that was hearing the Fundamental Rights Application cases bearing Nos. 262/2009, 191/2009 and 317/2009..67.(a)The Petitioner states that by Deed No.2876 dated 12/05/2012 attested by D.A.P.Weeratne Notary Public, an apartment of Trillium Residencies bearing No.1C/F7/P4 was transferred to the former Chief Justice J.A.N. De Silva and his daughter R.K.I. de Silva Balapatabendi.(b)The Petitioner states that to the best of her knowledge no permission was sought,obtained or required for the transfer of the said premises.68.In the circumstances the Petitioner states that it was known and accepted that after theaforesaid order and the other orders made by a Bench presided by Justice ShiraneeTilakawardane no permission of the Supreme Court was necessary for the transfer of thesaid property (Trillium apartments).69.In the circumstances the Petitioner states that as at the date the case came before a benchof which she presided all apartments in Trillium Residencies could be transferred without the permission of the Supreme Court.70.In the circumstances, the Petitioner states that being guilty of the charge is ex faciewrong.71.The Petitioner states that her sister did not receive any special concession. The concessions of purchase price may have been offered and taken by several of the purchasers and no special concessions offered to the Petitioner’s sister.72.The Petitioner states for the aforesaid reasons finding of guilt against her cannot besustained.73.Without prejudice to the aforesaid the Petitioner states that herewith the following.74.The Petitioner states that(a)a motion was filed by adepositor /intervenient –petitioner in SCFR 191/2009 on orabout 19/08/2011 asking that a bench of 5 Judges be constituted;

(b)when the matter was referred to Justice Shiranee Tilakawardane, Justice Shiranee Tilakawardane referred the same to the Petitioner;(c)in the circumstances , the Petitioner referred it back to the same benchvthat heardthe case , thereafter the matter was never referred to the Petitioner forconsideration of whether a Bench of five Judges should be constituted(d)that Justice Shiranee Tilakawardane did not refer the matter to the Petitioner for a constitution of a Bench of five Judges and there was no such minute in the file.(e)In the circumstances the constitution of the Bench of five Judges never came upbefore the Petitioner.(f)In the circumstances the order of the Select Committee is ex facie wrong.75.The Petitioner states further in answer to the said charge without prejudice to theaforesaid.76.The Petitioner states that –(a)there were several allegations against Justice Shiranee Tilakawardane which is notrelevant to be repeated here.(b)Judges refused to sit with Justice Tilakawardane in this matter as is evidenced bythe evidence of Justice Tilakawardane.(c)further allegations were made that Justice Tilakawardane met with some membersof the Watawala Commission alone in her chambers without any of the otherJudges and/or any counsel and that neither counsel nor other Judges were aware ofthe discussion.(d)The Petitioner further states that the Watawala Commission had been paid approximately Rs.40 million allegedly for work done. This money was in factmeant for repayment to depositors.77.In the aforesaid circumstances the Petitioner having considered all the facts and circumstances and after having consulted senior Judges of the Supreme Court, constituteda Bench chaired by her with two other senior judges to hear and determine the

case.78.The Petitioner pleads that at no time did any person protest that the case was taken out ofJustice Tilakawardane and or heard by her. 79.The Petitioner states (a)that case came up on several occasions. (b)Several hundred depositors were present in court (c)most if not all depositors were represented by Counsel. (d)The Respondents were represented by counsel,(e)the Watawala Commissioners were present in court, (f)the Hon. Attorney General was represented. (g)None of such persons ever protested that the case was either wrongfullytaken and/or that it should not be heard by the Petitioner.

80.In the circumstances, the Petitioner states that it is not only wrongful but also maliciousto conclude that the Petitioner wrongfully took over the case.81.In any event the Petitioner states that to the best of the Petitioner's recollection a Benchpresided by the Petitioner did not alter in any way the orders previously made.82.The Petitioner further states that the Petitioner did not make any order except purelyroutine orders in the said case.83.In these circumstances the Petitioner states that the taking of the case was not only notwrongful but correct and in any event did not in any way or manner affect the purchaseof the premises by her sister.84.The Petitioner states that in the aforesaid circumstances, the alleged finding of the 2 nd to8 th Respondents that the Petitioner is guilty of the aforesaid Charge 1 is wrongful, unlawful, arbitrary, against the weight of the evidence and without any legal or factualbasis.C HARGE N UMBER 485.The Petitioner states that Charge No. 4 against the Petitioner reads as follows;"Whereas, by not declaring in the annual declaration of assets and liabilities thatshould be submitted by a judicial officer the details of more than twenty bankaccounts maintained in various banks including nine accounts bearing numbers106450013024, 101000046737, 100002001360, 100001014772, 100002001967,100101001275, 100110000338, 100121001797 and 100124000238 in the aforesaid branch of NDB Bank"86.The Petitioner states that the 13 th Respondent wrote to almost all commercial banksinquiring about the Petitioner's Accounts and the evidence revals that the Petitioner from 2010 had no operative accounts in any other bank except the NDB Bank.87.In the circumstances the charge that the Petitioner had accounts in various banks isincorrect.88.Furthermore the evidence reveal that as at 31 st March 2012 the Petitioner had only 4active/operative accounts and that the NDB Bank had maintained 2 routing accounts as per the standard internal banking practice at the NDB Bank in the name of the Petitioneras morefully explained hereinafter. 89.The purported Report does not set out how many Bank accounts the Petitioner had. ThePetitioner sets out hereinunder from paragraph 92 onwards the accounts mentioned in the charge.90.The Petitioner sets out hereinunder the bank account dealt in the report.91.In the circumstances it is apparent that the Petitioner has made true and correctdeclaration of assets and liabilities.

92.The Petitioner states that of the accounts referred to in the above Charge No. 4:(a)Account No. 106450013024 was opened on or about 6th April 2011 with NationalDevelopment Bank PLC (NDB Bank) and has been duly declared in the relevantdeclaration of Assets and Liabilities dated 31 st March 2012.(b)Account No. 101000046737 had been duly declared in the relevant declaration of Assets and Liabilities of the Petitioner. (c)Account No. 100002001360 is a Special Current Account created by NDB Bank for the purpose of routing investments. (d)Account No. 100001014772 is an old Account No. which has been migrated dueto a IT System change by NDB Bank to Account No. 10100046737 referred toabove. (e)Account No. 100002001967 is a Special Current Account created by NDB Bank PLC for the purpose of routing investments. (f)Account No. 100101001275 had been closed by the Petitioner in the year 2008.(g)Account No. 100110000338 is an old Account No. which has been migrated dueto a IT System change by NDB Bank to Account No. 106160005893 referred toabove and has been duly declared by the Petitioner. (h)Account No. 100121001797

is an old Account No. which has been migrated byNDB Bank to Account No. 106450000542 and has been declared by thePetitioner. (i)Account No. 100124000238 is an old Account No. which has been migrated byNDB Bank to Account No. 106450013024 referred to above and has been declared by the Petitioner.93.The Petitioner states that of the 9 accounts referred to in the Charge No. 4, (a)there is in truth and in fact only 7 accounts whilst the other 2 accounts are old account numbers of 2 of the Accounts migrated due to a IT System change byNDB Bank. (b)of the said 7 accounts, 2 are special routing accounts (as opposed to regular current accounts) maintained by the NDB Bank for investment purposes in termsof standard internal banking practice at the NDB Bank and these are not regular current accounts. These routing accounts could be operated only by the NDB Bank as and when necessary. When the investments mature the funds will be credited along with the interest and thereafter the capital and the interest will be re-invested by the Bank as per the standing instructions of the customer based onthe financial advice given by the NDB Bank with regard to the investment. The Petitioner verily believes the funds in the account are credited to the account at the end of an investment cycle when the matured investment is credited pendingreinvestment and during the maturity period of the investment these routing accounts carry zero balances. (c)1 other account bearing No. 1001011001275 has been closed in 2008.

(d)thus only 4 of the 9 Accounts referred to in the said Charge 4, were regular operational Accounts and the Petitioner has duly declared the said Accounts in therelevant Asset Declarations. 94.The Petitioner states that, in the aforesaid purported Report of the 2 nd to 8 th Respondentsthe 2 nd to 8 th Respondent have referred to the following accounts though some of themwere not included in the said Charge 4. The said Accounts are:Account No. 1Account No. 100002001360 is a Special Current Account created by NDB Bank PLC for the purpose of routing investments. The said Account has been migrated by NDB Bank to Account No. 10111002058. (Account No. 7 referred to below)Account No. 2Account No. 100002001967 is a Special Current Account created by NDB Bank PLC for the purpose of routing investments. The said Account has been migrated by NDB Bank to Account No. 10110002778. Account No. 3Account No. 100121001797 has been migrated by NDB Bank to Account No.106450000542. This account is an account in US Dollars which was opened on 2 nd September 2008 and the money was transferred to a fixed deposit in 2009. The fixed deposit was duly declared in the declaration of Assets and Liabilities. Thisaccount had zero balance from 2009. Account No. 4Account No. 106110012694 was opened on 26 th April 2012 and thus could nothave been declared in any of the declaration of assets and liabilities. Account No. 5Account No. 106110012128 was opened on 20 th April 2012 and thus could nothave been declared in any of the declaration of assets and liabilities. Account No. 6Account No. 100124000238 has been migrated by NDB Bank to Account No.106450013024 was opened on 6 th April 2011 and was declared in the declarationof Assets and Liabilities as at 31 st March 2012. The said Account could not havebeen declared in the declaration of as at 31 st March 2011 because it was opened inApril 2011. Account No. 7Account No. 1001110002058 is the migrated Account No. 100002001360 referred to under Account No. 1 above. Account No. 8Account No. 100100039660 has been migrated by NDB Bank to Account No.106000134433 and has been duly declared in the Declarations of Assets andLiabilities for the years ending 31 st March 2010, 2011 and 2012. As is evidentfrom the Report itself and should have been evident to anyone who read the reportthat the transactions in the said Account commenced in November 2009 and thuscould not have been declared in years ending 31 st March 2007 or 2008.

95.The Petitioner states that of the 8 accounts referred to above(a)Account No. 7 is the new Account Number of the migrated and redundant oldaccount referred to under Account No. 1.

(b)Accounts 1, 2 and 7 are special routing accounts ( 1 and 7 being the same) maintained by the NDB Bank for investment purposes as per standard internal banking practice of the NDB Bank as morefully described above. The said Accounts do not form part of the Assets or liabilities of the Petitioner as the said Accounts maintained by the NDB Bank as per internal banking practice. ThePetitioner states that the Petitioner has duly declared the Investment Assets relating to such routing accounts in the relevant Asset Declarations under the category of 'Treasury Bills'. (c)Accounts 4 and 5 were opened in the year 2012 and therefore could not have beendisclosed in any Asset Declaration. (d)Accounts 3, 6 and 8 have been duly declared in the relevant Asset Declarations. 96.The Petitioner categorically states that the evidence reveal that the Petitioner hasdisclosed all her assets and liabilities and the said evidence does not disclose any asset and/or liability not declared by the Petitioner in the relevant Declarations of Assets and Liabilities of the Petitioner.97.The Petitioner states that the 2 nd to 8 th Respondents have wrongfully concluded that thePetitioner had not disclosed the routing accounts maintained by NDB Bank withoutproperly understanding the nature of such accounts. The Petitioner reiterates that the Petitioner has duly declared the Investment Assets relating to such routing accounts in the relevant Asset Declarations. 98.The Petitioner further states that the 2 nd to 8 th Respondents have wrongfully concludedthat the Petitioner has not disclosed Accounts 4, 5, and 8 referred to in the purported Report which were not in operation by reason that the Petitioner has only opened suchaccounts after such relevant date of disclosure in the respective years. The Petitionerannexes hereto marked P18 the letter dated 19 th November 2012 addressed to Messrs Neelakandan & Neelakandan by NDB Bank setting out the details of bank accounts held by the Petitioner.99.The Petitioner states that in the circumstances the evidence cogently establish that the Petitioner has duly, properly, truthfully and correctly disclosed all assets and liabilities as at the end of each reporting period as required by law. 100. The Petitioner states that the purported report of the 2 nd to 8 th Respondents has:(a)failed to consider that the evidence reveal that(i)the Petitioner, in fact had only Six (6) bank accounts with NDB Bankincluding 2 accounts opened after 31 st March 2012.(ii)the Petitioner did not have and/or maintain 20 bank accounts.

22 (iii) the Petitioner has not had any operative accounts in any bank other than theNDB Bank since 2010.(b)wrongfully concluded that the evidence that(i)the Petitioner maintained 13 accounts with NDB Bank.(ii)the Petitioner has not disclosed all operative bank accounts of the Petitionerin the relevant Declarations of Assets and Liabilities of the Petitioner.101. In the circumstances, the Petitioner states that(a)the said Charge 4 annexed to document marked P3 has not been duly proved. (b)the Petitioner is ex facie not guilty of Charge 4 annexed to document marked P3. 102. In the said circumstances the alleged finding of the 2 nd to 8 th Respondents that thePetitioner is guilty of the aforesaid charge is wrongful, unlawful, arbitrary and against theweight of the evidence and without any legal or factual basis.103. For more clarity and transparent the Petitioner states that the Petitioner has duly ,properlyand correctly declared all her assets and investments in the relevant assets and liabilitiesdeclarations and in any event the Petitioner could not have declared the investments inthe routing accounts under accounts catagory for the simple reason the Petitioner has to declare her investments under investments category. If the Petitioner was to declare the transactions in the routing accounts, there would have been duplicate (double) entries.C HARGE N UMBER 5104. The Petitioner states that Charge No. 5 against the Petitioner reads as follows;Whereas, Mr. Pradeep Gamini Suraj Kariyawasam, the lawful husband of the said Hon. (Dr.) (Mrs.) Upatissa Atapattu Bandaranayake Wasala MudiyanseRalahamilage Shirani Anshumala Bandaranayake is a suspect in relation to legalaction initiated at the Magistrate's Court of Colombo in connection with the offencesregarding acts of bribery and/or corruption under the Commission to Investigate intoAllegations of Bribery or Corruption Act, No 19 of

1994;Whereas, the post of Chairperson of the Judicial Service Commission which is vestedwith powers to transfer, disciplinary control and removal of the Magistrate of the said court which is due to hear the aforesaid bribery or corruption case is held by the said Hon. (Dr.) (Mrs.) Upatissa Atapattu Bandaranayake Wasala MudiyanseRalahamilage Shirani Anshumala Bandaranayake as per Article 111D (2) of the Constitution;Whereas, the powers to examine the judicial records, registers and other documentsmaintained by the aforesaid court are vested with the said Hon. (Dr.) (Mrs.) UpatissaAtapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani AnshumalaBandaranayake under Article 111H (3) by virtue of being the Chairperson of theJudicial Service Commission;Whereas, the Hon. (Dr.) (Mrs.) Upatissa Atapattu Bandaranayake Wasala MudiyanseRalahamilage Shirani Anshumala Bandaranayake becomes unsuitable to continue in the office of the Chief Justice due to the legal action relevant to the allegations of bribery and corruption levelled against Mr. Pradeep Gamini Suraj Kariyawasam, the lawful husband of the said Hon. (Dr.) (Mrs.) Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake in the aforesaid manner, and as a result of her continuance in the office of the Chief Justice,administration of justice is hindered and the fundamentals of administration of justiceare thereby violated and whereas not only administration of justice but visibleadministration of justice should take place;105. The Petitioner states that ex facie the said Charge is bad in law and cannot be sustained since the said charge probabilities and surmises and not on any factual occurrences. 106. The Petitioner categorically states that there was no matter concerning the ChiefMagistrate that came up before the Judicial Services Commission after the Petitioner's husband was charged in the Magistrate's Court. 107. The Petitioner further states that the said purported charge cannot in any event be a ground for proved misbehaviour in the absence of any allegation that the Petitioner has infact conducted herself in a manner unbecoming of a Judge of the Superior Courts inrelation to the said Charge. 108. Without prejudice to the above, the Petitioner states that ex facie the finding of the Select Committee are false, based on probabilities and surmises, wrongful, unlawful, against the weight of the evidence and without any legal or factual basis. 109. The Petitioner states that the purported report of the 2 nd to 8 th Respondents have concluded that there is insufficient evidence to find the Petitioner guilty of charges 2 and 3 and therefore the 2 nd to 8 th Respondents have not come to any conclusion with regard tothe said charges. 110. In the circumstances the Petitioner states that despite the aforesaid arbitrary investigation conducted ex parte by the 2 nd to 8 th Respondents, without adhering to the rule of law and principles of natural justice, on the own admission of the 2 nd to 8 th Respondents there is insufficient evidence even by the very negligible standard proof adopted by the saidRespondents to establish the said charges 2 and 3 relating to an alleged sum of Rs. 34 Million in foreign currency being received by the Petitioner, which the Petitioner hasallegedly not declared in the relevant asset declarations. 111. The Petitioner states that the purported report of the 2 nd to 8 th Respondent have notaddressed the purported charges 6 to 14 and have not come to any conclusion in respectof the said charges. 112. The Petitioner states that thus and otherwise(a)the purported exercise of judicial power by the Select Committee appointed under Standing Order 78A is contrary to Article 4(c) of the Constitution;(b)the Petitioner in the limited response dated 20 th November 2012 took up theobjection that the Parliament by standing orders confer itself judicial power and therefore the purported Select Committee has no jurisdiction to hold the purported inquiry.

113. The Petitioner states that the purported exercise of the judicial power by the SelectCommittee is unconstitutional and therefore any findings of the said purported Select Committee has no force or effect in law. 114. In the aforesaid circumstances the Petitioner states that(a)exercise of judicial power by the purported Select Committee is unconstitutional;

(b)functioning of the 2 nd to 8 th Respondents as the purported Select Committeenotwithstanding the vacancy created by the withdrawal of the 9 th to 12 th Respondents is wrongful, unlawful and ultra vires of the Standing Orders of the Parliament.(c)the Petitioner was deprived of a fair hearing;(d)In the aforesaid circumstances the Petitioner pleads that the 2 nd to 8 th Respondentsof the Select Committee -(i) failed to adhere to the rule of law ;(ii) breached the rules of natural justice(iii) acted unreasonably, and/or capriciously and/or arbitrarily(iv) had prejudged the issue.115. In the aforesaid circumstances the Petitioner pleads that there had been proceduralirregularity in the manner in which the Select Committee conducted its affairs.116. The Petitioner further states that:(a)the Parliament (Powers and Privileges) Act No. 21 of 1953 as amended affords no protection to the aforesaid unconstitutional and ultra vires acts of the 2 nd to 12 th Respondents complained hereof;(b)the judiciary is the only Institution entrusted with the onerous task of keepingevery organ of State within the limits of the law and thereby making the Rule of Law enshrined in the Constitution meaningful and effective. (c)the Government of Sri Lanka has represented that the decisions of the SelectCommittee appointed under Standing Order 78A would attract judicial scrutiny in the periodic report submitted by the Government of Sri Lanka to the Human Rights Committee appointed under and in terms of the International Covenant onCivil & Political Rights.117. For a fuller disclosure the Petitioner states that when the impeachment motion was presented to Parliament wide publicity was given to it in the media and therefore thePetitioners Attorneys-at-Law addressed a letter to the media, a true copy of which is filed herewith marked P19 and pleaded as part and parcel hereof.118. The Counsel for the Petitioner also issued statements to the media on or about 07/12/2012 and 12/12/2012, and true copies of which are filed herewith marked P20(a)and P20(b) respectively and pleaded as part and parcel hereof.

The Petitioner also annexes hereto compendiously marked P21 the several documents the Counsel tendered to the Tribunal on 4 th December 2012 marked ‘A1’ to ‘A11(b)’ andpleads the same as part and parcel hereof.120. The Petitioner respectfully states that irremediable mischief and irreparable damagewould be caused to the Petitioner and the independence and the integrity of the judiciaryand to the institutions of justice if the interim order prayed for are not granted. ThePetitioner states that the resolution for the removal of the Petitioner based on the purported report P17 is due to be taken up for debate on 8 th January 2013. 121. The Petitioner respectfully states that the report P17 was available only in the afternoon of the 17 th December 2012, and seeks the indulgence of Court to tender any documents that are necessary and presently not in the hands of the Petitioner at a subsequent stage asand when she obtains the same.122. In the circumstance the Petitioner respectfully states that the Petitioner is entitled to seek;(a)a mandate in the nature of Writ of Certiorari quashing the report of the 2 nd to 8 th Respondents marked as P17.(b)a mandate in the nature of Writ of Prohibition, prohibiting the 1 st Respondent fromacting on and or taking any further steps based on the purported report marked as P17.(c)an Interim Order restraining the 1 st Respondent from acting on and or taking anyfurther steps based on the purported report marked as P17 until the hearing anddetermination of this Application by Your Lordships' Court.123. The Petitioner states that the Petitioner has not previously invoked the jurisdiction ofYour Lordships' Court in respect of the subject matter of this Application. 124. An Affidavit of the Petitioner is appended hereto in support of the averments containedherein. W HEREFORE the Petitioner pleads that Your Lordships' Court be pleased to:(a) issue Notice on the Respondents;(b) grant a mandate in the nature of Writ of Certiorari quashing the findings and/or the decision of the report of the 2 nd to 8 th Respondents marked as P17 and/or quashing the said report marked as P17;

(c)grant a mandate in the nature of Writ of Prohibition, prohibiting the 1 st Respondentand/or 2 nd to 13 th Respondents from acting on and or taking any further steps based on thepurported report marked as P17;(d) grant an Interim Order restraining the 1 st Respondent and/or 2 nd to 13 th Respondents fromacting on and or taking any further steps based on the purported report marked as P17until the hearing and determination of this Application by Your Lordships' Court;(e) grant an Interim Order restraining the 1 st Respondent and/or 2 nd to 13 th Respondents fromtaking any further steps consequent to the purported report marked as P17 until the hearing and determination of this Application by Your Lordships' Court;(f) grant an Interim Order staying the effect of the purported report P17 and/or staying anyfurther action based on the said purported report P17;(g) grant costs; and(h) grant such other and further reliefs as to Your Lordships Court shall seem meet.REGISTERED ATTORNEYS FOR THE PETITIONERSettled by:Eraj de Silva Esq.Attorney-at-LawShanaka Cooray Esq.Attorney-at-LawManjuka Fernandopulle Esq.Attorney-at-LawBuddhike Illangatilake Esq.Attorney-at-LawRiad Ameen Esq.Attorney-at-LawSugath Caldera Esq.Attorney-at-LawSaliya K.M. Pieris Esq.Attorney-at-LawNalin Ladduwahetty Esq.President’s CounselJ. Romesh de Silva Esq.President’s Counsel Sc(206)-Petition.doc/Pleadings/Petition

## 11
# I Stand Here Before You Today Having Been Unjustly Persecuted

by Shirani Bandaranayake

I am the 43rd Chief Justice of the Democratic Socialist Republic of Sri Lanka. As the Chief Justice, I have an obligation and an unwavering duty towards the judges, lawyers and the citizens at large of my country.

I stand here before you today having been unjustly persecuted, vilified and condemned. The treatment meted out to me in the past few weeks, was an ordeal no citizen let alone the Chief Justice of the Republic should be subjected to. The 32 years of continuous service at the University of Colombo and the Supreme Court, during my 54 year lifespan, I have rendered in varying capacities towards my motherland, is rewarded unfortunately, in this unjust manner.

Though I was accused and arbitrarily convicted by the Parliamentary Select Committee, I have been vindicated in the bastions of the law. I take solace in the fact that, the due process and the rules of natural justice of which I was and continue to be an advocate and a firm believer, have been upheld by the superior courts of this country. The Supreme Court, acknowledged by the Hon. Speaker as having the sole and exclusive jurisdiction in interpreting matters relating to the Constitution, in its recent interpretation, unequivocally declared that the PSC and its proceedings therein were unconstitutional and illegal. Moreover, a Writ of Certiorari was issued by the Court of Appeal quashing the findings of the PSC. Therefore, the decisions of the PSC are ultra-vires, null and void and have no force or validity in law.

In the circumstances, in my country which is a democracy, where the rule of law is the underlying threshold upon which basic liberties exist, I still am the duly appointed legitimate Chief Justice. It is not only the office of Chief Justice, but also the very independence of the judiciary, that has been usurped. The very tenor of rule of law, natural justice and judicial abeyance has not only been ousted, but brutally mutilated.

I have suffered because I stood for an independent judiciary and withstood the pressures. It is the People who are supreme and the Constitution of the Republic recognizes the rule of law and if that rule of law had prevailed, I would not have been punished unjustly.

The accusations levelled against me are blatant lies. I am totally innocent of all charges and had there been a semblance of truth in any allegation, I would not have remained even for a moment in the august office of the Chief Justice. I can stand before you today as the Chief Justice, a citizen and a human being, purely because of that very innocence.

Since it now appears that there might be violence if I remain in my official residence or my chambers

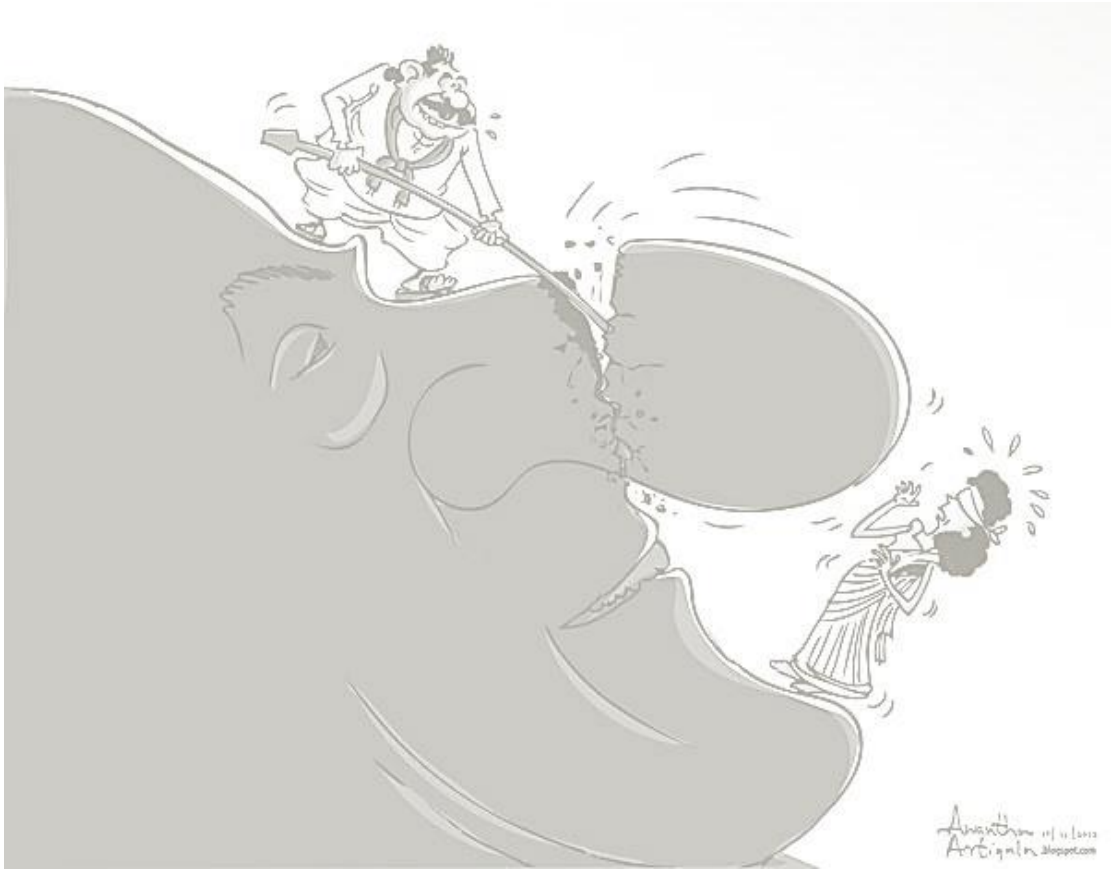
I am compelled to move out of my official residence and chambers particularly because the violence is directed at innocent people including judges, lawyers and committed members of the public. The 16 years I have spent in the Supreme Court have been dedicated to uphold the rights of the people in this country. I have always considered it my solemn duty to protect, to the best of my ability, the life and liberty of human beings and the rights of children and their education. I have always acted to that end.

I thank all those who stood with me and the greater cause to fight for the independence of the judiciary.Even though I have not been meted out with justice today; time and nature will justify what I have done and what I and others who shared my beliefs have stood for. Many will come and many will go. What matters is not the person who is the incumbent custodian of this position. What matters is the continued existence of an independent judiciary.

Thank you.

Dr. Shirani A. Bandaranayake
The 43rd Chief Justice of the Democratic Socialist Republic of Sri Lanka
15thJanuary 2013

# CHAPTER II



# STATMENETS ISSUED BY THE SELECTED ORGANIZATIONS

01

# Impeachment: A host of questions can be raised

A host of questions can be raised following recent events regarding the Chief Justice of our country. A survey of developments involving the independence of the judiciary can go way back to the 1972 Constitution, to the de facto sacking of judges by the 1978 Constitution, the summoning of Supreme Court Justices Wimalaratne and Colin Thomé before a Select Committee of Parliament, the attempted impeachment of Chief Justice Neville Samarakoon, the physical attacks against and killings, in a later era, of lawyers and litigants engaged in fundamental rights cases. Subsequently came the allegations levelled against Chief Justice Sarath Silva and the moves to impeach him. Along with disappointment at the content of several judgments of the Supreme Court (among which are that relating to the Eighteenth Amendment) many lawyers and laymen alike have watched with dismay the conferring of state benefits and positions on family members of judges and on retired judges. Most recently we have had the events concerning the Magistrate's court of Mannar, the conflict between the Judicial Services Commission and the President and the physical attack on the judge holding the position of Secretary of the JSC.

These are all matters of importance and should not be disregarded by anyone concerned about the independence of the judiciary in our country. However they do not, in the view of the Civil Rights Movement (CRM), affect the question of immediate urgency which is addressed below.

**The action against the present Chief Justice**

Charges have been framed and widely publicized against the current Chief Justice, and proceedings to remove her from office have been commenced. (In this context the term "impeachment" simply means the process of removal from office). The procedure is to be inquiry by a Select Committee of Parliament. The question we raise is both the constitutionality and the appropriateness of this procedure.

When similar proceedings were commenced against Chief Justice Neville Samarakoon in 1984 CRM in a telegram to the Speaker said:

The proposal is unconstitutional as it violates the concept of the independence of the judiciary which is part of the basic structure of our Constitution. The actions of such a Select Committee would be ultra vires the powers of Parliament as they are not ancillary to the exercise of legislative power. Parliament has no judicial power (except in respect of its own privileges). Parliament enjoys no supervisory function over judges, in respect to whom its power is limited to removal from office for proved misbehaviour or incapacity. Such misbehaviour or incapacity has to be proved by proper procedure as envisaged by Article 107 of the Constitution. It follows that any inquiry must be by an independent judicial tribunal similar to that provided under the Judges Inquiry Act of 1968 in India. In Sri Lanka no such

procedure has yet been created. … The fact that so far this machinery has not been provided does not justify parliament resorting to unconstitutional methods which in effect undermine the independence of the judiciary.[emphasis added]

**The argument on constitutionality**

One does not need to be a lawyer to follow the argument, which is restated briefly below.

- A judge of the Supreme Court can be removed by a certain procedure, all the details of which it is not necessary to set out here. Relevant for our present purpose is that such removal can only be for "proved misbehaviour or incapacity". (Article 107 (2) of the Constitution).
- The Constitution then proceeds to provide that "Parliament shall by law or by Standing Orders provide for all matters relating to …the investigation and proof of the alleged misbehaviour or incapacity …" (Article 107 (3))
- Under this provision, it was thus open to Parliament to pass a law similar, say, to the Judges Inquiry Act of India, providing for an appropriate judicial body to investigate and determine the allegations.
- Such a law had not (and still has not) been passed when the question of removing Chief Justice Samarakoon arose. Parliament then made provision by Standing Order of Parliament, which is the alternative method envisaged by the Constitution. That is the present Standing Order 78A.
- Standing Order 78A could itself have made provision for investigation and determination of the allegations by an appropriate body which would not attract the present criticism.
- What Standing Order 78A did, however, was to provide that the investigation and determination would be by a Select Committee of Parliament. A Select Committee of Parliament is necessarily composed of members of Parliament and is part of the legislature.
- This brings us to the vital Article of the Constitution, Article 4, which deals with how the separate Executive, Legislative and Judicial powers of the people are to be exercised. Article 4 (c) says

"The judicial power of the people shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law;"

- Thus the one and only exception to Parliament exercising judicial power is as regards its own privileges etc. Investigation and proof of misbehaviour or incapacity of a judge does not come within this exception. So when in Article 107 it is provided that "Parliament shall by law or by Standing Orders" provide for the investigation and proof of the alleged misbehaviour or incapacity, Parliament cannot, by reason of provision of Article 4(c) cited above, require that it be heard by a Select Committee of its own members.
- To recap, the investigation and determination of allegations of misbehaviour or incapacity, which can result in a judge being removed from

office, is clearly a judicial investigation and a judicial determination, and in view of Article 4 is therefore not properly exercisable by the legislature or a body that is part of the legislature.

• The provision made for the removal of the President is instructive. There again specific allegations have to be made. If satisfied that further steps are merited "the allegation or allegations … shall be referred by the Speaker to the Supreme Court for inquiry and report." (Article 38 (2) (c). It is only if the Supreme Court finding is adverse to the President that Parliament may proceed to remove him.

• Can one accept that the framers of the Constitution envisaged a lesser protection for the investigation of allegations against a judge of the superior courts?

**The Neville Samarakoon case**

The above argument was contended for comprehensively by defence counsel S. Nadesan QC in the impeachment proceedings against Chief Justice Neville Samarakoon, which took place in 1984 and is fully reported in Parliamentary Series No 71. The Select Committee divided on this, as it did on the merits, on party lines. The majority felt it was bound to carry out the mandate given it by Parliament. The minority view on this vital matter of constitutional interpretation is worth citing at length:

The point made by Mr. Nadesan, was that in the context of a Constitution such as that of our country, in which the separation of powers was jealously protected, this Committee in seeking to go on with this inquiry as to whether or not Mr. Samarakoon was guilty of "proved misbehaviour", was violating the provisions of Article 4(c) of the Constitution which stipulates that except in matters concerning parliamentary privileges — the judicial power of the people shall be exercised exclusively through the courts.

The signatories to this statement, while conceding that Mr. Nadesan's argument have considerable cogency — are not in a position to come to a definite conclusion on this matter. We would urge that H.E. the President could refer this matter to the S.C. for an authoritative opinion thereon–under article 129(1) of the Constitution.

The signatories to this statement however feel strongly that the procedure that Parliament finally adopts should be drafted along the lines of the Indian provisions where the process of inquiry which precedes the resolution for the removal of a Supreme Court Judge should be conducted by Judges chosen by the Speaker from a panel appointed for this purpose. We therefore urge the House to amend Standing Order 78A accordingly.

1) Anura Bandaranaike, Leader of the Opposition (2nd} M.P. for NuwaraEliya
2) Sarath Muttetuwegama, M.P. for Kalawana

3) Dinesh Gunawardena, M.P for Maharagama

**The Aftermath of the Neville Samarakoon case**

The aftermath of the Neville Samarakoon case is significant. The minority view cited above opened a clear way for the resolution of this issue – reference to the Supreme Court for an advisory opinion, which the President is empowered to call for under Article 129 . Neither the then President nor his successors, regrettably, availed themselves of the suggestion to seek a ruling from the Supreme Court. But the matter did not rest there, and eventually the government chose an even better option.

Numerous representations were made about the unsatisfactory nature of the existing situation. They were made, amongst others, by civil liberties groups, including repeatedly by CRM, and by international organizations concerned with the administration of justice . The need for change was stressed in several responses to official requests including from Parliamentary Select Committees for suggestions as to constitutional amendments. It was incorporated into public representations to various UN human rights bodies including in communications connected with the Periodic Review procedure of the International Covenant on Civil and Political Rights to which the Sri Lankan state is a party. Time and again this concern was raised in formal and informal discussions with those in authority. And at last these efforts appeared to have borne fruit.

**A wrong set right? – the proposed changes of 1997 and 2000**

Alternative provision for the inquiry into allegations of misbehaviour or incapacity of a judge of the superior courts, which took into account the criticisms levelled, was made in both the Government's Proposals for Constitutional Reform of October 1997, and the Bill of the year 2000 titled THE CONSTITUTION OF THE REPUBLIC OF SRI LANKA. The relevant part of the latter provides that procedure for the removal of a judge of the Supreme Court or Court of Appeal may proceed only if:
an inquiry has been held-

> (i) in the case of the Chief Justice by a committee consisting of three persons each of whom hold, or have held, office as a judge in the highest court of any Commonwealth country;
> (ii) in the case of any other Judge referred to in paragraph (2) of this Article, by a committee consisting of three persons who hold, or have held, office as a judge of the Supreme Court or the Court of Appeal created and established by the Constitution, the 1978 Constitution or any other law and appointed by the Speaker to inquire into allegations of misbehaviour or incapacity made against the Chief Justice or such judge, as the case may be, and such committee has found that the allegation of misbehaviour or incapacity has been established against such Judge.
> [Clause 151 (4) (b) of the Bill]

This Constitution Bill of 2000 was presented by a government headed by the same major political party that is in power today, and of which government the present President was a Cabinet Minister. Although the 2000 Constitution did not see the light of day, it seemed reasonable to assume that resort to the Parliamentary Select Committee procedure for investigation of allegations against senior judges was a thing of the past.

The present development is a retrograde step but it is not too late for the government to remedy it and thus remain true to its own principles on this subject as reflected in the Constitution Bill of 2000.

*(A statement issued by thehe Civil Rights Movement)*

**02**

## UN expert concerned about reprisals against judges urges reconsideration of the Chief Justice's impeachment

The United Nations Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, today expressed serious concerns about reported intimidation and attacks against judges and judicial officers, and warned that they might form part of a pattern of attacks, threats reprisals and interference in the independence of the justice system in Sri Lanka.

"I urge the Sri Lanka Government to take immediate and adequate measures to ensure the physical and mental integrity of members of the judiciary and to allow them to perform their professional duties without any restrictions, improper influences, pressures, threats or interferences, in line with the country's international human rights obligations," Ms. Knaul said. According to reports received by the independent human rights expert, most cases of attacks and interference against the judiciary in Sri Lanka are not genuinely investigated, and perpetrators are not held to account. "The irremovability of judges is one of the main pillars guaranteeing the independence of the judiciary and only in exceptional circumstances may this principle be transgressed," the Special Rapporteur underscored, expressing her uneasiness with the procedure of impeachment of the Chief Justice of the Supreme Court, Dr. Bandaranayake, launched before the Parliament on 1 November 2012.

"Judges may be dismissed only on serious grounds of misconduct or incompetence, after a procedure that complies with due process and fair trial guarantees and that also provides for an independent review of the decision," she stressed. "The misuse of disciplinary proceedings as a reprisals mechanism against independent judges is unacceptable." In her view, the procedure for the removal of judges of the Supreme Court set out in article 107 of the Constitution of Sri Lanka allows the Parliament to exercise considerable control over the judiciary and is therefore incompatible with both the principle of separation of power and article 14 of the International Covenant on Civil and Political Rights.

"I urge the authorities to reconsider the impeachment of Chief Justice Bandaranayake and ensure that any disciplinary procedure that she might have to undergo is in full compliance with the fundamental principles of due process and fair trial," the UN Special Rapporteur added.

Gabriela Knaul took up her functions as UN Special Rapporteur on the independence of judges and lawyers on 1 August 2009. In that capacity, she acts independently from any Government or organization. Ms. Knaul has a long-standing experience as a judge in Brazil and is an expert in criminal justice and the administration of judicial systems. (United Nations- GENEVA (14 November 2012)

*Learn more: http://www.ohchr.org/EN/Issues/Judiciary/Pages/IDPIndex.aspx*

**03**

## Commonwealth Secretary-General concerned about parliamentary move to impeach Sri Lankan chief justice

Commonwealth Secretary-General Kamalesh Sharma today expressed concern about the recent move by the Parliament of Sri Lanka to impeach the country's Chief Justice, Dr Shirani Bandaranayake.

Speaking in London, the Secretary-General said: "The Commonwealth's principal consideration is that the provisions of Sri Lanka's constitution are upheld with regards to the removal of judges, respecting the independence of the judiciary."

The Secretary-General stressed that the Commonwealth believes the preservation of the rule of law and independence of the judiciary are vital to the healthy functioning of a democracy. He noted: "The Commonwealth's Latimer House Principles, which govern the relationship between the three branches of government, are a cornerstone of our association's values. All our member states have committed themselves to upholding the Latimer House Principles so that citizens' faith and confidence in democratic culture is assured and the rule of law is maintained."

*15 November 2012, Statament issued by Richard Uku, Director of Communications and Public Affairs, Commonwealth Secretariat*

**04**

# Impeachment: Esure firness and Latimer house principles say Commonwealth lawyers, magistrates and judges

The Commonwealth Lawyers Association (CLA), the Commonwealth Legal Education Association (CLEA) and the Commonwealth Magistrates' and Judges' Association (CMJA) are concerned about the recent motion in the Sri Lankan Parliament to proceed with the impeachment of Chief Justice Shirani Bandaranayake.

The existence of an independent and impartial judiciary is one of the cardinal features of any country governed by the rule of law. By virtue of its membership of the Commonwealth, Sri Lanka is committed to the shared fundamental values and principles of the Commonwealth, at the core of which is a shared belief in, and adherence to, democratic principles including an independent and impartial judiciary. Any measure on the part of the Executive or Legislature which is capable of being seen as eroding the independence and impartiality of the judiciary is a matter of serious concern and is in danger of eroding public confidence in the legal system as a whole.

The Commonwealth (Latimer House) Principles on the Accountability of and the Relationship between theThree Branches of Government (2003), which form part of the Commonwealth fundamental values state that disciplinary proceedings which might lead to the removal of a judicial officer should include appropriate safeguards to ensure fairness' that is to say, the right to be fully informed of the charges against them, to be represented at a hearing, to make a full defence and to be judged by an independent and impartial tribunal.

Furthermore tthese Principles require that judges should be subject to suspension or removal only for reasons of incapacity or misbehaviour that clearly renders them unfit to discharge their duties. The Associations urge upon the Government and Parliament of Sri Lanka to respect the independence of the judiciary and in particular to comply with its constitutional safeguards and the Commonwealth Latimer House Principles which, as the Commonwealth Secretary General emphasised in his statement of 15 November 2012, 'govern the relationship between the three branches of government and are a cornerstone of our Association's values.'

*Statement issued by the*
*Commonwealth Lawyers Association (CLA)*
*Commonwealth Legal Education Association (CLEA)*
*Commonwealth Magistrates' and Judges' Association (CMJA)*
*19 November 2012*

05

# Impeachment on CJ Government must adhere to international standards of due process says ICJ

The impeachment process against Sri Lankan Chief Justice Shirani Bandaranayake must follow international standards of due process says the International Commission of Jurists.

"Many people in Sri Lanka have called the impeachment proceedings against Chief JusticeBandaranayake a politically motivated attack on the independence of the judiciary," said Sam Zarifi, Asia Director of the (ICJ). "If the government wants to dispel any such notion, it must adhere to international standards of due process in the impeachment proceedings."

The proceedings come in the wake of the Supreme Court ruling on a controversial bill, the Divi Neguma bill, before Parliament.

The bill seeks to establish a centralized development authority by amalgamating three provincial development agencies. If the bill passes, the Minister of Economic Development (who is also the President's brother Basil Rajapakse) would have control over a fund of 80 billion Sri Lankan rupees (611 million USD).

In early September, the Chief Justice, leading a bench of three Supreme Court Justices, issued a ruling, directing Parliament to obtain the consent of each of the elected Provincial Councils before passing the bill.

Following the ruling, all of the provincial councils, except the Northern province, endorsed the Divi Neguma bill. The Tamil-majority Northern Province, until recently the stronghold of the insurgent armed Liberation Tigers of Tamil Eelam, has still not held elections for the Provincial Council.

However, the appointed Governor of the Northern Province endorsed the bill on the basis that no provincial council had been elected or established in the Northern province.

The Tamil National Alliance (a political alliance of minority Sri Lankan Tamils) filed a petition before the Supreme Court challenging the authority of the Northern Province Governor to approve the Divi Neguma Bill in the absence of an elected provincial council.

On 1 November 2012, the Chief Justice handed the decision on the Divi Neguma bill to the Speaker of the House. On the same day, the Government coalition, the United People's Freedom Alliance presented a motion to initiate impeachment proceedings in Parliament.
The Speaker of Parliament then postponed the tabling of the impeachment motion until the announcement of the decision on the Divi Neguma bill.

"The timing of the impeachment motion, just as the Supreme Court had challenged the government, certainly has raised some eyebrows," said Zarifi. "And all this comes against the backdrop of increasing tensions between the between the judiciary and the Government, which have escalated to the point of physical violence in the past few months," Zarifi said.

In July 2012, Government Minister Rishad Bathiudeen threatened a Magistrate in Mannar and then allegedly orchestrated a mob to pelt stones and set fire to part of the Mannar courhouse.

In early October, the secretary of the Judicial Service Commission, Manjula Tillekaratne was assaulted by four unidentified persons in broad daylight.

The ICJ issued a report earlier this month, Sri Lanka's Crisis of Impunity, documenting the recent attacks on judicial officers and judges, explaining how the systemic erosion of accountability has led to a crisis of impunity in Sri Lanka.

**Fourteen charges**

The impeachment motion against Chief Justice Bandaranayake sets out 14 charges. Allegations include failing to follow Constitutional provisions by handing a Court decision to the Secretary of Parliament instead of the Speaker of Parliament; not declaring all of her bank accounts to the auditor general; and misusing her position.
Opposition leaders have called on the Speaker of Parliament to allow observers from the International Commission of Jurists and other international organizations to attend the proceedings.

"The fact that members of parliament believe it is necessary to have international observers indicates the strong perception that this impeachment motion is politically motivated," Zarifi added. Under the UN Basic Principles on the independence of the judiciary, a judge should only be removed for incapacity or serious misconduct.

**Exceptional measure**

In the region, impeachment is an exceptional measure reserved only for gross misconduct. Only India and Nepal allow for the impeachment of the Chief Justice and neither country has ever initiated proceedings.

In the two instances where a provincial high court judge was removed in India, allegations involved criminal acts or egregious acts of corruption.

Where a judge is at risk of being removed, he or she must be accorded the right to be fully informed of the charges; the right to be represented at the hearing; the right to make a full defense; and the right to be judged by an independence and impartial tribunal. The removal proceedings must meet international standards on fair trial and due process.

In India, an impeachment hearing is presided over by a three-member committee comprised of a Supreme Court justice, a Chief Justice of any High Court and an eminent jurist.

In Sri Lanka, a seven-member Select Committee, comprising only Parliamentarians, presides over the impeachment hearing. The Judicial Service Commission does not play a role in the impeachment process and there is no appeal to a judicial body.

At least twice, the Sri Lankan government has attempted to impeach its Chief Justice. In 1978, the Government attempted to impeach Chief Justice Samarakoon. The Chief Justice, however, retired before the Committee report could clear him of the charges after some two years of hearings.

In 2001, the Government initiated impeachment proceedings against Chief Justice Sarath Silva. However, before a Committee could be constituted President Kumaratunga dissolved Parliament.

*Statement issued by the International Court of Justice*

**06**

## BASL resolution on the impeachment motion

The Bar Association of Sri Lanka at a special general meeting yesterday passed a resolution calling on President Mahinda Rajapaksa and Speaker Chamal Rajapaksa to reconsider the impeachment motion against Chief Justice Shirani Bandaranayake.

Pandemonium reigned at the meeting attended by more than 1,000 lawyers from various parts of the country as views were exchanged for and against the eight-point resolution. The meeting was presided over by BASL President Wijeyadasa Rajapakshe.

Rival factions of lawyers seen cheering and booing at yesterday's special general meeting of the BASL at Hulftsdorp. Pic by Susantha Liyanawatte

Mr. Rajapakshe said the special general meeting was called for the first time in 24 years, the last being in 1988 over the abduction and killing of lawyer Wijedasa Liyanaarachchi. "The meeting was called due to the impending threat to the judiciary and the impeachment of the Chief Justice," he said.

As Mr. Rajapakshe and officials came to the head table, there was a rumpus with the lawyers split into two factions with one supporting the resolution and other against.

Some lawyers were seen hooting, with some standing on chairs and grabbing files from the head table.

Mr. Rajapakshe after a few desperate measures to control the lawyers decided to go for a vote and requested them to move into two sides. But this did not work out because of the large number present. Finally, senior lawyer Razik Zarook read out the eight-point resolution and it was passed amidst a mixture of cheering and booing. Even after the resolution was passed, a tense situation arose outside the Bar Association auditorium.

*The full text of the resolution is as follows:*

To express its grave concern about the impeachment and the independence of the Judiciary,

To urge his Excellency the President of the Republic and the Hon. Speaker of the Parliament to reconsider the said 'impeachment'.

To urge the Hon. Speaker to have a meeting with him for the Members of the Executive Committee and the former Presidents of the Bar Association of Sri Lanka on the above subject,In the event the Legislature decides to proceed with the said impeachment;

To urge the Hon. Speaker and the Hon. Chairman of the Parliamentary Select Committee appointed for the inquiry to look into the charges in the impeachment to adopt a transparent and accountable procedure with regard to the proceedings before it and announce it before the proceedings are commenced,

To urge the Hon. Speaker and the Hon. Chairman of the Parliamentary Select Committee to recognise our legitimate right to represent on behalf of the Bar Association of Sri Lanka in the proposed proceedings before the Select Committee.

To urge the Hon. Speaker and the Hon. Chairman of the Parliamentary Select Committee to ensure that the judicial pronouncements made by the Hon. Chief Justice should not influence adversely in the proceedings before the Select Committee and its findings.

To urge the Hon. Speaker and the Hon. Chairman of the Parliamentary Select Committee to permit a few observers on the proceedings before the Parliament Select Committee preferably retired Chief Justices and Justices of the Supreme Court who are not holding any public office.

To urge the legislature to formulate an alternate acceptable constitutional mechanism for the removal of a Judge of the Superior Courts that will not undermine the authority, the dignity and the independence of the Judiciary.

*(Courtesy: Sunday Times)*

07

# The motion to impeach the Chief Justice should be withdrawn

"We appeal to our representatives, the Executive and the Legislature, to fulfil their political and legal obligations towards us, and to guarantee respect of the judiciary and to defend their independence. The motion to impeach the Chief Justice should be withdrawn, those responsible for the assault on the Secretary to the JSC should be brought to justice and those responsible for the attack on the Mannar Courts should also be brought to justice." say some leading academics in Sri Lanka.

*Full text of the statement is follows;*

The varied types of attacks on the judiciary in Sri Lanka have risen to alarming proportions over the last few weeks and suggest that the very institution of the judiciary is under serious threat in the country. We the undersigned are extremely disturbed by these developments and would like to request that both the Executive and Legislative arms of the state fulfil their duty and guarantee the security and independence of the judiciary. In making this request we would like to remind the government and the public that;

ALL public power is derived only from the People (Articles 3 and 4 of the Constitution). As such, public power whether executive, legislative or judicial can only be exercised according to law and the democratic values of a society. Public power can only be exercised for the benefit of the People of Sri Lanka.

The 'benefit of the People' cannot be equated with a majority view, a majoritarian approach, the political interests of the political party(ies) in power or of a powerful few within a government. Contemporary society world over has accepted that the dignity and equality of all human beings is inherent, inalienable and that protecting that dignity is the primary responsibility of a state. Accordingly the 'benefit of the People' can only be understood as a framework for decision making which respects the inherent dignity and equality of ALL people in this nation.

Guaranteeing the independence and effective functioning of the judiciary in Sri Lanka is a prerequisite for protecting the dignity of all Sri Lankans. The judiciary are mandated under the Constitution to adjudicate on disputes that arise between private parties and between the state and individuals. It is only in a context where the judiciary can function independently and is also generally perceived as functioning independently that society could expect to live and act according to law.

Recent events such as the attack on the Mannar Courts, the assault on the Secretary to the Judicial Service Commission (JSC), understood in the light of the unprecedented public statement issued by the JSC, at the very least, suggests that the judiciary in Sri Lanka is struggling to maintain its independence. Political analysts have gone as far as to suggest that the Executive is directly interfering with the function of the judiciary.

Against this background, the motion to impeach the Chief Justice that has been handed over to the Speaker of Parliament is highly suspect. At the face of it, it seems to be evident that the all powerful Executive arm of the government is taking advantage of its position to undermine the judicial arm of the state, through a subservient Legislature. This is a manifest abuse of public power and goes against all accepted democratic norms of government. While the politicians and the political party(ies) in power may seemingly emerge as victors in the short run in this matter, in the long run, neither those politicians, those political parties, the Opposition nor the People would stand to benefit. All Sri Lankans will suffer grave consequences due to this interference with the Judiciary.

While politicians and political parties in power are understood as being susceptible to act according to prevailing political interests, the judicial arm of a state is designed specifically to defend against all, the law and the spirit of the law. That includes the democratic values of a society and the rights of all persons. In a society where the other arms of the government interferes with that function of the judiciary and is aggressive towards the judiciary, the political sustainability of that society is under threat.

The motion to impeach the Chief Justice and the other attacks on the judiciary are but only symptoms of a more alarming, complex and long standing crisis of governance in Sri Lanka. With each new incident the crisis becomes more embedded and widespread. The broader political context in which these incidents have taken place suggest a complex inter-play of different factors characteristic of a society where political patronage, expediency and convenience are the reference points for exercise of public power rather than democratic principles of governance and the law.

Therefore, we appeal to our representatives, the Executive and the Legislature, to fulfil their political and legal obligations towards us, and to guarantee respect of the judiciary and to defend their independence. The motion to impeach the Chief Justice should be withdrawn, those responsible for the assault on the Secretary to the JSC should be brought to justice and those responsible for the attack on the Mannar Courts should also be brought to justice.

*(The statement issued with the more than sixty signatures given by the leading acedemics in Sri Lanka)*

**08**

# The Mahanayaka theras have called President to withdraw the Impeachment

*Full text of the Mahanayaka theras letter to the President Mahinda Rajapaksa is follows;*

Importance of avoiding apprehension in the minds of the people in dispensing law and justice in a Democratic Society

Sri Lanka is an island which won the eulogy "Daham Divayina" from time immemorial and was praised here and abroad. But society at present is full of grave crimes such as murders, rape, robberies, arson, abductions, bribery, drug trafficking and child abuse; committed with craving and hatred. Almost every day these are reported in the media. These pernicious acts imply the lack of security and value of human life. There is more room for deterioration of human values, in the absence of equilibrium between the materialistic spiritual and ethical development and apprehension with regard to the equity in law. If there is a collapse in law and order it is rather difficult to rise up as a righteous nation. If we are to re-kindle the fast vanishing human values in our country, we must make the man a humanist, who respects human values. Teaching of Lord Buddha elucidates that the selfish craving , ignorance, hatred, lead to the destruction of human society. We can establish peace and happiness in our country by following Buddha's teaching and propagating and practicing patience and loving kindness. Many lessons can be learnt by the ruler and the subject if they follow the "Chakkavathi Sihanada" Sutra, the discourse by Lord Buddha and take refuge in the teachings of the Buddha. The time has come for all social institutions including the government to work together to bring this society out of this mire taking into consideration the saying of the Buddha, "To be born as a human is arduous and rare". The legislature, Executive and the Judiciary can perform an immense service to maintain morals, law and peace in any civilized democratic society. It should be based on law, justice, patience and fairness. In order to achieve this end, it is not proper to resort to actions which will generate an apprehension with regard to the judiciary and the judges. It will be harmful than beneficial. It is certain to affect the honour and the trust that the judiciary of Sri Lanka had up to now in the world. Majority of the people think that the impeachment motion against the Chief Justice will lead to a disenchantment about all branches of the judiciary. Therefore the government should think patiently about the ill effect of the prevailing attempt of the Legislature Executive and the Judiciary to go above the other and take steps to safe guard the independence of the judiciary and solidify the feelings of justice in the minds of the people. By the display of just behaviour of the government it will definitely generate a feeling of satisfaction in the minds of the people It is possible to get humans to respect law and traditions by acting according to human ethics without scorn. Therefore to avoid the breakdown in law and deterioration of society as a result of the impeachment motion we kindly request that the impeachment motion be withdrawn, taking into consideration the recent recommendation of the Supreme Court. This will be beneficial to the country.
May you have the refuge of the Triple Gem!

**09**

# Impeachment against CJ Irreparable loss of confidence and public respect of the judicial system

*A resolution passed by Attorneys –at-Law practicing in the Jaffna peninsula present at a meeting held on the 28th of November 2012 with regard to the Motion of Impeachment against the Chief Justice.*

Noting with grave concern that the impeachment proceedings initiated against Her Ladyship the Chief Justice would inevitably lead to an irreparable loss of confidence and public respect of the judicial system as a whole which in turn would further deteriorate the state of governance of the country,

Noting in particular as lawyers from the North and East of Sri Lanka the importance of ensuring stability in the administration of justice as such stability is quintessential to the restoration of normalcy in the North and East of Sri Lanka and noting that the motion against Her Ladyship the Chief Justice is a threat to the smooth functioning and administration of justice to the whole of the country,

Noting with concern the lack of comity on the part of the Parliamentary Select Committee in rejecting the request of Honourable Supreme Court to stay proceedings until the hearing and conclusion of a case on matter relating to the interpretation of the constitution relating to the impeachment of the Chief Justice,

Express their solidarity with her Ladyship the Chief Justice during this darkest hour of assault the independence of the judiciary and call upon the Honourable Members of Parliament who were signatories to the impeachment motion to consider withdrawing the motion of impeachment against Her Ladyship the Chief Justice.

And seek to inform the Chairman of the Parliamentry Select Committee that the Jaffna Bar Association, if invited is prepared to make submission on all of the above issues raised above.

## 10
# Speak out in defending judicial independence, before it is too late

*Letter to all judges of Sri Lanka written by AHRC Executive Director Bijo Francis*

by Bijo Francis

I am writing on behalf of the Asian Human Rights Commission (AHRC) under extraordinary circumstances as the gravity of the issues involved compels me to do so.

The issue that I wish to seek your attention is the impeachment proceedings of the Chief Justice of Sri Lanka, which violates the principles of separation of powers, due process and the right to a fair trial that the Chief Justice is entitled to. All of this is denied to the Chief Justice in the impeachment procedure as set out in Article 107 of the Constitution and the related Standing Orders.

It is the duty of the Supreme Court and all other judges in Sri Lanka to protect the dignity and the liberty of every individual. This is the exclusive prerogative of the judiciary. It is a universally recognised principle in all countries where independence of the judiciary exists and is valued. This is also a principle well enshrined in Sri Lankan law as so beautifully expressed by Sir Sydney Abraham in the Mark Anthony Lyster Bracegirdle case.

Defending the liberty of an individual and the independence of the judiciary weighs heavily on the shoulders of all the judges in the country, more importantly upon the Supreme Court. If the judiciary falters or fails in this, it will not only destroy individual liberty and also the very existence of an independent judiciary.

History is proof to the fact that in the past decades, the Sri Lankan judiciary has on crucial occasions failed to protect its own independence. Two of those crucial moments were when the Constitution itself was changed in 1972 and further in 1978, attacking fundamentally judicial independence. Had the judiciary used its inherent powers and constitutionally resisted these attacks, judicial independence and the entire nation would not have suffered the setbacks, Sri Lanka has suffered so badly, in the recent times.

In the very vocation of being a judge is the duty to be courageous, even at the expense of great personal sacrifice at crucial moments when the integrity of one's position is challenged.

The Sri Lankan judiciary is facing one such crucial situation at the moment. Perhaps a time in history that is so important, that if it is lost, the very independence of the

judiciary will suffer a setback so devastating, from which it would be difficult to recover.

The independence of the Chief Justice's office is being challenged, and the Chief Justice is deprived of the basic right, which every citizen of Sri Lanka is entitled to, in defending oneself within a framework of fair trial, observing standards that are universally recognised. If the Chief Justice falls, the entire judiciary will fall with her. It is within the powers of the judiciary in Sri Lanka to prevent this by demanding justice for the Chief Justice, who is also a colleague. It is not a mere act of solidarity or friendship, but a step so vital to the survival of an independent profession.

History will question whether the judges of Sri Lanka rose to the occasion and faced it with courage in defending the very foundation of their own profession and their independence. If the judiciary is not willing to shoulder this responsibility, that too will be on record and generations to come will suffer the loss of their liberty as a consequence of this failure.

Global support for just causes often begins from bold initiatives of a few individuals, who make the first move from the frontline of defence. It is equally the responsibility of the global human rights community to support initiatives in Sri Lanka in defence of fundamental freedoms.

I therefore, on behalf of the global human rights community and in the name of the best ideals on which human rights and human liberty rest, most humbly call upon all the judges of Sri Lanka, more importantly the judges serving at the Supreme Court of Sri Lanka, to face this moment of destiny, boldly, and with the farsightedness the situation warrants, in defending the Chief Justice in her right to just and fair treatment.

## 11
# The Supreme Court should resign before the executive destroys the judiciary

by Bijo Francis

The Supreme Court should resign before the executive destroys the judiciary as a separate branch of governance through the persecution of the Chief Justice

The political attack on the Chief Justice, which is in retaliation to some independent judgements given by the Supreme Court, is quite clearly an attempt to stop the Supreme Court judges doing what they are mandated to do. It is not just an attack on one person; it is an attack on the entire Supreme Court and, in fact, on the entire judiciary, on the very notions of the independence of the judiciary and the separation of powers. To suppress the independence of the judiciary and the separation of powers is to undo the judicial role and to reduce the judges to the same status as other government servants. Under these circumstances the only way to assert their unique mandate as members of the judiciary who belong to a separate and independent branch of the government is to let the government know that they will all resign unless the government immediately stops the persecution of the Chief Justice by way of the impeachment attempt.

Rarely in history does an institution like the judiciary face the option to be or not to be?

If the Supreme Court judges remain in office despite their mandate being fundamentally challenged and reduced it would mean that they would have opted not 'to be'. Their character, their mandate and their position would be fundamentally altered despite them retaining their jobs.

However, if they let the government know that if this persecution of the Chief Justice by of the impeachment attempt does not stop forthwith they will resign, then it is taking the option 'to be'.

The people will clearly get the message about the proportion of the threat that the judiciary is faced with. That it is the will of the judges to retain their position of independence as members of a separate branch of governance rather than to cow down to the obstinate will of the executive.

If the people see the will of the Supreme Court expressed so clearly they will rally round their Supreme Court, clearly understanding that it is their right for justice dispensed by independent judges that is at stake. The people will not let the judiciary sink if the judges themselves are willing to fight for the right to preserve their

independence. If the people do not see that will expressed firmly, they will feel discouraged and let down.

The cynics may argue that if the Supreme Court resigns the executive will replace them with others. In this, as always, the cynics fail to see the movement of history. Whenever judges have expressed their firm will to defend and to stand by the norms and standards of their profession and to defend the independence of the judiciary at the risk of losing their own jobs, nowhere have the judges been let down by the people.

In the history of Sri Lanka in recent decades it is some judges who have betrayed the people, not the people who have betrayed the judges.

For example, in 1972, by way of a new constitution, judicial review was removed and the supremacy of parliament replaced the supremacy of the law. If the Supreme Court had then challenged the coalition government that pursued that course the government would not have been in a position to so seriously damage the independence of the judiciary and the rule of law. Similarly, despite the four/fifths majority of the UNP government, if the judiciary had stood up against the obnoxious provisions of this constitution, then the power of the executive presidency could have been subdued at that point itself. Even later, when the 18th Amendment to the Constitution was proposed, if the judiciary had stood its ground and opposed the suppression of the 17th Amendment and also the extension of the powers of the president contrary to the well known traditions of constitutionalism throughout the world, the people would not be facing the monstrous attack on their rights by the power that is exercised without restraint.

Perhaps at this final moment the Supreme Court can undo many of its own mistakes in the past and help the people to reassert their sovereignty against tyranny.

It is on the sovereignty of the people alone that the power and the independence of the judiciary rest. Therefore there is the obligation of the judiciary to defend that sovereignty at whatever cost to themselves. If the prosecution against the Chief Justice succeeds, it is the sovereignty of the people that will suffer a serious setback.
At this crucial moment the judiciary should not cow down to tyranny. They should, by taking a risk themselves, provide the opportunity for the people to intervene decisively in protecting democracy.

## 12
## The attack on the judiciary is a logical extension of the 18th Amendment to the Constitution

by Basil Fernando

The 18th Amendment to the Constitution, which ended all the debates and discussions on the 17th Amendment, brought an end to all independent public institutions in Sri Lanka. From that point on, only one institution remained outside the complete control of the executive president. That was the judiciary.

True, that institution itself had been seriously undermined since the 1972 and 1978 Constitutions. The 1978 Constitution conceptually displaced the idea of the independence of the judiciary. However, a 200-year-old tradition of an independent judiciary could not be wiped out merely by a constitutional change. At ground level the institution and the people who had been trained under the 'old' framework were still there. More than that, a belief had been created over those 200 years that in court it was possible to obtain justice. And this was difficult to erase.

This gave rise to a contest between the executive president and Neville Samarakoon QC, the first Chief Justice under the new constitution. One of the issues that no one has yet explained is as to how a person with such legal erudition and integrity as Neville Samarakoon could have not seen the pernicious effect of the 1978 Constitution on democracy as a whole and on the independence of the judiciary in particular. Surely, as one of the leading civil lawyers of the time, he would have had some understanding of the basic principles of constitutionalism. That the ruler cannot be above the law is so basic a premise that it is difficult to fathom how Neville Samarakoon failed to understand it when he agreed to be the Chief Justice under the new constitution, in which the basic premise was that the executive president was above the law.

The debate throughout the period of the coalition government (1970-1977), particularly within the legal community, was about the attack made through the 1972 Constitution on the independence of the judiciary. It replaced the notion of the supremacy of the law with the supremacy of the parliament. This meant that parliament could make any law, because of the removal of the powers of judicial review that the judiciary had enjoyed until then. In fact, judicial review was what gave the power and the punch to the judiciary. In at least one instance, even in the colonial days, an order by the governor representing the British Crown was declared null and void and quashed by the then Chief Justice. This was in the well known case of Bracegirdle. Neville Samarakoon QC could not have failed to realise that if a similar situation arose under the 1978 Constitution an order of the executive president could not be so quashed by the Supreme Court of Sri Lanka, as Article 35 (1) of this constitution ensured that no law suits could be brought against the executive president in any court of law.

Mr. Neville Samarakoon QC and many others like him could have done better if they had initially rejected the 1978 Constitution rather than when they rebelled against the executive president when he began to bring into effect what he designed the 1978 Constitution for, which was to have absolute power. It is said by many who knew

Neville Samarakoon QC that he regretted his mistake bitterly until the time of his death.

It was when J.R. Jayewardene found that the Chief Justice was not under his control that he brought the first impeachment move under the 1978 Constitution. Since then, whenever the impeachment provisions are used, it is done under the same circumstances and for the same purpose.

The Chief Justices who came after Neville Samarakoon understood the new equation and did all they could to avoid any kind of confrontation. In that way they weakened the judiciary and also the peoples' faith in their independent function.

When Sarath N. Silva became the Chief Justice he understood the equation very well and made it his business to support President Chandrika Bandaranaike until the very end, up to the point when he realised that the future did not lie with her. Then he shifted his alliance to Mahinda Rajapaksa and kept up the supportive link to the executive until finally, for reasons best known to himself, their relationship faltered.

Sarath N. Silva makes many speeches now and, at times, expresses partial regret for his allegiance to the executive. However, by then irreparable damage had been done to the power, as well as the image, of the judiciary.

Over the years this situation led to the creation of disillusionment among the people as well as the lawyers. The following quote from S.L. Gunasekara's recent book Lore of the Law and other Memories reflects the demoralisation caused by the weakening of judicial independence. In answer to a question from a junior lawyer: "*Sir, is Hulftsdorp much different today to what it was when you joined the Bar?*" He replied,

> *"When I joined the Bar we had no air conditioners, no computers, no lifts, no ponds inside the Supreme Court premises, no photocopying machines or free trips abroad sponsored by the Government or nongovernmental organisations; but we had justice.....I did not, by this, mean to say that there is no justice whatever done in the courts today, (in that some measure of justice is done) but that the difference between then and now lay chiefly in the fact that while there were doubtless many shortcomings in the administration of justice even in those days which we nostalgically recall as having been the gold old days, that was a time when we almost always won good cases and lost bad cases whereas today, there are so many occasions when we lose good cases and win bad cases that it has now become virtually impossible to properly advise a client about his prospects in a case whether already filed or in contemplation....."*

The new impeachment motion

The advantage that President Rajapaksa may be trying to cash in on now as he brings the new impeachment motion against the incumbent Chief Justice may be this disillusionment and demoralization, prevalent among the people as well as among the lawyers themselves about what they see as the deterioration of the judiciary.

Perhaps the executive may be seeing this as a suitable moment for striking a final blow against the judiciary and thus complete the process started by J.R. Jayewardene when he filed his impeachment against Neville Samarakoon.

The 18th Amendment to the Constitution was a determined attempt for the full realisation of the aim of the 1978 Constitution, which was to give absolute power to the executive president. In 1978 this was still a difficult task as there were the habits formed over a long period to trust the local institutions and still a belief in the possibility of justice and fairness was quite alive. Perhaps the executive thinks that the opportune moment has arrived to realise the full potential of the 18th Amendment.

Already there are public rumours about who the executive is aiming to put in place of the incumbent Chief Justice once the impeachment process is speeded up by the utilisation of the toothless majority that the government has in parliament. If those rumours are correct then the last days of even the limited independence of the judiciary are close at hand.

However, it may not all go that way. The people may use this occasion not only to critique the absolute power of the executive but also as a critique of the weaknesses of the judiciary itself. They may use this occasion to demand a stronger judiciary. That, of course, implies that the people will have to deal with the displacement of the absolute power notion which was created through the tyranny of a four-fifth majority in parliament that J.R. Jayewardene had in 1978.

Whichever way, for better or for worse, the present impeachment motion will prove decisive.

## 13
## The impeachment of the Chief Justice is a prelude to Greater Militarisation

by Asian Human Rights Commission

After a series of attacks on the judiciary the Mahinda Rajapaksa government is now reported to be engaged in preparing papers for the impeachment of the Chief Justice (CJ). While the accusation against the CJ is not known the determination of the government to impeach her has been highly publicised. The state media have been mobilised to make a concerted attack on the judiciary.

Meanwhile there is also a bill being discussed which attempts to introduce several provisions which will limit the powers of the magistrates relating to arrest and detention and will increase the powers of the police.

The reasons for the hurried attempts to suppress the judiciary are not accidental. The project for the replacement of the democratic form of governance with a national security state where the military and the intelligence services will have enormous powers has been going on for some time. Impunity for almost all actions by the executive and the security forces against the freedoms of the individual has been assured now for many years. The allegations of serious abuses of human rights by way of enforced disappearances, other forms of extrajudicial killings, torture and kidnappings are never credibly investigated.

Now, according to reports there are moves to bring the military more directly into the policing system. It was reported that even the IGP may be replaced by a military officer as a police commissioner. Also the OICs and Divisional Police Chiefs will be replaced by Special Task Force officers. This will amount to a complete shift from the civilian policing which is an essential component of a democracy to military policing. Such radical changes would naturally be resisted by an independent judiciary. Therefore there is an urgent need to put in place judges who will be willing to carry out whatever projects the government may propose. The impeachment of the CJ has therefore several purposes. One is to remove the present CJ and replace her with a friend of the executive and the second is to have a chilling effect on all other judges of the Supreme Court and the Court of Appeal. The message is simple: anyone who will abide by the mandate to protect the dignity and the freedom of the individual as against the dictates of the executive is clearly not wanted among the highest judiciary.

The government, beset with serious economic problems will continue to impose harsher conditions on the population. The government knows that such measures will necessarily bring about retaliation from the trade unions and other organisations representing the ordinary folk. Such protests on the part of the people will be ruthlessly crushed and recourse to justice will be denied.

The government wants to pass a strong message to the effect that justice is no longer welcome. The courts will be required to approve whatever the government wants and the protection of the individual freedoms will be regarded as a hostile action towards the government.

Disappearances of persons and the disappearance of the system of justice

Over a long period Sri Lanka has been engaged in the large scale practice of enforced disappearances of persons. In the process justice has always been denied to the victims and their families. The practice of enforced disappearances amounts to the denial of all rights. This practice which has gone on for several decades has had a seriously paralysing influence on the entire system of justice.

Now the stage has been set for the destruction of the independence of judicial institutions altogether. These institutions have a history going back to 1802 when the Sri Lanka's first Supreme Court was instituted. It is this legacy that is now being seriously challenged. In a recent published book by a senior lawyer, S.L. Gunasekara entitled Lore of the Law and other Memories, the author quotes a prediction by another well known lawyer, D.S. Wijesinghe, President's Council, "We now have a new Parliament and with it democracy vanished. We are now about to get a new Superior Courts Complex and with that justice will vanish". With this attempt to file an impeachment on the incumbent Chief Justice this prophecy may come to a complete realisation.

While there are usual noises from some quarters protesting the impeachment move, there still does not seem to be a full grasp of the threat that the independence of the judiciary in Sri Lanka is faced with by the Bar Association of Sri Lanka or the legal profession. The end of the independence of the judiciary also means the end of the legal profession as an independent profession. The lawyers lose significant when the possibility of the protection of the dignity and the freedom of the individual is no longer possible. It is perhaps the last chance available for everyone including the judiciary itself and the legal profession to fight back from the ultimate threat to the independence of the judiciary and the possibility of the protection of the dignity and the freedom of the individual in Sri Lanka. Many years of cumulative neglect has led to the possibility of the executive being able to come to a position to make a final assault against any challenge by way of demand for justice. Unless the gravity of this threat is fully grasped Sri Lanka will soon become like some countries which no longer have independent institutions to protect individual liberties.

The people of the north and east are already under military grip. It may not take a long time before the people of the south are also brought under the same grip.

*( Statement issued by the Asian Human Rights Commission)*

**14**

## The AHRC seeks UN intervention on

## the independence of the judiciary in Sri Lanka

The Asian Human Rights Commission today wrote a letter to Ms. Gabriella Knaul, the Special Rapporteur on the independence of judges and lawyers informing her of the attempted abduction and assault of Mrs. Manjula Tilakaratne, the secretary of the Judicial Service Commission of Sri Lanka.

The AHRC stated that: The judiciary in Sri Lanka is facing an exception threat of being reduced merely to administrative functions and of rubber stamping the decisions of the executive as are some 'judiciaries' in Asia such as that of Myanmar and Cambodia. This is a very real and serious threat.

The AHRC requested the Special Rapporteur that:

> …. in your capacity as the Special Rapporteur on the independence of judges and lawyers you should seek a visit to Sri Lanka in order to observe the situation yourself or otherwise take some exceptional steps for assessment of the situation and to make an effective intervention. The highest bodies of the United Nations need to be duly informed about the predicament that the independent judiciary in Sri Lanka is faced with.

*The full text of the letter is as follows:*

Dear Ms. Knaul,

Re: Attempted abduction and the assault of the secretary of the Judicial Service Commission of Sri Lanka

I refer to my earlier correspondence to you dated September 25, 2012 regarding a press release issued by Mr. Manjula Tilakaratne, the secretary to the Judicial Service Commission (JSC) regarding certain threats faced by the JSC and the independence of the judiciary in Sri Lanka. I am now writing to you to inform you that there was an attempted abduction of the JSC secretary in which he was assaulted on October 7. Perhaps you have already been made aware of this incident.

The details of the incident are as follows:

On October 7, 2012 the secretary to the Judicial Service Commission (JSC), Manjula Thilakaratne, a former High Court judge, was attacked by four persons. The JSC secretary, accompanied by his wife, had taken his son to drop him at the St. Thomas College gymnasium. After dropping his wife and son at the college he parked his car and as he to wait for some time took a newspaper and was reading it.

Suddenly he saw four persons stopping near his car. One of them had a pole that was about three-feet long and another was holding a pistol. The one with the pole walked towards the passenger's door of the car and the other three were in front of

the door on the driver's side. The one with the pistol and the other two demanded that the JSC secretary should open the door but he refused. Then they threatened to use the pistol and at that point he opened the door. One of the three persons asked whether he was the boss (Lokka) of the JSC. Then without warning they started beating him about the face and tried to drag him out of the car.

He continued to resist them. Having realised that it would be difficult to pull him out of the car they tried to push him into the passenger's seat and he realised that they were trying to abduct him. At this stage he shouted loudly.

On hearing his shouts some doors from the nearby houses opened and some three-wheeler drivers and others were attracted by the noise. At this stage the four assailants grabbed his mobile phone and ran towards the road behind the car and he lost sight of them.

Later the JSC secretary was admitted to the hospital and is being treated for his injuries.

The following day all the judges and lawyers of Sri Lanka boycotted the courts for a day as a mark of protest.

I am attaching herewith a copy of a statement issued by the Asian Human Rights Commission pointing out the basic threats faced by the JSC and the independence of the judiciary in general in Sri Lanka.

The judiciary in Sri Lanka is facing an exception threat of being reduced merely to administrative functions and of rubber stamping the decisions of the executive as are some 'judiciaries' in Asia such as that of Myanmar and Cambodia. This is a very real and serious threat.

Perhaps in your capacity as the Special Rapporteur on the independence of judges and lawyers you should seek a visit to Sri Lanka in order to observe the situation yourself or otherwise take some exceptional steps for assessment of the situation and to make an effective intervention. The highest bodies of the United Nations need to be duly informed about the predicament that the independent judiciary in Sri Lanka is faced with.

Hoping for your urgent intervention on the situation of the Sri Lankan judiciary,
I remain,
Yours sincerely,
Basil Fernando
Director Policy and Programme Development
Asian Human Rights Commission

6 January 2103
Honourable Mr. Ban Ki-moon
Secretary General
United Nations SA-1B15
New York, NY 10027
Fax: + 212-963-7055

Honourable Secretary General

Re: The plan to impeach the Chief Justice of Sri Lanka and imminent danger to the rule of law and democracy in Sri Lanka

Greetings from the Asian Legal Resource Centre (ALRC)

I am certain that your office is already aware regarding the critical situation undermining the rule of law and democracy in Sri Lanka that has developed by way of an open conflict between the Supreme Court of Sri Lanka and the Government of Sri Lanka. This conflict relates to the impeachment, by the government of the Chief Justice of Sri Lanka, Mrs. Shirani Bandaranatake.

The Supreme Court in its judgment dated 1 January 2013, has stated that the process adopted by the government for impeachment is unconstitutional and hence illegal. The UN Special Rapporteur on the independence of judges and lawyers has stated that the manner in which the Government of Sri Lanka is proceeding against the Chief Justice violate the principles of separation of powers; independence of the judiciary and the process is the culmination of a series of attacks against the independence of judiciary.

The ALRC is contacting your office fearing that within the coming five days that is by 11 January there will be such a drastic change within the political system of Sri Lanka, which would transform Sri Lanka's judiciary to a mere administrative organ without judicial powers, and hence will be unable to protect the liberty of individual citizens. The judiciary in Sri Lanka will be transformed into an instrument at the service of the executive.

Perhaps during your tenure in office you may not have been confronted with a situation where democracy and the rule of law is abandoned and dictatorship established through a parliamentary process. This is exactly what the Government of Sri Lanka is attempting to achieve in Sri Lanka.

According to the announcements made by the government, on 8 January the President will address the parliament on the report made by a Parliamentary Select Committee constituted by the government to impeach the Chief Justice. It is this process that the Supreme Court has declared invalid and as illegal and is against the fabric of the constitution. However, the government has announced that subsequent

to the President's address to the parliament, there will be two days' of debate after which the issue of impeachment will be voted in the parliament. The government has more than the required majority to have the motion passed.

Since the Chief Justice is challenging the legality of her removal from office and the entire process held unconstitutional by the Supreme Court of Sri Lanka, the ALRC fears that the Chief Justice will be removed from office by force and a new Chief Justice who is willing to oppose the judgment of the Supreme Court appointed. The resulting chaotic situation will be disastrous to the rule of law and democracy in Sri Lanka.

Besides, since the Judicial Services Association and the Bar Association of Sri Lanka have categorically opposed the removal of the Chief Justice since the process is devoid of universally accepted safeguards, the government clashing with the judges and the lawyers of Sri Lanka is inevitable. It is most likely that many judges, lawyers and the members of the civil society will be arrested or otherwise their rights tampered with by the government.

Under these circumstances it is only an extraordinary intervention through your high office that could weigh upon the government, to persuade the government to withdraw from the disastrous collision course it has embarked upon against the judiciary in Sri Lanka. If this fails, Sri Lanka will sink under a dictatorship and how long that will last is hard to predict. Condemning this event and the damage done after it has taken place will be of little practical use to the people of Sri Lanka.

Sri Lanka has been undergoing many political catastrophes since the past several decades, and the United Nations is blamed for its inability to make timely interventions to prevent such situations. We firmly hope that the present catastrophe would not have the same fate and that your office would use its mandate and the capacities that is available to your high office to make a decisive intervention on this occasion.

Sincerely

Bijo Francis
(Interim) Executive Director
ALRC
Annexe:

1. Judgment of the Supreme Court of Sri Lanka
For a complete dossier concerning the impeachment kindly see: www.humanrights.asia/resources/books/the-impeachment-motion-against-shirani-bandaranayake

# REPORT ON THE IMPEACHMENT OF SRI LANKA'S CHIEF JUSTICE

Conducted for the Human Rights Committee of the Bar of England and Wales by

GEOFFREY ROBERTSON QC

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**INTRODUCTION**

1. The Chief Justice of Sri Lanka, Dr Shirani Bandaranayke, was impeached by the vote of government members of that nation's parliament on 10th January 2013, after a report from a Select Committee of seven government ministers declared her guilty of misconduct. This decision involved the rejection of a ruling by the Supreme Court that the process was in breach of the Constitution. The impeachment has been widely condemned both by a large majority of local lawyers and by international organisations concerned with human rights and judicial independence. The Sri Lankan government, however, claims that the actions of its ministers and MPs have done nothing to threaten judicial independence but have merely demonstrated the sovereignty of Parliament.. The Human Rights Committee of the Bar has itself issued statements evincing concern that judicial independence has been imperilled, but has made clear that these statements must in no way influence the outcome of my inquiry. I would certainly not have undertaken it otherwise.

2. It is a regrettable fact that close scrutiny of the impeachment by independent observers has not been welcomed by the Sri Lankan government. It has refused to grant visas for an International Bar Association fact-finding mission, which was to have been led by the former Chief Justice of India, J.S. Verma. The Sri Lankan Media Minister explained

> " The impeachment was done in accordance with the Sri Lankan Constitution. Outsiders cannot criticize the Constitution. This is an infringement of the sovereignty of Sri Lanka, which the government is bound to protect".[1]

On the contrary, the independence of the judiciary is a requirement of every human rights treaty and a requisite for membership of the Commonwealth: when a Chief Justice removed from office, whether in accordance with the Constitution or not, the question for outsiders as well as insiders is whether it has been done in a manner which comports with the judicial independence guarantee in international law. A mission of distinguished lawyers seeking to elucidate the facts cannot possibly infringe the sovereignty of the nation.

3. Nonetheless, it has meant that I have been unable to travel to interview the various parties – fortunately, an exercise which has not been an obstacle to the establishment of such facts as are necessary for this report. That is because I am in possession of all relevant documents – court judgements, 'Hansard' of the parliamentary impeachment process, the fourteen charges against the judge and two volumes (some 1600 pages) published by Parliament which contain the evidence. I have the statement by the four members who walked out of the Select Committee, its Minutes of evidence, and the findings of guilt on three of the charges. I have also read some press

[1] Xinhua/Agencies, "Sri Lanka to reject visa for delegation to probe controversial impeachment", Feb 8, 2013.

coverage of what happened, in papers such as the "Colombo Telegraph", "The Sunday Times", and "The Island online", as well as overseas reporting in journals such as "The Economist" and a collection of documents relevant to the impeachment published by the Asian Human Rights Commission. As will appear, the facts upon which I base my conclusions are either on record or incapable of significant challenge.

4. The question I am tasked to answer is whether the removal of the Chief Justice was a breach of the guarantee of judicial independence which Sri Lanka is bound to uphold, both by international law and by its membership of the Commonwealth. That requires an analysis of:

   - The reason for the impeachment. Were the motives "political" – for example, as a reprisal for some judgement against the government, or was the impeachment process begun out of genuine concern for the public interest because there was *prima facie* evidence she had committed some crime or serious misconduct?

   - The nature of the charges. Did they relate to the political inconvenience of her judgements, or to allegations of serious misbehaviour?

   - The fairness of the method used for proving them. Did the Select Committee give her a fair hearing and adopt a proper standard of proof?

- The question of political pressure. Was the Parliament was prejudiced or placed under pressure e.g. by demonstrations against the judge orchestrated by the government.

5. Much of the public debate has been over the use of the impeachment process, which takes place in Parliament rather than in the courts, but this is not the key issue: it is whether the impeachment process as used by the government *in this case* was used fairly. Another side-issue is the correctness of the Supreme Court decision to intervene in a parliamentary process. Again, the real question for judicial independence is whether that process was fair, not whether the courts were right to intervene - an interesting question, but one pertaining to the different subject of the separation of powers. A different consideration, raised by the UN's Human Rights Commission, is the fitness of Mrs. Bandaranayke's successor, one Mohan Peiris, who had been Attorney General and had led delegations to Geneva to "vigorously defend" the government over its mass-murder of Tamil civilians. Lawyers briefed to defend a client vigorously do not necessarily believe in the client or the defence: barristers who act for governments sometimes turn out to be remarkably independent of that government when appointed to the bench. The criticism of Mr. Peiris must come from the fact – if it is a fact – that he accepted the office in the knowledge that his predecessor had been unlawfully or improperly removed.

**JUDICIAL INDEPENDENCE**

6. Every international human rights treaty, and every constitutional Bill of rights, requires judges to possess "independence and impartiality". These are disparate concepts: the latter is well-defined and the tests for real or apparent judicial bias are well established. "Independence" however, has not been much litigated: I would define it as **a duty on the state to put judges in a position to act according to their conscience and the justice of the case, free**

**from pressures from governments, funding bodies, the military or any other source of influence that may possibly bear upon them**. Security of tenure is fundamental to independence, and subject to a mandatory retirement age it can only be lost by proven mental incapacity or else by serious misconduct, proved beyond reasonable doubt, preferably by a criminal conviction or at least by a trial proceeding that is fair.

7. That an independent judiciary is a prerequisite for any society based on the rule of law cannot be doubted, and the definition of that independence is uncontroversially set out in the IBA's *Minimum Standards of Judicial Independence* (1982) and in the *Basic Principles of the Independence of the Judiciary* adopted by the General Assembly of the United Nations in 1985.[2] These instruments lay down guidelines for appointment and removal, and for tenure, conduct and discipline, which are generally designed to ensure that "judges are not subject to executive control" (personal independence) and that in the discharge of judicial functions "a judge is subject to nothing but the law and the commands of his conscience" (substantive independence). This latter formulation strikes me as inadequate: a judge is subject additionally to certain public expectations arising from the constitutional importance of the office. These should be spelled out in a code of judicial conduct, requiring justice to be done efficiently and decently, without fear or favour, discrimination or discourtesy. Complaints about breaches of the Code should be decided by a Tribunal which includes senior judges, and is itself free from political influence. Most misconduct complaints, if upheld, will result in guidance or reprimand: if serious enough, in the Tribunal's estimation, to warrant removal that power (which in many countries constitutionally resides in the Parliament) can be exercised after a vote has been taken on whether to adopt the Tribunal's recommendation.

[2] Resolution 40/146, December 1985.

8. Although this is the case with the UN's own justice system[3] and in many countries with Westminster-style constitutions, others such as Sri Lanka – and the UK itself – still rely on an archaic system of an "address" in Parliament to remove a senior judge, the last step in a process known as "impeachment". Although in some respects unsatisfactory, it does at least ensure judicial accountability to an outside body – the democratically elected legislature - and this provides an ultimate safeguard against judicial guardians becoming too incestuous or perceived as too self-interested to guard themselves. The impeachment process *per se* is therefore unobjectionable – so long as it is conducted fairly, in a way that fully protects the judge's rights and in circumstances where it cannot be credibly suggested that it has been instituted or carried on as a reprisal – because, for example, the government does not like the judge's decision in a particular case. Almost all cases of serious misbehavior will involve allegations of crime: the judge should be normally be tried in court fairly, and only impeached if convicted.

9. It is generally accepted, and may now be considered an imperative rule of international law, that judges cannot be removed except for proven incapacity or misbehaviour. 'Incapacity' is clear enough, and is not relevant in this case. 'Misbehaviour' is a broad term and should be limited to *serious* misbehaviour. Criminal offences would normally qualify, although even here there are lines to be drawn: in England a circuit judge was sacked after his conviction for smuggling whisky, but senior appellate judges have escaped impeachment for drink-driving offences. Criminal offences can at least be 'proven' – namely by the verdict of a judge and/or jury, and subsequent impeachment by Parliament is scrupulously fair to a judge given

[3] The Code of Conduct for UN judges was drawn up by the Internal Justice Council (Chaired by Justice Kate O'Regan – the author was a member) which has recommended that complaints be investigated by three distinguished jurists: any recommendation they made for dismissal would be put before the General Assembly.

the opportunity (however unlikely it is to succeed) to claim that his conviction was wrongful.

10. Where for some reason a criminal charge has not been proferred, Parliament has the difficult task of replicating court procedures in order to prove – necessarily to the criminal standard, beyond reasonable doubt – that the judge is in fact guilty. Where the 'misbehaviour' alleged does not constitute a criminal offence at all, the question of whether it is serious enough to warrant dismissal becomes acute. Why should a judge be dismissed for conduct which is lawful? There are dangers of judges being impeached because governments dislike what they lawfully say or do. Republican politicians in the U.S. attempted to impeach William O. Douglas because he gave an interview to *Playboy*, and the calculating Dr. Mahartir, fearing that his honest Chief Justice would rule against him in a forthcoming case, had him dismissed because, at a University book-launch, he spoke up for the independence of the Malaysian judiciary. In every case where it is alleged that non-criminal conduct amounts to 'misbehaviour' sufficient to disentitle a judge to sit, especial care must be taken to ensure that the conduct really does reflect so badly on the individual that he or she can no longer be considered fit to judge others – because, in a sense, they cannot even judge themselves.

11. Some assistance as to the kind and degree of misbehaviour that disqualifies a judge is found in the "Latimer House Principles" agreed by Law Ministers of the Commonwealth and by the Commonwealth Heads of Government. A specific rule provides

> "Judges should be subject to suspension or removal only for reasons of incapacity or misbehaviour that clearly renders them unfit to discharge their duties".[4]

This requires clear proof of misconduct that renders them unfit, at least in the eyes of reasonable people, to occupy the justice seat. This finds an echo in the *Beijing Statement of Principles of the Independence of the Judiciary in the ASEAN Region* which is subscribed to by thirty-two Chief Justices, including Mrs. Bandaranayke's predecessor. Article 22 provides

> "Judges should be subject to removal from office only for proved incapacity, conviction of a crime, or conduct that makes the judge unfit to be a judge."

12. This international approach to what is required to secure judicial tenure is fully endorsed by the Constitution of Sri Lanka. It has a special Article – 107 – headed "Independence of the Judiciary" as if to underline its constitutional importance. Article 107(2) provides

> *"Every judge shall hold office during good behaviour and shall not be removed except by an order of the President made after an address of Parliament supported by a majority of the total number of members of Parliament (including those not present) has been presented to the President for such removal on the ground of proved misbehaviour or incapacity".*

It is essential that the misbehaviour or incapacity be *proved.* But how? By what procedures and according to what standards? Article107 is deficient in this respect – it requires at least a third of MPs to sign the motion for an

[4] *Commonwealth Principles on the Accountability of and the Relationship between the three branches of Government*, Abuja, 2003. Section IV (Independence of the Judiciary).

address, but goes on: "the investigation and proof of the alleged misbehaviour or incapacity and the right of such judge to appear and be heard in person or by a representative" is left to Parliament to provide, "by law or by Standing Orders...".[5] The President's powers to appoint (Article 122) and dis-appoint (Article 107) judges were, of course, based on the Presidency as a ceremonial position under a **?** style constitution. Subsequently, the President became the political leader of the country, with executive power and majority support from his party in Parliament.

13. Quite clearly, the standards and procedures for trying allegations of judicial misconduct, particularly if he has not been convicted in the courts of any offence – must comply with the minimum standards set out in Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR), to which Sri Lanka is a state party, namely

> *a fair and public hearing by a competent, independent and impartial tribunal", with the presumption of innocence (14(2)) and rights to have adequate time to prepare a defence, (14(3)(6)) to examine and cross-examine witnesses and to call witnesses on his behalf"* (14(3)(e)).

14. These are fundamental safeguards that must apply to quasi-criminal 'misconduct' charges which, if they result in an impeachment address by MPs, will blast the judge's reputation and deprive him of status, job and pension rights. For this reason the common law insists on scrupulous fairness, as the Privy Council made clear in the leading Commonwealth case of *Rees v Crane*, where the rules of natural justice were held to require a judge to be given, even at a preliminary stage, all the evidence against him and an

[5] S107(3).

opportunity to refute the charges.[6] The Beijing Rules insist that "Removal by Parliamentary procedure... should be rarely, if ever, used" because "its use other than for the most serious reasons is apt to lead to misuse"[7]. When it is used, "the judge who is sought to be removed must have the right to a fair hearing"[8]. The Latimer House principles are similarly emphatic: Principle VII lays down that "any disciplinary procedures should be fairly and objectively administered...with...appropriate safeguards to ensure fairness". The Latimer House Guidelines go further:

> "In cases where a judge is at risk of removal, the judge must have the right to be fully informed of the charges, to be represented at a hearing, to make a full defence and to be judged by an independent and impartial Tribunal".[9]

15. These principles must be stringently applied to any attempt to remove a Chief Justice, who is the representative of the judiciary as a whole and by virtue of the fact that he or she has achieved that exalted status, will normally have a high degree of peer approval and possess a recognised judicial distinction. Indeed many "Westminster model" constitutions give the Chief Justice, through chairmanship of a Legal Services Commission, a leading role in the disciplining and removal of other judges. This makes the removal of a Chief Justice particularly problematic. Some commonwealth countries provide in their constitution for a tribunal of overseas commonwealth judges to investigate misconduct charges against the Chief Justice, a recognition both of the momentous political character of such a move and the need to eliminate

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[6] *Evan Rees v Richard Alfred Crane* 1994 1 AC 173.
[7] Rule 23.
[8] Rule 26.
[9] Guideline VI(1)(9).

any suggestion of bias in the membership of the tribunal. The cases are, fortunately, very few, but the tribunal in Trinidad and Tobago called in 2006 to hear charges of misconduct against Chief Justice Sharma provides a procedural exemplar.

16. The Tribunal was chaired by Lord Mustill, siting with distinguished jurists from Jamaica and St. Vincent. The allegation was that Sharma had attempted to pervert the course of justice by pressuring the Chief Magistrate, to acquit the leader of the opposition of an imprisonable offence. This is, of course, a serious crime and it should always be 'proved' in court before removal proceedings are undertaken. The Chief Justice had been charged, but bizarrely the Chief Magistrate refused to testify when called into court to give evidence against him, so the criminal proceedings were discontinued and an impeachment process commenced instead. Lord Mustill insisted, after lengthy argument, on scrupulously fair procedures: the Chief Magistrate was cross-examined at length; the rules of evidence at a criminal trial were applied; the burden of proof (following *In re a solicitor*)[10] was held to be the criminal standard, i.e.proof beyond reasonable doubt.

17. The procedures adopted by Lord Mustill in *Sharma's Case* provide the best precedents for the first stage of any impeachment of a Chief Justice in a Commonwealth country. Regrettably the Commission's report has not been properly published by the Trinidad government. I have asked the Bar Human Rights Committee to publish the Mustill Report on its website, order that its findings might become better known and perhaps prevent some of the procedural improprieties that occurred in the course of impeaching Chief Justice Bandaranayke.

[10] *In re a solicitor* (1993) QB 69.

18. Article 107(3) of the Sri Lankan Constitution must therefore be read consistently with these international and commonwealth requirements. The "law or standing orders" it provides for the procedures leading up to the address, such as "the investigation and proof of the alleged behaviour," must be scrupulously fair. It is unfortunate that Sri Lanka has not passed a law similar to that of Trinidad and some other commonwealth countries, which provides (usually in their Constitution) for an independent tribunal to hear removal allegations against a judge. An amendment to the Constitution proposed in 2000 would have done exactly that, but it was dropped. As for Standing Orders, which do not have the force of law, those made by the Speaker in Sri Lanka (on the recommendation of a committee that he chairs) do not provide any kind of independent tribunal. The procedure for establishing judicial *misconduct* is merely set out in Standing Order 78A, headed confusingly, Rules of Debate:

> *1.Where notice of a resolution for the presentation of an address to the President for the removal of a Judge from office is given to the Speaker in accordance with Article 107 of the Constitution, the Speaker shall entertain such resolution and place it on the Order Paper of Parliament but such resolution shall not be proceeded with until after the expiration of a period of one month from the date on which the Select Committee appointed under paragraph (2) of this Order has reported to Parliament.*
>
> *2.Where a resolution referred to the paragraph (1) of this Order is placed on the Order Paper of Parliament, the Speaker shall appoint a Select Committee of Parliament consisting of not less than seven members to investigate and report to Parliament on the allegations of misbehavior or incapacity set out in such resolution.*
>
> *3.A Select Committee appointed under paragraph (2) of this Order*

*shall transmit to the Judge whose alleged misbehavior or incapacity is the subject of its investigation, a copy of the allegations of misbehavior or incapacity made against such Judge and said out in the resolution in pursuance of which such Select Committee was appointed, and shall require such Judge to make a written statement of defense within such period as maybe specified by it.*

4. *The Select Committee appointed under paragraph (2) of this Order shall have power to send for persons, papers and records and not less than half the number of members of the Select Committee shall form the quorum.*

5. *The Judge whose alleged misbehavior or incapacity is the subject of the investigation by a Select Committee appointed under paragraph (2) of this Order shall have the right to appear before it and to be heard by, such Committee, in person or by representative and to adduce evidence, oral or documentary, in disproof of the allegations made against him*

6. *At the conclusion of the investigation made by it, a Select Committee appointed under paragraph (2) of this Order shall within one month from the commencement of the sittings of such Select Committee, report its findings together with the minutes of evidence taken before it to Parliament and may make a special report of any matters which it may think fit to bring the notice of Parliament;*

7. *Where a resolution for the presentation of an address to the President for the removal of a Judge from office on the ground of proved misbehavior or incapacity is passed by Parliament, the Speaker shall present such address to the President on behalf of Parliament.*

> 8. *All proceedings connected with the investigation by the Select Committee appointed under paragraph (3) of this Order shall not be made public unless and until a finding of guilt on any of the charges against such Judge is reported to Parliament by such Select Committee.*

19. The impeachment procedure is arcane, the Order is elliptically drafted and at no point does it envisage the involvement of persons other than politicians. Article 107 requires impeachment to begin with a petition signed by at least a third of all members of Parliament, setting out the "full particulars" of the alleged misbehaviour. This is the cue under 78A(2) for the Speaker to appoint a Select Committee of at least seven MPs to investigate and report. It must give the accused judge a copy of the allegations (but not necessarily the evidence) and the judge *must* provide it with a written defence statement. Then the judge has the right to be heard and to call evidence (but not, apparently, to question or cross-examine any hostile witnesses). The Select Committee has only a month to investigate, and most importantly (and most unfairly) it must clothe its work in secrecy "until a finding of guilt on any of the charges against such judge is reported to Parliament by such Select Committee". After that report has been sent to Parliament, a month must elapse before the impeachment debate, at the end of which, if more than half the MPs favour the motion, the speaker will present the 'address' to the President who may then remove the judge.

20. These rules, which were broadly followed in Dr Bandaranayke's case, are highly objectionable. In the first place, the Select Committee members must all be MPs, and the Speaker may (as he did in this case) appoint a majority of government Ministers. Secondly, the Committee hearings must necessarily be in secret, and remain so until reasons for a 'guilty' verdict are presented to Parliament. This is a plain breach of Article 106 of the Constitution which provides that every "tribunal or other institution established under the

Constitution or by Parliament" (which would include a Select Committee established to try a judge and report on whether he is guilty) "shall be held in public and all persons shall be entitled freely to attend such sittings". The Rules are, therefore, contrary to the Constitution, which plainly requires open justice, as do the Latimer Rules and the Beijing principles and the common law. The Standing Order gives the judge a few rights, but the basic protection of openness, and the rights to have time to prepare a defence, and to cross-examine adverse witnesses, are not mentioned. Nor is the most important protection of all, the burden and standard of proof. The burden must fail in or the prosecution and conviction must only come after "proof beyond reasonable doubt". In all these respects, the Standing Orders of Parliament are gravely deficient in fairness.

21. There are other aspects to the protection of judicial independence which should be observed when a judge – especially a Chief Justice – is put through the demeaning ordeal of an impeachment. There must be some respected and responsible trigger for this draconian process, yet Article 107 provides that merely a third of the number of MPs can commence it, by signing a request to the Speaker. As this number of supportive members will necessarily be commanded by the party or coalition in power, it is a frail reed indeed to protect a judge from reprisals by the government if his rulings discomfort its Ministers. As for the President, who has the supreme and absolute power to accept or reject the address, this is not the ceremonial President envisaged by Westminster model institutions. Sri Lanka's head of state is not an apolitical figure like the Queen in the UK, but a street-fighting politician who is head of the government and has wide- ranging constitutional powers at his discretion. His party or its supporters will command over half of the MPs, and so can easily round up one third of them to initiate the process to remove a judge. In Sri Lanka, in 2012-13, President Rajapakse and his United People's Freedom Alliance, with supporting parties, had a large majority in Parliament - more than two thirds of its total

of 225 members. The President's elder brother, Chamal Rajapakse, was the Speaker of the House who oversaw Dr. Bandaranayke's impeachment. In this situation, the terms of the Constitution afford no real protection to a judge whose rulings incur the enmity of the ruling President or his family or his party.

22. I should note several non-legal ways in which a government can imperil judicial independence in the course of making attempts to remove a judge. In Sri Lanka, as in many other countries, it controls and heavily influences the state media, which endorses its campaigns. Tame journalists may wage a propaganda war against disfavoured judges, placing intolerable psychological pressure on them and their families. A government will, by definition, have a political party with control over large swathes of supporters, and an ability, for example, to organise demonstrations against judicial targets. The large scale public protests against Dr. Bandaranayke are of particular concern in this respect: the public at large does not know or much care about fine points of constitutional law and it is difficult to believe that they took to the streets against her without government manipulation. This has been widely alleged in Sri Lanka's free press and requires serious investigation: there is television footage which seems to show demonstrators being paid after chanting slogans against her and against the Supreme Court. Orchestrated protest against a particular judge is a particularly objectionable form of retaliation, and any government political party behind such demonstrations deserves the strongest condemnation. The government, of course, will have control of the police and armed forces, and I note how the authorities later effected the physical removal of Mrs. Bandaranayke from her Supreme Court chambers and official residence in disrespectful ways that seem designed to humiliate her.

**BACKGROUND TO THE IMPEACHMENT**

a) The Chief Justice

23. Sri Lanka is a long standing democracy which was granted independence from Britain in 1948 and endowed with a Westminster model constitution which has been substantially amended since. The Privy Council was its final Court of Appeal for many years, and its common law and its legal profession reflect their English models. "Queen's Counsel' are now styled "President's Counsel", (somewhat unfortunately when the President is no longer ceremonial but a powerful political figure). The country was plunged for many years into a violent civil war against the secessionist Tamil Tigers, which ended in 2009 when government forces captured their base in the island's north, killing up to 40,000 civilians in the process. A UN Human Rights Committee investigation was highly critical of both sides and particularly of the government, and some commentators have sought to draw connections between the government's lawlessness in the civil war and the disrespect for law it showed in the course of removing the Chief Justice. I perceive no such connection, other than that the result of the war – the ending of Tamil Tiger terrorism – had the consequence of making President Rajapaske so popular that the next election gave him an overwhelming majority. There have been long-standing tensions between the executive and the judiciary, noted in IBA reports in 2001 and 2009,[11] and two previous impeachment attempts. (The simmering discontent among politicians about judges getting "too big for their boots" was undoubtedly a background factor in their contemptuous behaviour toward the Chief Justice). However, in other respects Sri Lanka was a state in good standing in the commonwealth: so much so that criticism of it's conduct of the 2009 hostilities was removed

[11] Justice in Retreat: A Report on the Independence of the Legal Institutions and the Rule of Law in Sri Lanka (IBA Human Rights Institute, 2009).

from the CHOGM agenda at the 2012 meeting and Sri Lanka was paid the compliment of being chosen to host the Commonwealth Heads of Government meeting in November 2013.

24. Dr. Shirini Bandaranayake has had a most impressive career culminating in her appointment in May 2011, at age 53, as Chief Justice – the first woman to achieve that rank. She had attended a state school in the countryside before taking a law degree and winning a Commonwealth scholarship to earn her doctorate at London University. She went straight into academic work, rising to become Dean of Colombo's excellent law school and acting as Vice-Chancellor of the university. In 1996, at age 38, she had been made a Justice of the Supreme Court by President Kumaratunge, achieving a double first – first woman and first academic on that bench. There were petitions by several barristers objecting to her appointment on the grounds that the President had not consulted the judicial network,[12] but no-one suggested that she lacked integrity or intellectual calibre. Her record refutes any suggestion that she was anti-establishment (or, anti-Rajapaske) – on the contrary, her juristic writing in over three hundred court decisions is conventional and her approach quite conservative. Indeed, her appointment as Chief Justice met with criticism from some human rights NGO's. as she was seen as an ally of the President, after a ruling in 2010 which upheld controversial legislation extending his powers. She was respected by her colleagues and became one of the two Supreme Court judges sitting with the former Chief Justice in the Judicial Service Commission. During her impeachment tribulation she had the support of all high Court judges, and the majority of lawyers and magistrates in Sri Lanka.

25. On becoming Chief Justice, Mrs. Bandaranayake, under Article III of the Constitution, automatically became chair of the Judicial Service Committee,

[12] Sri Lankan Law Reports, (1997), 9 December 1996, *Silva v Bandaranayake & ors*.

comprising herself and two other Supreme Court Justices nominated by the President. The three were required to choose the Committee's secretary "from among senior judicial officers of the Courts of First Instance", and they chose a judge who was not the most senior of possible candidates but was "senior" nonetheless. The Commission is empowered to transfer, promote, discipline and dismiss judicial officers and public servants working in the courts.

b. The JSC under attack

26. The power of the Chief Justice, as chair of the JSC, came under political attack in September 2012 shortly before her impeachment. It began with a telephone call from the Secretary to the President on 13th September, telling that the President had directed the three JSC members to meet him at his residence on 17th September. No reason for the meeting was given. This direction was put in writing at the Chief Justice's request, again giving no reason, and the JSC wrote back saying that a meeting would be open to misinterpretation and harmful to public confidence in the independence of the judiciary. This was prudent, as the Chief Justice and another of the JSC judges were members of the bench that was about to deliver a very controversial decision on the *Devineguma Bill* (see later). It is a fundamental Latimer House principle that

> "While dialogue between the judiciary and the government may be desirable or appropriate, in no circumstance should such dialogue compromise judicial independence"[13]

[13] Guideline I, point 5.

Summoning two of the three judges who were about to deliver a politically important decision, and giving no reason for the summons, was unsatisfactory behaviour on the part of the President and I have no doubt that the judges genuinely feared that a meeting with him would compromise them.

27. On the 17th September, the *Divineguma Bill* decision was handed down, and it went against the Minister, Basil Rajapaske. A large crowd of governmental supporters suddenly materialized outside Parliament, shouting slogans against the Supreme Court and against the Chief Justice. Whether this demonstration was orchestrated by the government or not, it was clearly not spontaneous (the judgement at this point had been delivered to the Speaker, the President's brother, who was reporting it to Parliament.)

28. So far as the President's action in summoning the judges to a meeing was concerned, the JSC drew the inference – not unreasonably – that he was attempting to exert undue influence over them. On 18th September the JSC issued a press release which spoke of other threats from government quarters after it had disciplined a particular judicial officer, and said that there were "forces" (unspecified) that were using the electronic and print media to make baseless criticism of the JSC and attempting to undermine the judiciary. The press statement was being issued "to keep the public informed of the threat".

29. It was a surprisingly powerful statement, perhaps issued by a Commission rattled by the demonstrations on the previous day, but it threw down a gauntlet to the government. A week went by before President Rajapakse responded, by telling the media that he had summoned the JSC members not in his capacity as President but in his role as Minister of Finance, merely in order to discuss their budget. If this had been the case, it was very surprising

that his secretary failed to mention this purpose at the time. Although the President denied any intention of interfering with the judiciary, I have seen no evidence that he ever condemned the public demonstration against it, and nor did his law officers. The following day (28 September) the JSC secretary claimed that there was a security threat to the Chief Justice and her fellow judges, although it turned out that the most immediate threat was to himself. President Rajapaksa told national newspaper publishers at a breakfast meeting on 4 October that he had instructed the Criminal Investigation Department to look into an allegation of sexual harassment that had been made against the Secretary. This man, a District judge, was assaulted three days later, after dropping his wife and son at school, by unidentified men and suffered serious injuries to his face and head. On the following day, judges and magistrates refused to attend their courts in protest against this attack which they said was incited by the government. Its perpetrators have still not been arrested.

30. These incidents show the pressures that were building up in the weeks before the impeachment, partly as a result of the Supreme Court's decision to strike down the *Divineguma* Bill. Before explaining its significance, I should mention one other vulnerability of the Chief Justice at this time, namely her husband. Pradeep Kariyawasam had been appointed by the President as Chairman of the National Savings Bank, shortly before his wife was made Chief Justice. Although he was not a politician or a backer of the President's party, some thought at the time that this favour from the President, who then appointed him as director of a public company chaired by another of his brothers (Gotabhyaya Rajapaksa, the Defence Secretary). Some commentators expressed concern that his appointment might incline his wife to repay the favours by more pro-government judgements. However, the bank made a bad investment decision, lost public money, and Kariyawasam tendered his resignation in May 2012. In August, at the very time the argument about the

constitutionality of the *Divineguma* bill was being heard by the Supreme Court, he was summoned by the Bribery Commission to give evidence about the share transaction. This might well have been because the share transaction was dubious, although some thought that it was a means by which the government could put further pressure on the Chief Justice. There was media comment at the time about why he alone had been summonsed, and not others who were more involved in decisions to make the bad investment.

c. The Devineguma bill

31. It is difficult for those who do not live in a Federal system to understand the political importance of the *Divineguma* bill, or the government's anxiety to have it declared constitutional. It was the brainchild of another brother of the President, Basil Rajapaksa, the Minister of Economic Development, who presented it to Parliament on 10 August 2012. Sri Lanka, unlike the UK, has a system of preventive overruling, which permits speedy constitutional challenge to government Bills as soon as they are placed on the order paper of Parliament, and there were a number of challenges to the *Divineguma* Bill. Because it did breach the constitution, which required the Minister to consult with all Sri Lanka's nine provincial Councils before it could be tabled. It was a centralising Bill, bringing devolved power back to Colombo, in this case power that would henceforth be wielded by Basil Rajapaska, the President's brother. It also gave his departmental officials new powers to invade privacy and obtain information about citizens.

32. In deciding constitutional cases, judges must usually choose between arguments that are good and arguments that are better. The decision of the three Supreme Court judges, with the Chief Justice presiding, in the first

*Divineguma* bill case clearly and logically applied the provision S.154 of the Constitution requiring such Bills to be submitted *"to every provincial council for the expression of its views thereon"* before being placed on the order paper. As the Bill had been placed on the order paper without any such consultation, it could go no further. It was a straightforward issue, and the decision was in my view an obviously correct application of Section 154.

33. However, the Solicitor General on behalf of the government had taken a preliminary and highly technical point, Article 12(1) of the Constitution allowed citizens to challenge a Bill

> *"by a petition in writing addressed to the Supreme Court...within one week of the Bill being placed on the Order Paper of the Parliament and a copy thereof shall at the same time be delivered to the Speaker".*

The Bill was placed on the Order Paper on 10 April. And the petition was filed in the Supreme Court Registry on 17 August – just before the deadline. It was *at the same time* sent to the Speaker by registered post, arriving in the Speaker's hands only on the 20th August., which was not, obviously, *at the same time* as it was addressed to the Supreme Court. So what did the word "deliver" mean in the context of the constitutional right for citizens to petition against a proposed law – did it mean the act of conveying the document, which was performed when it was sent on 17th, or did it mean the point at which it came into the Speaker's hands, i.e. the 20th? If the latter, then the objectors to the Bill would be knocked out - on the merest of technicalities.

34. This is exactly the kind of problem that lawyers are born to solve. It is their bread and butter, from their first day at law school, when they are asked whether a law against bringing a "vehicle" into the park should exclude a perambulator or a bicycle or a crashing aeroplane. It is meat and drink to the judges of any country called upon to decide the meaning of words and phrases in a Constitution applying 'literal rules' and 'golden rules' and rules of 'purposive interpretation' to the language of sloppy parliamentary draftspersons. The Chief Justice and her two colleagues did what judges in other English-speaking countries usually do when faced with a question of the meaning of a word – they consulted the Oxford English Dictionary. It defined 'delivery' as "the act of conveying into the hands of another, especially the action of a courier in delivering letters entrusted to him for conveyance to a person at a distance". They reasoned that such an act could be carried out by posting, so the commencement of the delivery by posting on the 17th satisfied the precondition for bringing a petition about the Bill's constitutionality. They made reference to a previous case, in 1991, (the *Sri Lankan Telecommunications case*) but distinguished it on the facts of that case(there had been no posting of the petition simultaneously with its Court filing, but instead an out-of-time hand delivery to the speaker).

35. I have addressed the issue at some length, to point out that the court dealt and distinguished with the 1991 precedent and reached a perfectly sensible, logical and legal conclusion. It must be emphasized that this is a perfectly normal and indeed commonplace example of judicial reasoning, because the Chief Justice's accusers were later to claim, outrageously, that it amounted to misbehaviour justifying the impeachment.

36. The impeachment would soon come. The *Divineguma* decision against the government was handed down on 17 September, angering the government by invalidating legislation that was important to its agenda, followed by the

protest of the JSC and the assault on its Secretary. The press on 26 September and again on 4 October reported that the President and a committee of Cabinet members were discussing "strong measures" against the judiciary. It may be that at this point the drafting of impeachment charges began, although Basil Rajapaske was prepared to give the Supreme Court one last chance. On 10 October he tabled the Bill again, reporting that it had now been approved by eight out of nine elected Provincial Councils, and by the Governor who had been imposed on the largely Tamil and war-torn Northern Province. Challenges were made again, to the same Supreme Court bench, headed by the Chief Justice, this time on the grounds that the governor was not authorised to approve the Bill in the absence of an elected Council.

37. Given all this existing pressure on the Chief Justice it did not help when on 25 October the Bribery Commission charged her husband with unlawfully causing a substantial loss to the public. Nonetheless the Chief Justice and her colleagues reported on the 1st November that the Bill was even more flawed than they had ruled the first time – the Governor could not usurp the role of an elected Council, and other provisions of the Bill would need to be approved by a public referendum. Once again, their decision was properly reasoned, but it tipped the government over the brink. A few hours after the judgement was delivered, 117 MPs signed an impeachment resolution, calling on the Speaker to present an 'address' to the President seeking the removal of the Chief Justice. In all these circumstances, it is impossible to resist the inference that the impeachment was the government's direct response to the unfavorable decision by the Supreme Court in the *Divineguma* Bill cases.

## THE IMPEACHMENT CHARGES

### a. The Three *Divineguma* Counts

38. The evidence for this proposition is not only circumstantial – it came from the terms of the impeachment charges. There were fourteen of them, in not particularly coherent English, appended to the motion. Did any of them charge, as misbehaviour, conduct that on any reasonable view amounted to the exercise of a proper and conscientious professional judgement? That would be proof of a blatant assault on judicial independence, the ousting by government of a judge who did her duty and arrived at a result the government did not like. The Rajapaske government did not like the first *Divineguma* decision, and it probably liked the second even less, because the impeachment resolution was tabled on the same day it was handed down. What those 117 MPs did, fatally to their case, was to accuse the Chief Justice of misbehaviour for rendering an utterly professional judgement – shared by her two colleagues – in *Divinegume No.1.*

39. Count 8 in the Bill of impeachment reads:

> *Whereas Article 121(i) of the Constitution has been violated by the said Dr. Bandaranayke despite the fact that it had been decided that the mandatory procedure set out in the said Article of the Constitution must be followed in accordance with the interpretation given by the Supreme Court in the 1991 Sri Lanka Telecommunications Case.*

40. This was not an allegation of misbehaviour. It was an allegation that the Chief Justice should be sacked because she (and her two colleagues) had not accepted the Solicitor General's technical argument, based on the 1991 case. As I have explained, the judges distinguished the facts of the *Telecommunications Bill* case,, which did not therefore bind them, and reached

their interpretation of the word 'deliver' by reference to the Oxford English Dictionary. They did what judges in all common law countries do, and reached a decision that many other judges would have reached. That did not, of course, matter – the important thing is that they reached it honestly and professionally. The only reason it could appear on an impeachment charge was that the government and the 117 MP's who had all taken to the government whip, disliked the consequences of the decision, and it is that motivation that strikes at the heart of judicial independence. No honest lawyer, with any respect for the principles of his or her profession, could support such an impeachment and those of the 117 who were lawyers deliberately made a false accusation of misconduct against a judge for doing her judicial duty. I can think of no behaviour more likely to bring the profession into disrepute, although in fact it brings these individual MPs into disrepute. As far as Sri Lanka's membership of the Commonwealth is concerned, there can hardly be a more blatant breach of the Latimer House principles.

41. The Count 8 accusation against a judge of misbehaviour for doing her duty did not stand alone. It was no accidental inclusion, overlooked by MPs when they signed up to the impeachment. There was another charge, related to the court's dismissal of the Solicitor General's unattractive technical argument for adopting a literal interpretation to dismiss one of the petitions,[14] which had been "delivered" on time, but addressed to the "Secretary General of Parliament" rather than to the "Speaker of Parliament". As the petitioner's counsel pointed out to the court, the Solicitor General's argument was tantamount to saying that a rule requiring delivery to the Chief Justice could not be satisfied by delivering it to the Registrar of his court. Moreover it would be hopelessly impractical, because the Speaker is a grand figure (especially grand when he is the elder brother of the President) and

[14] The petition was No. 03/2012.

petitioners, process servers and lawyers cannot barge into Parliament or serve him personally in his limousine or when he is surrounded by security guards. Citizens usually approach him through the Secretary General of the Parliament, who is, in effect, the Speaker's gatekeeper and Parliament's administrator. The Solicitor General's reliance on the literal rule of construction was absurd and impractical, which is one reason why, the literal rule has fallen out of fashion, as Lord Steyn has pointed out:

> "The tyrant Temures promised the garrison of Lebastia that no blood would be shed if they surrendered to him. They surrendered. He shed no blood. He buried them all alive. This is literalism. If possible it should be avoided in the interpretative process"[15]

The Chief Justice and her colleagues dealt patiently and correctly with the submission of the Solicitor General, the government's lawyer. They quoted all of Article121, which showed that the purpose of requiring an urgent delivery to the Speaker was so that Parliamentary proceedings on a challenged Bill could be suspended as soon as possible, while the Supreme Court decided on its constitutionality – and this purpose would be as well served by delivery to the Secretary General of Parliament as to the Speaker. This "purposive construction" is one way of ensuring that the law conforms to common sense, and many judges would have rejected the Solicitor General's literal construction, which would have made the right to citizen petition depend on whether the citizen could get close enough to the Speaker in time to thrust the petition into his hands. Any court prepared to take this pettifogging approach

[15] The example is from William Paley. See *Sirius Insurance v FAI* (2004) 1 WLR 3251, per Lord Steyn.

to protect the government from having its unconstitutional plans overruled would be open to serious rebuke.

42. Nevertheless, Count 7 of the impeachment accused the Chief Justice of misbehaviour for not upholding the Solicitor-General's argument:

> *"Whereas with respect to Supreme Court Special ruling no's 2/2012 and 3/2012, Dr. Bandaranayke has disregarded and/or violated Article 121(1) of the Constitution by making a special ruling of the Supreme Court to the effect that provisions set out in the Constitution are met by the handing over of a copy of the petition filed at the court to the Secretary General of Parliament despite the fact that it has been mentioned that a copy of a petition filed under Article 121(1) of the Constitution shall at the same time be delivered to the Speaker of Parliament".*

This charge was clumsily worded and incompetently drafted – the court's ruling was in fact confined to petition 3/2012. It was a shameless attempt to re-run the unrealistic argument of the Solicitor General. The same objection applies to Count 7 as to Count 8: the MPs were alleging misbehaviour against a judge for delivering an exemplary judgement on the purposive interpretation of a Constitutinal provision.

43. They were taking issue moreover, with the legal basis of a decision which was not only correct, and which most courts would have reached, but which *only the Supreme Court had the right to reach.* That is clear from S125(i) of the Constitution.

> *"The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the interpretation of the Constitution..."*

It was the duty of the Chief Justice to preside over such a question, and even if she and her colleagues came to what other courts might think a wrong decision – if they preferred a good argument to a better one (although in truth both the Solicitor General's arguments were not very good) then the decision must stand as the correct interpretation until such time as the Supreme Court itself reconsiders the issue. It is monstrous to charge a judge with misbehaviour for doing her duty. Charges 7 and 8 did exactly that, and their inclusion proves beyond any doubt that this impeachment constituted a blatant attack on the independence of the judiciary and the Latimer House principles. This country's government, and this country's parliament, were out to remove a judge because they disliked her honest and expert decisions. The fact that, in the end, the Select Committee did not need to consider these two charges does not matter. The very that they were made matters a great deal.

44. The third impeachment charge related to the *Divineguma* Bill was risible. So furious were the 117 MPs about the Supreme Court's decision that in Count 10 they accused the Chief Justice of bias because one of the petitioners in the case (the Centre for Policy Alternatives) had, twenty years before, published an academic article she had written when she was a law lecturer at the University of Colombo. No rational person would consider this a ground for removal of a judge for misbehaviour, or indeed for any suggestion that she might be biased on an issue of statutory interpretation (from which she could obtain no possible benefit) because one of the petitioners happened to be a

public interest NGO which had once published an article she had written. It was obviously not "serious misbehavior," or misbehaviour of any sort.

**b). THE JSC CHARGES**

45. No less than six charges related to the decisions taken by the Judicial Services Commission in pursuance of its disciplinary functions under the Constitution. None of these can be described as "misbehaviour". Count 11, for example, alleged that a magistrate's brother claimed that she had been "harassed" by a JSB decision – with no details at all of the decision, or the "harassment". Count 12 is nonsensical (the JSC is accused of acting *ultra vires* because it "ordered the magistrate's right to obtain legal protection for lodging a complaint in police against the harassment meted out to her by the Secretary of the JSC". What does this mean? Did the 117 MPs ever read the charges? (perhaps – it was widely rumoured they signed blank sheets of paper). Did they not realise that her decisions were all supported by her fellow Commissioners who were both Supreme Court judges?

46. Counts 13 and 14 accuse the Chief Justice of misbehaviour because the JSC discouraged magistrates from going direct to police to seek protection, but directed them to route such requests through the Commission. This seems an eminently sensible policy, given that the JSC was in overall charge of maintaining security for judges. Several of the charges make accusations against the Secretary of the JSC, Manjula Thilakaratne, who had angered the government – and certainly the President – by his September press releases. Count 6, for example, accused the Chief Justice (it did not mention her judicial colleagues) who had joined in the decision of appointing Thilakaratne "disregarding the seniority of judicial officers" – as if the JSC was somehow debarred from appointing on what it considered to be merit. (Article 111G of

the Constitution simply says that the Secretary shall be selected "from among senior judicial officers" and Thilakaratne was one such. He was more senior, in fact, than some previous Secretaries to the Commission had been at the time of their appointment. In none of these cases could "serious misbehaviour" be a reasonable description of work undertaken by the Chief Justice, with the agreement of her other judicial colleagues, in administering the courts and the judges. They are all trivial and unparticularised, and accuse her of no criminal offence or of any behaviour that could be described as corrupt or of a kind that would make and reasonable person think her unfit to judge.

**COUNTS 9 & 11**

47. These two charges are worth briefly examining, as they provide proof positive of the irresponsibiity and incompetence of those who framed them and of the 117 MPs who signed them as fit for impeachment proceedings. Both are premised on

*"the absolute ruling stated by the Supreme Court in the fundamental rights violation case, President's Counsel Edward Francis William Silva and three others versus Shirani Bandaranayke 19912 New Law Journal Reports of Sri Lanka 92..."*

48. Count 9 alleges that "she acted in contradiction of the said ruling" and Count 11 alleges, on the say-so of a magistrate's brother, that she "harassed the said magistrate". Anyone reading the charge would think that the Supreme Court in 1992 had, on a challenge to her appointment, delivered a ruling on Mrs. Bandaranayke that constrained her in some way which she had ignored. The date of the cited case was odd (it was several years before her appointment) and I could not find it in the New Law Journal of Sri Lanka – I stopped looking when it was pointed out to me that these reports ceased to be published in the 1980's! I did find the case in the Sri Lankan Law Reports for 1996, and have carefully read the decision. It was not a ruling that in any way

constrained or commented upon Mrs. Bandaranayke or her suitability as a Supreme Court judge. It was entirely concerned with the President's power of judicial appointment, and it challenged her appointment only on the ground that the President had not consulted the Chief Justice. The petitions were quickly dismissed, first because the President had sole discretion in exercising his power of appointment, and secondly because the petitioners had produced no evidence that he had not consulted the Chief Justice or sought the co-operation of the judiciary in her appointment. The petitioners, seemingly upset annoyed that she was a woman and one who held and had expressed opinions, objected that she had "views and conduct" about political issues, to which the court replied "Her views and conduct, even if they related to political views, were neither illegal nor improper". It was absurd to suggest that she had somehow disobeyed this "ruling" or disobeyed it in a way that justified her impeachment.

49. The Chief Justice was not, in the event, convicted or acquitted on the three *Divineguma* counts or the 6 JSC charges. They have simply been left hanging to blacken her name. She was convicted on counts 1, 4 and 5 which I shall consider in detail after explaining the procedure which led to these verdicts. She was acquitted on counts 2 and 3.

**TRIAL BY SELECT COMMITTEE**

50. On the subject of the fairness of removal procedures, international law is adamant: extirpating a judge from his or her office determines their rights and obligations, and since "serious misbehaviour" usually means a criminal offence, it attracts the full force of protections in Article 14 of the ICCPR.

That means

- a fair and public hearing
- by a competent, independent and impartial Tribunal
- the presumption of innocence
- adequate time and facilities to prepare a defence
- the right to cross-examine any hostile witnesses and to call witnesses.

Each one of these safeguards was blatantly ignored by the eleven person Select Committee (seven government Ministers, plus four opposition MPs who soon resigned) appointed by Speaker of the House Rajapaske on 14 November to investigate and report to Parliament. Just three weeks later, on 8 December, the seven government Ministers reported her guilty of three charges. The Select Committee's breach of fairness standards may be summarized as follows:

**a) Public Hearing**

51. The Select Committee sat in secret. This was a consequence of Standing Order 78A(8), which requires secrecy until a "finding of guilt" is reported to Parliament. But Standing Orders are not laws – they can be altered or suspended, and the Chief Justice and her counsel repeatedly requested this protection. It was refused, and both her counsel and the opposition MP's spoke of the insulting and demeaning treatment she received, out of public sight, from several ministers. "At various stages of the proceedings" says one of her counsel, "two members of the Select Committee hurled abuse and obscene demands at the Chief Justice and her lawyers and addressed the Chief Justice in a humiliating and insulting manner." This is to some extent corroborated by the four MP's, in their resignation letter: "the treatment

meted out to the Chief Justice was insulting and intimidatory and the records made were clearly indicative of preconceived findings of guilt". Had the proceedings been open to the public, this kind of behaviour might not have occurred.

52. As I have pointed out above, (para 19), Standing Order 78A(8), which requires secrecy until a 'finding of guilt' is made, appears *ultra vires* Section 106 of the Constitution, which requires such committee proceedings to be open to the public. In any case, it is an order ostensibly made for the protection of the accused judge, and the Chief Justice's leading counsel explained to the Committee that she wished to waive that protection and have the trial in public, or at least to have international observers present. This was supported by opposition MPs, but the Chairman ruled that the Committee was bound by the Order. It could, of course, have asked the Speaker to amend or suspend it – the request was made on 4th December, before the 'trial' began on the 6th – but the government Ministers apparently had no wish to let the public observe their own behaviour, or that of their witnesses, and the request was refused,[16] on the basis that it was not possible. It was possible, of course, because the Speaker could immediately have called the Standing Orders Committee (which he chairs) to advise the House to amend or suspend 78A(8). It need hardly be said – Jeremy Bentham said it, and it still holds good - that "publicity is the very soul of justice. It keeps the judge, while trying, under trial". These proceedings, and particularly the evidence given on December 7th, would have come under public scrutiny and the prejudice of the Committee would have been palpable. It is essential, in cases of this kind, for the public to hear the witnesses, because if they tell lies others will come forward to confound them. The Chairman of the Committee, by refusing to suspend the Standing Order after its protection had been waived, ensured that justice was not seen to be done.

[16] See record, Parliamentary Series No.187, 190.

b) A Tribunal that is:

53. Independent

This means "independent of government". Yet Speaker Rajapaske deliberately chose seven senior government Ministers. At very least he might have scoured the Parliament for government-supporting MP's who had a reputation for independence or had some form of pubic and legal distinction: instead he chose six members of cabinet and a junior Minister, all of them angry about the government's defeat by the Chief Justice's rulings over the *Divineguma* Bill.

54. Impartial

Not only was the Select Committee majority made up of government Ministers, but two of them had recently suffered judgements against their personal interests by Supreme Court benches chaired by Mrs. Bandaranayke. On 23 November she appeared before the Committee and requested recusal in particular of Dr. Senaratne, whose wife's employment claim she had dismissed earlier in 2012 and whom she believed to harbour a grudge against her, and Mr. Weerawansa, whose appeal over a personal matter she had dismissed in 2010. The Ministers allegedly replied that the rule against bias did not apply to members of Parliament – an absurd proposition, although it accurately reflected the position taken by the Speaker in appointing them. The Chairman rejected the application.[17] He was a government minister, as were the other

[17] Ibid, 191.

six, who had signed the impeachment charges and were now embarking on a quasi-judicial inquiry into the charges that they themselves had brought. The judges and magistrates of Sri Lanka (below Supreme Court rank) all issued a statement, pointing out that "in no country does the party that makes the charges themselves inquire into the same charges."[18]

55. Competent.

None of the Committee members had law degrees had professional experience as adjudicators. They were party politicians, cabinet Ministers whose first loyalty was to the government they had sworn to serve, and which had been caused great problems by the *Divineguma* decision. The angry tone of the Select Committee judgement, and its frequent foray into rhetoric, far-fetched or unsubstantiated inference, and abuse of the Chief Justice, is compelling evidence of their unfitness for the task. The very fact that they produced a 15 page judgement the day after hearing testimony about complex matters by 17 witnesses, suggests that part of the judgement had been drafted before they heard the evidence, and certainly before they had time to analyse it properly.

c) Presumption of Innocence.

This involves, at very least, the rule that a prosecution must prove guilt – in criminal charges, beyond any reasonable doubt. This "golden thread" that runs through the criminal law is not mentioned at all in 78A. The Committee was asked

[18] Ibid.

by the Chief Justice to adopt this criminal standard, and the four opposition members supported her request and wanted a *prima facie* case to be made in relation to each charge, but these requests were refused. The findings of guilt were made on some inarticulate standard – whether on a hunch or a presumption of guilt, or pure prejudice or on a balance of probabilities. This is to fly in the face of fairness – as the Privy Council said in 2008 in *Campbell v Hamlet*

> *"That the criminal standard of proof is the correct standard to be applied in all disciplinary proceedings concerning the legal profession their Lordships entertain no doubt"*[19]

56. Lord Mustill, in his report to the Parliament of Trinidad and Tobago on the impeachment of Chief Justice Sharma, firmly rejected arguments that a lesser or 'flexible' procedure would suffice:

> *"The allegations against the Chief Justice are so grave, and the effect of an adverse finding so destructive, that the requirement of proof must be at the extreme end of the scale".*[20]

The failure to adopt this – or any – burden and standard of proof was the clearest breach of the presumption of innocence.

57. The presumption also requires restraint in making prejudicial statements about guilt whilst a trial is underway. Members of the government's

[19] (2006) 66WLR 346, per Lord Brown of Eaton-Under-Heywood.
[20] Report of Chief Justice Sharma Impeachment Tribunal; Lord Mustill, Sir Vincent Eloissac, Mr. Morrison QC, 14 Dec 2007, para [82].

parliamentary group made public attacks on the Chief Justice while the so-called 'trial' progressed in secret, and (quite disgracefully) certain members of the Select Committee appeared on television claiming that they were uncovering large sums of undeclared money. But the most serious breach of the presumption related to public demonstrations against the Chief Justice. On the first day of the trial, a large crowd demonstrated against her outside Parliament, shouting insulting slogans and waving abusive placards. There were allegations at the time that their transport was organized by members of the government's parliamentary group. I certainly do not believe that the demonstration was spontaneous – the *Divineguma* judgement had been delivered some time before and the Supreme Court's interpretation of the Constitution was not an obvious spark for public protest. If the demonstrations were organised by government supporters (and they certainly were not stopped or dispersed by any government orders and there is some evidence that they were paid). This would be further proof of the denial of fair trial by putting psychological pressure on the Committee to convict and on the Chief Justice to give in or give up.

**d) Details of charge and time to prepare defence**

58. The entitlement to be given details of the charge and time to prepare and present a defence are fundamental to the fairness of any "trial" and are guaranteed by Article 14(3)(a) and (b) of the ICCPR, by the Latimer House Guidelines,[21] and the Beijing Principles which stress that the right to a fair hearing remains intact even when removal by parliamentary procedures is required.[22] But standing order 78A merely provides:

[21] Guideline VI.1 para (a)(i).
[22] Beijing Principles, para 26.

i. that a copy of "allegations of misbehaviour" should be transmitted to the judge but not any particulars of those allegations;[23]

ii. that the committee *shall* require such judge to make a written statement of defence;[24] within a period specified by the committee;[25]

iii. The judge shall have "a right to be heard ... and to adduce evidence".[26]

These provisions are woefully inadequate to protect the judge. There is no requirement that the allegations be particularised, and charge 1, for example, on which she was convicted, was vague to the point of incoherence. Sri Lankan criminal law stiputes that any criminal charge shall be fully particularlised (times, places, dates, persons, things, etc.) and not merely a vehicle for broad allegations.[27]

59. The mandatory rule that the committee "*shall* require the judge to make a written statement" is a breach of the right not to incriminate oneself: accused judges, like everyone else, should in principle have the right to remain silent. Of course, normally judges will wish to speak ouit, to assert their innocence or explain away allegations. But there may be occasions where the charges are so nebulous, or the evidence non-existent, or the proceedings so unfair, that they would be fully justified in refusing to make any statement, or else having their lawyer make a legal submission of "no case to answer". The requirement that they *must* answer is grossly unfair. There is no rule in the Standing Orders that the judge should be given reasonable time or facilities to prepare a defence: the timing is left to the Select Committee. Since it is under

[23] 78A(3).
[24] Ibid.
[25] Ibid.
[26] Ibid.
[27] Section 165(1) Code of Criminal Procedure Act No 15 of 1979.

an international law duty to give fair trial, the Committee itself should have ensured that the judge was given ample opportunity to contest the charges.

60. That did not happen. The committee was selected and met on 14 November 2012. That evening it caused the charge sheet to be delivered to the Chief Justice, with a direction that her written statement be received no later than 22 November 2012. This was a ridiculously short time in which to refute in any detail the 14 charges, which ranged from transactions by relatives in Australia to decisions taken by the JSC. The Chief Justice's lawyer asked on several occasion that the deadline be extended but the Committee chairman refused. On 20 November 2012 the judge asked for further information and some particulars of the charges – this too was refused. On 23 November 2012 she appeared with counsel in front of the committee and asked to know the procedure the committee intended to follow – whether it was calling witnesses and if so whom, what standard of proof would it apply, and so on – but answer came there none. The committee merely told her to present her defence statement by 30 November: there would be a hearing on the 4th December and the trial would start on 6th December. It rejected her application that two of its members should stand down because they had personal bias against her. On 4th December (the day of the big demonstration against her), counsel for the Chief Justice requested a list of witnesses and relevant documents, but they were not provided. On the 6th, the Chairman announced that no witnesses would be called. At 4pm on that day a bundle of 80 documents, totalling over 1,000 pages, was given to the Chief Justice and she was told that the inquiry would begin to consider charges 1 and 2 at 1.30pm the next day, 7th December. Her request that independent observers from local and international bar associations attend the hearing was rejected.

61. In my opinion, these facts demonstrate a clear breach of the fair trial rules relating to particularised charges and to adequate time to prepare defences. It

is possible that the Chairman was misinforming the Chief Justice when he said that no witnesses would be called – it would be surprising if the committee simply decided overnight to summon 16 persons who were all available to testify the next day. Even if he believed on the 6th that there would be no live testimony, to deliver 1,000 pages of evidence to the defence at 4pm and tell them to be ready for trial in less than 24 hours is preposterously unfair. It demonstrates, indeed, the Committee's contempt for justice and its refusal to provide the Chief Justice with even a semblance of fairness. The four committee members from the opposition say they had not been consulted about the chairman's decisions, and they resigned on the afternoon of the 6th in a letter which protested about the lack of time given to the Chief Justice and her lawyers to study the evidence. I am forced to concluded that the Select Committee chair and his fellow ministers, all of whom took the government whip, were determined to convict the Chief Justice, come what may.

**Calling and cross-examining witnesses**

62. Lawyers should not, by virtue of their presence, give credibility to a proceeding that they know to be a sham. After the chairman rejected their application to have the proceedings heard in public, and their further application to have independent observers attend, and having heard him insist that there would be no live witnesses, the Chief Justice and her counsel withdrew, announcing that they would no longer accept the legality of a body steeped in such hostility towards the head of the judiciary. Later that day four opposition members resigned, pointing out that they, too, had not been given sufficient time to study the documents and that it was clear to them that the seven ministers had already made "preconceived findings of guilt". There had been no decision about procedures or the standard of proof: "we requested a direction that the Chief Justice and her lawyers be given an

opportunity to cross-examine the several complainants who had made the charges against her" the four MPs said, but this was not accepted.

63. The right to cross-examine accusers is fundamental to fairness. Article 14(3)(e) of the ICCPR guarantees, as a minimum, the right of an accused "*to examine, or have examined, the witnesses again him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.*" The Chief Justice and her counsel withdrew on the afternoon of the 6th December, having been assured that the committee would allow no live witnesses to be called and would rely only on the documents, albeit documents that the Chief Justice and her team would not be given sufficient time to absorb and deal with. The four opposition MPs withdrew shortly afterwards and the committee reconvened on 7th December without them. It was then, and in secret, that the 7 members summoned no less than 16 witnesses and heard their testimony! Just 24 hours later they issued a 15 page 'judgement', finding the Chief Justice guilty of charges 1, 4 and 5.

64. It might – indeed, was – said that by withdrawing, the Chief Justice forfeited her right to confront her accusers or - more realistically in this case – to extract from them by cross-examination the information that would demonstrate her innocence. In my view, having been firmly told that no evidence would be allowed from either side, she had been led to withdraw under false pretences.[28] The Committee's conduct involved a breach of faith - it should at very least have told her lawyers, on the morning of the 7th, that it had changed its mind and was summoning witnesses. The Chief Justice should have been invited back to cross-examine and to call her own

[28] The Chief Justice, in a subsequent petition to the Supreme Court, states that she was specifically informed that that no witnesses would be called, that the burden was on her to disprove the charges. See Petition, *Dr Bandaranayake v Chamal Rajapakse & ors*, filed 19 December 2012, [59-61] (Asian Human Rights Committee, Collected Documents, 10).

witnesses, including the Chief Justice herself, whose right to be heard in her own defence is one of the very few rights granted by the Standing Order. The Chief Justice had attended the proceeding voluntarily, and despite all the unfairness she would certainly have decided to testify and might well have taken the opportunity to cross-examine. It would, as will become clear, have been illuminating had she been allowed to question Justice Thilakawardene, whose recollection of the circumstances of being removed from the "Trillium" case was later challenged, with court documents that were unavailable at the time of her testimony. This opportunity was not afforded to the Chief Justice, thanks either to the misleading behaviour of the committee chairman or (at best) by his change of mind about calling witnesses once she had withdrawn. His failure to invite her back to question them was a serious breach of the ICCPR. Standing Order 78A at least envisaged an adversary procedure in which she would have some evidential rights, and the Committee's conduct denied her the opportunity to cross examine, to give evidence in her own right, and to call her own witnesses.

* * *

65. The Select Committee, under the aegis of Speaker Rajapakse, blatantly denied due process and natural justice. These are fundamental for any procedure that leads to the removal of a judge. Not only are they required by the ICCPR, the Latimer House Guidelines and the Beijing Principles, but also by decisions of international courts and tribunals. The UN's Human Rights Committee had previously pointed out in relation to Sri Lanka that "the procedure for the removal of judges from the Supreme Court is incompatible with Article 14 of the ICCPR, in that it allows Parliament to exercise considerable control over the procedure" and it had recommended that the country strengthen the independence of the judiciary by providing for

judicial, rather than parliamentary, supervision and discipline.[29] This was actually attempted by way of a constitutional amendment in 2000, which would have set up a Mustill-type tribunal of overseas judges, but the initiative lapsed. The Inter-American Court of Human Rights, like the European Court of Human Rights, has insisted that "the authority in charge of the impeachment procedure to remove a judge must behave impartially in the procedure established to this end and allow the latter to exercise the right of defence." That court decided that three judges must be re-instated, because their impeachment procedure "did not ensure their guarantees of due legal process." That was, most assuredly, the case with Dr Banadarenyke.

66. What Standing order 78A(8) terms "a finding of guilt" was reported to the Speaker by the Select Committee on December 8 – the day after hearing the witnesses. It was a document of 35 pages, which must have been finalised, if not written, the previous evening: a rushed judgement which serves to emphasise the injustice of proceedings. Standing Order 78A(1) requires a month to elapse between the committee request and impeachment resolution, so on January 9th – the first possible date – such a resolution was presented to parliament. A two day debate ended with its passage – the government MPs and their supporters, under the party whip, voted that the speaker "address" his brother the President and request the removal of the Chief Justice.

67. By this time, the independence of the Sri Lankan judiciary had ended, and the Beijing and Latimer House principles had been abandoned. The Chief Justice had been impeached by the government and its supporters, firstly by the charges brought in November which had accused her of misconduct for doing her conscientious duty in *Devinegama* and as Chief Justice at the JSC, and secondly by putting her through a grotesquely unfair secret trial at which she was abused and denied her rights, while outside parliament

[29] Concluding Observations on Sri Lanka, UN document CCPR/CO/79/Add.86 para [16].

demonstrators brought on government buses bayed for her blood.[30] On any view, this constitutes a shameful abuse of judicial independence. The President had power, of course, to stop it, but had fanned the flames and may have authorised the rejoicing when the impeachment motion was passed, at 7pm on Friday 10 January. Celebratory fireworks were set off outside parliament, without intervention from police or military, and according to the press reports four of the brothers Rajapaske – President, Speaker, Environment Minster Basil and Defence Secretary Gotabaya, along with other ministers, appeared on a balcony to watch a special fireworks display put on by the Sri Lankan navy. For four hours a jubilant crowd surrounded the Chief Justice's home, in the knowledge that Mrs Bandaranayake and her family were inside. A "milk rice celebration" took place, a free meal was served and fireworks were lit (presumably at government expense) and later the mob (said by some reporters to be members of the civil defence force in plain clothes) was addressed by members of the Select Committee and told to urge Mrs Bandaranayake to resign. They did so – when not singing and dancing to loud music.

68. A nation whose leaders treat the head of the judiciary as if she was a public enemy, abusing the democratic process to put her through an unfair trial as punishment for doing her constitutional duty and then celebrating her unjust impeachment with feasting and fireworks, deserves to have those leaders treated by the international community in ways I shall suggest at the end of this report.

**THE CONVICTION CHARGES**

[30] Much of the contemporary press coverage collected by the Asian Human Rights Commission reports on a government publicity campaign against the Chief Justice by posters and leaflets (p. 303), bussing in demonstrators, state media bans against her (p.230-231). See, AHRC, 'Collection of Documents', Revised Edition, 21 December 2012.

**Count 1**

69. In order to try to understand the case against the Chief Justice on this count it is necessary to set out it out in full:

> *"Whereas by purchasing, in the names of two individuals, i.e. Renuka Niranjali Bandaranayake and Kapila Ranjan Karunaratne using special power of attorney licence bearing No. 823 of Public Notary K.B. Aroshi Perera that was given by Renuka Niranjali Bandaranayake and Kapila Ranjan Karunaratne residing at No. 127, Ejina Street, Mount Hawthorn, Western Australia, 6016, Australia, the house bearing No. 2C/F2/P4 and assessment No. 153/1-2/4 from the housing scheme located at No. 153, Elvitigala Mawatha, Colombo 08 belonging to the company that was known as Ceylinco Housing and Property Company and City Housing and Real Estate Company Limited and Ceylinco Condominium Limited and is currently known as Trillium Residencies which is referred in the list of property in the case of fundamental rights application No. 262/2009, having removed another bench of the Supreme Court which was hearing the fundamental rights application cases bearing Nos. 262/2009, 191/2009 and 317/2009 filed respectively in the Supreme Court against Ceylinco Sri Ram Capital Management, Golden Key Credit Card Company and Finance and Guarantee Company Limited belonging to the Ceylinco Group of Companies and taking up further hearing of the aforesaid cases under her court and serving as the presiding judge of the benches hearing the said cases;"*

70. This first charge alleges – if any sense is to be made of its language – that the Chief Justice somehow disguised a purchase of a property in the name of her sister and brother-in-law, and then presided over a case which related to its purchase. No doubt it was drafted in haste and on hunch, but it unravelled in the course of proceedings. It turned out – as the Chief Justice explained in her defence statement – that there was nothing secret or sinister about the transaction. Her sister and husband had lived for twenty years in Perth, they

wanted to buy a home in Colombo, she held their power of attorney and had inspected the flat, been sent the money and paid it to the property company, Trillion, on their behalf. The documents evidencing this were all above board: the power of attorney had been specifically given for the purpose, and she had scrupulously declared, in her public filing of assets and liabilities, a sum that she was "holding on behalf of my sister to pay for the apartment". This was so clear, indeed, that on charge 3 – which accused her of not making a proper declaration in relation to this matter – the Select Committee was forced to acquit her.

71. So how came the Committee to convict her on count 1? It is not for me to pronounce her innocent of a misconduct charge, although I have combed the evidence (published in two volumes, comprising 1600 pages) in an attempt to understand the Committee's finding, that "in respect of this case, (her) conduct is in violation of the Constitution and is highly suspicious",[31] and that the evidence "gives the Committee the clear impression that she has something to hide and has deliberately violated the Constitution and neglected to discharge the duties and responsibilities entrusted in her".[32] A guilty verdict should not, of course, be based on suspicion or impression, but let that pass. What was the actual evidence suddenly produced on 7th December, after the Chief Justice and her lawyers had withdrawn and had been told that no witnesses could be called?

72. The key witness was another Supreme Court Judge, Justice Thilakawardame, seemed to have a grievance against the Chief Justice. She told the Committee that for the last three and a half years she had been presiding over a massive civil case involving a collapsed pyramid scheme in which 9,000 investors had lost deposits. One of the companies involved was Trillion, the real estate

[31] No. 187, 195.
[32] Ibid, 197.

company that had sold a house unit to the Chief Justice's sister. One depositor had asked for a legal issue to be referred to a five-judge court, and she had mentioned this to the Chief Justice who had simply referred the matter back to Justice Thilakawardame's three-judge court. Later, the Chief Justice took over the case with two other judges, and the witness could not fathom the reason because she had worked so hard on it. This case was "so special to me as a person" she said, although she volunteered that the two other judges were grumbling – "The judges are objecting me" – (i.e. objecting to sitting with her) - she assumed because "the case would take sometimes five hours of work".[33] The witness was speaking from memory and seemed annoyed with the Chief Justice for "taking me off the case". The Committee did not bother to call the other judges, or any of the senior counsel in the case. It jumped to the conclusions that the Chief Justice had deliberately violated the Constitution by failing to empanel a five-judge court and was therefore guilty of misconduct under Count 1.

73. This was not, of course, an allegation actually made in Court 1, and it was grotesquely unfair to convict the Chief Justice of it without giving her the opportunity to make a defence statement about it. But in any event, as an allegation of misconduct, it is palpably absurd. Under Article 132(3)

> *"the Chief Justice may*
>
> *i. of his own motion or*
>
> *ii. at the request of two or more judges hearing any matter or*
>
> *iii. on the application of a party...."*
>
> *iv. direct a five-judge court, but only if the question involved is in the opinion of the Chief Justice one of general and public importance".*

[33] Ibid, 1515-1517.

The point which one depositor (counsel for all the other depositors refused to join him) wanted to try to argue before a five-judge court was of no apparent public importance. The Chief Justice merely said, when it was mentioned to her, that it should be raised before the judges hearing the matter – obviously so they could decide whether to support the request, as 132(3)ii) envisages. This was a perfectly proper and sensible court management decision, entirely consistent with the Constitution, and it was preposterous for the Committee to conclude that it was a "deliberate violation" of the Constitution and a neglect of duty.

74. But there was another charge to be spun out of thin air, unmentioned in Count 1. The Committee said there must have been an "ulterior motive" in taking Justice Thilakawardame off a case to which she had been so "painstakingly committed". The motive, they jumped to conclude, was for the Chief Justice to hear a case in which she had an interest, namely to somehow help her sister who had purchase the home unit from Trillion. The Committee members, like amateur but prejudiced sleuths, never stopped to ask themselves whether there might be another explanation for taking a judge, whose brethren were "grumbling" about her, off a case. I have studied the judgements actually delivered in that case (the Committee does not seem to have read them) and they show that the court was not called upon to do very much at all: they only had to rubber stamp arrangements already agreed between leading counsel for the various parties (including the Attorney General) and by an expert group of Chartered Accountants. The court under Justice Thilakawardame did not have to do very much work. And as the Chief Justice explained (in a filing in the Supreme Court after the Committee's verdict) there was a very good administrative reason for moving the case from this judge – namely that the other judges refused to sit with her. The Chief Justice said that "having considered all the facts and circumstances and after consulting senior judges of the Supreme Court", she decided to move the case away from the judge. This would obviously have been a

justifiable and prudent action in the circumstances subsequently outlined by the Chief Justice in her affidavit, which the committee could have verified by calling other senior judges, but this Committee was so prejudiced against the Chief Justice, and so determined to find her guilty, that they failed to investigate further.

75. Any close study of the Commission's technique of fact-finding would demonstrate, in relation to other witnesses, a degree of bullying, threatening and putting words in mouths that would never be allowed in a courtroom. A member who appears on the transcript as "The Hon Nimal Siripala de Silva" was particularly objectionable and abusive, and was not stopped by the Chairman. "You should be prosecuted"; "You are guilty of a very very grave offence that we have to recommend... (be prosecuted)". He would say to two of them and possibly shout at them although it is impossible to be sure because the proceedings were not public, and the transcript released later does not reflect his tone of voice.[34] His particular targets were the lawyer and the Chief Executive for Trillion, who claimed they were entitled to sell the home units and had been allowed to do so by the Expert Committee. The Select Committee insisted – and found – that court orders made in 2010 prohibited this unless the court gave its express permission. The court orders, and the permission it subsequently and specifically gave, are not clear: it certainly authorised the Committee of Accountants to approve "the day-to-day activities of the real estate company", which might be thought to include selling real estate. The fact was that Trillion did sell many of its units, one of them to the sister of the Chief Justice. Whether the company was acting rightly or wrongly in doing so with the permission of the liquidators but not expressly of the Court cannot be laid at the door of the purchaser, let alone the purchaser's sister. An allegation surfaced – it was not in the charge - that the property company gave the purchaser a discount because it knew

[34] See, Series 137, 1351-7.

that she was the Chief Justice's sister, but there was no evidence that this fact (if it was a fact) was known to the sister or to the Chief Justice. Property companies with new buildings to sell may well decide to offer discounts to attract well-connected tenants. In any event, there was actual evidence that the so-called 'discount' was in fact given to all purchasers – which would make the point a complete non-issue.

76. The real issue – and the only true issue – on Count 1 is whether the Chief Justice deliberately sat on a case in which (so the Committee found) "the Chief Justice had a pecuniary interest in the subject matter" and whether (as it failed to go on to consider) this ground for disqualifying her from the case amounted, in the circumstances, to misconduct so grave that it should disqualify her permanently from sitting as Chief Justice. The Committee do not seem to understand this distinction at all: they cite with a flourish the *Pinochet* case and other well-known precedents for disqualifying judges from *a particular case*, but do not seem to realise that in none of them was it ever suggested to be misconduct capable of *removing judges from the bench* because there was no suggestion that it was done deliberately or knowingly. The Lord Chancellor with shares in the Dimes Canal Company, or Lord Hoffman with his *pro bono* work for an Amnesty Trust, were disqualified from sitting in a particular case, but that did not mean they were guilty of misconduct and had to be removed from the judiciary. Where was the evidence that the Chief Justice had ever made any decision which benefited her sister?

77. There is, for a start, no evidence that she made any decision at all. There were, apparently, routine hearings at the end of 2012 in which no judgements were delivered, so her sister could not have benefited from non-existent decisions. No evidence of any decision on the matter by the Chief Justice can be found in the 1000 pages of Committee material. The sister and her partner had bought the unit, and whether or not Trillion had power to sell it with the approval of the Chartered Accountant's Committee was not an issue that

would be likely to alter the sister's position as a purchaser for value, and if this question were ever to become relevant at a future hearing then no doubt the Chief Justice would have recused herself. Indeed it is a remarkable fact that none of the many counsel in the case ever raised the matter with the Chief Justice: the purchase by her sister of a unit was not a secret, and counsel have a duty to raise with judges any fact that might disqualify them. The "hearings" over which the Chief Justice presided appear to have been routine call-overs. The overriding fact is that the Select Committee could not point to any actual decision ever taken by the Chief Justice in which she had a pecuniary interest.

Count 4

78. The fourth count accuses the Chief Justice of "*not declaring in the annual declaration of assets and liabilities that should be submitted by a judicial officer the details of more than twenty bank accounts maintained in various banks*". The Committee, by sending subpoenas to all relevant banks, could find only thirteen accounts, several of them internal bank 'routing' accounts which she had not herself opened, and did not know about, others which were accounts for investment that she had declared as such but in a different section of he disclosure form, and others which she had not disclosed for what seems to be the simple reason that they had no money in them. The Committee declared her guilty of an offence against the *Declaration of Assets and Liabilities Act* (1975) because she had not disclosed these accounts with zero money: "She has neglected declaring such zeroed accounts in the assets declaration."[35]

79. In other words, although she had truthfully declared all assets and liabilities, as the Act requires, at the relevant date, she had not declared bank accounts

[35] Ibid, 212.

which contained no assets at that date. There may be a nice point of statutory construction as to whether this conformed with the Act – it would certainly conform with its spirit – but the Select Committee's ruling on the law, that "it is necessary to disclose all the accounts owned by an officer regardless of the availability or non-availability of a balance" – is a ruling that must be made after proper legal argument, and by a court of law, not a group of politicians. There is certainly no requirement under the Act to disclose empty bank accounts: S.12 merely says that assets and liabilities "includes moveable and immoveable property." To regard an empty bank account as an "asset" seems oxymoronic. This was a ruling on law that these politicians had no competence to make. Non-disclosure was a crime, which could have been brought before a court for a genuine trial. Even if a court were to conclude as they did that an empty bank account *is* an 'asset' and the Act imposed strict liability (which I doubt), the offence would be one of the sheerest technicality and could not amount to serious misconduct.

80. As if in recognition of this difficulty, the Committee called upon the President (to whom judges must make their declarations) to help out. His Secretary attended the Committee, after the Chief Justice and her lawyers had withdrawn, to claim that the judge had not made the Assets and Liabilities Declaration for the year 2001. This meant, the Committee immediately concluded, that the Chief Justice was guilty of an offence. It did not occur to them that this was ten years before she became Chief Justice. They did not wonder, if she had made declarations in every other year since her appointment in 1998, her declaration form had not perhaps gone missing in the President's office? Otherwise, why was she not chased up, or prosecuted, in 2001? Jumping to the conclusion that she must be guilty, without making any enquiry of the Chief Justice herself (who might have produced a copy of the missing form) was typical of the irresponsible rush to injustice which characterised the Select Committee's Report.

81. There was one other legal outrage it perpetrated under Count 4, namely to find her guilty of "misconduct" that was not mentioned in the charge or ever put to her, and which no rational person could ever think could be so described. It had subpoenaed all her bank statements and published them over hundreds of pages as annexures to its Report, so her privacy would be breached. For the most part, she is referred to as "Shirani Anshumala Bandaranayke" with her home address. In some, she is described as "Dr. Mrs. Bandaranayke, Supreme Court, Supreme Courts Complex". In certain accounts she is "Professor Bandaranayke" – obviously her status when she opened them years before, whilst at Colombo University. But the Select Committee said it located some references to her in bank records describing her as "Chief Justice", which of course she was. "The use of one's official designation for personal bank accounts amounts to an abuse of such person's official status" the Committee declared. "Committing such acts is unbecoming of a Chief Justice and the Committee resolves that this is misbehaviour under Article 107(2) of the Constitution".

82. This is plainly ridiculous. "Serious misbehaviour" does not mean "unbecoming conduct", and what can be wrong with allowing your bank to address you by your rank, whether is 'Dr' or 'General' or 'Justice'? There was no evidence that she had requested the designation. Her banker was asked why, in bank records after she was appointed in May 2011, the bank had added "Her Ladyship" to her name, and he replied (no doubt with a shoulder shrug) "It is publicly available information". The banker was bullied and badgered to suggest that there were suspicious transactions that should have been reported, and that even having a number of accounts was suspicious in itself. He denied all their insinuations, and said that the conduct of her affairs had never given rise to any thought on his part to make a report to the Central Bank. To find her guilty of misconduct because the bank changed its records to describe her as "Her Ladyship" seems to be a further example of the pathetic and indeed puerile lengths to which these politicians were

prepared to go in an attempt to destroy the career and reputation of a woman who had done the State much service.

Count 5.

83. This lengthy charge can be summarised thus:

a. The Chief Justice's husband is a suspect in a matter that will be heard by a magistrate.

b. The Chief Justice is, by virtue of Article IIID of the Constitution, the Chairperson of the Judicial Services Commission.

c. As such, she controls all the records belonging to the court that may try her husband, and would be in a position to hear any disciplinary charges against the magistrate.

Therefore she has to be removed as Chief Justice, because

> *"as a result of her continuance in the office of Chief Justice, administration of justice is hindered and the fundamentals of administration of justice are thereby violated and whereas not only the administration of justice but visible administration of justice should take place."*

84. The conviction of the Chief Justice on the fifth count was palpably absurd, if not sexist. There was no allegation that she had *done* anything. Her husband had been summoned to attend the Magistrate's court as a suspect in respect of a bribery offence. On that basis, and that basis alone, the Chief Justice was said to be guilty of misconduct, because the Constitution made her the head

of the JSC, which gave her disciplinary power over magistrates and access to their records. For this reason alone, the charge alleged, she was guilty of misconduct – apparently for remaining in office! The Select Committee nonetheless found her guilty of misconduct, on this reasoning:

> *"a doubt emerges whether a magistrate would perform his duty acting impartially... a doubt emerges with regard to the bias of judges appointed to hear the case. In addition, it is a matter of concern whether justice would be exercised by the judges of the Supreme Court, who serve along with the Chief Justice. When the husband of the Chief Justice becomes a defendant of charges of bribery or corruption, the spouse of such a person holding the office of the Chief Justice of the Supreme Court puts a blemish not only on the process of administration of justice, but also on the whole country and the courts system".*[36]

85. The only blemish, of course, on the whole country is that 117 MPs could bring this allegation, and that 7 Ministers could find it "proven misconduct" and that 255 MPs could endorse that finding and "address" the President by telling him that it warrants her removal. In legal systems throughout the world, it sometimes happens that partners or siblings or children of judges, even of Chief Justices, are accused of crime. Obviously that does not require the judge to resign, but merely to play no part in the disposal of the charges. If there is any doubt that they may not be dealt with by an independent magistrate or judge, that can be removed by special arrangements so that a former or foreign judge hears the case. For a Chief Justice to have a partner suspected of crime in which she was not alleged to have played any part is a misfortune, but it is not misconduct.

[36] Transcript of Judgement, Parliamentary Series 187, 214.

86. In convicting on this charge, I note

i. the presumption of guilt applied to the suspect husband – it is assumed that he is guilty, and the 'doubt' is only over whether the judges will have the confidence to find him guilty.

ii. the burden of proof applied is not a "proof of guilt beyond reasonable doubt" but proof of guilt because there is a 'doubt' over whether other magistrates or judges will act properly in his case.

iii. the sexist assumption in play that a female judge must be tainted by, or somehow responsible for the errors of her husband, or that his dominance over her is such as to make her exercise her influence over other lawyers on his behalf or in his interests.

This is a preposterous finding of 'guilt' of misconduct where there was no "conduct" at all.

**The Supreme Court Intervention**

87. The attack on the Chief Justice cause great dismay among Sri Lankan civil society: hundreds of articles were written in her support in non-government media, lawyers protested and even went on strike, judges at every level below the Supreme Court released statements insisting that due process and judicial independence had been violated. A joint statement of the High Court

and District Court judges and the Magistrates Association deplored the attacks on the Chief Justice, the judiciary in the state media,[37] and the Judicial Service Association protested as well at the contempt of court committed by "certain media institutions maintained by taxpayers money" but with apparent impunity from any action by the Attorney General. But the only real protection she had, like anyone else, against abuse of government power was the law, and ironically she had to appeal to her old colleagues to help. It is not, in my experience, the case that judges are necessarily biased in judging their own colleagues – they are usually unforgiving of fellow professionals who have acted unbecomingly, and the bench is a place where hostilities fester as often as friendships form. However, it does not *look* good, which is why many other countries insist first on criminal jury trials for charges of judicial misbehaviour which amount to a criminal offence or (in the Commonwealth) bring in respected jurists from other Commonwealth countries, like Lord Mustill in the *Sharma* case, to decide on guilt or innocence.[38]

88. So far as judicial review is concerned, the courts are historically reluctant to intervene in the affairs of Parliament. The Bill of Rights of 1689 lays down that proceedings in parliament, the ultimate court, may not be questioned. However that may be in the UK – a country without a written constitution – the precise limits of the separation of powers in other countries will depend on what their Constitution says. Article 125(1) of the Sri Lankan Constitution lays down that "*the Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the Constitution*" whenever it arises in any "*institution empowered by law to administer justice or to exercise judicial or quasi-judicial functions*". The Select Committee was such an institution, empowered by Standing Order 78A to make a "finding of guilt". It was set up under Article 107(3):

[37] Joint statement of the judges, December 3rd 2012, Asian Human Rights Commission, 7.
[38] Judicial Service Association Statement, Ibid 9.

> *"Parliament shall by law or Standing Orders provide for ... the procedure and the investigation and proof of the alleged misbehaviour"*

89. What exactly did this mean? Could a Standing Order provide, for example, that the hearing should be in secret, or that there should be no burden of proof? There was a genuine question of interpretation which the Select Committee refused to address. So the Chief Justice and some other petitioners took the issue to the Supreme Court on 20 November. On 22 November the Supreme Court (3 judges, excluding of course, the Chief Justice) politely and deferentially asked the Speaker, given "the mutual understanding and trust" between the judiciary and Parliament, to adjourn the Select Committee hearing until after it could deliberate and deliver its judgement. The Speaker announced that he would do no such thing – the court had no right to intervene. On January 3rd, however, the Supreme Court ruled that Article 107(3), properly interpreted, meant that Parliament had to pass a law to fix the burden of proof and to guarantee the judge's right to be heard and other basic matters: Standing Orders, which were made by the Speaker and were not in any sense "law", could only govern matters of procedure. That was because any "finding of guilt" by the Select Committee was a final decision which adversely affects the right of the judge to remain in office: it was an exercise of judicial power and Article 4(c) of the Constitution says in terms that any such exercise (except in the case of Parliament in respect of its own members) must be by a body "established by law". The Select Committee had been established by Standing Order, so its proceedings and its determinations of guilt were *ultra vires* the Constitution and so null and void.

90. It was a well-argued and logical judgement interpreting 107(3) purposively to mean that Parliament was obliged to pass a law setting up an impartial body to decided whether misconduct had taken place and laying down the standard of proof it should apply, while Standing Orders would deal with the more routine procedures, such as the powers to obtain evidence, the length of sittings and so forth. I need not go into the details of the judgement. S.107(3) is ungrammatical – *"Parliament shall by law or by standing orders shall (sic) provide for all matters ..."* and then it lists matters that the court said were appropriate for a law (ie a statute passed by Parliament) and other matters ("procedures for the passing of such resolution") appropriate for Standing Orders introduced by the Speaker. It was an elliptical sub-section, and the Court gave it a construction that made it work in the context of Article 4(e), which sets out the basic constitutional rule for the separation of powers. It was a perfectly legitimate construction.

91. Nevertheless, MPs reacted with fury at this perceived attempt by the judiciary to interfere with their sovereignty, and the debates on 9-10 January were dominated by MPs attacking the judges for daring to trespass on their prerogatives. It must be clearly understood that this question – whether a court has power to quash such a finding by a Parliamentary committee – is nothing at all to do with the question of judicial independence. They are quite different issues. But regrettably, I think, because the Supreme Court (and then the Court of Appeal, following its decision) to quashed the Select Committee finding, the argument over the legitimacy of it doing so overshadowed the argument about the palpable breach of judicial independence. In the debate, the two issues became hopelessly mixed up and speakers in favour of the impeachment were able to pose as democrats, fighters for Parliamentary sovereignty against interfering judges. The Sri Lankan government, through its external affairs Minister, one Professor Pereis, has pretended to foreign diplomats that this is really what the case is all about, i.e. the sovereignty of

Parliament. He regularly cites other cases – one from the Philippines, another from the US – pretending that they justify what happened to the Chief Justice, whereas they are really about the separation of powers under the relevant constitution. The government has a case – not a particularly good one, but at least arguable – that the Supreme Court was wrong to intervene. It has no case at all to claim that what happened was not a grave assault on judicial independence.

92. It is necessary, therefore, to disentangle the two issues. Professor Peiris made the main speech for the government on the impeachment, beginning with a reference to "the English Court of Appeal in the Pinochet case" which decided that "in respect of impeachment proceedings, the responsibiity is that of Parliament and not of the courts." The English Court of Appeal was not, in fact, involved in the *Pinochet* proceedings and the House of Lords (which was) decided nothing of the sort. He then expatiated on the *Corona* case, claiming that "the Chief Justice of the Philippines did exactly what the Chief Justice of Sri Lanka did" and the Courts in the Phillipines declined to intervene to halt his impeachment. The two cases are a world apart, and the Philippines Constitution, with Spanish and US legal influences, was not the same as the Constitution of Sri Lanka. Corona was appointed by the disgraced President Arroyo at midnight, just before she was to be replaced by Benito Aquino. Parliament impeached the judges, in televised proceedings lasting several months, in which he was accorded every defence right by Senate President Ponce Enrile, who frequently refused prosecution motions and allowed the defence team of 8 leading lawyers the time, whenever they asked for it, to obtain and study documents. Senators frequently criticised the prosecution and it was Corona, eventually, who could not face questioning over his undeclared bank accounts so he went on television to blame the bank. Interestingly, the Supreme Court did intervene by issuing an order restraining its own employees from testifying, and Speaker Enrile

obeyed the order against the wishes of the Parliamentary prosecutors. So the *Corona* trial was probably as fair as an impeachment by Parliament can be: the Supreme Court was obeyed by the Speaker when it ordered witnesses not to appear, and no one has doubted the verdict, reached upon clear evidence. Professor Peiris explained none of this to Parliament.

93. He went on, however, as if giving a law lecture, to claim former U.S. Chief Justice Rehnquist of the United States as an authority. In briefing foreign Ambassadors, he is reported to have place much reliance on the case – *Nixon v US*[39] and to have said "the views of Rehnquist were unanimously endorsed. Justice White said encroachment into the right of the Senate to impeach a judge is a violation of the law. Governments that condemn Sri Lanka should pay attention to this judgement."[40] They should indeed – close enough to see how this professor misunderstands both the facts and the law. Nixon was a federal District Court judge who refused to resign after being *convicted* of perjury and sent to prison, so there was no comparison with Dr Bandaranayake. The Senate rules allowed a committee to hear evidence and report it to the full Senate, which on that record decided to impeach him. The judge claimed that he was entitled to be heard by the full senate, but the Supreme Court declined to intervene. The committee hearing took four days, he had been given all defence rights, the facts were uncontested and a full transcript was available to every Senator. So in terms of fairness, Nixon was treated properly – unlike Dr Bandaranayke. Justice Rehnquist pointed out that "the Framers recognised that most likely there would be two sets of proceedings for individuals who commit impeachable offences – the impeachment trial and a separate criminal trial" – which of course had not been offered to Dr Bandaranayke - and that a further protection for the judge was the rule that impeachment requires a two-thirds majority, which was not

[39] *Walter L Nixon v US* (1993) 506 US 224.
[40] 'Ceylon Today' 5 Jan 2013, http:// www.ceylontoday.lk/et-admin/images/news/21157gl.ipg.

the case in Sri Lanka. It also required a finding of misconduct by the House of Representatives and a trial by the Senate. But Rehnquist actually conceded that "courts possess power to review either legislative or executive action that transgresses identifiable textual limits" – which was the position taken by the Sri Lanka Supreme Court when it decided to identify the textual limits of Article 107(3). As for Justice White, he made very clear that the courts should intervene in the "extremely unlikely" case that "the Senate would abuse its discretion and insist on a procedure that would not be deemed a trial by reasonable judges". That was exactly that case of Dr Bandaranayke. Governments which criticise Sri Lanka should certainly pay attention to *Nixon*, especially its last words uttered by Justice Souter:

> *"If the Senate were to act in a manner seriously threatening the integrity of its results, convicting say upon a coin toss or upon a summary determination that an officer of the US was simply "a bad guy", judicial interference might well be appropriate. In such circumstances, the Senate's action might be so far beyond the scope of its constitutional authority, and the consequent impact upon the Republic so great, as to merit a judicial response despite the prudential concerns that would ordinarily counsel silence".* [41]

94. So even the US Supreme Court, despite its judicial restraint, might intervene if Congress were ever to behave towards a judge as the Parliament of Sri Lanka behaved towards Mrs Bandaranayke. That was, however, not the opinion of Professor Peiris, whose speech went on to condemn the Supreme Court decision in vituperative terms – it was "astonishing" a "usurpation", "fundamentally and basically wrong", "not worth the paper it is written on", "unpardonable", "very bad", "tainted", "without any semblance of logic or

[41] Ibid, 748.

sound policy" "horrendous" "throwing to the winds all restraints" "riddled with errors" and so on. "The Supreme Court can go to hell" yelled his MPs. It was a shameful debate, in which the red herring of the separation of powers issue diverted attention from the question of whether the Chief Justice had been guilty of misconduct. Inevitably, the government won the division, by 155 votes to 49, and the firework celebrations began. The defiance of the Supreme Court has been seen by some commentators as a further example of how the Sri Lankan government willfully defies the rule of law – as the UN enquiry said it did, by killing tens of thousands of Tamils at the end of the war in the North. That may or may not be the case, and the limits of Parliament's immunity from judicial review may be left to constitutional scholars. What cannot be denied is that the government shook the foundations of the rule of law by a vindictive and unfair impeachment of its Chief Justice as a reprisal against her for taking a conscientious decision that it did not like.

**CONCLUSION**

95. The denouement was as unseemly as the procedures used to bring it about. On 12 January, 2 days after receiving the "address" from his brother, the President summoned the remaining 10 Supreme Court judges to his office for a 90 minute meeting. It is not known what he said – the meeting was highly improper – although it seems that he asked them to pass on one threatening message to the Chief Justice, namely that if she resigned without further fuss, she could keep her full pension entitlements. The Chief Justice, who appears to have behaved throughout with great dignity, remained with her family at her official residence. The following day she received a Presidential order removing her from office, and (in a despicably petty gesture) her security guards were withdrawn, while threatening demonstrators remained outside. On the next day, a holiday Monday, police ordered the Registrar to pack up

all her belongings in her chambers, to make way for the next incumbent. A large phalanx of military police occupied the court building overnight and a riot squad (with water cannon) arrived the next morning along with a government rent-a-crowd who shouted slogans in praise of the new Chief Justice. He was Mohan Peiris, a man without judicial experience, who served as the legal advisor to the cabinet and Chairman of a bank and of an arms procurement firm established by Defence Secretary Rajapanske. He was sworn in by the President and that afternoon took over the Chief Justice's chambers whilst a large number of lawyers stood outside the court holding candles "to symbolise the onset of darkness". Dr Bandaranayake was confined to her residence until her successor was installed in her former chambers, and then required to leave in her own car without speaking to the media or (as she had requested) being given an opportunity to thank her staff. She did issue a dignified and moving statement, pointing out that the rule of law to which she had devoted her life had been shattered. She would not resign in order to save her pension, but she could not resist the power of the state to remove her physically from the Court.

96. I have done my best to recite the facts, which are on record, as objectively as possible. That Dr Bandaranayake was not even conceivably guilty of misconduct on 12 of the 14 charges is palpable, and the evidence does not support Count 1 (that she made decisions in a case which somehow benefited her sister) and charge 4 (that she had "assets", in the form of an empty bank account, that were undeclared). The evidence shows that she was impeached as a reprisal for her decision in the *Divineguma* case and perhaps for the outspoken stance that her Judicial Services Commission took in defending what it saw, no unreasonably, as threats to judicial independence. Some commentators have suggested that the Rajapaske clan had a long-term plan to neuter the independence of the country's judiciary lest it put difficulties in the way of their future hegemony. Others claim that the impeachment removes any danger of unruly judges if the government is forced by

international pressure to put a few of its military leaders on trial for war crimes committed during the 2009 conflict: I have no comment to make on these suggestions. I have tried to confine this Report to the law and practice of judicial independence, as applied to Dr. Bandaranayke's case. Although there is an interesting intellectual debate over the precise constitutional borders that separate legislative, executive and judicial powers, I do not regard it as impinging on the question of whether the Chief Justice was properly impeached. To that question, the only answer is: "no".

97. What is to be – or can be – done? I have written this Report at the request of the Bar Human Rights Committee, and doubtless it will be read by lawyers elsewhere – people who know in their professional bones that this treatment of a judge is wrong, and that it undermines the rule of law to such an extent that the country which suffers it will suffer the loss of that independent power which is essential to make democracy work. It is a calamity for a nation that purports to uphold the rule of law but it is an international problem as well, in so far as it may be emulated elsewhere if it passes without consequences and becomes an example for other governments to follow, ie to sack inconvenient judges and hold the rest in fear of being impeached if they displease their political masters.

98. Politicians, media people and diplomats must be made to understand this, and international bodies which uphold, or purport to uphold, the rule of law must realise just what a corrosive precedent this impeachment sets. There is nothing necessarily wrong with impeachment, which gives a sovereign Parliament representing the people the ultimate power to remove a disgraced judge, but his or her misbehaviour must be *proved* and by fair means not foul. Certainly not by a process that has been triggered by dissatisfaction with a judgement which has gone against the ruling party. That this is precisely what has happened in Sri Lanka is a matter of record, and those who have

made it happen are on the record. Some of them, regrettably, are lawyers, but all of them must have known that they were embarked on a witch-hunt.

99. There are international fora in which Sri Lanka may be politely condemned-during periodic review in the UN's Human Rights Council, for example, where it will doubtless be "thrashed by a feather" when member states wring their metaphorical hands and evince "concern". The Commonwealth is an organisation which pretends to uphold democratic principles, and on occasion expels or suspends member states which disregard them. It cannot be taken seriously, however, if it permits Sri Lanka to showcase its destruction of judicial independence at the Commonwealth Heads of Government meeting planned for Colombo in November this year. A government which trashes the Latimer House principles and gets away with it – to such an extent that it is permitted to host the most prestigious event in the Commonwealth calendar – would make the whole organisation a mockery. At very least, governments which respect the rule of law should not attend. Nor should the Queen or any Royal family member, to provide a photo-opportunity for President Rajapaske, Speaker Rajapaske, Defence Secretary Rajapaske and Minister for Economic Development, Bail Rajapaske. Royal seals of approval serve the propaganda interests of people like this, and no-shows by powerful nations would signal the unacceptability of their behavior.

100. But it was behaviour in which many MPs – 117, to begin with – were complicit, and then the seven Ministers. These identifiable people are collectively responsible for an unlawful attack on the rule of law, and unless made to suffer for it others will do the same dirty work in other countries, in clashes with the judiciary which are yet to emerge. What might deter them, or at least give them pause? There is a new tool available to name, shame and actually cause pain to people like this – the train-drivers to Auschwitz, so to speak – those who are necessary for the perpetuation of a human rights

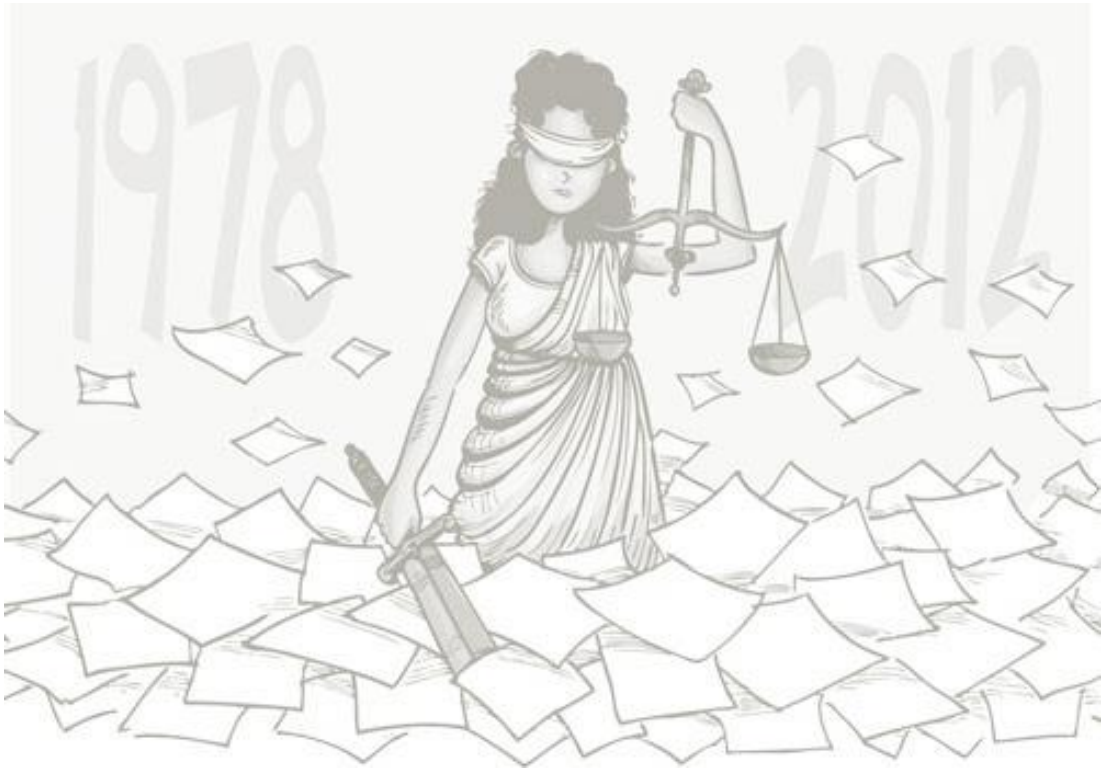
atrocity, even though their part is minor, and their hands unbloodied. It is called a *Magnitsky Act,* named after Sergei Magnitsky, the Russian whistleblower jailed when he tried to expose corruption and who was killed in prison. The Act, passed by the US Congress and ratified by President Obama in December last year, identifies all the people – police, lawyers, criminals and judges – who were in some small way morally responsible for Magnitsky's arrest imprisonment and death. The Act denies them visas for travel to the US, and their funds in US banks are frozen. The Act caused fury in Russia, and Mr. Putin rather pathetically responded by stopping US couples from adopting Russian orphans. But the Act is being taken up in the Council of Europe, Canada and other countries, and would seem appropriate to a case where there is no doubt as to the identity of those responsible, and where some of these Ministers and MPs are likely to want to go to Britain and may well have undisclosed funds in British banks. If a number of countries were to "Magnitsky" them, they might live to rue the day they chose to humiliate and vilify their Chief Justice.

Geoffrey Robertson QC

Doughty Street Chambers

27th February 2013

# CHAPTER III




# OPINIONS

**01**

## The Standing Orders relating to the impeachment are flawed in law

by Sergei Golubok

1. I am Sergei GOLUBOK. I hold postgraduate degrees of LL.M. in International Human Rights Law awarded by the University of Essex in the United Kingdom and Candidate of Juridical Sciences in Public International Law and European Law awarded by the St. Petersburg State University in the Russian Federation. In 2008-2011 I had an honour to serve as a legal secretary at the Registry of the European Court of Human Rights in Strasbourg, France. Currently I am a practicing attorney and member of the St. Petersburg Bar Association appearing before Russian courts including the Supreme Court of the Russian Federation and before the international human rights tribunals such as, for example, the Committee against Torture. I am also a deputy editor-in-chief of the International Justice law journal which is published by the Institute of Law and Public Policy and teach international law at the Russian Academy of Justice in Moscow.

2. It was brought to my attention that the following question had been referred to the Supreme Court of Sri Lanka: Is it mandatory under Article 107 (3) of the Constitution [of Sri Lanka] to provide for matter relating to the forum before which allegations are, the mode of proof, the burden of proof, standard of proof etc., of any alleged misbehaviour or incapacity in addition to matters relating to the investigation of the alleged misbehavior or incapacity?

3. Pursuant to Article 107 (3) of the Constitution of Sri Lanka in conjunction with Article 107 (2) of the said Constitution Parliament shall by law or by standing orders provide for all matters relating to the presentation of the address on removal of the serving Judge of the Supreme Court and of the Court of Appeal on the ground of misbehavior or incapacity ("the impeachment procedure") including the procedure for the passing of such resolution, the investigation and proof of the alleged misbehaviour or incapacity and the right of such Judge to appear and to be heard in person or by representative.

4. I was approached by the Asian Human Rights Commission with a request to prepare this opinion on international legal standards concerning the fair-trial guarantees in the impeachment procedures against serving judges.

5. The most important point of reference is the International Covenant on Civil and Political Rights (hereinafter, "the Covenant") to which Sri Lanka is a State Party. Article 14 § 1 of the Covenant provides that all persons shall be equal before the courts and tribunals and that in the determination of his or her rights and obligations in a suit at law everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. Further, under Article 25 (c) of the Covenant every citizen shall have the right and the opportunity without any distinction on the basis such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status and without unreasonable restrictions to have access to public service in his or her country, on general terms of equality.

6. In its jurisprudence the Human Rights Committee (hereinafter, "the Committee"), an independent expert body tasked with the interpretation and application of the provisions of the Covenant, has developed the meaning of the rights listed in the preceding paragraph of this opinion with relation to the impeachment and other types of involuntary removal from office of serving members of the judiciary.

7. The Committee found that a dismissed judge should have at his or her disposal the availability of effective judicial protection of his or her rights and be able to effectively contest the removal (see Views of the Committee rendered on 5 August 2003 in the matter of Pastukhov v. Belarus, Communication no. 814/1998, UN Doc. CCPR/C/78/D/814/1998, at para. 7.3).

8. With respect to the parliamentary impeachment with no subsequent judicial remedy the Committee found violations of Articles 14 and 25 of the Covenant referring to the conclusion that such procedure would not ensure required objectivity and impartiality (see Views of the Committee rendered on 24 July 2008 in the matter of Bandanaranayake v. Sri Lanka, Communication no. 1376/2005, UN Doc. CCPR/C/93/D/1376/2005, at para. 7.3).

9. In its concluding observations on Sri Lanka the Committee expressed concern that the procedure for the removal of judges which is set out in Article 107 of the Constitution of Sri Lanka is incompatible with the Covenant as it allows Parliament "to exercise considerable control over the procedure for removal of judges" (UN Doc. CCPR/CO/79/LKA, at para. 16). The Committee went on to recommend to Sri Lanka to provide for judicial, rather than parliamentary, supervision and discipline of judicial conduct.

10. The then Special Rapporteur of the United Nations Human Rights Council on the Independence of Judges and Lawyers (hereinafter, "the Special Rapporteur") Mr Leandro Despouy of Argentina opined in 2009 that the irremovability of judges was one of the main pillars guaranteeing the independence of the judiciary and that that fundamental principle might be transgressed only in exceptional circumstances (see UN Doc. A/HRC/11/41, at para. 57). Special Rapporteur Despouy further expressed his strong concern about the situation in those countries where, like in Sri Lanka, the legislative or executive branches of the government play an important or even decisive role in disciplining judges (see UN Doc. A/HRC/11/41, at para. 60).

11. The serving Special Rapporteur Mrs Gabriela Knaul of Brazil issued a special press statement on 14 November 2012 expressing her concern about reprisals against judges in Sri Lanka and urging reconsideration of Chief Justice's impeachment. Having reiterated her predecessor's thoughts as summarized in the preceding paragraph of this opinion, the Special Rapporteur expressed her uneasiness with the procedure of impeachment of the Chief Justice of the Supreme Court of Sri Lanka. She shared the view of the Committee that the procedure for the removal of judges of the Supreme Court set out in Article 107 of the Constitution of Sri Lanka allows the Parliament to exercise considerable control over the judiciary and is therefore

incompatible with both the principle of separation of power and Article 14 of the Covenant. The Special Rapporteur urged the Sri Lankan authorities to reconsider the impeachment of Chief Justice and ensure that any disciplinary procedure that she might have to undergo would be in full compliance with the fundamental principles of due process and fair trial.

12. The European Court of Human Rights (hereinafter, "the European Court") in its jurisprudence likewise considers possibility of independent judicial review with full fair-trial guarantees to constitute inalienable element of any involuntary removal from office of a serving judge.

13. Thus, in its recent judgment in Harabin v. Slovakia (Application no. 58688/11) the European Court found the following: "The mission of the judiciary in a democratic state is to guarantee the very existence of the rule of law. The [European] Court therefore sees as a matter of major importance when a Government, as in the present case, initiates disciplinary proceedings against a judge in his or her capacity as President of the Supreme Court. What is ultimately at stake in such proceedings is the confidence of the public in the functioning of the judiciary at the highest national level. It is therefore particularly relevant that the guarantees of Article 6 [of the European Convention on Human Rights which is substantially similar to Article 14 of the Covenant] should be complied with in such proceedings" (at para. 133 of the European Court's judgment rendered on 20 November 2012).

14. The European Court has earlier found that Article 6 § 1 of the European Convention is fully applicable in the disciplinary proceedings against a sitting judge (see the judgment of 5 February 2009 in Olujić v. Croatia, application no. 22330/05).

15. It follows that a serving judge in disciplinary proceedings which might ultimately lead to her or his dismissal should be entitled to fair-trial guarantees including a right to be tried by an independent tribunal. According to the international legal standards all disciplinary (including those ultimately potentially leading to removal) proceedings against members of the judiciary must be determined in full compliance with the procedures that guarantee the right to a fair hearing and to an independent review (by a court of law).

16. Given the absence of such guarantees procedure as currently established by the Standing Orders enacted by the Parliament under Article 107 (3) of the Constitution cannot be legally used.

Respectfully submitted,

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02

# Judiciary sans independence: The Sri Lankan chronicle

by Jasmine Joseph

The future of a judge who would have been the longest serving Chief Justice of the nation is grim in Sri Lanka. Widely alleged as politically motivated, the current move by the President to impeach her gives an opportunity to analyze the soundness of constitutional principles relating to judiciary in general and impeachment of judges in particular.

The bedrock on which the judiciary in Sri Lanka is built like most constitutional democracies is found in the Constitution. Unlike many constitutions, it has detailed provisions spanning from 107 to 147 with myriad of amendments relating to judiciary.

The primary concern in the present context is the competence of the relevant constitutional provisions to safeguard the interests of the institution of judiciary in a democracy. The most fundamental value would be independence of judiciary. The independence is not only an end in itself but is also a means. It is in the independence of the institution, the present and future of a democracy rests. Independence of judiciary is a prerequisite of a sound legal and governance system. The provisions relating to appointment, tenure, conditions of service and removal are the bulwarks of judicial independence. Provisions of Sri Lankan constitution are an anathema to the claim of independence.

In the context of the current attempt to impeach a judge, an assessment of the provisions and procedure of removal is taken up to test on the claim of judicial independence.

Removal of judge in Sri Lanka as per the constitutional scheme is virtually in the hands of the executive. This cuts at the very root of judicial independence. Though the legislature is involved, the requirement of the simple majority makes the ultimate decision at the sweet will of any government, which invariably will have majority in the parliament. Article 107 of the constitution of Sri Lanka provides that the President may remove a judge on proved misbehavior and incapacity. The process is established by the standing orders (see, Standing Orders 78A). The impeachment process is kick started by the parliamentarians with a notice of resolution signed by one third of the members. After the lapse of one month, the speaker shall appoint a select committee of not less than eleven members who investigates and submits a

report within a stipulated timeframe, which is one month from the commencement of the sitting of the committee. On the report of the select committee a resolution shall be passed by the parliament and the same shall be presented to the President for the action of removal. In this scheme of events, the judiciary is entirely under the benignancy of the government in power. It therefore remains as the affair of the government in power.

The breaches of independence vis-à-vis removal in the above scheme could be best understood in contrast with the structure provided by India, a neighbouring nation. Removal of a judge in India is commenced on the recommendation by the judiciary. The proceedings are detailed in the Judges Inquiry Act of 1968. It has elaborate provisions about the process. The enquiry is conducted by a committee of three; two from judiciary and one a distinguished jurists. The report of the committee is so decisive that if it does not find alleged misbehavior or incapacity, the proceedings are dropped. Only on an adverse finding that there will be any further proceedings in the House and the same shall be discussion and adoption of the motion to impeach with special majority. This process if nothing else does not leave the judges at the mercy of the government in power.

This limited comparative exercise brings out the inadequacies of the Sri Lankan scheme of removal of a judge, which is a heavy setback on independence of the institution. Judicial independence has been accepted as a coveted virtue world over. The lack of it is a severe dent on the rule of law record, human rights protection and liberty quotient of the citizen in its relation to its own government.

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*(Courtesy: The Colombo Telegraph)*

**3**

## Requirements for the removal in Australia
## *the views of two Australian experts*

Two Australian experts, Laureate Professor Cheryl Saunders AO Sugath Nishanta Fernando Professor Adrienne Stone, Director, Centre for Comparative Constitutional Studies, have submitted a paper at the request of the Asian Human Rights Commission (AHRC) based in Hong Kong explaining the requirements for the removal of judges in Australia.

The AHRC has referred the paper to the lawyers who are making presentations against government's move for the impeachment of the Chief Justice.

After giving a summary of the Australian experience regarding this matter the two experts sum up their position in Australia regarding the removal of judges as follows:

Judicial removals are treated by the vast majority of governments with the utmost seriousness. As extraordinary decisions that must only be made in extraordinary circumstances, judicial removals must be treated with that level of seriousness.

Australian and international standards on the removal of judges from office clearly reflect a requirement that prior to any consideration by a parliament to remove a judge, a thorough, cautious, fair and independent investigation into alleged misconduct or incapacity by former judicial officers must take place.

Any procedure which does not fulfil that standard is inimical to the rule of law and the independence of the judiciary, and no government that refuses to afford its judicial officers these standards of protection can claim to legitimately represent its constituent people, or act with the legitimate authority which only the people may bestow upon their governors.

They also state:

Australia forms a good comparator jurisdiction for Sri Lanka. Both nations share the same English common law arid parliamentary heritage. The rule of law forms the fundamental basis entrenched in the Australian Constitution. The stability of the Australian polity, its economic growth and prosperity, and the wellbeing of its people depend upon respect for the rule of law. Central to the realisation of that ideal is that the independence of the judiciary be beyond question. Australian courts, and not Parliament, have the final say on the interpretation of the law. The High Court has general authority to determine the meaning of Australia's Constitution, and its interpretations bind Australian legislatures and executives at all levels of government.1 The Court's power of judicial review prevents any law or executive action from transgressing the principles and limits to government laid down in the Constitution. The Justices of the High Court of Australia are highly respected as the guardians and guarantors of Australia's democracy: like all judges, they cannot fulfil these vital tasks without complete independence; in practice as well as principle.

These are the hallmarks of all successful and lasting constitutional democracies. Such a state cannot be achieved without entrenched safeguards to ensure judicial independence, chief among which is proper standards preventing the arbitrary or baseless removal of judicial officers.

The full text of the expert opinion may be viewed at: http://www.humanrights.asia/resources/pdf/removal-of-judges/view

1 Australian Communist Party v Commonwealth (1951) 83 CLR 1.

**04**

## The mega issue is the ending of the judiciary as a separate branch of the state

by Basil Fernando

The impeachment is not about the individual that is Shriyani Bandaranayake, the Chief Justice. The real issue is about ending the position of the judiciary as a separate branch of the state.

What is now being faced is a momentous transformation of the very structure of governance in Sri Lanka. It is the final completion of the objective of the 1978 Constitution and of the 18th Amendment to that same Constitution.

The process that is now being completed has been pursued for several years through many important events. A brief history of this change is as follows:

**a.** In 1972 the Constitution abandoned the principle of the supremacy of the law and in its place adopted the principle of the supremacy of the parliament. The very foundation of the independence of the judiciary is the supremacy of the law. When the supremacy of the law was constitutionally displaced, the ground on which the principle of the separation of power stood was removed.
**b.** The 1978 Constitution also removed the power of judicial review which the Supreme Court had from its very inception in 1802. This was a fundamental limitation on the judicial power.
**c.**The 1978 Constitution placed the executive president outside the jurisdiction of the courts and above the law. This was an attack on the very foundation of the principle of the rule of law, which is that no one is above the law. With this move the very possibility of the judiciary being on par with the executive was removed and the executive was placed above the judiciary.

**d.** Several judges who were in the Supreme Court and the Court of Appeal were not reappointed after the promulgation of the 1978 Constitution. This is known as the dismissal of judges by the Constitution.
**e.** Article 4 (c) of the Constitution states that "The judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law". By this the courts were placed below the parliament.
**f.** Article 107 created an impeachment procedure controlled entirely by the parliament and not in conformity with the principle of the separation of powers and the principles of fair trial as found in Article 14 of the International Covenant on Civil and Political Rights.
**g.** One more method of undermining the judiciary was to not provide the resources needed for the recruitment of qualified personnel to ensure the quality of the judiciary.

Besides such constitutional provisions there were many other methods by which the judiciary was undermined. Many of the emergency laws and the anti-terrorism laws removed the power of the judiciary to protect the rights of the individual through what has come to be known as 'ouster' clauses.

The appointment processes were tampered with by the executive, which took upon itself to appoint the judges of its choice instead of following the proper procedures, which would have ensured that the judges were chosen on the basis of merit and through a fair procedure.

In the case of Sarath N. Silva, the executive directly chose him as a person who would cooperate and collaborate with them and thus created an internal process of undermining judicial independence. The actions done by Sarath N. Silva as CJ to undermine the independence of the judiciary and also displace the legal guarantees on which the rule of law system rested make for a long list, which included the serious harassment of many lower court judges, considerable undermining of established legal procedures, the misuse of the contempt of court law and the continuous harassment and intimidation of lawyers.

The threat of impeachment was used on independent judges, including the first Chief Justice under the 1978 Constitution, Neville Samarakoon.

The use of the media to attack the judges that the government was displeased with as another aspect of this attack.

This is just a short list of measures that have been used to undermine the judiciary.

This long battle against the judiciary is now coming to a final clash by using the impeachment process in the most callous manner, quite blatantly for political purposes.

The result expected is that the judges will be reduced to the same position as other government officers and their unique character as members of a separate branch of the state will be brought to an end.

The consequence of this will be beyond imagination. There are countries where judges are not considered as part of a separate branch of the state but merely as government servants like others of similar status. Some examples are China, Vietnam, Cambodia and Burma. In these countries the judges do not have judicial independence and they mostly perform administrative functions.

The direct results of the judges losing their character as persons belonging to a separate branch of the state are that the citizens will not have any possibility of protecting their individual rights. The protection of individual rights is the sole prerogative of an independent judiciary.

In the law enforcement area, the vacuum that will be created by the removal of the independent character of the judges will be filled by the Ministry of Defence. The paramilitary and the intelligence services will play the role of accusers, judges and executioners. There will be no place to complain with the expectation of a fair hearing. The fate that befell the tens of thousands of disappeared persons will be the same fate that will befall the remaining citizens.

In the coming weeks this final shift will take place unless the people themselves come forward willingly to defend their independent institutions of justice.

**05**

## Speaker's ruling has no bearing upon the substantive issues in the impeachment

by the Asian Human Rights Commission

The Speaker's ruling relating to the Supreme Court's notice to the Speaker and the members of the Parliamentary Select Committee does not in any way prohibits the constitutional right of the Court to entertain and to determine the Reference made by the Court of Appeal for a specific question relating to the scope of Article 107 (3) of the Constitution. Since the issue mooted is of utmost importance, various aspects relating to it should be reflected upon on the basis of constitutional principles and logic.

Based on this the following issues could be highlighted:

The basic structure of Sri Lanka's constitution as a democracy - It is beyond question that Sri Lanka's constitution is that of a republic and a democracy. In this there is no fundamental difference between the Indian constitution and the Sri Lankan constitution. The Supreme Court of India finally laid the issue to rest through a historic judgment, Keshavananda Bharati vs. Union of India and others. In going into the questions referred by the Court of Appeal to the Supreme Court, the issue of the basic structure of the Constitution of Sri Lanka is an unavoidable issue. All the maters arising out of the Speaker's ruling should be considered relative to the basic issue of Sri Lanka as a democracy. The Speaker's powers need to be looked at within the constitutional architecture that defines Sri Lanka as a democracy.

Any reference to the ultimate supremacy of the parliament should only be understood with reference to the overall consideration of Sri Lanka as a democracy. Such phrases as "supremacy of the parliament" should not be given any meaning that will be detrimental to Sri Lanka's constitutional structure as a democracy.

The Speaker's ruling cannot limit the power of the Supreme Court to decide on the constitutionality of any matter - It is a settled principle that the primary opinion on the question of constitutionality of any issue is with the judiciary. To hold otherwise would be to deviate from the basis that Sri Lanka is a democracy.

Even a decision of the parliament arrived through a vote in the parliament is subject to judicial review - There is no limitation for the Supreme Court's authority for judicial review concerning any decision of the parliament or that of a Select Committee constituted by the parliament. The Court has also the power to review the material on which the decision of the parliament or that of the Select Committee is arrived at. The Indian Supreme Court in the S. R. Bommai case has dealt with this matter in great clarity.

The cornerstone of the objection concerning the impeachment process is that a Parliamentary Select Committee cannot exercise judicial power and that such a Committee cannot be considered an impartial and a competent tribunal to decide on the matters relating to the charges against the Chief Justice. This being so from the beginning the functions of the Select Committee in this regard would have no impact on law and could not this lead to any valid decision relating to the impeachment. Therefore the Court has the jurisdiction to declare the legality and the constitutionality of such a process and to declare it void.

The Court has the power to examine the material on which the decision is made - the decision of the Select Committee that is acting as a tribunal cannot lead to a valid decision, and therefore even if the parliament is to vote in favour of an impeachment on the basis of such finding the court has the power to declare such a decision as one that violates the constitution.

The actions of a Select Committee or the Parliament are actions of the government and therefore the court alone has the jurisdiction to review the constitutionality of any such action by a government - The decision relating to the impeachment and the process thereto are not different to any other action by the government. These cannot be claimed as exceptions to the rule that the court has the power to examine the constitutionality of any action of the government.

On the basis of the above considerations the ruling of the Speaker is of no practical importance to the substantive issues relating to the impeachment - Since no substantive issue rests on the Speaker's ruling there is no reason to give any serious consideration to this ruling as a substantive obstacle to the Court entertaining its jurisdiction in the matter.

The Speaker's ruling may indicate that the government may not abide the decision by the Court in this instance - This possibility exists relating to all decisions that a court make on the constitutionality of any law or other acts of the parliament or that of the executive. A government could ignore the court, and if does so, it openly violates the constitutional architecture and the law. On no instance should a court desist from making decisions on matters referred to it on the basis that the government may disrespect its ruling. If a court were to take such a view, it would be in no position to decide any matter at all. If the government decides to take a confrontational approach to the Supreme Court, that is a matter left to the government, and upon such an event the outcome should be left to the people to decide what course they should take.

06

# The final nail in the coffin of the judiciary

by Kishali Pinto-Jayawardena

For those of us who prefer to take refuge in comfortable illusions that this Presidency only hides a velvet hand in an iron glove (to mischievously twist that proverbial saying around), the motion of impeachment of the Chief Justice of Sri Lanka presented by 117 government MPs to the Speaker this week should dispel all such arrant foolishness.

**Government's intention in subordinating the judiciary**

Whether the government goes ahead with the impeachment or not, let it be clearly said that the final nail in the metaphorical coffin of the institution of the judiciary in Sri Lanka is already hammered in. The fact that such a motion could have been brought at a time when a Supreme Court decision on the Divineguma Bill is due to be read out in Parliament, unequivocally spells out the government's intention in subordinating the judiciary to its complete and utter control.

There is moreover a perceptible element of going beyond all norms of decency as exemplified in the scurrilous letter tabled by a government MP in the House last week which put the personal conduct of Sri Lanka's first woman Chief Justice in issue without any formal verification or substantiation. Is this the purpose for which parliamentary privilege has been conferred upon these so called peoples' representatives? What outrage is this? It may well be warned that henceforth, any judicial officer would be liable to be attacked in this manner if such abuse of parliamentary privilege is allowed to go unremarked and without collective protest. Indeed, this incident is similar to the country being informed by none other than the President himself, of a complaint purportedly made by a lady judicial officer against the Secretary to the Judicial Service Commission(JSC), which complaint was in fact later denied by that judicial officer in the relevant inquiry. These are both equally shameful attempts to degrade judicial officers in an attempt to cow them into submission.

**Public mystified as to precise charges against Chief Justice**

Unlike in the case of the aborted impeachment motions against former Chief Justice Sarath N. Silva brought by the opposition during 2001-2004, the contents of which related to several counts of well documented judicial misconduct that were in the public domain long before they were actually brought to Parliament, here the public is kept in the dark as to what the charges against the incumbent Chief Justice are.

All that we are told by the Media Minister this week is that the Chief Justice has 'challenged the supremacy of Parliament.' By logical inference, we are then supposed to link this objection to the fact that the Supreme Court had quite properly, in the

initial Determination on the Divineguma Bill, insisted that the government seek the approval of all Provincial Councils prior to bringing it before Parliament? On that same logic, the Supreme Court will then stand accused of that same charge each and every time that it rules that a Bill is inconsistent with the Constitution. One may as well then do away with the Constitution once and for all.

Or is it the fact that one petition in the initial challenge to the Divineguma Bill had been sent to the Secretary General of Parliament and not to the Speaker in terms of Article 121 of the Constitution? Are these fit matters to base an impeachment of the highest judicial officer of the country? This question is self explanatory surely.

**Incorrect interpretation of the Constitution**

Meanwhile, the Minister of External Affairs has claimed that the very appointment of the Secretary to the JSC was unconstitutional as he was the 29th in seniority in the relevant list of judicial officers and that only a 'senior most' officer should have been appointed. Quite apart from the fact that this objection appears to have dawned on the Minister quite ludicrously only after all this time had lapsed after the appointment, let us enlighten this former Professor of Law who has not only forgotten the basic tenets of the law but has also veritably forgotten to read the Constitution as to what exactly the relevant provisions stipulate.

Article 111(G) of the Constitution states that 'there shall be a Secretary to the Commission who shall be appointed by the Commission from among senior judicial officers of the Courts of First Instance.' This Article was brought in by the 17th Amendment to the Constitution which repealed the earlier Article 113 which stated that 'there shall be a Secretary to the Commission who shall be appointed by the President in consultation with the Cabinet of Ministers.' Quite rightly the 17th Amendment conferred this power of appointment on the Commission itself. On this reading, the appointment of the current JSC Secretary cannot be faulted. The term 'senior most' cannot be read as a gloss into this constitutional provision purely for political expediency and the Minister is himself in immediate breach of the Constitution in attempting to do so.

Moreover, from all accounts, the Minister of External Affairs is wrong not only on the law but also on the facts in his description of the JSC Secretary as being 29th in seniority. In any event, these objections appear not to have been applied to appointments made by former Chief Justices, one of whom had indeed appointed his own brother as the Secretary. Such objections therefore are clearly reserved peculiarly for those judges who dare to challenge this government even in the most minimal way.

An official communiqué from the JSC may clarify the precise factual issue regarding the seniority objection in the current context but in this environment of extreme intimidation, such clarification seems unlikely. We can only wait and see what the

substance of the impeachment motion will disclose and which the Chief Justice will be called upon to answer before a Select Committee of Parliament.

The fundamental propriety of a political forum determining the impeachment of a judicial officer is meanwhile a different question altogether. It deserves to be dealt with in depth elsewhere. However, the notion of parliamentarians sitting as judges to decide the fate of the highest judicial official in the land impacts unpleasantly on the notion of safeguarding the independence of the judiciary.

**Impact on the entire institution of justice**

Even given this government's flagrant flouting of the law at many different levels post war, the impeachment of the Chief Justice takes the degeneration of the Constitution to new depths. The contempt displayed for the law is patent. The threat that this holds out to the entire judiciary is clear. From this essential truth, there can be no retraction or withdrawal. In the absence of a spirited public reaction emanating from judges, lawyers, professionals and the general public against this most horrendous exercise of dictatorial power, we may well consider Sri Lanka's judiciary as being totally unable to perform in its constitutional role in the foreseeable future.

Certainly it is not a mere question of one individual as the Chief Justice being impeached. And putting aside whatever questions that we may have regarding the political process of impeachment of judicial officers, the question here is the context of the impeachment, the vagueness of the charges brought and its clear link to the intimidation of the judiciary when controversial determinations are pending. This is the essence of the crisis that confronts us.

Moreover the fact that the government is going ahead with this farcical impeachment process at the precise time that it is called upon to answer with increasing severity by the international community in regard to its lapses in respecting the Rule of Law also signifies its profound contempt for such mechanisms. The recommendations in the report of the Lessons Learnt and Reconciliation Commission (LLRC) were all predicated on the basic foundation of an independent judiciary. For example, its stress on accountability for enforced disappearances and extra judicial executions flows from its assumption that the country will have independent and fair minded judges who will be able to hear and decide those cases impartially. If that element is taken out, then the LLRC report may well be discarded.

We can only rue what this means for the country, for the dignity of the legal system and for the integrity of the judicial branch of government, sadly battered as it has already been by the ravages of internal and external politicization particularly in the past decade.

*(Courtesy: The Sunday Times)*

07

# Constitution Impeached!

by Malinda Seneviratne

It is now official. The Executive-Judicial clash is heading towards denouement and one that is not hard to call. We'll get to that later.

Chief Justice Neville Samarakoon escaped the ignominy of impeachment by resigning. Chief Justice Sarath N Silva was spared by the Parliament being prorogued first and then dissolved. In the case of the former, the Executive had sway over the necessary numbers in Parliament. In the case of the latter, the mover, Ranil Wickremesinghe didn't have the numbers and didn't have the support of the Executive, Chandrika Kumaratunga. When Silva ruled to snub Kumaratunga, she couldn't think impeachment because she didn't have impeaching numbers. Today it is Chief Justice Shirani Bandaranayakewho is in the dock. In a context where regime popularity is hinged on the popularity of the President and therefore the political fortunes of ruling party MPs are tied to him remaining in power, the Executive has a vice like grip on the legislative branch. The Executive, moreover, has the numbers that neither Wickremesinghe nor Kumaratunga had. As such, things look bleak for the Chief Justice.

There are howls of protests of course, but not all the protestors have moral right on their side. Silva himself had his ups and downs as well as his sideways ways including encroachment on executive territory. Among those who object to the current moves against the Chief Justice are those who sought to bring down Silva but forgave and forgot the moment Silva fell out with the Executive following the classic 'my enemy's enemy is my friend' formula.

Many who are shedding tears for the Chief Justice today, howled in protest when she was first appointed to the Supreme Court. 'Political appointee!' was the scream back then. Morality was cited by the objectors who pointed out that the lady's husband was a high ranking government servant. They later even salivated when her husband, who was Chairman of the National Savings Bank, was implicated in a 390 million rupee deal in the stock market.

On the other hand, the current investigation of the husband, following the much publicized Executive-Judicial spat and the subsequent impeachment move, says a lot about selectivity and even revenge-intent. The message that is not spelled out but is nevertheless clear is, 'We can just get along, but if we can't, there'll be arm-twisting, and if that doesn't work, well, we have the numbers and the law'.

It doesn't make it morally right though. It is morally wrong to subject the Chief Justice to a witch hunt, for that is what is has amounted to. It may be legal, but still the use of available mechanism to get rid of her without any mention of 'reason' or transgression on her part, makes a bad, bad, bad precedent. The howlers don't have

the moral authority either, given their flip-flopping nature on issues of this kind and the fact that they've been consistently motivated by matters of political expediency and not issues of legality and morality. If indeed, as alleged, the Chief Justice is inept or guilty of wrongdoing, the process that seated her in that august office must be flawed. If unseating is simply a matter of leveraging numerical edge, that too indicates mechanism-flaw.

Perhaps these developments, in the end, serve only to strip the 1978 Constitution to its iron-like bones, demonstrating that for all the sway and punch of the judicial and legislative arms, the executive can be too a heavy a weight to budge. It boils down to presidential discretion and that shows constitutional error and poverty. We can curse the Second Republican Constitution and its architects. We can find the gripe of its never-envisaged victims (the UNP) amusing. None of this requires us to cheer the current and principal beneficiary.

Simply, the constitution and by extension, its props and beneficiaries stand impeached.Morally.

** Malinda Seneviratne is the Chief Editor of 'The Nation" where this piece appeared and his articles can be found at www.malindawords.blogspot.com.*

*(Courtesy: The Nation)*

08

# Impeachment of the Chief Justice – The Charges

by Chandra Kumarage

Some Members of Parliament of the United Peoples Freedom Alliance (UPFA) have submitted an Impeachment Motion against the Chief Justice (CJ) to the Speaker of Parliament and the Speaker has decided to appoint a Select Committee to inquire into and report to Parliament on the charges contained in the Impeachment Motion. By evaluating the list of charges contained in the Impeachment Motion, the second and third charges are criminal offences triable by a competent, independent and impartial court, as provided for inArticle 13(3) of the Constitution which stipulates that any person charged with an offence shall be entitled to be heard, in person or by an attorney at law, at a fair trial by a competent court. Moreover Article 13 (5) mandates that every person shall be presumed innocent until he is proved guilty and Code of Criminal procedure Act No. 15 of 1979 stipulates that all criminal trials should be conducted publicly. The State media has already pronounced the respondent CJ guilty of all charges in the impeachment and the hallowed principles of the presumption of innocence guaranteed in the Constitution of Sri Lanka and the principles of Natural Justice have been put to the back burner.

It is submitted that the charge number two in the motion is very vague non sustainable in any tribunal conducting a fair trial.

The charges , three, four and five in the impeachment motion are essentially criminal and allegedly have been committed in her personal capacity as an individual and not either abusing or misusing her power as the CJ. Those are ex facie serious criminal charges falling under the Penal Code or other penal provisions of law, the complexity and legality of which could only be comprehended and adjudicated by a competent court comprising trained judges who are capable of handling such cases.

Even charge number one in the Motion , although it appears to be a serious charge, it is not alleged that respondent CJ had abused her powers as the CJ in adjudicating the fundamental rights cases referred to in the said charge. It can be easily inferred that had there been evidence to that effect the framers of the impeachment motion who should presumably have been experienced lawyers would have specifically stated so therein. There is also no evidence of allegation that the property has being purchased below the market value. It is submitted that the fundamental rights cases are heard by a panel of three judges of the Supreme Courts. Section 165(1) Code of Criminal procedure Act No. 15 of 1979 stipulates that a criminal charge shall contain such particulars as to the time and place of the alleged offence as to the person, if any, against whom and as to the thing ,if any, in respect of which it was committed as are reasonably sufficient to give the accuse notice of the matter with which he is charged… and it is submitted that even in an impeachment motion charges have to be framed according to these provisions and the above four charges have been

framed so vaguely without giving the essential particulars that should be given as stipulated in that section.

By including these charges in the motion to be adjudicated by lay individuals the majority of whom belong to the complainant party and on whose approval the impeachment was originated, incurably violates the basic principles of criminal and natural justice which state that the accuser must not be the judges of his own case.

It is an essential requisite in the criminal procedure established by law that the information shall be well founded to enable a prosecutor to prefer charges against a suspect the ascertainment of which requires that the statement of the suspect as well as his/her witnesses shall also be recorded. In this instance the charges which are of a criminal nature have been framed against the CJ without taking these mandatory steps. It is also very strange as to how the bank accounts of the CJ were accessed without following the procedure established by law.

It must be remembered that even the International Criminal Court (ICC) which tries war criminals and other offenders on alleged charges of crimes against humanity are afforded a fair trial with all due process guarantees.

It must be reminded that in the first ever motions for impeaching Nevelle Samarakoon CJ on an allegation that he made a speech in a public meeting allegedly disrespectful of the executive in his capacity as the Chief Justice, the Parliamentary Select Committee found him not guilty of the alleged charge as misbehaviour. In the second impeachment motion submitted to Parliament against S.N. Silva CJ was based on very serious acts alleged to have been committed in his capacity as the CJ could not be inquired into in that the President prorogued the Parliament once and dissolved it the next time when the motion was to be taken up to prevent it being inquired into. In an interesting but in a paradoxical move the Bar Association of Sri Lanka (BASL) at that time took the side of the allegedly errant CJ and passed a resolution expressing their faith and confidence in him.

In the circumstances it is the dedicated duty and responsibility of the Bar Association of Sri Lanka (BASL) representing the entire legal fraternity of the country to think professionally as lawyers who represent individuals facing the gravest of charges in the country's penal laws on whose defence they will never hesitate to plead relief and exceptions under every principle of natural law, statutory law, international standards and judicial precedents etc. in the defence of their clients to apply the same ethical and professional standards towards the highest judicial officer in the country who is facing an unfair and prejudiced inquiry by a panel of members of parliament the majority of whom belong to the political coalition in power and have a vested interest against the respondent CJ, and if found guilty has no right to appeal to a higher forum that is available to a convict by a competent, independent and an impartial court.

It is the view of the writer that the government has submitted this impeachment against the CJ violating the fundamental right to equality enshrined in Article 12 (1) of the Constitution which stipulates that all persons are equal before the law and are entitled to the equal protection of the law.

In these circumstances all members of the legal profession must urge the government in unison to withdraw this impeachment and/or to prefer criminal proceedings against her in a competent, independent and impartial court where she will get a fair trial and a right of appeal if found guilty of the charges.

It is stated that, Charge number five is based on the fact that the husband of the CJ is a suspect in a legal action initiated in the Magistrate's Court in Colombo in connection to acts of bribery and /or corruption under the Bribery or Corruption Act No. 19 of 1994. It will be pertinent to state with reference to the above charge in the motion that when the respondent CJ was sworn in May 2011 corruption allegations were already being levelled against her husband and the opposition declared her appointment to be unsuitable and this government of President Mahinda Rajapaksa appointed her despite such objections. The Parliament has no moral or legal right to impeach her on Charge number five now.

The Charge number Six in the motion is the appointment of Mr. Manjula Tilakaratne who "is very junior in service" as the Secretary of the Judicial Service Commission. Media reports stated that when she was asked by some senior lawyers who met her as to why she appointed judge Manjula Tilakaratna as the Secretary of the Judicial Service Commission she said that he was the sixth in the order of seniority and that his appointment was perfectly lawful and that the Constitution does not mention the necessity of seniority in making such appointments. She drew the attention of the lawyers that her predecessor Asoke De Silvaappointed his own brother Priyantha Silva who was the nineteenth in the line of seniority and was succeeded by Prasanna Silva who was the twenty ninth in the list of seniority and questioned further as to why the principle of seniority was not applied when Judge Chandra Jayatillake who was far down in the list of seniority was appointed to the Court of Appeal sidelining Malini Gunaratne who was number one in the order of seniority and was the one recommended by the CJ. Therefore this charge is also unfounded and does not constitute misbehaviour.

Regarding charge number twelve it was reported in the news papers that the magistrate concerned had denied that she ever made a complaint against the Secretary of the Judicial Service Commission.

Regarding charge number thirteen it is stated in the Establishment Code and the other administrative rules for a government official to obtain the permission of the head of department if he or she needs any additional privileges and facilities and particularly the Judicial Service being a closed service, obtaining police protection has to be done through the Judicial Service Commission and this matter cannot be

introduced as a charge in a motion to impeach the CJ who is the Chairman of the Judicial Service commission.

It is submitted that the other charges even if they are true also are so nebulous and fall far below the very high degree of proof necessary to be considered as misbehaviour.

It is pertinent to state here that similar impeachment inquiry of a Supreme Court judge of India is held before a committee of three members, two of whom should be judges of the Supreme Court of India. Moreover once a judge found guilty the impeachment motion must be endorsed by two third members of the Lokh Sabha(House of Representatives) and the Rajya Sabha(Senate).

It is very clear that in the circumstances this impeachment motion has been presented to the Parliament with the sole ulterior motive of removing the CJ for not giving a judgment favourable to the Government in the statutory determination of the Divinaguma Bill. Who can say that the same fate will not befall the other two judges of the Supreme Court who constituted the Supreme Court panel with the CJ in arriving at the statutory determination on the Divineguma Bill unanimously?

This is not going to be the end. The government which is under obligation to the International Monetary Fund (IMF) to implement the Structural Adjustment Policies dictated to them in return for the loans that they lavishly granted to the government have to pass laws like selling water in the guise of water management, and other sustainable natural resources like the Eppawala Phosphate deposit and even to sell the valuable lands to foreign companies at greatly undervalued prices. People in Sri Lanka will not forget that when the People's Alliance government of Chandrika Kumarathunga made an agreement with the Multinational Corporation, Freeport McMoran to sell the Phosphate deposit in Eppawala which would have deprived for generations of Sri Lankans' the right to extract the said deposit as fertiliser sustainably for many years to come was prevented by the Supreme Court. This time the government is making all efforts to prevent courts in Sri Lanka giving such people friendly judgments.

It is submitted in conclusion that the principles of judicial independence are entrenched in international instruments including the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights, (ICCPR), the Basic Principles on the Independence of the Judiciary, Bangalore Principles on the independence of the Judiciary and the Commonwealth (Latimer House) Principles on the Three Branches of the Government, (which specifically lay down that an independent, impartial and honest and competent judiciary is integral to upholding the Rule of Law, engendering public confidence and dispensing justice), all of which Sri Lanka has either approved, endorsed, ratified or acceded to.

** C. Kumarage, Attorney-at-Law is one of the Conveners of the Lawyers for Democracy, Sri Lanka ( Courtesy: The Colombo Telegraph )*

09

# ‘Trial of the chief justice’ – by Kangaroo court?

by Elmore Perera

A senior government source is reported to have stated on 08.11.2012 that “The PSC will work out the modalities for the sittings. It will only allow a single counsel to accompany the Chief Justice and would allow witnesses or documents to be called only with the consent of a majority of members,” and also that “the government had no intention of allowing representatives of theInternational Bar Association, International Judges’ Association and Commonwealth Bar Association and even the media to observe the proceedings as that would affect the Sovereignty, the authority and the Independence of the Sri Lankan Parliament if they were allowed to monitor or report or comment on the PSC.” If this is not a Kangaroo (with apologies to the Kangaroos) Court. I don’t know, what is. Certain legalistic individuals,prostituting their questionable standing as legal luminaries, have even advocated that these Kangaroos be clothed with Judicial powers tovalidate pronouncements based on their “findings”. The purported “findings” may very well be clearly contrary to the weight of evidence available. The modus operandi seems to be to shut out any information regarding such evidence until the foul deed of impeachment is concluded.

This government source, the Speaker, and the PSC appointed by him, must all realise that the only valid interpretation of “Sovereignty” as per the 1978 Constitution, is that given by the 9-judge bench of the Supreme Court headed by Hon. Neville Samarakoon CJ viz. “Sovereignty of the Sri Lankan People under the 1978 Constitution is one and indivisible. It remains with the People. It is only the exercise of certain Legislative, Executive and Judicial powers of the Sovereign People that are delegated to the Parliament, the Executive and the Judiciary. Fundamental Rights and Franchise remain with the People and the Supreme Court has been constituted the guardian of such rights.” There certainly cannot be any such thing as “Sovereignty” of Parliament. The Authority and Independence of Parliament is limited to what is set out in the Constitution and therefore the extent of such authority and independence are subject to the interpretation of the Supreme Court.
The impeachment of a President cannot be proceeded with unless the Supreme Court, after due inquiry, finds that the President has been guilty of any of the allegations contained in the resolution for his impeachment. Can the impeachment of a Chief Justice be based on a finding of a motley group of Parliamentarians with no judicial authority ? Clearly not ! Any such finding is clearly subject to appropriate Judicial Review.

It is self-evident that “the truth of a matter does not depend on how many believe it”. The truth of the 14 allegations (several of which seem to be clearly unfounded) certainly cannot be based on how many ‘vote’ for it. Cognizance must be taken of the

fact that several Parliamentarians who publicly professed to oppose the 18th Amendment did, however, for reasons best known to them, vote for it.

The submission made by ex- Chief Justice Sarath N. Silva that the impeachment exercise is "purely of a disciplinary nature relating to a contract of employment between the Judge and the Government of Sri Lanka" and that "the publication of the charges and the response moves the issue into the realm of a public trial which will only harm the Judiciary" is, to say the least preposterous! The charges against him were, at that time, all in the public domain and any attempt by him to answer them would have been tantamount to digging his own grave.

Without merely "sitting and staring at the Order Book", he took action and was saved from the ignominy of impeachment by the timely proroguing and subsequent dissolution of Parliament, by his benefactor President Kumaratunga, to whom he had administered the oath of office, as President in 1999 and once again "secretly" in 2000, for reasons best known to him.

It was only because the charges contained in the impeachment motion against her were made public, that the Chief Justice has been able to refute them as convincingly as she has done. On the other hand, if they were not publicised, the PSC could have gone through the motions secretly and caused irrevocable harm to the Judiciary. In that event no judge would in future dare to act independently to uphold the rights of the Sovereign People, even in the face of patently unlawful violations of the Fundamental Rights of the People.

Perhaps this ex-CJ is not averse to this impeachment (which will cause untold damage to the Judiciary) for the reason that his conduct at the meeting of the JSC on 30th December 2004, and the manner in which he conducted the affairs of the JSC in the year 2005 (with the active support of then Secretary of the JSC, Chandra Jayatilaka who was recently appointed by the President to the Court of Appeal) which resulted in the "Constructive Termination" of the tenure of Bandaranayake J and Weerasuriya J as members of the J.S.C. in January 2006, will thereby be permanently swept under the carpet.

This trial must necessarily be conducted in as transparent a manner as possible, to safeguard the independence of the Judiciary. It may be necessary for Civil Society to take a stand to ensure this. The arbitrary and indiscriminate use of the law enforcement agencies to suppress any dissent may require Civil Society to resort even to peaceful Civil Disobedience. Failure to do so may seal the fate of Democracy and pave the way for Ruthless Dictatorship.

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*(Courtesy: The Lanka E News / The Colombo Telegraph)*

# 10
# Make the impeachment boomerang on the Rajapaksas

by Tisaranee Gunasekara

> *"You'd wear out a marionette of steel if you pulled the string and jerked it all day long".* ***Diderot (Rameau's Nephew)***

The impeachment of the Chief Justice is neither the beginning nor the end of theRajapaksa-rush towards absolutism. But it does constitute a watershed moment in that journey, perhaps its final really-existing breaking-point.

Whether the impeachment boomerangs on the Rajapaksas or scythes Lankan democracy depends on how the judiciary, polity and society, including the non-SLFP parties in the UPFA, respond to it.

The Rajapaksas are determined to get rid of the CJ, because she has begun to block their way and cramp their style. Impeachment is the only possible solution to the Rajapaksa conundrum that is judicial independence – since doing to a chief justice what was done to Lasantha Wickremetunga or Prageeth Ekneligoda is not tenable….yet.

A pinprick of light still prevails in this gathering Cimmerian darkness. By going for the impeachment in such a ham-fisted fashion, the Rajapaksas have overplayed their hand. Handled properly, the impeachment can be used to de-legitimise the regime nationally and internationally, and impose a strategic wound on the Rajapaksa project.

The impeachment can be made to boomerang on the Siblings, if the CJ continues to stand firm and our customary indifference does not condemn her to wage this national battle alone.

The impeachment is a mark of Rajapaksa hubris; it is a result of Rajapaksa-numerical strength and of Rajapaksa-political weakness. It denotes a break in the Rajapaksa's Southern hegemony. The impeachment is symbolic and symbiotic of the Siblings' inability to do to the judiciary what they did, with such terrifying success, to the legislature, the army, the bureaucracy and the SLFP. All those entities succumbed to that particular Rajapaksa concoction of threats and rewards, snarls and smiles, with nary a murmur. Until a few months ago, the judiciary seemed to be headed in the same anti-democratic direction; and the Rajapaksa power-project seemed totally unassailable.

The Rajapaksas do not want a chief justice who will cooperate with them some of the time, on some of the issues (as Shirani Bandaranaike indeed did). The Rajapaksas want a chief justice who will do their bidding, unquestioningly, on all the issues, all

the time. The Rajapaksas want a chief justice no different from the fawning ministers/parliamentarians, the subjugated military-bosses and the supine bureaucrats, the sort of mindless underling they have become accustomed to.
Why the judiciary in general and the CJ in particular decided to resist Rajapaksa tyranny is for historians to debate. For us today it suffices that they are doing so. The judiciary, led by the CJ, is fighting to prevent itself from becoming another pillar of Rajapaksa power. They cannot win that necessary battle without the backing of all those who value the rule of law and understand that tyranny becomes destiny only through default.

**The Rajapakses Expose Themselves**

According to reports, the impeachment motion is riddled with errors and inaccuracies – just like Rajapaksa development and Rajapaksa governance. This shoddiness stems not only from the Rajapaksa penchant for low-quality, be it in road-building or parliamentary conduct, but also from the impeachment's very nature: a rush-and-rash job, motivated not by a desire for justice but by a raging thirst for vengeance.

Logically it would have been better for the Rajapaksas if the CJ continued to do their bidding. Logically it would have been better for the Rajapaksas if they did not have to impeach the CJ.

Though the Siblings pursued their power-agenda ceaselessly, from November 2005, they did so while making an effort to maintain appearances. They pretended fidelity to such impediments in their path towards absolutism as the 13th Amendment or judicial independence because they did not want to reveal, completely, their real purpose. But with the impeachment (and the growing talk about a 19th Amendment) the Rajapaksas have torn asunder the veil of deception of their own making and displayed their natural self to the world.

Interestingly, intriguingly, the Rajapaksas engaged in this political-disrobing while the world's attention was onSri Lankavia the UPR process.

The Rajapaksa need/desire to axe a chief justice who finally decided to place the constitution above the will of the executive is comprehensible. But they could have waited until the UPR process was over. The Siblings are adept at deception, and in the past they acted with considerable guile and wile to seduce the nation and hoodwink the world. Their dexterity enabled them to conceal behind a banal façade the insatiable ferocity of their power-famish. But this time they decided to go for the Chief Justice's jugular, while the world was watching. They could have waited, mouthing their usual shibboleths for a few weeks more, but didn't. They could have used at least a pinch of finesse and a drop of restraint, but didn't. Instead, they went for the kill, with bloodcurdling howls and bared fangs, at once. In doing so, they exposed their true-self, far more repellently than a thousand critical analyses could have.

Their new normal is demonstrated by their decision to reject, sans explanations, the unexceptionable requests by several countries (at the UPR) to respect judicial independence.

Why did the Rajapaksas act with such uncharacteristic rashness? Have their Chinese overlords given them a gilt-edged assurance about their financial, political and diplomatic safety? If so, what promises did the Rajapaksas make, in return? Or did their fury at an unexpectedly recalcitrant chief justice make the Rajapaksas abandon sense and sobriety and lash-out, Medamulana style? Did the Rajapaksas decide to nuke the CJ because anger made them forget the incinerating impact such a strike cannot but have on the people, the country and even themselves?

The Rajapaksas are in a hurry; they want to rid themselves of this CJ and replace her with a tried-and-tested henchman. It does not require oracular powers to know that all seven UPFA members of the Parliamentary Select Committee (a careful mix of wolves to maul the CJ and sheep to bleat indifferently) will find Shirani Bandaranaike guilty. But if those Lankans who are appalled by this dangerous charade, who understand its deadly consequences (including to themselves) make their displeasure felt, that might suffice to compel the left and minority parties in the UPFA to oppose this most egregious of travesties. If the impeachment gives rise to societal outrage, if it creates just a few wavelets of dissent in the UPFA, even a win for the Rajapaksas can become a pyrrhic victory.

Once this CJ is out and her supine successor is in, the Rajapaksas can amass every iota of power, constitutionally and legally. To achieve this end, the Siblings are willing to destabilise the system and confound the society, to blackenSri Lanka's image internationally and cause ordinary Lankans to suffer a critical loss of confidence in every branch of government.

Under Rajapaksa rule the Rajapaksas deny themselves nothing, from tax-free sports cars to witch-hunting troublesome chief justices. The cost is of no moment because the only things that count are Sibling Power, Familial Rule and Dynastic succession.
Just as Vellupillai Pirapaharan warped Tamil aspirations, undermined Tamil interests and destroyed Tamil future, in mindless pursuit of his own megalomaniac nightmare.

*(Courtesy: Colombo Telegraph/ Countercurrents.org/ Sri Lanka Guardian)*

## 11
# BASL has failed to act positively

by Lal Wijenayaka

The series of events which are naked attacks on the rule of law and the independence of the judiciary in the recent past are well recorded. These events culminated in the unprecedented action of the JSC chaired by the Chief Justice and constituted of two other Supreme Court Judges releasing a statement to the public through the Secretary to the commission. In whatever way one looks at the statement, it is the expression of the displeasure of the JSC on the interference of the executive in the discharge of its constitutional functions. There is no doubt that this unprecedented move stemmed from the unprecedented happenings of the recent past.

Lawyers are the persons who will be most affected by any outside interference in the enforcement of rule of law and the independence of the judiciary. Lawyers could perform their professional duties with dignity and self respect only under a system where the rule of law and independence of the judiciary is respected. In a legal system where the rule of law and independence of the judiciary is trammeled as far as the professional duties are concerned they cease to function as lawyers and become mere 'brokers' in the system. Therefore, the preservation of the rule of law and independence of the judiciary goes to the heart and core of the profession. No member of the legal profession with a conscience can compromise in any way with these developments.

The BASL as the professional body of the lawyers has a paramount duty to safeguard Rule of Law and independence of the judiciary against the attacks on the rule of law and the independence of the judiciary and to protect and promote the rule of law and independence of the judiciary.

In the midst of the serious and alarming events that has come to pass, it is saddening to see that the BASL has failed to act positively and meaningfully against these events that has dealt unprecedented blows on the rule of law and the independence of the judiciary. It has to be said that this has being the case not only under the present leadership of the BASL but for a considerable period of time. The failure to act during Chief Justice Sarath N Silva's tenure in office is a glaring instance.

It is not that the BASL did not do anything, but that the BASL has failed to do anything more than issuing statements condemning these attacks and expressing its concern.

These forms of protest would have even sufficed if these incidents were isolated incidents which are deviations from the norm.

But unfortunately it is not so and these series of events has shown a pattern, a system and repetition. It has reached a stage where the BASL is obliged to go beyond the

mere issuing of statements and going into discussions with the authorities concerned.
The time has come for the BASL to go to the people and educate them, enlighten them and get their backing for a campaign to force those responsible for the present state of affairs to refrain from such actions.

It is the people who are souverign and it is for the BASL to take these serious developments to them. There is no issue in discussing these matters with the authorities concerned. The view of the BASL seems to be that there should be a compromise between the executive and the judiciary. What is meant by this 'compromise' is not clear. The only compromise should be that the executive and the legislature should respect the Rule of Law and independence of the judiciary as proclaimed in the constitution and upheld in the constitution. There cannot be any other compromise short of this.

A suggestion made at the meeting of the Bar Council, that the BASL should go to the people to explain and enlighten the people on these issues was not even considered.
The very successful manner in which the university teachers under the FUTA, was able to take their cause to the people and to muster the people behind their cause is an example worth emulating. FUTA was able to carry on their campaign in taking the crisis of education to the people with much force in a dignified and enlightened manner worthy of academics. Now almost every household in Sri Lanka is aware of the crisis of education.

Every household should be made aware of the crisis in administration of justice which is more serious and goes to the very fundamental question of upholding the constitution and Democracy.

Democracy cannot stand minus rule of law and independence of the judiciary.

*( The Colombo Telegraph)*

## 12
# Shirani Violated
# The rule of Sinhala Chauvinism

by Vickramabahu Karunaratne

In the domain of liberal democracy a motion to impeach a judge of the Supreme Court is a serious matter. That is permissible only if either there is suspicion of insanity or some problem akin to it. Analysis of any impeachments of any judge in the post modern world show that whole intelligencia in that country and in related countries were participant in one way or the other in the judgment. It was a public, transparent affair where intimidation, political pressure and discrimination were brought to a minimum. Such a clear show was necessary to counter what happened under both fascism and Stalinism. It was made transparent so that the public were generally aware of the allegations – before those allegations are formally brought up. Here the situation is very different. Mahinda regime preached about the responsibility of the judiciary and the respect given by the people to the judges and magistrates. Indirectly people were made to suspect CJ of great misbehavior. However, still the public are not aware of details of the allegations against Chief Justice Shirani Bandaranayke. Whole thing was submerged in secrecy. There were campaigns, all political, against the CJ. Already, in public domain she is convicted of treachery and indecency. Village humbugs who rule the country, there by, has converted her to a modern day Jesus Christ. It is clear that she is victimized for exposing the limitations of the parliament and the central government, in relation to the 13th amendment. That is the greatest sin she has committed. Jesus became a conspirator and a criminal, because he preached all humans are equal and of single divine birth. Shirani has to bear the cross for telling that devolved power to the provinces cannot be simply over ruled; that power sharing in the 13th amendment is real. Her decision exposed the hypocrisy of Mahinda chinthanaya. That is her real crime. Gallantly she dismissed the ridiculous claim by the president that he consulted the northern Tamil people by getting the signature of the soldier appointed by him to lead the military rule there. She threw her dismissal on the face of the man who was directing an impeachment against her. Jesus went against the laws of the Roman Empire and the Jewish claim of selected race, when he said all humans are equal. In the same manner Shirani violated the rule of Sinhala chauvinism when she ruled that 13th amendment obstructs the parliament in relation to the devolved subject.

Mahinda so far maintained his support to the 13th amendment indirectly, as long as it is a mechanism for decentralization and diversification. But it cannot be a power sharing mechanism. When Shirani made it clear that the constitution and the 13th amendment stands for some thing different and devolution is already there, regime went into utmost crisis. Now they do not care for the rule of law or the constitution. What they want is to frighten and terrorize all those who are prepared to defend sharing of power. So it is clear that Shirani has to be crucified in order to save the great hero of war, man who finished the idea of Tamil liberation. She has become the

goat to be sacrificed for the unitary state of Sinhala chauvinists. The struggle of the government is not within the law. It is already a war conducted by terror and wild allegations. She is threatened to deny and change the ruling she has given already. There is clear evidence to establish that the government was involved in the attack on JSC secretary, Manjula. Also it is clear that political mudslinging at Shirani is backed by the regime. In fact GL behaved like a Stalinist Red professor in the recent adjournment debate in Parliament on JSC. The Minister of Foreign Affairs, in real terms, justified the attack on the JSC on the basis that its Secretary was appointed contrary to the constitution. He argued that according to the Constitution, only the senior most member of the minor judiciary can be appointed as the Secretary of the JSC. Manjula was 29th in the seniority list; and therefore should not have been appointed as Secretary. There are no such provisions in the Constitution and it exists only in the head of the local Red Professor. Out side parliament, using state media setup, the government is having a carnival of mud slinging and false propaganda against a woman who has given a historic judgment.

Mahinda knows that the parliament cannot act as a court in this case. It is clear that cases such as these are to be decided by courts and institutions that have been established to adjudicate judicially. However, MPs are made to believe that they can become a universal court in the name of the people. What they really expect is for this woman to break down and cry for help. In that way they expect to remove a stumbling block in their path to arbitrary rule. Time has come for all of us to defend the women carrying the cross on her shoulders. She may have done her job neatly not knowing the historic value of her stand and may be she has made mistakes in her judicial carrier. She and her family may not be the true example of a committed house hold living according to norms and traditions within the Lankan society. But, whether she likes it or not, she is in the middle of a struggle against injustice and discrimination. That makes her the women carrying the cross on her shoulder.

*( Courtesy: The Lakbima News)*

# 13
# Impeachment
# Good behaviour, misbehaviour and the trial by parliament

by Nihal Jayawickrama

On 14 March 1984, Mr Neville Samarakoon, the first Chief Justice to be appointed directly from the unofficial bar within living memory, made an ill-advised speech at an inappropriate venue. President Jayewardene, who had appointed him some six years earlier, decided that he should be removed from office. Article 107 of the 1978 Constitution provided that a Judge of the Supreme Court shall hold office during good behaviour and shall not be removed except by an order of the President made after an address of Parliament had been presented to the President for such removal on the ground of proved misbehaviour or incapacity. That Article also required Parliament to provide, by law or by standing orders, for all matters relating to the presentation of such an address, including the procedure for the investigation and proof of the alleged misbehaviour or incapacity.

What the Constitution contemplates, therefore, is a three-stage procedure. The determination whether the alleged offence of misbehaviour has been proved; which is a judicial act. The presentation of an address by Parliament; which is a legislative act. The removal of the Judge from office; which is an executive act by the President. The first stage involves the recording of evidence, due deliberation, and an independent and impartial determination by the application of pre-existing rules and objective standards. In other words, it involves the exercise of judicial power.

Article 4 of the Constitution states quite explicitly that the judicial power of the People shall be exercised by courts, tribunals and institutions created and established or recognized by the Constitution, or created and established by law. The single exception is in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, when the judicial power of the People may be exercised directly by Parliament according to law. The question whether a Judge is guilty of misbehaviour is not a matter that relates to parliamentary privileges, immunities or powers.

It was only after impeachment proceedings had commenced that the then Government realized that Parliament had failed to provide, by law or standing orders, the procedure for the investigation and proof of the alleged misbehaviour. In India, at that time, the Judges Inquiry Act 1968 required a committee appointed to investigate into alleged misbehaviour to consist of three members chosen by the Speaker – one from among the Judges of the Supreme Court, one from among the Chief Justices of High Courts, and one who, in the opinion of the Speaker, was a distinguished jurist. However, on 4 April 1984, a new standing order 78A was hurriedly drafted and adopted. It empowered the Speaker to appoint a select committee of seven members of Parliament to investigate and report its finding on

the allegation of misbehaviour. It was a blatant contravention of Article 4 of the Constitution. A Bill that sought to achieve what the standing order provided for would have required not only a two-third majority in Parliament, but also approval by a majority at a referendum.

At the first meeting of the select committee, three of its members, Sarath Muttetuwegama, Anura Bandaranaike and Dinesh Gunawardena, raised a preliminary objection that the committee could not conclude that there was "proved misbehaviour" unless it had previously been judicially determined. However, the majority of the committee, who were drawn from the ranks of the government parliamentary group, decided that "they had no alternative at that stage but to go into the matters referred to them by the Speaker". In a separate dissenting report submitted at the conclusion of the proceedings of the select committee, these three members urged the President to refer to the Supreme Court for an advisory opinion the question it had previously raised. They also expressed their strong view that the standing order should be amended on the lines of the Indian law where the process of inquiry that preceded a resolution for the removal of a Judge was conducted by Judges chosen by the Speaker from a panel appointed for that purpose. That was not done then, nor thereafter.

The determination of the question whether or not a judge is guilty of "misbehaviour" is neither legislative nor executive in nature, but involves the exercise of the judicial power of the people. Much water had flowed under the bridge since 1984. In India, the Judicial Standards and Accountability Act 2012 now enables Parliament to proceed with a resolution for the removal of a Judge only after the President has forwarded to it the report of the National Judicial Oversight Committee which consists of a retired Chief Justice, a Judge of the Supreme Court, the Chief Justice of a High Court, the Attorney General, and an "eminent member" nominated by the President. In Europe and in many countries on other continents, judges are disciplined by independent Judicial Councils, and not by the legislature.

The Judicial Integrity Group, a representative group of Chief Justices and Senior Justices from both common law and civil law systems, which has been mandated by the United Nations to develop a concept of judicial accountability, and which is at present chaired by Judge Weeramantry (and of which I am the Coordinator), has recommended the following, as part of "Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct":

> (a) The power to discipline a judge should be vested in an authority or tribunal which is independent of the legislature and executive, and which is composed of serving or retired judges, but which may include in its membership persons other than judges, provided that such other persons are not members of the legislature or executive.
> (b) A judge may be removed from office only for proved incapacity, conviction of a serious crime, gross incompetence, or conduct that is

manifestly contrary to the independence, impartiality and integrity of the judiciary.
(c) Where the legislature is vested with the power of removal of a judge, such power should be exercised only after a recommendation to that effect of the independent authority vested with power to discipline judges.
This is now the contemporary international standard and reflects the prevailing position in nearly all the democratic countries of the world.

The Government has chosen to march to the beat of a different drummer. It has chosen to ignore internationally accepted values and standards. It has chosen to violate the mandatory provisions of its own Constitution and laws. Indeed, that has been the unfortunate legacy of the presidential system of government in our country. Whereas the Prime Minister under previous constitutions sat in Parliament and was answerable for all his or her actions, the President is accountable to none. Moreover, the President is the source of all patronage. Since 1978, the extension of that patronage, and the desire of many to benefit from that patronage, has led to the undermining and eventual destruction of the integrity of almost every institution in our country, from the public service to the non-governmental sector, from the media to the legal profession, from the Opposition in Parliament to the Judiciary.

There have been, in the past, disagreements, cold war, and even conflicts between the judiciary on the one hand, and the executive or the legislature on the other. However, it is not without significance that the summoning of judges of the Supreme Court before select committees of Parliament, with a view to disciplining or removing them, is a phenomenon associated with the presidential system. It had never happened before in independent Sri Lanka. The political culture then was quite different from what it is now, and those who exercised state power then knew and recognized where the red lines were drawn.

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*( Courtesy: The Colombo Telegraph)*

## 14
# Learn from Pakistan's struggle for democracy

by Jehan Perera

The government's plan to impeach Chief Justice Shirani Bandaranayakeappears to be running into unforeseen problems. The indications are now that the government's charge sheet against the Chief Justice is not as watertight as the proponents of the impeachment motion had believed. In addition, opposition to the impeachment has come from an unexpected quarter. The four chief priests of the Buddhist Sangha have expressed their displeasure in a written statement. This has been followed by the Bar Association's call to the government to reconsider the impeachment. Apart from die-hard government supporters there appears to be little or no public support for the impeachment amongst the intelligentsia. Those who are in the government camp, such as a group of lawyers of the rank of President's Counsels, did not feel it prudent to let their names be attached to a statement they put out in support of the government view.

In these circumstances, the government would be concerned about the loss of popular sympathy and the possible fragmentation of its voter base. It needs another cause that will rally popular support. The strategy it seems to be using to regain lost ground is an appeal to ethnic majority Sinhalese nationalism. The government has shown itself to be sophisticated in offering different sections of the polity what would like to have, so as to keep them quiet on other issues. This may account for the sudden floating of the idea of a 19th Amendment to the constitution that will abolish the scheme of devolution of power contained in the13th Amendment and put in place an alternative structure to ensure a solution to the ethnic problem. The 13th Amendment has always been a controversial piece of legislation, as it deals with an issue on which there is no consensus in the country, which is the ethnic conflict and its political resolution.

So now comes government minister Wimal Weerawansa, a fiery orator known to have close links to PresidentMahinda Rajapaksa who has filed legal action in the courts of law to repeal the 13th Amendment. The government would hope that this will help to reunify its ethnic majority Sinhalese support base. As Minister Weerawansa is not a member of the ruling party but is a member of a coalition party, the government retains the option of distancing itself from this legal action if it runs into serious trouble. The proposed repeal may be rejected by the courts or it can be opposed internationally, especially by India, in a manner that the government deems detrimental to itself. In such a situation the government is likely to claim that the initiative was one that was solely that of the minister in question. However, at the present time, the government gives an impression that it intends to push ahead with its decision that the 13th Amendment needs to go.

**Strengthened devolution**

The fear of divisive forces that exist both within and outside countries is not limited to Sri Lanka. Take Pakistan for instance. There is justifiable concern amongst Pakistanis that their country is threatened by powerful international actors in a manner that could divide it. Virtually every day there are reports of bombings and attacks on military installations and civilian targets in that country. Last week I visited Pakistan to attend a conference at the University of Karachi on "Federalism in pluralistic developing societies: learning from the European experiences." But as the conference in the University of Karachi demonstrated, the academic community in Pakistan is prepared to discuss the concept of federal government along with politicians and share it with their students. One of the issues discussed was the transfer of powers from the central government to the provincial governments.

The 18th Amendment to the Pakistan constitution was passed into law in 2010. This amendment reduced the powers of the presidency, including the President's power to dissolve Parliament unilaterally. It was the first time in Pakistan's history that a president relinquished a significant part of his powers willingly and transferred them to parliament and the office of the prime minister. Senator Mian Raza Rabbani who is considered as the architect of the 18th Amendment addressed the conference in his capacity as chief guest and said, "We can learn and understand various concepts. We looked at several constitutions of countries with a federal system including Switzerland, Germany and Canada when drafting the 18th Amendment. But at the end of the day it came down to home-grown solutions." Senator Rabbani said the amendment had given rise to federalism in Pakistan. "Seventeen ministries have been devolved. After 1947 it is perhaps the biggest structural change in our governmental machinery. It is not a perfect document — it has its ups and downs."

Among other changes made by the 18th Amendment in Pakistan, courts will no longer be able to endorse suspensions of the constitution, a judicial commission will appoint judges, and the president will no longer be able to appoint the head of the Election Commission. It is therefore ironic that the 18th Amendment in Sri Lanka, which was also passed in 2010 is very much the reverse of the 18th Amendment in Pakistan. It further centralized powers of appointment of high state officers in the Presidency. As a country that continues to battle terrorism that comes from beyond its borders as well as within the country, Pakistan has more reason than Sri Lanka to fear the weakening of its central government. But the more enlightened political leaders of Pakistan have realized that the powers of government are meant to be shared and not hogged by a few persons and that it is the legitimacy that accompanies the system of shared governance that will best keep Pakistan together.

**Looking outside**

In making efforts to resolve conflicts in a manner that paves the path to the rapid development of the country's productive forces, the government can look outside Sri Lanka to see how other countries have solved their problems and are forging ahead. Government leaders, most notably President Mahinda Rajapaksa, have frequently said that they look to Asian countries for inspiration. One of the Asian countries that

the government can embrace is Pakistan, which stood by successive Sri Lankan governments during the years of war. However, even in post-18thAmendment Pakistan, the struggle to sustain democracy continues. The devolution of powers is resisted by the central government authorities. The military, that once ruled Pakistan, has its own national security concerns and continues to put pressure on the democratic leaders.

In Pakistan, the memory is still fresh how President Pervez Musharraf who originally took power in a military coup, had sacked Chief Justice Iftikar Mohammed Choudhry in 2007. But this led to mass protests and in 2008 it was President Musharraf who had to step down and flee the country. Chief Justice Choudhry was reinstated along with all other judges who were sacked. In a widely reported speech that coincided with the holding of the international conference on federalism that I attended, Chief Justice Iftikar Mohammed Choudhry referred to the role of the Supreme Court in the governance of Pakistan. He said that the Supreme Court had been restored to its rightful position by "an unprecedented struggle carried out by a consort of such professional classes as lawyers, students, media persons and civil society at large."

In the course of his speech the Pakistan Chief Justice said, "Gone are the days when stability and security of a country was defined in terms of numbers of missiles and tanks as a manifestation of hard power available at the disposal of the state." Therefore, he said "A heavy responsibility lay upon Supreme Court judges for being the guardians and protectors of the constitution to uphold the canons of the constitution's predominance and its supremacy over all other institutions and authorities." The outcome of multiple crises affecting the country is unclear at the present time. The challenge will be to resolve them in a manner that is constructive in the longer term rather than to more severe conflict. At a time when the Sri Lankan government is planning to impeach the Chief Justice and to undo the devolution of powers found in the 13th Amendment, it should look to Pakistan's example and listen to the wise counsel of its democratic leaders.

*(Courtesy: The Island)*

## 15
# Fast descent into a constitutional dictatorship?

by Eran Wickramaratne

Sri Lanka is fast descending into a Constitutional Dictatorship. In a kingdom the powers of the Executive, the Legislature and the Judiciary were exercised by the king. The king was sovereign. In a democracy the people are sovereign and their sovereignty is given expression through the executive, legislative and the judicial branches of Government. The healthiest democracy is where the different arms of government are independent of one another, and they exercise their powers in a manner that does not impinge on the other. A system of checks and balances should also be in place, so that one organ of power could arbitrate conflicts between the other two organs. If there was to be a conflict between the Executive and the Judiciary, the Legislature would be the arbitrator.

We are now facing a situation where Members of Parliament have brought an impeachment motion against the Chief Justice, and where they have to decide on the removal of the Chief Justice. In the United States of America there is a clear separation of powers between the Legislators on Capitol Hill and the President and his Cabinet. The President picks his Cabinet from outside the House of Representatives and the Senate. If a member of any of the Houses is picked to be in the Cabinet, like was the case with Senator Hilary Clinton, she resigned her legislative position to become a part of the Executive maintaining strict separation between the Executive and the Legislature. In Sri Lanka the Cabinet of Ministers is picked from elected members of Parliament diluting the separation between the Executive and the Legislature. The dilution was limited to the Cabinet of Ministers who share in executive power. The administration of President Rajapaksa has reduced the independence of the Legislature drastically by appointing multiple scores as Senior Ministers, Ministers, Deputy Ministers and Monitoring Ministers. The independence of the Legislature from the Executive has irretrievably suffered by turning most legislators into mini-executives. Government MP s have little choice but to bow down to the whims and fancies of the President when the structure of government has been altered in this manner.

It is in this situation that the Chief Justice will be subject to a hearing by the Parliamentary Select Committeeand a subsequent vote by the Members of Parliament. One has to assume that the Bench in a trial is unbiased and has no material interest in the case at hand. It must be pointed out that some of the MPs who have signed the Resolution have cases pending against them in the Supreme Court, and crossed over to the government from the Opposition benches. In a jury system of trial a Juror picked to hear the case will be vetted for independence. If the Juror is discovered to have any material interests or conflict on his selection he would step down as a Juror.

The critical issue in the dispensation of justice is to ensure that justice is done, and justice is seen to be done. I will refrain from commenting on the Resolution as per Article 107 of the Constitution that has been entered into the Order Paper of Parliament. I need to comment on the backdrop and process of the impeachment.
An ordinary citizen has access to several safeguards in obtaining justice. For example, a decision given by a lower court could be challenged in a higher court. In the case of the impeachment of the Chief Justice or a Judge there is no similar recourse. Therefore allegations must be converted into a charge sheet and then the evidence must be heard and carefully analyzed by the Parliamentary Select Committee. Even in the instance an offense has been committed, it will have to be further examined if the offense warrants impeachment. For example, former Chief Justice Neville Samarakoon's speech at a tutory in Colombo was thought to be improper, but did not lead to an impeachment and he was subsequently acquitted.

It is no secret that there have been bad judgments on important issues relating to the interpretation of the Constitution and the sovereignty of the people. It is also not a secret that there have been poor decisions by the Executive, and also by Parliament. A case in point was the abolition of the 17th Amendment to the Constitution. Bad decisions do not always provide a basis for an offense. Bad judicial decisions of the past should not bias one's view on the impeachment resolution It must also be pointed out that it was unfortunate that the Judiciary had presided over the reduction of its own independence when it ruled that the 18th Amendment was not inconsistent with the Constitution. If modern democracies are built on the notion of separation of powers, then Sri Lanka has transgressed that principle with the adoption of the 18th Amendment. It is also disturbing that the Constitution itself could be amended as an Urgent Bill, without time for public debate and consideration – an argument that appears to have not been considered by the Bench. A two-thirds majority in Parliament was not the mandate given by the electorate at the General Elections held in 2010. The special majority has been created artificially by inducing crossovers from the Opposition ranks.

Sri Lanka is one of the few countries where laws inconsistent with the Constitution can be enacted through a special majority and referendum. It begs the question whether such a Bill should be enacted into law or whether the Constitution itself must be amended after wide consultation. The Divi Neguma Bill seeks to centralize power in a Minister, who is a Presidential sibling. The proposed Bill attempts to subvert Articles 148 and 150 of the Constitution which deals with public finance which is a part of the sovereignty of the people that is entrenched in Article 3 of the Constitution. The Supreme Court has ruled that funds must be deposited in the Consolidated Fund and made available to the Divi Neguma Fund with the approval of Parliament. The Divi Neguma Bill was a further attempt to strengthen the Executive arm of the Government over the Legislative arm, while others feel that it was an attempt to get at finances outside Parliament's purview.

In another ruling on 22nd October on the Appropriation Bill the Supreme Court ruled that Clause 2(1) (b) and 7 (b) of the said Appropriation Bill contravened Article

148 of the Constitution giving Parliament complete control of finances. Article 2(1) (b) was an attempt to raise loans without Parliament's specific approval, and 7 (b) referred to the Minister's discretion in allocating funds from one purpose to another without Parliament s specific approval. The Supreme Court's recent rulings as explained above are a major irritant to the unbridled powers of the President and Executive arm of government. The Court s newly founded assertiveness and exercise of independence is troubling for Government. Dr. Shirani Bandaranayake as the Chief Justice may be a risk the Government does not want to take in the long run. Those who are drunk with power need more power as an addict is devoted to his addiction.

It is in this backdrop that a resolution with allegations of personal and professional misconduct has been entertained by the Speaker. Justice Bandaranayake has sat on the Bench for the past 15 years and her behaviour and judgments have been previously acceptable to the regime which then elevated her to be the Chief Justice. I do not wish to prejudge the charges against the Chief Justice. However questions will be raised as to their motivation.

The Executive and Parliament must now ensure that just and fair process will be followed and that the accused will be given the space and time to make her defense. If not Sri Lanka will be a Constitutional Dictatorship.

*(Courtesy: The Sunday Times)*

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# Impeachment and Corruption
# Why is the non executive chairman the only accused?

by Charitha Ratwatte

An ogre is a monster in a fairy tale or popular legend, usually represented as a hideous monster who feeds on human flesh. Recently in a number of Asian countries, the ogre of corruption has manifested itself, among the political class and their acolytes.

Normally it is the political class which alleges corruption and related misbehaviour among bureaucrats, public officers and business persons who do not tow their political line and carry out their illegal or unethical orders.

But just now, ironically, this ogre has flown back home to roost. Remember, it was the famous American author Mark Twain, who in his infinite wisdom, once declared the only criminal class in the United States of America is in Congress!

Let's take Sri Lanka first. Corruption of the political class has a long history. The Thalgodapitiya Commission was appointed in the late 1950s to inquire into allegations of corruption among some politicians. A Department and then a Commission to eradicate and inquire into Bribery and Corruption was created. In its present incarnation, the Commission can only act on a complaint.

Readers would recall the infamous attempt to unload some shares of a finance company, on to a State bank, in the recent past. The putative buyer was a State bank, regarding which there is Government guarantee on deposits. The shares purchased – 7,863,362 in number – were overvalued, the purchase price too high. Purchased with depositors' funds, over which there was a Government guarantee.

The bank attempted to justify the purchase, by a convoluted claim that the purchase would allow the bank, through the finance company, to get into the provision of profitable financial services which the bank's enabling law did not permit it to indulge in! The creators of the State bank, advisedly, prohibited that bank from getting into that kind of speculative, high risk financial services, for good reason. Because this was depositors' money, over which there was a Government guarantee.

The ethics of the bank trying to do, through an underhand transactional device, something its own enabling law did not explicitly allow it to do, is beyond belief and itself highly questionable. That, if anything, amounts to corruption. The public outcry against the transaction was so outraged that the Government was forced to cover its tracks and order the sale cancelled. The Securities and Exchange Commission had to give a special dispensation for the bank to resell the shares in the

finance company bought and paid for by the State bank to the sellers, who themselves, it is rumoured, are political acolytes of the highest order.

The sale was in May 2012. In October 2012, the Director General of the Bribery Commission, moving with the speed of light, in comparative terms that is (Usain Bolt watch out!), compared to the lethargy and sloth normally shown, according to analysts familiar with the agency, has through the Criminal Investigation Department of the Police made a complaint and had a plaint filed against the person, who was the Non-Executive Chairman of the bank under scrutiny for causing a loss to the bank and recommending another acolyte to serve on the board of the finance company.

Now it is strange that only the Non Executive Chairman is the accused in this case. The bank being referred to, a statutory organisation, in which it is presumed, its officers and servants follow due process. When the board of a statutory organisation, approves a purchase, when the executive officers, especially the accounting staff and other executive officers sign off on checks, for any purchase, we have to presume that the process has been followed, authorisation, approval and certification.

Then why is the Non Executive Chairman the only accused? At least the other board members of the bank and its executive officers and the other financial sector employees must be charged with dereliction of duty, at the very least? Whether this has been done is not in the public domain. A newspaper reports that Chairman of the Bribery Commission has refused to comment on why this particular case against the Non Executive Chairman is being fast tracked.

Among the legal fraternity, there is much agitation as regards the ostensible reason for the fast tracking of this State bank and finance company deal. A newspaper reports that it is the talking point on Hulftsdorp Hill, the location of Dutch Governor Hulft's mansion and currently where the higher Judiciary holds sway.

There is persistent speculation among the gowned and wigged fraternity that the Non Executive Chairman's indictment on bribery charges is in the context of plans under way to impeach a judicial officer. For which an impeachment motion has been handed over to the Speaker of Parliament. According to the newspapers one charge is specifically: 'That her husband is a suspect in relation to legal action initiated at the Colombo Magistrate's Court'.

There much anxiety expressed among lawyers that the indictment was designed to trigger the resignation of this judicial officer. On top of all this another Minister has suddenly discovered, no doubt to his utter amazement, that the appointment of the Secretary to the Judicial Service Commission is unconstitutional! All these things coming together, the timing that is, makes the whole caboodle, curiouser and curioser by the day!

This discovery and revelation has come one year after the appointment, it turns out that it is an issue of seniority, but historical records, it is said shows that other incumbents of that same office have had varying degrees of seniority in the list! Another charge in the impeachment motion is: 'Disregarding the seniority of judicial officers through the appointment of Manjula Thilakaratna as the Secretary of the JSC'. Truth is much stranger than fiction or allegations for that matter.

In India, Arjun Kejriwal, one-time follower of Anna Hazare, the anti-corruption activist, now recently broken away to form his own political party, keeps the Indian public in a state of constant titillation by alleging corruption charges against India's erstwhile political class and their acolytes.

Kejriwal's first target was against the ruling Congress party Chairperson Sonia Gandhi's son-in-law Robert Vadra on his sudden wealth and high net worth as a land developer. The allegations were that Vadra was favoured with prime land sold to him at knockdown prices, by a property development company, DLF group, one of India's leading reality firms, who also provided cheap financing for the purchase of the land, and Vadra then resold the land for astronomical prices.

In a connected development a senior civil servant IAS officer Ashok Khemka, was transferred from his post soon after he ordered an investigation into Vadra's land deals. The Haryana State Government however stated that it as the Government prerogative to transfer an employee and the move had nothing to do with the land deal allegations.

Later an investigation by the Deputy Commissioners in charge of the areas where the lands were located has reported that there are no irregularities in the transactions. Anti corruption campaigner refuse to accept this finding, demanding an independent investigation. The opposition party's went to town attacking, Vadra, the Government, the Gandhi family, and anyone else they could get into their sight, in a classic ready, fire, aim strategy. It was a real case of carpet bombing.

Kejriwal's next target was the opposition BJP Party's President Gadkari. Gadkari, a nominee of the right-wing Hindutva RSS, it is alleged had around the time he was the Public Works Minister in a State Government, set up a series of corporate entities, having cross holdings, in which among the investors were corporations and individuals who had got lucrative contracts from the State Public Works Ministry.

Gadkari's personal assistants like his chauffeur, his astrologer, etc. were shareholders in the companies, some other alleged shareholders in these shadow companies could not be found at their given addresses, the persons living at the addresses never having even heard of them.

By the way, as an aside, astrologers seem to have a prominent role in these shenanigans – even in Sri Lanka in the finance company and State bank corruption case, an allegedly prominent astrologer was a member of the State bank Board, who

in all fairness should also be charged with whatever the Non Executive Chairman is charged with!

But getting back to the Gadkari case the anti corruption campaigners led by Kejriwal alleged that he was involved in an irrigation scam worth millions of dollars. Gadkari was accused of stealing water, power and land from poor farmers in Maharashthra State. It was alleged that the Congress-controlled State Government bent the rules to give away land owned by farmers to Gadkari an oppositionist.

They allege that land left over after acquisition to build a dam should have been returned to the farmers from whom it was taken, but instead the State Government sold it at knock down prices to Gadkari. Kejriwal alleged that water from the dam was also diverted away from the farms to factories in which Gadkari had interests. Gadkari's response is that the land has been in fact given to a co-operative, which is a charitable trust and it is not controlled by him. He is open to any inquiry.

Kejriwal has also targeted India's current Minister of External Affairs, Salman Khurshid, who was until his recent elevation to that post, the Law Minister; Khurshid is a grandson of India's first Muslim President Zakir Hussein. Kejriwal's India Against Corruption Group, accused Khurshid of embezzling funds meant for disabled people, in Khurshid's electorate of Farrukhabad, Uttar Pradesh.

An amount of Rs. 7.1 million given to the Zakir Hussein Memorial Trust which is managed by Khurshid and his wife, by the Union ministry of Social Welfare, was alleged to have been misappropriated. Just after the allegation was made public, Khurshid was appointed External Affairs Minister. Kejriwal stated that the Congress was rewarding those who indulge in corrupt practices!

In the meantime Khurshid got into an argument with a reporter at a press conference and threatened him with legal action adding that he could "work with the pen – but I also work with blood". He further told the reporter who wanted to visit Farrukhabad to investigate the story: "He can come to Farrukhabad, but should keep in mind that he has to return, too."

Kejriwal has now an alleged conspiracy by the both the Congress and the BJP to assist billionaire Mukesh Ambani's Reliance Group. The allegation is that gas fields in the Krishna Godavari basin north of the international maritime boundary between India and Sri Lanka, was allotted to Reliance in the 2000 by the BJP Government.

Kejriwal alleges that Reliance undertook to supply gas to the Indian para statal the National Thermal Power Corporation for 17 years at $2.5 per unit of gas. But in 2007 the Congress Government allowed an increase to $ 4.25 to Reliance. In 2012, Reliance wanted an increase up to $14.25 per unit. The then Petroleum minister Jaipal Reddy refused. Reddy was removed at the same reshuffle at which Khurshid was promoted, and replaced, according to Kejriwal for having the gumption to stand up to Reliance.

What is happening in India is unprecedented. Analysts point out that, for all their vitriolic rhetoric in Parliament and in the media, the Indian political class – primarily the Congress and the BJP – have long had a tacit understanding to keep silent about each other's 'private' money-making activities and the 'businesses' run by their family members.

Like the nuclear deterrent which the USSR and the USA had during the Cold War years, the party leaders had enough ammunition for mutually-assured destruction if either should launch corruption charges against the other. But Arvind Kejriwal and his India Against Corruption have completely upset this cosy arrangement, especially the alleged connivance of the Congress and the BJP in the Reliance case, and India's vibrant 24-hour news TV channels are beaming these sensational allegations on serial corruption among the political class into the drawing rooms of India's vociferous middle classes – the chattering classes – on a 24/7 basis who are lapping it up.

They revel in watching the spectacle of the once untouchable political class, for whom they have a healthy contempt, squirm before public scrutiny. In India, in the absence of credible institutions to put an end to endemic corruption and abuse of power, the middle classes are embracing a contemporary form of mob justice, with anti corruption activists and a trial by a ratings-hungry media, acting as prosecutor, judge and executioner.

Similar earth-shaking events are taking place in the People's Republic of China. In the midst of the regular, once in a decade, orderly leadership transition, taking place in Beijing, China is in turmoil. The Communist Party has just completed the ouster of the former Party Head of Chongqing, former Red Princeling Bo Xilai from all posts and stripped him of immunity from prosecution for corruption charges.

Bo was a one-time highly connected hi flier, who was campaigning to be elected from the 25 member Politburo to the nine-member standing committee of the Politburo of the Communist Party. These nine men and women run China. Bo based his campaign on the left wing Maoists of the Party, which instilled fear in the reformers who suffered during Cultural Revolution at the hands of the Red Guards. The indiscretions of a former Bo ally, the police chief of Chongqing and the conviction of Bo's wife of the murder of a British national, were the ostensible reasons.

But Bo's populist leftist leanings are thought to be the real reason. The leading reformist among the current Chinese leadership is Wen Jiabao, Prime Minister, who is stepping down from the leadership. The current leaders saw Bo Xilai as a threat to their reform process. Prime Minister Wen made this clear when he spoke of Bo as a dangerous force which might turn China back to the chaotic days of the Cultural Revolution. Wen and the eight other members of the standing Committee of the Politburo of the Communist Party will stand down immediately and retire from

Government in March 2013. But the left wing of the Party have hit back with a thunderbolt.

The New York Times of 28 October published an expose detailing the riches amassed by Wen's closest family members in the 10 years since Wen rose to top office in China. The story is that several members of Wen's family amassed net assets worth at least US$ 2.7 billion after Wen assumed high office 10 years ago. The allegation is that the family's business dealings included, large profitable investments in State companies and financial backing form from State enterprises and State contracts for family members' companies. China's reformists fear that this attack on Wen will jeopardise the whole reform process.

Sina Weibo, the equivalent of Twitter in China, has been awash with allegations that the NY Times has been used by supporters of Bo to attack Wen. Prime Minister Wen's family has tried to hit back with an unprecedented statement issued through lawyers in Hong Kong. However, the NY Times is standing behind its story. In China the NY Times website has been inaccessible since Friday. Arthur Sulzberg Jr. the publisher of the NY Times acknowledged that he expected some sort of retribution from the Chinese Government. China's People's Daily, the Communist Party mouthpiece, launched a blistering attack on the NY Times accusing it of faking and distorting news. The NY Times was accused of trying to discredit China.

Like in India, the political class in China has been able to keep away from the public eye the wealth of its top cadres. When exposed, they react with predictable fury. A report about the family wealth of Xi Jinping, another Red Princeling, who is to succeed Hu Jintao to the post of President, in the next few days, by Bloomberg in the past, resulted in the boycott of Bloomberg's financial data by Chinese Banks and censorship of the Bloomberg web site. The Maoist left in China, infuriated by the dismissal of their champion Bo Xilai, by the reformists, have probably leaked information of the Prime Minister Wen's family wealth. This has resulted in the whole issue being in the public domain. Despite the heavy hand of the censor, some Chinese bloggers accessed the NY Times story and spread it around on Sina Weibo.

In Sri Lanka, India and China, just as anywhere else, the political class is unable to confine the stories of corruption among their ranks away from the public eye. The political class the world over would very much like to hold out that they are 'pure as driven snow'. But given the shameful scramble for power and predictability of human nature, it just won't happen. It is in the nature of things that –people will get to know, sometime, somehow, and consequences will inevitably flow. Just as night follows day.

*( Courtesy: The Colombo Telegraph)*

## 17
# In dealing with The Impeachment Motion

by Laksiri Fernando

In dealing with the impeachment motion against the Chief Justice, it is correct for the opposition not to stoop into dishonourable politics as the government conducts its affairs inside and outside Parliament, on the subject, especially through the government controlled media. There are charges, unfounded or not, that need to be carefully investigated. If theParliamentary Select Committee Investigation (PSC) becomes purely a political battle, between the government and the opposition, that is not what the constitution or the remaining democracy in this country would expect. Otherwise, the political culture of the country and the present sorry state of our many institutions would become completely irreparable.

But at the same time, there is no need for the opposition parliamentarians and others to keep completely silent on the subject, other than those who are nominated to the PSC. There are political dangers looming behind the impeachment initiative to completely scuttle the independence of the judiciary and make it an instrument of the executive. This is an extension of the 18th Amendment and the Executive Presidential System. The people in the country should be educated and we ourselves should get educated through the process. The indications so far are alarming.

According to CA Chandraprema, who perhaps reads the current 'Mahinda Chinthana' correctly, the "government means business." He also adds "in Sri Lanka – every battle, whether it be with terrorists, the Supreme Court or with foreign powers have to be fought to the finish." What is expected with the Supreme Court is apparently a Nanthikadal! These words should not be taken lightly considering what happened last Friday at the Wellikada remand prison; 27 dead. His suggestions on Supreme Court reforms are more dramatic than his political rhetoric.

"Shirani Bandaranayake made history by being the first woman Supreme Court judge and the first woman chief justice. She is about to make history again and how! What this shows is that no one should be appointed to a body like the Supreme Court and holds that position for more than five years. Shirani Bandaranayake has already been on the Supreme Court bench for far too long. Furthermore a position on the SC should be offered only to those with long years of experience at the bar or the bench and should not remain either as a Supreme Court judge or the chief justice for anything more than five years."

Apart from the obvious contradiction between "long years of experience" for appointment and not "more than five years" to hold office in the Supreme Court, the suggestion is a clear prescription for complete politicisation of the Supreme Court, let alone the judiciary in general. It is almost a universally accepted democratic principle today that what is of paramount importance is the independence of the judiciary. That is why a life tenure or tenure until retirement is prescribed. Impeachment is a

device to correct any adverse consequence in the process due to 'misbehaviour or incapacity.' In some countries 'crimes' or 'treason' are the terms used and in fact requires a two-thirds majority to pass an impeachment motion after independent judicial inquiry.

There is no question that the present Chief Justice had compromised her position by allowing her husband to accept and hold government appointments in the past, not one but several. But the main culprit in this predicament is the government itself. That kind of an appointment for a spouse of a Chief Justice or a Supreme Court Judge could be made only by a government which doesn't believe in the independence of the judiciary. 'Real politic' is not an excuse. There should be proper rules for government appointments, without making them merely political. Perhaps the appointment of the husband was done purposely as bait and to keep her position compromised as much as possible. In my opinion, at least now the Chief Justice should admit this mistake openly. Or her husband can make a public statement without implicating of course the ongoing bribery inquiries against him.

When the bribery charges were raised against her husband, whether he is innocent or not, the Chief Justice could have gracefully resigned, because the first mistake was already committed. That was unfortunately not done. These and related matters were raised impartially by Uvindu Kurukulasuriya before. Holding onto positions some way or the other whether politicians, government officials, academics or judicial officers is not a good practice for democracy and transparency or as a personal principle. It is my personal impression that the bribery charges are vindictively framed up. I may be wrong. The courts have no option but inquire. Only the Chairman of the NSB cannot be responsible when there is a Board of Management collectively responsible. And my experience as a Director at the Colombo Stock Exchange (CSE), reminds me that these kinds of large scale share transactions cannot happen without the government approval or prompting. All these are closely monitored and even manipulated. However, if something goes wrong, then they find scapegoats and in this case it is more than a scapegoat. This is a punishment mainly for the spouse going out of line of the government policy.

This is a good lesson for those who ask, accept and hold government appointed positions. Some are my friends. I have luckily escaped the predicament. Under normal circumstances, these are perfectly normal appointments and a way of contributing to the national development. But we don't seem to live under normal circumstances. The government is suffering from the Nanthikadal mentality. The government appears to keep a close tab on every important and vulnerable person in the public service and the judiciary. Foreign Service is not spared. The government or actually the ruling circle would give enough rope to deviate from normal practices. Their instructions over the phone would not be reliable. Then they will hound behind you if you fall out of line. Financial embezzlement is the most effective charge to destroy a person's credibility, whether proven or not.

Luckily for the Chief Justice, she can go before a Parliamentary Select Committee and the best strategy would be to place everything openly and frankly before the Committee, including any mistake in the past. The public would particularly like to know the political pressures coming from high offices on the functions of the Judicial Services Commission.

The charges against her, in my opinion, are not carefully formulated: some are frivolous and some are simply vindictive. There so many inaccuracies. She has already answered through her lawyers the charges against her bank accounts and financial matters. Many have commented on other charges and the political motives behind the impeachment are too naked. However, the impeachment procedure in Sri Lanka is flawed. It is simply incorrect for a simple majority of Parliament to impeach a higher judicial officer, while this is not particularly the case for the President. The composition of the PSC is lopsided and the procedure unclear. It would be a struggle for the opposition to try and rectify these matters.

There is no reason for her to resign now, however. Her integrity in respect of the Supreme Court decisions remains intact and those have never been unilateral decisions. While it is her responsibility to defend herself in respect of the specific charges with courage and confidence, it is up to the Opposition to defend the Independence of the Judiciary. What is at stake most is the independence of the judiciary. This is also the task of the Sri Lanka Bar Association and the civil society. The politicization of the judiciary should be prevented from all sides. The integrity of the position is already damaged by the last two chief justices, one becoming an advisor to the President and the other becoming an associate of an opposition politician. Compared to those two, the present CJ appears to belong to a rare species. The judicial officers should refrain from politics, in office and even after.

*(Courtesy: The Colombo Telegraph / Sri Lanka Guardian)*

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## Impeachment of CJ
## Path to standing orders?

by Kamal Nissanka

The impeachment of the Chief Justice of Democratic Socialist Republic of Sri Lanka is by every mean seems to be a judicial function. In this context it is vital and interesting to see how the Select Committee appointed by the Speaker of the Parliament acquired its jurisdiction.

Article 4(c) of the 1978 Constitution stipulates on judicial power of the people as follows:

Article (4)c-the judicial power of the People shall be exercised by Parliament through courts, tribunals, and institutions created and established by law, except in regard to matters relating to the privileges , immunities and powers of parliament and of its members wherein the judicial power of People may be exercised directly by Parliament according to law.

According to the above article judicial power of the people is unequivocally vested in the courts, tribunals and institutions created by law (e.g.: Rent Boards)

According to article 4 (C) of the constitution, Parliament can act judicially in regard to matters relating to privileges , immunities and regarding powers of Parliament and its members.

A literal interpretation of the Article 4 (C) clearly manifests that the Parliament did not possess jurisdiction to investigate an impeachment motion when the constitution was passed in 1978.

Then a question arises as to whether the parliament could grab judicial power directly for a subject which is not falling under privileges, immunities.

**Impeachment of Superior Court Judges**

It is clear that the Article 107(1) is regarding appointment of judges while Articles 107(2) and 107(3) are regarding impeachment of a judge.

Article 107(2) states as follows: Every such judge shall hold office during good behavior and shall not be removed except by an order of the President made after an address of parliament supported by a majority of the total number of members of Parliament (including those not present) has been presented to the President for such removal on the ground of proved misbehavior or incapacity.

Provided that no resolution for presentation of such an address shall be entertained by the Speaker or placed in the on the order paper of parliament, unless notice of such resolution is signed by not less one third of the total number of members of parliament and sets out full particulars of alleged misbehavior or incapacity .
Article 107(3) states as follows: Parliament shall by law or by standing orders provide for all matters relating to the presentation of such an address including the procedure for passing of such resolution the investigation and proof of the alleged misbehavior or incapacity and right of such judge to appear and to be heard in person or by representative .

When one scrutinizes the above two Articles of the constitution the steps that would be taken for an impeachment motion would be in two stages

STAGE 1

a) Presentation a motion signed by at least 75 members. (b) Entertainment by the speaker (c) Placing that in the order paper
STAGE 2
a) Investigation of alleged misbehavior or incapacity. (b) Judge has the right to be heard in person or representation
At the time or just immediately after the enactment of 1978 constitution there had not been any law or Standing Orders to initiate an impeachment process as sighted in Article 107(2) of the constitution until 4thApril of1984.

**Law or Standing Orders?**

Instead of drafting a bill first and then making it an Act for the impeachment process incorporating "an investigating body or board" comprising of retired judges and eminent personalities, then government opted to introduce Standing Orders in this regard in 1984.

It was to impeach former Chief Justice Mr. Neville Samarakoon that the parliament under President J. R. Jayawardene had passed the respective Standing Orders. If the investigation elaborated in the Article 107 (3) is done by a tribunal, body or board created by law passed by parliament as mentioned in the same article that would have been in par with Article 4 ( C ) of the constitution.

Instead the parliament by creating Standing Orders had grabbed the judicial power unto itself in the impeachment process contravening or violating Article 4c of the constitution. Thus the then government had also violated the concept of separation of powers by installing "judicial power" regarding impeachment in the legislature.

**Standing Orders -78 A**

The following Standing Orders which were passed by United National Party government in 1984 will applied to the impeachment process of the Chief Justice.

78A(1)Notwithstanding anything to the contrary in the Standing Orders , where notice of a resolution for the presentation of an address to President for the removal of a judge from office is given to Speaker in accordance with Article 107 of the constitution , the Speaker shall entertain such resolution and [lace it on the Order Paper of Parliament but such resolution shall not be proceeded with until after the expiration of a period of one month from the date on which the Select Committee appointed under paragraph (2) of this order has reported to Parliament.
(2)Where a resolution referred to in paragraph (1) of this order is placed on the Order Paper of Parliament, the Speaker shall appoint a Select Committee of Parliament consisting of not less than seven members to investigate and report to Parliament on the allegations of misbehavior or incapacity set out in such resolution.
(3) A select committee appointed under paragraph (2) of this Order shall transmit to the Judge whose alleged misbehavior or incapacity is the subject of its investigation, a copy of the allegation of misbehavior or incapacity made against such judge and

set out in the resolution in pursuance of which such select Committee was appointed, and shall require such Judge to make a written statement of defense within such period as may be specified by it.
(4)The Select Committee appointed under paragraph (2) of this Order shall have power to send for persons, papers and records and not less than half the number of members of the select committee shall form a quorum.
(5) the judge whose alleged misbehavior or incapacity Is the subject of the investigation by a select Committee appointed under paragraph (2) of this Order shall have the right appear before it and to be heard by , such committee in person or by representative and to adduce evidence ,oral or documentary in disproof of the allegations made against him.
(6) At the conclusion of the investigation made by it, a select committee appointed under paragraph (2) of this order shall within one month from commencement of the sittings of such select Committee, reports its findings together with the minutes of evidence taken before it to Parliament and may make a special report of any matters which it my think fit to bring to the notice of Parliament.
Provided however, if the select Committee is unable to report its findings to Parliament within the time limit stipulated herein the Select committee shall seek permission of Parliament or an extension of a further specified period of time giving reason therefore and Parliament may grant such extension of time as it may consider necessary.
(7)Where a resolution for the presentation of an address to the President for the removal of a Judge from office on ground of proved misbehavior or incapacity is passed by Parliament, the speaker shall present such address to the President on behalf of the parliament.
(8)All proceedings connected with the investigation by the select Committee appointed under paragraph (3) of this Order shall not be made public unless and until a finding of guilt on any of the charges against such Judge is reported to Parliament by such Select Committee.
(9) In this Standing Order "Judge" means the Chief justice, the President of the Court Appeal and every other judge of Supreme Court and Court of Appeal appointed by the President of the Republic by warrant under his hand.

**Conclusion**

A question regarding the jurisdiction of the Parliamentary Select Committee (on impeachment) created under Standing Orders 78A arises as they were passed by parliament in 1984 in violation of Article 4(c) of the Constitution. The exercising of "judicial or quasi judicial power" by a body of the legislature is in violation of the theory of separation of powers. As the majority of the Select Committee members belong to the government party they are naturally influenced and interfered by their political leader. Thus prosecutor becomes the judge. (See Sinno Appu Vs Rajapakse(1928)30NLR 348)

***References:***

*J.C.Weliamuna- Impeachment of CJ-An Unconstitutional Witch Hunt (Colombo Telegraph)*
*Dr. Nihal Jayawickrama – Behavior, Misbehavior and Trial by Parliament (Colombo Telegraph)*

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*( Courtesy: The Colombo Telegrpah)*

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# Impeachment of CJ
# An Unconstitutional Witch-Hunt

by JC Weliamuna

Rajapaksha Regime, through its parliamentarians, handed over an impeachment motion to the Speaker, the elder brother of the President Rajapaksha against the first woman Chief Justice of the country. It appears that the Government of Sri Lanka is in a mighty hurry to "get rid of the Chief Justice" so that a major obstacle for government's capricious track is removed. With the handing over of the impeachment, the government has signaled to the entire public service and judiciary two rules – that the Regime is superior to the Law and that Rule of Law does not exist in the country. This short article is written to bring out several vital issues that the public should not lose sight of, in relation to the present impeachment attempt.

**Background**

The events leading to the impeachment demonstrates that the move to impeach the CJ is nothing but a political witch-hunt. The tension between judiciary and executive started with Minister Bathirdeen's unsuccessful attempt to influence the Magistrate of Mannar, resulting in an attack on the Magistrate's court. Then there were attempts by the Executive to influence the Judicial Services Commission (JSC) on disciplinary matters, where the JSC stood firm. The JSC, through the Secretary, in fact issued an unprecedented statement on 12th September 2012 stating that there is interference with the functions of the JSC. Everyone knew by whom. Soon thereafter, the JSC

Secretary was brutally assaulted in a typical – state sponsored style attack. Divineguma Bill, which takes away some of the powers of the Provincial Council and concentrated power of rural development in the hands of a Minister under an unusual legislative scheme, came up for review in the Supreme Court. Chief Justice presided over the relevant Bench. The Minister concerned was another Brother of the President. The decision has ignited so much of unfair criticism against the Court. Threats of impeachment emerged with this case! Discharging a constitutional function or a duty (in this case protecting the judiciary against unlawful interference and delivering a judgment) cannot be the basis for any impeachment.

**Divineguma Petition not being handed over to Speaker**

In an unusual move, the Speaker of Parliament made an unprecedented statement to the effect that the authority of parliament was undermined by not submitting a petition (filed by one of the petitioners in the Divineguma Supreme Court challenge) to the Speaker and instead submitting to the Secretary General of Parliament. Article 121 of the Constitution states that once a petition is filed, it shall be delivered to the Speaker. Delivered by whom? By the petitioner and not by the Court. However, when the objection was taken on one of the three petitions, the Supreme Court overruled the objection. Even if the Supreme Court upheld the objection, still the Court would have continued with the remaining cases. Under our constitution, the Supreme Court has authority to interpret the constitution and, in my view, the Court rightly rejected the objection. This issue has blown out of proportion and the Speaker made a statement on this! In my view, by interpreting the Constitution, the Supreme Court has not undermined the authority of the parliament but given effect to the Constitution. Can this be a basis of an impeachment? Certainly not, because interpretation of the constitution is an exclusive power vested with the Supreme Court.

**Investigation against CJ's Husband and not against others?**

Husband of the Chief Justice had been appointed by the Government as the Chairman of National Savings Bank, a state bank and later resigned, after an attempted share scandal. This is a statutory board consisted of all political appointees – including the President's astrologer. Only information in the public domain is that the anti-corruption commission conducted an unusual fast track investigation into the matter and a case has been filed against him in the Magistrate's Court. Person with proper senses know that a share scandal of that magnitude cannot take place without the participation of "higher-ups". Who are the beneficial owners? No investigations into those who were involved with it. No one can say that a scandal should not be investigated but when an selective investigation is done, that raises serious issues on the investigation itself. Every time when the Divineguam case came up in court – a dramatic event takes place on CJs' husband's investigation. Once he was called before this Commission and then before the CID. When the Divineguma case came up last, case was filed in the Magistrate's Court. Is there any doubt that this exercise was intended to twist the arm of the CJ? We all

know that the law enforcement mechanism is totally politicized in Sri Lanka today – the government can manipulate a case against any one and can clear any corrupt official, if they want. In any event, the issue of the husband cannot be a sudden wake up call for the government to clear the judiciary or to restore the lost integrity in share market.

**No Charges in the Public Domain?**

Motion to impeach a judge of the Supreme Court is a serious matter that is permissible on limited grounds. Analysis of any impeachments of any judge of any country will show that the public are generally aware of the allegations – before those allegations are formally brought up. For example, allegations against former CJSarath N Silva were known and public discussed about them. However, until today, the public are not aware of the allegations against Chief Justice Shirani Bandaranayaka. Such situation is possible, in my view, only if the impeachment is totally politically motivated with impunity.

**Political Motive**

There is overwhelming evidence (or reasonable and logical inferences) to establish that the government was involved in the attack on JSC (and physical attack on its Secretary) and political mudslinging on the CJ. Take the example of the recent adjournment debate in Parliament on JSC. The Minister of Foreign Affairs Prof. G.L. Peiris virtually justified the attack on the JSC on the basis that its Secretary was appointed contrary to the constitution. He said that in terms of the Constitution, only the senior most member of the minor judiciary can be appointed as the Secretary of the JSC and the present Secretary was 29th in the seniority list; and therefore should not have been appointed as Secretary. This is absolutely incorrect and false. There are no such provisions in the Constitution. On the other hand, to the best of my knowledge, Mr. Majula Tilakaratnewas brought in as a Deputy Secretary by the previous Chief Justice Asoka Silva, who had appointed his own brother as the Secretary, though he was not the most senior. The then Chief Justice, soon after retirement, became an advisor the President! Many others previously were appointed as Secretary to the JSC, though they were not senior at all. At this Parliamentary Session, an attempt was also made to table a mudslinging and derogatory "manufactured document" on CJ. Such conduct is unheard of in Commonwealth parliamentary traditions. The Government's propaganda machine is the other indicator to judge who was behind these attacks. Several political programmes in State media were designed to criticize the judiciary. All this moves reveals Government's mala fides.

**Unconstitutional Exercise of Judicial Power by Parliament**

There is a vital Constitutional issue on whether the Parliament can "hear" the charges against the Chief Justice. Can the Parliament be converted into a court to try an accused? As we know, it is the judiciary that can hear cases and not the

parliament – whether it is against the President, judge of a court or any other. Please read carefully the following paragraph in the Constitution (Article 4(c) of the Constitution):

> *"the judicial power of the People shall be exercised by Parliament through Courts, tribunals, and institutions created and established, or recognized by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, wherein judicial power of the People may be exercised directly by Parliament according to law."*

It is clear that the cases are to be decided by courts and institutions that have been established to adjudicate judicially. However, parliament can also do it in respect of ONE type of cases; i.e. matters relating to breach of Parliamentary privileges and Nothing Else. Impeachment inquiry of a judge is not one of them. And therefore, the Parliament cannot hear and determine on whether a judge is guilty of misconduct or not.

Let us also examine the other relevant provision in the Constitution in relation to the impeachment of a judge. Article 107(2) ensures that a judge shall hold office during good behavior and shall not be removed, except by an order of the President made after an address of Parliament on the ground of proved misbehavior or incapacity. Article 107(3) states as follows:

> *"Parliament shall by law or by Standing Orders provide for all matters relating to the presentation of such an address, including the procedure for the passing of such a resolution, the investigation and proof of the alleged misbehavior or incapacity and the right of such judge to appear and to be heard in person or by representative."*

The Parliament has not passed a law in that regard but by Standing Order 78A, a procedure has been introduced. The following features are important for this debate:

(i) Once a resolution is tabled in the Order paper, the Speaker shall appoint a select committee of parliament, consisting not less than 7 MPs to investigate and report to parliament on the allegations of misbehavior or incapacity set out in such resolution;
(ii) the judges is entitled to legal representation before the Select Committee
(iii) the select committee shall within one month conclude the inquiry and if not seek further time to complete it from Parliament
(iv) Proceedings are held in camera until a finding of guilt is reported to Parliament by the select committee.

The procedure laid down in the Standing Order seems to suggest that the Select Committee is serving as a judicial body to find a person guilty! This is therefore contrary to the Constitution – Article 4(c) and in my view ultra vires the Constitution.

**Different to Two Previous Impeachment Attempts**

Unlike previous impeachment motions, present one is unique. Motion to impeach Hon. Neville Samarakone CJ took years as the Select Commission did not want to rush through and parliament readily extended the period. Samarakone CJ had the best representation in the form of S. Nadeson QC. The Opposition fully supported him against the impeachment. Media was not under the government control in the same way we experience today. The Bar was united and strong. Then came the two impeachment moves against Sarath N. Silva CJ. In my view, there were enough and serious allegations against him but the President Chandrika Bandarayaike protected him by proroguing the Parliament once and then dissolving it second time. With so much of allegations against him, Mr. Mahinda Rajapakse was among those who openly protected him. Part of the Opposition UNP also supported Silva CJ, based on personnel relationships. The Bar was indirectly controlled by Silva CJ through his connections and intimidatory tactics. However, present Chief Justice does not have such open support from politicians as she only discharged official functions with a different approach. She is quiet and secluded. The Bar is presently divided and Bar Association lacks its excellence and leadership. Even lawyers found it difficult to meet her, except on strictly official matter. There are no issues of her integrity. On the other hand, the state media and part of the Bar is fully controlled by the regime.

**Conclusion**

Impeachment is not a remedy for private wrongs; it's a method of removing someone whose continued presence in office would cause grave danger to the nation (Charles Ruff). But proposed impeachment of CJ Bandaranayake is not a danger to the nation but only to a few in the regime, which believes that her presence is a stumbling block for their arbitrary rule. The nation cannot do away with the basic principles of justice in impeachment proceedings. Will Chief Justice of Sri Lanka have a fair hearing in her own country? From LLRC to UPR proceedings and from international conventions to the basic human rights, every one urges the Government of Sri Lanka to uphold Rule of Law. The Government responds to international community with one statement; "Justice and fair play is guaranteed in Sri Lanka and therefore there is no need for independent investigations into alleged human rights violations externally". The way how the Chief Justice is treated by the government (and its highly political state mechanism) will tell to the world that Sri Lanka cannot guarantee basic human rights even to its own Chief Justice.

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(Courtesy: Lanka E News / Colombo Telegraph)

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# Judging a judge
# Politics and pitfalls in the process

by Saliya Pieris

For the third time in 30 years, Members of Parliament have launched impeachment proceedings against a Chief Justice of Sri Lanka setting the stage for a crucial struggle for the preservation of independence of the judiciary and the rule of law.

In many democratic countries impeachment of a judge is among the rarest of events reserved for the worst cases of misconduct or incapacity. Yet the fact that the process has been used thrice during the existence of the present Constitution raises questions about the how and when the impeachment process should be used, whether sufficient safeguards exist to prevent abuse of the process and whether the process can be safely left in the hands of politicians.

While similar provisions existed under the previous constitutions there are no known attempts to impeach a senior judge during that period. The first to be subjected to the impeachment process was Chief Justice Neville Samarakoon who is still referred to in legal circles as a fearless and courageous judge. Chief Justice Samarakoon was appointed by President J.R. Jayewardene directly from the private Bar to the highest position in the judiciary and when it became apparent that he was not a pliable Chief Justice he was hauled up before Parliament, in respect of a speech he had made at a prize-giving ceremony, where he was critical over the treatment of judges.

That impeachment process failed when Chief Justice Samarakoon retired two years later, before the proceedings could be concluded. Subsequently the Parliamentary report cleared him of the charges.

Again in 2001, a resolution was handed over by Opposition MPs to the Speaker seeking the impeachment of Chief Justice Sarath N. Silva. A Supreme Court bench issued a stay order on Speaker Anura Bandaranaike restraining him from appointing the Select Committee.

The Speaker rejected the court order holding that Parliament could not be so restrained and declared that he would proceed to appoint the Select Committee. However before he could appoint the Select Committee, the resolution was scuttled

when President Kumaratunga first prorogued and then dissolved Parliament. A second attempt to impeach Chief Justice Silva in November 2003 by the UNP regime fizzled out without even a resolution being submitted to the Speaker.

The resolution to impeach the current Chief Justice Shirani Bandaranayake comes in the wake of a relentless attack on Sri Lanka's judiciary in the past few months. Interestingly it was just over one and a half years ago that President Mahinda Rajapaksa chose to appoint Dr. Bandaranayake, the most senior judge of the Supreme Court, as Chief Justice seeing her as a safe choice to head the judiciary.

Starting from last year's determination on the amendment to the House and Town Planning Act, to the role played by judges in the attack on the Mannar Magistrate's Court, the decisions of the Supreme Court in the Z-Score cases, the orders made in the web site cases and cases pertaining to demolition of residences by the UDA and finally the determination of the Court on the Divi Neguma Bill, not only the Chief Justice but the judiciary in general has asserted its role in the democratic firmament of Sri Lanka, performing its role as the guardian of the rights of the people.

In September 2012, the Judicial Service Commission issued an unprecedented statement stating that there was interference over the work of the Judicial Service Commission. Although some questioned whether a public statement was appropriate many saw it as one made in desperation in the face of tremendous pressure brought upon the JSC. The JSC is presided over by the Chief Justice and includes two other Supreme Court Judges appointed by the President: Justices Amaratunge and Imam.

The media release did not spell out the specific instances of interference or who had interfered with its activities, but reading between the lines it was not difficult to understand the source of the interference, given that the JSC had only recently moved to discipline certain members whose conduct had been called into question.

Many will see the attack on the JSC Secretary, the orchestrated attacks by the State Media against the Chief Justice and the judiciary, as well as action initiated by certain government bodies as being part of a grand plan to crush what those in power see as "judicial dissent".

Sri Lankan judges unlike their counterparts in India and the United States do not enjoy parity of status with the executive President and Parliament. While the President exercises executive power of the People and Parliament exercises legislative power, judicial power is exercised not directly by the Courts but by Parliament which functions through the Courts of Law. This wording in the Constitution places the judiciary a step below Parliament.

It is said that when the Constitution was first enacted at least one eminent lawyer on the panel who went onto become one of the most distinguished judges of the

Supreme Court had wanted the judiciary to be placed on an equal footing but his view did not prevail.

The independence of the two Superior Courts is supposed to begin from the very appointments of those judges. It is presupposed that when the President appoints judges to these Courts he desires them to be independent and impartial. For that reason it has been held by the Supreme Court that consultation with the Chief Justice in making these appointments is desired. Judge's salaries although not adequate in comparison with lawyers' earnings are safeguarded and cannot be reduced or withheld. Their pensions are guaranteed. To safeguard their independence judges of the higher courts are precluded from holding any other office and after retirement they are precluded from engaging in the practice of law in Court, except with the President's express permission.

The Constitution provides that judges hold office during "good behaviour", until their retirement age, which in the case of the Supreme Court is 65 years. This is different from the pleasure principle such as in the Forces, where the President can withdraw an Officer's Commission at his pleasure. A judge can be removed only on the grounds of proven misbehaviour or incapacity.

The Constitution lays down that the process of inquiry can be launched with just a third of the Members of Parliament signing and handing over to the Speaker a resolution calling for the appointment of a Select Committee.

Once the resolution is received, the Speaker proceeds to appoint a seven-member Select Committee which is required to inquire into the allegations and report to Parliament. The Chief Justice is entitled to appear before the Committee and be heard either in person or through lawyers. Once the Select Committee submits its report to Parliament, Parliament once again has to submit an address to the President, seeking the Judge’s removal. That address has to be passed by an absolute majority of Members of Parliament (i.e. 113 members). Only thereafter can the President remove a Judge from office.

While on paper the Constitution appears to offer substantial safeguards, will Sri Lanka’s Chief Justice in reality be afforded the protection that ought to be given in inquiries of such a nature? The reality of the process has to be understood in the light of the highly partisan nature of Sri Lanka’s politics.

In an instance when it is known that a resolution has government backing what is the situation of individual members of the Select Committee, who are Members of the Ruling Party?

Can they depart from the official party line and act according to their individual conscience and act solely on the evidence before them? What guarantees are there to safeguard the independence and impartiality of the Members of the Select Committee? Will their decisions be influenced by the respective positions of their

political parties or will the parties give them a free hand? If the Select Committee finds against the Chief Justice, will the Members of Parliament who vote on the final resolution be given the right to vote according to their conscience or will there be a three-line whip compelling them to fall in line?

These are important because the entire process of removal should be not a legislative function but a quasi-judicial function. There are basic attributes such as independence and impartiality that ought to be found in a judicial or quasi-judicial body. Without these basic attributes of due process, no proper or fair decision can be arrived at. Furthermore unlike in normal cases there is no appeal available from a decision of the Select Committee.

The Supreme Court and the Court of Appeal deal with many cases involving public law. There are numerous cases where Government Ministers and Parliamentarians are Respondents in Fundamental Rights and Writ Applications. When the same people are called upon to pass Judgment over Judges who hear their cases, what happens to the essential requirement of impartiality?

In ordinary courts, judges who have a personal knowledge or involvement in cases recues themselves.

There is no question that there must be a forum to investigate and inquire into credible allegations against judges, and that genuine and bona fide complaints must be inquired into and determined. But what of allegations motivated by political consideration, malice or with the intent of attacking the judiciary and its independence?

In other countries, independent tribunals presided over by either foreign or retired judges or other impartial persons are constituted to try complaints against members of the judiciary and often an appeal or review is available by law.

It is important that initiation of such proceedings are not based on political needs or dictates but are done objectively after a proper inquiry conducted by expert investigators.

Unless and until objectivity, independence, impartiality and due process in the proper sense of the words are followed in the process of impeaching judges, a sword of Damocles will hang over the head of every Judge of the Supreme Court and the Court of Appeal each time they are called upon to exercise the powers given to them by law.

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*(Courtesy: The Colombo Telegrpah)*

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# Reflections on the killings in the prisons and the impeachment of the Chief Justice

by Basil Fernando

Humankind has at least a few millenniums of experience in keeping prisons. It is part of the unfortunate predicament of humanity that there is this need to have prisons. However, over these long years, through bitter experiences, humanity has learned to lessen the suffering involved for the inmates of prisons and to make the whole experience within the bounds of humane limits and within the framework of human cooperation.

The art of governance is the art of achieving cooperation among disparate factions. Perhaps the hardest aspect in achieving that cooperation is when certain aspects of liberty are removed from some individuals as a matter of punishment for whatever wrong they may have done. Achieving cooperation under these circumstances requires enormous human ingenuity, where people who are confined into a position of having limited freedoms understand that it is for their own good under the given circumstances to adjust to certain rules within the prisons. In this difficult endeavor, humanity has made enormous progress.

A hallmark of such progress was when the philosophy of governance changed with the influence of enlightenment thinkers in Europe. Among so many intellectual contributions, what stand out are the approaches of John Locke and Jean-Jaques Rousseau, who laid the foundations for rules of governance that were adopted after the French Revolution and in the drafting of the American constitution. Through a completely different path, Britain too has developed its own principles of governance.

It was those principles and the philosophies on which they were founded that created the groundwork for dealing with the problem of prisoners through a completely different perspective. While, out of necessity, certain restrictions were brought upon persons who were found to be guilty of crimes, at the same time there was the development of methodologies within which they could cooperate with the authorities with as limited amount of coercion as possible.

With the arrival of the British in Sri Lanka, these philosophies and principles found their way into the Sri Lankan administration of justice. It was to the credit of the talent and the ingenuity of generations of Sri Lankans who were able to grasp these principles and establish the rules and procedures within which cooperation with the prison population and the prison authorities were established.

This came to an abrupt end with the introduction of the 1972 and 1978 constitutions, which changed the principles of governance from the fundamental ideas of the enlightenment into crude manipulations by local politicians, who forgot the ideas of cooperation and reduced governance to direct control of the population for their own ends. This same philosophy spread into the prisons. The first, the most inhumane and barbaric treatment of prisoners, took place on a large scale in July 1983, when a large number of Tamil prisoners were killed inside prison.

The incidents of this weekend are the second most barbaric act, which was a result of a rejection of the principles of governance on which the behavior of authorities were based. Like all authorities in the country, the prison authorities today are manipulated by the authoritarian system and the inner structure of the prison system has broken down.

Instead of a system of cooperation, a system of crude coercion has been introduced and this is now done under the tutelage of the Ministry of Defense. A former Executive President, DB Wijetunga, once said that wherever DIG Udugampala went, there were complaints about disappearances. It can now be said that wherever the Ministry of Defense enters, there are killings and other forms of cruelties perpetrated on the population. This is manifest in the way that the people of the North and East are treated now. It is the same kind of manipulation that has entered into the control of prisons and the large scale killings of the prisoners during this weekend, which were a direct result of STF interventions, which are done under the control of the Ministry of Defense.

Like the entirety of the country, which has lost the system of governance on the principles of the enlightenment, now the prison authorities have been dragged into a similar type of chaos as that exists throughout the country.

It is this same kind of chaos that is reflected in the impeachment proceedings. Under the kind of coercive methodologies that are now employed, the crushing of one individual, a woman who is now the Chief Justice, may be a simple task. However, what is being destroyed is not just one individual but whatever that remains from an old structure of governance, where the protection of the dignity of the individual was kept in the hands of the judiciary alone. Perhaps the greatest Chief Justice in Sri Lankan history, Sir Sidney Abraham, epitomized this role by his historic judgment in the Bracegirldle case, where an order of the representative of the Queen, the governor of Sri Lanka, was declared null and void and quashed by the court. It is that structure of governance and the principles of independence of the judiciary that is being destroyed now.

The despicable cruelty in the prisons and the arrogant interference into the independence of the judiciary are all a part of the sinking of the foundations on which Sri Lankan civil administration and administration of justice are based.

The Executive Presidential system is the greatest danger to the nation and the greatest danger to the Sri Lankan people to remain as a civilized people.

The killing of prisoners, who are in the protective custody of the state, is the worst act that any civilized people could ever do. In Sri Lanka that has happened now and it is no surprise then that, at the same time, the final blows are dealt on the independence of the judiciary.

## 22
## "Dhang Justice Naah"
## Now there is no justice

by Basil Fernando

When I talked to a Sri Lankan friend about the killings of prisoners which happened yesterday and tried to convince him that people should demand justice, his instance reply was, " Dhang justice naah". In the past, this expression meant that there were serious concerns about justice. However, now it has come to mean literarily what it says. It is a statement of fact, of which no one has any doubt.

Regarding the shooting itself, the very first issue is that it should not have happened and would have been avoided if the normal rules and procedures were followed. STF officers should never have been sent to an inspection in a prison. This should have been by prison officers themselves who, if necessary, could have sought the help of civilian police. Experienced officers would have known what to do and how to do it.

That it was done by STF shows that the raid or the inspection was carried out on the direction of Ministry of Defence. Whenever this ministry is involved, killings are usually the result. Earlier killings at demonstrations quite clearly show that.

In any case, those who conducted the inspection should not have carried guns and even, if they did, no live ammunition should have been issued. Further, no shooting should have taken place without the express command of a commanding officer. There should have been an express command not to shoot to kill, but only to use minimum force.

All this and many other questions need to be examined through an impartial inquiry.

However, such an inquiry will not happen and that is one thing about which there can be certainty, going by all the experiences on such matters in recent times.
Now it has come to a point that even the Chief Justice cannot get an impartial inquiry.

All that will happen is that a story will be concocted, blaming the prisoners for bringing about the shooting on themselves. And then that story will be given the full blast of publicity though the state media.

So, who could say that it is wrong to say "Dhang justice naah"

**23**

## How does the Attorney General file indictments and how do Members of Parliament sign impeachment petitions?

by Basil Fernando

The Chief Justice (CJ) has reputed all allegations made against her contained in the much publicized impeachment motion filed in parliament.

The CJ's legal representatives have said in a letter

"In the circumstances, in summary:

(a) Our Client has declared all her operative bank accounts having assets in her declaration of assets and liabilities; and
(b) After her appointment as a judge of the Supreme Court, our Client has not received any remittances from anyone in Sri Lanka or abroad save and except the remuneration as a judge and the remittances from her immediate family.
Thus, clearly, there has been no financial impropriety on her part.
Our Client totally denies the other allegations and can easily refute them."
This raises a question as to how Members of Parliament (MP) sign impeachment petitions.

Do they merely sign these on orders from above or do they do so after sober reflection and on the assessment of facts? It is useful to contrast how they do it and what the Attorney General (AG) is supposed to do when he/she files indictments.

Before preparing an indictment, the AG's office studies the investigation file submitted to it by the investigating police. This will include whatever the suspect

may have said in answer to the allegations, besides all other witnesses, including those witnesses who have made statements supportive of the suspect's version.

Then, the officers who study the file make a proper assessment of available evidence and arrive at a reasoned out opinion as to whether there is adequate basis to proceed to file an indictment. It is only on that basis that a decision is taken to file an indictment. In contrast to this, how do MPs sign impeachment motions? Do they study the issue and make up their minds with a proper assessment before doing so?

Since the matter of accusing anybody is a serious affair and accusing a Chief Justice, as in the present instance, is a very serious affair, shouldn't the 118 MPs who signed have done so with the utmost seriousness or responsibility? Did they act in that manner?

If not, have they not done a great injustice, not only to an individual, but also to the whole nation?

## 24
## Like the Titanic Sri Lanka Democracy Sunk

by Basil Fernando

A comparison with the Titanic is most appropriate.

Titanic at the time was thought of as a wonder ship that could never sink. It was not expected ever to perish.

Sri Lanka also was considered a wonder. It was expected to be an example to other countries. It was expected to prove that democratization of a "less developed country" is possible and achievable. In granting adult franchise in 1931, long before many other countries, Lord Donoughmore said, the world will watch the outcome of this.

However, what everyone conveniently forgot was that they must be vigilant because of the possibility of hidden icebergs.

One such iceberg emerged in 1978. This was by way of a new constitution. It had been quickly created through the tyranny of a two-third majority that government had in parliament. It was a man-made iceberg that created a constitutional monster called the executive president.

However, the country's affluent sections and the intellectuals were happily drinking and singing the praises of open economy and became oblivious to the danger that was looming.

Each group was pursuing their petty interests and lost sight of the whole.

While the legislature and the judiciary were also were having their parties with the executive, the iceberg got ever closer.

It finally struck. The final blow was on the judiciary, which was itself enjoying the party. When and how will the sunken democracy rise again? Those are the only real questions now.

In Indonesia it took over 35 years to undo General Suharto's attack on democracy. Burma, is still struggling to rise again after General Newin's attack on that country's democracy and there are many other examples which show how difficult it is to rise again. It is, of course, possible, the sleep walk-by thinking nothing has happened.

Many may find ways to get something out of this tragic situation…… There are times when vultures have their festivals.
But, the truth now is that the ship has in fact sunk.

## 25
## Why is Sri Lanka abandoning a court centered, law based system of justice?

by Basil Fernando

*A reflection on the 16th murder in Kahawatte, gruesome violence in Galle and the petition for impeachment*

The 16th murder of a woman took place at Kahawatte last week. The woman is said to be 65 years old and was staying alone in the house until her son came back, when she was brutally murdered. Her body was found in the parlor of the house when the son returned. People of Kahawatte have been under the threat of these kinds of mysterious murders. The police from time to time claimed that they have solved the problem and the now the situation is under control. However, the credibility of such statements is then tested by new events like the one that happened last week. It was only three months back that a mother and a daughter were brutally murdered in their own house.

There are also the incidents in Galle, which are gruesome and bewildering. One man was attacked, one of his arms and a foot was cut off, and then he was stabbed in the back and left on the road. A video published on the internet showed this gruesome and sad sight. It is said that he lay there for quite some time before an ambulance reached to take him to the hospital. The video footage shows that while there were many people nearby, no one even dared to come near him or to offer any kind of assistance. It was reported later that this man died due to his injuries. According to the reports, some persons came from behind him in a van while he was going on his motorcycle and knocked him down. And then after he felt he was cut and stabbed.

Two policemen watched the brutal attack and his prolonged struggles as he bled out but they did not intervene.

It was not long after that the next report came, about four persons whose hands were tied behind their backs, blindfolded and shot in the head and left by the wayside at Poddala in Galle. The initial police report was that these were the culprits who had caused the death of the man mentioned above and that they belong to rival gangs. The story was that another gang, who were supporters of the dead man, had killed these four in revenge. However, the stories by the relatives of the four dead persons revealed that the four persons were taken in a police vehicle and it was later that they were found dead. One of the persons who were killed is said to be a navy officer who had come on a holiday. The four murders suggest a police killing rather than a gang murder.

These two incidents at Kahawatte and Galle both point to a situation where in the law enforcement capacity of the police has reached almost to a zero point throughout the country, an observation that almost everyone has been making for quite some time now. Often, what follows a serious crime is some gesture by the police about taking action and then a report that the matter has been resolved. However, instances where there are serious investigations are by now rather rare occurrences. The internal contradictions within the policing system are so many that the type of capacity which existed within the police in an earlier period is now almost lost. In fact, there is not even an expectation that the police will do a proper investigation or, to be more exact, that the police will be allowed to do a proper investigation.

When things are as bad as that, there is hardly any initiative to encourage the police capacity for law enforcement within the framework of rule of law. The initiatives that have come forward, as shown by the newly proposed Criminal Procedure Amendment Bill, are to make the police more distanced from judicial control and to adopt the tactic of more brutal methods of dealing with some criminals (while leaving many others to go their way, free). In this situation, the killings of the four persons are no surprise. There is a mentality that is promoted to adopt such methods in dealing with crimes.

It was quite some time back that there were police working within the framework of rule of law, guided by the Penal Code, Criminal Procedure Code and their own police departmental orders, and led by discipline officers of higher ranks who engaged in crime control. These officers knew that they were directly responsible to the courts and that everything they did had to be reported to the courts. The system they followed was a law based system, which had at its center the courts' control by judicial officers. They understood their role as part of a judicial system of criminal justice.

All this changed, particularly after 1971. Under the guise of emergency, the police were given extra-legal powers and were used to do extrajudicial activities. The most manifest activity of the time was abductions, which were followed by

disappearances. It was a license to kill and to dispose of bodies, a power given to the police and the armed forces, which changed the character of the policing system in Sri Lanka. It changed from a law based, judicially controlled criminal justice system into a system controlled by the Ministry of Defense, and guided by emergency laws, anti-terrorism laws or directives that have no legal basis at all. Police officers became less and less accountable to the judicial system. The powers of judges were limited by emergency and other regulations. A tacit understanding developed that the things that judges could control were quite limited and that officers could follow orders from somewhere else.

This system has lasted from 1971 up to now. The times of tensions, sometimes called 'a time of war', distance the judicial control of the police and other law enforcement agencies, and they became a law unto themselves. The statement of then the Deputy Minister of Defense, Ranjan Wijeratna, in parliament, "these things cannot be done according to the law," became the unwritten law. All the governing parties led this system to develop into a system outside the normal law and, more and more, the ministry of defense became the controller of "justice", and the courts had less and less to do in controlling the process. In fact the words "the due process of law" began to be forgotten and today hardly any police officer uses or even understands these terms.

Gradually, a mentality developed among the politicians that a system of justice based on law and control by the judiciary is rather an absolute affair and that they could handle these matters on their own rather than through the judges. There were some developments in the constitutional setup itself which undermined the judiciary. Both the 1972 Constitution and the 1978 Constitution displaced the idea of supremacy of law in favour of the supremacy of politicians.

It is this distancing of the system of crime control from the legal system and from judicial oversight that has brought about this situation and the failure to control crimes. However, the politicians do not understand the problem in that way. The politicians think that they should take over the matter themselves and keep the judiciary out even more to make things efficient. The Ministry of Defense is considered the center of efficiency, while the judiciary and the law are considered obstacles to the workings of the Ministry of Defense.

Even the LLRC was able to see these problems and one of their recommendations was to separate the control of police from the Ministry of Defense. However, like everything else, such recommendations were useful only to create a deception at the international forums and these things have no relevance to real life issues. The real life issues are dealt with by the same philosophy, "these things cannot be done according to the law".

The attack that is now happening on the judiciary, which has been manifested through series of events culminating in the impeachment petition, is in this same mentality of considering the law and the judiciary as irrelevant or even as obstacles

to the way the politicians want to do things. The writers, on behalf of the government, directly argue (as in Divaina today, 05 November) and seriously advise the opposition not to oppose the impeachment petition but in fact to support it because subjugating judges would also benefit them when, in some future date, they come to power. The judiciary is seen as an obstacle to the efficiency of the executive. When the BBC questioned some government MPs who had gone to the speaker's house to submit the impeachment petition as to why they are doing that, their reply was the judiciary is doing an injustice to the executive and to the legislature by obstructing what they are trying to do. They saw the judicial interpretation of law as an obstacle on their way. They even turn it into an injustice done by judiciary. Their question was that if the judiciary is obstructing us (meaning the legislature and executive) do we not have a remedy? Their own answer was yes, they had a remedy, and that was the impeachment. Thus, impeachment was seen as a way to stop a judicial role in interpreting law. In fact, the writer who wrote the government point of view to the Divaina states that he has already demonstrated in his article that leaders in India and the United States do not allow judges to behave in that way (categorically stating the falsehood that judicial review isn't tolerated in those countries). That was the thinking behind the petition for impeachment.

Sri Lanka has thus arrived at a point where the law and the judiciary are regarded as obstacles to progress. Executive action alone is seen as the real government. The judiciary is no longer seen a branch of the government – definitely not an independent branch. If the judiciary wants to survive within this scheme, it is forced become a branch of the executive instead. That is how far Sri Lanka has derailed from the path of law and the path of administration of law under judicial control.
The result is what we saw at Kahawatte and Galle. These are not exceptional places. Everywhere there is lawlessness and the resulting chaos. And no one can find a solution to that situation. This is no surprise. When the path of law within an administration of justice, authoritatively interpreted by judiciary, is lost, then justice is lost all together. Justice is fairness. When justice is lost, fairness disappears. When fairness disappears, there are brutal forms of competition. When the competition degenerates by the actions of rulers, then violence and chaos is the result.

That is what Sri Lankans are experiencing at Kahawatte, Galle and Hultsdorf also.

## 26
# The banality of the impeachment

by Basil Fernando

Under the present circumstances and under the 1978 constitution, when the president does not want the Chief Justice, the president just tells them to get out and go home. The way he does it is called impeachment proceedings. Once the president decides to file such proceedings – he has a two thirds majority in parliament – the victimized person has no real option. His or her fate is sealed and the only options open are to resign and go away, as Chief Justice Nevil Samarakoon, did it or be impeached and thrown away.

Impeachment is an act of might. The rights and wrongs are not weighed in the matter. So-called charges can be cooked up and may be about the most trivial matters. In an article to a Sinhala paper, Gomin Dayasiri, a senior lawyer, stated that in Sri Lanka a judge can be impeached very small reasons. The charge against Chief Justice Neville Samarakoon was about some comment he made at some school prize giving.

Just last week, at Maha Veediya in Galle man's leg and hand was cut off and he was stabbed and left in the road struggle and die. A video footage about this incident was a circulated in the internet. It was a gruesome sight of extreme barbarism. The act of impeaching of judge is symbolically more or less a similar kind of act of might in Sri Lanka. The knife with which the judge will be stabbed is the two thirds majority that the ruling party has in the parliament.

Thus, looking into the impeachment process with the idea of finding some kind of rationality is falling for a basic fallacy. Under the conditions in Sri Lanka and under the 1978 constitution it is just public stabbing and nothing more.

**J R Jayawardana's mean scheme**

No one as mean as J R Jayawardana has held the position of the head of the state in Sri Lanka since the time of his self-appointment as the president of Sri Lanka. Having obtained a four fifths majority in parliament due to exigencies of the time and clever campaign by his deputy R Premadasa, and not due to J R Jayawardana's popularity, he was able to obtain this four fifths majority. Realizing how fast things change in Sri Lanka, J R Jayawardana quickly created a constitution just to suit himself and to enjoyed absolute power. In the constitution he created provisions that made it next to

impossible to remove a president by way of an impeachment. On the other hand, he made provisions to make it quite easy to remove a superior court judge, including the Chief Justice.

Once the impeachment decision is taking by the president, there is no room at all to ensure any kind of justice. Thus a superior court judge, whose task it is to ensure justice for everyone, is himself or herself without any possibility of justice, as has been pointed out by a former Chief Justice.

It is difficult to understand why the judgers of Sri Lanka, the lawyers and also the intellectual community, cowed down to the 1978 constitution, which declared the president to be outside the jurisdiction of the court for any matter whatsoever. The head of the executive place himself above the law. Once this was done, there was hardly any possibility of preventing the entire scheme of the rule of law breaking down, and this also turned constitutionalism upside down. However, there was hardly any resistance by the judiciary or by the legal profession. Perhaps they were all mesmerized by the four fifths majority the government had in parliament. Even the otherwise honorable Neville Samarakoon QC accepted this constitution and agreed to be Chief Justice of Sri Lanka, over the heads of the other judges of the Supreme Court. At this point in time, the legal intellect of Sri Lanka froze or got paralyzed. The consequences that came, about which there are a lot of lamentations now, are a direct result of the failure to resist the imposition of this constitution.

There are many lamentations and one is a book publish by S L Gunasekara, a senior lawyer, entitled Lore of the Law and other Memories, the latter part of which is worth reading to get some idea of what has happened to the judiciary and the legal profession in Sri Lanka. There he quotes D.S. Wijesinghe, President's Council, who said,"We now have a new Parliament and with it democracy vanished. We are now about to get a new Superior Courts Complex and with that justice will vanish".

**Making the judiciary a branch of the Executive**

The separation of powers is basic to democracy. The legislature, executive and judiciary are the three separate branches. While they complement each other as three branches of the system of governance, one cannot be a branch of the other. Their independence is at the essence of the judiciary. This independence is inherent into the task of defending the law and protecting the dignity and the freedom of the individual.

In the scheme of 1978, the whole structure was rebuilt in a way to have only one unit and that is by putting the judiciary and the legislature all as branches of the executive, while the jargon of separation of powers was kept.

It was easy to make the legislature into merely a branch of the executive, and the symbolic gesture by which this was done was by demanding letters of resignation from all the members of the ruling party, which had to be handed over to the

Executive President. This was held as a threat over them. The task for the legislature was (and is) clearly to vote for whatever that the executive dictated them to.

However, with the judiciary, it was a more complex affair. That was why a conflict soon developed between the Executive President and Chief Justice Neville Samarakoon. That conflict was manifest at the very inspection of the 1978 constitution and it took a long time for executive to maneuver its way to suppress the judiciary into a position that it would accept being a branch of the executive.

The present impeachment is perhaps the final stage of settling this and making sure that the judiciary of Sri Lanka is nothing more than a branch of the executive.
The massage that this impeachment is giving to the next Chief Justice and the other superior court judges by the Executive President is to be his stooges or the stick of impeachment will be on you.

**The place of lawyers under this scheme**

When the judiciary is a branch of the executive, the idea of the independent legal profession also goes under with that. The role left for lawyers is also to be stooges to the executive and to go behind this or that person to get favours from them on behalf of their clients. In fact, that has already happened to a great degree; there are some who have learned to make a fortune by playing that role, but, for those who wish to pursue law, there is already no room.

Under such circumstances, what happens is that the courts become something like a marketplace. Litigating there is to use various forms of bargaining. There, again, there are those who have their way with the executive, and they can even get out of committing bloody murder, as has already happened on several occasions in broad daylight.

The implication of all this is that there is no big drama or a struggle between forces that will manifest itself in the days to come over the impeachment proceedings. It is a pre-arranged drama, where political cruelty and mean cunningness will demonstrate how it has destroyed all the possibilities of justice in Sri Lanka.

27

# Can the legislature declare all automobiles to be rickshaws?

by Basil Fernando

The answer to that question is if the legislature can do whatever it likes, as it is becoming fashionable for some in Sri Lanka to say, it can also make such a declaration. The leader of the party that has the majority in parliament (even better if there is a two thirds majority), can order that his party members should vote to that effect and thus ensure that it will become the law.

The impact of the legislature making such a declaration can be twofold. It may merely be a name change. The automobiles will thereafter be called rickshaws. However, if besides a mere name change the legislature goes on to further stipulate that all the engines should be removed from automobiles and that, like rickshaws, they should be pulled by their operators, this would of course mean quite a radical change. If the legislature goes further and prescribes sanctions for those who would not abide by this new legislation, that would result in quite a lot of people ending up in jail or paying fines.

At the moment the attack on the judiciary is made on this basis that the legislature can do whatever it likes. Thus, the legislature can take over the functions of the Judicial Service Commission (JSC) and dictate what the JSC should or should not do. For example, it is the position of some ministers and spokesmen for the government that the secretary to the JSC should not have made a press release mentioning, among other things, the interference on the workings of the JSC and the independence the judiciary. They are also of the view that this particular secretary of the JSC should not have chosen for that post as, they claim, he is not senior enough to have been thus chosen. The government and the legislature have thus taken upon themselves the task of deciding who should hold which post in relation to the JSC and what is or is not appropriate for the JSC to do.

There was at one time the idea that there was something called the separation of powers. The functions of the judiciary under that doctrine are the functions that belong to the judiciary alone and to no one else. That exclusion included the legislature. However, by now, the view of the government seems to be that the legislature can do whatever it likes. This includes the idea that the legislature can do the functions of the judiciary also.

However, it would be unfair to say that this is entirely an original idea of this government. In fact, in 1972 the then coalition government put forward the idea of the supremacy of the parliament in place of the supremacy of the law. The original conception of the supremacy of the parliament meant that the king was no longer

supreme but, like anyone else, is equal before the law. This simply meant that no one was above the law.

However, the 1978 Constitution quite simply declared that the executive president was above the law and no court could bring any suit against the president. Thus, the legislature did the very opposite of what parliament did at the origin of its power, which was to reduce everyone to be equal before the law.

President J.R. Jayewardene went on to say that the only thing that the president cannot do is to make a man into a woman and vice versa. This meant that president can, in fact, declare automobiles to be rickshaws if so wishes or anyone not to be what he or she was if the president so wishes.

That is exactly what was done to all who held public office. For example the Inspector General of Police was in charge of the police department and had command responsibility to run that institution. But with the creation of the executive president the IGP no long has that power and the politicians decide on the appointments, promotions, dismissals and disciplinary control of those who belong to the police force. Similarly, the Attorney General used to be the commander-in-chief of his department and was responsible for everything that went on in that department. But the AG's post is now under the control of the president's office and he must do what he is instructed to do. Giving independent legal opinions on the illegality or otherwise of the actions of the government is no longer his prerogative. This is also the case of all public institutions and that was all the debate about the 17th Amendment to the Constitution was. That debate was settled by the 18th Amendment, which virtually nullified the operation of the 17th Amendment. Now, automobiles are rickshaws, if one is to use that metaphor, and all these persons who held those officers now merely carry out the direct orders of the president.

There was one institution which was not completely under the president's control and that was the judiciary. Of course there were all kinds of weakenings as compared to the position the judiciary held before the 1972 and 1978 Constitutions. The 1972 Constitution removed the power of judicial review and the 1978 Constitution placed the president above the law. Besides that there were many ways by which the appointments to the judiciary were made which interfered with the rules universally recognised as being essential for the independence of the judiciary.

Despite of such limitations the judiciary still had limited power to declare a proposed bill to be in conformity with the Constitution or not. Quite reasonably the judiciary used this power and declared the Divinegama Bill to be unconstitutional in its present form.

Now this has angered the president and the government and the debate is now as to whether the judiciary should have such power. Using the argument that the legislature can do whatever it likes, the argument is mooted that this power of limited review of a bill should also be removed. While all kinds of gimmicks are tried

to present that view as a profoundly correct perspective on constitutional law, there are writers who always write whatever the government wants, like, for example, the quite notorious C.A. Chandraprema of the Divayina, who has concocted arguments to state that there is nosuch review power for the judges in India and also of the Supreme Court of the United States itself. He claims that from Jefferson to Clinton, all the presidents of the United States have stuck the Supreme Court's head on a pole and suppressed it. The title he gives to the article is that India should be followed as a precedent on the issue of the Supreme Court.

Writing in Sinhala C.A. Chandraprema seems to believe he can utter whatever falsehood he likes about India and the United States on the issue of the independence of the judiciary and their power of judicial review. What he perhaps does not know is that the power of judicial review in its pristine purity exists in both countries and is a very proud part of the legacy of constitutionalism in these countries, as well as in every other country which believes in the supremacy of the law. Some jurisdictions, such as France and Germany, have even created above the Supreme Court even higher courts such as the Constitutional Court of Germany and the Constitution Council of France to deal with the issue of the judicial power over the interpretation of the law.

As for India, the matter was quite clearly settled when Indira Ghandi, who like J.R. Jayewardene and Zia-ul-Haq of Pakistan wanted to be her country's dictator, was clearly suppressed by the Indian Supreme Court. In the Keshavananda Barati case (Kesavanda Bharati vs State of Kerala And Anr on 24 April, 1973), the Supreme Court said further that the parliament under the constitution is not supreme, in that it cannot change the basic structure of the constitution. It also declared that, in certain circumstances, the amendment of fundamental rights would affect the basic structure and therefore would be void. It also overruled Golaknath and thus all the previous amendments which were held valid are now open to be reviewed. They can also be sustained on the ground that they do not affect the basic structure of the constitution or on the fact that they are reasonable restrictions on the fundamental rights in public interest. Both the cases, if seen closely, bear the same practical effects. What Golaknath said was that the Parliament cannot amend so as to take away the fundamental rights enshrined in Part III, whereas in Keshavananda, it was held that it cannot amend so as to affect the basic structure.

To quote from the judgment,

> *"316. The learned Attorney General said that every provision of the Constitution is essential; otherwise it would not have been put in the Constitution. This is true. But this does not place every provision of the Constitution in the same position. The true position is that every provision of the Constitution can be amended provided in the result the basic foundation and structure of the Constitution remains the same. The basic structure may be said to consist of the following features:*
> *Supremacy of the Constitution;*
> *Republican and Democratic form of government.*

*Secular character of the Constitution;*
*Separation of powers between the Legislature, the executive and the judiciary;*
*Federal character of the Constitution.*

*317. The above structure is built on the basic foundation, i.e., the dignity and freedom of the individual. This is of supreme importance. This cannot by any form of amendment be destroyed."*

**The source of confusion**

The 1948 Constitution, which is also known as the Soulbury Constitution, had a basic structure. That basic structure was the same basic structure as of any democracy. The essential elements of a democracy, including the supremacy of law, the rule of law, the separation of powers and the independence of the judiciary, are part of that basic structure. Any amendment that affects this basic structure vitiates the constitution and therefore will destroy the very possibility of the state remaining a democracy. It was this basic structure that was changed by the 1972 and 1978 Constitutions. Unfortunately the Supreme Court then did not follow a course similar to that which the Indian Supreme Court followed in the statement of the doctrine of the basic structure. Had that happened, several parts of the 1972 and 1978 Constitutions would not have been allowed to be passed as law and Sri Lanka would not have been in the mess that it is in today.

The law cannot remain law if the parliament can do whatever it likes. As all human beings dealing with any kind of expression are bound by the rules of rationality, the parliaments are also bound by the rationality of the basic form of government, if that form of government is that of a democracy. The moment that rationality is abandoned, the entire legal structure is affected by irrationality. It is then that automobiles can be called rickshaws, when the judiciary is required to rubber stamp the decisions of the executive, and when the IGP's, the AG's and all other officers of the state lose all their independence and just become robots playing to the tune of the executive.

The present debate about the independence of the judiciary, the role of the JSC and all related issues, are the result of the failure to abide by a most fundamental notion, that a democracy has a basic structure which, when abandoned, ceases to be a democracy. What today's debate reflects is that the form of government envisaged in the 1978 Constitution is that of a dictatorship and not of a democracy. The dictator now demands the judiciary to submit to its will, and this is what the legislature carrying out the will of the dictator is expected to do to the judiciary and is trying to do.

The way out is a fundamental rejection of the 1978 Constitution and the reinstatement of the doctrine of the basic structure, as India has done. The structure of the government must conform to the basic structure of democracy and, within that framework, the legislature can only do what the basic structure allows it to do. The

only path for the future in Sri Lanka is either to submit to a dictatorship or to achieve this fundamental reform to reinstate the basic structure of the Constitution as that of a Constitution of a democracy.

## 28
## The ugliest attack in Sri Lanka's history on the Supreme Court and the chief justice

by Asian Human Right Commission

The Mahinda Rajapaksa regime has resorted to the ugliest attack in Sri Lankan judicial history on the Supreme Court and the Chief Justice this week by using the state media as a slander machine and through employing the state media to introduce deliberately manufactured slanderous letters to the parliament solely with the purpose of abusing parliamentary privilege for biased purposes. The government has within its ranks, schemers of the lowest quality who have little scruple in manufacturing any lie to suit their purpose and thereafter using others to introduce and propagate such lies in the highest legislative assembly of the country, namely Sri Lanka's parliament. It is evident that people in the state media will defy every rule in journalistic ethics to do whatever that the government demand. However the responsibility for such vile attacks lies entirely on President Rajapaksa himself for allowing such schemes to be carried out.

Manufacturing a slander sheet is an easy affair. Whoever allowed such a slander sheet to be put before the country's most august forum clearly showed a high degree of unscrupulousness and carelessness regarding every form of decorum and public etiquette that is generally required in the use of materials in the county's Parliament. This is one of the worst act of irresponsibility that has defamed the Parliament itself and the very tradition of parliamentary debate anywhere in the world. Only fools and criminals would permit the abuse of parliamentary process in this manner.

The issue in question was an attempted abduction and an attack by four unidentified persons on the Secretary of the Judicial Service Commission on 7th of October 2012. So far the police have filed reports in the courts stating that they are unable to identify the culprits responsible for this attack. And then the government introduces an unscrupulous letter in Parliament stating that it was the Chief Justice's husband who had organized the attack because he had suspected an illicit relationship between the Chief Justice and the Secretary of the Judicial Service Commission. Yet the country's criminal justice investigators have declared to the court that they do not know who the attackers are. Irrespective of this, the government introduces this despicable letter manufactured by one of its hatchet men to the Parliament. The question then becomes as to what precisely is the role and importance accorded to criminal investigations in Sri Lanka? Has this role been usurped by hatchet men who write unscrupulous leaflets? The Supreme Court of Sri Lanka was established on 1802. Up to this date there had never been such dastardly attacks on the Supreme Court or the Chief Justice. This marks perhaps the lowest point of Sri Lanka's

political culture when a government in power could abuse parliamentary privilege in this fashion. And it is worse when the Government's slander machine is utilized to attack the Supreme Court and the Chief Justice.

The strategy behind the government action is very clear. The Secretary of the Judicial Service Commission in a press statement had complained that the public media is carrying on a campaign against the Judicial Service Commission and the independence of the judiciary. Then the government retaliates with a far worse abuse of public media in attacking the Supreme Court and the Chief Justice herself.

In doing this government resorts to the lowest forms of abuse by taking advantage of the vulnerability of the Chief Justice being a woman. This is one of the worst sexist attacks that we have seen in recent times and women movements in Sri Lanka together with every woman in Sri Lanka and anywhere else in the world should protest against this ugly abuse in regard to a woman holding a public office. Does this mean that every time that the government is unhappy with a woman holding public office, it will resort to this kind of dastardly tactic in order to humiliate and defame such a person? This is shameful Mr. Mahinda Rajapaksa. Very shameful.

In functional democracy, people would have demanded that the President himself and every one held who has participated in this shameful abuse of power, the abuse of parliamentary privilege and abuse of women should resign because they simply do not deserve to hold public office. This episode only demonstrates the lowest depth that Sri Lanka has reached at this point of time. No nation can avoid dire consequences to its societal moral when the government at the highest level resorts to such lowest level of mean and dastardly conduct.

If the people of Sri Lanka tolerate this level of immorality on the part of the government then they should blame themselves for all the societal ills that will rise from a situation such as the current crisis that the country is facing. The greatest societal ill that will rise from this kind of abyss is the very high level of criminality in every aspect of social life. There will be loss of respect for anything called moral or ethical in a society like this. The children of such a nation will inherit a culture that is ugly and stinking.

The Asian Human Rights Commission is aware that there are many others against whom such gimmicks are being schemed. One such scheme is to attack the lawyers who appear for just causes and oppose the government's abuse of powers in court through the use of manufactured reports accusing them of all kinds of things, for example saying that they are being paid by drug loads. We are aware that there was an attempt to publish such a report in the government's mouth piece Daily News last week against Mr. J C Weliamuna and another lawyer against whom the government does not agree with. It was because a particular news editor was a man who respects journalistic ethics that the report was not published. However possibly others who are willing to engage in any kind of abuse may be put in the editorial chair and publish such reports against those whom the government select to slander.

The Asian Human Right Commission is saddened by the attack on the Supreme Court and the Chief Justice. Its concern is not due to any personal attachment but due to respect for principle which when undermined, harms the very fabric of society. The Supreme Court deserves respect. The Chief Justice, whoever it is, deserves respect and the Parliament deserves not to be abused. History tells us that societies that do not respect these principles ultimately pay a high price for that disrespect.

## 29
# The proposed bill will limit the powers of the magistrates and increase the powers of the police

**by Basil Fernando**

Making bad laws has become the hallmark of lawmaking in Sri Lanka for several decades now. The most recent example of the making of very bad laws is a bill which has recently been placed before parliament under the title Code of Criminal Procedure (Special Provision). The pursuit of injustice through legal enactment finds one more expression in this proposed bill.

The task of law is to create the framework for justice. Legislators, in making laws, ought to be preoccupied with enhancing the liberties of the people and thereby bringing about greater happiness to the people of their countries. However, it is now a Sri Lankan habit to create a framework of injustice through law and to create conditions that will make the people of the country as unhappy as possible. The pursuit of justice is by now a habit that has been lost in Sri Lanka.

In the protection of individuals, the task of the magistrates is of prime importance. It is said that the kingpin of the criminal justice system is the magistrates. It is by enhancing the capacity of the magistrates to dispense justice that society is kept in safe hands. To undermine the magistrates is to undermine the law itself and to allow illegality as law. That is one of the aims of the proposed bill. Its ultimate objective is to undermine the powers and the functions of the magistrates in Sri Lanka.

While the magistrates are being undermined, the Officers-in-Charge (OICs) and other officers of police stations are being given greater powers under the proposed bill. The powers of the OICs are embellished at the expense of the powers of the magistrates. In the future, Sri Lankans will have to depend on the mercy of the OICs of the police stations and even on officers of lesser ranks.
The average Sri Lankan knows by experience that OICs know of very little mercy or justice, but that they have great appetites and get what they want by using their fists and boots. It is quite a part of the average man's common sense to avoid the police to the best of their ability. However, with the proposed bill the chances of avoiding the grip of such policemen and their demands will be much less. There will be no escape from the increase of extortion, torture, custodial deaths and dealing with all kinds of other demands from the police. The proposed bill will enhance such powers of the police and even change the age-old rule of the 24 hour limit before one is produced before a magistrate.

While the magistrate's powers will be reduced, the powers of the Attorney General will be increased. The way people think of the Attorney General's Department now is not the same as it used to be. The fact that the department's powers can be manipulated for the benefit of politicians brings no surprise to anyone anymore. What this simply means is that the people with the right connections, whether they are accused of rape, torture or any other crime, could resort to the escape route which will be opened through interventions to the Attorney General's Department. Under the proposed law on many serious offenses, the Attorney General's Department will be empowered to call back the file from the magistrates. While that may be happy news for those who have the right links, it is not good news for those who are seeking justice.

However, justice may not be the concern of the government and those who are drafting these kinds of laws. Sri Lanka's history for the last 40 years is one of the taking away of civil liberties by various means. The easiest ways were the emergency regulations and the anti-terrorism laws. However, these were not all. The country's constitution itself is designed to embellish the power of the executive and diminish the powers of the judiciary and to leave the people without protection.

What is really happening is the naked abuse of power. However, this abuse of power is given respectability by all kinds of enactments, bills and other legislation. Freedom loving nations make laws exactly to avoid the kind of situations that Sri Lankans are creating for themselves by their laws. While more and more chains are placed on the people, these chains are now called laws.

The duty of any sensible person is to oppose the use of legislation for creating injustice and the deprivation of liberties. It is for that reason that the proposed bill needs to be opposed.

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# The JSC secretary could have ended up like Prageeth Eknaligoda

by Asian Human Rights Commission

There was an attempted abduction of the Secretary to the Judicial Service Commission on October 7, near the St. Thomas College gymnasium. Had the attempted abduction of Manjula Tilakaratne succeeded, what might have happened is hard to guess. However, judging from previous abductions it is quite possible that he may have ended up in one of the following ways:

It could have been like that of Kumar Gunaratnam and Dimuthu Artigala, who were rescued after their abductions due to the intervention of the Australian High Commissioner after a massive publicity campaign immediately undertaken after their abductions; or it could have been like the case of Richard de Zoysa, whose body was found after his abduction and assassination; or he could have met the fate of Prageeth Eknaligoda, whose whereabouts remain unknown after his abduction, which happened immediately prior to the last presidential election.

The JSC secretary's attempted abduction happened in a lonely spot. Had the four abductors succeeded, it would have been unknown for hours. No one would have known what had happened and the abductors would have had sufficient time to hand him over to their masters.

Given the high profile position held by Manjula Tilakaratne as secretary of the JSC, it would have been most unlikely that he would have been released alive if the abduction attempt had succeeded. The implications on the abductors and those who were politically responsible for the attempt would have been too much for that. If he would have been in a position to reveal what had happened it would have caused too much damage. In such circumstances the victims usually never reappear.

Sri Lanka is a nation with experience of abductions and enforced disappearances, which are numbered in the tens of thousands. The abductors and those who are engaged in disappearances in Sri Lanka have enormous experience. It is seldom that they fail in their attempts as they did in this case. However, whenever they succeed they know how to keep secrets.

All Sri Lankan governments during the last few decades have done whatever they can to keep the secrets about enforced disappearances intact. Despite many high level international interventions, there has hardly been even an iota of success in

breaking down the secret codes of those who are engaged in such enforced disappearances.

By now, such enforced disappearances, which started with the abductions of rural youth, have reached the point of an attempted abduction of a former High Court judge who is the secretary of the Judicial Service Commission itself. Today hardly anyone considers him or herself as exempt from the threat of such abductions.

Prior to the abduction attempt, the secretary of the JSC warned that the life of the Chief Justice herself is under threat. No one treats such statements lightly. Everyone knows that anything is possible in Sri Lanka as far as abductions, enforced disappearances and extrajudicial killings are concerned.

There is an apparatus at work that does not leave any sense of security for anyone in the country. This internal security apparatus, supported by the intelligence services and maintained with the blessings of the highest political circles, is well entrenched itself in Sri Lanka. It has taken over 40 years since the first experiment in large scale extrajudicial killings in 1971 for this apparatus to become mature and wrap itself around the political life of the country like a python.

Ever since the failed abduction several highly placed government spokesmen have made public statements attempting to make light of the allegations from the secretary of the JSC. One minister said that the JSC secretary should not have been reading a newspaper inside his car but should have been with his son in the playground. Another said that the secretary had planned the attempted abduction himself. Yet another minister said that this might be the work of a third party to bring the government into disrepute. A government spokesman at a press conference said that the JSC secretary should not have made the press release that he made some weeks ago.

None of the actions or statements of the government showed any seriousness or genuine attempt to initiate any inquiries. Justice seems to be the remotest thing available to a Sri Lankan faced with a serious threat to his life and security.

Now the threatened ones are members of the judiciary itself. It is rather sad that during all these past 40 years or so the judiciary itself did very little to deal with the threat of abductions and enforced disappearances of easily over 100,000 persons in their country.

Belated as it is, it is time for the Supreme Court of Sri Lanka and all the judges to wake up to the threat posed to the rights of individual citizens in terms of their lives and security. It is the judiciary alone that can play the role of initiating the fight against a well entrenched evil scheme of abductions and enforced disappearances in their country. Now that one of their own had become the victim it is perhaps the final chance for the judiciary to take up the role it should have been playing to protect the civil liberties of all citizens.

All Sri Lankans and the international community should take this attack on the JSC secretary seriously, not only as an attack on an individual but as an attack on the institution of the judiciary itself, for the judiciary is the final resort for the protection of democracy.

**31**

## Who will respond to the distress call of the JSC of Sri Lanka?

by Asian Human Rights Commission

This distress call is not from a sinking ship but from the supreme body that represents the Judicial Service Commission (JSC) of Sri Lanka, which is desperately stating that the independence of the judiciary is under threat from the executive. The Asian Human Rights Commission has for years warned that democracy in Sri Lanka is sinking and this distress call from the JSC is one of the final indications of how fast it is sinking. If Sri Lanka has any friends left in the democratic world, it is time now for them to respond.

The JSC, through its secretary Manjula Tilakaratne, complained on September 18, 2012 about threats to its independent functioning. This is the first time in the history of Sri Lanka that the JSC, which is the highest body dealing with appointments, dismissals, disciplinary actions and promotion of judges in the country, has made a public complaint about attacks on its independence.

A translation of the full statement is given below. (A copy of the Sinhala original published in Lankadeepa, a well known Sinhala newspaper is also attached).

> *"The attention of the Judicial Service Commission (JSC) has been drawn to baseless criticism of the JSC and in general on the judiciary by the electronic and print media. The main objective of those behind the conspiracy of those trying to undermine the JSC and Judiciary is to destroy the independence of the judiciary and the rule of law.*
>
> *"It is regrettable to note that the JSC has been subjected to threats and intimidation from persons holding different status. Various influences have been made on the JSC regarding decisions taken by the Commission keeping with the service requirements. Recently the JSC was subjected to various influences after the Commission initiated disciplinary action against a judge.*
>
> *"Moreover an attempt to convince the relevant institutions regarding the protection of the independence of the judiciary and the JSC over the attempt to call for a meeting with the chairperson of the JSC, who is the Hon Chief Justice and two other Supreme Court judges, was not successful. The JSC has documentary evidence on this matter.*
>
> *"It is the JSC that is the superior institution which is empowered with the appointment of Magistrates, District judges, their transfers, dismissal from service and disciplinary action against them. It is an independent institution established under the Constitution. Under the Constitution any direct or indirect attempt by any*

*person or through any person to influence or attempt to influence any decision taken by the Commission is an offence which could be tried in a High Court.*

*'It should be emphasized that the JSC is dedicated and it is its responsibility to protect the independence of the judiciary and discharge its service without being intimidated by influences, threats or criticism. I have been instructed by the Commission to issue this media release to keep the majority of the public who value justice informed about an attempt by conspirators to destroy the credibility of the JSC and the Judiciary. – Manjula Tilakaratne, Secretary, JSC."*

*This translation was reproduced in the Political Column of the Sunday Times on September 23, 2012.*

This official statement refers to the following matters:

A call for the three-member commission (JSC) consisting of the Chief Justice and two other judges of the Supreme Court to meet the Honourable President of Sri Lanka to discuss the functions of the JSC. The JSC declined to attend the meeting as they found it unconstitutional to discuss the decisions of the JSC with anyone else.

Attempts to pressurize through the interventions of several powerful persons to remove the interdiction of a particular judge, who was interdicted by the JSC as a part of inquiries into very serious allegations of corruption. According to newspaper reports, this judge is said to be a close friend of the president's family.
A media campaign through state media channels against the judges of the Supreme Court and members of the JSC on baseless allegations and the unethical use of language for the purpose of belittling the judges and to undermine the independence of the judiciary.

Many will already be aware that there was a previous incident of a cabinet minister, Rishad Bathiudeen, attempting to intimidate the magistrate of Mannar, followed by two attacks on the High Court and the Magistrate's Court of Mannar, which caused serious damage to both premises. That minister is now facing charges of contempt of court at the Court of Appeal and he and some others are also facing criminal charges before the Magistrate's Court. The attempt to intimidate the magistrate and the attacks on the courts led to a nation-wide boycott on the courts by the judges and lawyers of Sri Lanka. Despite of the public outcry, the government has taken no action against this minister for his behaviour in relation to the interference with the independence of the judiciary.

A further event of importance is that, following an order by the Supreme Court in reviewing a bill placed before it, the court held that the particular bill was unconstitutional until consultations are held by the Central Government with the provincial councils about the matters taken up in the bill. The court made its ruling known to the Speaker, who read the court's ruling to the parliament as is required by the Constitution. However, following this ruling, three members of the cabinet and a

crowd, reported in the newspapers to consist of about 3,000 persons, held a protest against the Supreme Court in front of the parliament.

All these recent events are a part of a chain of events that have been taking place since 1978, with the promulgation of a new constitution that placed the executive president outside the jurisdiction of the courts. The new constitutional order proposed by the 1978 Constitution is unique and has no parallel anywhere else in the world. It established the executive president with absolute power and ever since there has been a constant conflict between the judiciary established under the earlier constitution of 1948, which recognised the separation of powers and which incorporated the independence of the judiciary as an integral part of the constitutional order, and the executive presidential system. Several attempts to get over this problem, such as the 17th Amendment to the Constitution, were abandoned and the president's power was even more strengthened by the 18th Amendment passed in 2010.

This conflict has now reached a proportion that the Supreme Court through the JSC has had to make a public complaint of interference into the independence of the judiciary.

Over several decades, the Asian Human Rights Commission has pointed out that the independence of the judiciary in Sri Lanka is facing peril due to the operation of the 1978 Constitution.

The AHRC has consistently commented on the conflict created by the executive presidential system, which replaced the democracy in Sri Lanka with a system of patronage. The executive presidential system has wrapped itself around all democratic institutions, including the judiciary, like a python and has broken bones. Saving the independence of the judiciary now is almost an impossible task. Unless the people of Sri Lanka themselves and their friends in the democracies throughout the world rise up now, very soon the functions of Sri Lanka's judicial institutions will be reduced to nothing more than rubber stamping. Such things have happened in several other countries, for example, Cambodia and Myanmar.

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# India's judicial standards & accountability bill, 2012 is worthy of emulation

by Basil Fernando

Safeguarding judicial independence from attacks by the government came to light due to the threats alleged to have been made by Minister of Industries and commerce, Rishard Badurdeen and the attacks on the High Court and Magistrate's Court of Mannar. That powerful politicians have been attempting to excerpt their influence over the judiciary is a widespread perception that has been seen for several decades now. Concern for the prevention of corruption in the judiciary is a topic that has found expression in many public debates.

Despite of the great public importance of this issue nothing significant has been done to inspire public confidence in the country's political determination to safeguard the independence of the judiciary. In this regard India, where there was similar public concern, has taken initiatives to bring a law to penalise any form of judicial corruption and to ensure speedy and credible investigations into allegations of corruption. The Judicial Standards and Accountability Bill, 2012 is designed to address this public concern.

The judicial standards to be followed by judges are proposed by Chapter II of this bill.

> **15 JUDICIAL STANDARDS TO BE FOLLOWED BY JUDGES**
> 3(1) Every Judge shall continue to practice universally accepted values of judicial life Judicial standards – as specified in the Schedule to this Act..
> (2) In particular, and without prejudice to the generality of the foregoing provision, no Judge shall—
> (a) contest the election to any office of a club, society or other association or hold such elective office except in a society or association connected with the law or any court;
> (b) have close association or close social interaction with individual members of the Bar, particularly with those who practice in the same court in which he is a Judge;
> (c) permit any member of his immediate family (including spouse, son, daughter, son-in-law or daughter-in-law or any other close relative), who is a member of the Bar, to appear before him or associated in any manner with a cause to be dealt with by him;

(d) permit any member of his family, who is a member of the Bar, to use the 30 residence in which the Judge actually resides or use other facilities provided to the
Judge, for professional work of such member;
(e) hear and decide a matter in which a member of his family, or his close relative or a friend is concerned;
(f) enter into public debate or express his views in public on political matters or on matters which are pending or are likely to arise for judicial determination by him:
Provided that nothing contained in this clause shall apply to,—
(i) the views expressed by a Judge in his individual capacity on issues of public interest (other than as a Judge) during discussion in private forum or academic forum so as not to affect his functioning as a Judge;
(ii) the views expressed by a Judge relating to administration of court or its efficient functioning;
(g) make unwarranted comments against conduct of any Constitutional or statutory authority or statutory bodies or statutory institutions or any chairperson or member or officer thereof, in general, or at the lime of hearing matters pending or likely to arise for judicial determinations.
(h) give interview, to the media in relation to any of his judgment delivered, or order made, or direction issued, by him, in any case adjudicated by him;
(i) accept gifts or hospitality except from his relatives;

(j) hear and decide a mailer in which a company or society or trust in which he holds or any member of his family holds shares or interest, unless he has disclosed his such holding or interest, and no objection to his hearing and deciding the mailer is raised;
(k) speculate in securities or indulge in insider trading in securities;
(l) engage, directly or indirectly, in trade or business, either by himself or in 5 association with any other person:
Provided that the publication of a legal treatise or any activity in the nature of a hobby shall not be construed as trade or business for the purpose of this clause;
(m) seek any financial benefit in the form of a perquisite or privilege attached to
his office unless it is clearly available or admissible; 10
(n) hold membership in any organisation that practices invidious discrimination on the basis of religion or race or caste or sex or place of birth;
(o) have bias in his judicial work or judgments on the basis of religion or race or caste or sex or place of birth.
Explanation. — For the purposes of this sub-section, "relative" means:-
(i)spouse of the Judge;
(ii) brother or sister of the Judge;
(iii) brother or sister of the spouse of the Judge;
(iv) brother or sister of either of the parents of the Judge;
(v) any lineal ascendant or descendant of the Judge;

(vi) any lineal ascendant or descendant of the spouse of the Judge;
(vii) spouse of the person referred to in clauses (ii) to (vi).
Chapter III of the Bill is entitled Declaration of Assets and Liabilities of Judges. Chapter IV is about making of complaints. The proposed law requires that there will be a 'Complaints Scrutiny Panel' in the Supreme Court and in every High Court to scrutinise complaints against the judges received under the proposed act.
The Scrutiny Panel in the Supreme Court will consist of a former chief justice of India and two judges of the Supreme Court to be nominated by the incumbent Chief Justice. The Scrutiny Panels in the High Courts will consist of a former chief justice of that High Court and two judges of the same court to be nominated by the incumbent Chief Justice of that High Court.

The Scrutiny Panel has to submit a report on the basis of the findings to the Oversight Committee within a maximum period of three months from the date of the receipt of the complaint from the Oversight Committee.

The proposed Bill prescribes the procedure for investigations into the complaints. The investigating committee conducting an investigation will have all the powers of a civil court while trying a suit under the Code of Civil Procedure. The investigating committee has the powers of summoning and enforcing the attendance of any person, requiring the discovery and production of any documents, receiving evidence on affidavits, requisitioning any public record or copy thereof from any court office, issuing commissions for the examination of witnesses or other documents and any other matter which may be prescribed.

The proposed Bill also prescribes penalties on the conclusion of the inquiries. The investigating committee may recommend stoppage of assigning judicial work including cases assigned to the judge concerned during the period of the investigation. Further, if the Oversight Committee, on receipt of the report from the investigating committee is satisfied that there has been a prima facie commission of any offense under any law for the time being enforced by a judge, it may recommend to the central government for prosecution of the judge in accordance with the law for the time being in force.

The proposed Bill is comprehensive and deals with all the matters relevant for the conduct of such investigations and for the enforcement of the findings.

The judges and lawyers in Sri Lanka have a lot to benefit in terms of the protection of their good name and credibility and also in fighting against the pressures brought by the government in power or by politicians or any other powerful persons or groups by having a law of similar nature for the country. As the present government is quite unlikely to take the initiative for the promulgation of such a law the judges themselves and the Bar Association of Sri Lanka could take the initiative for bringing about such a law.

Above all the political opposition and the civil society organisations should translate their criticism about the breakdown of the law and the widespread lawlessness that prevails in the country into concrete proposals for reforms of the judicial system. Among such proposals the adoption of a law similar to the Indian Bill on judicial standards and accountability should receive serious consideration. The protection of the rule of law is an essential condition for the stability of the economy as well as the security of society. The business community itself should play a more proactive role in safeguarding the rule of law in Sri Lanka as the very survival of the private sector depends on the prevalence of the rule of law.

For the full document please see: The Judicial Standards and Accountability Bill, 2012

## 33
## The rise of the security apparatus and the decline of the criminal justice system

by Basil Fernando

A few decades ago, Sri Lanka's criminal justice system was organised on the basis of the Penal Code, the Criminal Procedure Code and the departmental orders of the police . The Penal Code defines crime and lays down penalties for each particular crime. New crimes were identified or defined either through amendment to the Penal Code or through separate statues. The Criminal Procedure Code describes basic protocol that should mechanisms in the justice and law enforcement institutions should comply with and provide proper processes along which those in authority must operate. This includes how complaints are to be taken down, how to and who should conduct the investigations into crime, how the findings of the investigations are to be submitted to the Attorney-General, how arrests should be made, how indictments are to be made by the Attorney-General, how the indictments are to be filed in courts, how the trial process is to be carried out and how bail and appeals are to be made. The Criminal Procedure Code also lays down the manner in which people are to be summoned to courts and how to deal with persons who evade the summons, as well as many other matters incidental to the investigation, prosecution, trial, appeal, sentencing and punishment of an accused in accordance with accepted legal principles within the country. This system that had been gradually developed over centuries was supported, implemented and enforced by the police departmental orders, and guaranteed to large extent fairness through equality before the law and equality of protection by the law.

The departmental orders of the police lay down the manner in which police who are to play the key role in the investigations into crime are to carry out their obligations. These orders circumscribe the legal mandate of police officers and prescribe acceptable ways of recording complaints, making arrests, detaining a person,

interrogating suspects and witnesses, maintaining records and proper documentation of all proceedings, the systematic archival of evidence and case files to the Attorney-General and pursuing crimes their order permits them to prosecute. The obligations of police officers are described in minute detail in these departmental orders. Officers-in-charge of police stations were tasked with the critical role of personally demonstrating, supervising and enforcing the proper conduct of police officers and of investigations, as well as with the maintenance of discipline within the police station. Assistant Superintendents of Police were in turn to monitor the conduct of all police stations under their charge. In this manner, a strict hierarchy and chain of command was strengthened through dense networks which demanded accountability and a certain amount of transparency. This system provided feedback mechanisms with which rogue actors and misconduct could be quickly checked by superiors and peers. This possibility in turn encouraged self-regulation by those in authority and inspired trust and confidence among the general populace.

The Penal Code, Criminal Procedure Code and the Departmental Orders together enshrine scientific methodologies for investigation into crime. Centuries of vigorous debates in the European context gave rise to the rules set out in these various legal documents. The norms of equality of all before the law, justice and protection for all by the law led to the gradual abandonment of the systems that prevailed in Europe before the 17th Century. This period came to be known as the period of Enlightenment. The primary concern during this period was the development of a system of governance based on models of rationality, empiricism and science, and on the ideal of utilitarianism. This system attempted to balance the interests of many, often competing, parties, and to design rules to uphold, protect and enforce principles of justice. The criminal justice system was based on the acceptance of presumption of innocence before being proven guilty, and the placement of the burden of proof on state agencies, particularly investigators and prosecutors. These agencies were charged with bringing before the court adequate information and evidence which would conclusively link the suspect with the crime committed. Guilt was to be imputed through concrete evidence alone, the logical interpretation of which should prove beyond shadow of a doubt that the accused was responsible before any verdict or sentence is dealt.

**A thing of the past**

The system described above is today much a thing of the past. Since 1978, the adoption of the new Constitution of Sri Lanka has replaced this old conception of criminal justice. Increasingly, state and public security laws have replaced the old system of criminal justice and its belief in due process and the principles of equity, equality and justice. These national security laws and acts suspend scientific rules and processes that would normally apply in the event a crime is committed. This is equivalent to a suspension of justice, equality and equity in law enforcement and the judicial system. For over 40 years since the counterinsurgency of 1971, the rules and recommendations composing the Penal Code have been systematically neglected or violated, rendering irrelevant considerations underlying the rule of law –

presumption of innocence and burden of (adequate and scientifically obtained/interpreted) proof on the prosecuting agencies. Newly defined transgressions are often accorded disproportionately severe punishments and new legal statutes permit the suspension of due process for arrests and detentions. This undermines every principle upon which the old system of criminal justice was built.
In the earlier system of criminal justice, two departmental heads played critical and roles . The Inspector General of Police directed and supervised the policing and law enforcement institutions, while the Attorney-General ran the Attorney-General's Office, which excecised the prosecutors function. Both department heads were expected to ensure that the entire system of investigations and the prosecutions are conducted within that normative framework delineated by the rules comprising the Penal Code and the Criminal Procedure Code. These department heads enjoyed the privileges, power and respect attendant high office.

**Enter the Ministry of Defence**

Yet national security laws have hollowed out the portfolios of the Inspector General of Police and the Attorney-General by placing greater power in the hands of the Ministry of Defence. The Secretary of Defence has acquired unprecedented powers through national security laws such as the 1979 Prevention of Terrorism Act (PTA) and various Emergency Regulations (ERs) since the 1971 Janatha Vimukthi Perumuna (JVP) insurgency. ERs can suspend, amend or override any legislation . Such powers threaten the long cherished principles of criminal justice. Some of the ERs cleared the way for causing forced disappearances in large scale.

There has also been a proliferation of power amongst other agencies closely connected with the Sri Lankan Ministry of Defence. The intelligence service, whose earlier mandate had been strictly and clearly limited, has an expanded purview that includes most sectors of society, where they play supervisory roles. There are few, if any, restrictions to their power akin to the boundaries set to the ambit of the police according to their departmental orders. Intelligence service operations follow unwritten guidelines very vaguely and generally understood within the Ministry of Defence and amongst affiliates. These groups remain unaccountable to the courts and the public. They often abuse even the chain of command and communication established by the government. Yet their actions are often overlooked, condoned or justified by the ruling parties as essential to "national security."

Paramilitary groups such as the Special Task Force, and others of an even more clandestine nature, are also intentionally kept outside public scrutiny and the control of an elected parliament. The nature of these agencies and their work is often secret. In the earlier criminal justice system, it was compulsory for police officers to identify themselves in public through donning a uniform, carrying badges and presenting various identification numbers upon request. They worked openly in society and had to clearly explain their activities in accordance with well-established rules and procedures. Law enforcement agents today have no such organisational obligation; the public are often unaware of the presence of police, who may dress in plainclothes

on duty, do not present badges or identification numbers upon request or conduct arrests by due process (informing the suspect of the charges being brought against him or carrying a memo authorising the arrest, for instance).

Agencies charged of national security have adopted methodologies which would have been considered completely unacceptable within the earlier criminal justice system. Under the excuse of protecting "national security", the officers may themselves engage in criminal, barbaric and morally reprehensible activities such as abducting, torturing, falsely charging or extrajudicial killing of persons. Victims are often dehumanised through rhetoric that terms them animals, traitors or enemies of the state. Instead of open arrest, persons may be suddenly accosted, brought into detention in "unusual" places or forcibly "disappeared" or killed in extrajudicial operations. These new practices not only substitute old processes but the fundamental principles upon which the old processes were constructed. Such executive impunity has never before been allowed to be exercised, even by police in the earlier criminal justice system. And these new practices have been put to use large a scale. These are not hiccups in the earlier criminal justice system – they are manifestations of a radical departure from the criminal justice approach to national security approach.

**A Radical Departure from criminal justice**

The corpus of complaints about the complete disregard for all provisions of law dealing with crime is so vast it is no exaggeration to say that today the Penal Code, the Criminal Procedure Code and the Departmental Orders of the police are regarded as matters that are no longer vital to the functioning of criminal justice in Sri Lanka. The process by which this entire system has been displaced is described in popular parlance. Much has also been written and spoken about the politicisation and militarisation of judicial processes. What in essence this means is the displacement and replacement of the command responsibility that comes down from the Inspector General of Police down to the lowest ranking police officer with a new structure wherein there is direct contact between politicians and police officers of all ranks without reference to their superiors. Hierarchy, accountability, checks and balances have lost much of their meaning and the superior officers themselves seem to have accepted this erosion of their authority and the corrosion of due process as fait accompli. The policing system was never intended to be run by power holders outside the system. When such intrusions and impositions occur, the integrity, independence, impartiality and credibility of the entire process is compromised.

This is not an exhaustive exposition of the security apparatus of Sri Lanka. There are many texts that provide analyses of the contemporary political and judicial administration of Sri Lanka. Instead, this article merely stresses the transformation of a society where even the phantom of criminal justice no longer haunts the structures now filled by actors who aspire only to the semblance of order and justice while themselves holding the reins of power and acting with impunity. The public has a right to know the extent to which Sri Lanka has changed and the impact this has had

and continues to have on their lives. The successful erasure of the importance of justice in public awareness and the secrecy with which political responsibilities of a regime are held in Sri Lanka signify the pressing need for understanding and local debate to be generated.

## 34
## Sarath N. Silva is no respecter of principles and rules

**by Basil Fernando**

Mr. Sarath N. Silva has taken three different positions in regard to the impeachment of the Chief Justice within a quite a short time.

Initially, he said that, under the provisions of the 1978 constitution, even a Chief Justice who gives justice to others has no way to get justice.

Then, while attending a funeral he met his old friend and master, the President. Soon he declared that the charges against Chief Justice were very serious and that she should think of resigning.

Then, after the Chief Justice's letter was published, in which she clearly and firmly denied the charges, Silva's reflections on the seriousness of the charges lost ground. His new argument was that the President has the power to appoint an Acting Chief Justice and the Chief Justice should take that seriously. He did not ask any questions as to whether any action by the president to that effect would be right and just, and what impact it might have on independence of the judiciary.

The Lord of the Flies is a great novel by William Golding. It is about a group of young British boys who land on an isolated island due to an accident. Hoping that some ship may notice them and come to their rescue, they initially organize themselves and abide by rules. As the days pass by and there seems to be no hope of rescue their discipline wanes and they forget about those rules. Gradually, once well behaved boys become savages.

The British are a rule abiding people and their idea of being civilized is abiding by well tested rules. Their legal system is based on that premise. That is the legal system they introduced to Sri Lanka. It can survive only while the principles on which the rules are based are respected.

Early generations of judges and lawyers understood this and they were quite capable of being good guardians of the legal system. That is no longer the case. This is told quite eloquently by S.L. Gunsekara, himself a well tested lawyer, in his book titled Lore of the Law and other Memories. He talks of the "good old days" when good judges and lawyers, some of whom he speaks of as giants, ran the system; where good cases almost always succeeded and bad ones were lost. He describes the present situation through a quote from a senior lawyer, D.S. Wijesinghe, President's Council, *"We now have a new Parliament and with it democracy vanished. We are now about to get a new Superior Courts Complex and with that justice will vanish".*

It is in that bad period that S.L. Gunsekara places Sarath N. Silva: He writes:

> *"…our former Chief Justice Sarath Nanda Silva PC (whom to my mind did more to undermine the independence and quality of judiciary and hence the administration of justice, and to destroy the confidence the people had in the judiciary, than any other person or persons both living and dead)…"*

S.L. Gunsekara devotes one small chapter about an incident that happened when his father, who had been appointed as Acting CJ, visiting him at his school, St. Thomas College. One boy, having noticed him shouted,ADO Chief Justice Hoooo. This is of course quite a boyish prank.

But, on hearing about former CJ, there are many who would want quite earnestly to say, Sarath N. Silva, Hoooo, Hoooo, Hoooo. I believe that is quite an appropriate salutation to him.

I have that feeling every time I remember the case of Tony Fernando (Anthony Emmanual Fernando). I did not know Tony at the time of the case but had lot to do with him later. Tony had an idea of justice for himself as well as for others. He belongs to that category of citizens to whom the justice system owes a lot. I have met and worked with many of them who fought cases knowing quite well that at the end nothing will really happen. Fighting for justice is itself the cause and the outcome was of little concern to them.

Tony went before Sarath N. Siva and two other judges to request the relisting of a case which had been dismissed twice already. He appeared for himself and made a simple request to refix the case before some other judge and not Chief Justice Silva. However, the case was called before the same three judges and Chief Justice Silva asked Tony on which basis he came to court. Tony replied that he appeared under article 12(1), equality before law. Chief Justice Silva may not have expected that reply from a mere layman. His reply was to ask him to shut up or face the consequence of having one month each added to each word Tony would speak. Tony was sentenced

to one year's imprisonment and taken from the court to jail immediately. That was the type of justice prevailing then. When I heard this, as I could not say, Ado Chief Justice Hoooo, Hooo, Hooo, I nominated Tony to a Human Rights Defenders Award, the first ever award by the Asian Human Rights Commission. Tony did not consider offering an apology to the Chief Justice in order to get his sentence reduced. He appealed and the same three judges, with Chief Justice Silva, presiding refused the appeal. Undaunted, Tony then filed papers with UN Human Rights Commission, which held that the imprisonment amounted to illegal detention committed by the Supreme Court of Sri Lanka.

Tony now lives with his family in Canada, still a very just man working for justice for others.

Whenever I think of him, in my mind I salute him the same way I do to hundreds of others, who I know have spent years in courts knowing well that they will not get justice. But they continue to do so to make a point. Such great litigants are still there and they deserve a better system and better judges.

When I think of former Chief Justice Silva, what comes to my mind is the other salutation.

Legal reasoning is about applying the mind to legal principles and rules in terms of particular facts and circumstances. Perhaps the greatest example of such juridical thinking was exhibited by Sir Sydney Abraham when he gave his judgement in the famous Bracegirdle case. The Supreme Court quashed a decision made by the governor ordering the deportation of Bracegirdle within 48 hours. The Chief Justice said,

> *"There can be no doubt that in British territory there is the fundamental principle of law enshrined in the Magna Carta that person can be deprived of his liberty except by judicial process".*

It is the total opposite of cunningness, of unscrupulously bending the reasoning to suit one's own preconceived ideas and schemes. Chief Justice Silva failed to grasp the distinction between just reasoning and cunningness.

The legal edifice that existed in the 'good old days' that S.L. Gunsekara speaks about has now been pulled down. The cunning of politicians like Junius Jayewardene, who pulled down the very foundation of the legal edifice founded on rule of law through his "constitution", combined with the cunning application of law to serve his political bosses by Chief Justice Silva, has brought the nation down to the situation of those boys who turned savage in the novel, The Lord of the Flies.

How we can rise out of that savage state is hard to predict. However, one can predict that so long as the cunningness of politicians and judges who serve savagery remain, we are doomed to stay where we are.

35

# The procedure in Article 107 of the Constitution is incompatible with principle of the separation of powers and with the ICCPR article 14 says the UN Special Rapporteur

by Asian Human Rights Commission

The United Nations Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul in a statement issued yesterday (November 14, 2012), stated that,

".....the procedure for the removal of judges of the Supreme Court set out in article 107 of the Constitution of Sri Lanka allows the Parliament to exercise considerable control over the judiciary and is therefore incompatible with both the principle of separation of power and article 14 of the International Covenant on Civil and Political Rights." Ms. Knaul also said, "The irremovability of judges is one of the main pillars guaranteeing the independence of the judiciary and only in exceptional circumstances may this principle be transgressed," the Special Rapporteur underscored, expressing her uneasiness with the procedure of impeachment of the Chief Justice of the Supreme Court, Dr. Bandaranayake, launched before the Parliament on 1 November 2012.

"Judges may be dismissed only on serious grounds of misconduct or incompetence, after a procedure that complies with due process and fair trial guarantees and that also provides for an independent review of the decision," she stressed. "The misuse of disciplinary proceedings as a reprisals mechanism against independent judges is unacceptable."

The procedure set out in Article 107 of the Constitution is as follows:

(2) Every such judge shall hold office during good behaviour, and shall not be removed except by an order of the President made after an address of Parliament supported by a majority of the total number of Members of Parliament (including those not present) has been presented to the President for such removal on the ground of proved misbehavior or incapacity:

Provided that no resolution for the presentation of such an address shall be entertained by the Speaker or placed on the Order Paper of Parliament, unless notice of such resolution is signed by not less than one-third of the total number of Members of Parliament and sets out full particulars of the alleged misbehavior or incapacity.

(3) Parliament shall by law or by Standing Orders provide for all matters relating to the presentation of such an address, including the procedure for the passing of such resolution, the investigation and proof of the alleged misbehavior or incapacity and the right of such judge to appear and to be heard in person or by representative.

The incompatibility of the ongoing impeachment attempt by the government against the Chief Justice, Dr. Shriyani Bandaranayake arises from the following reasons:

1. The impeachment is motivated by political reasons as the Chief Justice, with some other judges has delivered some judgements that the government does not agree with and therefore is not for any exceptional circumstances due to which a judge can be removed.
2. The procedure contained in Article 107 and the related Standing Orders do not comply with due process and fair trial guarantees and also does not provide for an independent review of the decision.

Yesterday the government Parliamentary Select Committee had its first meeting and on that day itself, issued the charges to be handed over to the Chief Justice giving her only one week to reply.

The guarantees of fair trial require that the inquiry into the charges should be conducted by judicial officers and all the procedural requirements for the making of a proper response by the Chief Justice are provided. However, under Article 107 it is the Select Committee which consists of parliamentarians and not judicial officers who will conduct the inquiry. From that very fact the Select Committee will not be in a position to provide for the requirements of a proper hearing as required under the principles of fair trial.

The Asian Human Rights Commission in several of its statements on the impeachment has stated that it is an attempt to destroy the independence of the judiciary and make it a branch of the executive. Under the principle of the separation of powers the judiciary is a separate branch of the government and is independent from the executive legislature. What is now happening is to end the character of the judiciary as a separate branch of the state and to subordinate it to the executive.

**36**

# Is impeachment a synonym for beheading?

by Basil Fernando

In May 1993, a UN sponsored election was held in Cambodia to elect a government. The country had faced a civil war after Polpot's catastrophic revolution. At the time, a large part of the country was under the State of Cambodia, of which Hun Sen was the head. His party was one of the two leading parties that contested the election, the other being led by Prince Ranariddh, the son of the former king, King Sihanouk. A day or two after the election, while the ballots were still being counted, a rumour began to be spread that Hun Sen's party had lost the election (it was proved true when the results were announced) and that now the loser, Hun Sen, would be publicly executed.

That was how people understood the result of losing an election and in Sri Lanka, at the moment, the attempted impeachment of the Chief Justice is conveying many such surprising meanings.

One perception seems to be that it is more or less like a beheading, and that the beheading will take place at the parliament.

A beheading assumes that the issue of guilt or innocence is no longer relevant. It is only the final ceremony that is left to be carried out.

Perhaps what has given rise to that perception is that an impeachment is assumed to be a political affair.

In political affairs, it is assumed that what matters most is what the leader who can muster most votes really wants or thinks. His supporters have only one function: that is to vote in the manner that they are told to vote.

S.L. Gunarasekara, who was himself a Member of Parliament once, writes this on how MPs vote now:

Vast numbers of Members of Parliament "simply voted 'for' or 'against' according to the decisions taken by the leadership of his/her party.....The 'bottom line' in this regard is the most unpalatable fact that independent thought and the expression of independent opinions by its Members are, to the leadership of any Party, as taboo as pork is to a Muslim or a Jew. The harsh reality about our political system is that 'thinking' is the exclusive preserve of the leadership of the Party and that acting in consonance with such 'thinking' and the decisions based on its is a mandatory obligation of all its Members and Members of Parliament in particular of any Party."
Since voting in parliament is assumed to be happening this way, it is natural to conclude that no thinking is expected in the parliament regarding the impeachment. All that would happen is the execution, the beheading.

However, such perception fails to take into consideration the Parliamentary Select Committee (PSC) function, which is in fact to decide on the issue of guilt of innocence.

That raises the issue as to whether a decision of guilt and innocence can be a political decision?

If the answer to that question is yes, then it would follow that, as the members of party are expected to vote according to what their party leader wants, the impeachment would involve no process of judging, and therefore it would indeed be a beheading.

This simply means that someone other than the leader of the party that moving the impeachment motion should be the judge. The PSC cannot do that function for the reasons stated above.

Those who judge on the issue of guilt and innocence have to be impartial and impartiality assumes freedom to make decisions. It follows then that judging on guilt and innocence cannot be a party political act.

This being so, it appears that the view of the 'impeachment' of the Chief Justice as a synonym for beheading is correct in the Sri Lankan circumstances.

37

# Judicial Dilemma?

by Ravi Perera

In the midst of all the uncertainties and the ambiguities of the impeachment saga the one firm ground we Sri Lankans have is the comfort of knowing that the impeachment motion was handed over to the Speaker of parliament at the auspicious time. The daily newspapers carried the picture of the smiling parliamentarians, who it was reported had waited patiently for the right "time", to submit their all important petition. And it was done. What follows, for those confirmed believers in the time tested practice of arranging/reading the future, is just unavoidable destiny. The impeachment motion now before parliament, if allowed to progress unhindered, should logically conclude in the removal of an incumbent from office and the petitioners may well consider that moment ,when the document containing their charges were handed over to the Speaker, as propitious. On the other hand, for the Chief Justice of the Republic of Sri Lanka, the person facing the charges, the intended result would be an inauspicious end to a career. The long term impact of this action on the overall stability, progress and the legitimacy of the State is yet to be determined, and perhaps needs much deeper analysis by the practitioners of the occult.

It is obvious that the practice of predicting/arranging the future by use of astrology is based on obtaining precise timing. That very moment of handing over the petition will determine its success or failure. As to how the practice functioned in the era before the advent of clocks is open to speculation. Some argue that ancient ways of determining the time, such as by the reading of the length of shadows, were used. It is not clear whether such methods enabled the precise reading of time as we now do with hours divided into minutes, seconds and even less. The length of the shadows would depend very much on the position of the sun, and finding shadows on an overcast day would be hard, placing the astrologers at a considerable disadvantage. They also had to deal with the night hours, compounding the problem further.

Whatever one may think of the practice of astrology, the fact remains that it has a large and ready following in this country. The occult seems to appeal to something deep in our social psyche while fitting in well with the way we see the world. That "vision" of the world presupposes a "fixed" future which can be read by the appropriate means. Today if the horoscope of the Chief Justice can be obtained, an astrologer ought to be able to narrate to us the final act of the impeachment drama. It is already out there, only waiting to be enacted. But then, according to other schools of occult, there are defensive weapons with which the ill-winds of fate can be warded off. We see many individuals carrying on their person talismans, charms and amulets, which act as shields against harmful effects of fate.

Not every culture that sees the world this way. Although they observe the same phenomenon as us, other cultures have come to different conclusions. It can be said

that every culture represents a different way of seeing the world. What one may see as a law of nature another may view as mumbo jumbo. Some cultures are noticeably more hopeful of a future which can be changed and fashioned by human effort. Others think life goes around in repetitive cycles with all change ultimately coming to nothing. It is undeniable that the inspiration for nearly all the public institutions we have today come from cultures that have attempted to change and improve an existing condition. The judicial system that we have adopted is such an institution. So are the concepts such as the rule of law, elective principle, an elected president/legislature, a free media etc which now have become very much a part of our political/social structure. But how much of these foreign concepts, particularly the spirit thereof are understood by our culture is a moot point.

The idea of separation of power, which is in relation to the functions of the State, is quite different to the power that an astrologer will talk about. For him "power" or "bala shakthiya" in our lingo, is a word to be uttered in a deeper tone, eyes glazed, face contorted, emphasizing its undefined, unlimited quality. The person in power can virtually do anything. Power has come to him in a mysterious process which cannot be divined by mere mortal faculties. The holder of power has unerring wisdom, sweeping intelligence, deep cunning, an extraordinary knowledge of human weaknesses and also a magnificent benevolence which will favour the humble subject, if appropriately approached. Controlling that power or creating checks and balances thereto is not the function of the occult.

The judiciary, in its true form and substance is a representation of foreign ideas and ways of looking at things. For instance, some of the desired qualities of a good judge such as an independent spirit, integrity of a high order, an appreciation of fairness, a wide outlook, a natural dignity etc are not obtained by sitting an examination. Often these are the gifts of an individualistic culture, formative influences and childhood up-bringing. On the other hand in the way we see the world, a judicial appointment, like all high appointments, maybe taken as a sign of good fortune. It is an opportunity the appointee should use to advance his family prosperity, to canvass jobs for them, benefit from Presidential and other government funds, obtain sinecures and appointments after retirement and failing everything else at least insist on a retinue of police body guards, enabling him to make an impression.

But whatever our belief system, every day we face a mundane reality which cannot be ignored. In this real world, the things we desire most fervently are simply beyond the reach of our income. A land to build a house , an expensive car , a foreign education for our children and various creature comforts are not possible with the salary earned in a third world country.

It is a situation with tremendous potential for the occult. Why would those who have got their astrological timing all wrong, object to the doings of those who have got their timing all right?

*(Courtesy: The Colombo Telegraph)*

38

# The myth of blanket immunity of the president

by Elmore Perera

Article 3 of the much maligned 1978 Constitution unambiguously sets out that "In the Republic of Sri Lanka Sovereignty is in the People and is inalienable. Sovereignty includes the powers of Government,fundamental rights and the franchise". Article 4 clearly defines how the Sovereign People shall exercise and "enjoy" their inalienable Sovereignty through its creatures – the Legislature, the Executive and the Judiciary. Vested with the sole and exclusive jurisdiction to hear and determine any question relating to the interpretation of the Constitution, the Supreme Court headed by the President's hand-picked Chief Justice Hon. Neville Samarakoon Q.C., withstood covert and even overt attempts (such as stoning of Judge's bungalows and rewarding those found guilty of violating fundamental rights) by the Executive to intimidate the Judiciary into submission. A despicable attempt to subvert the Independence of the Judiciary was described by the Chief Justice in these words.

"Here is a classic example of the uncertainties of litigation and the vicissitudes of human affairs. The annals of the Supreme Court do not record such a unique event and I venture to hope, there never will be such an event in the years to come. It behoves me therefore to set out in detail the events that occurred in their chronological order …… On Monday the 12th (September 1983) I was informed that the Courts of the Supreme Court and the Court of Appeal and the Chambers of all Judges had been locked and barred and armed police guards had been placed on the premises to prevent access to them. The Judges had been effectively locked out. I therefore cautioned some of my bother Judges who had made ready to attend Chambers that day not to do so. I referred to this fact in my conversation with the Minister of Justice on the morning of Monday the 12th and he, while deprecating it, assured me that he had not given instructions to the police to take such action. I was made aware on Tuesday that the guards had been withdrawn. This matter was referred to in the course of the argument (in SC Application No. 47/83 (Visuvalingam v Liyanage) and the Deputy Solicitor General informed the Court that it was the act of a blundering enthusiastic bureaucrat. He apologized on behalf of the official and unofficial Bar. On the last day of hearing the Deputy Solicitor General withdrew the apology and substituted instead an expression of regret. The identity of the blundering bureaucrat was not disclosed to us. However his object was clear – that was to prevent the Judges from asserting their rights ……On the15th September all Judges of the Court of Appeal and Supreme Court received fresh letters of appointment, commencing 15th September ….. Counsel for the Petitioners vehemently objected to proceedings de novo and contended that proceedings must continue from where it stopped on the 9th September as the Judges had not ceased to hold office. I considered this a matter of the greatest importance and therefore referred all points in dispute to this Full Bench of nine Judges. The following issues

were raised for decision…… 'Is the President's act of making a fresh appointment of the Judges an executive act not questionable in a Court of Law?'….. The Deputy Solicitor General contended that the oaths taken by the Judges before their fellow Judges are not legally binding or valid even though Judges of the Court of Appeal and Supreme Court are ex-officio JPs….. He added that the requirement to take the oath before the President is mandatory. His reason for stating this needs to be quoted verbatim: 'The reason for this is not far to seek. The Head of State as repository of certain aspects of the People's Sovereignty has a constitutional obligation to obtain from the Judges their allegiance. The personal allegiance which the Judges owed to the sovereign in the days of the Monarchy is continued to the present day where the allegiance is owed to the Head of the State as representing the State. The Head of the State is entitled to ensure that the allegiance is manifested openly and in his presence?' This is a startling proposition. Sovereignty of the People under the 1978 Constitution is one and indivisible. It remains with the People. It is only the exercise of certain powers of the Sovereign that are delegated under Article 4 as follows:-

(a) Legislative power to Parliament
(b) Executive power to the President
(c) Judicial power through Parliament to the Courts

Fundamental Rights (Article 4(d)) and Franchise (Article 4(e)) remain with the People and the Supreme Court has been constituted the guardian of such rights. I do not agree with the Deputy Solicitor General that the President has inherited the mantle of a Monarch and that allegiance is owed to him….. There is no doubt that Judges had been denied access to the Courts and Chambers by a show of force. There is also no gainsaying that this Act had polluted the hallowed portals of these Courts and that stain can never be erased."

Sharvananda J. opined, inter alia, that "The matters referred to the Full Bench involve important questions which concern the jurisdiction, dignity and the independence of the Supreme Court and of the Court of Appeal of the Republic of Sri Lanka…. It is therefore in a spirit of detached objective inquiry which is a distinguishing feature of judicial process, that we need to find an answer to the questions that are raised. It is essential to deal with the problems objectively and impersonally ….. In dealing with problems of Constitutional importance and significance it is essential that we should proceed to discharge our duty without fear or favour, affection or ill-will and with the full consciousness that it is our solemn duty and obligation to uphold the Constitution of the Democratic Socialist Republic of Sri Lanka (1978) ……Rule of Law is the foundation of the Constitution, and independence of the Judiciary and fundamental human rights are basic and essential features of the Constitution…… There can be no free society without law, administered through an independent judiciary ….. The supremacy of the Constitution is protected by the authority of an independent judiciary to act as the interpreter of the Constitution.,….. It was contended by the Deputy Solicitor General that this Court is precluded from directly or indirectly calling in question or making a determination on any matter relating to the performance of the official acts of the President. He supported this objection by

reference to Article 35 of the Constitution. I cannot subscribe to this wide proposition. Actions of the Executive are not above the law and can certainly be questioned in a Court of Law. Rule of Law will be found wanting in its completeness if the Deputy Solicitor General's contention in its wide dimension is to be accepted. Such an argument cuts across the ideals of the Constitution as reflected in its preamble. An intention to make acts of the President non-justiciable cannot be attributed to the makers of the Constitution."

Neville Samarakoon CJ, Sharvananda J, Wanasundera J, Wimalaratne J, Ratwatte J, Soza J and Abdul Cader J held, with Ranasinghe J and Rodrigo J dissenting, that "Article 35 of the Constitution provides only for the personal immunity of the President during his tenure of office from proceedings in any Court. The President cannot be summoned to Court to justify his action. But that is a far cry from saying that the President's acts cannot be examined by a Court of Law. Though the President is immune from proceedings in Court, a party who invokes the acts of the President in his support will have to bear the burden of demonstrating that such acts of the President are warranted by law; the seal of the President will not be sufficient to discharge that burden."

The comprehensive and unambiguous interpretation of the extent of Immunity granted to the President by Article 35 has thereafter never been considered by a bench of nine or more Judges of the Supreme Court and therefore continues to be the only lawful and valid interpretation of the provisions of Article 35. Clearly therefore, all judgments delivered thereafter by Supreme Court Benches of 3, 5, or even 7 Judges purporting to confer blanket immunity on the President based the erroneous/ mythical presumption that "the process of election ensures in the holder of the office based on the erroneous/mythical presumption that "the process of election ensures in the holder of the office correct conduct and full sense of responsibility for discharging properly the functions entrusted to him" have all been made "per incuriam" and are therefore void, ab initio. The limited immunity conferred on the President by Article 35 shall therefore, clearly not apply to anything done or omitted to be done by him in his official capacity, provided only that such proceedings shall be instituted against the party invoking the act of the President in his support and the Attorney General, and not against the President.

*(Courtesy: The Lanka E News/ Colombo Telegrpah)*

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# Impeachment of CJ
# An effort to preserve arbitrary rule

by Laksiri Fernando

It may appear that the Rajapaksa regime is so powerful that even for the initial impeachment motion against the Chief Justice, Dr Shirani Bandaranayake, it has gathered 117 signatures of parliamentarians. What it actually required was 75 or one third of the 225 member Parliament. But what appears on the surface is not actually the case. It is so powerful; but it is so weak. It is powerful in numbers within and outside Parliament, at present, but weak in moral legitimacy and justice both from a national and an international perspective.

**Motives Behind**

The reason behind the impeachment is obvious. It is to retaliate and circumvent the constitutional and legal objections coming from the Supreme Court and the judiciary for its arbitrary rule. The full content of the impeachment motion is yet to be revealed.. But the appointment of the Secretary to the Judicial Services Commission (JSC), Manjula Tilakaratne, and even the 'refusal' to meet the President on 18 September, highlighting the interference with the judiciary, must have been included in the impeachment petition. While the appointment of the JSC Secretary was made a long time back, there is no rule to say that the senior most judge should be necessarily appointed to the position of secretary. The JSC required a competent and an efficient person with nothing against the others who are perhaps equally qualified.

The government spokesman, Keheliya Rambukwella, has used the terms 'overstepping' its role and 'improper conduct' in justifying the impeachment motion against the Chief Justice. It is quite possible that the determination on the Divineguma Bill, both the initial one to direct the bill to all provincial councils and yesterday's one, determining whether the endorsement of the Governor of the Northern Province is sufficient on behalf of the Provincial Council, must have angered the government. It is extraordinary, however, to impeach a Chief Justice, in the midst of a Supreme Court determination on the constitutionality of a bill and its procedure that disfavours a government action, whatever the importance or the merits of such a bill. This is particularly so, as it is the unanimous decision of a three member bench of the Supreme Court which in itself exposes the ulterior motive behind the impeachment motion. No other argument is necessary.

**Implications**

It is clear where the Rajapaksa regime is heading. This would have been clear, but unfortunately not to many, when the 18th Amendment was passed in September 2010. Only now has the Communist Party realised its mistake. The impeachment of the CJ is a dress-rehearsal for many more to come. Revamping of the whole judiciary is on the cards whether it will succeed or not.

The next major assault would be on the 13th Amendment and the provincial council system. The regime is insecure otherwise. The power of the Eastern Provincial Council soon would be on the balance and if the provincial council election is held in the North, the process of the de-legitimation of the regime would be accelerated. One major trait of the present regime, in fact a dangerous one, is its 'pseudo-populist' nature which is a farce. The opposition to the Supreme Court and its determination on the Divineguma Bill was mustered on this basis, within Parliament and outside. This is the most dangerous trend.

Those who are blind to populist rhetoric and who cannot distinguish between what is in letter and what is intended, even the Supreme Court decision on the Divineguma bill might appear 'not correct' even though they may like to 'defend devolution' like a pet dog. They might stumble when the real challenge comes in abolishing the 13th Amendment and the provincial council system. Then, in addition to populism, it would be 'patriotism' against foreign interference or imperialism. Even the 'moderate' left in Parliament cannot be completely relied on, on the issue of the 13th Amendment.

**Dual Challenge**

The challenge to be faced by the Rajapaksa regime in the future with 'law and justice' is not only national but primarily international. Even the internal challenge will not go away and the impeachment might boomerang on the regime. The submission of a motion is not the end of an impeachment. It should go before Parliamentary debate and the legal profession and the civil society has ample time to protest against the move.

The judiciary in Sri Lanka with an independent tradition since the Bracegirdle judgement in 1937 cannot be coerced easily. Minister G.L. Peiris recently told Parliament that many of the sitting judges are his students, perhaps to indicate to the house that he has some authority over them. The statement was completely inappropriate and an insult to the judges. The guru-gola (teacher-student) relations apart, the issues that confront the judiciary are to do with clear legal matters which the government is hell bent to neglect, by-pass and violate. No judiciary or a judge would be in a position to ignore justice in their right mind. They might waver for a while but not for long and after this, there will be more vigilance on the judiciary nationally and internationally.

The major challenge for the government in the future would be from the international justice system. That may be the main reason why the government is so

erratic and almost hysteric about the stance of the national judiciary to safeguard its independence. There is a link between the two and some of the matters bordering on international justice i.e. 'war crimes' might come before the Supreme Court of the country soon and if a prominent legal scholar like Dr Shirani Bandaranayake is at the helm, it would be a virtual disaster for the government. This is another reason why this impeachment is brought against her. It is likely that the UN Human Rights Council (UNHRC) would request the Sri Lanka Supreme Court to investigate the alleged violations reported in the UN Experts Report at the last stages of the war.

Even otherwise, there is no easy escape for the Rajapaksa regime from war crime charges which would haunt the regime, it's perpetrators and those who have been wilfully covering them up so far, until they go to their graves. On the other hand, the international civil society is getting their acts together, step by step, to utilise the available international legal avenues to pursue these cases. Thousands of surviving victims and their loved ones from the atrocities of both sides (the LTTE and the Government) are in perpetual agony. If we are not doing justice to them, Sri Lanka is not a civilised society. It is argued, and perhaps the government believes, that the setting up of an international tribunal on Sri Lanka could be stalled with the backing of China in the Security Council which might or might not be the case when the crunch comes.

There are other avenues available in the Rome Statutes of the International Criminal Court (ICC), where even a sitting Head of State could be brought before the Court, even without the respective country being party to the ICC. No Security Council approval is necessary.

This is what the Rajapaksa regime is scared of: National and International justice through independent judicial institutions.

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*( Courtesy: The Colombo Telegraph/ Sri Lanka Guardian)*

## 40
# Blackmailing the judiciary

by Laksiri Fernando

*"They see governments come like water and go with the wind. They owe no loyalty to ministers, not even the temporary loyalty which civil servants owe…"* – ***Jag Griffith***

The judiciary in Sri Lanka is under threat. There cannot be any doubt about it. The extent and gravity might be the dispute, if any. First it was a Minister threatening the Mannar Magistrate. Now it is the President insinuating threats to the Supreme Court. This should be a concern of all right minded Sri Lankans, including the so-called 'patriots' and those who live abroad, and also the 'international civil society,' if anyone is allergic to the so-called 'international community.'

Sri Lankans should be concerned about the issue because the muzzling of the judiciary is the death knell for the remaining democracy. How many have so far received redress for violations or imminent violations of their fundamental rights from the Supreme Court? The mere existence of an independent judiciary is a deterrent against violations. One of the most significant recent cases is the Z-score fiasco. If not for the independent judiciary, the verdict would have been in favour of the pathetic politicians and bureaucrats manning the ministries of higher education and education who are completely unconcerned about the fate of the innocent children.

Another example is the Divinaguma decision which undoubtedly angered the President and/or his brother about the judiciary's independent resolve. If not for this decision, the government was planning to stream role its legislation quite detrimental to the spirit of devolution and in violation of the 13th Amendment, and that means the Constitution of the country.

Still the intent is the same, although the procedure is followed until it reaches the approval of the 'non-existing' provincial council in the North. It is a controversial matter whether it is constitutional for the Governor alone to approve it, instead of the elected provincial council, and particularly in the context that the election is arbitrarily withheld for political reasons. This is obvious to the whole world. This is one immediate reason why the government requires a 'coerced judiciary' for its arbitrary, if not evolving tyrannical governance.

The international civil society, to mean the international legal profession (including the International Bar Association and the International Commission of Jurists) and democratic and human rights constituencies at large should be concerned about the situation as a matter of principle. If the judiciary in Sri Lanka is muzzled and if

democracy is further turned back in the country then there will be repercussions on other countries and internationally.

Even the regime might 'showcase and sell' the 'model of the muzzled judiciary' to other countries like they did or try to do in the case of the 'victory over terrorism' no matter how many innocent civilians were killed, deliberately or otherwise, in the process without any accountability. The regime's external affairs are so reactionary headed by a corrupt legal 'luminary.' He is the author of the so-called "good measures for the judiciary" to prescribe how the judiciary should behave and deliver decisions with 'patriotism' in a 'patriarchal democracy' in Sri Lanka.

**Threats**

Let me preface the events or the controversy with some quotes from Jag Griffith (The Politics of the Judiciary,1985) more appropriately. In a democracy, 'the judiciary or the judges are not beholden to the government of the day.' This is something many people cannot understand or they are prevented from understanding.

The 'governments come like water and go with the wind.' The judges owe no loyalty to ministers; not even the temporary loyalty which civil servants owe. Judges are lions under the 'democratic republic' and in the eyes of the judges 'the republic is not the President or the Ministers, but the law and their conception of public interest.' 'It is to that law and to that conception alone that they owe allegiance. In that lie their strength and their weakness.'

I will not refer to the Mannar controversy but to the most recent events.

President's Secretary called the Chief Justice (CJ) and summoned her and other two members of the Judicial Services Commission (JSC) for a meeting. The 'summoning' in itself was an insinuated threat. The CJ rightly asked for the request to be sent in writing. The letter was sent on 13 September yet without giving any particular reason. The meeting could have been on anything. The CJ declined the request in writing highlighting the 'implications of that kind of a meeting on the independence of the judiciary.' The President obviously does not have a constitutional mandate to summon the Judicial Services Commission (JSC) or the Chief Justice whatever the reason.

In the principle of separation of powers, there can be and should be coordination between the executive and the legislative branches and/or functions. But there is no need of coordination between the judiciary and the executive or the judiciary and legislature. Any attempt at coordination is against the principle of independence. There is no such a principle of independence between the executive and the legislature. Instead the executive should be responsible to the legislature. It is this principle which has considerably eroded under the presidential system since 1978 and in fact encroaching on the matters of the judiciary throughout years.

There is another fundamental structural reason for the erosion of the independence of the judiciary, and the rule of law that it is supposed to uphold. That is the removal of the post-enactment judicial review from the Constitution since 1972, and the limited time given (only one week) including the urgency provision for an incumbent government to curtail the proper judicial review even in the case of the existing (limited) post-enactment judicial review. A major aberration that has occurred in my view is the draconian 18th Amendment.

First, by declaring it as an 'urgent bill,' no proper opportunity was given to the citizens or the people in the country to submit their constitutional objections; or the Supreme Court to review them properly. This was in addition to the curtailment of a proper public debate on the issue. The passage of the 18th Amendment revealed a clear dictatorial turn of the Rajapaksa regime.

Second, there are certain legal texts, such as the 18th Amendment, the constitutional inconsistencies or implications of which cannot hardly be evident form the text alone. Those could be judged only through the passage of time and the way those enactments are actually implemented in constituency with or contrary to the constitutions and public interest.

The present encroachment or attempted encroachment on the judiciary is exactly a result of the 18thAmendment, in violation of both the letter and spirit of the 'democratic (socialist) republican constitution.'

**Proof of Threats**

On 18 September, the Secretary to the Judicial Services Commission (JSC) was compelled to issue a public statement on the advice of the Chief Justice and the Commission, declaring very clearly the threats to the independence of the judiciary. Some of the important matters are quoted below from that statement translated by the *Sunday Times* (23 September 2012) with emphasis added.

"It is regrettable to note that the JSC has been subjected to threats and intimidation from persons holding different status. Various influences have been made on the JSC regardingdecisions taken by the Commission keeping with the service requirements. Recently the JSC was subjected to various influences after the Commission initiated disciplinary action against a judge."

> *"Moreover an attempt to convince the relevant institutions regarding the protection of the independence of the judiciary and the JSC over the attempt to call for a meeting with the chairperson of the JSC, who is the Hon Chief Justice and two other Supreme Court judges, was not successful. The JSC has documentary evidence on this matter."*

"It is the JSC that is the superior institution which is empowered with the appointment of Magistrates, District judges, their transfers, dismissal from service and disciplinary action against them. It is an independent institution established

under the Constitution. Under the Constitutionany direct or indirect attempt by any person or through any person to influence or attempt to influence any decision taken by the Commission is an offence which could be tried in a High Court."

> *"'It should be emphasized that the JSC is dedicated and it is its responsibility to protect the independence of the judiciary and discharge its service without being intimidated by influences, threats or criticism. I have been instructed by the Commission to issue this media release to keep the majority of the public who value justice informed about an attempt by conspirators to destroy the credibility of the JSC and the Judiciary. – Manjuala Tilakaratne, Secretary, JSC."*

It has to be admitted that the JSC should not issue public statements ordinarily. This is not a statement by the Secretary, but on the instructions of the Commission. As I have highlighted, it talks about the "attempts to destroy the credibility of the JSC and the Judiciary." It talks about 'threats and intimidation,' and 'various influences' from 'persons holding different positions.' These are apparently on the 'decisions taken by the Commission' in pursuant of its constitutional obligations as outlined in the third paragraph above. A recent decision on 'disciplinary action against a certain judge' is specifically mentioned that created the ire of certain politicians.

More generally, while asserting that the Commission is the constitutionally appointed institution to take decisions on the appointments and discipline of all judicial officers, it emphasises that such influences or intimidation constitute an offence. This is given in Article 115 of the Constitution.

Since the Bracegirdle decision of the Supreme Court headed by the Chief Justice Sir Sydney Abrahams in 1937, against an arbitrary deportation order of the then Colonial Governor (largely equivalent to the authoritarian President today!), the judiciary in Sri Lanka has resolved to safeguard the 'independence of the judiciary' whatever the later constitutional restrictions (1978 Constitution) and limitations (18th Amendment). The Supreme Court so far has withstood by and large the intimidation, encroachments and threats, including the stoning of the residences of its judges at one time. It is hoped that the judiciary today would withstand similar threats and intimidation, outlined by a second statement by the Secretary to the JSC on 28 September (Colombo Telegraph, 29 September 2012). He has said,

> *"A situation has arisen where there is a danger to the security of all of us and our families beginning from the person holding the highest position in the judicial system."*

**Further Evidence**

After the failed attempt to summon the JSC by the President, a letter was sent on 25 September to the CJ stating that the intent of the proposed meeting was to discuss the 'salaries, financial benefits and scholarships to the judiciary in view of the forthcoming budget.' This appears 'a second thought,' but confirms the attempts to

influence the judiciary in financial terms or using the 'carrot.' As an authority on the subject, Clifford Wallace, once said:

> *"Budgetary decisions are usually made by the political branches of the government; it is essential that the budget not be used as a means to undermine the independence of the judiciary."*

There is no question that the salaries and facilities to the judges are extremely poor. This is something that a former Chief Justice strongly raised without a proper response from the President, the Treasury or Parliament. I once remember a senior police officer stating that 'when they go for cases in official vehicles with assistants, it was embarrassing to see some magistrates come by bus carrying large folders of documents themselves.' However, there are and there should be correct procedures to rectify these salary and other anomalies without making the judiciary dependent or obliged to the executive on these matters. This is why the salaries of the judges of the Supreme Court and the Court of Appeal are set aside usually through the consolidated fund and not the annual budget.

Much worse was the President's salvo on the JSC, and more particularly on the Secretary, with the Media Heads on 26 September. If the President cares for the independence of the judiciary then his statements and discussions at that meeting were completely unwarranted. He has said "as a lawyer by profession who had practised for nearly two decades, he was an ardent advocate of an independent judiciary" (The Island, 27 September 2012); but has proved completely the contrary. He must have been in the past, but not now. His has claimed that "it was the UNP which had got judges' houses stoned and tried to impeach Chief Justices," which is true, but not an excuse for his present behaviour.

There were personal remarks made by him on the Secretary to the JSC. If the comments came from a person other than the President, then those could have been construed as defamation. Unfortunately, the President has his constitutional immunity; he can defame anyone!

In the Constitution, there are certain protections to the Commission and its Secretary. Otherwise, the duties of those positions cannot be properly performed with dignity. If there are genuine allegations against the Secretary, then those should be referred to the Chief Justice, not by the father of the aggrieved party but by the relevant party herself. There is no business for the President or the Presidential Secretariat to take disciplinary action against the Secretary to the JSC as it has been mentioned.

This is very much similar to the 'corruption charges' against the husband of the incumbent Chief Justice, who was the government appointed former Chairman of the National Savings Bank. The appointment should not have been done or accepted in the first place. After he resigned over a controversial decision, most likely the decision dictated by the government itself, he is now charged on the same matter on corruption. There is no question about investigating the charges through the correct

procedure. But the concerted efforts at 'blackmailing the judiciary' for political purposes are abundantly clear.

It is reported that the efforts at what they call 'taming of the shrew' is coordinated by a secret committee of some ministers and high or low level lawyers. The names and conspiracies of these people will be revealed very soon.

*(Courtesy: The Colombo Telegraph/ Sri Lanka Guardian)*

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# Attack on the JSC secretary
# Fooling the masses on *'International Scrutiny'*

by Laksiri Fernando

There is a new pattern of argument by government spokesmen (no women!) denying the last Sunday (7 October) attack on the Secretary to the Judicial Services Commission (JSC), Manjula Tilakaratne. They in essence ask, 'could the government be so foolish to indulge in such attacks on the Judiciary when Sri Lanka is at the scrutiny of the UN Human Rights Council?"

I am positive that the 'argument' was collected from Mahinda Rajapaksahimself who roamed around the corridors of the then Human Rights Commission (now Council) in Geneva in early 1990s. Unfortunately this is not 1990s!

**Geneva**

Those days several Latin American countries, particularly El Salvador, Guatemala and Chile, were on the spotlight of the UNHRC, but abductions, disappearances and other human rights violations nevertheless continued stealthily. The argument on the part of the government spokespersons (there were women!) were the same: 'are we so foolish to do these things when we are willingly under your scrutiny, they argued.' Even the human rights advocates who came from these countries were perplexed at the beginning; more so were the human rights observers from other countries including government representatives.

But this was only a passing phase. Within few years, the speculation disappeared and before that Mahinda Rajapaksa disappeared from Geneva. Human rights research and investigations on those countries very clearly proved that the governments and their various agencies were the real perpetrators of human rights atrocities except where armed or terrorist organizations (like the LTTE) were in existence.

Under normal circumstances, when a country is under the international scrutiny it works as a deterrent on government violations. This is largely the case in Sri Lanka, after March 2012, when the UNHRC managed to pass a resolution against the government (not necessarily against Sri Lanka). Suddenly the government changed the tune. This sudden or abrupt change was quite suspicious considering the whole 'show-off' and 'browbeating' that they demonstrated in Geneva. They have agreed, as if wholeheartedly, for a 'full body check' from top to bottom.

As they have 'agreed' they now believe that they can claim anything found suspicious in the body (politic) as an 'implantation' or result of 'conspiracy' of other parties. This is fooling of masses on 'international scrutiny.' Without insulting women, I may add that the pretended innocence of the government is like the proverbial 'virginity of the prostitute.'

Among several government spokesmen who put forward this argument before the media; while Keheliya Rambukwella badly mumbled; perhaps Wimal Weerawansa was the most articulate on the argument, as usual. I am quoting from News 1st yesterday. He asked and argued, "What is the benefit that the government can accrue through this action when the UNHRC in Geneva is ready to blame the government even on false accusations? It is like roping its own neck. Do you think the government would do that when there is international scrutiny?"

**Pre-empt Speculation**

The reasoning behind the argument or the behaviour behind 'rogue' governments usually goes like follows.

> *(1) When there are violations, international scrutiny can work as a deterrent. Yes.*
> *(2) When there is international scrutiny, even 'rogue' governments are careful not to indulge in massive violations. Partly Yes.*
> *(3) When there is public or international assumption of deterrence, governments can continue with selective violations (as strategically necessary) and claim international scrutiny as defence. Mostly true.*

Of course, the same or similar reasoning can be employed by other parties to discredit a government, rogue or not. But it is extremely unlikely that any other political actor is in a position to indulge in such an action to discredit presumably the 'all powerful' Rajapaksa government, with a massive military and security apparatus today. For the opposition political parties, there are so many political issues to utilize against the government, if they wish to, rather than trying to discredit it through risky stage-managed assault or abduction.

It is true that irrespective of all these apparatchiks, the government has also allowed cudu (drug) mafias and the underworld to operate. Therefore, there can be a slight possibility that this kind of a thing can be done by a private party. But can there be a motive for such a private revenge-taking on the JSC Secretary? What the public know is what the President revealed to the Media Heads at his meeting with them on 11 October that there is a complaint from a 'father of a female judge' regarding what amounts to sexual harassment. This is categorically denied by Tilakaratne.

Be as it may, the complaint apparently was made in April, but no action was taken until October by the President, properly directing it to the relevant authorities to investigate the matter!

Of course there can be a cynical theory that because of the above, or for some other reason, the JSC Secretary himself hired thugs to assault him to blame the government or any other. Didn't a dubious Minister say that? Of course there can be such a deceitful people in society, especially among politicians, but it is difficult to imagine that such a person can survive in the judiciary for long years whatever his other weaknesses. Tilakaratne was a High Court Judge previously before becoming the Secretary to the JSC.

No one can conclusively say who attacked the JSC Secretary on that Sunday. As Rev. Maduluwawe Sobithahas said, there should be prompt action to arrest the attackers and to conduct an impartial inquiry. There are many doubts that the attempt was to abduct Manjula Tilakaratne and not merely to assault him.

There is every reason to believe that the government is the prime suspect. They have every strategic reason to attack the judiciary at this juncture. There is no need to reiterate the events surrounding the pressure or the attacks on the judiciary from the executive branch in recent times subsequent to the 18th Amendment to the Constitution. If there is any impeachment necessary, it should be against the President but not against theChief Justice. There are clear attempts to install 'dictatorial authority and governance' by doing away completely with the independence of the judiciary. Motives are to safeguard family rule, hoodwink minority rights, suppress dissent and pre-empt strikes like FUTA. There is so much written on the subject.

**Defend the Judiciary**

In a court of law when someone is accused of a crime, the person is 'presumed innocent until proven guilty.' That should be the case when and if anybody is arrested and accused of the said attack and assault.

But in politics, the reasoning is different, and it should be different. Otherwise democracy is in jeopardy. The exposure of attacks on democracy is an absolute necessity of course on factual grounds. The accusation on the government on this assault is a political accusation. It is a valid accusation on the reasons given above. This does not mean that the government or the cabinet came to the Hotel Road, Mount Lavinia, and assaulted Tilakaratne. But political responsibility lies with the government and most likely the assault or the attempted abduction was conducted on clear instructions from above.

The assault is not merely on Manjula Tilakaratne but on the judiciary. The judiciary is not merely one branch of government among the three (legislative, executive and judiciary), but constitute a special position in safeguarding the rule of law, adjudication of justice and fundamental rights of the people. All these are under threat in Sri Lanka at present.

No one would argue that the judiciary (or the legal profession in general) in Sri Lanka is perfect or up to proper democratic expectations. There should be judicial reforms, expeditious delivery of justice, more professionalism, sensitivity to the ordinary people (not only to the rich!) and commitment within itself for judiciary's independence. There must have been politically biased judgements in the past or bending over backwards to the political whims of even the present regime. However, as the judiciary is under attack from political goons at present, whatever the past weaknesses, the judiciary should be unconditionally defended by the people and all sectors of the democratic society. It is also an international duty.

*(Courtesy: The Colombo Telegraph/ Sri Lanka Guardian)*

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# Two questions before the Supreme Court on the Divineguma Bill

by Laksiri Fernando

The matter before the Supreme Court in Sri Lanka as the sole legal authority in interpreting the Constitution, and its democratic procedure, in respect of the Divineguma Bill, in my opinion, is:

> (1) Not only to determine whether, in the absence of an elected Provincial Council in the North, the Governor could fulfil the requirements specified in Article 154 G (3),
> (2) But also in the absence of such a Council, and in the absence of "views expressed" thereon, without any special circumstances like war or natural disaster, whether the Bill that was obligatory to refer to "every Provincial Council" could be placed before Parliament for a decision, under the same provisions in the Constitution.

What is 'supreme' in this instance is the provision in the present Constitution, unless the Constitution is changed through due process. The relevant section of the Article on both matters is as follows with emphasis added:

> *"No Bill in respect of any matter set out in the Provincial Council List shall become law unless such Bill has been referred by the President, after its publication in the Gazette and before it is placed in the Order Paper of Parliament, to every Provincial Council for the expression of its views thereon, within such period as may be specified in the reference…"*

Let me deal with these two matters one after the other, of course within my competence and expertise.

**Council and the Governor**

First, that the Governor cannot act on behalf of the Council in this instance is so obvious. It is completely erroneous to refer the matter to the Governor by the President. The Governor simply is not the Council. The Council is an elected body of the people in that Province. The Governor is not, but appointed by the President on behalf of the Center and not the Province. Allowing the Governor to "express his views" on the matter on behalf of the Council defies the election principle of

democracy in the Constitution and franchise, apart from the very clear procedure specified in the Constitution as quoted above.

The Governor may have certain legislative functions, but not on the questions of abrogating or relinquishing matters related to the Provincial Council List in the Constitution. It is a prerogative of the people in the province through their elected representatives and that is the Provincial Council. The fact that the Governor is not the proper authority to "express views" on the Divineguma Bill is already conceded implicitly by President's Counsel, Faizer Mustapha, appearing on behalf of the Government, but "on behalf of the mediatory petitions," according to the Colombo Page news (22 October 2012). "There was no need for the President to direct it to the Northern Province which has no Provincial Council," he has pointed out.

**Absence of the Council**

Then why did the President refer the Bill to the Governor or the Northern Province? "But the President has directed the Bill to the Northern Province with the intention of safeguarding democracy," the same Counsel has pointed out. Yes, "safeguarding democracy" is important, but through the correct procedure. Otherwise it is not democracy.

The absence of the Provincial Council in the North is not by accident or by special circumstances such as 'war or natural disaster.' The President has failed to direct the Commissioner of Elections, for some reason, to hold elections for the Northern Provincial Council since the end of war in May 2009, now for more than three years.

In the absence of their Provincial Council, the people in the North are denied of "expressing their views" on this important bill of Divineguma either way, for or against. This is not only a denial of fundamental right, that the people of other provinces have already exercised (i.e. discriminatory), but also jeopardize the correct procedure that has to be followed in the case of bills such as Divineguma.

There are arguments that by approving the Divineguma Bill in Parliament by two third majority, this impasse can be solved. This presumes two erroneous conditions. First, the situation of in fact the 'absence of the Council' is equivalent to the 'disapproval of the bill' by the Northern Provincial Council! This is an absurd presumption to make, to say the least.

Second is that the Divineguma Bill could 'necessarily' be passed with two thirds majority in Parliament. This is simply an unknown or incorrect presumption to make. In case, the bill fails to seek two thirds majority, and in case the 'will of the people' in the North is to approve the Divineguma Bill, then the presumption negates democracy, to say the least.

There are no short cuts to democracy. The holding of elections for the Northern Provincial Council, in my opinion, is imperative.

*(Courtesy: The Colombo Telepgraph/ Sri Lanka Guardian)*

## 43
## Give full force and effect to the separation of powers and unity in diversity

by Chathurika Rajapaksha

On the 19th day of May 2009, with the end of the military conflict that had divided the country for over thirty years, Sri Lanka entered a new era.

The next step that Sri Lanka has to face is also extremely sensitive due to nationalistic feelings of the various ethnic groups. A durable peace can be built only if all these groups that go to form the Sri Lankan society feel that they are a part of the same nation.

Building a nation had always been somehow a difficult task in Sri Lanka. Susil Sirivardana in his article titled "Paradigms and Foundations in Nation Building: A Way of Understanding" underlines that Sri Lankan leaderships believe in illusions that historically we were already a nation and hence, nation building as such, was not the central challenge of national politics. The articles mentioned in this paper appear in the book "Nation Building:Priorities for Sustainability and Inclusivity" edited by Gnana Moonesighe.

The post-conflict situation is the opportunity to introspect the mistakes done in the past and to undertake profound reforms. Indeed, today's context offers new perspectives and the people of Sri Lanka who await impatiently to live in a peaceful nation seem to be ready to accept changes.

**What do we want?**

When we consider the nation building process of countries such as France, there were foundations that had contributed towards implanting the idea of a "nation". Among such foundations, we can for instance underline one's respect for the sovereignty of the people and the acknowledgement of unity in diversity arising from religious and ethnic differences.

As regard to the sovereignty of the people, it is imperative that the separation of powers that is Legislative, Executive and Judicial should not be confined to the Constitution only; it must be practiced by the leadership so that the power rests always with the people in a democratic set up.

This separation of powers was theorized by Montesquieu in his book "The Spirits of the Laws". This model of governance structures the powers of a nation among the three branches, each branch having separate and independent powers in order to prevent the concentration of powers within one branch or one person. Therefore, the people can elect their leaders without any fear or duress. As we know, France built its foundations of good governance on those lines.

In Sri Lanka, the 1978 Constitution provides for the separation of powers to which it is necessary to give full force and effect, particularly in the context of a peace building process. This would contribute towards gaining the trust of all Sri Lankan people. It is well-known that until 1977, a Sri Lankan voter had the power to change the government and as a result the country was governed alternatively by the two main parties. It was known that at one time,Sri Lanka was the envy of countries such as Singapore.

As regard to the unity in diversity, Sri Lankans of different religious background have coexisted side by side in harmony for many centuries, enjoying the core values. One could wonder whether article 9 of the 1978 Constitution which gives special protection to Buddhism had interfered with that stability. Since religious harmony is a corner-stone for nation building, in future governance of the country, all religions and free thinkers must be given equal recognition. Much hard feeling can be avoided as mentioned by A.C. Visvalingam in his article titled "Resolution of Majority and Minority Concerns" by minimizing "references to race, religion and other divisive descriptions in all laws and official work as far as practically possible." The aim being that Sri Lankan people are made to feel that they are first Sri Lankan and that their ethnic and religious specificities come thereafter.

The Diaspora Youth also needs to bear in mind that the economic development is also an important factor in nation building process. As mentioned by Marchal Fernando in his article titled "Sri Lankan Economy in Nation Building", it is noteworthy that economic development helps to bring people together as it generates wealth "to satisfy the needs and aspirations of the citizens, irrespective of ethnicity, religion, or any other differentiation in society".

**How to raise awareness on such values?**

Building bridges between Sri Lanka and France could contribute to such economic development. Therefore, the Diaspora Youth could support and encourage young Sri Lankan entrepreneurs in their activities for instance by awarding the best innovative initiatives or helping Sri Lankan entrepreneurs to penetrate the developed countries' markets.

The Diaspora Youth had already started to write in papers about these subjects. We must continue to do so as media is an important change agent in public attitudes.

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*(Courtesy: The Colombo Telegraph/ Sri Lanka Guardian)*

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# I, Me and Myself Syndrome
# The Dilemma of Sri Lankan Governance

by a member, Sri Lankan Spring

The Reversal:
People's sovereignty is supreme is the familiar phrase that is bandied about in the world. In some countries this holds true, but in Sri Lanka this is reversed, so much so that it is felt that there is no turning back. People through the constitution have vested their power with the Judiciary, the Executive and Legislature for right action to bring about justice and well being. In Sri Lanka today this has taken a full turn.

**The Dilemma of Sri Lankan Governance**

Let me be very plain and simple. What has happened to Sri Lanka? The country is a failed state, despite its grandiose façade of Singapore style city development – enjoyed by the elite few. In contrast there are yet villages, even those not so rural and fairly close to cities that have no basic road access nor transport. Let us have some of the organic muck back in the cities, interspersed with the vestiges of good governance that we had. But the threads of governance are slipping away slowly and surely from the fingers of the people, the polity, the citizenry. The concept of people's supremacy, have we forgotten this? Who is serving whom? The people have been designated to serve as lackeys of politicians. The concept of the servant of the people too has gone to sleep in the way bureaucrats on the one hand, lick the hands of the politicians and kick the citizens who have to be served. Are they being paid with tax payer's money? One fails to remember these facts.

Who has brought this upon ourselves? Let us have an open analysis about this sad state of affairs. The root cause being the I, ME AND MYSELF syndrome.

**THE SYNDROME:**

1. **JR's I, me and myself syndrome**: The Executive Presidency brought in to serve his party and consolidate his own power, today has strangled the nation, so much so that it is gasping for breath through this stranglehold. To quote the Asian Legal Resource Centre writings of 1978;

*'Mr. Jayawardena went into the 1977 general elections asking to be made the Prime Minister of this country. The voters overwhelmingly gave him his request. But elect him. President they did not. He did not ask it and he could not ask it. All he did was to declare that he would change the Constitution to provide for a President with executive powers who would be elected by popular vote. He is entitled to claim that the people gave him a mandate to carry through the appropriate constitutional amendments. Upon completion of that task through the appropriate processes, his task in respect of the new-style Presidency was to organize the election of a President by popular vote. If, moreover, it was his ambition to be the first such elected President, then, he would have had to seek election under whatever electoral process the amendments to the Constitution provided. That undoubtedly was also the People's expectation. But that precisely is what Mr. Jayawardena has not done. He has neither provided for his own election by the People nor got himself elected by the People to the Presidency. He has simply imposed himself on the People by amendment of the Constitution. And imposed -himself- as the signs already show for six fateful years.'*

To consolidate power the he passed a new constitution on 31 August 1978 which came into operation on 7 September of the same year. It retained the Executive Presidency with drastic and unchecked powers, and, on its adoption into law, continued him as the first Sri Lankan Executive President. Attack on the judiciary also actively commenced from his term of office with the abortive impeachment of Chief Justice Neville Samarakoon.

2. **R Premadasa's I, Me and Myself syndrome**: 'Ranasinghe Premadasa was unique among Sri Lanka's Sinhala political elites. He was the country's first low-caste, lower class, inner-urban head of state. However, Premadasa was not unique in his (ab)use of Buddhist doctrine to further his own political ambitions and to fuel Buddhist chauvinism. His public profile was also shaped to resemble that of a King and not that of an elected President. At special functions he sat on a specially constructed throne-like seat flanked by large ceremonial shields depicting the Sun and the Moon. In Buddhist royal legend, the Sun and the Moon are supposed to revolve around the King. Perhaps the near absolute power that Premadasa enjoyed in the Executive President position was enough to convince him that this was true for him too! Premadasa's attempts to manufacture a political persona based on Buddhist tradition and rhetoric took Sri Lankan political 'spin doctoring' to new heights. The juxtaposition of his pious performances with his violent practice raises many of the central political issues that continue to dog Sri Lanka's future.'

Extracted from'Who is he, what is he doing?' *Religious Rhetoric and Performances in Sri Lanka during R. Premadasa's Presidency (1989-1993) By Josine van de Horst (Amsterdam: VU University Press, 1995) Vol 2, Sri Lanka Series in the Humanities and Social Sciences.*

3. **Chandrika's I ,me and myself syndrome –** In her own self interest never abolished the Presidency and played the scenes in the macabre drama of the Water's Edge land deal, the privatization of Air Lanka and many other profit making institutions, The battle for her term of office went into full swing and she was actually responsible for

helicoptering the present Chief Justice, who was not a ranker into the Judiciary. Therefore lots of feathers were ruffled and the judiciary and its associated apparatus also split up, when the ranks were violated, however clever the lady – a good academic from undergraduate to doctoral level, Chevening Scholar no less. The Hon. GL Pieris was quite taken aback by this student of his, considered clever enough by him, and recommended by him no less to Her Excellency, Chandrika Bandaranaike.

4. **Mahinda Rajapaksa's I, ME, MYSELF and OURSELVES syndrome**:

Has been the worst period in Sri Lankan history. To quote Tisaranee Gunasekera's article of 11 August 2012 titled *"Megalomania of Rajapaksas is Driving Country Down the Low Road Towards an Abyss"*, sums up the current situation very well.

She goes onto say 'The Rajapaksas won the war. This is their only solid achievement. Their record in every other realm is abysmal. Just last week, the newly built Norochcholai power-plant broke-down, again; and two serious errors in the 2012 AL papers were discovered. Of course, neither of the subject-ministers (both virtuosos in verbosity) resigned. Malaises are so ubiquitous under Rajapaksa Rule, if ministers started resigning whenever colossal errors were discovered in their areas of responsibility, the obese Rajapaksa cabinet will become as thin as a reed.

Gotabaya Rajapaksa lectures to the world about Lankan successes in resettlement. According to the extremely anti-Tiger V Anandasangaree,

> *"The resettled IDPs are virtually starving. They were given dry provisions for six months only and some money. With limited scope for employment, there is hunger and famine prevailing in the Vanni District… (The Island – 23.7.2012).* Under Rajapaksa Rule, everything is a smoke-and-mirrors show, sans substance.

The National Olympic Committee reportedly bought tickets worth Rs. 7 million for London 2012, and sent our entrants without a single coach! The sports sector received a massive allocation of Rs. 1,923million in 2011, not to develop Lankan sports but to hold as many international sports extravaganzas as possible (ideally in Hambantota) for the greater glory of the Rajapaksas. So as disaster follows debacle, the Rajapaksas will have no choice but to cling to their heroic status, as the sole raison d'être for their rule.

In the story of I, ME, MYSELF and OURSELVES the drama goes on with the third actor and de facto President No 3, Basil Rajapaksa's latest attempt to centralize power and control the poorest people's meager savings under a Dept of Divineguma, which can barely provide a plant of good quality. All the plant material provided under the current shape of the Divi Neguma rarely take life and the Divineguma beneficiary list has a lot of ghost recipients.

The list of abject corruption and failed projects of the Rajapaksa Brothers and Sons "Grimm" and their many relatives, henchmen and women, fellow politicians

continue in the shape of billions and billions of 'deals' and commissions, personal and state land grabs, not acting on the LLRC recommendations and the suffocation of the people of the North and East, violence against women and children unchecked, attacks on the judiciary, high cost of living culminating with an I, ME, MYSELF, OURSELVES serving budget and the current attack on the Chief Justice. The icing on the cake is the budget decision on racing cars freed from tax and increases of taxes on many items consumed by the ordinary man.

This corrupt, dangerous and inept regime continues its existence through a fear psychosis driven into people through white van abductions and increasing militarization in the use of the defence forces in every sphere of controlling civilian life on a daily basis (military police now control traffic, army is doing construction as part of cities beautification programs, sports events for civilians are organized by the army, quelling the prison outbreak recently with the use of the STF, using Forces' armed vehicles and bulldozers to flatten buildings at short notice after giving a pittance for compensation or none at all and indiscriminate use of force to quell the uprising of people against the many, many wrongs committed against them by the state).

5. **Bureaucrats, Associations and NGOs, Trade Unions, Political Parties I, me and myself syndrome**:

The syndrome has affected the Opposition as well as political parties including leftist parties such as the LSSP and the Communist Party.

Ranil Wickramasinghe acutely suffers from this syndrome of selfishness in wanting to continue as Leader even if he is the only member of this party left at the end of all the crossovers. Those crossing over are also suffering from this malaise as they take on the shape of the party in power to such an extent that politicians such as Mahinda Samarasinghe are now defending the vile behavior of the Rajapaksa regime in Geneva. Leftist politicians who are hanging in there for their own benefits such as Vasudeva Nanayakkara have become the mouthpieces on propaganda for the government. They have sacrificed their soul and principles for perks received for staying with these bandits.

Of the many NGOs functioning few raise their voices on governance issues for fear of reprisal. This can be justified partly as the government has made NGOs the boogyman in all matters of development and community service. The government loves to brandish this whip as this is an excuse to cover up their own inefficiencies. Few NGOs justify this treatment. This is the NGO syndrome on survival. What cannot be tolerated are upstanding professional bodies such as the Bar Association, not taking up issues efficiently and with alacrity on a united platform, as some members are afraid of loosing their own privileges. The recent appointment of President's Counsels (PCs) is a joke as most of them do not warrant this prestigious accolade, many being stooges of the government. There has been no activism as the

newly proposed PCs should have all refused to accept this title as the standard has dropped so pitifully. Again the syndrome prevails.

A word must be mentioned about the Dean of the bureaucrats, Lalith Weeratunga, who himself remains as Secretary to the President without taking a stand on any transgressions of the government. In fact he seems to aid and abet the President up the garden path and covers up many an evil deed such as the siphoning of the "Helping Hambantota" Fund. If Weeratunga was successful to any extent, atrocious deeds committed especially by the Brothers would have been reduced. If he has not been able to exact change he should resign from his post by way of taking a stand. He too is riddled with the syndrome.

6. **Civil Society's I, me and myself syndrome:** Half or more of the population that constitutes the civil society of Sri Lanka exist in a coma fighting for existence battling with the challenges of daily living and cannot be interested in activism of any sort. Furthermore this segment of the population does not take the time to read or access information. They are also encapsulated in the syndrome which takes the shape of survival. However they do crave religious salvation to get out of this suffering and can be easily hoodwinked with the likes of exhibiting Kapilavastu relics which make them momentarily forget the problems of living. The government played an adept role in showing these relics in the midst of Provincial Council elections.

The rest live in an elitist world of comforts and luxuries such as 4 wheel drives, visits to hotels, clubs and luxury spas, trips abroad and an insatiable acquisition of assets, very often ill gotten by doing service to the very people of the regime in the form of wheeler dealing and earning commissions. These are the people furthest from wanting change as this would upset their comfortable existence and standing in Society. They suffer from the very worst form of this syndrome.

**A Sri Lankan spring for change**?

However much all segments of Sri Lankan people live with the Syndrome, they are likely to act when aspects of bad governance enter into their personal space, interests and aspirations hindering progress. Several groups have risen up against the atrocious behavior of the government in the past two years. These include several groups of workers, the most prominent being the Free Trade Zone workers, university teachers, the GMOA, nurses, CEB, Railway Unions, lawyers, farmers, clergy and most recently prisoners as well as Civil Society organizations. The uprising is gaining momentum. However leadership at an Apex level will be necessary to have an Arab Spring style effective change or a set of event which have a central focus. The impeachment of the Chief Justice has provided such an event. But it is up to all members of civil society to shed themselves of self interest and apathy, not to be bought over by the government which is particularly good at this, to exact change, if not as Martin Niemoller said;

*First they came for the Socialists, and I did not speak out–*

*Because I was not a Socialist*
*Then they came for the Trade Unionists, and I did not speak out–*
*Because I was not a Trade Unionist*
*Then they came for the Jews, and I did not speak out–*
*Because I was not a Jew*
*Then they came for me–and there was no one left to speak for me.*

*(Courtesy: The Colombo Telegraph)*

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## De-Escalate Impeachment Crisis

by Jehan Perera

The process of impeaching Chief Justice Shirani Bandaranayake has commenced in earnest. The Parliamentary Select Committee to investigate and pass judgment on her has been appointed with a 7-4 government majority and consists of very senior government and opposition members. It has been very prompt in serving the charges against her. The Chief Justice was given one week to answer the 14 charges which she appealed against. According to news reports, this appeal filed by her lawyers was denied, and she was asked to appear in person and request for more time. Usually government administrative procedures offer those who are charged and have to answer the charges a period of 6 weeks. But this is not an ordinary case, and so the wheels of justice are moving extraordinarily fast.

Sri Lanka has a government that has shown it can dispose of obstacles to its path without delay. Once the government has decided on a course of action there is little or nothing that it will permit to stand in its way. Whether it was the elimination of the LTTE or the cleaning up of Colombo to be one of the most livable cities in Asia, the government has not permitted opposition to stand in its way. In eliminating the LTTE the government chose to ignore those sections of the international community who urged a negotiated settlement. The plight of slum dwellers has not stopped the government's beautification of Colombo.

The improvements taking place in Sri Lanka compare favourably with other post-war countries such as Nepal or the Philippines. But now an albatross hangs around its neck in the form of international allegations of war crimes that are not going away. In an interdependent and interconnected world, every action has its reaction, and these cannot be confined to national boundaries. The recently published internal report of the UN on the end phase of the country's war will add to the international demands for further investigations into what actually happened in Sri Lanka's war.

On the other hand, this quality of doing what has to be done, or what is deemed to have to be done, has earned the government much praise within the country. It was not that the government leadership was unaware of the possible consequences of

defying the international community in its bid to end the terror of the LTTE. The government has experts in all forms of law, including international law and local and international relations. The government would have consulted them prior to deciding to eliminate the LTTE and its leadership at high human cost and dare the consequences. The fact that the government was able to take this decision has served it well in subsequent elections, particularly going by the electoral verdicts in most parts of the country.

**Mounting Opposition**

The initial indications are that, the international furor over the end of the war notwithstanding, the government will follow the same strategy of dealing quickly and decisively with the Chief Justice as well, and facing up to the consequences later. The state media has been utilized to place selective information before the general public. The state media does not believe in media ethics of providing balanced coverage as a matter of right. Therefore it has been able to create a political environment in which even punitive actions taken by the government against the Chief Justice will be accepted by the majority of people. Where poverty and limited resources prevents people from obtaining a well-rounded picture of reality, there is none that can rival the government's ability to use the state media at its disposal.

In these circumstances the government may be able to politically get away with the impeachment, at least in the short term. Most of the Sri Lankan people would have seen the charges against her, which were widely publicized in the state media. Only few would have seen the Chief Justice's answers to some of the more important charges. As a result they may feel that what the government is doing is justified. However, there are indicators that the majority of those in the legal profession are deeply perturbed by what is happening to the Chief Justice as they know both sides of the issue, and know that the charges against her are weak ones. The Bar Association at the national level as well as at the district level have become activated and have expressed their concerns.

The government also has reason to be concerned that the highest religious leaders of both the Buddhist Sangha and the Christian churches have come out strongly against the impeachment. It is noteworthy that the strongest expressions of disquiet about the government's decision to impeach the Chief Justice have come from religious and civil society. The Chief Justice has come to be seen as embodying the values that democratic society stands for, such as separation of powers, checks and balances, independence of state institutions from political interference and personal rectitude in public affairs. It is also noteworthy that there is no full governmental consensus on the impeachment. The left parties within the government coalition have refused to support the impeachment.

In addition there is a gathering storm of international outrage over the impeachment. Within a few days of government's announcement it would impeach the Chief Justice, the UN Special Rapporteur on the Independence of the Judiciary issued a

strong statement expressing concern and called on the government to respect the independence of the judiciary. This has been accompanied by several statements of concern by international legal and human rights organizations. Ironically, the government declared its intention to impeach the Chief Justice on the very day that Sri Lanka was being discussed at the Universal Periodic Review of the United Nations in Geneva. This gave the move the maximum international publicity.

**Overreaction**

The government's hard line on the issue of the impeachment appears to be an overreaction to what is perceived to be anti government actions by the Supreme Court. Sections within the government wish to create an ill-motivated impression that the Chief Justice is opposed to the government and that this is part of a larger political conspiracy. These misgivings began with the unprecedented stone throwing attack on a court house in the north of the country allegedly by a government politician. This led to an unprecedented strike by the lower judiciary. This has created the impression of a confrontation between the government and judiciary. Unfortunately the government has still not taken action against those involved, and the investigation appears to have ground to a halt.

Adding to the government's fear of being stopped in doing what it believes is the way to move forward, is the fact that one of its proposed laws to concentrate economic development powers in itself was ruled as unconstitutional by the Supreme Court. However, it is not the judiciary that is opposed to the government, but a proposed law (the Divineguma bill) that is opposed to the Constitution. A dispassionate analysis would indicate that the Sri Lankan judiciary has, by and large, been deferential towards the decisions and plans of the government. The present Chief Justice can be described as being in that typical mould.

It must be kept in mind that it was a Supreme Court bench headed by her that permitted the removal of the two-term limit on the Presidency without subjecting it to approval at a referendum as hoped for by most democratic civil society activists. The government has the option of swiftly eliminating this Chief Justice through the impeachment process. It has a 7-4 majority within the Parliamentary Select Committee that is inquiring into the merits of the charges and the necessary 2/3 majority in Parliament to impeach her. The government leaders may feel that they have a mandate from the people to do as they please.

However, it is not good governance or the practice of democracy when the government, popular as it is and with a mandate from the people, dismantles the system of checks and balances. Continuing with the impeachment would be a grave mistake that would harm the country's democratic system. It would also erode the government's credibility with civil society and the international community at a time when the government needs their goodwill. The government needs to give the highest priority to reconsider this ill conceived impeachment. The first step in de-

escalating the crisis would be for the Chief Justice to be granted the additional time she has requested to reply the charges against her.

*(Courtesy: The Island)*

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## A heavy price will have to be paid for losing the judiciary as a separate branch of governance

by Basil Fernando

The late Mr. A.C. Soyza (Bunty), a well-known criminal lawyer and the president of the Bar Association, was retained by a group of young, radical leftists, who had been charged for their political work. During the consultations in prepartion for the trial, Mr. Soyza used to chat with these young radicals. One of these young persons told Mr. Soyza, "You lawyers are doing all this work only for money, no?" Then Mr. Soyza told these young people, "One day, when there are no lawyers, you will understand the value of lawyers." In some cultures, there is no deep understanding of the value of liberty and what it means to lose it. Aleksandr Solzhenitsyn made a similar observation after great catastrophes had been faced in Russia, in the following words:

> *"And how we burned in the camps later, thinking: What would things have been like if every Security operative, when he went out at night to make an arrest, had been uncertain whether he would return alive and had to say good-bye to his family? Or if, during periods of mass arrests, as for example in Leningrad, when they arrested a quarter of the entire city, people had not simply sat there in their lairs, paling with terror at every bang of the downstairs door and at every step on the staircase, but had understood they had nothing left to lose and had boldly set up in the downstairs hall an ambush of half a dozen people with axes, hammers, pokers, or whatever else was at hand?… The Organs would very quickly have suffered a shortage of officers and transport and, notwithstanding all of Stalin's thirst, the cursed machine would have ground to a halt! If…if…We didn't love freedom enough. And even more – we had no awareness of the real situation…. We purely and simply deserved everything that happened afterward."* ***— Aleksandr I. Solzhenitsyn, The Gulag Archipelago***

Many Sri Lankans, with great shock, have now begun to realize that something that they never thought of is going to happen. One of the most valued things in the country, despite the tremendous limitations it had, was the independence of the judiciary. It is finally going to be lost. The judiciary as an independent branch of governance will cease to exist. All kinds of ifs about how this could have been

prevented are of little use now. Sri Lanka, which has witnessed some of the worst kinds of human rights violations, such as mass-scale forced disappearances, extra-judicial killings, rampant torture, illegal arrest and detention and unbelievable levels of corruption, extreme rise in crime and every form of abuse of power, will soon realize that what they have already suffered is nothing compared to what is to come. It is only when the independence of the judiciary is lost that everyone, including those who are causing this loss, will begin to realize under what horrors they will have to live when there is no institution to protect the basic liberties.
Yes, as the late Mr. Bunty Soyza said, it is only when we lose these things that we will begin to realize what we have lost.

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## Need to hit the bottom of the precipice before climbing back

by Kishali Pinto-Jayawardena

It did not take much prescience to foretell that parliamentary privilege would be formally wielded to prohibit public discussion of the PSC process with the commencement of the Parliamentary Select Committee (PSC) to consider the impeachment of the Chief Justice of Sri Lanka this week. The Speaker's warning to party leaders on Friday that matters discussed at the PSC may not be divulged to the media is therefore unsurprising.

**Bar on premature publication of proceedings of PSC**

As observed previously, first we had a group of recently appointed (but unfortunately unnamed) President's Counsel who tried to make out, quite wrongly, that fair and reasonable discussion of the impeachment even before the Select Committee had commenced sittings, amounted to a breach of privilege. Moreover, that the Chief Justice's response to the charges relating to financial impropriety was also prohibited. As remarked in these column spaces, one can understand their natural eagerness to prostrate themselves before the Presidential hand that had magnanimously rewarded them. Yet this was a truly preposterous attempt to gag public discussion.

Now however that the PSC has commenced sittings, a bar applies to publication of proceedings in a committee of the House before they are reported to the House (see point 9. of Part B in the schedule to the privileges law, 1953). This is an offence that may be tried by Parliament itself.

Power to deal with offences in Part B. is conferred upon either the House or the Supreme Court. This is different to offences defined in Part A. which, as discussed last week, are exclusively within the power of the Supreme Court to punish. It is from this prohibition in Part B. that the Speaker's warning to party leaders and the media this week emanated.

**Public duty to discuss general issues of impeachment**

Even so this bar applies strictly only to the premature publication of matters discussed before the PSC. It does not and cannot, even on the most favourable interpretation that the government may endeavour to give to its wording, encompass general criticism of the impeachment, its impact on the independence of the judiciary, the quality of justice meted out to the Chief Justice and relevant actions of the government in that regard.

The core question, as fittingly editorialised in this newspaper last week, remains as to whether this an impeachment or an inquisition of the Chief Justice? The public is entitled to discuss this question. It is this capacity which distinguishes Sri Lanka from a barbarian society, even though many may be of the opinion that we have crossed the line from civilised to barbarian some time ago. Efforts to suppress fair discussion of these matters must therefore be fiercely resisted.

**Power of the mere threat of privilege**

But there is little doubt that, quite apart from what the law actually prohibits, the mere threat of privilege with all the power that this gives to a House in which the ruling party pushing this impeachment of the country's top judicial officer predominates in rude numbers, will inhibit vigorous discussion of the very impeachment process itself.

The potential that parliamentary privilege possesses to chill freedom of expression and information is certainly enormous. It is parallel to the similar 'chilling' effect that the power of contempt of court has in relation to questions touching on judicial behaviour.

In enlightened jurisdictions, the negative impact of both contempt and parliamentary privilege is limited by wise law reform, the sheer weight of liberal public opinion that raps governments as well as judges over the knuckles when authority becomes converted to authoritarianism not to mention powerful lobbies that jealously safeguard basic rights of information and expression. Even in South Asia itself countries such as India, Pakistan and Bangladesh have surged ahead with legal, regulatory and policy reforms. In contrast, we remain in the "Dark Ages' as it were.

**Thrusting of judges into the 'thicket' of political controversy**

That said, esoteric questions of law anyway have little impact when the law itself has fundamentally lost its relevance in Sri Lanka. As this column has repeatedly stated, the responsibility for this crisis of the Rule of Law which was slow and gradual in the making, cannot be laid solely at the door of different administrations. As voters and citizens, we bear a far share of the blame.

But this is not the only point at which questions must be directed back to ourselves. It needs to be asked therefore as to what specific contribution has Sri Lanka's judiciary made towards protecting and securing its own independence. This is not to claim that we should have had judges of the calibre of Ronald Dworkin's satirical idealization of a judicial Hercules possessed of infinite judicial wisdom. Judges are human beings after all and subject to the same frailties that visit all of us. From independence, Sri Lankan judges have failed the people on some occasions. They have also arisen magnificently to the challenge at significant points in history. We have had the best and most conscientious of judges working miracles with an obdurate law or legal provision while respecting the judicial function. We have also had amoral and politicised judges rendering silent the most liberal law or constitutional provision.

Yet the unpleasant thrusting of judges into the 'thicket' of political controversy without respite, (ordinarily far removed as this is from the judicial role), became evident particularly from the early part of the previous decade, notwithstanding retired Chief Justice Sarath Silva's most labored denials of the same to this column two weeks ago. This is the point at which the cherished theoretical notion of the independence of the judiciary itself came under ferocious and unprecedented public scrutiny to the extreme discomfiture of those in the legal and judicial spheres.

This focus continues to the extent that names of judges and their actions are now bandied about, (as irrepressibly well deserved as this may be in certain cases), in chat forums, websites and at public discussions. Surely only the most blinded among us will say that this is a good development for public respect for the institution of Sri Lanka's judiciary? Certainly an honest discussion of the judicial role in Sri Lanka must occupy our minds if this country is to recover even decades down the line in regard to this most profound crisis of confidence in the law since independence.

**Stepping back from this ruinous action**

Now, external political excursions into the functioning of the judicial institution have culminated in the present sorry impeachment of an incumbent Chief Justice.

The government should even at this late stage step back from its ruinous actions for the sake of this country's bemused people if not in order to avoid the ridicule that this exposes the country to, internationally.

That it would not listen to reason is however a near certainty. That Sri Lanka would need to hit the bottom of the precipice before climbing back towards slow recovery is also a near certainty. These are the unpalatable but unavoidable truths that confront us.

*(Courtesy: The Sunday Times)*

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# A deaf and dumb 113 signed a piece of paper
# Hone a crisis to finish off a crisis

by Kumar David

Obama and Lanka's opposition must show no mercy! There are times when one must drive a political crisis to a ruthless finish to terminate a pernicious adversary whose continued survival will be iniquitous.Obama and the joint opposition in Lanka, each in their spheres, surely smell blood these days. Obama must finish off the Republicans for a decade. Events have played into his hands; the point is whether he has that killer instinct the moment demands. The Rajapakse regime has abruptly been caught flat footed and can be bloodied. No I am not saying it can be brought down in months, but its face can be ground in the dust so that it will limp on a cripple for the remainder of its term. Lanka's opposition, does it have the hard-nosed intelligence to drive home the advantage of the moment – oh sigh! Still, neither my dismissal of Obama as short on testosterone, nor disdain for the stunted aptitude of Lanka's opposition, will stop me from having a damned sassy say at speaking my mind more openly than usual today. Let's talk about Obama first; if only his spherical appurtenances were feral enough, he would refuse to blink, right up to, and over the "fiscal cliff". This is also the time to press a reset button on US-Israeli relations, to tell Netanyahu where to get off, and to reconstruct US-Arab and US-Muslim relations in alignment with the Twenty-first Century. All that mush about eternal love for Israel was election talk; now elections are over, its time to get real and hard nosed, time to grow up. Obama set off on the road of rebuilding relations with the Arab and Muslim world but backed off when he got no support at home and was blocked by the powerful US Israel lobby. The US-Israel special relationship dates back to the Cold War and the Arab nationalism of the post-war period. But that's a long gone world. Long run US interests now lie in ditching Israel and dealing with newly semi-democratic Arab nations. Obama must press reset buttons, one by one, step by step.

**Is Obama tough enough?**

Next let's tackle the economy. Obama must not blink right up to, and over, the fiscal cliff. The 'fiscal cliff' is a term to describe the end of Bush Tax Cuts due to expire in a few weeks, after which, across the board tax increases come into effect and everyone, including low income earners, pay more. Simultaneously, fiscal expenditure on defence and other discretionary items, as well as social security and medical aid will come under pressure. The panic story sold by Wall Street and American capitalism is that this will lead to a double edged (private and public) decline in demand which will trigger a second recession. Their chorus is "Let the rich continue to enjoy Bush era tax cuts to prop up demand, invest and rebuild the economy". Recession talk is bollocks! There will be more recessions in the US in the next decade, but that's to do with the fundamentals of capitalism. The so-called fiscal cliff is a scare story to panic Obama into approving tax cuts across the board; for poor as a smoke screen, for the filthy rich, the essence of the plot. Compromiser Obama may fall for it.

If the US goes over the so-called fiscal cliff it will be a good for the Obama Administration. First, tax cuts will reduce consumption, but by nowhere as much as Europe-on-austerity diets. Some belt tightening is essential for US capitalism if it is to ever climb out of the hole it has fallen into. Second, further cycles of recession will be benefit capitalism by clearing out moribund enterprises. There is nothing for the Obama Administration to fear if America falls off the so-called cliff; if Obama plays his cards properly he can come out a winner. The important motive for taking the fiscal plunge is political. Obama can blame Republicans in Congress, who will, in any case, continue to be as obstructionist as before. Obama wants to let the Bush tax cuts on the rich and companies expire, but keep them for 90% of lower income earners – a populist measure, not economic rationality. That's my point; let tax cuts expire for everybody and blame the Republican dominated House of Representatives and the Republican minority in Senate. "Bloody obstructionist sons of bachelors!" must be the battle cry. The target, the 2014 Congressional elections, when the entire House and one-third the Senate come up for grabs. From right now Obama's objective must be to smash the Republicans in 2014 with an appeal to voters to give him a Congress he can work with instead of saboteurs. If he is strategic and cold blooded, he can win control of Congress in 2014 and drive the Republicans into the wilderness for years.

**Tables turn on the lynch-mob**

In Lanka a deaf and dumb 113 signed a piece of paper without knowing what would eventually be written on it. This is further proof, if needed, that the UPFA is stuffed with toadies grovelling at the feet of the Pakses to safeguard sinecures and dip their fingers into slime baskets. It is beyond belief that the mob would sign up to a motion of such monumental importance without extended, itemised discussion, and without conducting their own thorough investigations, prior to formalisation. Only poodles sit or stand when commanded by the master. Now the tables have turned and the lynch-mob is public laughing stock! The statement released by the CJ's lawyers, I guess is 100% true, no way can they risk anything else at this conjuncture. In which case, the egg on the face of the Pakses and the lynch-mob is inches thick. It is also very significant that Rauff Hakeem, DEW and Thondaman are not among the

signatories. Tissa Vitarana who initially signed seems to have been instructed by his party to withdraw. I am not sure ofVasudeva's situation though his signature is not there. Are some pro-government parties going to step back and let the SLFP drown in its own excrement? The CP has issued a statement of dissociation from the impeachment resolution; this is important. Some commentators have suggested that what the Dead Left does, does not matter since it is dead anyway. Well there's more to politics than that; when a decaying structure is crumbling, every brick pulled away, expedites its fall. When rats leave a ship, it proclaims a stinking sinking story. This then is my point about driving home the crisis. I forecast the last quarter of 2012 as the turning point in the fortunes of the Rajapakse regime, the beginning of its end. I am prophet enough to see that, but not prophet enough to foretell the funeral date. Six months, thirty-six months, I don't know; but it's downhill, all the way from now. The opposition however needs to get its act together; it needs the firmest unity, and merciless, relentless determination, to drive home the stake. Can Obama or Lanka's opposition rise to their tasks? I don't know, we have to wait and see -

*(Courtesy: The Colombo Telegraph)*

**49**

# It's not mahinda vs. Shirani
# It's the Rajapaksas vs. The rest

by Tisaranee Gunasekara

*"No questioning arises from subservient lips". **Andrée Chedid (For Rushdie)***

Ideally Chief Justice Shirani Bandaranaike would have prevented her husband from accepting Rajapaksa largesse; ideally.

Ideally, the Supreme Court would have resisted the 18th Amendment; ideally.

Ideally the term-limit provision would be in place and a post-Rajapaksa future just five years away; ideally.

But as Gandalf of 'The Lord of the Rings' trilogy told Frodo Baggins, "All we have to decide is what to do with the time that is given us". And the time that is ours has given us just three options: follow the Rajapaksas out of conviction, fear or cupidity; seek refuge in indifference; or do whatever possible, within the law and within democratic norms, to preserve the last remaining non-Rajapaksised spaces.

And for those who value the few islets of relative autonomy and marginal freedom still extant in our polity and society, supporting the CJ and the judiciary in their contestation with the Ruling Family is an inescapable duty.

Irrespective of their analysis/opinion of the CJ's past actions.

The Rajapaksa tide is an all encompassing one; it will allow no exceptions; it seeks to submerge every aspect of political and civil life. It will dictate not only who will rule us but also how we should live and what we should think.

The Siblings are targeting the judiciary precisely because the courts are beginning to resist this absolutist tide.

In its ruling on the 2013 appropriation bill, the three-judge bench headed by Justice Shiranee Tilakawardane reiterated that finances are the sole responsibility of the legislature and stated that "…no single member of the executive should be permitted to traipse within the boundaries of that power" (*The Sunday Times – 11.11.2012*). Rulings such as these are of seminal importance because they remind us of those lines of power-demarcation without which a democracy will die.

It is that spirit of judicial independence the Rajapaksas want to pulverise.

The Siblings overwhelmed the CJ's husband with largesse, partly to discredit her, partly to ensure her 'good behaviour'. Indubitably, the impeachment would have come sooner, had the CJ resisted the Rajapaksa power-grab earlier. That is why our opinion of Ms. Bandaranaike's past conduct should not prevent us from defending her in the impeachment battle, so long as she continues to resist the absolutist tide. In that battle she symbolises judicial independence; she stands for a judiciary which is willing to uphold the constitution even at the risk of incurring the wrath of the political leaders. That battle has a relevance beyond Rajapaksa Rule. Lankan judiciary must retain the capacity to resist anti-democratic, anti-constitutional moves by the executive, irrespective of the identity of the executive.

The impeachment is thus not a contestation between Shirani Bandaranaike and Mahinda Rajapaksa. The impeachment is not even a contestation between the executive and the judiciary in the classic sense, in the way such contestations happen in democratic contexts. It is a contestation between an ailing democracy and a voracious despotism. It is the final Rajapaksa offensive against the judiciary, in the Siblings' overall battle to sealSri Lanka's fate as a patrimonial oligarchy.

If the Rajapaksas win the impeachment battle politically and propagandistically, if Lankan polity and society fail to inflict a de-legitimising wound on Rajapaksa Rule, the Siblings will have a judiciary that is totally under their thumbs. This will enable them to do administer the last rites to democratic freedoms and basic rights perfectly legally, with the blessings of the courts. Equally pertinently, it will enable them to win the succession battle, if the demise of President Rajapaksa happens before another Rajapaksa is ensconced in the prime minister's seat.

**The Succession Issue**

The Siblings are accelerating their power-grab – via the impeachment – partly because they want to ensure that a Rajapaksas succeeds a Rajapaksa.

The Rajapaksas are making serfs of all Lankans, starting with SLFPers. Since their project includes not just familial rule but also dynastic succession, the demise of Mahinda Rajapaksa will not save the SLFP (and the country) from bondage. It will be a case of 'President Rajapaksa is dead! Long live President Rajapaksa!'

Is that the future we want for ourselves? Would any non-Rajapaksa SLFPer, however true-blue, be happy with such a future?

Usually, aspiring despots with dynastic dreams come to power in youth/early middle age. Thus they have the time to acclimatise their societies to the notion of dynastic succession. By the time the Presidential-father dies, the country has been conditioned into seeing in the son-in-waiting the only possible successor. Such travesties are possible not just in antediluvian lands like North Korea but even in sophisticated societies like Syria.

Mahinda Rajapaksa became president rather later in life. This makes a gradualist approach to the succession issue unaffordable, politically. His sons are too young and his brothers are not 'party-seniors', the way a Maithripala Sirisena or Nimal Siripala Silva is. If a presidential demise happens before the succession issue is resolved, the Party might rebel against the Family.

Since death is the great unknown, the Siblings must subjugate every pivotal institution in society so that they play their allotted role in ensuring that President Rajapaksa is succeeded not by another SLFPer but by another Rajapaksa.

The militarization of Sri Lankaby a Rajapakasised military is an important component in this plan. The subjugation of the Supreme Court is another. A non-subjugated chief justice can seriously upset Rajapaksa dynastic plans, by ruling against the Family in a post-Mahinda power contestation between the Party and the Family. A completely invertebrate CJ is thus a necessary condition for dynastic succession.

The importance of the impeachment battle cannot be overdrawn for either side. If the Rajapaksas win it politico-psychologically, they will be able to use the courts to destroy every pocket of resistance. But if the Rajapaksas emerge from the impeachment battle with their legitimacy scathed, the judiciary will gain a much needed dose of vigour to lead the democratic resistance against the gathering darkness of impunity, arbitrariness and unfreedom.

No judicial system is perfect. There are judges who act unjustly in any judicial system. But if the impeachment battle is lost, the end result will be more than a few or even many unjust judges; it will be an unjust system, a system which is structurally incapable of dispensing justice, even occasionally; a system which is nothing more than an instrument of Rajapaksa patronage and Rajapaksa vengeance, not some of the time but all the time.

Only the Rajapaksa kin and their current kith would be safe in such a land. Even Rajapaksa friends/allies/supporters will become insecure, if they slip down the totem pole of Rajapaksa-favour, as symbolised by the fate of Presidential Advisor Bharatha Lakshman Premachandra.

For the Rajapaksas and for the rest of us, the impeachment is the Rubicon. Once this is crossed, there will be no turning back, and barring a miracle, Lankans will have to become resigned to a seemingly endless Rajapaksa future. Realistically the options before us will be reduced to servitude, death/imprisonment or exile.

Vellupillai Pirapaharan did not give Tamils any other choice. The Rajapaksas will treat all Lankans, including every Sinhala-Buddhist, in the same way.

*(Courtesy: The Colombo Telegraph/ Sri Lanka Guardian)*

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## Once judiciary is broken the Rajapaksas will use the courts to destroy every remaining right or freedom

by Tisaranee Gunasekara

*"Whatever I have to do to have my way, I will have my way".* ***Hitler (quoted in 'The Germans: 1933-45: They Thought They Were Free – Milton Mayer)***

There is an unbroken thread linking the Rajapaksas' 'humanitarian operation' with the Rajapaksas' impeachment assault, the asphyxiation of the 17th Amendment with the planned throttling of the 13th Amendment, the advent of the 18th Amendment with the impending arrival of the 19th Amendment.

That thread is made of impunity – the Rajapaksa belief that they have the right to do whatever they need or want to do and the Rajapaksa conviction that with the proper combination of lies and threats, they can get away with anything.

Like Vellupillai Pirapaharan the Rajapaksas believe in not just absolute power, but also cost-free power, power without controls or limits and power without a price.

The Rajapaksa administration became addicted to impunity in the Northern war. Now the regime is applying some of the very same practices in the South. The manner in which the Welikada prison riot was suppressed is an ideal case in point.

According to reports, most of the inmates who died were not killed during the riot, but murdered in cold blood after the riot had been suppressed: *"'The army took control of the prison around 2-3 am on Saturday. After the riot was quelled, prisoners had reportedly gone to their cells. Later the STF came with a list of names and some inmates were asked to come out of their cells', said an official. Well placed sources alleged that 11 bodies which were taken to the Colombo National Hospital were of the victims who had been summarily executed" (Lakbima News – 18.11.2012).*

If true, this incident is indicative of the regime's absolute contempt for the rule of law, its limitless capacity to take the law into its hands and its obvious willingness to break the law with total impunity (it is illegal to murder, non-judicially, even convicted murderers). It is also a warning that what happened in the North can happen in the South.

The Rajapaksas have become habituated into having their way, using whatever means necessary, and they think they can get away with it. The South and the Sinhalese – including peaceful, law-abiding ones, will be at the receiving end of this attitude and the policies which result form it for decades to come.

**Vanquished Tigers**

A belief in their own absolute and eternal impunity is a quality the victorious Rajapaksas share with the vanquished Tigers.

Vellupillai Pirapaharan believed that sympathy for Tamils and outrage at Sinhala supremacism would suffice to ensure Western neutrality and Indian inaction, as he breached every boundary and broke every rule. Matters did proceed the way he calculated, for a very long while. But in the end, the Tigers' accumulated outrages became too much for the world to swallow.

A world weary of the LTTE's intransigence looked the other way as the Fourth Eelam War escalated.

As the recent UN Internal Report on the UN's actions and inactions in Sri Lanka observes, "UNHQ (United Nations Head Quarters) engagement with Member States regarding Sri Lanka was ineffective and heavily influenced by what UNHQ perceived Member States wanted to hear, rather than by what States needed to know if they were to respond.

Reflection on Sri Lanka by UNHQ and States at the UN was conducted on the basis of a mosaic of considerations among which the grave situation of civilians in Sri Lanka competed with extraneous factors such as inconclusive discussions on the concept of the 'responsibility to protect' and Security Council ambivalence on its role in such situations. In the absence of clear Security Council support, the UN's actions lacked adequate purpose and direction…." (from the Executive Summary – dbsjeyraj.com).

This near-total global indifference to the obvious plight of the Tamil people cannot be understood without considering the pre-history of the Fourth Eelam War in general and the manner in which the Tigers conducted themselves during the Third Peace Process in particular. By the time the Tigers' precipitated the Fourth Eelam War, the world – including that part of the world which sympathised with the Tamil people and supported Tamil rights – had become weary of the LTTE. The Tigers had broken too many rules, norms and promises.

The manner in which the LTTE provoked the Fourth Eelam War (just as it did the Second and the Third Eelam Wars), over a trivial issue, would have been the final straw to an international community appalled by the Tigers' anti-civilisational conduct such as murdering unarmed political opponents and conscripting children. By the time the Fourth Eelam War reached its crucial final stage, the world (including those countries which had supported the LTTE earlier, out of sympathy for and solidarity with the Tamil people), had come to see the Tigers as a part of the problem and an impediment to any solution.

And the Rajapaksas were prodigious in promising devolution. Many undertakings were given to India and the West, about the regime's determination to implement a political solution to the ethnic problem, as soon as the war ended and the obstructionist Tiger was removed from the political scene.

The LTTE's abhorrent record, the Rajapaksas' seeming moderation and the permissive climate created by the 'War on Terror" would have been key factors which made the UN Secretary General and the Security Council look the other way, as the Fourth Eelam War reached its bloody conclusion.

The Tigers had dug their grave. Unfortunately the grave was for the Tamil people as well.

**War Crimes**

Had the Rajapaksas followed a more tolerant and democratic policy after defeating the Tigers, the world would not be talking of 'war crimes' and the UN would have allowed the 'humanitarian operation' to become submerged in the mire of things forgotten. But for the Rajapaksas pursuing a Lankan peace is impossible, because a Lankan peace does not fit in with their agenda of Familial Rule and dynastic succession.

The Rajapaksas want to concentrate all power in their hands. Sharing power with anyone – minorities or fellow SLFPers – is thus contradictory to the Rajapaksa purpose. And in the absence of a consensual peace based on genuine reconciliation and a political solution, the only way to keep the North quiescent is through force, fear and demographic re-engineering.

That is why almost the entire population of the Tiger controlled-North was incarcerated in open prison camps, post-war. That is why three years after decimating the Tigers, North and parts of the East remain occupied territories. That is why the plans to dot the North not just with military camps but also with military cantonments, plus supportive-services, from army shops to Buddhist temples.

The Rajapaksa plan is clear: not only will there not be a new and a better political solution; even the 13th Amendment will be abolished. It is now virtually certain that

a 19th Amendment, which will further empower the Rajapaksas via the Janasabha system, will be implemented.

At the end of his Budget Speech President Mahinda Rajapaksa said, "A change in the prevailing Provincial Council system is necessary to make devolution more meaningful to our people. Devolution should not be a political reform that will lead us to separation…." Brother Gotabhaya has already declared his visceral opposition to the 13th Amendment. According to Brother Basil, "The Janasabha system is the unit of devolution. It is similar to old Gamsabha system. The political empowerment of people at grass roots level through Janasaba's on similar line with Panchayat System in India is an ideal solution. It will be successful when the new electoral system is implemented soon….. It is a new village concept…. Now, we have amended the Constitution for the 18th time. We will now do so for the 19th time" (Daily Mirror – 7.11.2012).

With the three Siblings ranged against it, the 13th Amendment's chances of survival are worse than that of a snowball in hell.

One of the main reasons for the impeachment of the CJ is the Rajapaksa ire at her decisions on the Divineguma Bill and the consequent Rajapaksa fear that she will stand in the way of the 19th Amendment.

The Rajapaksas may try to assure the rest of the judiciary that the impeachment targets Ms. Bandaranaike and only Ms. Bandaranaike. But those assurances are of as little real value as their uncountable undertakings to protect human rights or promote devolution. The Rajapaksas will not tolerate any limit on their power, be it via devolution or judicial independence.

If the impeachment succeeds without wounding the Rajapaksas, that will become the judicial norm in Sri Lanka. Once the judiciary is turned invertebrate, it too will begin to act like the current AG's Department (which was taken over by the President in 2010), all the time. And instead of a magistrate issuing an arrest order against Duminda Silva, a magistrate will declare him innocent, on the orders of the Family. The Siblings and their kith and kin will decide who are guilty and who are innocent. The courts will be reduced to pronouncing Rajapaksa judgements and Rajapaksa sentences.

Once the judiciary is broken, the Rajapaksas will use the courts to destroy every remaining right and freedom, from habeas corpus to limited devolution, from independent websites to autonomous civil society organisations, from free ground water to a pension scheme which does not rob the pensioners to enrich the rulers.
In the end, justice will become a comedy. In its place, power abuse by the powerful and mob-rule by the powerless will prevail.

*(Courtesy: The Colombo Telegraph/ Sri Lanka Guardian)*

## 51
# A Deeply Flawed Impeachment Process

by Friday Forum

The Friday Forum, in a statement issued several weeks ago, referred to the gradual erosion of judicial independence in Sri Lanka, through acts of commission and omission on the part of successive governments. The recent initiative by members of Parliament seeking to impeach the Chief Justice, Dr Shirani Bandaranayaka, coincided with the conclusion of the second case filed in the Supreme Court challenging the Divineguma Bill. The timing of the impeachment creates an impression that the government is subverting the right and duty of the Supreme Court under our Constitution, to review and determine the validity of proposed legislation, without interference from the legislative and executive branches of government. The impeachment motion can therefore be perceived as an attack on an institution that is expected to function independently in the public interest.

The impeachment of a Chief Justice or judge of the Supreme Court is a serious matter, when these persons are guaranteed security of tenure in order to ensure impartial administration of justice. In an unprecedented initiative, an impeachment motion has been presented in Parliament against the presiding judge of Courts consisting of three Supreme Court judges that determined each of the Divineguma Bill cases. The motion of impeachment was presented in Parliament even before the second court order was sent to the speaker. The selective manner in which the government has initiated these impeachment proceedings against the Chief Justice, gives rise to grave concern about Parliament's exercise of its powers of impeachment. The Friday Forum in its earlier statement referred to the deplorable manner in which the executive has given political appointments to family members of the Supreme Court, creating serious problems of conflict of interests. Ironically one of the charges in the impeachment motion against the Chief Justice refers to the alleged conflict of interest created by a political appointment given to Justice Bandaranayaka's husband, immediately prior to her appointment as Chief Justice.

The Supreme Court of this country has in recent years pronounced judgments that have been criticized for their failure to protect the sovereignty and rights of the People. The determination in the 18th Amendment case, which contributed to the removal of the limits on the term of office of the Executive President, and the elimination of the 17th Amendment procedures for appointing the Police, Public Service and other independent commissions, was one such decision. Earlier decisions of the Courts have provided the basis for the obnoxious practice of members of parliament elected from one political party, crossing over to the government and retaining their seats in parliament. In the past, they were unseated when they crossed over, since they no longer represented the voters that elected them. This jurisprudence has contributed to the government acquiring a 2/3 majority, which the voters of this country did not give the ruling party.

The norms of democratic governance under our Constitution demand that the government accepts judicial decisions that they disapprove of without rancour. Judicial decisions remain the law of the land until they are overruled or revised by another court, or changed by legislation enacted lawfully by Parliament. This cardinal principle of good governance is violated when a government approves of judicial decisions that conform with its agenda, and responds with an impeachment motion against the presiding judge, in particular cases decided by the Supreme Court. In acting in this manner the government interferes with the exercise of judicial authority by an individual judge, as well as by a lawfully constituted Court of Justice.

During the attempted impeachment of Chief Justice Neville Samarakoon it was argued vigorously and cogently that the investigation and determination by a Select Committee of Parliament of the allegations against him was unconstitutional. Our Constitution, it was pointed out, provides in Article 4(c) that;

> *"The judicial power of the people shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law."*

The only exception to Parliament exercising judicial power is as regards its own privileges, immunities and powers. Investigation and proof of misbehaviour or incapacity of a judge it is argued does not come within this exception. Therefore, when Article 107 states that Parliament shall by law or by Standing Order provide for all matters relating to an address of parliament on the removal of a judge, including investigation and proof, it could not have envisaged enabling trial by a Select Committee of Parliament.

Quite apart from the above legal argument, it is crystal clear that the process is deeply flawed in principle. The current Select Committee procedure does not provide for the investigation and determination of the allegations by an independent judicial body. It permits Parliament to be a judge in its own cause at every stage of the impeachment proceedings. It has been the subject of repeated criticism ever since the 1984 proceedings against Chief Justice Samarakoon.

The need for change was recognized in the draft Constitution of 2000 which provided for a hearing, in the case of allegations against a Chief Justice, by three persons who hold or have held office as judges of the highest Court of a Commonwealth country. In the case of other superior court judges, it provided for the hearing to be by three persons who hold or have held office as judges of the Supreme Court or Court of Appeal. That draft Constitution was proposed by a government of the same party as the present President, who was then one of its Cabinet Ministers. Although it was not proceeded with, the above provision in the draft Constitution on impeachment was never a matter of controversy. It is incumbent on the government to abandon its present course and to stand by its welcome commitment embodied in the draft constitution of 2000.

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# Will the predictions about the judiciary come true?

by Basil Fernando

In an article entitled 'Once judiciary is broken the Rajapaksas will use the court to destroy every remaining right or freedom', Tisaranee Gunasekaramakes the following prediction:

If the impeachment succeeds without wounding the Rajapaksas, that will become the judicial norm in Sri Lanka. Once the judiciary is turned invertebrate, it too will begin to act like the current Attorney General's Department (which was taken over by the President in 2010), all the time. And instead of a magistrate issuing an arrest order against Duminda Silva, a magistrate will declare him innocent, on the orders of the Family. The Siblings and their kith and kin will decide who are guilty and who are innocent. The courts will be reduced to pronouncing Rajapaksa judgements and Rajapaksa sentences.

I think any thinking person should give serious consideration to this prediction. The time that is still left to prevent the prediction from coming true is indicated by the 'if' with which the prediction begins. The basic issue is as to whether soon it will be the executive who will decide the distinction between what is legal and what is illegal. That is whatever the executive (which has come to mean the three Rajapaksa brothers) wishes to do will be treated as legal. We are dealing with the Otto Adolf Eichmann view of the law. In his defence when he was tried by a court in Israel, Eichmann took up the position that in Germany whatever the Führer ordered was the law. Hannah Arendt, who watched and reported on this trial, termed this as the 'banality of evil'.

That is why that 'if' is of such paramount importance. There is still a very short time for testing the prediction. Those few weeks are in the hands of Sri Lanka's higher courts. They could either begin to cause the beginning of the reversal of submission

to the dictates which more or less started with the four fifth majority of the UNP and continued with the borrowed two thirds majority of the present regime.

The legality of much of the 1978 Constitution could have been challenged by the Supreme Court at that time. However, this document called the Constitution of Sri Lanka which, in fact, in the history of constitutions is one that could without any hesitation be termed a joke, was allowed to be the paramount law of Sri Lanka only because the judiciary refused to exercise its role as the final arbiter of what is legal and illegal within the territory of Sri Lanka. In my book, Sri Lanka Impunity, Criminal Justice and Human Rights (2010) I devoted a whole chapter to illustrate that the distinction between legality and illegality has been lost in Sri Lanka.
After 31 years of the 1978 Constitution, it is not even possible to recognize what is law and what is not. When the executive president placed himself above the law, there began a process in which law gradually diminished to the point of no significance. This is unsurprising. The constitution itself destroyed constitutional law, by negating all checks and balances over the executive. When the paramount law declares itself irrelevant, its irrelevance penetrates all other laws. Thereafter, public institutions also lose their power and value……..When there is a loss of meaning in legality, terms such as 'judge', 'lawyer', 'state counsel' and 'police officer' are superficially used as if they mean what they did in the past; however, their inner meanings are substantially changed. Those who bear such titles no longer have similar authority, power and responsibility as their counterparts had before, when law still had meaning as an organizing principle.

It was that failure which led to the creation of continuous ambiguity about what is legal and illegal in Sri Lanka in recent decades. Even things like abductions and enforced disappearances are not clearly defined as illegal in Sri Lanka. If such acts were defined as illegal and the law was enforced, how many would now be in jail for committing that crime? This is just one example. How many other things which would have been considered illegal in a country that has the rule of law came to be considered as legal? The list would be a very long one.

**The proverbial last minute**

Still, all the space was not lost. At least an appearance of courts exercising some authority has still remained. The recent judgements on the Diviniguma Bill and the Criminal Justice Provisions Bill are just some examples which showed that still there is room for the judiciary to act as the arbiter of what is legal and illegal.

It is that which has been challenged now by way of the impeachment. The procedure under which the impeachment proceedings are to be held under the Standing Orders as they stand now is clearly unconstitutional. If through this unconstitutional process the Chief Justice is removed with that the power of the courts will be finally removed.

The test is as to whether the courts will exercise their authority against an illegal process for the removal of the Chief Justice and thereby retain in their hands the final power of deciding what is legal and illegal within the territory of Sri Lanka. The Indian Supreme Court has clearly kept their authority and, in the last few years, the Supreme Court of Pakistan also has reasserted its power to be the final arbiter of declaring what is legal and illegal within their national territories.

A court that does not exert the power it has will have no one to blame but itself. But there is still time before that 'if' may come true. So we are in that proverbial last minute.

## 53
## Yearning for my Old, Fear-Free, Democratic Sri Lanka

by S. Ratnajeevan H. Hoole

Justice Shirani Bandaranayake, our Chief Justice, is being threatened with impeachment. I got to know her personally when I was organizing an Ethics Seminar for SLAAS in 2003. I was looking for someone who could speak with authority on Human Rights in Education. Several people encouraged her name and told me that I would be lucky if she agreed. To my pleasant surprise, she readily agreed and called me to her chambers at the Supreme Court. My daughter who was highly motivated just hearing about a woman Supreme Court Justice, tagged along. She spoke to my daughter personally, encouraging her in her studies and my daughter went on to specialize in Gender and Society at Ivy League Universities. In my book Enforcing Human Rights: Towards an Egalitarian Sri Lanka, published by the International Centre for Ethnic Studies (2003), Justice Bandaranayake's chapter received a prominent place.

What then is this foul business about impeaching one of our brightest minds – a Chevening Scholar, Fulbright-Hays Fellow, British Council Assert Awardee, Zonta Woman of Achievement and a lot more? When she was inducted on to the highest bench by President Chandrika Bandaranaike Kumaratunga from University of Colombo, it was said that Prof. G.L. Peiris who had once been Professor of Law there, was her strongest advocate. Today, this same Prof. Peiris has turned against her. We have a constitution, he assures us, that allows impeachment by a simple majority in Parliament and that it is all legal. Prof. Peiris who, my friend Carlo Fonseka once told me has the best resume in Sri Lanka among us academics, is letting himself and his reputation down badly by making public speeches on various subjects ranging from UNHCR matters (last year and again now) to the 13th amendment to foreign ministry matters that are contradicted by his government

colleagues. Thus, few take him seriously any more. It is as though he will say anything as commanded to play the government's good-cop/bad-cop intrigues.

Minister Peiris' justifying the proposed impeachment as constitutional is unbecoming when the least intelligent of us can sense that this sudden finding fault with the CJ is vindictiveness and that a simple majority in Parliament (always available to a sitting government) removing the CJ only points to a terrible constitution rather than legal propriety. Indeed, the fact that the two parties of the government with some remnants of principled behaviour, CP (Moscow) and the LSSP, have asked their members not to sign the petition for impeachment, should be enough indication to us all that the government is wrong about the accusations against the CJ and is trying to instill fear and thereby exercise control over us.

I grew up in Sri Lanka, proud of my country. Many of my vintage would remember the things we were proud of – the University of Ceylon with its world class postgraduate level training for undergraduates, educated gentlemen MPs like Pieter Keuneman and SJV Chelvanayagam, judges who could not be manipulated, brave newspaper editors like Reggie Michael and Mervyn de Silva (even if we do not agree with all they wrote), civil servants like Permanent Secretary Murugeysen Rajendra who – when asked by his Minister of Finance what he thought he was doing in taxing the minister's daughter-in-law's sports car import – could reply "Upholding the law," radio broadcasters like Tim Horshington, etc. I can go on. We produced giants. We were proud of our democracy and institutions.

Today, I do not think I have to list the present state of affairs for the reader. In my own world, academic standards have collapsed. Everything good seems gone. Once-liberal newspaper editors, now scared, cut sections of my articles that are too critical of the government. An editor whom I used to write for has been killed and two have gone into exile because of threats. Once loquacious friends are fearful of writing anything critical of the government in emails after a Dialog employee among us said that intelligence officials tap into email there. With that, friends do not even like to talk politics on the phone. A trustworthy source personally saw displaced Tamils in Kokilai in the Vanni with title deeds to their lands unable to claim their lands which had been sold by very high government personages to a foreign company; even as once vocal NGOs were too scared to even listen to their stories. Elections are rigged and a TNA campaigner murdered while the identified EPDP murderer was let out on bail to travel to England where he lives in luxury.

In all these, the judicial branch despite its many failures, is the only bulwark against encroachments by the executive. Despite all of Sri Lanka's troubles, it is people like Justice Bandaranayake who still make Sri Lanka feel like home to us and safeguard our rights. These moves against the judiciary, we see culminating in the latest salvo against her because of her recent judgement.

The attack on the judiciary has been a slow, creeping insidious process. In Jaffna I have seen a magistrate asking MPs to help her be a high court judge and sitting with

Douglas Devananda on the stage at his political meetings. With these controversies Jaffna now has a rival bar association run by Devananda's legal advisor, and few lawyers will come forward to represent a client in a political case. Communal feelings let loose by this government have taken their toll as when the Bar Association resolved against the Ban Ki Moon Panel, condemning its report as cooked up despite plenty of evidence as to its veracity, thereby making lawyers an extension of the government's communalism. The climate of fear and patronage led to Tamil Vice Chancellors and Hindu leaders also signing statements against the report.

We can be sure that if these moves against the CJ prevail, no judgement on political matters will ever again be against the government. Our fears will become more acute and oppressive, making us obedient. The CP and the LSSP must speak up against the impeachment – mere abstention is cowardly. All right thinking people must stand up. *(Courtsey: The Lakbima News/ The Sunday Leader/ Sri Lanka Guardian)*

**54**

## From a farce to witch hunt

by Asian Human Rights Commission

The impeachment of the Chief Justice which was staged as a farce has now turned into a blatant witch hunt where the government is shamelessly mobilising taxi drivers and other mobs to call for the resignation of the Chief Justice.

For this shadow state the independence of the judiciary is an obstacle. The shadow state requires the kind of 'judiciary' which will merely carry out its orders.

Today was declared by the lawyers a day of protest against the impeachment process which is ignoring the request by the Supreme Court to delay the proceedings until it inquiries into a constitutional question referred to it by the Court of Appeal requesting legal opinion. Meanwhile, local and international pressure has also widened and the government has been told in very clear terms that any impeachment must be preceded by a genuine inquiry by a competent and impartial tribunal. The government is also being told that aninquiry by a Parliamentary Select Committee would not meet this requirement. However, the government is blatantly ignoring the criticism against the manner in which it is proceeding and has begun to resort to street tactics in dealing with this all-important constitutional question.

Today, while lawyers, religious dignitaries and others gathered to show their solidarity with the Chief Justice and protest against the blatant violations of the constitution by the government, the government has responded by bussing in people to shout slogans against the Chief Justice. According to reports about 500 Special Task Force (STF) personnel were sent to the premises of the Superior Court Complex. The STF is a paramilitary unit working under the direction of the Ministry of Defence. The task of peace keeping belongs to the civilian police and not the paramilitary groups such as the STF.

Yesterday (December 3) the judges of the lower courts, that is the Magistrate's Courts to the High Courts, gathered at the official residence of the Chief Justice and held a two-hour consultation with her and declared their support. It is clear from the statement of the judges that they perceive the impeachment as an attack on the independence of the judiciary. In the joint statement of the judges they stated that the impeachment proceedings are being conducted in violation of the respect owed to the Chief Justice and the judiciary. They also pointed out the unbecoming behaviour of the media. They stated that such behaviour of the media amounts to contempt for the court. By such contemptuous expression, not only is the Chief Justice being brought into disrepute but it also affects the respect for the courts and thereby contributes to the collapse of the rule of law. They also stated that the inquiry against the Chief Justice should be done impartially and with transparency. They went on to state that the inquiry by a body that includes seven persons from the government violates natural law and blatantly violates all legal considerations and that nowhere in the world would decisions on such matters be made in this manner.

Thus, what is now taking place is a clear confrontation between the judiciary as a whole and the government. On the one hand the Supreme Court has granted leave to proceed in several cases and fixed inquiry into the cases referred to it by the Court of Appeal. On the other hand all the lawyers of the lower courts have gathered and clearly indicated that they have begun to perceive the threat to the independence of the judiciary.

Under these circumstances any government would have heeded public opinion and take appropriate action in order to ensure that whatever action is taken is within the law and would in no circumstances infringe the basic guarantees of the independence of the judiciary. Such a rational reaction was to be expected as the matter involved is of the utmost seriousness and the attention of the whole nation is now focused on this issue. Besides, the international community is clearly watching and the matter at stake is of the most sensitive nature in terms of international relationships.

However, the way in which the government is reacting does not show much regard for these important considerations and instead seems to rely entirely on muscle power in determining the outcome of this most important constitutional issue.

This does not come as a surprise as the government has drifted from a democratic form of governance to the governance of a shadow state. This shadow state relies more on the security apparatus that is the paramilitary forces, intelligence services and the military rather than the democratic institutions. In fact, the democratic institutions have ceased to function independently and are controlled by the presidential secretariat.

Everything else other than the presidential secretariat and the Ministry of Defence seems to have become irrelevant. Naturally the security apparatus in all critical

moments brings in mobs and criminal elements to counteract people who express their democratic aspirations by way of peaceful demonstrations.

For this shadow state the independence of the judiciary is an obstacle. The shadow state requires the kind of 'judiciary' which will merely carry out its orders. Legality and constitutionality are matters that have no relevance to the functioning of this shadow state.

Under these circumstances the government is now engaged in a witch hunt against the Chief Justice as well as all the judges who demonstrate any attachment to the independence of the judiciary. This witch hunt will also extend to all independent lawyers. As we have pointed out in the past the rule of law is now rapidly being displaced by direct government control without regard to the law.

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## Move to impeach chief justice of Sri Lanka - Sign of rotten conditions

by N.S.Venkataraman

Sri Lankan parliament has admitted a motion to impeach the Chief Justice of Sri Lanka. The Chief Justice has been accused of unethical conduct in the performance of her duties, harassment of junior judges and financial irregularities including unauthorised possession of large amount of foreign exchange. She was the Chief Justice even when a corruption case against her husband was pending in the magistrate's court.

The move to impeach the Chief Justice is obviously a political decision , though it may be argued that there are valid grounds for it. The Chief Justice is bound to respond stating that the charges have been motivated and unjustified due to political or other considerations. When a Chief Justice herself is facing such charge, who could sit on the judgement !

While as per the constitution, parliament is entitled to impeach the Chief Justice and remove her from the post, one cannot ignore the fact that many members of the parliament including the leaders of various parties themselves have often faced charges of corruption and nepotism. Many people will wonder how can someone suspected of corrupt dealings can accuse and punish someone else of corrupt practices; in this case, Chief Justice of Sri Lanka.

The question that comes to one's mind is as to why such a person of doubtful integrity was selected to become the Chief Justice of Sri Lanka at all in the first place. Obviously, the selection process has been wrong or those who have been responsible for selecting her were themselves dishonest.

Nobody becomes corrupt and dishonest over night. One can become the Chief Justice after spending several years in the bar and holding positions as judicial officers at various levels in various places. Normally , anyone would be selected for the post of Chief Justice only if the concerned person has a blemish less track record over length of time without facing any charges or any punishments during the entire career. One would reasonably think that the present Chief Justice of Sri Lanka, now facing impeachment would have enjoyed such track record without which she could not have become the Chief Justice.

Under the circumstances, the move to impeach the Chief Justice reflects also on those in charge of the government who have appointed her for the post. This certainly reflects on the President of Sri Lanka who is the ultimate appointing authority.

We have heard the moves to impeach President in USA in the past but the US President is an elected political leader. The move to impeach a political personality cannot be equated with the move to impeach a Chief Justice.

In any case, the entire episode that Sri Lanka is now witnessing is nauseating and shows both the Chief Justice and the political leadership of Sri Lanka in poor light. They seem to be fighting with each other, at the cost of the reputation of Sri Lanka. It would be graceful if the Chief Justice would resign the post on her own and avoid the ugly scenario of the Sri Lankan parliament removing her. Alternately, the parliament should have the wisdom to allow her to continue in the post till her term would be over, since it has done "the mistake" , of appointing her for the post.

Sri Lanka appears to be paying a big price due to this confrontation that would result in loss of credibility and reputation for the entire judiciary system itself.

*(Courtesy: Sri Lanka Guardian)*

## 56
# Shameful stifling of freedom of expression

by Kishali Pinto-Jayawardena

It is heartening to witness an element of angry vigor emanating from Sri Lanka's legal profession against the pending impeachment of the country's Chief Justice. The resolutions issued by the general membership of the Bar Association of Sri Lanka yesterday expressing concern over the impeachment and the indignation displayed by provincial Bar Associations show that decency and sanity is not yet lost in the country.

**Stifling the Chief Justice's response**

In depressing contrast however, we have a most shameful attempt to stifle freedom of expression by a group of unnamed 'President's Counsel' this week who have pontificated that replying and commenting outside Parliament on the charges contained in the impeachment motion constitutes breach of parliamentary privilege (see Island, Saturday 10th November 2012).

Further, these worthies have stated that replying to these charges could constitute an additional charge in the impeachment motion. This is obviously aimed at stifling the publication and discussion of the letter sent by the Chief Justice's lawyers eminently in the public interest this week, clarifying the specific allegations of alleged financial impropriety in an effort to meet the vicious avalanche of state media led attacks on her personal and financial integrity.

These 'Counsel' have taken umbrage at the public discussion of an impeachment motion which contains mistakes even in regard to essentials such as the correct reference to the official law reports, the correct reference to the reported case challenging her assumption of office and the correct constitutional provision in terms of which the Secretary to the Judicial Service Commission is appointed. If this was a legal document, it would have been thrown out of court at the very first instance.

Is it any wonder therefore that, instead of a candid discussion of what these charges are all about, these 'President's Counsel' urge a ruthless lynching by the state run media while the Chief Justice is supposed to remain silent and is therefore condemned in the public forum by that very silence. Where the Parliamentary Select Committee's proceedings are held in camera and (reportedly) with even stricter restrictions imposed than normal, from where exactly is the public supposed to glean the truth?

Or is the truth no longer relevant in this country where a sitting Chief Justice is now facing the exact fate meted out to Sri Lanka's former Army Commander, both of whom have fallen foul of this administration? These are valid questions in the public interest.

**Inapplicability of Parliamentary privilege**

These government backed lawyers, conferred with 'silk' by President Mahinda Rajapaksa appropriately enough for favours done, appear to be blissfully unaware of the precise legal nature of parliamentary privilege. One may well ask, are they aware of the law at all? It would be vastly amusing if it was not so tragic.

For their enlightenment, (assuming that this is indeed possible), parliamentary privileges do not exist to prevent public scrutiny of parliamentary proceedings but are merely the "sum of the peculiar rights enjoyed by the House collectively and by members individually in order to enable the proper carrying out of constitutional functions" (Erskine May's Parliamentary Practice, 22nd Ed, London Butterworths, 1997).

Sri Lanka's Parliamentary (Powers and Privileges) Act No 21 of 1953 (as amended), modeled on the English law, lists grave breaches of privilege in Part A of the Schedule. These are serious acts amounting to criminal offences which were mandated by the original Act to be punishable only by the Supreme Court. Lesser offences (such as disrespectful conduct in the precincts of the House) listed in Part B of the Schedule are in the hands of Parliament to punish.

In consonance with the draconian tone of the Jayawardene administration at that time, an amendment of 1978 gave Parliament concurrent power with the Supreme Court to punish in respect of these offences. But this amendment was repealed during the Kumaratunga administration and exclusive power restored to the Supreme Court in that regard. In all fairness, the repeal was in response to repeated appeals by legal activists that this was an undesirable power given to parliamentarians.

**Threat made with malice**

Importantly however, even in respect of breaches contained in Part A., the prohibitions are strictly defined. These include willfully publishing any false or perverted report of any debate or proceedings of the House or a committee or words ordered to be expunged by the Speaker or any defamatory statement reflecting on the proceedings and character of the House or any member thereof.

Relevantly these prohibitions cannot, even in the wildest imagination of these "Counsel' who would like to spew any lie for the benefit of the government, encompass the publication of a deliberately reasoned and carefully worded response by the Chief Justice, sent through her lawyers, to reverse the considerable harm sought to be done to her reputation. Neither can it restrain balanced commentary on the substantive contents of the motion.

This threat is made with the malicious intention of 'chilling' discussion of a matter that goes to the heart of the integrity of Sri Lanka's legal system. As such, it needs to be roundly condemned.

**Rendered a laughing stock in the eyes of the world**

Quite apart from all this, let us however assume (hypothetically) that an extremely defamatory report is published by a newspaper, putting into issue the very integrity of the Parliamentary Select Committee in question and offending the grave privileges stipulated in Part A.

If an objection is brought in this context, it will be the very Supreme Court who will assess the gravity of reports critical of the parliamentary process in regard to the impeachment of its own Chief Justice. The absurdity of this does not need to be spelt out for the dim witted or the deliberately obtuse among us.

These ill conceived, ill judged and ill timed actions against the head of the country's judiciary only hides the fury and chagrin of the government against a Chief Justice who is not seen to be abasing herself sufficiently enough before it.

The Bar has now indicated that enough is enough in no uncertain terms. In doing so even at this late hour, a clear message has been passed to the government. This is only the beginning of a long and difficult struggle as the pieces of a once proud legal system are sought to be painfully retrieved. Assuredly the very survival and public legitimacy of the Bench and the Bar remains contingent on this struggle.

*(Courtesy: The Sunday Times)*

## 57
# Drawing back from a ruinous precipice

by Kishali Pinto-Jayawardena

It did not take much prescience to foretell that parliamentary privilege would be formally wielded to prohibit public discussion of the PSC process with the commencement of the Parliamentary Select Committee (PSC) to consider the impeachment of the Chief Justice of Sri Lanka this week. The Speaker's warning to party leaders on Friday that matters discussed at the PSC may not be divulged to the media is therefore unsurprising.

**Bar on premature publication of proceedings of PSC**

As observed previously, first we had a group of recently appointed (but unfortunately unnamed) President's Counsel who tried to make out, quite wrongly, that fair and reasonable discussion of the impeachment even before the Select Committee had commenced sittings, amounted to a breach of privilege. Moreover, that the Chief Justice's response to the charges relating to financial impropriety was also prohibited. As remarked in these column spaces, one can understand their natural eagerness to prostrate themselves before the Presidential hand that had magnanimously rewarded them. Yet this was a truly preposterous attempt to gag public discussion.

Now however that the PSC has commenced sittings, a bar applies to publication of proceedings in a committee of the House before they are reported to the House (see point 9. of Part B in the schedule to the privileges law, 1953). This is an offence that may be tried by Parliament itself. Power to deal with offences in Part B. is conferred upon either the House or the Supreme Court. This is different to offences defined in Part A. which, as discussed last week, are exclusively within the power of the Supreme Court to punish. It is from this prohibition in Part B. that the Speaker's warning to party leaders and the media this week emanated.

**Public duty to discuss general issues of impeachment**

Even so this bar applies strictly only to the premature publication of matters discussed before the PSC. It does not and cannot, even on the most favourable interpretation that the government may endeavour to give to its wording, encompass general criticism of the impeachment, its impact on the independence of the judiciary, the quality of justice meted out to the Chief Justice and relevant actions of the government in that regard.

**The core question, as fittingly editorialized in this newspaper last week, remains as to whether this an impeachment or an inquisition of the Chief Justice? The public is entitled to discuss this question. It is this capacity which distinguishes Sri Lanka from a barbarian society, even though many may be of the opinion that we have crossed the line from civilized to barbarian some time ago. Efforts to suppress fair discussion of these matters must therefore be fiercely resisted.**

**Power of the mere threat of privilege**

But there is little doubt that, quite apart from what the law actually prohibits, the mere threat of privilege with all the power that this gives to a House in which the ruling party pushing this impeachment of the country's top judicial officer predominates in rude numbers, will inhibit vigorous discussion of the very impeachment process itself.

The potential that parliamentary privilege possesses to chill freedom of expression and information is certainly enormous. It is parallel to the similar 'chilling' effect that the power of contempt of court has in relation to questions touching on judicial behavior.

In enlightened jurisdictions, the negative impact of both contempt and parliamentary privilege is limited by wise law reform, the sheer weight of liberal public opinion that raps governments as well as judges over the knuckles when authority becomes converted to authoritarianism not to mention powerful lobbies that jealously safeguard basic rights of information and expression. Even in South Asia itself countries such as India, Pakistan and Bangladesh have surged ahead with legal, regulatory and policy reforms. In contrast, we remain in the "Dark Ages' as it were.

**Thrusting of judges into the 'thicket' of political controversy**

That said, esoteric questions of law anyway have little impact when the law itself has fundamentally lost its relevance in Sri Lanka. As this column has repeatedly stated, the responsibility for this crisis of the Rule of Law which was slow and gradual in the making, cannot be laid solely at the door of different administrations. As voters and citizens, we bear a far share of the blame.

But this is not the only point at which questions must be directed back to ourselves. It needs to be asked therefore as to what specific contribution has Sri Lanka's judiciary made towards protecting and securing its own independence. This is not to

claim that we should have had judges of the caliber of Ronald Dworkin's satirical idealization of a judicial Hercules possessed of infinite judicial wisdom. Judges are human beings after all and subject to the same frailties that visit all of us. From independence, Sri Lankan judges have failed the people on some occasions. They have also arisen magnificently to the challenge at significant points in history. We have had the best and most conscientious of judges working miracles with an obdurate law or legal provision while respecting the judicial function. We have also had amoral and politicized judges rendering silent the most liberal law or constitutional provision.

Yet the unpleasant thrusting of judges into the 'thicket' of political controversy without respite, (ordinarily far removed as this is from the judicial role), became evident particularly from the early part of the previous decade, notwithstanding retired Chief Justice Sarath Silva's most labored denials of the same to this column two weeks ago. This is the point at which the cherished theoretical notion of the independence of the judiciary itself came under ferocious and unprecedented public scrutiny to the extreme discomfiture of those in the legal and judicial spheres.

This focus continues to the extent that names of judges and their actions are now bandied about, (as irrepressibly well deserved as this may be in certain cases), in chat forums, websites and at public discussions. Surely only the most blinded among us will say that this is a good development for public respect for the institution of Sri Lanka's judiciary? Certainly an honest discussion of the judicial role in Sri Lanka must occupy our minds if this country is to recover even decades down the line in regard to this most profound crisis of confidence in the law since independence.

**Stepping back from this ruinous action**

Now, external political excursions into the functioning of the judicial institution have culminated in the present sorry impeachment of an incumbent Chief Justice.

The government should even at this late stage step back from its ruinous actions for the sake of this country's bemused people if not in order to avoid the ridicule that this exposes the country to, internationally.

That it would not listen to reason is however a near certainty. That Sri Lanka would need to hit the bottom of the precipice before climbing back towards slow recovery is also a near certainty. These are the unpalatable but unavoidable truths that confront us.

*(Courtesy: The Sunday Times)*

58

# A surge of public empathy for a court under siege

by Kishali Pinto-Jayawardena

The government's brushing aside of the Supreme Court's entirely appropriate order this week requesting Parliament to desist from continuing with the impeachment of the Chief Justice until a final determination was handed down in petitions being heard filed before it, was arrogant but unsurprising.

The Bench spoke to the comity that must exist between the judiciary and the legislature for the greater good of the country. It cautioned that this would be prudent as well as 'essential for the safe guarding of the rule of law and the interest of all persons concerned.'

But its words were in vain and at the close of the week, Sri Lanka's Chief Justice was compelled to appear in person before the Parliamentary Select Committee (PSC) in the formal commencement of a politically driven impeachment process.

**Neither purse nor sword but only judgment**

American founding father and political philosopher Alexander Hamilton's potent and powerful warning that 'the judiciary has no influence over either the sword or the purse, it may truly be said to have neither force nor will but merely judgment…' ((Federalist Papers, No 78) is therefore singularly apt for the dilemma in which Sri Lanka finds itself today.

The executive holds the sword of the community while the legislature commands the purse. In contrast, the judiciary is dependent solely on its judgment and integrity. If the integrity of the judicial branch of the State is destroyed through executive action or its own complicity, then all is lost. The executive is free to trample as it wishes on the judiciary, the law is then unseated and justice is thrown proverbially to the wolves.

In the present impeachment of Sri Lanka's Chief Justice, it does not require remarkable wisdom to determine as to who will be the winner and who the loser in a head-on clash. This is possibly why Thursday's order by the Supreme Court wisely sought to avert an open confrontation with the legislature at the outset itself. Commendable restraint was shown, transcending a most particular anger that must naturally be felt by judicial officers when the head of the judiciary is impeached in this way. Now that this request has been abruptly brushed aside by the government, the consequential judicial response remains suspenseful though it is not difficult to imagine a plea of futility being put forward by the Attorney General in later hearings.

**Significant differences with recent precedent**

Notwithstanding, this week's measured ruling contrasts sharply with an earlier order of the Court delivered in 2001 when an impeachment motion lodged by the opposition was due to be taken up by a Select Committee against a former Chief Justice, Sarath Silva. In that 2001 order, interim relief was granted staying the appointment of a Select Committee with the judges opining that a stay was warranted due to a purported exercise of judicial power by the legislature. This view was peremptorily dismissed by the late Anura Bandaranaike, then Speaker of the House who reasoned in copious detail that the judiciary had no business interfering with the constitutionally mandated parliamentary process of judicial impeachments. Fortuitously, (for that former Chief Justice), Parliament was thereafter dissolved by former President Chandrika Kumaratunga, preventing any further action.

However there were significant differences between that impeachment motion and the current unseemly fracas. Charges against that former Chief Justice relating to abuse of judicial power had been ventilated long before 2001, causing a veritable public scandal as it were. That motion for impeachment was brought by the opposition and not by the government. That Presidency's entire effort was, in fact, to prevent the impeachment being brought against that former Chief Justice for reasons that are well in the public domain.

**Comity must exist between the judiciary and executive**

In contrast, what we have now is a hastily drafted impeachment motion, replete with mistakes but driven by the formidable might of this government with accompanying full scale abuse of the judiciary by the state media. A greater contrast therefore cannot be evidenced. Rather than the executive safeguarding a Chief Justice against whom allegations of judicial misconduct had been leveled, what drives this present process is executive pique if not outright anger at a series of adverse Determinations by the Supreme Court on key Bills. The move is against the entirety of the Court for a Determination is not an opinion of an individual judge but a binding decision of the entire Court. The Court's response this Thursday illustrates its recognition of the danger that it faces collectively. Indeed, given the peculiar context in which its

intervention was sought, this was a far more appropriate ruling than the stay order handed down by a previous Court in 2001.
Whatever this may be, this judicial stand must be unequivocally supported by the Bar and by the citizenry. The Bar has bestirred itself recently in passing a resolution requesting that the President reconsider the impeachment of the Chief Justice. Contempt of court applications may be filed against an abusive state media. But its leaders need to question themselves in good conscience as to whether merely passing resolutions and engaging in private meetings with politicians and parliamentary officials fulfils the heavy responsibility vested in them given the extraordinary threats that face the country's justice institutions?

**An enchanted complicity in the executive's attacks on the judiciary**

Half-hearted responses to the instant crisis only expose the credibility of the leadership of the Bar. Surely have we not learnt enough from the past? After all, the very omissions and commissions of the Bar were crucial factors that led to this crisis in the first place. As appreciated by the inveterate satirists among us, some of these legal worthies jostling to prove their bona fides against the impeachment were themselves thoroughly implicated in the ravages of justice that occurred during the previous decade, after which, it became unarguably much easier for any politician to call up a judge and exert inappropriate pressure.

We also saw lawyers vehemently arguing not so long ago in defence of presidential immunity in order to shield the President and his minions from the reach of the law. It is only now that these worthies appear to have woken up to realities. One is tempted to ask whether they were cast under a spell, like the enchantment of old which helplessly bound Rapunzel, into conscienceless complicity with the executive all this while.
Furthermore, seniors of the Bar accepted unconstitutional appointments by the President in defiance of the 17th Amendment and steadfastly looked the other way when the 18th Amendment was passed. The grave historical responsibility of the Bar in this regard can only be mitigated by unconditionally courageous actions now. That much must be emphasized.

**This Presidency should take heed**

This impeachment is destined to leave us with a hollow shell where the authority of the law once proudly possessed centre stage. Black coated members of the legal fraternity will prance before courts in a bitter mockery of the legal process.

This is what is desired perhaps by those in the seats of authority. But the best laid plans of mice, men and authoritarian political leaders drunk with insatiable power may still go awry. The steady gathering of public empathy for a Court under siege is now noticeably under way. Undoubtedly this Presidency should take heed of bitterly dissenting voices, at times coming from the very support base that brought this administration to power.

To ignore these voices would be to imperil its ultimate political survival. Make no mistake about that.

*(Courtesy: The Sunday Times)*

**59**

## Legality of government actions rendered politically irrelevant

by Kishali Pinto-Jayawardena

This week, a committed New Delhi based civil rights advocate and incidentally a good friend, observed in a dispassionate aside to an otherwise entirely different conversation in that country that 'this situation that Sri Lankans are facing regarding the political impeachment of the Chief Justice is quite alien for us to grasp here, even in the abstract. How could checks and balances in your constitutional and legal system break down to that terrible extent? Even with the war and all its consequences, how could the centre of judicial authority implode with such astounding force?'

**A juggernaut government brushing aside protests**

In retrospect, these questions assume great significance. Sri Lankan newspapers are now gloriously resplendent with opinions of all shades and colours on the propriety or otherwise of the impeachment process. The airing of these opinions and the filing of court cases calling Parliament to order for a politically targeted impeachment of the Chief Justice are certainly necessary. However, these frantic actions remain ostrich-like in the ignoring of certain truths. Foremost is that questioning the legality of particular actions by this government has now been rendered politically irrelevant. Perhaps at some point in the past, these interventions may have had some impact. But this logic does not hold true any longer, no matter how many learned discussions are conducted on the law and on the Constitution.

In particular, the laborious posturing by members of the Bar, many of whom appear to have only now belatedly realized the nature of the crisis that confronts us, are destined to be futile if that is all that we see. In the absence of popular collective protests reaching the streets which target the protection of the law and the judiciary at its core, this government will press on in its juggernaut way, brushing aside civil

protests couched in the carefully deliberate language of the law, as much as one swats tiresome mosquitoes with a careless wave of the hand.

**Three wheeler drivers marching before the Supreme Court**

This immense contempt shown by those in power for the law was very well seen recently when news outlets reported a government orchestrated procession of three wheeler drivers chanting slogans in support of the impeachment and marching before the courts complex housing the Supreme Court and the Court of Appeal.

This stark fact, by itself, demonstrates the degeneration of the esteem in which the judiciary was once held. Such an event would have been unthinkable in the past, even taking into account the much quoted abusing of judges and the stoning of their houses during a different political era. There is a huge difference between the two situations. In the past, the intimidation of judges was carried out in the twilight of the underworld even though the threatening message that this conveyed to the judiciary was unmistakable. Now, political goons threatening judges parade in the harsh glare of daylight with total impunity and total contempt.

To what extent is a judicial officer from a magistrate to a Supreme Court judge including the Chief Justice able to now assert the authority of the law in his or her courthouse when such open contempt is shown for the judiciary with the backing of the government?

**Not simply harping on the past**

But as this column has repeatedly emphasized, this degeneration did not come with this government alone though it may suit many to think so. Rather, those who expound long and laboriously now on the value of an independent judiciary for Sri Lanka including jurists as well as former Presidents, given that the latest to join this chorus is former President Chandrika Kumaratunga should, if they possess the necessary courage, examine their own actions or omissions in that regard.

As history has shown us, whether in the case of the genocide of the Jewish people by the Third Reich, the horrific apartheid policies of the old South Africa or indeed in many such countless examples around the world, a country cannot heal unless it honestly acknowledges its own past with genuine intent not to travel down that same path once again. It is not simply a question of harping on the past though again, it may suit some to say so. Indeed, the entire transitional justice experience for South Africans, even though it did not work as well in other countries in the African continent, was based on that same premise. It was honest at its core and was led by a visionary called Mandela. This was why it worked (with all its lack of perfection) for that country but did not work for others. Those who unthinkingly parrot the need for similar experiences for Sri Lanka should perhaps realize that fundamental difference.

**Reclaiming a discarded sense of legal propriety**

But there are many among us who still believe that, magically as it were, matters would right themselves and we would be able to reclaim our discarded sense of legal propriety. Unfortunately however this is day dreaming of the highest magnitude. What we have lost, particularly through the past decade and culminating in the present where reason and commonsense has been thrown to the winds in this ruinous clash between the judiciary and the executive, will take generations to recover, if ever it will.

As Otto Rene Castillo, the famed Guatemalan revolutionary, guerilla fighter and poet most hauntingly captured in his seminal poem 'the apolitical intellectuals', someday, those whom the country looked upon to provide intellectual leadership will be asked as to what they did, when their nation died out, slowly, like a sweet fire, small and alone.'

Castillo's admonition about 'absurd justifications, born in the shadow of the total lie' applies intoto to this morass in which Sri Lankans find themselves in. We flounder in the mire of the arrogance of politicians who do not care tuppence for the law but still we cling desperately to our familiar belief of the authority of the law though this belief has been reduced to a phantasma. It is only when that 'total lie' is dissected remorselessly by ourselves and in relation to our own actions that we can begin to hope for the return of justice to this land.

That day, it seems however, is still wreathed in impossibility and uncertainty. Hence my Indian friend's probing though casual questions a few days ago remain hanging in the air. Undoubtedly the answers to those questions lie not in blaming the politicians but in confronting far more uncomfortable truths about ourselves as a nation and as a people.

*(Courtesy: The Sunday Times)*

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## Sri Lanka's judiciary
## Enter the goons

### An ominous attack unsettles the country's judges

Tensions have grown in Sri Lanka between the executive and a beleaguered judiciary. They have prompted government claims of an international plot to pit one against the other, as "in Pakistan or Bangladesh".

In September Manjula Tillekeratne, the secretary of the Judicial Service Commission, alleged in a press release that efforts were being made to destroy the independence of the judiciary as well as the rule of law. The statement was unprecedented in the 40-year history of the commission. The body is tasked with appointing, transferring

and dismissing judges and other court officials. It comprises the chief justice, as chairman, and two other Supreme Court judges.

Then, on October 7th, four unidentified men assaulted Mr Tillekeratne as he waited in his car for his children to finish their tennis lessons. One of the assailants pistol-whipped him, while the others beat him with their fists and an iron rod. The attack took place on a public road in broad daylight in Colombo, the capital.

Mr Tillekeratne had told journalists that his life was in danger soon after he had issued the statement on the commission's instructions. The statement alleged that the commission was being threatened and intimidated by persons "holding different status". It said members had been summoned, but it did not reveal by whom. And it claimed the commission had documentary proof of how "relevant institutions" remained unconvinced about the importance of protecting the autonomy of the judiciary and commission.

The statement, with its many opaque references, was confusing. Clarity soon came from an unlikely source: President Mahinda Rajapaksa. He told reporters that it was his secretary who had called the commission for a meeting, ostensibly to discuss budgetary allocations and training for judges. Senior lawyers say it was more likely that the president had wanted to question the commission about the suspension of a certain district-court judge known to be close to the powerful Rajapaksa clan.

Relations between the chief justice, Shirani Bandaranayake, and the president are also strained. Her husband, Pradeep Kariyawasam, is being investigated over a questionable share transaction effected while he was chairman of the state-owned National Savings Bank. The Bribery Commission is appointed by the president and is notoriously lethargic on high-profile complaints. But it has fast-tracked the probe on this one. Activists had initially questioned how Mr Kariyawasam could hold position in a government entity while his wife headed the country's top court. But he has been forced to resign, and legal practitioners now face open sniping between judiciary and executive.

The assault on Mr Tillekeratne drew condemnation from abroad. The International Commission of Jurists urged the government to bring the perpetrators to justice, and to ensure that judges were secure from assault and intimidation. In Sri Lanka district and magistrate court judges went on strike for two days in protest. Hundreds of lawyers and supporters demonstrated. The government reacted by accusing NGOs, Western governments and separatist forces of trying to destabilise the country—a familiar refrain.

The stand-off may yet grow more serious. On October 9th Chamal Rajapaksa, the parliamentary speaker, insisted that the Supreme Court had failed to comply with the constitution in the way it had conveyed a decision on a controversial bill to parliament. Mr Rajapaksa, who is one of several brothers of the president in government, said the court had erred in delivering the documents to the secretary-

general of parliament and not to himself. This might be "muscle-flexing" as one activist put it. But judges and lawyers appear inclined to flex right back.

*(Courtesy: The Economist)*

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# The Democratic Socialist Republic of Absurdistan

by Tisaranee Gunasekara

*"….Cicero's tongue will have to be torn out, Copernicus's eyes gouged out, and Shakespeare stoned. That is my system."- **Dostoyevsky (The Possessed)***

With the speed of lightening and without as much as a nano-ripple, the Rajapaksa regime removed Neville Gunawardana, the 'crime-busting' Director General of the Customs.

Mr. Gunawardana had commenced an investigation into the alleged illegal doings of nine dummy-companies; a warehouse in Gampaha was raided and sealed. The suspect-companies obviously enjoy Rajapaksa patronage, because the Treasury ordered the Customs to halt the investigation, immediately. The story leaked to the

media. The regime ordered the CID to probe the leak and transferred the Customs boss to the Treasury.

In removing the Customs boss, the Rajapaksas displayed the same degree of abusive-impunity they did in removing the five-decade old newspaper stands in the Fort. The Customs boss inconvenienced Rajapaksa-governance while the newspaper stands cramped Rajapaksa-style; so both were ousted arbitrarily, in total violation of natural justice.

That is how the Rajapaksas like to rule – with absolute opacity, unaccountability and arbitrariness. That is why they replaced the 17th Amendment with the 18th Amendment.

The Rajapaksas never hesitate to bite hands that help them. Today the Siblings are using the powers they gained from the 18th Amendment against the very judiciary which gave that anti-democratic law a free-passage. Tomorrow they will use the subjugated courts against those very parliamentarians who are helping them to asphyxiate judicial independence via the impeachment.

A politically successful impeachment will open the portal to other measures which are unjust to the point of absurdity. For instance, a constitutional amendment empowering the president to deal with an inconvenient chief justice in the same arbitrary way the Treasury dealt with an inconvenient Customs boss and the UDA dealt with inconvenient newspaper vendors. Once such an amendment is in place, money and time need not be wasted on impeachment travesties, nor effort expended on transporting bought-and-paid-for demonstrators to Colombo.

In that perfect (and not-too-distant) future, an inconvenient chief justice can be removed by the simple expedient of a Presidential decree, signed in between lecturing to students about ethics at the Mahinda Rajapaksa Conventional Centre and ordering the police to free a ministerial offspring arrested for ducking the AG in the ornamental pond outside the Mahinda Rajapaksa Superior Courts Complex. A tiny news item will inform about the change to a public which by that time would have become inured to every idiocy and lunacy of Rajapaksa Rule.

Once Namal Rajapaksa PC is appointed chief justice, eternal harmony will dawn between the Executive, the Legislature and the Judiciary, all headed by Rajapaksas (except for an occasional family-spat).

Absurd? Yes. Impossible? Not really, not more impossible than the contrasting fates of the war-winning army commander, the current chief justice and the one-time Tiger financial-czar; or the Rajapaksa-occupation of the state; or Mihin Air…..
Under despotic rule, the absurd and the impossible become 'the new normal' while the pre-despotic normal becomes both absurd and impossible.

**The Despotic Normal**

'The Onion' describes itself as 'America's finest news source'. Its latest news items include such gems as 'Romney locks self in Oval Office during White House Visit' and 'Congress Arrested on Manslaughter Charges'.

Satirical publications such as 'The Onion' belong in a world which accepts humour, a world in which the absurd is just that – the absurd. But in places where political humour is a crime and absurd is the 'new normal', news, a la 'The Onion' can seem the real thing. So when 'The Onion' named North Korea's Kim Jong-Un 'The Sexiest Man alive for 2012", the story was reproduced by China's People's Daily as a serious news item. Clearly the deciders at the People's Daily did not see anything funny in 'The Onion's' following description of North Korea's baby-despot: "With his devastatingly handsome, round face, boyish charm and his strong sturdy frame, this Pyongyang-bred heartthrob is every woman's dream come true. Blessed with an air of power that masks an unmistakable cute, cuddly side, Kim made this newspaper editorial board swoon with his impeccable fashion-sense, chic short hairstyle and, of course, that famous smile…."

The People's Daily didn't get the joke because in Beijing one does not joke about politics or politicians. In any case, 'news' disseminated by Pyongyang's official news agency, KCNA, are far more fantastic than anything 'The Onion' can conjure. For instance, Grandson Kim, known as the 'Great Successor' and a 'great person born of heaven' has taught flying to pilots and music to the military band, according to the KCNA. Recently North Korea, which depends on international handouts to feed its people, carved the slogan 'Long Live Gen. Kim Jong-un, the Shinning Sun' on a hillside in Ryanggang province in letters huge enough to be visible from space. According to KCNA, archaeologists of the History Institute of the Academy of Social Sciences have discovered the lair of a unicorn believed to have been ridden by an ancient Korean king, proving that Pyongyang and not Seoul was the capital of that long-ago and glorious empire. This momentous discovery was made thanks to "a rectangular rock carved with words 'Unicorn Lair'" (KCNA – 29.11.2012). Doubtless carved by the unicorn, as a sign to the dragon next door and the occasional visiting phoenix.

Rajapaksa Sri Lanka is not there, yet. These are still early days (the Kims have been around for decades). But if 'The Onion' names any Rajapaksa, 'The Sexiest Man alive for 2013', one can imagine with what glee the Daily News and the SLBC will reproduce the story! And a local artist-turned-amateur-historian has already traced the Rajapaksa lineage all the way to Prince Siddhartha through King Dutugemunu!

In the meantime, the impeachment, which did seem absurdly impossible just two months ago, is moving ahead like a bullet-train flattering everything in its path, starting with the judiciary. After Monday's black comedy, whatever illusions there existed about the justice of the impeachment has vanished. The penultimate veil was torn asunder by the anti-judiciary protestors who played their shameful role, shamelessly, with the full backing of the police and UPFA ministers; the final veil

was ripped apart by the UPFA members of the Parliamentary Select Committee, who, with a shamelessness which rivalled that of the bought-demonstrators, used their enormous majority to turn down the CJ's fair request for an open or an observed trial.

The unseemly haste with which the impeachment is being conducted is probably dictated by astrological needs. Perhaps there is an auspicious time for the new CJ to be sworn in, a favourable arrangement of stars which gives the new CJ a life-time immunity from germs of honour or self-respect.

The Rajapaksas do not care that with their frenzied attacks on the judiciary, they are destroying public faith in the rule of law. They do not care that such loss of faith will cause more and more people to act outside the law. They do not care that they are encouraging not just crime but also acts of vigilante justice and that this path will end in power-abuse at the top and mob-rule at the bottom.

They will call that anarchic Sri Lanka a hub of law and a haven of justice.

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## It is just a hop, skip and jump from enforced disappearances to the impeachment of the Chief Justice

by Basil Fernando

It is clear by now that the attempted impeachment is being done in a completely lawless manner. The present approach adopted for the inquiry is no different to a committee consisting of a man's enemies being assigned to conduct a murder trial against him. Regardless of the man's guilt or innocence, the enemies will ensure that he will be found guilty and be hung.

There are many clips on YouTube about the mobs that gathered before the Supreme Court and the Parliamentary Complex shouting slogans against the Chief Justice and demanding her resignation. In no other country can you find examples of mobs

gathering to shout slogans demanding that judges resign. Some of the people in the mobs who were interviewed directly named certain Members of Parliament from the ruling party as those who organised the mobs. It was thus clear that the mobs were organised by the government to shout slogans against the CJ. Thus, the responsible party for mobilising the mobs to bring down the prestige of the courts is the government itself. This is a government that is openly encouraging lawlessness. A government that mobilises mobs in this manner demonstrates no political will to keep law and order or to ensure respect for the institutions of the state. The result will be the government causing chaos in the country.

However, the history of the government resorting to lawlessness is not new in Sri Lanka nor is it confined to this government only. The most glaring example of absolute lawlessness is the manner in which various governments since 1971 have resorted to the causing of large scale disappearances.

In 1971, according to the statistics which came up at the Criminal Justice Commission (CJC) the JVP was responsible for 41 civilian deaths, the killings of 63 and the wounding of 305 members of the armed forces. In retaliation, the United National Party government killed 5,000 to 10,000 young people and placed another 15,000 to 25,000 in arbitrary detention. As it is well known, a very small number of these would have been hardcore JVPers but there was little concrete evidence of engagement in any serious attacks against the majority. The procedure that was followed was arrest, torture during interrogation, killings and, for the most part, secret disposal of the bodies.

It is a universally recognised principle in law that, once a person is arrested, the state is under obligation to protect that person and produce them in court. It was this principle that, on government orders, the armed forces and the police openly flouted. The government neither expressed any regret for giving such orders nor did it ever conduct inquiries into such killings. Thus, this heinous criminal activity began to be accepted as a legitimate activity by the armed forces, police and the paramilitary.

Later, the causing of enforced disappearances was practiced on a much larger scale in the south, north and the east. In relation to the JVP uprisings from 1987 to 1991, the number of persons who were made to disappear was around 30,000, according to the statistics given by the commissions of inquiry into involuntary disappearances. Many are of the view that the numbers are much larger.

As for those who have been made to disappear from the north and the east from the early 80s to May 2009, no records have been made but obviously they would outnumber the enforced disappearances from the south. Once again, no government has ever expressed any regret about such killings and no attempt has been made to conduct any inquiries or hold anyone accountable. In fact, to demand inquiries into these enforced disappearances is considered treachery and an act which favours the LTTE. The simple issue of the protection that should have been afforded to an arrested person is no longer taken for granted in Sri Lanka. The principle that is

really in practice is that after arrest, if the particular agencies so wish, a person could be extrajudicially killed or made to disappear altogether.

A complete transformation has taken place in the basic norms regarding crimes. What was universally considered a crime may not be considered a crime in Sri Lanka if, for some political or practical reason, the government wishes to treat them as not being such. Thus, the idea of crime has been relativised and the choice as to whether to treat even a heinous crime as a crime or not is now in the hands of the government in power.

It can be said that no other government in the region regards crimes in as much of a casual manner as is done in Sri Lanka. There are countries in which, due to certain historical reasons, there has been the collapse of their legal system and they have ignored basic norms of legality and illegality. Two such countries that are known to face such situations are Cambodia and Burma. However, even these countries have not gone to the extent of ignoring the criminality of an action to the extent that it is being done in Sri Lanka now. Even in situations like those of Cambodia and Burma, there is still protection for a person who has been arrested and taken into custody.

In a country where lawlessness has gone that deep, the illegal impeachment of a superior court judge, ignoring universally accepted norms regarding the removal of such judges, is merely a logical extension of the overwhelming disregard of the law.

The law now is that whatever the government does is correct and that the correctness will be demonstrated by the use of the mob under its control. Any kind of behaviour that a law abiding nation might consider illegal or even vulgar may go as decent and right in Sri Lanka under the present circumstances.

This is a bewildering situation and the implications are beyond comprehension. Both the rights of the individual, as well as property rights, will fall foul of this situation. Anyone who has the will to defy the law and has any connection with the government would be able to do whatever they like. Each individual citizen will learn about it when his or her rights are directly affected by this situation. There are already tens of thousands of people who have had that experience.

If the people thought that they might have some recourse to the courts and find some solace as in the past that too will prove an illusion more and more. In a country where the Chief Justice herself is helpless before lawlessness how could any other citizen expect the protection of the law?

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# Sri Lankan Parables:

*The Greatest Product Of Our Own Political Laboratory*

by Basil Fernando

Mr. Thinking Citizen asked the ruler, "Why don't you make a law against forced disappearances? It is such a terrible and ugly thing."

The ruler replied, "You Mr. Thinking Citizen, you make me laugh. You cannot understand what a great political laboratory our Sri Lanka has been and you try to undermine the greatest achievement that has come out of that laboratory?"

Mr. Thinking Citizen asked, "What is that achievement?"

The ruler replied, "It's our own utopia. Not the one you are educated about. In your utopia, reason is the king or queen. But what we have demonstrated to world is that there is a better way to rule. When every mother or father knows in their hearts that

their child is not immune to be counted among the disappeared, we have the key to control the young. When we control the young, we can rule forever. See how we control insurgencies since 1972. Who else has been so successful? We have a lesson for the whole world."

"What is that lesson?" asked Mr. Thinking Citizen.

"It is that the body is all that there is. No soul, no sprit. See this UN and other pundits come and demand inquiries, prosecutions. When there is nothing to found by way of exhumation, what comes of their demands?" The ruler laughed. "There are no souls to come and tell tales. Only the body tells tales. That is the lesson, you fool, that we have found from the experiments in our own laboratory. Fellows like you do not know how to be proud of our own great achievements."

Pointing his finger at Mr. Thinking Citizen, the ruler said, "I want to be alive so that I can illustrate the contrast between your utopia and mine. So few of you are around. Others have been dispatched or fled to other worlds… Do not worry, I will let you live, so long as I need you… But don't take too much liberty, my guarantees are conditional."

- *Colombo Telegraph*

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## Beware You May Be Impeached By Your Members, Clients, Shareholders And Stakeholders!

by Chandra Jayaratne

Chandra Jayaratne
10th December 2012
Open Letter to;
Anil Amarasuriya Esq.

Vice-Chairman,

Sri Lanka Banks' Association (Guarantee) Ltd.
69, Janadhipathi Mawatha,
Colombo 1.

Dear Sir,

**Beware You May Be Impeached By Your Members, Clients, Shareholders and Stakeholders!**

I write this note to you as a client and a shareholder of several commercial banks, who are members of your Association, a collective with a proud heritage and high recognition both in Sri Lanka and overseas. I have been a director of two of the commercial banks, who are members of your Association. I have in addition been closely associated with committees engaged in banking and finance sector reforms and the development of codes of best practice and good governance for the banking sector.

As a client and a shareholder of commercial banks, I have a continuing interest in the public image, stability and growth of such banks, as well as in ensuring that these banks operate strictly in accord with the expected standards of best practice and codes of good governance. I would certainly expect all such banks to strictly abide by their commitment to banking secrecy and contractual agreements with their customers.

The recent news reports of purported violations of the expected standards of best practice and codes of governance, including banking secrecy, by a member or members of your Association, have made me highly disturbed and disappointed. The purported failure to abide by time honoured professional standards of banking and client commitments worries me as a client and a shareholder of banks. It is especially so, in the context of the enhanced risks now attaching to banks and their customers, due to the probability that similar violations could be a reality even in the future, negatively impacting clients , shareholders and other stakeholders of commercial banks.

Your silence and inaction in the face of arrogant, egoistic, foolish steps taken by those in politics and governance, in openly violating the expected best practices of governance, rule of law and natural justice, may lead to you and your Association being impeached by your members, clients, shareholders and stakeholders!

Your members, clients, shareholders and stakeholders have witnessed their property rights being negatively impacted by those in politics and governance, with the passage of the Expropriation Act.

They have now witnessed the flagrant violation of another property right, the right to the secrecy of banking details with licensed banks in Sri Lanka. This reported violation was in connection with the personal banking account details of a customer ( in this case the personal banking account details of the Chief Justice of Sri Lanka) of a licensed commercial bank, believed to be a member or members of your Association. It is reported that in this instance, the relevant information have purportedly been made available by a member or members of your Association directly or indirectly to third parties (in this instance purportedly to 117 members of Parliament who were

thus able to originally sign the impeachment motion handed over to the Speaker, based on the details of the banking accounts of the customer of the said licensed commercial bank or banks operating in Sri Lanka).

It is reported that the aforesaid information had been publicly made available by the bank or banks, without the knowledge and authorization of the client concerned and outside the permitted instances for any such information to be made available as provided for in the statute.

If the above presumption be correct, then this purported release of banking information normally subject to secrecy commitments, is a flagrant violation of the rights of the concerned client of the bank or banks. It further violates the strictly upheld principles of banking secrecy and best practices of banking governance.

In the light of the above, I appeal to you and the Sri Lanka Banks' Association (Guarantee) Ltd. to take immediate steps to publicly notify all Members, Clients, Shareholders and Stakeholders of all banks, who like me have a continuing interest in all such banks strictly abiding by their commitment to banking secrecy and contractual agreements with their customers;

1. Whether a member or members of your Association have in fact released any personal banking account details of the client concerned as reported in the media?

2. If the member or members concerned have released such information directly or indirectly to a third party,

a. Whether the bank or banks concerned had informed the client concerned prior to release of the information?

b. Whether the authorization and agreement of the client concerned for such release had been obtained prior to the release of the information?

c. Under what provisions of the law or client banking agreement conditions were such information released?

d. Did the bank or banks in releasing such information lay down any conditions and obtain any commitments from the persons who received the information?

e. Who asked the bank or banks concerned for such information and under what authority was such information requested?

f. Have the person or persons with whom such information was shared acknowledged receipt of same?

g. Who in the bank or banks concerned actually released the information and on whose authority?

h. Was this exception reported to the Risk Manager, Internal Auditor, General Manager and the Board of Directors of the said bank or banks?

i.Was this exception reported to the Bank Supervision Department of the Central Bank by the bank or banks concerned?

j. Have the Board of the Bank or banks concerned carried out an investigation and taken all such steps so as to prevent any such recurrence in the future?

k. Have the Bank or banks concerned even at this stage formally informed the client concerned of the purported violation?

l.What consequential action has been or will be taken by your Association against the member or members concerned for this flagrant violation of banking standards and good governance practices?

m. What compliance commitments and future assurances of good governance by your members could your Association be able to provide clients, shareholders and stakeholders of banks?

n. Will action be taken by your Association to assure all present and future clients, shareholders, correspondent banks and other stakeholders that necessary controls, compliance processes and codes of ethics and governance will be in place to assure that no similar instances will happen in the future?

I earnestly appeal to you, the Secretary General and the immediate past President of your Association in network with the Ceylon Chamber of Commerce and the National Chamber of Commerce, to address the issues of significant importance to the Banking Industry set out herein above and collective be the oversight assurance platform, ensuring rights of and obligations to clients being strictly upheld and no breaches of confidence will occur in the future.

I trust that you will uphold the interests of the Private Sector, Investors both local and foreign, Correspondent Banks and the country as a whole, by placing the future sustainable interests of the nation and the people of Sri Lanka as one of your Association's core commitment.

Yours Sincerely,

Chandra Jayaratne

cc.

Upali de Silva, Secretary General, Sri Lanka Banks' Association (Guarantee) Ltd. 69, Janadhipathi Mawatha, Colombo 1.

R. Theagarajah Esq. Immediate Past President, Sri Lanka Banks' Association (Guarantee) Ltd. 69, Janadhipathi Mawatha, Colombo 1.

Susantha Ratnayake Esq. Chairman, Ceylon Chamber of Commerce, 50, Navam Mawatha, Colombo 02,
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Editors of Media Institutions

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## Remote Control Of Justice

by Basil Fernando

Next Saturday, the Bar Association will meet to discuss the resolution of non-cooperation with anyone who may be chosen to be the next Chief Justice in the event that the incumbent Chief Justice is impeached.

While that matter is being considered, a question may also be asked as to whether any person with integrity and commitment to the rule of law and independence of judiciary would want to become the next Chief Justice, or a superior court judge for that matter, in such an event. The responsibility of the superior court is to uphold the rule of law and the independence of the judiciary. Their primary task, of course, is to safeguard the individual liberties of all citizens in the event of those liberties being threatened by the executive. Such a task would become impossible in if the judiciary

is reduced to being a stooge to the executive. There will be a fundamental contradiction between the very meaning of being a judge and meeting the expectation of the executive to serve it wholeheartedly without regard to whatever implications that may have on the individual liberties of citizens.

It is an unfortunate fact that, in Sri Lanka, there is such an attraction for higher positions and status. In popular drama and other works of art, this is often depicted by the character of the "arachi", who has such a great love for his black coat and the silver buttons. It is unfortunate that, in the past, when there was competition in the elite families, becoming a judge in a superior court was considered more from the point of view of family prestige rather than from the point of view of onerous responsibilities that are inherent in holding such a position. The seriousness of responsibilities is symbolized by Thomas More, who has earned the title of "man for all seasons" due to his willingness to give even his life in defence of a principle.

When the judiciary is expected to play a stooge's role, it will not be a symbol of honor or prestige, but rather a symbol of shame and willingness to sacrifice integrity for the sake of demonstrating loyalty to the executive, irrespective of whatever burden the executive may cause on the liberties of the citizens.

For the legal profession and the judiciary, their role will significantly change as, by a final act of callous disregard for the rule of law and the independence of the judiciary, the Parliamentary Select Committee – members representing the government – have declared the Chief Justice to be guilty of some counts, despite the opposition members and the Chief Justice and her lawyers have refused to participate in the committee proceedings after raising very serious matters of principle. The Parliamentary Select Committee report, according to a government spokesman, is supposed to contain a hundred and twenty odd pages. The spokesman has also claimed that the document contains the arguments of law on the basis of which the PSC arrived at its conclusions. It is an amazing feat of genius for these seven members from the government, none of whom have any claim for proven intellectual excellence, to be able to write such a report within just a few hours.

The truth seems to be that the report was written by others and was already written before the inquiry was concluded. As for the finding, the public already knew that it was already predetermined from a higher source than the seven members of the PSC.

The most important criticism is that the PSC has pretended to be an impartial tribunal when it is not. Not only the conduct of the proceedings but also the manner in which the final written document was prepared demonstrated that it was not an impartial tribunal.

This matter is significant as, with the executive subordinating the judiciary to its will, even the basic procedural aspects that people are used to expecting from the courts are likely to disappear. I am reminded of watching a trial at a Cambodian court at the

time of the United Nations transitional authority in Cambodia, which was expected to assist Cambodia to recover from the losses suffered under Pol Pot's regime.

It was a trial for theft. The evidence consisted of reading a confession supposed to have been made by the accused, who was still a teenager, and the only defense allowed was to give reasons for reducing the sentence. When this was done (trial lasted an hour or so) the judge retired to his chambers and returned in 10 minutes. Then he began to read from a written text consisting of several pages. Obviously, the verdict had been written before the trial. When this matter was raised with the then Minister of Justice in Cambodia by the UN officers, the Minister explained that he did not rely on these not very qualified judges and that the verdicts are written in the Ministry of Justice, in which he had a few more-qualified persons. He further explained that if a person was already not found guilty, they will not bring him to a trial. The trial presupposed that the person was guilty. This Minister later expressed this same position to a Phnom Pehn Post journalist, who reproduced it in an article during the time.

The implications of having a stooge judiciary are similar. In a recent PhD thesis, which was received with honors at the Australian National University, Dr. Nick Cheesman writes a whole chapter on court proceedings in Myanmar, which he described as juridical proceedings in a marketplace. Long years of dictatorship have caused the loss of fair trial In Myanmar and today the young lawyers with whom I had a few discussions with could not even grasp the meaning of what law is.

All these are the considerations that Sri Lankans should face now. In fact, sober reflection would reveal that the impeachment proceedings and the verdict have nothing new in them. The causing of the forced disappearances of Prageeth Eknaligoda, the killing of the Sunday Leader editor Lasantha Wickramatunge and all the other episodes that are so commonly known to Sri Lankans are illustrations of a radical transformation of the manner in which "justice is meted out". In an earlier article I have mentioned that since the start of the forced disappearances of persons, which started with the large scale killings in 1971 under the coalition government, heinous crimes have begun to be considered as legitimate actions. What is new in the impeachment motion, proceedings and verdict is that this common phenomenon of lawlessness has found expression in a dramatic manner that no honest person can ignore.

The path for the rule of law and the independence of the judiciary lies now on the courage of the lawyers judges and citizens to actively engage in continuous non-cooperation with all schemes of illegality that the executive wishes to pursue. In the past, the great legal minds were tested by the cases they win and the precedents that they may help to create. However, in the midst of such lawlessness as now, the test of those who help to create the rule of law is a firm commitment to reforms. This alone is the only legitimate path open to anybody with a conscience and a sense of integrity who wishes to take any steps on the path of law.

*Courtesy: Colombo Telegraph*

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# Speaker, SLFP/UPFA Should Take Action against Two PSC Members!

by Laksiri Fernando

When I wrote my last piece on the impeachment debacle, "Parliamentary Select Committee Exposed," I was extremely concerned and shocked about the fact that the Chief Justice was insulted and humiliated by two members of the Parliamentary Select Committee. These happened reportedly irrespective of protests by the CJ, the legal team and the opposition members, and unfortunately complete disregard or tacit approval of the Chairman of the PSC, Anura Priyadarshana Yapa, whom I so far considered a decent gentleman or politician.

The walk out of the Chief Justice was in protest against this outrageous situation and there were unfortunately some who even considered the walkout itself as impeachable completely approving the humiliation that she had to undergo before these two male hecklers.

It came to my attention how much pain or anguish that public humiliation could inflict on a person, a woman or a man and in both of these cases women, when I came to know about the suicide of a female nurse in London who was humiliated unintentionally though because of a 'royal prank' call during the same week from Sydney, Australia.

It is not my intention to say that both cases are same except the fact of humiliation. When Kate Middleton, Dutches of Cambridge, was in a private hospital in London for reportedly morning sickness, there was a call from two young broadcasters from 2Day FM, Sydney, pretending to be the Queen and Prince of Wales asking about Kate's health early in the morning. A nurse of an Indian origin who was at the telephone exchange at that time allowed the call and information. She was apparently gullible under the circumstances. The radio in Sydney without much consideration for the implications, broadcasted the prank in effect humiliating the nurse. The nurse, a mother of two young children committed suicide on Friday apparently because of the humiliation.

The humiliation inflicted in the case of the nurse was not intentional. Last night I saw the two broadcasters who gave the call apologising and virtually crying. But the humiliation inflicted on the Chief Justice was not unintentional. Otherwise an apology should have been in order by now. I am sure that some even would unashamedly justify the humiliation and some have already done so by trivializing the words used.

One is a nurse and the other is a Chief Justice and a recognized legal academic. There is of course a vast difference in education and background and hence stamina for endurance. The Chief Justice probably would like to forget about the insults given her stature, determination and courage. As the Buddha said, if you don't take insults, the insulters have to take them back. But humiliation is humiliation whether it is a nurse or a Chief Justice. In the case of Sri Lanka this is a public interest issue given the deteriorating ethics and culture of particularly the politicians. Some have become nose biters and ear eaters!

The reported utterances of the two members of the PSC are completely unacceptable by all standards, national and international. Therefore, disciplinary action should be taken against these two members. By whom might be a million dollar question? The following are some options.

There is no much point in asking the present President personally to take action against these two Ministers. Asking any justice from him would prove futile given his jubilant attitude against the rivals or enemies and also jovial defence of people like (Dr) Mervyn Silva. He does not seem to be serious about justice.

Asking the Speaker to take disciplinary action against these two members of the Parliamentary Select Committee however is in order as they were appointed to the PSC by him in his official capacity. At least in that way the Speaker might be able to

preserve the reputation of the Parliament from public contempt. Otherwise talking about 'supremacy' of parliament is useless.

Asking the Secretaries of the SLFP and the UPFA is also in order because one Minister is a member of the SLFP and the other one does come under hopefully the discipline of the UPFA as his party is a constituent member.

Whether the above efforts would prove futile or not, another option left for the legal fraternity, the civil society and the opposition political parties is to boycott the two ministers from all public events at least for an earmarked period in protest.

We all have seen the photograph published in The Island newspaper yesterday (10 December 2012) captioned "Divided in fighting, united in feasting." No one would ask opposition parliamentarians or anybody else to be impolite or disrespectful to anybody in the government even those who were involved in insulting the Chief Justice. There are circumstances that we have to be civil and social to all human beings. But politics simply would become a joke if the opposition politicians are not serious about what they preach or claim to fight for. The following is the photo.

Divided in fighting, united in feasting

Courtesy: The Island

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## The King Asserted That He Was Competent To Exercise Judicial Power: What The CJ Said?

by Nihal Jayawickrama

We do not seem to appreciate the fact that in this country it is the Constitution that is supreme; not the President, not Parliament; not the Judiciary, but the Constitution. It is explicitly stated in its preamble, that the Constitution is the supreme law of the Democratic Socialist Republic of Sri Lanka. It means not only that every institution of government is subject to the Constitution, but also that all power flows only from the Constitution. The legislative power exercised by Parliament, the executive power exercised by the President, and the judicial power exercised by courts and other institutions established by law, are derived from, and defined by, the Constitution.

The Constitution also makes it explicit that only the Supreme Court has "sole and exclusive jurisdiction" to hear and determine any question relating to the interpretation of any provision of the Constitution. If any such question were to arise

in the course of any proceedings in any other court, tribunal or institution that is performing a judicial or quasi-judicial function, such question is required to be referred forthwith to the Supreme Court. Under the 1972 Constitution, it was the Constitutional Court that performed this task. When that Court was examining the Press Council Bill, a question arose whether the requirement to convey its decision to the Speaker within 14 days of the reference was mandatory or directory. Amidst angry rumblings in the National State Assembly where the Speaker had ruled that it was directory, the President of the Court declared that the Court would sit even until doomsday, until all the counsel had been heard, because, as he explained:

"The duty of interpreting the Constitution is ours and ours alone. To interpret it, we have to first understand it. For that understanding, we have to rely on our own judgment, assisted, if need be, by the opinions of learned counsel. Any other course of action involves an abdication of our own functions. It therefore follows that our duty by the Constitution and the People in whom Sovereignty resides, is to continue to perform the function which the Constitution enjoins on us. That we intend to do."

It is from the Constitution (unlike in England) that the three principal branches of government derive their powers. Legislative power is exercised by Parliament and by the People at a Referendum. Executive power is exercised by the President elected by the People. Judicial power is exercised by "courts, tribunals and institutions, created and established, or recognized, by the Constitution, or created and established by law". The only exception is in respect of the privileges, immunities and powers of Parliament and of its Members, where "judicial power may be exercised directly by Parliament according to law". When Article 4 of the Constitution states that judicial power is "exercised by Parliament through courts and other institutions" that are "created and established by law", it obviously means that judicial power is exercised by Parliament, not directly, but through institutions that it has created and established by law.

Two important consequences flow from Article 4. Any institution seeking to exercise judicial power must be established by "law". Even the determination and regulation of the privileges, immunities and powers of Parliament is required to be by "law". In fact, Article 67 of the Constitution states that until these are determined and regulated by law, the Parliament (Powers and Privileges) Act of 1953 shall apply. There can be no confusion about what "law" means. Article 170 of the Constitution defines "law" to mean any Act of Parliament and any law enacted by any previous legislature. It does not include the standing orders of Parliament.

Why then does Article 107 of the Constitution give Parliament the option of acting either through law or standing orders in providing for matters relating to the presentation of an address for the removal of a Judge, "including the procedure for the investigation and proof of the alleged misbehaviour"? The answer to that question appears to be quite simple. If Parliament chooses the option of legislating, it may do, for example, what the Indian Parliament did by the Judicial Standards and Accountability Act of 2012. That is, establish a National Judicial Oversight

Committee to which the Speaker of the Indian Parliament is now required to refer any charge of misbehaviour or incapacity against a Judge. That law has prescribed a detailed procedure for the investigation of such charge.

Alternatively, if Parliament decides to proceed by way of standing orders, it may provide for the Speaker to refer the charges to an existing institution vested with judicial power, such as the Supreme Court, as is the case in respect of a resolution for the removal of the President under Article 38 of the Constitution. It cannot, by standing order, establish, say, a new tribunal or other institution for this purpose since, under Article 4, that can only be done by law.

What Parliament also cannot do, is what Standing Order 78A purports to do. It cannot establish a Select Committee of Parliament to investigate the charges and report whether or not the offence of "misbehaviour" has been proved. This is because a Select Committee is not "a court, tribunal or other institution created or established by law to exercise judicial power". That was why, in 2000, by common consent of all the political parties, provision was sought to be made in the Constitution itself for an inquiry to be held, in the case of the Chief Justice, by three persons who hold, or have held, office in the highest court of a Commonwealth country; and in the case of any other Judge, by three persons who hold, or have held, office in the Supreme Court or Court of Appeal. This option was proposed by the United Front Government for the specific purpose of remedying the defect contained in Standing Order 78A.

There are sound reasons why a Select Committee is not competent to find a Judge guilty of "misbehaviour". A tribunal that is called upon to determine whether a charge of "misbehaviour" is proved, has to address three other questions before it can proceed to do so.

The first is the meaning and content of "misbehaviour", an offence not defined in our law. It will be necessary to identify the precise elements that constitute "misbehaviour", perhaps by reference to relevant decisions of courts in other jurisdictions. Without identifying these elements, it is not possible to proceed to the next stage, which is investigation. The purpose of the investigation is to apply the law to the facts as presented by the accusers, in order to determine whether the offence of "misbehaviour" has been committed.

The second is the degree of proof that is required. Is it a balance of probability, or proof beyond reasonable doubt? This matter needs to be clarified before proceedings begin, because on that will depend the nature, quality and quantity of evidence required. Will a layman serving on the Select Committee be able to distinguish between these two standards of proof?

The third is the burden of proof. On whom does it lie? Under our law, the burden always lies on the person who makes the accusation; in this instance, the 117 members of the government parliamentary group. Every person is, under our

Constitution, "presumed innocent until he is proved guilty". Standing Order 78A, on the other hand, states that the Judge who is accused "may adduce evidence, oral or documentary, in disproof of the allegations made against him". To require an accused person to disprove the charge against him, is to turn our system of justice on its head. Under Article 13(3) of the Constitution, it is only by law (and not by standing order) that Parliament may place the burden of proving particular facts on an accused person. On that ground, the standing order is clearly unconstitutional.

The determination of these three questions is a classic example of the exercise of judicial power. It is no different to the situation envisaged in Article 36 of the Constitution where the Supreme Court will need to make similar determinations before a resolution to remove the President from office is voted upon in Parliament.

In this connection, it may be pertinent to recall the celebrated conversation that Sir Edward Coke, Chief Justice of England, had with King James I in 1607. The King asserted that he was competent to exercise judicial power. The Chief Justice records thus:

* Then the King said, that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges:

* To which it was answered by me, that true it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason, but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it; and which protected His Majesty in safety and peace:

* With which the king was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said.

*Courtesy: The Sunday Island*

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# Constitutional Supremacy Or Parliamentary Supremacy?

by Kamal Nissanka

When notices were sent to the Hon speaker, President and the members of the Select Committee impeaching Chief Justice by the registrar of courts, the Speaker and leader of opposition were vociferous about the notion of supremacy of Parliament and they seemed not to heed to the Supreme Court request/order to appear before or submit objections on pending cases against them. They by now should know that only the President of the country under the constitution is immune to litigation. If the parliamentarians concerned had thought that they were also citizens of Sri Lanka as us, they would have readily abide by the Supreme Court directive until the constitutional issue before the court is finally determined. Unfortunately Hon Speaker further kept a step forward and related a speech delivered by Mr.Anura Bandaranaike , then Speaker of Parliament in 2001 upholding the idea of parliamentary supremacy when there was an stay order against the Speaker.

Now if one goes to the root of the logic behind the speaker 's speech one can understand that what the speaker believed was that parliamentary supremacy could not be infringed by any other outside body. It is worthy at this stage to note that belief of Parliamentary supremacy is a notion evolved in United Kingdom where there is no written constitution. In short Parliamentary supremacy can be defined as the power of parliament to make laws and unmake laws. The duty or business of the courts is to follow the legislation already enacted by Parliament and then interpret, adjudicate, redress or punish. Yet, though the courts do not make any legislation judgments of superior court are considered as binding law.

In the post independence period political-legal community followed a tradition to accept the notion of Parliamentary supremacy as experienced in United Kingdom. Yet, although the Soulbury Constitution upheld the idea of parliamentary supremacy; it is interesting to note that Parliaments under the Soulbury Constitution

also did not enjoy infinite supremacy to make laws as the constitution under Article 29(2) restricted to make legislation in some areas and subjects.

The 1972 constitution which had only one chamber was consciously framed on the basis of the notion of parliamentary supremacy. Accordingly, legislative power was vested in the National State Assembly, executive power in the National State Assembly through President and the cabinet , while judicial power by National State Assembly through courts except in parliamentary privileges. There was also a Constitutional Court to determine matters relating to constitutionality.

The 1978 constitution which lasted for over 30 years now is somewhat different from the two earlier constitutions. The founders of the constitution have clearly deviated from the British tradition of constitutional theory. Prof.A.J. Wilson, former professor of Political Science, declared that the 1978 constitution had been extensively influenced by the present French Constitution. The 1978 constitution took a quasi federal nature with introduction of 13th amendment and parliament lost some of its powers regarding some subjects and lost sole supremacy over legislation.

On the other hand this parliament does not have executive power as in the 1972 constitution. 1978 constitution explicitly says that executive power shall be exercised by 'the president of the republic elected by the people "(not by parliament). So this is clear deviation from the British tradition of parliamentary supremacy. True that ministers who are also said be in the executive branch are chosen from the parliament but they are subordinated to the president who can keep any ministry or department under him. They do not enjoy the prestige they had under the British tradition. The president through the cabinet can make the parliament his appendage and the dignity of the parliament is completely eroded, added by the PR system of electoral method which allowed all sorts of anti social elements to enter into parliament. Parliament is further devalued because the President can dissolve it after one year of an election.

The position of judiciary is made explicit under the 1978 constitution. According to the Article 118, the Supreme Court is the 'highest and final court of record' in the Republic. It has jurisdiction in respect of constitutional matters, for the protection of fundamental rights, consultative jurisdiction, and jurisdiction in election petitions including the election of President. It also has jurisdiction whether to determine a bill was consistent with the constitution. This jurisdiction can invoke by president or any other citizen. Its determination is sought of regarding urgent bills which the cabinet thinks to pass urgently for national interest concerns. It has jurisdiction to determine the validity of the expulsion of a member from a political party. It has role to play in the impeachment of a President of the Republic. Therefore it is very clear that the Supreme Court under the present constitution is a very powerful body that is endowed with important national responsibilities. Further the constitution has endorsed the idea of an independent judiciary.

Standing orders cannot be considered as law by any learned person in the legal profession. Under our legal system laws are legislation, decided cases, customs and may sometimes international covenants. Standing orders are procedural regulations. Further they cannot be formulated against the provisions of the constitution. Rules and regulations are there in various corporations, companies, societies to conduct their day to day activities. Can an outsider be brought to face trial on the basis of these regulations? Is that justice? Is that rule of law?

When there is matter before the Supreme Court to be decided, specially a matter of interpretation it is the sacred duty of all law abiding persons to obey its directives. Under our constitution people are sovereign and the constitution is supreme not the parliament. This is what is called constitutionalism, a legal philosophy derived from the famous case in the United States of America, Marbury Vs Madison, 1 Cr. 137 (1803) decided by John Marshall ,CJ. The decision held that:

"Congress did not have the power to add to the original jurisdiction of the Supreme Court; thus, the available remedy mandamus ,was unconstitutional .More significantly , Marshall logically extracted the power of judicial review from the constitution by reasoning that the document was supreme and, therefore , the Supreme Court should invalidate legislative acts that ran contrary to it."

In conclusion it could be said that the idea of parliamentary supremacy which both the Hon. Speaker and the Leader of the Opposition attempted to uphold in a holy manner is an outdated and obsolete political-legal concept which has no relevance in the present constitutional framework of Sri Lanka.

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Courtesy: Colombo Telegrpah

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# Reducing Of Sri Lanka's Judiciary To A Mockery

by Kishali Pinto-Jayawardena

Nowhere in South Asia or indeed the entire world (excepting in failed states) would a responsible government hire thugs and party supporters to jeer and hoot at the Chief Justice of the country while she was leaving the superior courts complex to appear before a parliamentary select committee considering her impeachment.

Yet in Sri Lanka, this is what happened a few days ago. Nowhere in the world except in pariah nations would government members of parliament have been allowed to verbally insult the Chief Justice (Sri Lanka's first woman Chief Justice at that) and her lawyers while they were participating in the deliberations of a select committee.

Yet this is what is reported to have happened on Thursday. Unable to bear the continuous insults, the Chief Justice's decision to walk out of the select committee proceedings must be commended. Her courage in facing such an inquisition with head held high must be recognised.

Spewing of vile abuse against the head of judiciary

This is the culmination of a process that has brought Sri Lanka tremendous shame and lent credence to the claims of its detractors who refer to the country as a democratic graveyard. For the past several weeks, the Chief Justice was mercilessly hounded by government media propagandists as they spewed vile abuse on radio talk shows.

Blatantly contemptuous placards were carried by three wheeler drivers and lottery sellers right outside the seeming citadel of justice on Hulfsdorp Hill. State protection was provided for all these acts.

The government appeared to have abandoned all norms of ordinary decency befitting treatment of a human being let alone a judge, let alone the head of the judiciary. It appeared to have turned virtually mad in its desperate struggle to counter what has turned out to be a huge embarrassment for it.

No wonder that judges and lawyers throughout the country rallied to the support of the beleaguered Chief Justice, from provincial Bars as remote and diverse as Matara, Anuradhapura, Kandy, Jaffna and Vavuniya.

It was as if with a rush, the legal profession and the judicial service particularly in the outstations realized the great dangers that they were in (at last) and decided to push against the rock of executive humiliation of the judiciary with determination.

Walkout of the Select Committee a foregone conclusion

From the commencement of this fiasco, the issue was less the constitutionality of the process, (regardless of the vehement submissions made by lawyers appearing in cases challenging the impeachment), and more the fairness of the procedure followed and the clearly political timing of the impeachment itself.
Certainly the impeachment procedures as constitutionally stipulated violates basic norms of fair adjudication both domestically and on international standards.

They deny an appellate court judge even the most rudimentary rule of law safeguards afforded to a common criminal. But in previous impeachments, convention and good sense dictated that an unwritten line of propriety was not crossed. Through its intemperate fury at being challenged, the Rajapaksa government has however put paid to that past practice.

In no seemingly democratic country would a Chief Justice be subjected to an impeachment process distinguished by the inquiry committee's inability to prescribe rules of procedure for its sittings (as pointed out by its members representing the Opposition in the public interest), its refusal to open the hearings for public scrutiny in the interests of transparency and accountability and its reported refusal to allow the Chief Justice's lawyers to cross examine witnesses cited in the documents filed against her or to allow more time for her to answer allegations contained in a thousand page bundle of documents. Her walking out of the Select Committee proceedings this Thursday was therefore a foregone conclusion.

No need for a contempt law now

From 1999 to 2009, we had a Chief Justice whose conduct in and outside Court as documented opened up the judiciary to unrelentingly harsh public scrutiny. And as much as water rushes out when the walls of the dam is first breached, former Chief Justice Sarath Silva's successors could do little but pay obeisance to the executive. It was when the judicial tide turned as a result of one humiliation being enforced a step too far that we saw the avalanche of executive anger being unleashed.

The Minister of Justice has pontificated to the media this week that the government plans to enact a contempt of court law soon. But let it be clearly said that there is now little purpose for such a law. The primary aim of a contempt law is to protect the administration of justice and the dignity of the courts while allowing for reasoned and crucial debate on the functioning of the justice system. Yet the administration of justice has already been rendered a snarling mockery and the dignity of courts has been remorselessly stripped away by this government and its media hounds. Day after day, the Chief Justice is attacked beyond all norms of propriety with a government giving the full seal of its approval. A contempt of court law has become quite redundant in this post Rajapaksa impeachment climate as much as the concepts of justice and fairness have also become redundant. This is undoubted.

Painful destruction of an independent judicial system

Those who willfully turned a blind eye to the internal politicization of the Supreme Court from the year 1999 onwards, those who were foolhardy or blinded by their own interests to applaud the handing of a blank cheque to this Presidency to do what it would with Sri Lanka after the ending of the conflict and those who looked away when the 18th Amendment was enacted, should now rue their folly and culpable ignorance.
In previous columns starting from almost a decade ago, predictions that this precise fate would befall the Sri Lankan judicial and legal system if there was no course correction were greeted with shrugs and smiles from members of the legal profession. Some condemned these predictions as unnecessarily dire. Others were cynical enough to say that the system had survived despite past beatings.

But now as we see a Sri Lankan Chief Justice humiliated by common ruffians who hold the money which they were paid in one hand while they shout slogans with their other hand upraised, these complacent characters may well ruminate on their unfortunate inability to recognise the warning signals. This column makes no apology for repeatedly stressing the most coruscating lesson to emerge from this cataclysmic upheaval, particularly for those of us trained in the discipline of the law.

Even if new struggles are born as a result of the ongoing inquisition cum impeachment of the country's Chief Justice, this is the comprehensive end of Sri Lanka's independent judicial system as we have known it since 1948. It is a sad day indeed.

Courtesy: The Sunday Times

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# Impeachment of the Chief Justice, did she get a fair trial?

by K.D.C.Kumarage

Some citizens including lawyers have filed petitions in the Court of Appeal seeking writs restraining the Parliamentary Select Committee (PSC) from inquiring into allegations mentioned in the impeachment motion submitted to Parliament by some Members of Parliaments (MPs). The Court of Appeal has referred them to the Supreme Court (SC) since there is a constitutional problem involved. In the meantime some fundamental rights (FR) cases have also been filed in the SC stating that the Standing Order 78 (A) violates FRs under various articles of the constitution. Having considered these applications a panel of three judges of the SC has issued notices to the members of the PSC. And everyone knows now that the Speaker has made an order to the effect that no court could issue process on the Speaker or any committee appointed by him. However the SC has decided to go ahead with the inquiry.

Let us take our memory back to the impeachment inquiry select committee appointed by the Speaker to impeach Neville Samarakoon the then Chief Justice (CJ). Mr S. Nadesen QC who represented the respondent CJ took up a preliminary objection that standing order 78 (A) is ultra vires the constitution and that the said select committee had no power to proceed with this inquiry because it violates article 4 (C) of the Constitution which stipulates that except in matters concerning Parliamentary Privileges the Judicial power of the people has to be exercised exclusively through the courts.

In its report at the conclusion of the inquiry a majority of members (five members) representing the government in the PSC writing a separate report dealt with the objection taken up by Mr Nadesan as Follows. " While the members of the committee have certain reservations regarding the validity of Mr Nadesan's contentions particularly in view of the specific provision of Article 107 of the Constitution of the Democratic Socialist Republic of Sri Lanka , this committee feels that notwithstanding any objections it is duty bound to carry out the mandate given to it

by Parliament according to the terms of reference specified. In carrying out this task the committee is fortified by the fact that the exercise of disciplinary power over the higher judiciary in a large number of countries almost without exception is a right which has been exercised by the Parliament. Furthermore under the standing order 78(A) Parliament exercises its power in the fulfilment of its duty under Article 107(3) of the constitution.

Submissions made by Mr. S. Nadesan Q.C. on behalf of Neville Samarakoon C.J. that "In a constitution such as that of our country, in which separation of powers is jealously protected , the Committee in seeking to go on with the inquiry as to whether or not Mr. Samarakoon was guilty of "proved misbehaviour," was violating the provisions of Article 4(c) of the Constitution , which stipulates that except in matters concerning Parliamentary Privilege –the judicial power of the people shall be exercised by the courts."

What is more significant in the present context is findings of the separate report of the three members of parliament, of the opposition namely, Sarath Muththettuwegama, Anura Bandaranaike, and Dinesh Gunawardane who happens to be a cabinet minister and the leader of the House in the present government.

Their separate report states "Although Mr. Nadesan's arguments have considerable cogency they were unable to come to a definite conclusion on that matter. Therefore they urge H.E. the President to refer this matter to the Supreme Court for an authoritative opinion thereon –under Article 129(1) of the Constitution" Moreover the separate report goes onto state that "The signatories to this statement however feel that the procedure that Parliament finally adopts should be drafted along the lines of the Indian provisions where the process of inquiry which precedes the resolution for the removal of a Supreme Court judge should be conducted by Judges chosen by the Speaker from a panel appointed for this purpose. We therefore urge the House to amend Standing order 72A accordingly." It is not difficult to understand how. Dinesh Gunawaradane MP who took up the said strong position against the Standing Order 78A in their separate report in the Neville Samarakoon impeachment inquiry did a completely somersault in the present impeachment inquiry against the incumbent Chief Justice.

It is important to look at the procedure stipulated in the Constitution to impeach the President of Sri Lanka. Under Article 38(c) of the Constitution once a resolution is passed by not less two-thirds of the whole number of members (including those not present) voting in its favour, the allegation or allegations contained in such resolution shall be referred by the Speaker to the Supreme Court for inquiry and report. It is common knowledge that the Supreme Court holds such inquiry observing all fair trial and due process guarantees applying accepted rules of evidence.

In India, The Judges Inquiry Act of 1968 provided for the impeachment of higher court judges. Provision of this section is read with Article 124(5) of the Indian Constitution. This was later developed further by the New Judicial Standards and Accountability Act 2012.

It enables the parliament to proceed with the resolution for the removal of the Supreme court Judge only after the President of India has forwarded a report to the National Judicial Oversight Committee which comprises, a retired Chief Justice of India, a Judge of the Supreme Court, a Chief Justice of the High Court of the State , the Attorney General of India and an eminent member nominated by the President of India. The President of India holds no -executive post unlike his/her counterpart in Sri Lanka.

Once when the impeachment motion is submitted to the Parliament , the speaker of the Lokh Sabha refers the allegations to the above panel who will go through it and if they find the charges are not well founded they will inform the Speaker accordingly and the matter ends there. If they find that one or more of the allegations merits inquiry they will hold a judicial inquiry guaranteeing all fair trail and due process rights to the responded Judge. At the end of the inquiry if they find that the charges are proved they will submit the report to the Speaker of the Lokh Sabha. Thereafter the resolution for impeachment must be adopted by both houses of Parliament i.e. Lokh Sabha and Raja Sabha by a two third of MPs, including those not present.

It is clear therefore from the above example how fair, the impeachment procedure of Judges are under the respective legal systems.

As the great jurist John Rawls has stated "Justice is fairness." A politician according to him is one who cannot by his very nature "divorce his political interest from his judgement." This truism of Rawls apply aptly to the seven members of the PSC. The ratio of appointing members of the PSC according to the party strength in the Parliament violates the principles of equality before the law. Ours is a Parliament which always votes politically. It is impossible to expect a different attitude from them. In a Parliament which is totally subservient to the President none of the seven members will never vote against the wishes of the President.

In Sri Lanka where the Jury system still prevails in criminal trials, the jurors are elected by a lottery. The accused person facing trial can object to any number of jurors on various grounds. But in the impeachment inquiry of the Chief Justice of Sri Lanka the majority of judges as well as jurors are the MPS of the governing coalition whose verdicts are predictable beforehand.

Now the people in Sri Lanka as well as the world over are aware that the Chief Justice walked out of the PSC in protest of the hostile, biased and scurrilous conduct of the latter. Her lawyers have stated, according to media report that the Chairman of the PSC had stated that no oral evidence would be led to establish allegations and

hence no opportunity of cross examination of such witnesses would be granted to respondent's lawyers. It was evidenced to lawyers that the accepted natural law principle that"those who alleged must prove" has being shifted to the responded.

John Amarathunga, one of the four MPs who sat in the PSC told the Washington Post that the four of them walked out of the sittings of the committee because they could not be a party to an unfair process. He has stated further the government members using their numerical majority rejected what they said were reasonable demands to establish a procedure for the inquiry and to give Dr Bandaranayake an opportunity to cross examine the accusers and enough time to pursue the three hundred documents relating to the case. He further stated that too many of the accusers and judges in the case were from the same group – government law makers, whereas in other countries such inquiries were assigned to separate legal professionals appointed by Parliament. He further stated that government law makes treated Dr. Bandaranayake in an insulting and intimidating manner and their remarks clearly showed they already found her guilty. The same newspaper reported that the US State Department spokesman Mark Toner as saying , "US is Deeply concerned about actions surrounding the impeachment trial and urge the government and ensure due process. These latest developments are part of a disturbing deterioration of democratic norms in Sri Lanka including infringement of the independence of Judiciary. He called upon the government to uphold the Rule of Law.

Courtesy: Daily Mirror

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# We Are Told That CJ Is A Rogue And A Cheat But It Is Crystal Clear That The Decision Is Political

by Vickramabahu Karunaratne

Among the first modern authors, to give principle theoretical foundations to the notion of 'rule of law' were Samuel Rutherford in Lex, Rex (1644). The title is Latin for "the law is king" and reverses the traditional "the king is the law". In 1776, the notion that no one is above the law was popular during the founding of the United States. For example, Thomas Pain wrote in his pamphlet that "in America, the law is king. For as in absolute governments the King is law, so in free countries the law ought to be king; and there ought to be no other." In 1780, John Adam enshrined this principle by seeking to establish "a government of laws and not of men." Thus we see that the rule of law came in to satisfy the needs of market economy of the bourgeoisie society. Market can survive only if promises and assurances are upheld in a formal manner. Such bindings should be sacrosanct; thus giving the necessity to take the law away from human personality to be a thing in itself. All government officers of the United States including the President, the Justices of the Supreme Court and all members of Congress, pledge first and foremost to uphold the Constitution. This formality, with a deep meaning, has been adopted in many countries including Lanka. These oaths affirm that the rule of law is superior to the rule of any human leader. The rule of law has been considered as one of the key dimensions that determine the quality and good governance of a country. World over, authorities define the rule of law as: "the extent to which agents have confidence and abide by the rules of society, and in particular the quality of contract enforcement, the police and the courts, as well as the likelihood of crime or violence." on this definition a government based on the rule of law can be called a "nomocracy."

It is true that the parliament in general is responsible for making laws and in the form of a constituent assembly it can dismiss the current constitution and inaugurate an entirely new constitution. But having said all that we have to agree that even the

parliament and all political organs are bounded by the constitution; the fundamental law of the country. No way can we accept the idea that parliament as the law maker stands above the law of the country. Lankan constitution has empowered the Supreme Court as the sole authority to interpret the constitution. In effect it is a power bestowed by the parliament. In fact it is a privilege of the parliament to be able to consult SC when ever the need arises. If so how can the notice of the SC indicating its participation in an interpretation problem, relevant to the parliament activity, could create a breach of parliamentary privilege issue. On the contrary it is a privilege for the parliament to be notified and there is no room to consider that some kind of a warrant has been issued. The actions of a Select Committee or the Parliament are actions of the government and therefore the court alone has the jurisdiction to review the constitutionality of any such action by a government and advice the political leadership. Government is very sensitive on this impeachment issue as it is aware that its action is completely subjective and vindictive and also at a tangent to the constitution. Government leaders have accepted that this attempt to dislodge the CJ came because of her ruling in the Divi neguma case. Even otherwise it is crystal clear to any body that the decision is political and nothing to do with ethics and morals of CJ. If not they should have brought this out long time back.

Already huge campaign of posters, leaflets and booklets combine with hearsay was launched to discredit Shirani Bandaranayke. It shows that the government has no trust in their own legal strategy and hence resorted to a terror campaign to make her resign and go away. We are told that she is a rogue and a cheat; hence not fit to act as a judge. This campaign shows that impeachment is just a façade to initiate pressure to push her out. Government action has created a reaction that has spread through out the Lankan society. It has drawn the attention of international democratic forces including the trade unions. Here too, trade unions have started a campaign to arrest the villainy of the government. It has disturbed the bourgeoisie society too. Not only lawyers but also other professionals and business mangers have come out condemning the actions of the government. It is the government that has taken the first step to draw this issue in to the streets. Disregarding threats of the government people have come out in support of judiciary. People who were angry over budget proposals are now coming out on this issue which has attracted all classes in society. We must expect a civil unrest that could challenge the authoritarian regime of Mahinda.

Courtesy: Lakbima News

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# You Can't Say Parliament Is Supreme Over The Other Two Institutions

by M.A. Sumanthiran

The other issue is also one of great concern to us, that of military rule. The Hon. Member was heard to talk of the Rule of Law. We don't want military rule in any part of the country. Be it LTTE rule or even Sri Lankan Army rule. We want civilian rule.

We don't want the Army rule, but there is a military rule that is being imposed upon our people and that is to be avoided.

It is true that during the time that the war was on there were certain necessities, but now it is 3 ½ years later…enough time to have changed the situation. It is not necessary to continue in that high-handed fashion. We are not going to achieve any reconciliation if it goes on like this.

Coming to the Rule of Law, I want to read A.V. Dicey, 'The Law of the Constitution'. These books are available in the library…those of you who can read, can read these things! And for your benefit I'll read certain portions, enough for you to be able to digest for the day. And this is what it says – the principle of the rule of law:

'The supremacy of the law of the land was not a novel doctrine in the 19th century. It may be traced back to the medieval notion that law, whether it be law ordained by God or by man, ought to rule the world.'

That is the Rule of Law and that is why our own Constitution also has very specifically, even in the preamble, talked about the Rule of Law. It says, that is a fundamental principle – the Rule of Law. It's on that bedrock that our democracy exists. Several mentions have been made in this House in the last couple of weeks

with regard to sovereignty of the people. In our Constitution the people are sovereign. It is not the Parliament that is sovereign. It is the people who are sovereign. This is different to the British concept…it is a British concept that the Parliament is sovereign. In fact, A.V. Dicey says that in Britain, Parliament means three things; the King, the House of Lords and the House of Commons.

All these three things, together, is called the Parliament and the essence of the supremacy or the sovereignty of Parliament is that Parliament can make any law whatever and Parliament can unmake law and that is what we call the legislative supremacy of Parliament.

In this country also we have the legislative supremacy of parliament…there is no supremacy of Parliament. That's a wrong notion. Not even in England, now. Hundred years ago that concept went out. In the 8th edition of A.V. Dicey, that was in 1855, he talked about the sovereignty of Parliament but in 1911, after the Parliament Act in the UK, in the 1914 edition, before he died, at the age of 92, he retraced it and said that the concept of Parliamentary sovereignty was outdated, and that was in 1911…hundred years ago in England. The situation had changed. But in Sri Lanka, in the 1972 Constitution, we did have the notion of Parliamentary supremacy or the legislative supremacy of Parliament. In the 1978 Constitution, for the first time, the issue of referendum was introduced.

In our Constitution we have two concepts: one is the rule of law and the other is separation of powers and as Parliament is supreme in the legislative sphere, the Judiciary is supreme in another sphere. Even in England, the concept of legislative supremacy came about through interpretation of Courts. In our Constitution, in Article 125 it has been very clearly laid out that it is only the Judiciary, and that too only the apex court, the Supreme Court, that has the sole and exclusive jurisdiction to interpret the Constitution.

When the concept of referendum was brought in the 1978 Constitution – it wasn't there in 1972 Constitution – why was that brought in? It was brought in because the powers of Parliament were limited. Even by 2/3 majority you can't change certain things in the Constitution. You can change it only by additionally going directly to the people and getting their consent at a referendum. That is why we have these entrenched clauses in the Constitution.

The point that I'm making is that in the 1st Republican Constitution you could make any law. You didn't have to get the consent of the people at a referendum. But now, under the 2nd Republican Constitution that we live under, the power of the Parliament has been restricted because you can't change or you can't make laws contrary to certain entrenched provisions.

You have to go directly to the people because the people are sovereign, not Parliament. People have delegated their sovereignty to be exercised by three modes of governance and one has been given to Parliament, the other has been given to the

President…the President has also been elected directly by the people but that does not mean that the Executive is supreme. Parliament is elected by the people, President is directly elected by the people…you can't say Parliament is supreme over the other two institutions, merely because the Parliament is elected by the people.

These are three parallel institutions that operate under a concept of separation of powers and unless we function in that way, the whole system will collapse.

Thank you very much."

*Text of speech made in Parliament on January 7th 2012

Courtesy: dbsjeyaraj.com

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## The Walk Out Of Chief Justice And The Rajapaksas

by R Hariharan

The walk out of Chief Justice Mrs Shirani Bandaranayake and her team of lawyers from a Parliamentary Select Committee (PSC) hearing on an impeachment motion against her Thursday was an eloquent testimony to the charade being enacted in Sri Lanka in the name of democracy. Probably it is a matter of time the PSC would find her guilty of the charges of corruption slapped against her.

Mrs Bandaranayake, who was picked by the President for the high office though she lacked adequate judicial experience, fell out of favour with her ruling on the Dive Neguma Bill. She ruled that the Bill required the approval of all provincial councils before enactment as it impinged upon their constitutional powers. Apparently she had taken her job too seriously and stopped the Bill from being passed forgetting it was moved by President's brother Basil Rajapaksa, Minister for economic development.

The Divineguma Bill aims to create a department merging three authorities – Samurdhi, Southern Development and Udarata (up-country) Development involved in savings and loan schemes. Though the Bill appears innocuous, its enactment would deprive the limited financial powers of provincial councils have rural development. The Bill is important for the Rajapaksa clan because it forms part of President Rajapaksa's grand plan to consolidate his hold on power. And as a masterly stroke, it would strike one more nail in the coffin of the much maligned 13th Amendment (13A) to the Constitution which created the provincial councils.

The Rajapaksas are set on getting rid of the 13A. The first call for abolishing 13A came up from the President's brother and defence secretary Gotabaya Rajapaksa in September 2012. It was vigorously backed by some coalition partners – the Right wing Jathika Hela Urumaya (JHU) and the former JVP-leader Weera Wansa's

National Freedom Front (NFF) and the Mahajana Eksath Party (MEP). Both JHU and NFF feared if it is not abolished the "anti national" and pro-LTTE Tamil National Alliance (TNA) was likely to gain control the Northern provincial council in September 2013. Basil Rajapaksa vexed by the opposition criticism of the Dive Neguma Bill spoke of the need to replace 13A and suggested introducing 19thamendment. The ruling coalition immediately reacted to say there was no move to abolish the 13A when probably the Chief Justice's ruling was not factored in the scheme of things.

So the President cleared the air when addressed the parliament on November 8. In his budget speech he said, "A change in the prevailing Provincial Council system is necessary to make devolution more meaningful to our people. Devolution should not be a political reform that will lead us to separation but instead it should be one that unifies all of us." He added "the elimination of provincial disparities using national standards" was the main weapon "through which national reconciliation can be promoted…That will be an effort which ensures greater self-respect than having to lobby foreign countries to interfere in our internal problems."

The three operative ideas in the above quote are – devolution should not lead to separation, use of national standards to eliminate provincial disparities, and ensuring greater self respect "than having to lobby foreign countries to interfere in our internal problems." In other words he wants centralised dispensation of powers, use standards as decided by him and his coalition to eliminate provincial disparities, and keep foreign powers (obviously India) off the political turf of Sri Lanka.

Obviously, 13A introduced to implement India-Sri Lanka Agreement 1987, is central to all the three operative ideas of the President. But what was the hurry to get rid of 13A – the toothless tiger caged by Colombo? After all, 13A implementation was handy for the President to make repeated promises to India on devolution. New Delhi also found it useful to save its face in its nebulous coalition predicaments in Tamil Nadu. But every move the President has made so far, not only on the issue of 13A or Divi Neguma or impeachment of Chief Justice, but also on many other acts of omission and commission is part of the jig saw puzzle of his game plan. At the heart of it is implementing his vision on devolution of powers to minorities envisaged in the Mahinda Chinthana released on the eve of his election as President in 2005.

The Chinthana expounds Rajapaksa's ideas and plans on rights of citizens including media, equality of citizens, social development and welfare.Its portions relating to the Liberation Tigers of Tamil Eelam (LTTE) are obviously no more relevant. The President has been implementing his vision selectively, ignoring some inconvenient parts like those relating to free media. But as far as devolution is concerned he is going by the Book.

His concept of devolution differs from what has been evolved and understood in the last three years. Till his advent major parties including his own Sri Lanka Freedom Party (SLFP) as well as the major opposition United National Party (UNP) as well as

the Tamil National Alliance (TNA) had accepted it. And they recognised rights for minorities. But Rajapaksa does not distinguish minorities from majority but his solution is based upon majority consensus. But what does it mean in terms of unfinished narratives of devolution, equal rights of minority etc which have been discussed and debated for last five decades? What happens to his assurances to his home constituents as well as international community notably India on this subject? Whatever he said so far does not matter because his ideas spelled out in the vision statement only will be implemented.

The relevant portions of the Chinthana say:

Primacy for Buddhism:"while preference will be given to Buddhism in terms of the Constitution will be consolidated, all other religions including Hinduism, Islam, Catholicism and Christianity will be treated on equal footing."

What does this mean? What does consolidation of Buddhism in terms of "constitution" mean? These questions will probably figure in the minds of sections of Christians, Hindus and Muslims.

Devolution: His "primary aim is to arrive at a peaceful political settlement where the power of each and every citizen is strengthened to the maximum, without being trapped into the concepts such as traditional homelands and right to self determination. My intention is to devolve power to the level of the citizen…."

To do this, he would "abide by the majority consensus which is a fundamental premise of democracy. The majority national view shall prevail over my view individual view." In other words, current discourse, talks and discussions on devolution of rights to minority Tamils are of marginal relevance as the final dispensation will require majority consensus and approval. With no minority recognised in the vision who will be the majority? Obviously, the larger Sinhala community. And this 'consensus' will be ratified by a referendum as the President promises to "submit the national consensus that emerges from the consultative process to a referendum of the people as soon as a consensus is reached." This would mean when the PSC on devolution completes the job, a referendum will decide whether to accept it or reject it. So what is all the song and dance about 13A? Obviously, it is to buy time for the President to cobble up a solution of his liking. That means the whole process may be carried over to the President's next term if TNA continues to stall the talks. If President Rajapaksa decides he may ask the PSC to evolve a consensus even in the absence of TNA and decide to get it validated by a referendum. Already at least one political party has asked for a referendum on getting rid of 13A. So at in near future we can expect whipping up of populist pressure for a referendum to remove 13A.

The President has the strength to implement his will; his brothers control key ministries, he has two thirds majority in the parliament with coalition partners eager

to please him. He enjoys unchallenged public popularity. With these advantages we can expect the following results of his policy:

Executive presidency: Executive presidency will be here to stay; and all strategies to abolish it will be thwarted. Any move on this count by Sarath Fonseka or other leaders will be defeated using all available instruments of power.
Judiciary: With the executive and parliament already under the President's control, judiciary is the only one that could spoil the game plan. The chief justice should be willing to conform to the wishes of the President and the government. Mrs Bandaranayake was not and she is facing the consequences. Soon a pliant candidate will replace when parliamentary formalities are over.

Tamil issue: The Tamil issue will be handled the way President Rajapaksa would like to do rather than to fulfil assurances to India or Tamil constituency or anyone else. The Provincial council elections in the Northern Province will be held only when TNA is 'tamed' and its tendency to lobby for "foreign interference in our internal affairs" is curtailed. (Already TNA is talking of creating five zones instead of provinces; does it mean it is abandoning 13A? ) If TNA does not fall in line by September 2013, the provincial council elections could be deferred.

Opposition: Opposition activity will be tolerated as long as they conform to rules laid down by the government. Ditto for media and trade union activities. So all the talk of fundamental freedoms and human rights by civil society can continue but the executive will respond to only to issues of their choosing.

Only thing that will hold up Rajapaksa Inc., juggernaut is growing pressures on national economy. The year 2013 is going to be crucial when it is time for servicing debts. This could dictate the President to be cautious about India and the U.S. as they have economic leverages to pressurise Sri Lanka. Both nations probably understand the President's ploys and vulnerability. And they will be keen to protect their own interests. How will they respond? That is a question waiting to be answered.

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*Courtesy: South Asia Analysis Group*

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## Chief Justice's impeachment hearing violates due process

The impeachment process against Chief Justice Shirani Bandaranayake ignores international standards and practice, says the ICJ.

The ICJ urges the government of Sri Lanka to take immediate steps to uphold the independence of the judiciary and adhere to international standards and practice on the removal of judges.

Today, the Chief Justice and her team of lawyers walked out of the impeachment hearing in protest over the denial of a fair hearing.

Protests supporting and opposing the impeachment process erupted on Tuesday 4 December 2012 as the Chief Justice appeared before the Parliamentary Select Committee for the second time.

Over two hundred judges, several hundred lawyers, trade union leaders and a large number of religious dignitaries assembled to show their support for the Chief Justice.

Opposition members of parliament publicaly called on the Government to adhere to principles of fair trial and due process in the impeachment process.

Reportedly the Chief Justice has been denied the right to cross-examine potential witnesses and has not been provided full disclosure of the allegations against her.

The Parliamentary Select Committee has also denied the request for a public hearing and prohibited observers from attending.

"Parliament is pushing ahead with an impeachment process that fails to adhere to fundamental principles of due process and fair trial," said Sam Zarifi, ICJ Asia Pacific

Director. "The Chief Justice's impeachment is part of a relentless campaign waged by the Rajapaksa Government to weaken the judiciary. An independent judiciary is the principle check on the exercise of executive and legislative powers – vital to the functioning of a healthy democracy."

As recalled by the United Nations Special Rapporteur on the independence of judges and lawyers in a statement last month, international standards require that judges be removed only in exceptional circumstances involving incapacity or gross misconduct.

A cornerstone of judicial independence is that tenure of judges be secure.

"Any process for removal must comply with all of the guarantees of due process and fair trial afforded under international law, notably the right to an independent and impartial hearing," Zarifi added.

The United Nations Human Rights Committee, in its 2003 concluding observations on Sri Lanka, expressed concern that the procedure for removing judges under Article 107 and the complementary Standing Orders of Parliament was not compatible with Article 14 of the International Covenant on Civil and Political Rights.

The Parliamentary Select Committee, presiding over the impeachment hearings is composed exclusively of members of parliament, the majority of which are drawn from the Government coalition. No members of the judiciary are permitted to sit on the Select Committee.

Comparatively in India, an impeachment hearing is presided over by a three-member committee comprised of a Supreme Court justice, a Chief Justice of any High Court and an eminent jurist.

In South Africa, a judge may only be removed after a hearing by the Judicial Service Commission, a body composed of members of the judiciary.

In Canada, all removal proceedings are conducted by the Judicial Council, a body composed of 38 chief and associate chief justices of the superior courts and chaired by the Chief Justice of Canada.

The United Nations Special Rapporteur on the independence of judges and lawyers warned against the misuse of disciplinary proceedings as a reprisals mechanism against independent judges.

The timing of the impeachment motion raises questions. The impeachment motion was initiated just days after the Chief Justice ruled against the Government on a controversial bill – the Divi Neguma Bill – before Parliament.

If the bill passed, the Minister of Economic Development (who is also the President's brother Basil Rajapakse) would have had control over a fund of 80 billion Sri Lankan rupees (611 million USD).

Attacks on the judiciary have been escalating in recent months. In July 2012, Government Minister Rishad Bathiudeen threatened a Magistrate in Mannar and then allegedly orchestrated a mob to pelt stones at the Mannar courthouse.

In early October, the ICJ condemned the physical assault on the secretary of the Judicial Service Commission, Manjula Tillekaratne.

In early November, the ICJ issued a report, Sri Lanka's Crisis of Impunity, documenting how the erosion of state accountability and judicial independence, has led to a crisis of impunity in Sri Lanka.

The ICJ calls on the Government of Sri Lanka to take active measures to promote the independence of the judiciary and rule of law by adhering to international standards and practice in impeachment hearings.

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# PSC offers the CJ an inquiry without witnesses

by Basil Fernando

The Parliamentary Select Committee (PSC) inquiring into the allegations against the Chief Justice, Dr Shirani Bandaranayake in a surprising and shocking move informed her that during this inquiry no witnesses would be produced and therefore there would be no room for cross examination.

An 'inquiry' without witnesses naturally cannot be an inquiry at all. The essence of an inquiry is to place before the accused the witnesses who are making allegations thus giving the opportunity of cross examination on any such witness. There is no other way to find the truth behind any matter by any person who sits as an impartial judge than to listen to the witnesses and to see how they fare when they are cross examined on what they have said in evidence.

This really raises the question about the PSC. Are they a body who has already made up its mind about the allegations and are sitting there just to listen to what the CJ has to say about the allegations? If they have already made up their mind about the allegations they have no right to sit as judges.

Verdict first -- trial later

The PSC inquiry is a reminder of the story of Alice in Wonderland where the verdict is made first and then when reminded, that there was no trial with a request "for just a little trial" the queen replies, the verdict first and the trial later.

The PSC inquiry is not just funny but only a ritual setup before the verdict is announced to the parliament for a vote. The task of the PSC is just to hook up a finding to be placed before the parliament which will decide the matter on the basis of a hand count.

'Peoples' Power' -- a comic programme in the SLBC

While this is proceeding in this manner there is also a comic show which is staged every morning in a programme entitled 'Peoples' Power' broadcast through the SLBC. Under the pretext of reading the headlines in newspapers a commentator who is a former editor of several newspapers that has been unceremoniously dismissed from his position tries to interpret the news in a truly sycophantic fashion. The main point is to say how right the government is and how wrong everybody else is.

To do that the commentator chooses not to mention any of the factual information around the news item he is discussing. For example in discussing the walkout of the CJ from the PSC proceedings the commentator does not inform the public the reasons as to why the CJ and her legal team decided to take that path. He does not tell his listeners that the PSC proposed an inquiry with witnesses and cross examination.

Instead, rhetorically the commentator asked if any person walks out of a judicial proceeding whether it would not amount to contempt of court. In fact, if any judge in Sri Lanka were to announce that in the trial he was about to conduct no witnesses will give evidence and that the affected person has no opportunity for cross examination no litigant would commit contempt to court if he refused to participate in such proceedings. The precondition of participation is that there is a real trial where the basic norms of fairness would be observed. The commentator of course does not ask his question from anyone else who may have given him the explanation as to condition under which people are under obligation to participate in judicial proceedings. Instead he himself gives the answer and that is the monologue that the listeners are forced to listen to.

The commentator also does not follow any of the ethics that are expected to be observed when accusing persons which this commentator quite liberally does. None of those persons are called upon to reply to his accusations. Like the PSC this commentator running the programme 'Peoples' Power' does not believe that he has any duty to be fair.

Strangely in today's programme (December 7) the only person whose opinion the commentator called for was a member of PRA a onetime underground death squad. This former member of PRA is the Erskine May that this commentator relies on regarding parliamentary practices.

What all this indicates is not just funny but the lowest depth to which the government has reduced all political discourse, whether it is about conducting an inquiry for the removal of the highest judicial officer in the country or about the manner in which the state media is used for providing their version of the information to the people.

That lowest depth is no surprise. In a country where no inquiries are conducted into well-publicised murders which are perceived by the public as political assassinations, where enforced disappearances are allowed and even allegations of rape against the ruling party politicians do not amount to a scandal, and where prisoners are shot down inside the prisons, where every kind of financial fraud goes without accountability and where lawlessness has become the norm that is the lowest depth that society can descend to.

But that is no matter, nothing is treated as shocking and even the Chief Justice of the country is treated worse than a common criminal (in fact, the common criminals enjoy rather a privileged place).

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## Economics Of Impeaching Chief Justice In The Absence Of The Opposition

by Kusal Perera

She's abused, says the media. That was all some parakeets could do. She, Chief Justice walks out and that's all she could do, as well. The UNP members in the PSC says, the CJ should be given a fair chance and be persuaded to attend PSC sittings, stressing they will stay on and fight to the end. The "end" was decided before the beginning. It was for that, the PSC was appointed by this regime with a 7 to 4 margin and not with a single vote majority of 6 to 5.

We now begin the ascendency to the next ugly phase of Executive power strengthened through the 18 Amendment to the Constitution (for now, lets not discuss Justice Shirani Bandaranayake's hand in it) and that of economics under this regime. This for me therefore is no narrow issue of saving or cleaning the CJ. It is for me a much broader political issue of contradictions within the system created to develop a free market economy through political patronage. A situation where answers are sought for the inherent contradictions within their system in continuing with the free market. Of course with not just political patronage, but with political partaking. A revised system that allows more powers, unquestioned in any forum. Some in fact marvelled at the arrogance of this regime in impeaching the CJ while the Universal Periodic Review (UPR) on Sri Lanka was on.

From the side of the regime, by 27 November, there was some justification, or rather, some explanation on why the CJ was impeached. In a neither official nor unofficial media intervention, a spokesperson for the Presidential Secretariat suggested that the CJ and her husband acted improperly, contravening legislative regulations. Only when the number of acts began increasing alarmingly did the executives of the legislature take up the issue, the spokesperson said. While that could be so, they need to be proved beyond doubt in an impartial and a fair forum.

Within Sri Lanka, protests against this arrogant impeachment remains a very isolated social protest by a concerned group of lawyers and some urban Sinhala middle class elements. What nevertheless becomes important is, the constituency of the growing protests. For the first time, a conspicuous section of the Sinhala middle class that steadfastly backed this regime against LTTE separatism and promised a reasonably fair and comfortable post war dividend, has got dislodged from their "patriotic" Sinhala platform. They now seem to understand, there is a serious mismatch between the regime they helped consolidate and its economic life that define its style of governance. These Sinhala urbanites have now joined the foray against the regime, buddying up with their direct opponents on the pro devolution platform, demanding a reversal of the impeachment. To that extent, the impeachment against CJ has shaken up the social power alignment against the regime.

What is also conspicuous is the absence of the political opposition that could exploit such social bewilderment against this regime if they want to, but to date have not. The total collection of political and NGO personalities that dominated the "Platform for Freedom" show clear absence so far. They have not geared themselves in protesting against the impeachment. That again shows the reluctance in the UNP leadership in challenging the regime on this issue of impeachment against the CJ. Protests have thus remained without any political drive and without any connect to the larger social audience, leaving concerned lawyers and middle class urbanites to agitate as they could. The JVP too have not taken a clear stand on the impeachment and their participation in the PSC seems dubious and meek.

The impeachment process thus continues unabated, gathering arrogance from the side of the regime, now trying to tie up all State power into a single bundle. An attempt, seen by most anti Rajapaksa elements as "dictatorial" and a "crumbling of the State". It is both and reason why the UNP leadership is playing it out with the regime through subtle compromises. For the UNP, at least for those who see eye to eye with Wickramasinghe, it is their responsibility to save the system on which they would have to live and take over. The problem the UNP leadership has with this Rajapaksa regime therefore is that, it had got into their shoes, not only in keeping a liberal market economy afloat, but is now getting into re designing the State to concur with the tottering economy.

UNP's reluctance therefore to meet the Rajapaksas head on, leaves this regime with an advantage and makes it indifferent to those shifts in power balances in society. It is therefore most unfortunately clear, Ms. U.A.B.W.M.R Shirani Anshumala Bandaranayake's fate as the 43rd and the first female CJ of Sri Lanka, would not be decided on how innocent or not she is. But, decided on the already finalised recommendation that would come to parliament from the PSC and the vote from subordinate and tamed ones, waiting to say "Aye" to the Speaker on the impeachment.

What makes this regime so adamant and arrogant to go this far is certainly a clear tie up in how they manage, or rather handle the free market economy. The economy,

with all the tinkering of numbers and figures to prove it is being set on a fast forward growth mode, delivers nothing to the larger constituency of urban and rural lower middle class and the poor. Despite Cabraal's boasts of a "graceful growth" of around 06 per cent of the GDP needs no government to run the country, where the economy is no more State owned and controlled. A government is elected to lift that percentage to over at least 10 per cent through well thought out incentives and restrictions or regulated markets in selected service and production sectors of the national economy.

In spite of what is said in the budget speech, it is not budget proposals that guide the economy. It had not been the budget that decided where the economy goes, even in the past few years. All through the year, supplementary estimates brought to parliament decide where and how the economy moves, if it does. In year 2011 by end September, 67 Supplementary Estimates worth billions of rupees, made the budget proposals for 2011 almost irrelevant. It can not be different in 2012 and would not be different, if not for the worse in year 2013, with a regime that turns arrogant each day. In a country where revenue projections in budgets either has no relevance in real life or falls short by two digit percentages in actuals, where even reduced imports by 3.3 percent during the first 09 months in 2012 (year on year), yet keep the trade deficit increasing, where incentives are thrown out for laundering of black money legally, the judiciary in such a country, especially at its apex level, becomes crucial for economic survival of the regime.

Thus for the first time in the history of Executive rule in this country, the Attorney General's Department was brought under the purview of the President. This has to be assessed within a culture of subordinate politics in the legislature and heavy politicising of all important State agencies and institutes. Assessed within the effective implementation of the 18 Amendment to the Constitution.

Even in such context of usurped power, the past months proved how important it is for this regime to have the higher echelons of the judiciary under its dictates. It had to scheme and manipulate with the parliamentary opposition to get the "Divi Neguma" Bill back in the Order Book, after it was effectively stalled by the SC. It had once again to play politics behind curtains with the opposition, to have the Second Reading of the Budget 2013 and vote on it, that nevertheless remains unconstitutional with no required amendments made as determined by the SC.

Far worse it would be, to continue to have a SC that would sit on crucial FR petitions challenging the regime on monetary and financial issues, delivering on its own right. The FR petition filed by 11 trade unions on investments made from the Employees' Provident Fund (EPF), praying for a permanent injunction on all such investments, which is a major source of unaudited big money for this regime, would be a problem if decided independently by the SC. It therefore has to be determined as decided by the regime. Such sensitive cases can not be left to chance, more so in the coming months and years.

It is pretty clear, this regime that wants to handles public money as it pleases, the very issue that was taken to Courts regarding the 2013 budget, can not go on with a judiciary that may not give priority to the regime all the while. Even if the conflict now in public domain was not there, the court would have held that permission granted to the Finance Minister to withdraw money allocated for specific purposes and/or from the Consolidated Fund presents "a direct challenge to the onus of Parliament to have full control over public finances as protected by Article 148 of the constitution." That was what made independence of the judiciary unacceptable to this regime and thus had to be ignored with the connivance of the opposition for the Second Reading of the 2013 budget. But, that is definitely not a long term answer for this regime moving into a new phase of executive power.

A Bangladeshi Assistant Professor, Taiabur Rahman of the Department of Development Studies at the University of Dakha, who in late 2004 undertook an extensive study on governance in Sri Lanka and wrote the paper, "Parliamentary Control and Government Accountability in Sri Lanka; the Role of Parliamentary Committees" concluded that "….the formal institutional structure of the political system in Sri Lanka, appears seriously disadvantaged in checking the unbridled power and authority of the Executive and virtually unable to call the government to account. All the major characteristics of a strong legislature in practise are absent in Sri Lanka and it plays in the hands of the President who monopolises power, even in time of cohabitation. All the major political institutions including parliament (let alone parliamentary committees), the provincial parliaments and the local government units are made captive to the vagaries of the President." (p/42)

That power of the president is what decides who does what for the regime and the regime has apparently decided, it now needs a free hand in handling the economy including public finances, without any possibility of a judiciary checking its right to do so or its constitutionality. Thus the fate of the CJ, almost foretold as closed, on economics of this regime. An attempt to re invent the State with absolute centralism and political power, creating within it the fissures and fractures of a decaying State.

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# It Is Just A Hop, Skip And Jump From Enforced Disappearances To The Impeachment Of The CJ

by Basil Fernando

It is clear by now that the attempted impeachment is being done in a completely lawless manner. The present approach adopted for the inquiry is no different to a committee consisting of a man's enemies being assigned to conduct a murder trial against him. Regardless of the man's guilt or innocence, the enemies will ensure that he will be found guilty and be hung.

There are many clips on YouTube about the mobs that gathered before the Supreme Court and the Parliamentary Complex shouting slogans against the Chief Justice and demanding her resignation. In no other country can you find examples of mobs gathering to shout slogans demanding that judges resign. Some of the people in the mobs who were interviewed directly named certain Members of Parliament from the ruling party as those who organised the mobs. It was thus clear that the mobs were organised by the government to shout slogans against the CJ. Thus, the responsible party for mobilising the mobs to bring down the prestige of the courts is the government itself. This is a government that is openly encouraging lawlessness. A government that mobilises mobs in this manner demonstrates no political will to keep law and order or to ensure respect for the institutions of the state. The result will be the government causing chaos in the country.

However, the history of the government resorting to lawlessness is not new in Sri Lanka nor is it confined to this government only. The most glaring example of absolute lawlessness is the manner in which various governments since 1971 have resorted to the causing of large scale disappearances.

In 1971, according to the statistics which came up at the Criminal Justice Commission (CJC) the JVP was responsible for 41 civilian deaths, the killings of 63 and the wounding of 305 members of the armed forces. In retaliation, the United National

Party government killed 5,000 to 10,000 young people and placed another 15,000 to 25,000 in arbitrary detention. As it is well known, a very small number of these would have been hardcore JVPers but there was little concrete evidence of engagement in any serious attacks against the majority. The procedure that was followed was arrest, torture during interrogation, killings and, for the most part, secret disposal of the bodies.

It is a universally recognised principle in law that, once a person is arrested, the state is under obligation to protect that person and produce them in court. It was this principle that, on government orders, the armed forces and the police openly flouted. The government neither expressed any regret for giving such orders nor did it ever conduct inquiries into such killings. Thus, this heinous criminal activity began to be accepted as a legitimate activity by the armed forces, police and the paramilitary.

Later, the causing of enforced disappearances was practiced on a much larger scale in the south, north and the east. In relation to the JVP uprisings from 1987 to 1991, the number of persons who were made to disappear was around 30,000, according to the statistics given by the commissions of inquiry into involuntary disappearances. Many are of the view that the numbers are much larger.

As for those who have been made to disappear from the north and the east from the early 80s to May 2009, no records have been made but obviously they would outnumber the enforced disappearances from the south. Once again, no government has ever expressed any regret about such killings and no attempt has been made to conduct any inquiries or hold anyone accountable. In fact, to demand inquiries into these enforced disappearances is considered treachery and an act which favours the LTTE. The simple issue of the protection that should have been afforded to an arrested person is no longer taken for granted in Sri Lanka. The principle that is really in practice is that after arrest, if the particular agencies so wish, a person could be extrajudicially killed or made to disappear altogether.

A complete transformation has taken place in the basic norms regarding crimes. What was universally considered a crime may not be considered a crime in Sri Lanka if, for some political or practical reason, the government wishes to treat them as not being such. Thus, the idea of crime has been relativised and the choice as to whether to treat even a heinous crime as a crime or not is now in the hands of the government in power.

It can be said that no other government in the region regards crimes in as much of a casual manner as is done in Sri Lanka. There are countries in which, due to certain historical reasons, there has been the collapse of their legal system and they have ignored basic norms of legality and illegality. Two such countries that are known to face such situations are Cambodia and Burma. However, even these countries have not gone to the extent of ignoring the criminality of an action to the extent that it is being done in Sri Lanka now. Even in situations like those of Cambodia and Burma, there is still protection for a person who has been arrested and taken into custody.

In a country where lawlessness has gone that deep, the illegal impeachment of a superior court judge, ignoring universally accepted norms regarding the removal of such judges, is merely a logical extension of the overwhelming disregard of the law.

The law now is that whatever the government does is correct and that the correctness will be demonstrated by the use of the mob under its control. Any kind of behaviour that a law abiding nation might consider illegal or even vulgar may go as decent and right in Sri Lanka under the present circumstances.

This is a bewildering situation and the implications are beyond comprehension. Both the rights of the individual, as well as property rights, will fall foul of this situation. Anyone who has the will to defy the law and has any connection with the government would be able to do whatever they like. Each individual citizen will learn about it when his or her rights are directly affected by this situation. There are already tens of thousands of people who have had that experience.

If the people thought that they might have some recourse to the courts and find some solace as in the past, that too will prove an illusion more and more. In a country where the Chief Justice herself is helpless before lawlessness how could any other citizen expect the protection of the law?

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# Sri Lanka, between the Hammer of Rajapaksa-absolutism and the Anvil of Societal-indifference

by Tisaranee Gunasekara

*"This is what happens when men decide to stand the world on its head".*
*Hannah Arendt (Responsibility and Judgement)*

Their greed, our apathy; their fanaticism, our indifference; their brutal aggression, our embarrassing cowardice: such are the basic ingredients of the baleful concoction which is seeping into almost every aspect of Lankan life, undermining Lankan stability and destroying Lankan security.

The unnatural and repeated earth-tremors affecting Ampara and the (mercifully unsuccessful) attempt to divide the Bar Association, the attack on the President of the Colombo Magistrate Court Lawyers' Association, Gunaratne Wanninayake and the dangerous babblings about a 'Hulftsdorf coup', the disgracefully trite decision to withhold funds from the UNDP-sponsored Annual Judges Conference and the road bisecting the Yala National Park which has become a death-trap to the wildlife: these are some of the many disasters generated by Rajapaksa-absolutism, in the enabling atmosphere created by our indifference.

Miracles are occurrences which fall outside/violate the natural order. In that sense, Rajapaksa Sri Lanka is rapidly becoming a land of daily miracles. The tremors in Ampara, often accompanied by massive noises variously described as 'explosive' and 'booming', are not caused by natural seismic activity, according to the Chairman of the Geological Survey and Mines Bureau: "These earth tremors are unusual, as they occurred several times in one day, and some people claimed they heard an accompanying loud noise…. That's too unusual to be natural. That's why we are suspecting these tremors are manmade" (The Sunday Times – 16.12.2012).

In Ampara (like in the rest of the East and the North) large-scale economic operations are not possible without Rajapaksa involvement/sanction. Ampara is also the chosen location for the next Deyata Kirula extravaganza. So the tremors shaking Ampara

cannot but be of Rajapaksa provenance, as much as the impeachment is or the white-vans are.

Manmade tremors, if ignored, can grow in intensity and destructive-power. Given Sri Lanka's minute size, the earth-shattering activities in Ampara can eventually impact on the rest of the island. Will we wake up from our self-enforced slumber at least then?

Commenting on the Connecticut elementary school massacre, John Lee Anderson asked, "What does it take for a society to be sickened by its own behaviour and to change its attitudes?" (The New Yorker – 16.12.2012). That question would not be inapposite in today's Sri Lanka, caught between the hammer of Rajapaksa-absolutism and the anvil of our collective indifference. We Lankans have ample reason to be concerned about the present state and the future trajectory of our country. Even if we do not care about politics, we should be bothered by the erosion of the rule of law. Even if the mass arrests of Jaffna students do not move us, we should be affected by the damage done to our environment, to the point of creating unnatural earth tremors. Even if we feel that the assault on lawyers and judges is not our problem, the arbitrary price hikes and the wanton waste of public funds should outrage us.

We must realise that none of us can remain islands of comfort and safety, when all around us the skies are darkening and the seas are heaving.

The Absolutist Project

The Rajapaksas are absolutists. Nothing less than total power and complete control can satisfy them. They abhor independent spaces. They are distrustful of and hostile to any institution which is not under their complete control. They work actively to undermine, divide and, if necessary, destroy anyone and anything standing in their way. No political corner or societal cranny is beyond the reach of their power-grab. Their victims vary from civilian Tamils to the war-winning army commander, from Lasantha Wickremetunga to the weekly-dead at unprotected railway-crossings, from the CJ to the pregnant leopard and the baby elephant killed by speedo-maniacs on Yala's 'Death Road'.

To complete their absolutist agenda, the Rajapaksas need the judiciary to commit hara-kiri and be reborn as a Familial tool, as the military and the bureaucracy have done; and the parliament is doing.

As the impeachment travesty raced towards its prearranged conclusion, many a UPFA legislator hurled verbal thunderbolts at the judiciary and proclaimed their readiness to uphold parliamentary supremacy at any cost. But these same ministers and parliamentarians unanimously approved a bill which would erode a key power conceded to the legislature by Sri Lanka's presidential system – that of financial control. Denying the all-powerful executive president the control over finances was

one of the few balancing acts contained in the lopsided constitution of 1978. This is why a three-judge Supreme Court bench (headed not by Shirani Bandaranayake but by Shiranee Tilakawardana) "expressed reservations over allowing the Minister of Finance to withdraw funds allocated for specific purposes"; the bill which facilitates such a power-transfer "presents a direct challenge to the onus of parliament to have full control over public finances" (The Sunday Times – 9.12.2012). Instead of embracing this judicial decision reinforcing legislative supremacy in financial matters, the UPFA majority in parliament decided to the opposite. These self-proclaimed defenders of parliamentary supremacy voted for a bill which undermines parliamentary supremacy by allowing the executive to poach on legislative control of finances.

The UPFA legislators can contort themselves into veritable corkscrews to suit Rajapaksas purposes, in the hope of safeguarding their powerless-positions; but the Siblings are fickle towards all but their own kin. For instance, while ordering UPFA legislators to attack the CJ and accuse the judiciary of plotting a pro-Tiger coup, the Rajapaksas are taking pains to publicly distance themselves from the impeachment travesty – obviously in an attempt to evade international opprobrium. Mahinda Rajapaksa says he did not see the impeachment motion until it became a done deal. Basil Rajapaksa says he too did not see the impeachment motion until it was tabled in parliament. Namal Rajapaksa says he is not happy with the impeachment. If the Rajapaksas are to be believed, the impeachment was done without their knowledge, let alone approval.

The Rajapaksas' 'Chinese Monkey' act regarding the impeachment demonstrates yet again their essential untrustworthiness. They will not hesitate to sacrifice anyone and anything, from the SLFP to the Sinhalese to maintain themselves in power. Any bureaucrat, military officer, judge or lawyer who succumbs to the Rajapaksas today can face betrayal and abandonment tomorrow. They do not even have to oppose the Rajapaksas a la Sarath Fonseka or Shirani Bandaranayake. Like the serfs who signed and investigated the impeachment, they can be turned into scapegoats and thrown to the wolves of national/international public opinion, whenever necessary.

(Interestingly, this inherent Rajapaksa unreliability and untrustworthiness seems to have been grasped accurately by Beijing. A new Chinese loan of Rs 8.9billion for the power sector will not be released until and unless Colombo pays a fee of Rs 627million to a Chinese insurance company).

When will we understand that the Rajapaksas, left to their own devices, will do to Sinhalese in particular and Lankans in general what the Tigers did to the Tamils? What will make us shed our mantle of apathy and open our eyes and our mouths? White-vans pursuing judges and lawyers? Yala denuded of wildlife? A manmade earthquake which kills? A devastating financial crisis, surpassing the ongoing (modern-day) Greek tragedy?

*Courtesy: Sri Lanka Guardian*

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# Why not telecast the impeachment proceedings?

Asian Human Rights Commission

According to reports, the Chief Justice (CJ) through her lawyers have informed the Parliamentary Select Committee (PSC) that she wishes to waive the right to have the impeachment proceedings in-camera and instead wishes the inquiry to be open to the public. The Rajapaksa government has used every opportunity to make their allegations against the CJ public; in fact, a propaganda war has been waged making use of the state media, taxi drivers and paid demonstrators. Since the government is so eager to create the widest possible publicity and thinks that such publicity is to its advantage there is no reason for it not to grant the wish of the CJ, the affected judge, to waive her rights given under Standing Order 78A (8) which prescribes that the proceedings should be published only if the judge is found guilty. Since this Standing Order is a safeguard against the judge who is being accused the waiving of the safeguard is the prerogative of the affected judge.

Since 117 Members of Parliament have signed the petition supporting the allegations it is not only their right but also their duty to find out whether the allegations they have made are sustainable or they are blatant lies. The CJ through her lawyers have invited the MPs to come and there is no valid reason for them to refuse that invitation. Surely any honest accuser would want to know whether they accusations he or she has made are true or false.

The Rajapaksa government relies heavily on propaganda. It has used the state television and other media to propagate its position with extraordinary zest. In fact, it has even allowed the broadcasters to break all their ethical codes and do all they can to put before the people whatever the government wishes to propagate. Under such circumstances if the government believes that it has a genuine case against the CJ there is no reason to deny the wish of the CJ to have the allegations inquired into in full glare of the public.

In fact, when allegations are being made against the chief of the judiciary such allegations are of the highest public importance and therefore the public would have

a good reason to know what is going on. If the government wants to deny the public their right to know it is their obligation to explain to the public as to why it is denying the request made by the CJ. The government cannot take cover under the Standing Order 78A (8) which is available to a judge for the purpose of protecting that judge against unfair allegations. By indicating that the CJ wishes the inquiry to be held in public she is clearly stating that she has nothing to hide and that she is willing to bear the consequences of having the inquiry in public.

The judicial officers who met last week expressed their concern about the process of impeachment which they see as unfair, not only to the CJ but also to the independence of the judiciary as a whole. They are concerned that under the abuse of media freedoms used against the judiciary it would become difficult to continue with the judicial function in the country and this is a serious warning of what is at stake. It is the administration of justice in the entire country which is in peril due to manner in which the government has proceeded in this case.

By all indications most people in the country and also in the international community are not with the government as far as these proceedings are concerned. The government has failed to convince the public and the international community that it, in fact, has a just cause to take the steps that it has on this issue. There are open accusations of blatant unfairness and injustice made by senior citizens including Buddhist monks.

Under these circumstances the government is under the obligation to respect the right of information of the public. As the CJ herself has invited the government to grant the public their right to view the inquiry the refusal of the government would indicate that it is deliberately attempting to withhold information on a matter of the greatest public importance.

As for the example of other countries it was quite recently that an impeachment inquiry was held in the Philippines against their Chief Justice. The entire proceedings were telecast internationally. In that particular instance that Chief Justice was found guilty of the charges as it was proved that he held about two million US dollars in foreign banks without disclosing this in his declaration of assets. As the people had the opportunity to watch the proceedings there were no allegations of any kind of unfairness towards the judge during the proceedings.

As the CJ of Sri Lanka has herself invited the government to provide opportunity for the public to view these proceedings the government might follow the example of the Philippines and telecast the proceedings.

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# Not Justice – But Hunger!

by Sajeeva Samaranayake

It is rather superfluous to have debates on a question of 'justice' when our central issue is one of unappeased hunger.

Dealing with hunger first

There is hunger for food; and there is hunger for wealth, power, position and influence. In this rat race there is an insatiable appetite for 'more' and 'better' things – but hardly any concern for sharing. So long as our temples of 'democracy', 'justice', 'nirvana', 'progress' and a growing culture of five star hotels can co-exist with one third of our children being malnourished, we cannot afford to speak of one society – still less of 'rights.' Our true values have excluded social justice and integrated the egoistic pursuit of personal satisfaction to the fullest measure.

The Second Republican Constitution of 1978 has now unraveled to its logical conclusion. In the immortal words of Dr. N. M. Perera we are fully committed to a bogus value system which ensures "justice for the rich and freedom for the poor to starve." While the poor hunger for food, a voice and access to justice, the rich hunger for better food, leisure, entertainment and power. It is all about food for the body and food for the mind; and we desire more and more variety as we stumble upon the feasts and riches only the kings and nobles enjoyed in the past. Both the rich and poor are essentially united by a mindless hunger, and alienated by everything else.

We discuss matters of justice as if we were a society of human beings. My humble submission is that we are not; that this talk about justice is yet another aspect of the self-deception we have clothed ourselves with. Not having asked ourselves what it takes to be human we have not attained to this status yet.

Truth of violence

The noble truth of suffering is inextricably interwoven with the truth of violence. Nyanaponika Mahathera (Four Nutriments of Life) referred to the reality of violence involved in our incessant search for food:

If we wish to eat and live, we have to kill or tacitly accept that others do the killing for us. When speaking of the latter, we do not refer merely to the butcher or the fisherman. Also for the strict vegetarian's sake, living beings have to die under the farmer's ploughshare, and his lettuce and other vegetables have to be kept free of snails and other "pests," at the expense of these living beings who, like ourselves, are in search of food. A growing population's need for more arable land deprives animals of their living space and, in the course of history, has eliminated many a species. It is a world of killing in which we live and have a part. We should face this horrible fact and remain aware of it in our Reflection on Edible Food. It will stir us to effort for getting out of this murderous world…

Beginning with this way we get our food we can go on to the whole structure of human society and ask 'on what do we stand?' This question is important because we assume in our critical mode, at least at the sub conscious level, that we are respectable men and women of worth. We have learnt to separate the good from bad in our society under the terrible influence of the criminal law. As such we take this frivolous attitude that individuals are to blame for the chaotic state of society. In fact all individuals – however powerful externally, are powerless inside. We would never concede that we are suffering together because we are collectively culpable.

Society is founded on violence

Unlike Gandhi we don't really see ourselves in the mirror. Unlike Gandhi we cannot quite realize that we all stand, both historically and currently, on a flawed foundation of violence. Sociologists are fond of saying that the political history of mankind is nothing but a history of crimes. The present politicians (all over the world) are simply perpetuating this ignoble tradition (either with or without imperial immunity or backing.) The Mahatma rather than "9/11" was the defining incident of our recent political history and he expressed this saying ""generally history is the chronicle of kings and their wars; the future history will be the history of man."

In 1894, M.K. Gandhi, a timid 25 year old, was reading Tolstoy's The Kingdom of God is Within You when he found the passages dealing with the torture of hungry peasants by a Provincial Governor in Russia. By then this internationally reputed Russian Count was finishing his life and search for enduring principles for man who had become distanced from God with the emergence of scientific materialism in the West. When Gandhi read the lines below, he became to the aging Russian, what Lenin became to Marx,

Fate, as though on purpose, after my two years' tension of thought in one and the same direction, for the first time in my life brought me in contact with this phenomenon, which showed me with absolute obviousness in practice what had become clear to me in theory, namely that the whole structure of our life is not based, as men who enjoy an advantageous position in the existing order of things are fond of imagining, on any juridical principles, but on the simplest, coarsest violence, on the murder and torture of men.

We are conditioned by a culture of entitlement. This may be based on feudal privilege and family wealth, the more superficial modern idea of rights or plain robbery. Having thus made ourselves respectable a finding that we are nothing but hairy apes driven by selfishness, aggression and violence to get what we want may come as a shock. Yet this is who we are; this is the bottom line; this is square one. Of course every human society has to go through materialism before graduating into a level of balance and sanity. But for this even materialism has to follow certain norms – like mutual affection between human beings and basic trust. No society has developed without them.

Brute force and violence are not the basis for a sustainable society. The hungry dogs let loose upon the powerless today will eventually turn on the powerful. Negative and destructive energy will follow its own rules. It will not make fine distinctions in the end.

Test of morality

The acid test of morality is our behavior when we are hungry; hungry for food, for sex, for belonging, for acceptance and for power and control. Do we observe any rules of restraint in these situations or none? Have we lost sight of that victory in our heart when we know in our own court of conscience that we have done the right thing? Or are we still playing to the gallery like intoxicated clowns; heroes to all except ourselves?

The effort to tame this animal energy with external controls – whether these consist of those western ideas of propriety or the more ancient five precepts the Buddha laid down – have failed. Public life, private enterprise and the Sasana are simply opportunities for personal advancement. They are ladders to be climbed – nothing more. The time has arrived to stop talking about ladders and start talking about what is inside the men and women who climb them. This is the environment that must be probed – not by asking who did what and taking up fingers of accusation against each other.

We have to simply ask ourselves who we are – not when our stomachs are full, but when we are hungry and how we set about getting what we want. We have to experience and know ourselves at this point of pain and suffering; without extinguishing it with mindless food, drink and talk.

Voluntary poverty, self restraint and non violence

In the Buddha's time in India mendicancy or voluntary poverty was a powerful expression of non-violence and human interdependence. This is a valuable point our pious kings overlooked when they guaranteed the economic security of the Buddhist priesthood with land grants in perpetuity. With the death of mendicancy within the priesthood, society itself lost its spiritual backbone and frame of reference.

It is the resultant drift away from reality which has created this pseudo society. Every social institution is in crisis starting with the family. The functions of parents, teachers, family and friends have been replaced with masks and figureheads. They are either absent, or if present, demoralized and disempowered. Both family and society outside are monsters from whom the children have to be 'protected'. And so called protection is a mere exchange of institutional dysfunction for family dysfunction. These are not allegations against anyone but a simple exercise in collective self-criticism.

We do not know the value of human relationships and institutions we are destroying today. And the only way to know their value is to go on a fast and experience hunger and deprivation without judgment or reactions. To do this is to know our self and our dependence on others. This is to be blessed with gratitude and happiness for what is without getting tied up in knots over what ought to be. But the more we get lost in the distractions of the senses placed in our way – the good life, the entertainment and sports – the more we stand in danger of losing our deeper selves and our connectedness to each other.

The Muslims fast in the holy month of Ramadan and the Buddhist monks observe a fast after 12 noon every day. Both Hindus and Christians observe penances for purifying the soul and strengthening the heart. For the atheists, humanists and free thinkers also I say that there is nothing intellectual or mystic about hunger. It is direct and hits you in the gut. And it has a startling efficacy for both brutalizing and ennobling us. To delay our gratification even for ten seconds can reveal a deeper human being we never knew existed.

Today the whole society is poor because we have not realized the commonality of the pain of hunger and the suffering in our hearts. Our choice is quite simple. We can undertake some form of voluntary poverty or abstinence today and strengthen ourselves for the hard times ahead; or we can undergo deeper forms of enforced and ignoble poverty tomorrow without freedom, rights or dignity.

We can fool ourselves with discussions about justice in air conditioned rooms. But the moment we step out into nature elemental forces like sun, rain and wind hit us directly in the face. It is the same when hunger hits us and we are face to face with the tiger within. It is in acknowledging this defenselessness, this utter vulnerability that we develop qualities of courage and compassion. When our hearts are not dominated by our own hunger and climb up the social ladder and we can step

outside this little self to embrace our greater self, our community – then we are qualified to talk of justice. Not before.

Where individuals who hold public office are dominated by personal hunger and poverty and are therefore committed to a path of violence rules of public law cannot address this dysfunction within that individual and the group to which s/he belongs. In addressing any problem we must begin at the beginning – not in the middle or at the end. Enacting dramas that do not get to the root causes of any problem is simply a waste of money and a waste of time. Courts as a whole are familiar with this folly.

*Courtesy: Colombo Telegraph*

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## From a farce to witch hunt

Asian Human Rights Commission

The impeachment of the Chief Justice which was staged as a farce has now turned into a blatant witch hunt where the government is shamelessly mobilising taxi drivers and other mobs to call for the resignation of the Chief Justice.

Today was declared by the lawyers a day of protest against the impeachment process which is ignoring the request by the Supreme Court to delay the proceedings until it inquiries into a constitutional question referred to it by the Court of Appeal requesting legal opinion. Meanwhile, local and international pressure has also widened and the government has been told in very clear terms that any impeachment must be preceded by a genuine inquiry by a competent and impartial tribunal. The government is also being told that aninquiry by a Parliamentary Select Committee would not meet this requirement. However, the government is blatantly ignoring the criticism against the manner in which it is proceeding and has begun to resort to street tactics in dealing with this all-important constitutional question.

AHRC-STM-250-2012Today, while lawyers, religious dignitaries and others gathered to show their solidarity with the Chief Justice and protest against the blatant violations of the constitution by the government, the government has responded by bussing in people to shout slogans against the Chief Justice. According to reports about 500 Special Task Force (STF) personnel were sent to the premises of the Superior Court Complex. The STF is a paramilitary unit working under the direction of the Ministry of Defence. The task of peace keeping belongs to the civilian police and not the paramilitary groups such as the STF.

Yesterday (December 3) the judges of the lower courts, that is the Magistrate's Courts to the High Courts, gathered at the official residence of the Chief Justice and held a two-hour consultation with her and declared their support. It is clear from the statement of the judges that they perceive the impeachment as an attack on the independence of the judiciary. In the joint statement of the judges they stated that the

impeachment proceedings are being conducted in violation of the respect owed to the Chief Justice and the judiciary. They also pointed out the unbecoming behaviour of the media. They stated that such behaviour of the media amounts to contempt for the court. By such contemptuous expression, not only is the Chief Justice being brought into disrepute but it also affects the respect for the courts and thereby contributes to the collapse of the rule of law. They also stated that the inquiry against the Chief Justice should be done impartially and with transparency. They went on to state that the inquiry by a body that includes seven persons from the government violates natural law and blatantly violates all legal considerations and that nowhere in the world would decisions on such matters be made in this manner.

Thus, what is now taking place is a clear confrontation between the judiciary as a whole and the government. On the one hand the Supreme Court has granted leave to proceed in several cases and fixed inquiry into the cases referred to it by the Court of Appeal. On the other hand all the lawyers of the lower courts have gathered and clearly indicated that they have begun to perceive the threat to the independence of the judiciary.

Under these circumstances any government would have heeded public opinion and take appropriate action in order to ensure that whatever action is taken is within the law and would in no circumstances infringe the basic guarantees of the independence of the judiciary. Such a rational reaction was to be expected as the matter involved is of the utmost seriousness and the attention of the whole nation is now focused on this issue. Besides, the international community is clearly watching and the matter at stake is of the most sensitive nature in terms of international relationships.

However, the way in which the government is reacting does not show much regard for these important considerations and instead seems to rely entirely on muscle power in determining the outcome of this most important constitutional issue.

This does not come as a surprise as the government has drifted from a democratic form of governance to the governance of a shadow state. This shadow state relies more on the security apparatus that is the paramilitary forces, intelligence services and the military rather than the democratic institutions. In fact, the democratic institutions have ceased to function independently and are controlled by the presidential secretariat.

Everything else other than the presidential secretariat and the Ministry of Defence seems to have become irrelevant. Naturally the security apparatus in all critical moments brings in mobs and criminal elements to counteract people who express their democratic aspirations by way of peaceful demonstrations.

For this shadow state the independence of the judiciary is an obstacle. The shadow state requires the kind of 'judiciary' which will merely carry out its orders. Legality

and constitutionality are matters that have no relevance to the functioning of this shadow state.

Under these circumstances the government is now engaged in a witch hunt against the Chief Justice as well as all the judges who demonstrate any attachment to the independence of the judiciary. This witch hunt will also extend to all independent lawyers. As we have pointed out in the past the rule of law is now rapidly being displaced by direct government control without regard to the law.

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## Legality of government actions rendered politically irrelevant

by Kishali Pinto Jayawardena

This week, a committed New Delhi based civil rights advocate and incidentally a good friend, observed in a dispassionate aside to an otherwise entirely different conversation in that country that 'this situation that Sri Lankans are facing regarding the political impeachment of the Chief Justice is quite alien for us to grasp here, even in the abstract. How could checks and balances in your constitutional and legal system break down to that terrible extent? Even with the war and all its consequences, how could the centre of judicial authority implode with such astounding force?'

A juggernaut government brushing aside protests

In retrospect, these questions assume great significance. Sri Lankan newspapers are now gloriously resplendent with opinions of all shades and colours on the propriety or otherwise of the impeachment process. The airing of these opinions and the filing of court cases calling Parliament to order for a politically targeted impeachment of the Chief Justice are certainly necessary. However, these frantic actions remain ostrich-like in the ignoring of certain truths. Foremost is that questioning the legality of particular actions by this government has now been rendered politically irrelevant. Perhaps at some point in the past, these interventions may have had some impact. But this logic does not hold true any longer, no matter how many learned discussions are conducted on the law and on the Constitution.

In particular, the laborious posturing by members of the Bar, many of whom appear to have only now belatedly realized the nature of the crisis that confronts us, are destined to be futile if that is all that we see. In the absence of popular collective protests reaching the streets which target the protection of the law and the judiciary at its core, this government will press on in its juggernaut way, brushing aside civil

protests couched in the carefully deliberate language of the law, as much as one swats tiresome mosquitoes with a careless wave of the hand.

Three wheeler drivers marching before the Supreme Court

This immense contempt shown by those in power for the law was very well seen recently when news outlets reported a government orchestrated procession of three wheeler drivers chanting slogans in support of the impeachment and marching before the courts complex housing the Supreme Court and the Court of Appeal.
This stark fact, by itself, demonstrates the degeneration of the esteem in which the judiciary was once held. Such an event would have been unthinkable in the past, even taking into account the much quoted abusing of judges and the stoning of their houses during a different political era. There is a huge difference between the two situations. In the past, the intimidation of judges was carried out in the twilight of the underworld even though the threatening message that this conveyed to the judiciary was unmistakable. Now, political goons threatening judges parade in the harsh glare of daylight with total impunity and total contempt.

To what extent is a judicial officer from a magistrate to a Supreme Court judge including the Chief Justice able to now assert the authority of the law in his or her courthouse when such open contempt is shown for the judiciary with the backing of the government?

Not simply harping on the past

But as this column has repeatedly emphasized, this degeneration did not come with this government alone though it may suit many to think so. Rather, those who expound long and laboriously now on the value of an independent judiciary for Sri Lanka including jurists as well as former Presidents, given that the latest to join this chorus is former President Chandrika Kumaratunga should, if they possess the necessary courage, examine their own actions or omissions in that regard.

As history has shown us, whether in the case of the genocide of the Jewish people by the Third Reich, the horrific apartheid policies of the old South Africa or indeed in many such countless examples around the world, a country cannot heal unless it honestly acknowledges its own past with genuine intent not to travel down that same path once again. It is not simply a question of harping on the past though again, it may suit some to say so. Indeed, the entire transitional justice experience for South Africans, even though it did not work as well in other countries in the African continent, was based on that same premise. It was honest at its core and was led by a visionary called Mandela. This was why it worked (with all its lack of perfection) for that country but did not work for others. Those who unthinkingly parrot the need for similar experiences for Sri Lanka should perhaps realize that fundamental difference.

Reclaiming a discarded sense of legal propriety

But there are many among us who still believe that, magically as it were, matters would right themselves and we would be able to reclaim our discarded sense of legal propriety. Unfortunately however this is day dreaming of the highest magnitude. What we have lost, particularly through the past decade and culminating in the present where reason and commonsense has been thrown to the winds in this ruinous clash between the judiciary and the executive, will take generations to recover, if ever it will.

As Otto Rene Castillo, the famed Guatemalan revolutionary, guerilla fighter and poet most hauntingly captured in his seminal poem 'the apolitical intellectuals', someday, those whom the country looked upon to provide intellectual leadership will be asked as to what they did, when their nation died out, slowly, like a sweet fire, small and alone.'

Castillo's admonition about 'absurd justifications, born in the shadow of the total lie' applies intoto to this morass in which Sri Lankans find themselves in. We flounder in the mire of the arrogance of politicians who do not care tuppence for the law but still we cling desperately to our familiar belief of the authority of the law though this belief has been reduced to a phantasma. It is only when that 'total lie' is dissected remorselessly by ourselves and in relation to our own actions that we can begin to hope for the return of justice to this land.
That day, it seems however, is still wreathed in impossibility and uncertainty. Hence my Indian friend's probing though casual questions a few days ago remain hanging in the air. Undoubtedly the answers to those questions lie not in blaming the politicians but in confronting far more uncomfortable truths about ourselves as a nation and as a people.

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# Impeachment And Dilemma Of Independent Judiciary

by Kamal Nissanka

If my recollection is correct from Sir Edmund Codrington Carrington the first Chief Justice of Ceylon (maritime areas) to the Hon Dr (Mrs.)Shirani Bandaranayake there had been 43 chief justices in Ceylon and Sri Lanka. After the introduction of the 1978 Republican Constitution the judiciary was under eight Chief Justices beginning from Hon Mr.Neville Samarakoon to incumbent Dr (Mrs.). Shirani Bandaranayake. Out of eight Chief Justices three were destined to face impeachments. It is noted that Impeachment motions of both Hon Mr. Samarakonn and Hon.Dr (Mrs)Bandaranayake were initiated by the respective governing parties in the parliament of the day under the tenure of respective Presidents. The two impeachment motions against former Chief Justice Mr.Sarath Nanda Silva were initiated by then governing United National Party (UNP) government without the blessings of the President Mrs.Chandrika Kumaratunga. Mr. Silva was lucky to evade from the impeachments firstly as a result of proroguing the parliament and secondly by dissolution of the parliament by Mrs Kumaratunga. According to Sunday Leader of 28th September 2008 in an article written by Ms. Sonali Samarasinghe (MR gets set to battle the judiciary as war takes its toll on IDP)an attempt had been taken to impeach Hon Mr.Saleem Marzoof, a judge of the present Supreme Court against a comment made by him on non implementation of 17th amendment to the constitution.(17th amendment to the constitution is repealed now)

So, under this 1978 constitution as at present isn't that there is a chance of 37.5 percent for a Chief Justice to be impeached? If this is so, it is a grave situation and I must suggest that this unfortunate occurrence should be a deep concern to all honorable judges in Sri Lanka specially the superior court judges. In scrutinizing the manner of appointments of these three judges who faced or facing impeachment one salient feature that could be clearly identified is that all three were not carrier judges. For some reasons , late Mr.J.R. Jayawardene , former President ,founder of the 1978

constitution had relied and trusted on Mr. Samarakoon ,a respected lawyer among the legal fraternity but who at a crucial stage of the understanding of the present constitution felt that the judiciary in Sri Lanka was not independent as same as under the Soulbury Constitution. Further he clearly understood that the president of the day, his personal friend was marching expressly towards authoritarianism under the blessings of his draconian constitution. A man of principles and much respected Chief Justice Mr. Neville Samarakoon courageously faced the proceedings of "Standing Orders" which were solely framed to trial him under the direction of his estranged friend, Mr. J.R.Jayawardene. (Similar to the Criminal Justice Commission that was formed to try Mr. Rohana Wijeweera in 1971 or 1972)

Mr.Sarath Nanda Silva was the most long standing Chief Justice after the introduction of 1978 constitution. He had been on the respected seat for ten years. Mr. Silva who hailed from Katana was regarded a personal friend of late Mr.Vijaya Kumaratunga, actor turned politician of the same locality, the husband of former President Mrs. Chandrika Kumaratunga. President Kumaratunga who always had a style of working with trustworthy friends wanted to bring Mr. Silva, who started his legal carrier at the Attorney General's Department, later as a judge in the Court of Appeal (also President), sometime later as a judge in the Supreme Court to the post of Chief Justice for reasons best known to her. Elevation of Mr. Sarath Nanda Silva to the highly respected post was also regarded as a political appointment.

However by the end of 2005 the the working rapport between the Chief Justice Mr. Sarath Silva and President Mrs.Chandrika Kumaratunga seemed to have been diluted. An application for question of interpretation regarding the duration of the term of the President who have been elected to second term was before the Supreme Court for interpretation. During the period of the proceedings of this case articles appeared in the media that the former President had taken a secret oath before Mr. Silva for some other reason. It should be noted that Just after the 1999 Presidential Election Mrs. Chandrika Kumaratunga took an oath before CJ in public but an article written by Mr.Rohan Edirisinghe (Senior Lecturer, Faculty of Law, University of Colombo) and another article written by late Presidential Counsel Mr.H.L. de Silva maintained the view that it was not the time, an oath to have been taken as the remaining period of her first term of the President Kumaratunga had by then not yet been over.

At the time of filing case for interpretation of the Presidential term Mr. Silva's good relationship with Mrs. Kumaratunga was in descending status. The SC under Mr. Silva delivered the judgment declaring the period of Chandrika ends on a certain date.

When President Mr. Mahinda Rajapakse won the 2005 presidential election he had to take the oath before Mr. Silva, the Chief Justice. No doubt he was one of the architects, in fact a decisive architect of 2005 victory of Mr. Rajapakse. However his relationship, a personal friend of Mr. Rajapakse did not last long and the UNP and alternative media was also attacking him on numerous allegations. Mr. Silva

suddenly found that the immense power he could wield through the post of Chief Justice and dared to deliver some people friendly but anti government judgments. He exhibiting his authority dared to punish Mr. S.B.Dissanatake, then UNP parliamentarian. Thus Mr. Sarath Silva became a Frankenstein; the Executive President was not in a position to control him during his last few years in the office. With his retirement the President found a tamed Chief Justice in the apex court who is now an advisor to the President

Hon Dr (Mrs.) Shirani Bandaranayake no doubt in every sense a clear cut political appointee was appointed to the Supreme Court in 1996 by then President Mrs.Chandrika Kumaratunga while serving as a an academic in the University of Colombo. There was unrest in the higher legal circles including the judges during her appointment, however she remained there and gradually became the most senior Supreme Court judge at the end of Mr.Asoka de Silva's tenure. At this juncture it is interesting analyze the episode of Chief Justice's husband who was suddenly appointed to high profile financial posts and later involved in a financial scandal. It seemed that CJ was in very good terms with President initially. However matters were not so conducive and an estrangement had been developed between the two. Now there is a question as to whether the appointments offered to Chief justice's husband were given by the President on Mrs. Shirani Bandaranayake's own request or by President himself as a future taming strategy on the Chief Justice?

Unlike in the first two impeachments, this time a question is posed by the legal community as to the constitutionality of standing order 78 A, as to the jurisdiction of the Parliamentary Select Committee(PSE.) These issues will be determined in near future. It should be noted by all including the lawyers representing the PSE as well as lawyers who signed the impeachment motion as members of parliament that the interpretation of the constitution only could be done by the Supreme Court itself and abiding by any decision thereof is a must to any lawyer whose enrollment as well as removal is within the wielding power of the court. The Supreme Court by requesting the PSE not to proceed with until it determination has exemplary shown its maturity and judicial temperament.

For judges and lawyers and the legal fraternity, it is not a question of safeguarding the Chief Justice but a mission bestowed upon them by circumstances and nature to safeguard the integrity, independence and self respect of the judiciary. I think CJ as of now, is also fighting to achieve the same objective as ours, the people's sovereign right of the independence of judiciary. If not within the sight of the hangman, within sight of gallows she would not have opted to have chosen the difficult path of facing the challenge at this difficult moment. As in the field of politics the legal profession is also not without jokers and court jesters. These jokers may suggest the chief justice to resign but what we need is the ongoing debate. The non resignation will definitely intensify the debate. The Bar and the Bench have no option but work in unison to safeguard the self respect and independence of the judiciary not becoming a passive stooge of any branch of state.

From the retirement of Mr. Neville Samarakoon up to date it is almost over three decades and it is evident that during this concerned period number of constitutional issues , writ issues and fundamental right applications were argued and determined by superior courts to produce a set of highly valued challenging judgments as a result of dedication of legal luminaries of both judiciary(Bench) and Bar which lacked at the time of impeachment of Mr. Neville Samarakoon.

However, the impact of three examples of impeachments against three Chief Justices places us in a precarious political-legal trap. A President is always is in search of a tamed Chief Justice who could be manipulated to his own tunes, whims and fancies. On the other hand an upright, erudite, honest, intelligent, reasonable judge akin to new developments in the international arena cannot be submissive to a President who clearly manifests dictatorial and authoritarian tendency, in other words to a disciple of Machiavelli. Therefore it seems that the plea for independence of judiciary under the 1978 constitution to be a myth.

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# Integrity Of The Judiciary: Lawyers Can Decide Which Category They Belong To

by Shenali Waduge

An institute to be held in esteem must function and follow the principles of ethics and the fundamentals of integrity of their profession. Members of the Judiciary, the Legislature or even the Executive to be regarded as icons of integrity must function with integrity, ethics and high moral standards. When they do not – there is conflict and when they cross each other's turfs it aggravates the conflict. No institute becomes doyens of Integrity by default – it is the lawyers and judges that make a Judiciary "Independent", it is the Parliamentarians who must function as "servants" of the people who voted them (not the reverse) and it is the Executive that must ensure he/she leads by example! Anyone violating such codes has no moral grounds to be pointing fingers. That doesn't leave many standing does it and breaking coconuts is unlikely to solve matters either!

The Chief Justice now under the microscope herself had declared she is worried about the conduct of "some" lawyers while the Bar Association President Mr. Wijeyadasa Rajapakse agreed that there was a sharp decline in the quality of the legal profession. If there is deterioration in the legal profession it is no one but the members of the judiciary who must take the blame.

So long as lawyers function in questionable ways it is unlikely that the public will even respect lawyers or judges. If their shortcomings have been as a result of being trapped by outside forces – the simple answer is, the guilty are those who throw the bait and those who take the bait.

The misdeeds are many – lawyers have been found guilty of exploiting the innocence of their clients, lawyers have sought sexual favors from those unable to make lawyer payments, it is nothing different to what Minister Maithripala says of the sex maniacs in the Health Ministry, the deals struck between lawyers representing defendant and accuser to prolong cases is nothing new either, lawyers have been found to divulge

classified client information thereby breaking the client confidentiality code and the list is no short one.

It is the judicial duty to "do justice according to law". One finds it hard to understand how a lawyer can defend a known murderer, a rapist, a child killer and argue his case on the strength of the payment to allow such an offender to walk free citing technicalities! It may prove the arguing ability of the lawyer but it does little to uphold justice for those who are dead or raped! No lawyer should take a case based on the payments, the promotion, recognition associated with the case or even political affiliations.

All decisions must have a combination of moral cum legal principles. Lawyers become lawyers because they have a strong inclination to ensure justice, rights, legal systems and the codes of law prevails. They do not become lawyers only to gain fame and prestige and use that to charge exorbitant client fees using the strength of their ability to use the law to even secure the release of people best locked up and safe from society.

Legislators on the other hand are those voted in by the people. If people vote for politicians who are unsuitable to function as servants of the people – there is an adage that says the people get the government they deserve. People – the voters must be aware of who they are voting or refrain from voting altogether. If people vote a rogue into parliament he is only carrying out his mandate – afterall people voted for him! Until such time people intelligently vote their representatives, parliament is likely to continue its colorful record of malpractices and there is nothing to be really surprised or groan about either.

However, with the judiciary it is very different. They have all the powers before them to commit zero-crimes in terms of zero-legal malpractices. The argument is that for any authority to be declared as INDEPENDENT it must first ensure that all those belonging to that authority function with independence. When they don't and misadventures come to light it is unfair to blame only one party – afterall it takes two to tango.

That's not to say there are no excellent lawyers who uphold every word of justice and are people highly respected in society.

A code of conduct for lawyers and judges is much in need!

However, 98% of lawyers give the other 2% of lawyers a bad name – the lawyers can decide which category they belong to!

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# Is Sri Lanka's Parliament Supreme?

by Laksiri Fernando

With the impeachment motion against the Chief Justice, some of the old debates have surfaced in new form. One of which is the question of supremacy of Parliament. This was a matter of contention in early 1970s during the debates over the 1972 constitution which somewhat died down with the advent of the executive presidential system; JR Jayewardene claiming that he could do anything other than making a 'man a woman or a woman a man.' This adage was traditionally attributed to the British Parliament, which was claimed to be supreme. JR kept undated letters of resignation from all MPs of his party to 'prove or disprove' that 'Parliament is supreme.'

When the first press announcement was made about the impeachment motion, the government spokesman, Keheliya Rambukwella, claimed that the Chief Justice has violated the supremacy of Parliament (Combo Page, 1 November 2012). But it was not a charge in the impeachment motion. By that time many MPs in the ruling coalition had surrendered their signatures to a blank paper to be attached to the impeachment motion, reminding the undated resignation letters of JR Jayewardene's time! What they verbally said however was that the judiciary should not object to whatever they want to do in Parliament whether constitutional or not apparently on the instructions of the President. During the Divineguma hearing before the Supreme Court, some argued that the Bill is not unconstitutional because the Parliament is supreme.

The reason for this argument is one phrase in Article 4 (c) of the Constitution which says the following:

"The judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, wherein the

judicial power of the People may be exercised directly by Parliament according to law."

The phrase "the judicial power of the people shall be exercised by Parliament through courts…" cannot however be taken in isolation without properly reading the conditional clause "created and established, or recognized, by the Constitution, or created and established by law…" The intermediation of Parliament between the people and the judiciary is conditioned by the Constitution and the Constitution is supreme. If there is any judicial power directly to the Parliament that is in respect of "matters relating to the privileges, immunities and powers of Parliament and of its Members."

It is understandable that the parliamentarians wish to 'feel and claim' that they are part of a supreme body, but constitutionally speaking this is not the case in Sri Lanka. It is only good for their ego. Even people might be delighted to see if the parliamentarians could assert their dignity and pride against the Executive President, under whose powers the Parliament has simply become a rubber stamp or something worse. If they assert, then they may call it 'supreme.' But this is not the case at present. Instead they try to assert their illusory supremacy against the Supreme Court, which in fact they should respect and safeguard. This is the tragedy of the political situation in Sri Lanka today. They are barking up the wrong tree.

The Supreme Court is only doing a professional job independently by interpreting the constitutionality of the bills. They should not be dragged into politics by all parties, those who are for or against the impeachment.

British Concept

Talking about 'supremacy' of anything is only illusory or relative these days. This applies to the concept of 'sovereignty' as well, except in its ultimate sense in respect of the 'people's sovereignty' who can legitimately overturn governments and reconstitute constitutions through genuine representatives. Otherwise all are dependent on each other and the balance between the 'national and the international' or the balance between 'different branches of government' are common everywhere. That is in respect of politics and society.

But in respect of law, some still wants to refer to a specific legal source and that his how the British concept of the supremacy of parliament emerged. Parliament here however did not mean only the House of Commons. AV Dicey is one of the prominent authorities on the subject. In his Introduction to the Study of the law of the Constitution (1885) he said "Parliament means The King, the House of Lords, and the House of Commons: these three bodies acting together may be aptly described as the 'King in Parliament', and constitute Parliament."

He further said "The principle of Parliamentary sovereignty means neither more nor less than this, namely that Parliament thus defined has, under the English

constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament."

In the above statement, 'no person or body' at one point meant mainly the Church or the Pope. We also have to keep in mind that the House of Lords was Britain's 'Supreme Court' before 2009. Therefore, the 'Supreme Court' was included in the concept of supremacy.

Leaving aside that legal concept, there is no political reality in the concept of the supremacy of Parliament in the United Kingdom today. Four main reasons can be attributed: (1) the devolution of power to the Scottish Parliament and the Welsh Assembly, (2) the Human rights Act of 1998, (3) the UK's entry to the European Union in 1972 and (4) the decision to establish a Supreme Court in 2009.

Supremacy in Finland

In the case of republics like Sri Lanka, the general concept of the source of law is not Parliament but the people themselves. Jayampathy Wickremaratne has very clearly explained this to The Island newspaper giving an interview to Lynn Ockersz (26 November 2012). That is why the American Constitution begins by saying "We the People of the United States." There the separation powers are almost a sine qua non. It was rather dangerous to handover sovereignty of the people to one single body.

But there were countries, in the socialist block, which believed that the people's sovereignty can be transferred into a legislature that would constitute supreme; and no law court or any such institution could curtail or check its legislative functions. Most of these countries now have vanished, except the caricatures like North Korea. Almost all of these countries were one party States. The theory of this 'supremacy' in fact was a justification for the authoritarian one party rule.

There were very few other countries which were not directly in the socialist block but nevertheless shared a similar concept of legislative supremacy. Sri Lanka in 1972-77 and Finland even today are examples. Their concept was or is a combination of some sort of socialism and utilitarian thinking. Even the liberal utilitarian thinkers (i.e. Jeremy Bentham) strongly believed in strong horizontal democracy for progressive legislative purposes. There is some resonance of this thinking even today among those who oppose the Supreme Court ruling on the Divineguma Bill and wanted to impeach the Chief Justice for that crime. But this is only a mistaken conception.

Neither in the present Finish Constitution (2000) nor in the First Republican Constitution in Sri Lanka (1972) that a blatant concept of supremacy was enshrined as asked by the government aligned law makers today in Sri Lanka. The reason why the Finish Parliament is called supreme is the following clause in Section 2 of the Constitution.

"The sovereign powers of the State in Finland are vested in the people, who are represented by the Parliament."

Based on that premise, the Supreme Court in Finland does not review the constitutionality of a bill prior to enactment although the judicial system headed by the Supreme Court has considerable power on rule of law and implementation of law based on separation of powers in the Constitution. The review of constitutionality of a bill is vested within the Parliament itself. There is a Constitutional Law Committee of Parliament to review all bills and recommend changes, if needed. They do it fairly impartially. They do not allow normal legislation to go through in contravening the Constitution through a special majority like in Sri Lanka. Most interestingly, the Finish courts do have a form of 'post-judicial review' to the extent that if there is an inconsistency between a normal law and the Constitution then they have power to uphold the Constitution. In Finland changing the Constitution is also not an easy process.

Now our law makers should not jump on the Finish example to uphold the supremacy of Parliament and reject the directives or 'recommendations' of the Supreme Court. Sri Lanka's present Constitution is different. I remember the former President of Finland (1994-2000), Martti Ahtisaari, saying at a close meeting in Colombo, organized by Lakshman Kadirgamar, somewhere in 2003 that the Finish Constitution is still under scrutiny and they may go for more separation of power through experience. He also explained that the supremacy of Parliament was instituted to move away from the previous Presidential system where the President had veto powers on legislation. As far as I understand, Martti Ahtisaari played a major role in this transition.

1972 and 1978 Constitutions

One may argue that something closer to the supremacy of Parliament was in the First Republication Constitution of Sri Lanka in 1972. But it is not the case today. Articles 3 and 4 of the 1972 Constitution stated "In the Republic of Sri Lanka, Sovereignty is in the People and is inalienable. The Sovereignty of the People is exercised through a National State Assembly of elected representatives of the People." (my emphasis).

The comparable Article 3 of the 1978 or the present Constitution says in contrast the following.

"In the Republic of Sri Lanka sovereignty is in the people and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise."

It is very clear that the second proposition which was there in the 1972 Constitution that the 'sovereignty of the people is exercised through National State Assembly/Parliament' or something similar is not there. Instead, sovereignty is defined to include 'fundamental rights and the franchise' in addition to the 'powers

of government.' It has to be added that the Supreme Court has constitutional power in safeguarding the fundamental rights of the people which is a clear part of sovereignty.

In terms of the three branches of the government or how the delegated sovereign powers are exercised, there are comparable articles in the 1972 Constitution and the present (1978). In the 1972 Constitution, it is Article 5. In the present Constitution it is Article 4. Article 5 of the 1972 Constitution begins by saying:

"The National State Assembly is the supreme instrument of State power of the Republic."

It is very clearly stated that the 'National State Assembly is the supreme instrument of State power." In contrast, Article 4 of the present Constitution simply begins by saying

"The Sovereignty of the People shall be exercised and enjoyed in the following manner."

I can go on and on giving more examples but simply there is no conception of the supremacy of Parliament or anything similar in the present Constitution. That is what matters to the present debate. Of course some of the parliamentarians of the UPFA may say that they uphold the ideology of the 1972 Constitution and not the present. That is well and good but first they should respect the present Constitution and work within its four corners.

Conclusion: Supremacy of the Constitution

In respect of any supremacy that we can think of in politics, it is the Constitution that is supreme. The rule of law and constitutionalism are the main derivatives of that supremacy. Supremacy of the Constitution in turn is a reflection of the sovereignty of the people, their powers of government, fundamental rights and the franchise that are mentioned in the Constitution. The 'powers of government' are not the powers of corrupt politicians but the powers of the people. They include not only the powers of the Centre but also the Local Government and the Provincial Councils.

Even in ancient times there were two types of law that were recognized: (1) Dhamma Thath or laws of Dhamma and (2) Yasa Thath or laws of the King. It was believed, although not always practiced, that the laws of the King should be consistent with the laws of Dhamma. That is how the moral legitimacy derived for government. Dhamma Asoka was one king who tried to practice his laws according to the higher laws of Dhamma.

Supremacy of the Constitution in Sri Lanka is evident from many aspects of the Constitution; first and foremost from the strict provisions for its amendment and repeal. The Constitution is subordinate only to the sovereignty of the people,

ultimately through referendum. The legal and formal interpretation of the Constitution is assigned only to the Supreme Court and that is why the SC should be considered in utmost respect as a collective and an institution. Their interpretations are binding on the members of Parliament and the Parliament itself. People are well aware of the character and calibre of many politicians in the country today, particularly of the governing party. They have simply become corrupt through money and power. The backing of the army should not be considered as legitimacy for their illegitimate behaviour or arrogant disregard of the Constitution.

All members of Parliament have already taken an oath to uphold the Constitution. This is a vindication of the supremacy of the Constitution. According to Article 63, the oath is as follows:

"I ……. do solemnly declare and affirm /swear that I will uphold and defend the Constitution of the Democratic Socialist Republic of Sri Lanka."

Politically speaking, however, the people may appreciate the Parliament asserting some sort of 'supremacy' against the Executive; a supremacy on condition and with checks and balances. That should be against the Executive and not against the Judiciary. The Judiciary is a professional body and should be independent from all politics. This assertion against the Executive should lead to a change in the present Constitution from the executive presidential system to a parliamentary form of government in the future.

The need for this assertion today primarily derives because of family rule within the Executive; the President holding almost absolute executive powers; one brother controlling the armed forces and now also the police; another brother is being the most powerful Minister in Parliament; and yet another brother trying to control Parliament being the Speaker of Parliament.

If there had been many family dynasties in history, the present caricature in Sri Lanka might be the worst and the vicious kind clothed under a 'democratic garb.' This is utterly shameful by all ethical norms and standards.

Courtesy: The Island

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# Removal Of Judges; A Comparative Review Of The Procedures

by Thushara Rajasinghe

Removal Of Judges; A Comparative Review Of The Procedures Of Sri Lanka, India, Singapore And New Zealand

The Parliament Select Committee (PSC) appointed to probe the allegations leveled against the present Chief Justice of Sri Lanka commenced its proceedings on the 23rd of November 2012. Meanwhile numbers of prominent professionals have invoked the jurisdiction of the Court of Appeal seeking orders in the nature of writ of prohibition against the PSC challenging the constitutionality of the PSC and its procedures. These petitions are now before the Supreme Court to determine the constitutionality of Article 107 (3) of the Constitution and Standing Order No. 78A. These developments derived from the move to impeach the present Chief Justice of Sri Lanka have sparked a very important and constructive intellectual discussions, apparently sidelining some of the politically and personal affiliation rhetoric over the present impeachment process.

Independence of the Judiciary is one the main cornerstones of a vibrant and dynamic democracy It holds a significant position within the wheels of the democracy. Unlike other two main organs of the government, the judges of the Judiciary are appointed officers but not elected representatives of the people. It is the organ of governance entrusted the exercise of the judicial power of the People. The appointment and the removal of the judges to and from their respective office is highly delicate and sensitive process. Both these processes of appointment and the removal should be done with great amount of fairness and openness as it manifestly affects the independence of the Judiciary. It is evident that most of the democracies in the world have guaranteed the tenure of the office of the judges without any disturbance and they could only be removed on the grounds of proven misbehavior or incapacity through a special process established under constitution which is the paramount law of the land.

On other hand the Judges are also required to maintain not only a high standard of judicial conduct and behavior but also their personal lives. The judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer. Expanding the scope of judicial conduct, "the Bangalore Principles of Judicial Conduct 2002" which was adopted in Hague by "the Judicial Group on Strengthening Judicial Integrity" stipulates that a judge shall not allow the judge's family, social or other relationships improperly to influence the judge's judicial conduct and judgment as a judge and also Judge shall not use or lend the prestige of the judicial office to advance the private interests of the judge, a member of the judge's family or of anyone else, nor shall a judge convey or permit others to convey the impression that anyone is in a special position improperly to influence the judge in the performance of judicial duties[i].

Bearing in mind the need of a competent, independent, and an impartial judiciary and also the high level of integrity, official and personal conduct of the judges, the process of removal of the judge from his or her office should be a process embodied with a high level of fairness and transparency. A fair and just adjudicating process is required to fully adhere the principles of " Nemo iudex in causa sua" ( no one should be judge in their own case) and "Audi alteram partem" ( both parties should be heard) in order to ensure the process is not paralyzed with actual or imputed bias.

In view of such a high level of fairness and openness in the process of removal of a judge from his or her office on the grounds of proven misbehavior and incapacity; this is a timely effort to comparatively review the process of removal of judges in the highest court in Sri Lanka with three leading Commonwealth jurisdictions of India, Singapore and New Zealand.

All these four jurisdictions which are under review of this paper have recognized the independence of judiciary by stipulating that every judge appointed shall not be removed except from the stipulated procedure under their respective constitutions[ii]. Article 107 (2) of the Constitution of Sri Lanka and Article 124 (4) of the Indian Constitution state that Judges of the highest court of record could be removed by the order of the President made after address of parliament (in the case of India each house of parliament) supported by a majority of the total number of members of parliament has been presented to the President for such removal on the grounds of proved misbehavior or incapacity. Section 23 of the Constitution Act of 1986 of New Zealand states that A Judge of the High Court shall not be removed from office except by the Sovereign or the Governor-General, acting upon an address of the House of Representatives, which address may be moved only on the grounds of that Judge's misbehaviour or of that Judge's incapacity to discharge the functions of that Judge's office.

The procedure adopted in Singapore is not similar to the rest of the jurisdictions under review of this paper, wherein the Prime Minister, or the Chief Justice after consulting the Prime Minister, represents to the President that a Judge of the Supreme Court ought to be removed on the ground of misbehavior or of inability,

from infirmity of body or mind or any other cause, to properly discharge the functions of his office[iii].

The Article 107 (3) of the Constitution of Sri Lanka and Article 124 (5) of the Indian Constitution provide the appropriate procedure to be adopted for the presentation of an address and for the investigation and proof of such alleged misbehavior or incapacity of a judge. However the article 107 (3) is noticeably differ from Article 124 (5) of the Indian Constitution whereas the article 124 (5) has only conferred the Parliament of India to regulate the procedure of presentation, investigation and proof of such address according to an enacted law of the Parliament which is the Judges (Inquiry) Act of 1968. The Sri Lankan Parliament is given a wider scope to regulate the presentation and the investigation of such address either by law enacted by Parliament or by Standing Orders of the Parliament. So far the Parliament of Sri Lanka has not enacted such law regulating such procedure and opted to rely on Standing order 78A of the Parliament Standing Orders.

Article 98 of the Constitution of the Singapore deals with the procedure to investigate the presentation made to the President in relation to the removal of a judge pursuant to Article 98 (1). On par with the Indian approach "the Judicial Conduct Commissioner and Judicial Conduct Panel Act of 2004" provides the procedure for investigation to remove a judge on the grounds stipulated in section 23 of the Constitution Act of New Zealand.

Section 3 (2) of the Judges (Inquiry) Act of 1968 of India empowers the Speaker of the House of the People ( Lok Sabha) or the Chairman of the Council of State ( Rajya Shaba) and/or Speaker and the Chairman in joint consultation as the case may be to appoint a committee of three members to investigate into the alleged misbehavior or incapacity of a judge. The three member committee shall comprise one from among the chief justice or other judges of the Supreme Court, one from among the chief justices of the High Courts, and one person who is in the opinion of the Speaker or the Chairman as the case may be a distinguished jurist.

President of the Republic of Singapore shall appoint a tribunal which consist with not less than five persons and refer the presentation made to him by the Prime Minister or the Chief Justice as the case may be to investigate the same[iv]. In pursuant to Article 98 (4) of the Constitution, the tribunal shall consist with the persons who hold or have held the office as a judge of the supreme court of Singapore. The president is given an optional approach under the Article 98 (4) to appoint a person who holds or have held equivalent office as a judge of Supreme Court of Singapore in any part of Commonwealth if it appears to the President expedient to make such appointment.

Under the Judicial Conduct Commissioner and Judicial Conduct Panel Act of 2006 of New Zealand (hereinafter refers as Judicial Conduct Act), a Commissioner is appointed to the office of the Judicial Conduct Commissioner by the Governor General on the recommendation of the House of Representatives. Prior to such

recommendation by the House of Representatives, the Attorney General (it should be noteworthy to understand the office of Attorney General is a political office and he is a member of the parliament) must consult the Chief Justice about the proposed recommendation and inform the parliament accordingly[v]. The functions and the powers of the Commissioner under the Act are to receive complaints about judges and deal with them, to conduct preliminary examinations of complaints, and in appropriate cases, to recommend to the Attorney-General that a Judicial Conduct Panel be appointed to inquire into any matter or matters concerning the conduct of a Judge.

If the Commissioner recommend the Attorney-General that a judicial Conduct Panel be appointed to inquire, the Attorney-General may appoint such a panel pursuant to Section 21 of the Act. It is noteworthy to mention that to appoint such a panel is a discretionary power of the Attorney General. Prior to the appointment of the Panel the Attorney-General must consult the Chief Justice about the proposed membership of the panel, but should not consult the Chief Justice whether the Penal should be appointed. If the alleged misconduct is in respect of the Chief Justice, the Attorney-General must consult the next senior most judge of the Supreme Court[vi]. The Attorney-General subsequent to consultation with the Chief Justice or a senior most Judge of the Supreme Court as the case may be, then appoint a 3 Member Judicial Conduct Panel pursuant to Section 22 of the Act. Two of them must be from the judges of the Supreme Court, retired judges of the Supreme Court or a Barrister or Solicitor who have held the practicing certificate for not less than seven years. Other member of the Panel must be a lay person who is not a judge, retired judge or a Barrister or Solicitor.

Coming back to Standing Order 78A (2) of the of the Parliament of Sri Lanka, it states that the Speaker shall appoint a Select Committee of Parliament consisting of not less than seven Members to investigate and report to Parliament on the allegations of misbehavior or incapacity set out in such resolution. The appointment of the Parliament Select Committee consisting of Members of the Parliament to investigate the allegation is remarkably different from the adopted procedures of other three Commonwealth countries under review of this paper.

The three member committee appointed under Section 3 (2) of the Judges (Inquiry) Act of 1968 of India shall have power of civil court under the Civil Procedure Code of 1908 to summon, enforce the attendant of persons, discovery and production of documents, receive evidence of oaths, issue commission for examination of witnesses and documents[vii]. The committee shall frame the charges against the judge on the basis of which the investigation is proposed to be held and serve the same with all other material statements on which the charges are based on to the Judge in concern and shall give him a reasonable opportunity of presenting a written statement of defence. The Committee shall have power to regulate its own procedures in making an investigation and shall give reasonable opportunity to the judge for cross examination of the witnesses, adduce evidence, and of being heard his defence. The

Central Government if required by the Speaker or the Chairman as the case may be could appoint an advocate to conduct the case against the judge[viii].

Likewise in India, The Judge who is the subject of the inquiry by a Judicial Conduct Panel is entitled to appear and be heard at the hearing and to be represented by counsel. The Judge's reasonable costs of representation in respect of the inquiry must be met by the office of the Commissioner[ix]. The section 26 of the Act specifically states that the Penal has and may exercise the same powers as are conferred on Commissions of Inquiry by sections 4 and 4B to 8 of the Commissions of Inquiry Act 1908. Furthermore, the Penal must act in accordance with the principles of Natural Justice[x]. A noteworthy feature in the proceeding of the Panel is that the Attorney General must appoint and instruct a person to act as special counsel in an inquiry by a Judicial Conduct Panel. At the hearing, the special counsel must present the allegations about the conduct of the Judge concerned, and may only make submissions on questions of procedure or applicable law that are raised during the proceedings. The special counsel must perform his or her duties impartially and in accordance with the public interest[xi].

In line with the approaches adopted by India and New Zealand, 78A (3) of the Standing Order requires the Parliament Select Committee to transmit to the Judge whose alleged misbehaviour or incapacity is the subject of its investigation, a copy of the allegations of misbehaviour or incapacity made against such Judge and set out in the resolution pursuant to such Select Committee was appointed, and shall require such Judge to make a written statement of defence within such period as may be specified by it. The Judge shall have the right to appear before it and to be heard by, such Committee, in person or by representative and to adduce evidence, oral or documentary, in disproof of the allegations made against him.

In conclusion of this comparative review, it could be found that the salient different feature of the procedure adopted in Sri Lanka is that the Parliament of Sri Lanka has entrusted the Parliament Select Committee consisting Members of Parliament to investigate the allegation against the Judge. Whereas, India, New Zealand and Singapore have entrusted such responsibility with a committee or a tribunal consisting of Judges of Supreme Court, Retired Judges of Supreme Court, Prominent lawyers and jurists. New Zealand has gone further by including a lay person to the Panel which is entrusted to investigate the alleged misconduct or incapacity of the Judge.

[i] Principle 4.8, 4.9. of the Bangalore Principles of Judicial Conduct 2002,

[ii] Article 107 (2) of the Constitution of Sri Lanka, , Article 124 (4) and 217 (1) of Indian constitution, Article 98 (1) of the Singapore Constitution, and Section 23 of the Constitution Act of 1986 of New Zealand

[iii] Article 98 (3) of the Constitution of Singapore,

[iv] Article 98 (4) of the Constitution of Singapore,

[v] Section 7 of the Judicial Conduct Commissioner and Judicial Conduct Panel Act of 2006

[vi] Section 21 of the Judicial Conduct Commissioner and Judicial Conduct Panel Act of 2006,

[vii] Section 5 of the Judges (Inquiry) Act of 1968,

[viii] Section 3 (9) of the Judges (Inquiry) Act of 1968,

[ix] Section 27 of the Judicial Conduct Commissioner and Judicial Conduct Panel Act of 2006,

[x] Section 26 (3) of the Judicial Conduct Commissioner and Judicial Conduct Panel Act of 2006,

[xi] Section 28 of the Judicial Conduct Commissioner and Judicial Conduct Panel Act of 2006,

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# The CJ And The Prisoners Come Under The Same Law

by Bishop Duleep de Chickera

The move to impeach the Chief Justice (CJ) and the prison riot at Welikada in which a number of prisoners died, have aroused considerable public interest over the recent past. The Government's reactions and actions have come under the scrutiny of the people in what seems like an unofficial referendum. But public interest and scrutiny must be sustained consistently if the Judge and the judged are to receive the justice they are both entitled to.

## Different but equal

The persons connected with these happenings belong to two very different worlds. One is a prominent figure holding very high public office; the others are a mass of faceless and excluded persons. One interprets the law and dispenses justice; the others have been judged and sentenced under this same law. One has access to the best legal advice, skills and competence; the others are deprived of such resources.
On principle however, the CJ and the prisoners come under the same law and must be equally protected from any distortion of justice. Ironically, it is the judicial power that the one commands that makes her a threat; and the social powerlessness that the others convey that make them dispensable. But justice requires that neither this power nor this powerlessness should be allowed to work to their disadvantage.

## The responsibility to act justly

The Circumstances surrounding the impeachment of the CJ are worrying. Most of the fourteen charges could have been raised long before, but were not. Something recently provoked the impeachment and public opinion suggests that this in all probability was the Supreme Court ruling, interpreted as defiance. Consequently the objective of the impeachment is questionable. Is it to ensure a clean CJ or a tame CJ?

Also questionable is the procedure being adopted. For instance, representatives of a government that already believes there are valid charges for an impeachment comprise the majority on the Parliamentary Select Committee (PSC) which will also make the judgement. This simply does not sound right.
In these circumstances it is still not too late for the government to consider one of two options. The first is to avoid the escalation of a national crisis by withdrawing the impeachment and resolving any differences with the CJ through conversations; so that our national energy could be directed towards more important internal and external challenges. If on the other hand it still wants to proceed with the impeachment, the shortcomings in procedure should be rectified and the principles of justice set in place. If it is the latter, the members of the PSC will be obliged as representatives of the people to take on to themselves a national responsibility and rise above any partisan expectations. It will only be then that the CJ, who according to media reports is ready to defend herself, will have a fair and even chance of doing so.

Prisoners are also human

The Welikada riot in which prisoners took to violence is unacceptable and must be condemned. All security personnel injured while exercising their duty to quell the riot, and their families should receive the care, appreciation and prayers of the nation. Allegations of corruption in the Prisons system and the need for an effective grievance resolution mechanism for prisoners will also have to be addressed by impartial and competent persons without delay.

Of immediate importance however is the need to ensure justice for the prisoners killed in the riot and their families. That they were persons already judged, convicted and often socially despised, does not mean they and their families can be denied justice.
The truth about the causes of the riot and very particularly whether those killed died in a shootout or otherwise, has to be ascertained by an impartial commission and divulged to the nation. If it transpires that some of these deaths could have been avoided those responsible will have to be dealt with under the law.

A just promise

All citizens of our beloved Sri Lanka belong somewhere within this range of power and powerlessness. This is why what happens to the judge and the judged matters to us all; and this is why an accountable and independent CJ within an accountable and independent judiciary are of monumental importance for the nation today.
They together hold a promise of justice for the Judge and the judged, the powerful and powerless, each so vulnerable and excluded in their different ways.

Courtesyl The Island

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# Similarities And Dissimilarities Between The PSC Trial And The Moscow Show Trials

by Basil Fernando

In the mid-1930s, Stalin staged several trials that are now known as Moscow Show Trials. The similarities and dissimilarities between them and the "trial by PSC" are as follows.

Stalin's trials had a façade of justice, in that they were conducted in a court by a judge and prosecutor, and it was an open trial. In fact, the wide openness of the trial was one of the very important factors of that kind of trial. However, the PSC trial is by seven parliamentarians and conducted in secret, and even the reporting of the process is contrary to the Standing Orders.

The central aspect of Stalin's trials was the confession; the accused admitting his guilt and apologizing to the nation. This was to create the public impression that the verdict is based on actual guilt, admitted by the accused himself. In a "PSC trial", there is no such possibility of "voluntary" confessions. (In fact, in Stalin's trials the confessions were obtained by torture and if the victims were not willing to make a public confession, they would have been killed without the trial. However, in a PSC trial the issue of proof, even in an artificial way, does not seem to be required. In fact, it is the issues relating to proof that are being challenged by the cases filed before the Supreme Court.)

In Stalin's trials, there was no show of hurry. Of course, the entire process was pre-determined and if anything went against the script, the cases were postponed and the victims were made to understand, by torture or otherwise, that the script has to be followed. In the PSC trial, there is a mighty hurry and, according to reports, even the request for a reasonable time for preparation by the Chief Justice has been denied.

Stalin wanted the Western world to believe that the trial was a genuine one. That was the reason for allowing observers – and even inviting very high level observers – to the trial. When the PSC trial is held, ignoring requests by the Supreme Court to withhold the trial until they determine some questions relating to the legality of the PSC process, there is not even an attempt to give an impression of a fair trial.

A good book to read these days as we watched the PSC trials is Darkness at Noon by Arthur Koestler, where the sheer irony of so-called justice is brilliantly exposed.

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## Why Only Judges Should Judge?

by Basil Fernando

The Parliamentary Select Committee's inquiry has raised the issue of the politicians being judges. Some have even said that the politicians have a better right to judge because they are elected representatives of the people whereas the judges are not.

The people elect their representatives for particular purposes. By the very nature of judging guilt and innocence that is not a matter that would depend on people's consent even if a hundred percent of the electors declared a guilty person innocent or an innocent person guilty, their verdict do not represent justice.

This is not a difficult problem to understand. We entrust only qualified medical doctors to deal with the affairs of illness and healthcare. It is only qualified and experienced surgeons that we entrust with the duty of conducting surgery. This list can be long in terms of various other professions.

In each of these the efficacy depends on "a judgment made" on the basis of evaluation of factual circumstances and established principles that belongs to each of the branches of such professions. Where no such knowledge of those principles exists there cannot be a valid judgment within that field.

Among all subjects that humans have to deal with the most difficult are the problems of justice. Justice means fairness as John Rawls so comprehensively explained. Dealing with fairness is perhaps the most complicated and difficult of all categories of thinking and arriving at conclusions.

This may be illustrated by an example. Between 1975 and 1979 Pol Pot ruled in Cambodia, during which time, one-seventh of the population of that country was

destroyed. Among them was almost the entirety of the educated sections of the society. Among all other professionals lawyers and judges were also completely wiped out.

Between 1980 and 1989 there was the period of trying to rebuild Cambodia out of the tremendous and indescribable destruction that was caused in the past. Much of the rebuilding took place under the guidance of the Vietnamese advisors. It is they who built the new administrative structure, though at a most rudimentary level. The biggest obstacle they had for rebuilding of the structure was the absence of trained human resources.

Where this was most manifest was when an attempt was made to create some form of a court system. It was an elementary dispute settlement system and not a formal justice system. However, even to do that there were no educated group of persons. People were randomly selected mostly by the skills they have shown in party work to works as "judges" in the new setup.

When the UN Transitional Authority started in 1992, to prepare the elections for 1993 May, one of the major problems that were identified was the absence of the justice sector. The UN and the international agencies tried to conduct training programmes for "the judges." In one such programme where many "judges" attended was to last for two weeks and was attended by two internationally renowned judges, one from India and the other from Australia.

After the second day of the sessions, "the judges" requested that they needed special sessions where they want to raise some questions and it was accordingly arranged. During this meeting Cambodian "judges" asked the international experts what they are proposing to achieve by this training programme to which the international experts replied that they were trying to help them to be trained as judges. The Cambodian "judges" in return asked how long does it take in other countries to make a judge. The international experts replied with the details of legal education, followed by periods of actual practice of law and thereafter the selection process to become judges and the gradual process of learning from being a lower court judges to ascend to various steps in the judicial ladder, which in each case took many years. The Cambodian "judges" then asked the experts, whether they thought it is possible to give that training to them in two weeks. Thus exposing the ridiculousness of the situation.

Judging in a judicial sense involves dealing with the problems of truth without consideration for anything else. Acting without consideration for anything else, one of the most difficult endeavours for humans. In normal circumstances, people think of so many things when dealing with any particular thing. People bring into their judgments the problems about their personal ambitions, expectations and hopes, problems of their families, of those relating to their properties and other issues concerning with prestige, reputation and the like. A judge alone is expected to

completely disregard all such matters in dealing with the questions of guilt or innocence of persons they are judging.

A politician is by the very nature a person who cannot divorce his political interest from his judgments. In fact a politician is a person who has internalised abilities to turn everything into a political advantage. What votes he would gain or lose, the implications of that he does has on the political party he belongs to and the problems of power are the maters that the politicians mind deal with all the time. A politician simply cannot make judgements, which could have disastrous impacts on the interest of his political party and his own political interest.

Thus when the politicians sit in judgment on issues on which they have a deep interest such for example as the outcome of this inquiry into the Chief Justice's affair there is no possibility at all of such politicians being able to deal with the intricate problems of fairness which is the essence of justice.

A nation that is incapable of ensuring of ensuring a process of justice is a society in great peril for no single case is case only about the persons involved. The standards of justice affecting each case, affects the entire society. And this is even more so when obvious matters of national interest such as the case of the Chief Justice is involved. If such an activity is done with careless disregard for basic issues of fairness, the society as a whole will have to pay a huge price for the absence of justice.

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# A surge of public empathy for a court under siege

by Kishali Pinto-Jayawardena

The government's brushing aside of the Supreme Court's entirely appropriate order this week requesting Parliament to desist from continuing with the impeachment of the Chief Justice until a final determination was handed down in petitions being heard filed before it, was arrogant but unsurprising.

The Bench spoke to the comity that must exist between the judiciary and the legislature for the greater good of the country. It cautioned that this would be prudent as well as 'essential for the safe guarding of the rule of law and the interest of all persons concerned.'

But its words were in vain and at the close of the week, Sri Lanka's Chief Justice was compelled to appear in person before the Parliamentary Select Committee (PSC) in the formal commencement of a politically driven impeachment process.

Neither purse nor sword but only judgment

American founding father and political philosopher Alexander Hamilton's potent and powerful warning that 'the judiciary has no influence over either the sword or the purse, it may truly be said to have neither force nor will but merely judgment…' ((Federalist Papers, No 78) is therefore singularly apt for the dilemma in which Sri Lanka finds itself today.

The executive holds the sword of the community while the legislature commands the purse. In contrast, the judiciary is dependent solely on its judgment and integrity. If the integrity of the judicial branch of the State is destroyed through executive action

or its own complicity, then all is lost. The executive is free to trample as it wishes on the judiciary, the law is then unseated and justice is thrown proverbially to the wolves.

In the present impeachment of Sri Lanka's Chief Justice, it does not require remarkable wisdom to determine as to who will be the winner and who the loser in a head-on clash. This is possibly why Thursday's order by the Supreme Court wisely sought to avert an open confrontation with the legislature at the outset itself. Commendable restraint was shown, transcending a most particular anger that must naturally be felt by judicial officers when the head of the judiciary is impeached in this way. Now that this request has been abruptly brushed aside by the government, the consequential judicial response remains suspenseful though it is not difficult to imagine a plea of futility being put forward by the Attorney General in later hearings.

Significant differences with recent precedent

Notwithstanding, this week's measured ruling contrasts sharply with an earlier order of the Court delivered in 2001 when an impeachment motion lodged by the opposition was due to be taken up by a Select Committee against a former Chief Justice, Sarath Silva. In that 2001 order, interim relief was granted staying the appointment of a Select Committee with the judges opining that a stay was warranted due to a purported exercise of judicial power by the legislature. This view was peremptorily dismissed by the late Anura Bandaranaike, then Speaker of the House who reasoned in copious detail that the judiciary had no business interfering with the constitutionally mandated parliamentary process of judicial impeachments. Fortuitously, (for that former Chief Justice), Parliament was thereafter dissolved by former President Chandrika Kumaratunga, preventing any further action.

However there were significant differences between that impeachment motion and the current unseemly fracas. Charges against that former Chief Justice relating to abuse of judicial power had been ventilated long before 2001, causing a veritable public scandal as it were. That motion for impeachment was brought by the opposition and not by the government. That Presidency's entire effort was, in fact, to prevent the impeachment being brought against that former Chief Justice for reasons that are well in the public domain.

Comity must exist between the judiciary and executive

In contrast, what we have now is a hastily drafted impeachment motion, replete with mistakes but driven by the formidable might of this government with accompanying full scale abuse of the judiciary by the state media. A greater contrast therefore cannot be evidenced. Rather than the executive safeguarding a Chief Justice against whom allegations of judicial misconduct had been leveled, what drives this present process is executive pique if not outright anger at a series of adverse Determinations by the Supreme Court on key Bills. The move is against the entirety of the Court for a

Determination is not an opinion of an individual judge but a binding decision of the entire Court. The Court's response this Thursday illustrates its recognition of the danger that it faces collectively. Indeed, given the peculiar context in which its intervention was sought, this was a far more appropriate ruling than the stay order handed down by a previous Court in 2001.

Whatever this may be, this judicial stand must be unequivocally supported by the Bar and by the citizenry. The Bar has bestirred itself recently in passing a resolution requesting that the President reconsider the impeachment of the Chief Justice. Contempt of court applications may be filed against an abusive state media. But its leaders need to question themselves in good conscience as to whether merely passing resolutions and engaging in private meetings with politicians and parliamentary officials fulfils the heavy responsibility vested in them given the extraordinary threats that face the country's justice institutions?

An enchanted complicity in the executive's attacks on the judiciary

Half-hearted responses to the instant crisis only expose the credibility of the leadership of the Bar. Surely have we not learnt enough from the past? After all, the very omissions and commissions of the Bar were crucial factors that led to this crisis in the first place. As appreciated by the inveterate satirists among us, some of these legal worthies jostling to prove their bona fides against the impeachment were themselves thoroughly implicated in the ravages of justice that occurred during the previous decade, after which, it became unarguably much easier for any politician to call up a judge and exert inappropriate pressure.

We also saw lawyers vehemently arguing not so long ago in defence of presidential immunity in order to shield the President and his minions from the reach of the law. It is only now that these worthies appear to have woken up to realities. One is tempted to ask whether they were cast under a spell, like the enchantment of old which helplessly bound Rapunzel, into conscienceless complicity with the executive all this while.

Furthermore, seniors of the Bar accepted unconstitutional appointments by the President in defiance of the 17th Amendment and steadfastly looked the other way when the 18th Amendment was passed. The grave historical responsibility of the Bar in this regard can only be mitigated by unconditionally courageous actions now. That much must be emphasized.

This Presidency should take heed

This impeachment is destined to leave us with a hollow shell where the authority of the law once proudly possessed centre stage. Black coated members of the legal fraternity will prance before courts in a bitter mockery of the legal process.

This is what is desired perhaps by those in the seats of authority. But the best laid plans of mice, men and authoritarian political leaders drunk with insatiable power may still go awry. The steady gathering of public empathy for a Court under siege is now noticeably under way. Undoubtedly this Presidency should take heed of bitterly dissenting voices, at times coming from the very support base that brought this administration to power.

To ignore these voices would be to imperil its ultimate political survival. Make no mistake about that.

Courtesy: The Sunday Times

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## Impeachment: Power Corrupts, God Forbid The Achievement Of That Objective

by MA Sumanthiran

Last week we saw an unprecedented action by the Supreme Court. I wonder whether any court, let alone the Supreme Court, has ever before made a 'request', without making a coercive order. This perhaps was dictated to by the experience gained on two previous instances. Both involved the former Chief Justice Sarath Silva.

In 2001 when a Motion for his impeachment was presented to the then Speaker Anura Bandaranaike, the Supreme Court issued a stay order restraining him from appointing a Parliamentary Select Committee (PSC) in terms of Standing Order 78A of the Parliament. On that occasion the Speaker ruled that he was not bound by the order of the Supreme Court.

The second was when the Supreme Court presided over by Sarath Silva ordered the lowering of fuel prices. On this occasion the Executive refused to abide by the court order. On both occasions the judiciary was unable to enforce its orders. The reason for this lies in the way the concept of separation of powers ought to work.

The theory of separation of powers obligates each institution of government to respect and work harmoniously with the other two institutions. If not there will be clashes and confrontations between each other and democracy will not be able to function. Therefore it is a sine qua non that each organ leaves the function of the other two organs to themselves without transgressing into the areas, which are the exclusive preserves of those. In such a set up the question as to which organ is

supreme does not arise. Each is supreme within its own area of competence, as laid down by the Constitution, which alone is actually supreme.

The Constitution recognizes that the people are sovereign and that their powers of governance shall be exercised by three separate organs: legislative power of the people by the Parliament, executive power of the people by the President and the judicial power of the people by the Parliament through courts, tribunals and other institutions established by law, subject to one exception where in respect to their own privilege the Parliament can exercise judicial power directly. It is this principle of separation of powers that s being breached when Parliament tries to exercise judicial power of the people in matters other than privilege. Standing Orders 78A and 78B were hastily introduced when the UNP government tried to impeach the then Chief Justice Neville Samarakoon QC, which unconstitutionally vested in a Parliamentary Select Committee, certain judicial functions.

This issue as to the constitutionality or otherwise of Standing Orders 78A and 78B has loomed large again in the context of the present efforts to impeach the incumbent Chief Justice. The matter was referred to the Supreme Court by the Court of Appeal for interpretation, since it is the Supreme Court that has been vested with the sole and exclusive jurisdiction of interpret the Constitution. No other institution, not even another court, has been conferred with such power. The Supreme Court, having been properly taken cognizance of the matter, will make a pronouncement within a period of two months as prescribed by the Constitution. In the meantime it is the duty of all others to await that determination and not seek to present the country with a fait acompli.

In other words, when the PSC became aware that the Supreme Court was in the process of considering this matter, it ought to have held its hand without even a prompting by anyone. That is what is expected of a responsible institution. In this case, the Supreme Court acted in an unprecedented manner and made an overt request. It certainly was obligatory on the part of the PSC, in the interest of comity, to immediately stay its proceedings and await the Supreme Court's determination.

After all it is only the Supreme Court that has the power to interpret the Constitution. Neither the Parliament nor the Executive can do that. If the Executive or the Parliament usurps that function, or effectively prevents the Judiciary from doing that, the whole system of democratic governance will collapse. Perhaps that is precisely what the government wants. They do not want any other institution to check their abuse of power. Therefore it has now become necessary to undermine the powers of the judiciary and take it over, so that it will then have absolute power.

Power corrupts – and we can see that very well. Now they want absolute power! God forbid the achievement of that objective.

Courtesy; The Island

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# Fight For CJ Without A "Pro People" Judiciary Helps Rajapaksa

by Kusal Perera

On 20 November (2012) afternoon, a fair gathering of people at the badly neglected Colombo Public Library, gave that old black and white look of an art gallery photograph. Grey haired, bald and elderly men on stage argued against the impeachment now being taken up by the Parliamentary Select Committee (PSC) to decide on charges levelled against the Chief Justice (CJ). The audience, brought together by a group of city based trade unions for this public meeting, looking equally ancient, but was determined the impeachment should be defeated. The speakers argued their case quite well, and proved the impeachment was morally, legally, constitutionally and democratically wrong and should not be allowed to have its passage through parliament. A good case, they established. The meeting had one very conspicuous lapse though, to put it mildly. The youth, the young generation that should take up the fight for the future, was almost absent with only a very negligible presence of women too. The audience was not one of a broad social representation. That added up to a question raised by another from the audience at the conclusion of the meeting. "All this is fine" he said and asked, "What all the arguments and explanations implied is, Rajapaksa would have his way. They never indicated what should be done ?" So the important question is "Critic and analysis is good, but what next ?"

This goes with all what was written to date on the impeachment, including interventions and comments on "FaceBook" and e-mail chains. They were all good

and strong arguments to say the impeachment is and attempt to wrongfully remove the incumbent Chief Justice and politically control the judiciary. Yes it is. But it is one that can not be left as a campaign to save the Chief Justice. It has to be a campaign to save the judiciary. It should not stop at shouting hoarse to save the CJ, but go on to demand judicial reforms to have an independent, pro people judiciary. That seems the absent part in all of these segmented campaigns and protests.

The towel has already been thrown in, it looks, with the Rajapaksa regime declared the winner. Not merely because they have a steam rolling majority in parliament, but because the Opposition is clearly compromising on any and everything the regime wants. All decisions so far taken regarding the PSC proceedings has gone the way the regime wants, with the Opposition representation in it, consenting though at times with mild reservations. The time frames set, the refusal to grant the CJ her request for time to present her submissions, refusal by the Speaker and the PSC in accepting the judicial advice to defer PSC sittings till the Supreme Court determines on the petition before it, referred to by the Appeal Court, have all gone the way the Rajapaksa regime decides, with the Opposition timidly agreeing to fall in line with the government majority.

Thus all previous calculations (including my own assessment) on how the PSC impeachment process would get dragged on, at least till March 2013, now seems pretty much miscalculated. Ranil Wickramasinghe who was also initially calculating for long sessions, now goes with the Rajapaksa schedule in wrapping up everything in a month or so. So have the TNA and the JVP represented in the PSC. They end up giving the regime what it wants to do with the PSC without any serious and active dissent that can be seen by the public and boost the pro judiciary campaign outside.

This accommodation of the regime by the Opposition is not only with the PSC. It is how the Opposition actually play politics with this regime. None seem to defy the Rajapaksas in parliament, even on other important issues. That was the case with the Budget and the Divi Neguma Bill too. The Budget for 2013 was challenged for its provisions in handling public funds and was determined as against the Constitution by the Supreme Court that directed 03 proposals to be amended before the Second Reading is taken up. Neither the UNP leadership as the Opposition Leader, nor the TNA and the JVP, bothered to take that up, when the original budget was up for the Second Reading. Why did not the Opposition refuse to participate in the debate ? They had a social obligation to refuse participation in a budget debate that is not in line with the Constitution. So had the JVP too. But that was not how the Opposition acted.

The UNP leadership and some of their MPs did murmur few things from outside parliament for the media to carry. But not in parliament. In parliament they debated and voted at the Second Reading, allowing the same non amended budget to go through the final reading during the next week or two. So did the JVP that otherwise cries foul over anything by the Rajapaksas. The TNA may have been advised from Delhi, not to throw a spanner in their way, as they are "trying for the umpteenth

time" to convince this Rajapaksa regime to agree on a serious devolution package. What ever the reason(s) may be, all in the Opposition have agreed to keep the parliament functioning, the way this regime wants. In such adverse and frustrating context, the next best thing that should have developed is a strong, independent "people's movement" that stands for serious judicial reforms. Strong enough to challenge the Opposition's compromise with this R regime as well. Most unfortunately that potential is also absent in the protests that can be heard. If one maps the class and geographical presence of these protest campaigns to date, geographically it is horribly restricted to the Colombo city. Not even to the Colombo district. The only protests so far were in Hulftsdorf and once at the Public Library hall. A few provincial Bar Associations that met initially and the unanimous resolutions adopted by the Bar Association of SL, are all things of the past. They were any way a membership gathering of a single profession and not a public intervention. Even lawyers in Courts other than those in Hulftsdorf, in Mt. Lavinia, Kaduwela and Gangodawila have no part in any of the campaigns organised by the activists in Hulftsdorf. That leaves all satellite towns around Colombo and the other few major cities, almost oblivion to what's happening in the Hulftsdorf Hill and within the Diyawanna Sanctuary.

Its class nature is also very apparent with the city upper middle class, dropping their ethnic politics to rally against the impeachment against the CJ. One now sees long time Sinhala campaigners like S.L Gunasekera and pro devolution activists like Jayampathy Wickramaratne together against the impeachment and a learned advisor to the Rajapaksa regime like Gomin Dayasri reluctantly and ambiguously talking against the impeachment. Discussions and statements were all Colombo city centred and by upper middle class personalities. It is clearly the upper middle class urban constituency that has got activated, for it is they who feel the need to have a judiciary independent of politicking. And, they have turned it into the academic exercise, they are more familiar with.

This leaves out the vast majority who should actually get mobilised to have not only an independent judiciary, but also an efficient and a clean judiciary. In 2010 November, reading out his 2011 budget speech, President Rajapaksa said, "A prolonged delay in legal disputes is one such cause for poverty. There are approximately 650,000 unsettled legal cases before our judiciary pending justice." He promised an allocation of 400 million rupees in total to remedy this issue of "pending justice". He also promised, he would allocate 150 million rupees for 2011 and the Ministry of Justice was to immediately set up 60 new courts with retired Judges to address this issue. What has come of it, is not been discussed even during this budget debate. Thus it is not ONLY an issue of judicial independence that now needs to be taken up. But also that of a clean and an efficient judiciary to serve the people. The plight of those many thousands who daily linger around the Courts, spending their hard earned money, needs to be taken up with that of an independent judiciary. It is definitely a very long wait for justice, if it comes at all and in between that long wait, the ordinary people are also fleeced, not only by touts, but also by some hard bargaining lawyers. The whole system is corrupt and warped. Therefore today, while

the need of an independent judiciary is more an upper middle class urban discourse, the majority of the common people would want an efficient and a clean judiciary. The fact is, an independent judiciary is only a fore runner to an efficient and clean judiciary that a country should have.

The impeachment against the CJ therefore allows much space for a more complete discourse and a campaign for judicial reforms that should include the slogan "efficient and a clean judiciary". It is such a slogan that would allow for a broad social support base, but was lost due to this very narrow approach of the city campaigners and the compromising Opposition. It is not the strength of this Rajapaksa regime that keeps it afloat, but the supportive winds of the Opposition that leaves it roaming around. It is also the short sighted Sinhala outlook of the urban middle class that kept most what the regime did all this while, justified. Well, there isn't a decent, intellectual "Left" discourse either to galvanise any futuristic thinking in society for now. That's what this impeachment is all about.

Courtesy: The Colombo Telegraph

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## Has the Parliamentary Select Committee (PSC) become a Political Tribunal?

by Laksiri Fernando

The Parliamentary Select Committee's rejection of the Supreme Court's decision that the impeachment proceedings against the Chief Justice should be postponed until the Supreme Court determines the constitutionality of the Standing Order 78A that purportedly governs such proceedings, as requested by the Court of Appeal, undoubtedly is the latest breach against the judicial authority in Sri Lanka by the political authority.

The decision of the Supreme Court was good as a 'determination' or 'order' although the Deputy Speaker, Chandima Weerakkody, opted to ridicule it by saying a "request or something" to Live at 12 of Swarnawahini yesterday (23 November 2012). The format of the recommendation was like any other court order. It was argued and decided. The carefully worded directive after outlining the legal circumstances said:

"However, at this stage, this Court whilst reiterating that there has to be mutual respect and understanding founded upon the rule of law between Parliament and the Judiciary for the smooth functioning of both the institutions, wishes to recommend to the members of the Select Committee of Parliament that it is prudent to defer the inquiry to be held against the Hon. the Chief Justice until this Court makes its determination on the question of law referred to by the Court of Appeal."

It is important to underline the importance of what it said about the "mutual respect and understanding founded upon the rule of law between Parliament and the Judiciary for the smooth functioning of both the institutions." But, the Political Commissars over Diyawanna Oya apparently didn't want to listen to this sober

advice for reasons best known to them. Instead they decided to go ahead with the flawed proceedings. They apparently didn't even listen to the four members of the opposition. Consensus over the procedure of the PSC perhaps is not their concern.
The Supreme Court decision was given after listening to the Counsels on behalf of the petitioners and the Attorney General, Palitha Fernando, as it commented "who appeared on very short notice." As the decision quoted, the following was the main question that the Court of Appeal has referred to the Supreme Court:
"It is mandatory under Article 107 (3) of the Constitution for the Parliament to provide for matters relating to the forum before which the allegations are to be proved, the mode of proof, the burden of proof, the standard of proof etc. of any alleged misbehavior or incapacity in addition to the matters relating to the investigation of the alleged misbehavior or incapacity?"
It is obvious that the above important question or questions would not have been referred to the Supreme Court unless there had been serious doubts about the Constitutionality of the Standing Order 78A that purportedly governs the proceedings of the impeachment. The following questions naturally come to my mind, as a result of the above and other reasons, even without a proper legal background as a concerned citizen as to the consistency between the Standing Order 78A and the Constitution and particularly its Article 107.

Is the PSC the correct Forum before which allegations against a Judge of the Supreme Court (including the Chief Justice) or the Court Appeal (including the President) are to be investigated and proved?

Why the Stating Order 78A from paragraphs 1 to 9 is completely silent on the mode of proof and the standard of proof? Can the PSC be considered a proper legal Forum?

Why the Standing Order 78A is completely silent on any prior investigating procedure into any allegations of Judicial Officers?

More importantly, who has the burden of proof? The PSC or the accused Judge?

Anyone who goes through the scantily drafted nine paragraphs of the so-called Standing Order would come to the conclusion - if the person is unbiased and concerned about natural justice – that the procedure of the impeachment is terribly flawed and the fate of the present Chief Justice should not be place under this Kangaroo Court. The following is what the Standing Order says about anything closer to the 'burden of proof' in paragraph (5). On all other matters except the question one the Standing Order is completely silent.
"The Judge whose alleged misbehaviour or incapacity is the subject of the investigation by a Select Committee appointed under paragraph (2) of this Order shall have the right to appear before it and to be heard by, such Committee, in person or by representative and to adduce evidence, oral or documentary, in disproof of the allegations made against him."

Now the accused, in the present case the Chief Justice, "shall have the right to appear before it and to be heard by such Committee, in person or by representative." This may appear great or sufficient to some because she is given a hearing! Then she can

"adduce evidence, oral or documentary." For what, "in disproof of the allegations made against him!"
Now she is not a 'He.' Let alone the gender bias in the language, the Chief Justice has to disprove the allegations! This is travesty of natural justice and people like Anura Priyadarshana Yapa, Nimal Siripala de Silva and Dilan Perera should be ashamed to sit in this Kangaroo Court, not to speak of others.
The Supreme Court also has given very obligingly the reasons why it requests the PSC to kindly postpone the proceedings. As it said, "In terms of Rule 64 (1) of the Supreme Court Rules of 1978 certain procedural steps have to be followed before a determination is made by this Court." It has also been noted that a decision could be given within two months. This is completely ignored by the PSC. The decision also noted the following more substantially.
"According to the pleadings filed in the Court of Appeal and the submissions made by all learned counsel in this Court, standing order 78(A) of the Parliament contravenes Article 4(c) read with Article 3 , Article 12(1) and 13(5) of the Constitution and are also contrary to the accepted norms relating to the burden of proof."

The observed points of inconsistency with the Constitution above are mainly four: (1) Article 4 (c) (2) Article 3 (3) Article 12 (1) and (4) Article 13 (5). This is in addition to the Article 107 of the Constitution which governs the overall impeachment procedure. The observation shows the absurdity and the arbitrary nature of the PSC procedure. It is also important to quote what it also said in terms of rule of law and justice in trying to persuade the PSC or the Speaker on the importance of postponing the impeachment proceedings.

"The desirability and paramount importance of acceding to the suggestions made by this Court would be based on mutual respect and trust and as something essential for the safe guarding of the rule of law and the interest of all persons concerned and ensuring that justice is not only be done but is manifestly and undoubtedly seem to be done."

Unfortunately all these good advices were completely ignored and proceedings went ahead yesterday morning at the Parliamentary complex. It appears that the Political Commissars in the Parliamentary Select Committee seem to think that they are ABOVE THE LAW. They are badly mistaken. The Standing Orders are not law but only rules of procedure. When the Supreme Court decides to hear the objections based on 9 petitions, on Constitutionality and natural justice, by all decency or good sense the PSC proceedings should have been postponed. But it is not to be the case under the present political administration.

What a tragedy of justice if the 'Chief Justice' has to prove her innocence before a Political Tribunal hastily convened with inaccurately drafted 14 charges for nothing but political reasons? How can one easily disprove allegations if those are framed and false? What are the implications on rule of law and the system of justice if the so-

called Representative of the People (MPs) so behave? These questions speak volumes of the tragedy of Sri Lanka's democracy under the Rajapaksa rule.

Courtesy: Sri Lanka Guardian

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## The Courts Are Expected To Blindly Support The Executive

by Asian Human Rights Commission

Executive presidential system and the judiciary- An over-view

From the beginning of the executive presidential system, the most important threat to it was perceived to be the judiciary.

With a four fifths majority in parliament, J.R. Jayawardene, the UNP leader, made sure that all his party members in the legislature surrendered their rights to him. He got this through undated letters of resignation he took from everyone except for a few who refused to comply. He was therefore certain that there would be no challenge to his authority from the parliament.

JR saw the judiciary as the real threat to his authority -Photo by Kaku Kurita

However, he saw the judiciary as the real threat to his authority. Being the cunning politician that he was, he adopted many strategies to counteract any possible challenge to him from the judiciary.

The first step he took was to appoint his former lawyer and friend, Neville Samarakoon QC, as the Chief Justice. 1n 1977, as the new constitution was being prepared, he wanted to ensure that there would be no opposition to the passage of the constitution from the judiciary. By the appointment of Neville Samarakoon QC as Chief Justice, he managed to avoid any direct threat to the passing of this constitution. It was quite possible that if Neville Samarakoon QC was not there in the

Supreme Court, that the court may have examined the new Constitution more critically. At this stage, Neville Samarakoon QC naively believed in the good faith of his friend J.R. Jayawardene and the conflicts between the two only began later.

However, it was at this early stage that the 1978 Constitution should have been scrutinised more closely. If that had been done, many of the internal contradictions of this constitution would have been exposed and the court could have quite possibly taken up the position that several of the provisions were a serious threat to the character of the constitution as a republic and a democracy. In particular, the threats posed by the constitution to the rule of law should have been examined at that stage, prior to its promulgation.

Particular attention should have been paid to the threats posed to the independence of the judiciary itself. The possibilities of the quick passage of some bills, including those for amendments to the constitution itself, were clearly contrary to democratic norms and practices and posed a threat to the independence of the judiciary, in that they did not provide adequate time for interventions by the public and thus the court was deprived of the opportunity of proper consideration of such proposed amendments. It was the possibility of passing laws hurriedly that was created by this constitution, which later enabled the executive president to enhance his power through several amendments. There were other provisions too which should have been examined closely from the possible threat that was posed to the independence of the judiciary. Article 35 (1) which placed the president outside the jurisdiction of the courts should have been subjected to scrutiny at this stage itself. Article 107 (3), which related to the impeachment of superior court judges, should also have been subjected to scrutiny, and safeguards for the judges should have been insisted on by the courts. However, with Neville Samarakoon at the head of the judiciary, none of these things happened.

Even worse, several Supreme Court judges who were functioning prior to the promulgation of the constitution were not reappointed. The objections to this issue were quite publically raised. However, Neville Samarakoon as Chief Justice did not take objection to the 'dismissal of the judges by the Constitution'.

Thus, appointing Neville Samarakoon QC as Chief Justice was an important maneuver that J.R. Jayewardene resorted to.

The first conflict with Neville Samarakoon as Chief Justice was the closing of the doors of the Supreme Court to prevent the judges from entering the court. The problems that arose from this situation are discussed in Vishvalingam vs Liyanag. How strongly the Chief Justice felt is quite clearly expressed in this judgement. He said it was the greatest insult against the courts in Sri Lanka since their inception.

From that point on, J.R. Jayawardene's strategy was to harass and humiliate Neville Samarakoon QC, the Chief Justice, as openly and blatantly as possible. In doing this,

J.R. Jayawardene was clearly passing a message to all other judges. Any kind of opposition to him would lead to unpredictable, adverse consequences to any judge.

That message was more forcefully conveyed when the impeachment motion was filed against the Chief Justice. It was not merely a threat to Neville Samarakoon QC. It was a clear demonstration to all other judges, showing them that the president had the ultimate weapon against them and that once it was used they would be helpless.

It was a deliberate maneuver on his part to get the Standing Orders relating to the impeachment of judges made in such a way as to deny them the right to a fair trial before an impartial tribunal. This was not an oversight, this was a deliberate strategy. In fact, the court should have struck down these Standing Orders, as they contravened the constitutional principles relating to the separation of powers and the independence of the judiciary. It was an irony of history that having come to the top as a friend of the president, the Chief Justice was unwilling to pursue all the possibilities that existed for his defence within the judicial system itself.

After this period, a much more brilliant strategy were adopted by Chandrika Kumaratunga as president. She brought someone in as Chief Justice who would do every possible service to the president, not only by preventing opposition from the judiciary to the executive president, but also support the president when opposition arose from other quarters. Sarath N. Silva as Chief Justice provided this service both to Chandrika Kumaratunga as well as Mahinda Rajapaksa.

With the end of the tenure of Sarath N. Silva, again the problem of the possibility of people resorting to seeking relief from the courts against the actions of the executive president arose.

It is this problem that President Mahinda Rajapaksa is trying to resolve again through the impeachment proceedings against Shirani Bandaraniake. The strategy again is to eliminate the possibility of a threat to the president from an independently functioning judiciary. The courts are expected to blindly support the executive.

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## Will the predictions about the judiciary come true?

by Basil Fernando

In an article entitled 'Once judiciary is broken the Rajapaksas will use the court to destroy every remaining right or freedom', Tisaranee Gunasekara makes the following prediction:

If the impeachment succeeds without wounding the Rajapaksas, that will become the judicial norm in Sri Lanka. Once the judiciary is turned invertebrate, it too will begin to act like the current Attorney General's Department (which was taken over by the President in 2010), all the time. And instead of a magistrate issuing an arrest order against Duminda Silva, a magistrate will declare him innocent, on the orders of the Family. The Siblings and their kith and kin will decide who are guilty and who are innocent. The courts will be reduced to pronouncing Rajapaksa judgements and Rajapaksa sentences.

I think any thinking person should give serious consideration to this prediction. The time that is still left to prevent the prediction from coming true is indicated by the 'if' with which the prediction begins.

The basic issue is as to whether soon it will be the executive who will decide the distinction between what is legal and what is illegal. That is whatever the executive (which has come to mean the three Rajapaksa brothers) wishes to do will be treated as legal. We are dealing with the Otto Adolf Eichmann view of the law. In his defence when he was tried by a court in Israel, Eichmann took up the position that in

Germany whatever the Führer ordered was the law. Hannah Arendt, who watched and reported on this trial, termed this as the 'banality of evil'.

That is why that 'if' is of such paramount importance. There is still a very short time for testing the prediction. Those few weeks are in the hands of Sri Lanka's higher courts. They could either begin to cause the beginning of the reversal of submission to the dictates which more or less started with the four fifth majority of the UNP and continued with the borrowed two thirds majority of the present regime.

The legality of much of the 1978 Constitution could have been challenged by the Supreme Court at that time. However, this document called the Constitution of Sri Lanka which, in fact, in the history of constitutions is one that could without any hesitation be termed a joke, was allowed to be the paramount law of Sri Lanka only because the judiciary refused to exercise its role as the final arbiter of what is legal and illegal within the territory of Sri Lanka. In my book, Sri Lanka Impunity, Criminal Justice and Human Rights (2010) I devoted a whole chapter to illustrate that the distinction between legality and illegality has been lost in Sri Lanka.

After 31 years of the 1978 Constitution, it is not even possible to recognize what is law and what is not. When the executive president placed himself above the law, there began a process in which law gradually diminished to the point of no significance. This is unsurprising. The constitution itself destroyed constitutional law, by negating all checks and balances over the executive. When the paramount law declares itself irrelevant, its irrelevance penetrates all other laws. Thereafter, public institutions also lose their power and value.....When there is a loss of meaning in legality, terms such as 'judge', 'lawyer', 'state counsel' and 'police officer' are superficially used as if they mean what they did in the past; however, their inner meanings are substantially changed. Those who bear such titles no longer have similar authority, power and responsibility as their counterparts had before, when law still had meaning as an organizing principle.

It was that failure which led to the creation of continuous ambiguity about what is legal and illegal in Sri Lanka in recent decades. Even things like abductions and enforced disappearances are not clearly defined as illegal in Sri Lanka. If such acts were defined as illegal, how many would now be in jail for committing that crime? This is just one example. How many other things which would have been considered illegal in a country that has the rule of law came to be considered as legal? The list would be a very long one.

**The proverbial last minute**

Still, all the space was not lost. At least an appearance of courts exercising some authority has still remained. The recent judgements on the Diviniguma Bill and the Criminal Justice Provisions Bill are just some examples which showed that still there is room for the judiciary to act as the arbiter of what is legal and illegal.

It is that which has been challenged now by way of the impeachment. The procedure under which the impeachment proceedings are to be held under the Standing Orders as they stand now is clearly unconstitutional. If through this unconstitutional process the Chief Justice is removed with that the power of the courts will be finally removed.

The test is as to whether the courts will exercise their authority against an illegal process for the removal of the Chief Justice and thereby retain in their hands the final power of deciding what is legal and illegal within the territory of Sri Lanka. The Indian Supreme Court has clearly kept their authority and, in the last few years, the Supreme Court of Pakistan also has reasserted its power to be the final arbiter of declaring what is legal and illegal within their national territories.

A court that does not exert the power it has will have no one to blame but itself. But there is still time before that 'if' may come true. So we are in that proverbial last minute.

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## The Post-Impeachment Future

by Jayantha Dhanapala And Suriya Wickremasinghe

The Post-Impeachment Future And The Role Of The Judiciary

In several previous statements the Friday Forum expressed its deep concern about, and its opposition to, the manner in which Chief Justice Shirani Bandaranayake was impeached. The entire episode deeply offends all sense of decency and fairplay; it has also earned the opprobrium of responsible international bodies.

Citizens no longer can rely on fundamental principles of democratic governance to protect their rights and liberties. The manner in which the ruling political group flouted norms of democratic governance and political decency was unprecedented and unacceptable.

The politically charged nature of the impeachment, the denial of natural justice guarantees to the Chief Justice and the crude manner in which she was addressed during the Parliamentary Select Committee hearings, the manner in which the ruling party blatantly disregarded the constitutional powers of the Supreme Court, the use of police powers to stifle protest and free movement, and the use of goon squads to vilify and drive fear into those opposed to the impeachment process in the presence of police officers who were humiliated by their helplessness, were all blows dealt to the citizenry by the ruling political group. The principle of separation of powers lies

in tatters as Parliament, by all appearances, is acting as nothing but an appendage of the Executive.

In this political landscape, it is the resolute actions of the judiciary that gives a glimmer of hope to the people of Sri Lanka. The judiciary did not cave into the wishes of the Executive as did Parliament. The Courts stood their ground despite the pressures under which we presume they had to function during the impeachment. That can be said irrespective of whether one agrees or disagrees with the judicial opinions expressed by the courts on the constitutionality of the impeachment process.

As citizens we take heart that at least one branch of the government has displayed its determination not to succumb to the gravitational pull of the Executive during this crisis. Our hope is that the independence of the judiciary remains strong in the difficult period that awaits us. We do not underestimate the challenges lying ahead. The judiciary now has to contend with a Chief Justice whose appointment is fraught with controversy and whose previous partiality toward the Executive is under scrutiny.

The country relies on the judiciary to uphold the Constitution and to exercise the judicial power it holds in trust for the people without fear or favour. Failure would result in a disaster for the nation that will take generations to put right.

Jayantha Dhanapala and Suriya Wickremasinghe
*On behalf of Friday Forum, the Group of Concerned Citizens*

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# The Safety Of The 43rd Chief Justice

by Jayantha Dhanapala

The Friday Forum is gravely concerned about the security and well being of persons who have taken positions regarding the impeachment contrary to that of the government, and continue to do so. These comprise judges and other state officials, lawyers, various civil society groups and individuals.

The right to hold and to peaceably express different opinions, and to act lawfully in furtherance of them, is basic to a free society and must be respected not only by all organs of state but also by every member of the community. The fear now is not merely of possible public vilification, discrimination and victimisation but also of danger to personal security. Several lawyers, including those who appeared for the Chief Justice in the Parliamentary Select Committee inquiry, and two of our members, having received death threats have notified the law-enforcement authorities.

Last but not least Friday Forum also expresses its deep concern about the safety of the 43rd Chief Justice of Sri Lanka Dr Shirani Bandaranayake, regarding whom the Parliamentary Select Committee's proceedings have been held a nullity by the Supreme Court, and who is regarded by many, including distinguished lawyers, as continuing to be the Chief Justice.

Eating of ceremonial kiri buth (milk rice) on the public road outside her official residence, with Ministers of the Government reportedly participating | Photo Vikalpa/CPA

Whatever different opinion others may hold on Dr Shirani Bandaranayake's present status, it is vital that adequate security be ensured for her and her family. In this context we view with shock and abhorrence the campaign carried on against her by the state-controlled media while she was indisputably the Chief Justice and facing the inquiry by the Parliamentary Select Committee. We likewise view with shock and abhorrence the facilities enjoyed by crowds to demonstrate against her outside Parliament and elsewhere, the contrasting interference with the right of persons critical of the impeachment to peacefully demonstrate in expression of their views, and the disgraceful spectacle of lighting crackers and the cooking and eating of ceremonial kiri buth (milk rice) on the public road outside her official residence, with Ministers of the Government reportedly participating, and the failure to ensure her a dignified and peaceful exit from her residence the following day.

Eating of ceremonial kiri buth (milk rice) on the public road outside her official residence, with Ministers of the Government reportedly participating | Photo Vikalpa/CPA

The impunity and indeed official sanction with which all this was permitted to take place raises in us serious apprehension as to the future safety of this family. The responsibility of ensuring its security, as also that of the legal professionals, activists and others we have referred to earlier, falls fairly and squarely on those wielding political and governmental power. The Friday Forum urges all concerned, including the law officers of the state, to act with responsibility and impartiality at this important moment of our country's history.

*Jayantha Dhanapala*

*On behalf of Friday Forum, the Group of Concerned Citizens*

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## Three Challenges For The New Chief Justice

by Jehan Perera

The government acted swiftly to make the impeachment of Chief Justice Shirani Bandaranayake a closed chapter. President Mahinda Rajapaksa did not appoint the advisory committee to provide him with a second opinion on the merits of impeachment. This was seen as a time buying exercise to enable the President to find a statesmanlike way out of the imbroglio that the impeachment had apparently created. However, there was no hesitation on the President's part. He did not balk at removing the Chief Justice from her office despite the ruling by the Supreme Court that the impeachment process was not valid in law and when the public protest against the impeachment process was at its peak. He also immediately speedily appointed her successor, President Advisor and former Attorney General Mohan Peiris to be the new Chief Justice.

Most lawyers were not in favour of the impeachment process, and many were bitterly opposed to it. The Bar Association of Sri Lanka even passed a resolution not to welcome any new Chief Justice appointed by the government in the context of the impeachment of Chief Justice Shirani Bandaranayake. There are lawyers groups that continue to hold that Chief Justice Bandaranayake remains Chief Justice and that her removal by President Rajapaksa is not legally valid. This is on account of the rulings by the country's highest courts of law that the impeachment process was flawed and a nullity in law. According to media reports, the Bar Association is standing by its decision not to welcome the new Chief Justice at a ceremonial sitting to be attended

by senior lawyers. The first challenge that the new Chief Justice will face will be to heal the divisions that have occurred in the legal community.

**ENDING IMPUNITY**

There has been further fallout from the impeachment crisis that blots the democratic credentials of the government. Incidents that took place during the course of the impeachment included the flouting of decisions of the highest courts in the country and attacks by armed thugs on peaceful protesters in the presence of police personnel. Now some of the lawyers and civic activists who exercised their right of peaceful protest against the impeachment have been threatened in the aftermath of the impeachment and fear for their safety. Letters from a purported patriotic organization have been sent to the lawyers and civic activists who led the campaign against the impeachment of the Chief Justice.

The efforts to brand the work of those who stood up for the Rule of Law, checks and balances on the exercise of power and for international standards in governance as being traitors and deserving of punishment is deplorable. The right to dissent is a fundamental right in any society and requires to be upheld. The reason why people protest collectively is because they sense a moral transgression although they may not be individually affected. It speaks much for the conscience of our society and shows that there are people still who are prepared to stand against injustice. It is to be hoped that the new Chief Justice will ensure that legal processes are not obstructed as they appear to be when politically motivated violence and thuggery is concerned.

There is a need to heal the divisions that occurred and restore the Rule of Law that suffered during the impeachment process. The failure of law and order and to follow the Rule of Law in Sri Lanka has already led to international criticisms and to calls for sanctions. The government cannot abdicate its responsibility to protect the dissenters from underworld activities for sooner or later the blame will descend on the government. The work of bridging the ethnic and political divides and bringing reconciliation and binding up the wounds of war remain this country's greatest challenge. Indeed that is what the Lessons Learnt and Reconciliation Commission appointed by the government has also said. Accordingly, the second challenge to the new Chief Justice would be to provide umbrella cover, if not moral and ethical leadership, to efforts that put an end to the culture of threats and impunity. Effective action in this regard that is spearheaded by the new Chief Justice would do much to enhance his credibility with the legal community and the people at large.

**REFERENDUM REQUIREMENT**

The collapse of the public resistance to the impeachment would have come as a surprise to those who believed in the theory of legal processes and the primacy of the Rule of Law. Those who saw the impeachment in terms of the three great branches of government being locked in combat as equals may have been theoretically correct.

The outcome of the impeachment demonstrated was the asymmetry of power in the three branches of government in practice. Although theoretically on an equal footing as co-equal branches of government, the executive, legislature and judiciary are unequal when it comes to raw power of enforcement of decisions. The judiciary has no men at arms to call upon. It is the executive branch of government that has the power of enforcement.

In the aftermath of the contest over the impeachment, the government appears determined to ensure that a similar challenge will not be mounted from the ranks of the judiciary against the government in the future. A new constitutional amendment, the 19th Amendment is reported to be on the way. This will be to restrict the term of office of a Chief Justice to just three years and make provision that Standing Orders of Parliament are part of the country's laws. The Constitution now stipulates that the age of retirement of Judges of the Supreme Court shall be 65 years and of Judges of the Court of Appeal shall be 63 years. Shirani Bandaranayake who was appointed Chief Justice in May 2011 could have continued in office till 2023 if she was not impeached and removed from office.

By restricting the term of office of the any Chief Justice to three years, the government will be making it harder for any judge to become a thorn in its flesh in the future. Before a Chief Justice has time to consolidate his or her position among the other judges, his or her term of office will be coming to an end. A short term of office would not permit any future Chief Justice to gain a position of leadership and influence within the judiciary to challenge the government. A Chief Justice who wishes to remain a little longer in the judiciary as Chief Justice would be compelled to be deferential to the President who is empowered by the 18th Amendment to appoint the Chief Justice and presumably to extend or terminate his or her term of office. It is not impossible to believe that next there might be yet another constitutional amendment that imposes similar time limits on all judges of the superior courts.

The proposed 19th Amendment will clearly weaken the position of the judiciary in relation the government. This is a shift of constitutional balance and weakens the system of checks and balances. Therefore it can potentially give rise to a legal challenge in the Supreme Court. The question to be answered is whether this proposed constitutional amendment brings into play the constitutional requirement of approval by the people at a referendum, in addition to requiring a 2/3 majority in Parliament. The decision whether to consider the proposed 19th Amendment as affecting the basic design of the Constitution will fall upon the new Chief Justice. Strengthening the position of the judiciary as an institution would be his third challenge.

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# Parcel of a contemptible plan to victimise the CJ

by S. L. Gunasekara

The impeachment of a judge of a superior court is indisputably a tragic event to be dealt with due solemnity and wholly divorced from all considerations of extraneous matters such as party affiliations and `loyalties'; prospects of rewards; political gain etc. It is a solemn occasion where Members of Parliament are required and indeed bound to discard and ignore completely their party affiliations, the decisions of their respective parties on such matter as well as the instructions of their party whips and decide wholly dispassionately and objectively whether on the evidence adduced before them, the Judge concerned was or was not guilty of any one or more of the charges against him that gave rise to the resolution for his impeachment and whether such charges were of sufficient gravity to warrant his dismissal.

The entire object of an impeachment being to `cleanse' the judiciary if indeed it needed `cleansing', there is clearly no `place' in such a proceeding for lawlessness, thuggery , fraud, boorishness histrionics, exhibitionism or the wholesale misuse of religious ceremonies to serve political ends. Tragically the recent `drama' relating to the impeachment of Chief Justice Shirani Bandaranayake saw all these unsavoury features but not an iota of objectivity or any of those salutary practices that should have been evident therein.

Commencing with the Select Committee which was alleged to have investigated the charges against Chief Justice Shirani Bandaranayake and arrived at `findings' in

respect of some of them, and ignoring, for the moment, the facts that both the Supreme Court as well as the Court of Appeal had held that it was constituted unconstitutionally and that the Court of Appeal had quashed, by way of certiorari, its purported findings, let us consider whether the conduct of that Select Committee was in any way objective, dispassionate and/or responsible.

One disgusting fact about which there can be no dispute is that some members of the Select Committee behaved in an utterly uncouth manner towards the Chief Justice which was clearly designed to humiliate her and perhaps to cause her to leave. The fact that those who behaved in such manner were not possessed of an iota of `breeding' apart, one startling fact about such behaviour is that those who sank so low as to behave in such uncouth fashion actually thought they were doing something clever and laudable !!! What was even more startling was that they, not having been taken to task for such behaviour by even the President, the inference is inescapable that such rowdyism as was displayed by them was indeed approved by him and was part and parcel of a deliberate plan to compel the Chief Justice to throw in the towel.

Such rowdyism as was displayed within the Select Committee was echoed in a different context when mobs of raucous alleged supporters of the Government were brought to Hulftsdorp by some ambitious politicians and they, while armed to the teeth with clubs, staves etc shouted slogans and displayed banners highly defamatory of the Chief Justice, moved around the hordes of police officers who had been deployed there ostensibly to preserve law and order (!!) displaying `proudly' their grisly weaponry without any let or hindrance from those alleged "guardians of the law". One does not need more than one guess to visualize what their reactions would have been if those slogans had been aimed at the President or the new `Chief Justice'. It being wholly unthinkable that any police officer would have so ignored breaches of the law committed by any person whomsoever in his presence, the conclusion is inescapable that the inaction of those salaried men was necessarily a result of superior orders.

It is more than passing strange that the Government has yet failed to appreciate the dangers of using thugs as an instrument of state policy. They appear to be oblivious to the fact that the "loyalty" of the thug being wholly to himself, the day cannot be far off when the thug tires of the Government using his thuggery to impose his will on the dissenter, and decides to use their `talents' for his own purposes even though that would be against the Government. That is a day that will be rued by all including those sycophants of the Government [whose name is "legion"] to whom no act of sycophancy or abject servility is too much provided it secures for them, some measure of patronage from the Government.

When to these facts are added the unbelievable facts that requests repeatedly made by Counsel for the Chief Justice for a list of documents sought to be produced and information about the procedure to be followed by that Select Committee fell on deaf ears, and they were given a bundle of some 1000 documents and told that the so

called inquiry would be continued within 24 hours, the fact that no fair inquiry was contemplated and that the entire object of the exercise was to get rid of the Chief Justice by whatever means possible and replace her with another who, in the Government's perception would be partial to it becomes as clear as crystal.

While this so called impeachment process has displayed a degree of perfidy unparalleled in the history of our land, one final act of overt deception damns for all time, the `Select Committee exercise' as a `no holds barred' exercise in victimization. This shameful act of unparalleled fraud was committed when the Chairman of the Select Committee having announced that no oral evidence would be led, adduced the oral evidence of some 17 witnesses after the Chief Justice had `walked out'. If the Select Committee intended adducing such oral evidence, how is it that so manifest a lie was uttered and the Chief Justice misled ?? How was it that all those witnesses attended the Select Committee and gave evidence at such short notice? There clearly having been no time to secure their attendance by due service of summons, it must follow that they were standing by to give evidence when called and were hence part and parcel of a contemptible plan to victimize the Chief Justice.

That all this was wholly unnecessary is a fact so manifest that it needs no repetition. Nobody would disagree with the proposition that if the Chief Justice had been corrupt, she had to go. This same proposition would be equally applicable to the President and other political appointees including ministers. There is clearly no gainsaying the fact that had the Chief Justice been subjected to a fair inquiry or trial, nobody could possibly have objected to her removal from office if she was found guilty of corruption. Yet she was not subjected to such an inquiry or trial and the entire impeachment process was converted into a political circus. Why ????

There are several unanswered questions surrounding the impeachment. One of the chief among them is why the President appointed the Chief Justice's husband Chairman of the Insurance Corporation and then of the National Savings Bank. What was the aptitude displayed by Kariyawasam to hold such a position when, to the best of my knowledge and belief he had only displayed some aptitude in the field of marketing motor vehicles !! Thus his appointment to those posts gives rise to the inference that such appointments were given so as to win over the Chief Justice to the Government camp and secure judgments from her whether as Chief Justice or as a Judge of the Supreme Court, that were favourable to the Government. Those appointments were, in short `bribes' and both the giver and the taker are equally culpable so that it is not possible for one wrongdoer to ride the high horse and point an accusing finger at the other.Yet, this, precisely is what, happened.

That the filth called "politics" would pollute the impeachment process was a foregone conclusion. Thus, there were, on the Government side, a number of sycophants who sought to portray the impeachment drama as a contest between the President who gave leadership to the Country to defeat the LTTE on the one hand and the Chief Justice on the other!! There were other sycophants of the Government who purport to see an international "conspiracy" in any dissent offered to anything

the Government proposed doing who saw in the Chief Justice's spirited defence of herself, a part of such a "conspiracy". What these addicts to "conspiracy" theories would have to say about the appointment of Mohan Peiris to succeed the Chief Justice is left to be seen !!!.

It is indeed tragic that even members of the Bar and the Chief Justice herself succumbed to the temptation of bringing politics into this process. Thus, we experienced the tragic spectacle of members of the Bar engaging in the silly exercise of smashing coconuts on the road to 'save" the Chief Justice while some other exhibitionists flocked round the Chief Justice's car, making sure that they are photographed when the Chief Justice first went to parliament and returned therefrom. They even engaged in `strikes', an exercise which, to my mind, is wholly unbecoming of the dignity of a member of the Bar.

Not to be outdone even the Chief Justice got the Ven Maduluwawe Sobhitha to chant Pirith prior to her setting out for her "inquisition". Religion being something that is essentially personal, nobody could have faulted the Chief Justice if she got such ceremonies performed at her residence – however, when they are performed in the Court premises, they cry out for the conclusion that it was a part of a political exercise.

It was not only such amateurs who sought to infect this process with politics. Both the UNP and the JVP lost no time in "jumping the bandwagon" and seeking to gain some political capital out of these tragic events by posing dishonestly as champions of the independence of the judiciary while maintaining a deafening silence about their own efforts to undermine that noble principle. Not to be out-done Sarath Fonseka made one of his usual stupid statements by inviting the Chief Justice to take to politics.

As is usually the case the foreigner [both foreign Governments as well as their NGOs] who just cannot tolerate the idea of Sri Lanka being an independent Country which does not require his tutelage to manage its own affairs, was quick to put in his two cents worth condemning the impeachment. Apart from adding fuel to the flames lit by the "international conspiracy theorists", there are hardly any results that followed from their presumptuous prognostications. Of these foreign effusions it need only be said that one of the most vociferous among them is the international thug which once bathed Vietnamese babies in Napalm and presently runs a torture chamber at Guantanamo Bay !!!.

Sri Lanka has been through a trial by fire. The country was rent in two by the impeachment. Today the dust seems to be settling over the impeachment drama. However, it would be a mistake of monumental proportions for us, now, to say "lets put the past behind us" and proceed with "business as usual". One important aspect of the impeachment drama is that it brought into focus and the public eye, the independence of the judiciary and its vital importance to the life of our Country as a civilized Nation. It also brought into focus as never before, the corrupting influence

of power and the self serving machinations of the sycophant resulting in otherwise decent People of whom much more was expected being wholly incapable or unwilling to accept or admit their own mistakes and most of all the monumental dangers presented to the Country by thuggery being used as an instrument of state power.

If the tragic drama of the impeachment results in National attention being focused on these evils and the dangers that face our Country, and we have the strength and the fortitude to overcome them, the anguish of the impeachment would not have been in vain but will result in this Country becoming a better place in which to live.

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## 'Hats Off' To The 'De Jure Chief Justice'

by Elmore Perera

Any individual willing and able to discern the rationale of what is taking place in Sri Lanka can have no doubt that the 43rd Chief Justice of Sri Lanka has been unjustly vilified, persecuted, condemned and crucified. A once respected academic prostituted any little reputation he had left, by stating that "the Supreme Court decision was not worth the paper it was written on" and justifying the unlawful process as being "in accordance with local procedures".

Non-Sri Lankans who dare to comment adversely on this injustice will immediately be labelled as traitors and/or as "International Conspirators". This perhaps explains, what appears to be the surprisingly lukewarm concern expressed by the International Community.

The Sovereign people of Sri Lanka have, willy-nilly mortgaged their "inalienable Sovereignty" to the 225 "geniuses" who purport to represent them in the Legislature. The Sovereign people fear to expose themselves to a swift demise on the direction of the all-powerful executive, for alleged "acts of treason", by failing to acknowledge the majesty of the Emperor's New Clothes.

When the decade of Judicial Terrorism ended in June 2009, Bandaranayake J and Attorney General K.C. Kamalasabeyson PC were the only qualified appointees to the

exalted position of the 42nd Chief Justice, in terms of the 17th Amendment. The independence and integrity of both were unimpeachable – thereby rendering them unsuitable for service in the emerging empire. However, a judge who was guilty of collusion in an abuse of the process of Court, and therefore unable to resist easily manipulation by the Executive President, was appointed as the 42nd Chief Justice. Simultaneously, the President appointed the spouse of Bandaranayake J as Chairman of the Insurance Corporation, giving rise to the clearly false impression that it was part of a deal he had made with Bandaranayake J. Hon, K.C. Kamalasabeyson was thereafter required to retire prematurely, to make way for the President's confidant, legal adviser and friend as Attorney General.

This 42nd CJ served his master well, by inter alia,

(i) paving the way for the President to appoint as Secretary to the all-important Treasury, an officer who, the Supreme Court had held to have deceived the Cabinet and arrogated to himself the powers of the Cabinet,

(ii) putting Gen. Sarath Fonseka (who led the armed forces to defeat LTTE terrorism) behind bars and depriving him of his seat in Parliament by holding that the Court Martial was a Court, and

(iii) engineering the repeal of the 17th Amendment and abolition of the limitation on the President's eligibility to seek re-election as President, by the adoption of the 18th Amendment which effectively vested in the President the "inalienable Sovereignty of the People".

The illusion that Bandaranayake J had sought the President's patronage was reinforced when the President, on his own initiative, appointed her spouse as Chairman of the National Savings Bank on 15th May 2010.

One year later, on 18th May 2011, Bandaranayake J was appointed as the 43rd Chief Justice in preference to the then Attorney General, Mohan Peiris P.C. who was appointed as Legal Advisor to the Cabinet – a clearly political appointment. The 42nd CJ was amply rewarded for his treacherous services to the Executive President by appointment as the Senior Legal Advisor to the President to further exploit his special expertise.

Recently, Senior Minister Tissa Vitarana confirmed to the media that, when asked why he had appointed Bandaranayake J's husband as Chairman, N.S.B., the President had replied that it was at the request of Bandaranayake J.

Within a few months, the independence and integrity of this 43rd Chief Justice, which seemed to have been blunted by the 42nd Chief Justice, proved irksome to the President for well known reasons. He would have none of this nonsense. She had to be impeached!

117 of the President's minions in Parliament signed a document which purported to be a resolution for the impeachment of the Chief Justice. It certainly did not contain "full particulars of the alleged misbehaviour", as specifically required by the proviso to Article 107(2) of the Constitution. However, it was accepted by the Speaker on 1st November 2012 and placed on the Order Paper of Parliament on 6th November. A Select Committee of 7 "Super Geniuses" from the Government and 4 MPs from the Opposition was appointed on 14th November, in terms of Standing Order 78A. A sham of an inquiry commenced on 23rd November. The conduct of the 7 super geniuses was such that the 43rd Chief Justice withdrew on the 6th December at 6.30 p.m. and the Opposition MPs withdrew at 5.30 p.m. on 7th December 2012. These 7 Super Geniuses thereafter summoned 18 witnesses, recorded the evidence of 16 who answered the urgent summons, evaluated the evidence, weighed it against reported judgments, wrote a learned judgment holding the CJ guilty of 3 charges and exonerating her from the other 11 charges, and compiled a report of more than 1500 pages, before 7.30 a.m. – all within the space of 14 hours. Such efficiency will surely find its place in the Guiness Book of Records, in due course!

The Supreme Court entertained a reference by the Court of Appeal on 22nd November, 2012 and made a determination on 1st January 2013 that Standing Order 78A was ultra vires the Constitution, in that it could not empower these Super Geniuses to arrive at any finding of guilt. On the 7th January 2013, the Court of Appeal quashed the purported finding of guilt by these Super Geniuses.

Undaunted, these Super Geniuses succeeded in prevailing on 148 other geniuses in Parliament to disregard with contempt the rulings of the Court of Appeal and the Supreme Court, and resolve that the President should be humbly requested to authorise the crucifixion of the Chief Justice.

In obedience to the dictates of his "Conscience" the President authorised the unlawful eviction of the incumbent Chief Justice. Soon thereafter he purported to "swear-in" the once discarded candidate, to the non-existent vacancy in the position of Chief Justice. It is widely known that this appointee had an unparalleled (and much sought after, in today's context) reputation for blatant corruption since retiring from the public service as Senior State Counsel. The Government MPs and the State Media vociferously claim to have acquired an amazing, and amusing, capability of authoritatively interpreting Constitutional provisions, hitherto assigned by the written Constitution, solely and exclusively to the Supreme Court. The Government's minions amongst the "vigilant" public and the numerous fawning Counsellors of the President have acted swiftly in an attempt to clothe this vile and unlawful deed with legal validity.

To avoid the inevitable blatant victimisation of many law-abiding persons, the Chief Justice has acted with remarkable wisdom. She has however, rightly stated that she is the one and only lawful Chief Justice. Sooner rather than later, it will be revealed that she was betrayed by more than one Judas, by the subsequent conduct of such Judases.

It is the fervent hope of all "law-abiding" Sri Lankans that she, the braveheart who dared to stand up against anarchy, will be restored to her rightful position of Chief Justice, sooner rather than later, to serve this country as Chief Justice, long before she reaches the age of retirement in 2023.

Long live Madam Justitia!

*Elmore Perera, Attorney-at-Law, Founder CIMOGG, Past President OPA

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## End Of Constitutional Governance In Sri Lanka

by Nihal Jayawickrama

In Libya, at the height of the 2011 revolution, it was said that Colonel Gadaffi did not believe rebel claims of captured territory. And, as Tripoli was being encircled, Gadaffi famously exclaimed to a BBC interviewer that "the people love me". The disinformation practised by the Libyan Government through the state controlled media was institutionalized to such an extent that even those in power, who concocted the lies, had begun to believe their own concoctions. When they saw the truth, it was too late for them. The rampaging mobs had ravaged their cities, and turned their palaces into rubble. I saw all of this both before and after.

In the past two months, we too, have experienced a virulent campaign of disinformation through the state media and other state organs in the effort to remove an inconvenient Chief Justice and replace her with one more amenable to the Government. It did not seem to matter that the exercise was both unlawful and unconstitutional, or that it would destroy the foundations of democratic governance. The Chief Justice had to go, and the load of gibberish gratuitously offered by state media and cabinet ministers was intended to lull the people into complacency. Even members of the Government had begun to believe the mumbo jumbo. One cabinet minister was so swayed by the Government's own propaganda that he shouted out to the Supreme Court to "go to hell".

**The obsolete impeachment**

"Impeach" was a word that was introduced into our political lexicon in mid-October, as the process to remove the Chief Justice began. It was a term that came with the weight of history. Soon, law professors and political columnists were delving into the history of "impeachment" across the globe, and arguing that no court could interfere with the process of impeachment. We were given an example from the United States, where one Robert Nixon, a district judge and convicted perjurer in an obscure region of Mississippi, had attempted unsuccessfully to have his impeachment by the Senate reviewed by the Supreme Court, on the ground that he should have been tried in the first instance, not by the House of Representatives, but by the Senate. But how relevant to us is the impeachment procedure prescribed under the 1787 Constitution of the United States of America? We are surely not aspiring to be the 51st state.

We were told that in the United Kingdom, judges are impeached by Parliament. But we were not told that in that country, where "impeachment" was once a process resorted to when a "peer" or "commoner" was accused of "high crimes and misdemeanours beyond the reach of the law", it is now obsolete, its last use having been in 1802. In any event, the United Kingdom is governed, not under a written constitution, but by statute law and convention.

We have our own Constitution, and that Constitution does not provide for any form or kind of "impeachment". The term "impeachment" does not appear even once in our Constitution. What article 107 states, with regard to a judge of a superior court, is that such judge "shall not be removed except by an order of the President made after an address of Parliament has been presented to the President for such removal on the ground of proved misbehaviour or incapacity". There is no reference to "impeachment". That term was obviously introduced into the public domain so that the baggage that it carries from the United States and elsewhere could be employed to challenge the constitutional right of the Judiciary to be subject to judicial review any decision that adversely affects an individual's legal rights.

**The fake supremacy**

It was asserted, without any basis whatsoever, that Parliament is supreme. Apart from references to the Supreme Court, the only place in the Constitution where the word "supreme" appears is in the preamble where it is stated that the Constitution is the law" of Sri Lanka. The 1978 Constitution, unlike its 1972 predecessor, is firmly entrenched on a separation of powers. Parliament exercises legislative power. The President exercises executive power. Courts, tribunals and other institutions established by the constitution or by law exercise judicial power. In fact, not only is one power not regarded as supreme in relation to the others, there is an inter-locking process, or a system of fine checks and balances, which is the essence of democratic governance in the civilized world.

For example, the President summons, prorogues and dissolves Parliament, but he cannot make law. It is Parliament alone that can make law (except in a state of emergency that is approved by Parliament). Parliament, however, cannot proceed to

enact a law until the Supreme Court has examined and certified that the Bill for that law is in accordance with the Constitution. Neither the Speaker, nor a select committee, can perform that function.

The President alone may exercise executive power, but he is "responsible to Parliament" for the due exercise of his powers and duties, and it is Parliament that provides him the funds necessary to perform his legitimate functions. If he is faced with a question of law of public importance, he is required to refer it to the Supreme Court (and not to Parliament) for its opinion on that question. The President may be removed from office by resolution of Parliament for bribery, misconduct, corruption, abuse of power or intentional violation of the Constitution, but only if the Supreme Court, after due inquiry reports to Parliament that he is guilty of one of more of the allegations. The President may address Parliament, but he may not appear and be heard in the Supreme Court, except when that court is investigating his conduct on a reference by the Speaker. The President may pardon a person convicted by a Court, or remit or commute a sentence imposed by a Court, but he may not set aside or overrule an order or judgment of a Court.

The Judiciary alone may exercise judicial power, but Judges of the Supreme Court and of the Court of Appeal, though appointed by the President, may be removed by the President only on a resolution of Parliament, and only on the ground of "proved misbehaviour or incapacity". The Supreme Court alone may interpret the Constitution, but Parliament may amend or repeal the Constitution. Parliament may summon a judge to appear before a select committee conducting an inquiry relevant to its legislative or oversight functions, while a judge may summon a Member of Parliament to appear before him as a witness, party to a proceeding, or an accused.

**A delicate balance of power**

The respective roles of Parliament and the Supreme Court are best exemplified in the Parliament (Powers and Privileges) Act. In respect of any alleged breach of privilege which cannot be punished with "admonition at the Bar of Parliament" or "removal from the precincts of Parliament" (the only two punishments that the law allows Parliament to impose on anyone), Parliament is required to refer to the Supreme Court every other alleged breach of privilege that warrants a penalty more severe than these. In fact, if a person summoned by a select committee to give evidence or to produce a document, disobeys that order and fails to appear or produce the document, the select committee has to refer that matter to the Supreme Court if it desires to punish that person.

The constitutional relationship between the three organs of government, this delicate balance of power, therefore, requires mutual respect. For one branch to tell the other "to go to hell", or that its judgment is "not worth the paper on which it is written", is to demonstrate an unfortunate lack of understanding of the processes of government, or an incredible arrogance based on ignorance. If it is neither of these, then, it is a

classic example of disinformation designed to mislead the public. It also demonstrates a lack of institutional memory.

For example, when in 1958, Prime Minister S.W.R.D. Bandaranaike wanted to persuade a Judge to head a commission of inquiry, he visited Hulftsdorp on a Saturday morning and met the Judges in the Supreme Court Library; he did not summon them to his residence or to his office. In 1973, Chief Justice H.N.G. Fernando sought an appointment with the Prime Minister to discuss certain administrative difficulties that had arisen in the Criminal Justice Commission (1971 Insurgency) over which he was presiding. Mrs Bandaranaike considered it improper that the person who was presiding over a trial in which the accused were charged with attempting to overthrow her Government, should meet her at her residence at Temple Trees. She requested me to meet him, in my capacity as Permanent Secretary to the Ministry of Justice. Mrs Bandaranaike did not personally speak with any potential Chief Justice or Judge of a superior court. Instead, she left that task to the Minister or Secretary of Justice. Such was the scrupulous manner in which conventions that underpinned the separation of powers were understood and observed in the past.

Of course, there were conflicts from time to time. In 1973, when I attended, on invitation, a ceremonial sitting of the Supreme Court and, on the instructions of the Minister, sat next to him at the Bar Table, the response of Chief Justice Tennekoon was peremptory. I was asked to sit in the row behind, which I did. It was not that we had nowhere else to sit. I usually stood at the back of the crowded courtroom on such occasions. It was the Minister's view that, by sitting at the Bar Table, we would convey the message to the Judiciary that the Legislature and the Executive, too, had roles to play in the administration of justice. As it turned out, the Judiciary carried the day!

**Falsifying the past**

The removal of the Chief Justice after a flawed "investigation" under standing order 78A, which the Supreme Court determined to be void ab initio, has been sought to be covered up by the assertion that several judges had been "impeached" in the past by employing this same standing order. This is factually incorrect, and is yet another attempt at disinformation. The one single occasion when a select committee was appointed under this hastily drawn up standing order was in 1984. An allegation of misbehaviour was made against Chief Justice Samarakone barely one month before he was due to retire from office. His counsel, Mr S. Nadesan QC, did not dispute the facts, but challenged the constitutionality of the standing order. He made submissions on 14 days over a period of two months. The select committee reported, after the Chief Justice had reached his mandatory age of retirement, that the charge of misbehaviour had not been established.

The two other select committees that were appointed to inquire into the conduct of judges were fact-finding exercises, at a time when standing order 78A was not in

existence. The first was In 1983, to inquire into a complaint made to President Jayewardene by Mr K.C.E. de Alwis, a former Judge of the Court of Appeal and a Member of a Special Presidential Commission, against Justice Wimalaratne and Justice Colin Thome who, together with Chief Justice Samarakone, had issued a writ of prohibition restraining De Alwis from continuing to be a member of that Commission. The second was in April 1984, to inquire into and report on whether Chief Justice Samarakone had made a certain speech on a certain occasion.

When, in June 2001, the Opposition attempted to present a resolution seeking the removal of Chief Justice Sarath Silva, President Kumaratunge prorogued Parliament and aborted the process.

When, in 2004, the UNP Government was making arrangements to establish a tribunal consisting of three Commonwealth Judges to inquire into charges against the same Chief Justice, President Kumaratunge again aborted the process by dissolving Parliament.

**Misinforming the present**

The disinformation campaign also sought to make out that, even in other countries, Judges are "tried" by Parliament. Reference was made to the United States and Philippine Constitutions where the Senate is vested with the sole power to "impeach" a Judge. The Senate in each of these two countries is not even remotely comparable to our Parliament for the simple reason that it does not have among its members anyone who holds executive office. The Cabinet, in both these countries is drawn from outside the legislature.

What the disinformation campaign cleverly attempted was to misrepresent the position in the United Kingdom. Under the Constitutional Reform Act of 2005, an appellate judge may be removed from office by the Lord Chief Justice and the Lord Chancellor if, after an investigation by an Investigating judge, they both agree to uphold a report that finds the complaint against the judge to be justified. In the case of the Lord Chief Justice of Northern Ireland, a resolution for his removal may be introduced only by the Lord Chancellor, and only after a three-member tribunal has reported that grounds exist for such removal. No provision yet exists for the investigation of an allegation of misbehaviour against the Lord Chief Justice of England and Wales (the Head of the Judiciary), or of the Judges of the Supreme Court of the United Kingdom (which replaced the House of Lords). However, it has been suggested that should the need ever arise to do so, the procedure prescribed for Northern Ireland will be followed. Judicial ethics are so widely respected in that country, the democratic fabric is so secure, parliamentary and judicial proceedings are so transparent, and constitutional conventions so strong, that it is almost inconceivable that an occasion would arise for the removal of the Lord Chief Justice of that country.

The disinformation campaign also hides the fact that in practically every Commonwealth country, the Latimer House Guidelines have been incorporated into domestic law. A judge may be removed from office, whether on a parliamentary resolution or otherwise, only after an independent tribunal has found that judge guilty of misbehaviour or incapacity. From Australia to Uganda, through Belize, Botswana, Canada, Cyprus, Ghana, Guyana, India, Kenya, Malaysia, Singapore and South Africa (to name only a cross section of Commonwealth countries selected at random), this is the consistent constitutional practice.

Sri Lanka stands outside the fold, an outlaw as it were, claiming the right to bulldoze its way, with slogan-shouting, stick-waving, screaming mobs, protected by armed police and the military, padlocked gates, water cannons, and fireworks – all this and more to remove from office the lawful Chief Justice of the Republic, the first woman, the first academic, the first product of a non-urban school who, with her quiet dignity, grace and determination, surpassed herself as she faced what must have been the greatest challenge of her life.

**End of constitutional governance**

The purported removal of a serving Chief Justice, and the purported appointment of a new Chief Justice, marks the end of constitutional governance in Sri Lanka. These were the final acts in a series of bizarre events orchestrated by the Government in the past six weeks. These events were accompanied by an unprecedented campaign of disinformation, at a level and of a kind we have not been subjected to in recent years. Parliament is no longer a legislative body that can hold the government accountable. With two-third of its members serving as salaried officers of the Executive, it has been transformed into a mere legislative arm of the Executive. With the judgment of its highest court incapable of being enforced, and the head of that court pushed out of office by brute force, the once proud, independent and internationally acclaimed Judiciary of our country has been dealt a body blow of unimaginable magnitude. We have begun an era of unbridled, authoritarian presidential rule.

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# The Disappearance Of A System Of Law

by Kishali Pinto-Jayawardena

With the dust uneasily settling over a legal community thuggishly coerced into fuming silence, an unjustly ousted Chief Justice Shirani Bandaranayake may yet be proud.

**Disastrous steps in a dictatorial journey**

Despite overwhelming odds, she succeeded in uniting a deeply divided Bar, rallying judges to her side, provoking strongly worded editorials and unexpected protests from the normally quiescent business, investment and employment sectors, quite apart from religious leaders and concerned citizens.

Most of all, her dogged determination not to resign effectively pushed the political leadership over the brink, forcing it to take a series of disastrous steps in a dictatorial journey that surely cannot continue for too long. For, if any among us believed that President Mahinda Rajapaksa would have been capable of a statesmanlike stepping back from the brink which would have instantly turned hostility into accolades, those naïve illusions were dispelled in no uncertain terms. As security personnel peered into the vehicles of lawyers and judges entering the superior court complex this Tuesday as much as if Bandaranayake was hiding under the seat and the entirety of Hulfsdorp resembled a war zone with lawyers not being allowed freedom of movement, no reasoned person could profess ignorance of the iron hand now thoroughly out of the velvet glove.

**Janus-faced weapons of threat and promise**

That the political leadership is well aware of the deep anger felt by the legal community is evidenced by the use of its customary Janus-faced weapons of threat and promise. Thus, even as threatening letters were sent by vigilante forces to lawyers at the forefront of the anti-impeachment struggle, empty reassurances were made by ministers that the constitutional process relating to impeachment of superior court judges will be overhauled. And from farce we progressed to unbearable comedy as a National Human Rights Commission, which has manifestly failed to live up to its statutory responsibilities, solemnly announced that it will initiate a reform process. These games may be entertaining to those who paddle where the Government tells it to go but they are scarcely credible.

Of course the Government would not have been so hard pressed if it had been able to coax a convenient resignation of the ousted Chief Justice, which indeed was the mistaken basis on which it first acted. The Minister of External Affairs and former law professor was reported to have stated this week that he was not proud of some of the actions of his former student. He may be unequivocally informed that the thinking citizenry is not only, not proud of him for his singular hypocrisy but further roundly condemn for his allegiances to and justification of a political leadership that, much as the Nazi boot did, engages in mercilessly grounding and stamping democracy into the dust in Sri Lanka.

From start to finish, this impeachment process was riddled with impropriety and at certain points, distinct illegality. The resolution was framed without formulating the charges in the expectation that the Chief Justice would be pressurized to step down. The hearings violated the right to natural justice in almost every conceivable way, despite President Mahinda Rajapaksa's repeated mantra that the constitutional process was followed to the letter. Finally, in the ultimate idiocy, the wrong resolution was reportedly voted upon by the House on 11th January 2013. The Minister of External Affairs, who is blind, deaf and dumb to all these happenings, is a living example of the deplorable limits of seeming intellect. Such is the stuff of unreasoned ambition.

**Recovery of the democratic spirit**

Meanwhile, it is interesting that alarm cries raised in regard to the judiciary struggle have raised skeptical eyebrows in a context where the summary disposal of a Chief Justice may seem to be somewhat dry and legalistic as compared to the decades of still unresolved killings, disappearances and extra judicial executions.

Some time ago, this column posed the question as to what was worse, the disappearance of individuals or the disappearance of a system. Answering this question has great significance now more than ever. The horrors of the Southern disappearances in the eighties or the tragedy of Tamil civilians ruthlessly dispensed with as 'collateral damage' in May 2009 are events that a country could still recover

from if its systems and its citizens have the inner strength to withstand barbarities of a period.

We saw this in 1994 when Sri Lanka shook off a dark decade of the Southern terror, ushering in a new government on a mandate of peace. That Chandrika Kumaratunga failed to deliver is another question altogether. But the important fact was that Sinhalese, Tamils, Muslims and others dared to hope. And they did so because, despite the brutalities, the country's judicial institutions remained essentially intact and before long, judges and lawyers stood up for what was right. Flawed as it was, the notion of justice had not yet disappeared from the turning of the legal wheel. Consequently, from the mid to late nineties, the Supreme Court did the country proud in asserting the rights of all citizens, minorities and majority through voluminous jurisprudence that could have held its own anywhere in the Commonwealth.

Such recovery of the democratic spirit will not be so easy now. Ironically, we have not only a former Army Commander declaring that he is the actual President with the incumbent being a rogue president but also an ousted Chief Justice raising a similar cry. In that context, the promise made to uphold the Rule of Law and the legal system by Sri Lanka's new Chief Justice, former Attorney General and legal advisor to the Cabinet Mohan Peiris sounded particularly hollow, even given the cynicism that normally attaches to these statements.

**The repercussions of dissent will continue**

So while it hectors to the Bar quite spine chillingly not to use the courts as a political platform, the Rajapaksa Presidency has ushered in the 'disappearance' of an entire system. The institutional memory of an independent judiciary will be remorselessly erased and the very notion of legality lost, even though lawyers may practice and judges may ascend the bench. As much as an animal frantically struggles for the last time before it dies, we may look upon the events of the last few months as symbolizing a judiciary in its death throes. Consequentially, to underestimate the danger of what Sri Lanka is now facing only for the Sinhala majority but for the Tamil minorities, is to be abysmally if not myopically ignorant.

Granted that, given the nature of this regime, the result of the anti-impeachment struggle was a foregone conclusion. In an appropriate analogy, it would be as if during the recent FUTA struggle, the Government had sent the army into the universities. In regard to the FUTA demands, it was a question of ego with the administration's arrogant refusal to back down. In the case of the judiciary, what was in issue was far greater, going to the root of the political survival of the regime. Naturally therefore, the tactics used and the methods employed were far more brutal.

Yet amazingly enough, the Bench and the Bar, even despite the Judas-like betrayal of the leadership of the Bar at a game-changing meeting with the President this week,

threw its weight together in a unified stand which lasted for several months. That by itself, was near miraculous. This dissent is not momentary. Its repercussions will continue to be felt.

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## Unleashing A Period Of Terror Again

by AHRC

With the law, the legal institutions and the courts diminishing in value secret agencies are surfacing quite openly once again. The presence of the military and the police the night before Mohan Peiris was sworn in as chief justice and also during the day itself and the ferocious manner in which the Chief Justice, Dr. Shirani Bandaranayake, was escorted out of her official residence are images that were designed to terrorise the lawyers and citizens who were anxious and bewildered by what is taking place.

However, yesterday another move was started. This was the sending of threatening letters by a group that identified themselves as a patriotic taskforce. They named lawyers who participated in the movement for the independence of the judiciary as traitors, bent on destroying what has been achieved with a great blood sacrifice. Any kind of protest is portrayed as a war against the great warrior who is now ruling Sri Lanka after gaining a victory at enormous sacrifice. Such was the message given to the lawyers. Not only were the lawyers named and identified as targets for their activities but also their spouses were also named. The wording of the letter states that this is the first warning. The warning of what exactly, they do not state. However, from past experience it is quite clear that these are warnings of assassination.

Dr. Shirani Bandaranayake herself left her official premises and despite the fact that there was a blatant attempt to refuse her the opportunity of making a statement to the assembled press, among the things she said was, “Please look after the three of

us". That is the kind of terror that is once again being unleashed and brought to the surface. When the law, the legal institutions and the courts diminish in value the vacuum has to be occupied by something else and that something else is terror! And the agency behind the terror is the Ministry of Defence. It has vast resources as well as trained personnel including the paramilitary forces which carry out the orders given by the Ministry which need not be justified in terms of any law or regulation. When the lawyers asked under what law the entrance to the Supreme Court was closed on the 15th there was no answer. When the media personnel were not allowed to enter the premises the lawyers protested to the police, who attended in force, stating that there was no law to prevent the journalists from entering the premises. However, the police simply ignored the question and continued to prevent the journalists from entering.

Then when the media asked the Chief Justice to make a statement as she was leaving their questions were shouted down by a senior police officer and many others who virtually chased the car carrying Dr. Bandaranayake in order to ensure that she had no opportunity to make a statement.

Now the lawyers and others who participated in these protests have to live in their houses in fear taking great precautions for their security. In one's own country the alienation of individuals has come to a point where it is only with the provision of security for himself and his family that he can live. Naturally, individual lawyers and others are not able to provide such security for themselves against the overwhelming power of large numbers of police, military and paramilitary forces that the intelligence services.

Threats of assassination to lawyers and their spouses

Three lawyers from Mannar have received the threatening letters as have several other lawyers from Colombo. In Mannar a few months ago a magistrate was threatened by a government minister and Magistrate's Court and High Court were attacked. There is a contempt of court action against Rishard Bathuidin and also criminal charges against him and several others. It is obvious that the threats against the Mannar lawyers are directed towards the withdrawal of these cases by way of threatening the lawyers and witnesses.

In Colombo a petition challenging the appointment of Mohan Peiris as the chief justice is pending. Although in terms of the tradition this case should have been fixed for argument immediately, no date has been fixed for lawyers to support this case. Obviously, threats against the lawyers in Colombo are directed towards intimidating the lawyers who would support this petition or file other actions.

There is also some contempt of court cases filed against some media personnel whose utterances or writings have contained statements alleged to constitute contempt of court. Obviously, one of the purposes of the intimidation campaign that is going on now is to force the withdrawal of these cases.

Above all it has been the position of the lawyers that the Court of Appeal order in issuing the Writ of Certiori on the basis of the Supreme Court's interpretation of Article 107(3) of the Constitution invalidates all measures taken to remove Dr. Bandaranayake as the Chief Justice. On that basis they have stated that the appointment of Mohan Peiris lacks legitimacy. One of primary causes of the intimidation campaign is to stop lawyers raising objections on the basis of the absence of legitimacy against the actions of Mohan Peiris.

**Periods of terror**

There have been periods of terror over and over again in Sri Lanka. Such a period has begun again. Behind the increase of this terror is the fear of the government that their actions do not appear to be legitimate. There is no political myth by which the people's loyalty might be guaranteed and the people are beginning to see some kind of rationale by which they can no longer justify the actions of the state in denying the elementary right to an honest and genuine enquiry into the charges made against the Chief Justice. Many others are not charged and others are punished without charges. The agencies that carry out the punishment are given secrecy to enable them to send threatening letters and of course the complaints about such threats are not investigated by anybody. There is no one to seek protection from and the courts are no longer places where the individuals can go to for protection. Instead at the top of the judiciary there now sits a person whose loyalty to his political master is so clear that no one will go into his presence in order to complain about the threats they are receiving.

**All voices for restraint ignored**

The voices of the Mahanayakes and other religious leaders have also lost any kind of value to the point that anything they say is completely ignored. They themselves complain that what they say does not matter at all. The media is suppressed and not allowed to carry these messages to the public through print or in other forms. Instead, every morning begins with a Sinhalese or Tamil programme through the Sri Lanka Broadcasting Corporation, which without any visible standard of decency creates the message of violence and indulges in character assassinations naming people as traitors, robbers and thieves and even openly cursing people, saying they are a menace to society. The programmes go on to ask that lightning should fall on these people. Thus, every morning begins with a terrorising programme to create psychological conditions of fear in anyone that has a dissenting voice. Indeed, every dissenting voice is identified as a traitor who is trying to fight against the great warrior who has protected the people by winning a great war.

To be a reasonable thinking person in Sri Lanka is now an offense. It is a crime that could be punishable with death by secret agencies with enormous experiences in carrying out extrajudicial killings in large numbers. A tradition which goes back to

1971 remains where extrajudicial killings, enforced disappearances, abductions, torture, illegal treatment and every kind of terrorising is allowed.

Such is Sri Lanka in January 2013. This is beginning of a period of terror which may be worse than any similar period in the past because the law and the courts are no longer there to protect the citizens of Sri Lanka.

The voices of two women, one a prominent journalist who had to leave the country, Fredericka Jansz, stating that, "My children need a Mum and not a heroine" and the Chief Justice, Dr. Shirani Bandaranayaka, saying, "Please look after the three of us, are symbolic of the fear psychosis that prevails now.

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## From A Shameless Impeachment To A Shameless Chief In-justice

by Tisaranee Gunasekara

*"Hitler seemed intent, in fact, on delivering these blows completely in the open so as to leave a deep and abiding impression, as if proclaiming from the rooftops his immutable will…."*
***Joachim Fest (Plotting Hitler's Death)***

The end was preordained. The quintessentially Rajapaksa-impeachment produced a quintessentially Rajapaksa Chief In-justice. Mohan Peiris, the trusted acolyte of Gotabhaya Rajapaksa, the man who lied to the world on behalf of his political masters, is the ideal choice to head the Rajapaksa judiciary, given the critical absence of a Rajapaksa Sibling, Son or Nephew capable of holding that fort.

The elevation of Mr. Peiris reveals the naked truth about the impeachment and about the force propelling it forward – the Rajapaksas. The Rajapaksas want to concentrate all power in their hands and they want to stay in power 'forever'. The impeachment was aimed at removing constitutional and legal barriers on the path to absolute and eternal power. In order to bolster familial rule and ensure dynastic succession, the Rajapaksas need a judiciary which is abjectly servile, which has no will of its own, which would not hesitate to lie, cheat, violate the constitution or break the law, on demand.

The purpose of the impeachment was to create that mindless, shameless judiciary from top down.

Had the Rajapaksas so wanted, the impeachment could have been conducted less crudely, with at least an appearance of fair-play. The Rajapaksas chose to turn the impeachment into a witch-trial for several reasons. They hoped a brutish impeachment would force the CJ to resign. They desired to revenge on a woman who had the temerity to go against their royal wishes. Most of all they wanted to send a clear, unequivocal message to the judiciary, the legal fraternity and the larger society about the prohibitive costs of dissent. They wanted to maul Shirani Bandaranayake, publicly, in order to snuff-out the flame of resistance by encouraging some of the worst qualities in society – cowardice, opportunism, greed, duplicity, self-interest, apathy…

Had the Rajapaksas wanted to maintain appearances they could have appointed a more amenable Supreme Court judge to head their judiciary. They chose not to take that marginally moderate path because moderation, even in miniscule quantities, is alien to their extremist mindset. They care as little about legitimacy as they do about legality. Power is their God. Their willingness to tolerate dissent decreases as their hold on power increases. The more powerful they are, the less tolerant they become, less willing to accede to compromises, more determined to inflict a scorched-earth policy on any individual or entity who dares to disobey them.

Our Sun God and his Brothers

On Tuesday, the apex courts-complex resembled the occupied North. In another Sri Lankan first, police and military men surrounded the courts-complex and turned it into an open prison camp for a few hours. Sloganeering musclemen were at the ready in case lawyers, in their hundreds, came out in protest against the illegal occupation of the bastion of justice. That extra-precaution was needless; given the Bar Association's all too explicable volte face, most lawyers seemed to have decided to watch from the sidelines. Only a handful, following the courageous example set by Chief Justice Shirani Bandaranayake, came forward to defend the honour of their profession.

As the army and the police occupied the apex court premises, the President – and his handpicked Chief In-justice – vowed to safeguard judicial independence. The Rajapaksas, like all tyrants, have an instinctive understanding of 'Newspeak' without every having read Nineteen Eighty-Four. In the Rajapaksa-speak, servility is independence, just as a brutal war was a 'humanitarian offensive' and open prison camps were 'welfare villages'.

Assisted by the Rajapaksa Judiciary, (and its incomparable Injustice-in-Chief), the Rajapaksa Legislature can now go all out to strengthen Rajapaksa Democracy. The law enabling the detaining of suspects for 48 hours will be debated and approved next week. Other laws will come, to make it even easier for the Rajapaksas to destroy every vestige of dissent, under cover of fighting crime/terrorism.

Impunity will become as ubiquitous in the South as it is in the North, the testing ground for Rajapaksa governance. An incident which took place in the Jaffna Magistrate Courton 20th September 2011 may be an omen of things to come. Antony Nithyaraja, a man wanted by the police, went to the court and appeared before the magistrate voluntarily through his lawyer. "The Magistrate after considering the police submissions and court documents released him. However, seven police officers in civilian clothes arrested him and started beating Antony in the presence of the Magistrate, lawyers, court staff and a large number of people. He was dragged to the Jaffna Headquarters Police Station for detention" (Asian Human Rights Commission – 23.9.2011). That act of injustice, committed within the halls of justice, may foretell future events in the South.

Remember Vellupillai Pirapaharan and understand Mahinda Rajapaksa. Remember Baby Subramaniam and understand Gotabhaya Rajapaksa. Look at KP and understand Basil Rajapaksa. Like the Sun God and his Tigers, the Siblings too cannot afford to give up power. And the longer they stay in power, the more they will undermine Sri Lanka by destroying everything that is good about this land and its people.

As Steve Biko warned, "The most potent weapon in the hands of the oppressor is the mind of the oppressed" (I write What I Like). The Rajapaksas want us to succumb to them psychologically by accepting their new commonsense which worships power (and the powerful), celebrates cowardice and opportunism and enthrones mindless obedience as the highest virtue. They want us to believe that cowardice is intelligence, apathy is foresight and self-interest is wisdom. They want us to see nothing wrong in a country where the chief justice is hounded-out for abiding by the constitution. They want us to regard CJ Bandaranayake's courageous resistance to the impeachment as an act of unparalleled foolhardiness.

They want us to feel weak and helpless.

They want us to accept aSri Lankain which courage is the ultimate stupidity, compassion is a sin, solidarity is dead and decency is unheard of. It is only in such a land the Rajapaksa Dynastic Project can take root and flourish.

That is why resistance, in any democratic and peaceful way possible, is not a choice but a necessity for those who do not wantSri Lankato become a country of and for the Rajapaksas.

And resistance begins by refusing to allow the Rajapaksas to occupy our minds. Do not embrace the Rajapaksa-worldview. Do not accept the Rajapaksa-commonsense that resistance is futile and wrong and silly. Do not allow the Rajapaksa-lies to affect our judgement and the Rajapaksa-deceptions to cloud our perception. Do not forget that the impeachment was unjust and illegal. Do not allow the Rajapaksas to convince us that this is democracy. Do not swallow Rajapaksa concoctions about

national and international conspiracies and undead Tigers; they want to addle our minds with fear so that we will infantalise ourselves and cling to them for protection.

See the Rajapaksas as they are.

Remember where Adolf Hitler took the Germans and Vellupillai Pirapaharan took the Tamils; ask, 'Is this the future we want for ourselves'?

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## BASL And Wijedasa Had Their Own Concerns?

by Vishvamithra

Until the 'cordial meeting' held with the President Rajapaksa on 14th Jan 2013, the Bar Association head Wijedasa Rajapakshe, was firmly of the view that rule of law should prevail in the country and there cannot be two CJs (one legitimate another illegitimate). In short he was of the view that no one should be allowed to undermine the integrity of the judiciary and that all alike should respect the Court System and all determinations made by the Supreme Court and the Court of Appeal.

Yet, when Mohan Peiris arrived at the Supreme Court premises the general membership of the bar observed something fishy and strange. The government supporters hailed both Wijedasa Rajapakshe and Mohan Peiris followed by a statement by the bar that it was willing to cooperate with the illegitimate CJ Mohan Peiris.

The membership of the bar, feels that the head of the Bar effectively deceived them. They sensed that both the general membership and the general public that opposed the oppressive, arrogant and lawless regime has been betrayed by Wijedasa Rajapakshe, the kind of total breakdown of the integrity eaten into the entire social fabric in this country.

As happened in Pakistan recently, when some members demanded the Association the total stoppage of work until the legitimate CJ is recalled and restored to the office, it was opposed by the Executive Committee, on the basis that 48 hour token stoppage of work is adequate to display the dissent of the Bar, which in any event the President Rajapakse would have appreciated, even 72 hours of stoppage of work. Effectively the Executive committee of the Bar disregarded the offer made by the JSA (Association of Magistrates and Judges in the District Courts) that they would fully standby any decision taken by the bar that would lead to restore the rule of law.

In this backdrop, the people of this country, indiscriminate battered by the deceptive leadership and helpless would only raise the question, as to the morale integrity of this so-called professional body, which some members of public referred as 'black coats' and about the false leadership it offered to the public, at a time there was a total breakdown of the law and order in the country.

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## Impeachment And The Misconceived Reliance On CJ Corona's Case

by Reeza Hameed

The case involving the impeachment of Chief Justice Corona of Philippines has been cited in some places in support of parliament's move to impeach our own Chief Justice. It was most recently invoked during the recently concluded impeachment debate in parliament when, speaking favour of the motion, our Minister of External Affairs said that the principle is that in respect of impeachment proceedings the responsibility is that of Parliament and not the Courts. He noted that when the Filipino CJ went to court, the Court had declined jurisdiction and said: "This is not a matter for us to get involved in because this belongs to the domain of the legislature".

Justice Corona's impeachment did not proceed without controversy because of its political undertones. There it was alleged, inter alia, that

1. the signatories to the complaint had signed it without reading and evaluating its contents

2. failing in their duty to verify the sufficiency in form and substance of the existence of a prima facie case to pursue

3. the inordinate speed with which the complaint was filed prevented such verification

4. the CJ was impeached in respect of collegial decisions.

Interestingly, Justice Corona's case bears many similarities to that of our own CJ's case.

The Supreme Court of the Philippines dismissed the case brought by Chief Justice Corona on the ground that the matter had become academic, given the fact that the impeachment trial had been concluded and the petitioner had accepted the verdict of the Senate without any protest and vacated his office. In fact, in the case of Francisco v the House of Representatives of the Philippines, the Supreme Court had previously asserted its power of judicial review even over impeachment proceedings.

The Philippines has never been considered by Sri Lankan constitution makers as a model worth emulating, and the Philippines constitution does not provide any assistance for the interpretation of the impeachment clause in article 107 of the constitution because in the Philippines the "sole power of impeachment" is vested in the House and the "sole power to try all impeachment" is vested in the Senate. However, even in the Philippines, a comparably better safeguards have been built into the impeachment procedure. Impeachment proceedings may be commenced on a "verified complaint or resolution of impeachment filed by at least one-third of all the Members of the House". Furthermore, the existence of a bi-cameral legislature acts to avoid the problem of the same body initiating the impeachment proceedings and trying the allegations.

Clearly, Justice Corona's case provided no precedential value to support the proposition that was being asserted against Mrs Bandaranaike. She has neither refused to stand trial nor walked away from facing the charges, but protested that the proceedings were unfair and did not give her a fair chance to defend the allegations against her.

The suggestion in Sri Lanka that the courts by quashing the Select Committee's report trespassed into parliament's territory was made to try to discredit the court's ruling on the validity of those proceedings. In Francisco, the Philippines Supreme Court rejected similar arguments stating that the political defence argument can never be raised to cover up abuse of power. The Court in that case said: "The claim, therefore, that this Court by judicially entangling itself with the process of impeachment has effectively set up a regime of judicial supremacy is patently without basis in fact and in law." The court also referred to the US Supreme Court's opinion in United States v Smith (1932) where Justice Brandeis declared that where

the construction to be given to a rule affects persons other than members of the legislature, the question becomes judicial in nature.

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## Many Sides Of Partiality Of Mohan Pieris

by Laksiri Fernando

Apart from being an illegal appointment to the post of Chief Justice, Mohan Pieris undoubtedly is a controversial character in many respects. His business connections and government appointments are well known and contrary to the independence and integrity expected by that highest position in the judiciary. He was the Chief Legal Advisor to the Cabinet. He himself is personification of 'conflict of interest' par excellence. The following is an article I wrote about his views on the ethnic question and reconciliation which was published in the Asian Tribune on 16 June 2012, seven months ago.

I wish the readers to pay attention to what he said about the 'lawyers, constitutional jurisprudence and the Tamil community' quoted in my paragraph 14 below. This is what I quoted:

"The whole problem with the Tamil community is that they have too many lawyers there. They just talk law. They are enjoying themselves talking constitutional jurisprudence."

When he said that he was just the former Attorney General, but now he is supposed to be the Chief Justice. Look at his attitude about constitutional jurisprudence, lawyers and the Tamil community. His full interview appeared in the Asian Tribune under the title "Mohan Pieris: On the urgency of reconciliation for lasting peace" on 12 June 2012.

Dangerous Pronouncements of Mohan Pieris on 'Reconciliation'

When the Asian Tribune, probably the Editor KT Rajasingham himself, raised the important issue of 'confidence' as a possible barrier for the TNA and the UNP to so far nominate their representatives to the Parliamentary Select Committee (PSC), Mohan Pieris, in an interview on 12 June 2012, characterized it as "being selfish," and lambasted saying "What is confidence? They are enjoying all the perks of their offices they hold. They enjoy all the material benefits every other government members enjoy. What is this confidence they talk of?"

Mohan Pieris is not only a former Attorney General of the country who recently lost his credibility by saying one thing to the UN Committee on Torture (CAT) on the disappearance of Prageeth Ekneligoda and then refuting it cheekily before the Homagama Magistrate, but also the Chairman of the Inter Agency Commission to Implement the Interim Recommendations of the Reconciliation Commission (LLRC). In addition he is also a Special Advisor to the Cabinet of Ministers.

To such an important person on reconciliation, 'confidence' or 'confidence building' in the reconciliation process equals to 'perks' and 'material benefits,' perhaps revealing his own mindset on matters that are well prominent nowadays in Sri Lanka. Thus he cannot understand why the TNA or the UNP cannot have confidence in the government, when they enjoy the official benefits of MPs, as if these benefits are given to them by the benevolence or as 'bribes' of the government. What is implied is the ownership of power and wealth within a small group of people, masquerading as Government, and the need for others to serve them with 'confidence.'

When the interviewer commented on the TNA position that "they are not going to come as far as I am aware," the answer was "well..well..well…then the Government will have to do the next best thing." Mohan Pieris also spelled out this 'next best thing' saying that "there are other right thinking people in the Tamil community who will join with us and will come with a formula which we think is the next best." It is perhaps in this context that he mentioned about the 'perks' and 'material benefits' that can generate confidence among some 'dummies' instead of the TNA.

Pieris also talked about 'clapping' and 'Tango.' "It takes two to Tango. You need two hands to clap," he boldly said. But instead of a real Partner to Tango, as he revealed, the government is going to have a dummy as the second best. Why? The answer came when the Asian Tribune asked "why can't the government try to persuade the TNA?"

First it was sheer arrogance saying, "You can take a horse to water, but you can't get it to drink." Then it was utter impatience when the need of 'government again talking to the TNA' was suggested. The answer was "What is there to talk…We are just talking, talking and talking." This was the attitude of such an important person from the government side on 'talks' as part of a reconciliation process or political negotiations.

Pieris was somewhat taken aback when the "UNP also not joining the PSC" was suggested. "So that is because none has the country at heart" was the answer. He was not talking about a 'second best' in this instance. Instead, he was waving the 'patriotic' card.

When the Rajapaksa associates first brought the issue of 'patriotism,' many people who wanted to be critical of the government, including myself, were somewhat puzzled thinking whether they (we) were doing something wrong, because we all love the country. But now it has become an utter joke simply because of the scale of abuse, vendetta, plunder and deceit going on in the name of patriotism.

In the interview, Pieris very clearly refuted the possibility of reconciling with the TNA. That should be noted by everyone at home and abroad. "I can only reconcile with someone who wants to reconcile," he categorically said. Perhaps he was ignorant of the political implications of the simile that he brought into the discussion. He said, "it is no different to – may be a family break up." He should know better than anyone else the marriage law regarding separation or divorce when there is a family breakup. I am sure however he is ignorant of the theoretical literature on the subject of self-determination that equates political separation to family breakups.

There is no wonder why Mr R. Sampanthan was talking about the impossibility of having a 'solution even within a united Sri Lanka' at the ITAK convention in Batticaloa, if he has encountered utterances like Mohan Pieris' during the "quantum of dialogue" with the government that Pieris referred to during the interview. Still I would persuade Mr Sampanthan to otherwise.

It was utter nonsense that Pieris talked about referring to amity among communities in the Galle Face Green! Almost like a senile 'post-modernist,' he said "in the evening you see the community living in peace. They are talking, laughing and enjoying themselves. There is no Sinhalese, Tamils, Muslims or Burghers over there." Then he said "Nothing," like what he said about "Ekneligoda's whereabouts" before the Maharagama Magistrate: "only God who knows."

Perhaps this type of self-deception must be going on in the inner circles of the Rajapaksa associates. It is entirely true that the ordinary Sinhalese, the Tamils and the Muslims have ever lived in peace and still wants to live in peace and amity. Then who is igniting communal ill feeling and violence like what we recently saw in Dilithura, Dambulla or Dehiwala?

At least we know for sure that Rev. Inamaluwe Sumangala who led the attacks on the Dambulla Mosque was a President's delegate to Myanmar in June 2009 just after the end of the war and perhaps he learned those tactics from there (listen to ITN News on YouTube, 18 June 2009). It is equally known that many recent attacks on Muslim religious places, including the Dehiwala Musjid attack on 25 May 2012, were led by the JHU monks, a constituent partner of the Rajapaksa administration.

Most dangerous or vicious were Pieris' comments on the TNA leadership and Mr Sampanthan. When the interviewer asked why doesn't the government "talk to the TNA leader Sampanthan on all these issues," the sarcastic answer was "in that case we will add another round of talks…The whole problem with the Tamil community is that they have too many lawyers there. They just talk law. They are enjoying themselves talking constitutional jurisprudence." Mind you, these answers came not from an ordinary politician, but from a former Attorney General.

This is not what I exactly thought vicious, but his comments about the future of the TNA leadership. He said, "Sooner or later the present TNA and the whole existing political outfits will be no more due to natural causes (my emphasis)." Pieris didn't explain what these natural causes might be but repeated even at the very end of the interview that "the present TNA and others will be no more due to natural causes (again my emphasis)."

I have met Mr Sampanthan several times and he is an extremely a gentlemanly and a pleasant person whatever the political differences that we may have. I call him 'Mr' because of his seniority and with respect. We all know that he is old with several health problems.

The world needs an explanation from Mohan Pieris what he meant by "natural causes." What we know about him is his entanglement with disappearances in Sri Lanka, especially of Prageeth Ekneligoda. If he is involved with 'natural causes' as well, then he should explain them without dragging this time God into the whole affair.

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## Take Care Of Three Of Us: A Call For Help

by Basil Fernando

As the Chief Justice Dr. Shirani Bandaranayake left her official residence under duress from the heavy police squad that surrounded her and tried to prevent her from making any statement, she still managed to say a few words reaffirming her innocence and telling that all that she did was according to the law and that the interest of the people was what she cared for.

However, the most moving words of that brief comment were "take care of three of us" meaning her family. These words of a Supreme Court judge in Sri Lanka for 16 years should echo in the minds of every conscientious citizen because it is no surprise that even a person who is a Chief Justice of Sri Lanka and have been a Supreme Court Judge for such a long time lives under the threat of assassination and has to alert the people about their security.

She has a reason to be worried because the ones who have dissented with the government even in much smaller ways have had to pay a heavy price for their dissent. It is not surprising therefore that Dr. Shirani Bandaranayake who has put

President Rajapaksa 's regime to its biggest challenge in the last few months of her being in the office, should fear for the life of herself and her family.

There are many reasons for the Rajapaksa ( regime to want to silence her. The very issue of the falsity of the charges that were made against her will remain one of the great problems for the Sri Lankan government in the country as well as outside. The vicious intentions behind the charges having been exposed have already prevented the government from appointing a competent and impartial tribunal. The same reason would trouble this government for a long time to come. She is able to expose the falsity of the charges and this will rubbish the claims of the government to have acted in a good faith and having removed her in the best interest of the country as the government propaganda machine has been trying to drill in the minds of Sri Lankan people through one of the most extraordinary mudslinging and character assassination campaign carried out through state media.

Her continuing capacity to challenge the conduct of the government and the claims of the government makes her an exceptional target for attack.

The impeachment debate preceding her forced removal has already brought very uncomfortable questions that include the issue of the independence of judiciary and the way the rule of law is being violated in the country to the foreground. With this act, even the very nature of Sri Lanka being a democracy or not is under scanner. Yesterday (January 15th), a US State department Spokesperson gave voice to international concerns while categorically stating that doubts have arisen whether Sri Lanka is still a democracy. Forced removal of Dr. Shirani Bandaranayake as well as appointment of a new Chief Justice has been severally condemned across the world. The Commonwealth Secretariat and other associated initiatives have also questioned whether Sri Lanka still abides by the core values of the Commonwealth such as the independence of the judiciary and the rule of the law.

The debate, biggest since Sri Lankan independence, and the consequent embarrassment to the regime, is not going to die anytime soon both within Sri Lanka and in the international community. Further, what Dr. Shirani Bandaranayake has to say will matter a lot in all such debates.

In short, she is an embarrassment to the Rajpakasa government locally as well as internationally. The cause of concern is that this regime and particularly Its Ministry of Defense have demonstrated in the past that they do not lightly ignore those who cause such problems. They have always gone all out for particularly those who gain the sympathy of the people. Dealing violently with the opponents has remained one of the most consistent principles followed by the regime, and that is what should make stand in defense of the life of Dr. Shirani Bandaranayake and her family.

The need of the hour is a response from the Sri Lankan people as well the international community to her call requesting "look after three of us". The ferocity with which the regime behaved in the courts as well as near her residence yesterday

has made Ministry of Defens's intention of silencing her clear. It has also made the aggressive perusal of this agenda clear.

What we need to do was put out best by Frederica Jansz, former editor of The Sunday Leader. To paraphrase her what we need is not a dead heroine but a living person able to contribute to her family and society in the years to come.

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## Shirani As The Lawful Holder Of The Office

by Charitha Ratwatte

Natural law is a system of law which is determined by nature and thus universal. Natural law refers to the use of reason to analyse human nature and deduce binding rules of moral behaviour. Natural law holds that morality is a function of human nature and reasoning and those valid moral principles of conduct can be discerned by studying the nature of humanity in society. Basic and fundamental rights and values are considered to be inherent in or universally cognisable by virtue of human reason or human nature.

As human society emerged from the itinerant hunter gatherer stage to one of stabilised and settled communities in the fertile river valleys of West Asia, South Asia, Central Asia and China, universal rules of conduct and behaviour evolved from the natural law principles, which human beings followed, to a code of universally accepted rules which were enforced by the leaders of the community.

When disputes arose among community members over enforcement of the rules by the leaders, the necessity for interpretation, arbitration and adjudication emerged.

Over time a group of persons, other than the leaders who codified and enforced the rules, trusted by the community, to listen to all sides of a dispute and to be fair and unbiased in determining the issues in dispute, of necessity emerged. The determinations made by these adjudicators began to be universally accepted as applying to later disputes, relating a similar set of facts, and thereby precedent and common law emerged.

Common law is a legal tradition whereby certain rights or values are legally cognisable by virtue of judicial recognition or articulation. Two fundamental principles – the rule against bias and the right to a fair hearing – have over time come to be recognised as the two fundamental principles of natural justice.

Manmade law

As human society became more complex, manmade law, came into existence. There was a need to formulate rules to govern new situations, which did not arise in a natural state of affairs. The need to barter and trade required set standards and behavioural rules.

The need to meet the expenses of defending a community from external threats, the expenses incurred by the leaders in undertaking their onerous duties and maintaining their (mostly extravagant) lifestyles, the expenses of those whose task it was to adjudicate and settle disputes, gave rise to the need to raise revenue and taxation came into being.

Representative government, 'no taxation without representation,' evolved. People wanted a say over how taxes were raised, what was done with the taxes they paid, they wanted to ensure that taxation was just and lawful and that expenditure was not wasteful. Even hereditary rulers, notwithstanding their claimed 'divine right' to rule had to subject themselves, to 'God's law,' to other religious rules like the Dasa Rajah Dharma, to tradition, custom, natural and common law themselves and to the scrutiny of their actions by their subjects, as to their behaviour. Even when absolute rulers were complimented or replaced by elected rulers, the latter's actions were also subject to law.

Where there is a written constitution, all is subject to that supreme document. Even though the legislature may have the power, through a specially specified process, to amend the constitution, such a constitution, until so amended, is the supreme law. Even where there is a purported amendment, the authority which is vested with the power of interpreting laws has the power to examine such amendments to evaluate whether they are lawful and in terms of and comply with the constitutional and due process provisions – including the natural and common law – fundamental human rights.

Only in Britain, where the constitution is 'unwritten' that is, not contained within the pages of one single document is the power of the Legislature (Parliament) claimed to

be untrammelled and supreme. But, even in Britain, today, the reality is that the 'Queen in Parliament' is no longer sovereign or supreme. The European Communities Act of 1972, the Human Rights Act of 1998 and the three 1998 acts devolving powers to the legislatures of Scotland, Wales and Northern Ireland, constrain the power of legislation of the 'Queen in Parliament'.

Sri Lanka's Constitution

In the present written Constitution of Sri Lanka, the powers of government have been kept separate and the independence of the Judiciary and the protection of fundamental human rights have been guaranteed. There is both institutional and functional division between the power of enacting laws and the power of implementing those laws. The power to interpret and adjudicate on those laws is also separated.

Such a system cannot work without an independent institution to arbitrate and determine issues on the subject of allocation of the powers of government and to interpret laws. Fundamental rights will be meaningless if there is no independent institution to protect the individual when those rights are violated.

The argument that the people who make laws are elected, and therefore appointed persons cannot sit in judgment over them is plainly ridiculous. Legislators are subject to law, the law properly enacted in terms of the Constitution by their predecessors and themselves. They can certainly change the law, but they can do so only within the limitations of existing law and by the laid down process – the exception being the purported 'revolution' proclaimed by the framers of the 1972 Republican Constitution.

The Constitution of Sri Lanka provides that the judicial power of the people shall be exercised by 'unelected' judges! These members of the Judiciary are vested with the power to control and limit, according to the terms of existing law, the elected representatives and the administrators of law.

It has been said that 'the price of liberty is eternal vigilance'. The vigilance referred to must mean the vigilance of those ruled and the vigilance of a Judiciary to which the ruled have recourse from abuse of their rights by the rulers. The Constitution and laws of Sri Lanka gives no organ of state, the legislators, the administrators , the adjudicators, or even the fourth estate – the media ( constrained by the laws of defamation) – unlimited power. All power is constrained by law.

The legislators are constrained by constitutional limits of their power to enact laws and special processes required in prescribed situations. The administrators are constrained by rules of administrative law, principles of natural justice and fundamental human rights. The adjudicators are constrained by the laws they interpret, precedent and due process requirements. Rarely a court may foray into

interpreting a law in such a way, that they could be accused of making law, what is referred to as 'judge made law'.

While the common law has evolved in this way, in today's environment where most laws are statutory and judges prefer to interpret the 'plain language' of statutory provisions, 'judge made law' is rare. But corrupt and unprincipled false judges, from whose pronouncements there is no recourse for further appeal, may, for all the wrong and corrupt reasons, decide to be innovative and create 'false judge made law,' which may be slavishly followed as precedent later!

We have seen this in the recent past. The preamble to the Constitution of Sri Lanka says very clearly and categorically that the people 'ratify the immutable republican principles of representative democracy and assuring to all people's Freedom, Equality, Justice, Fundamental Human Rights and the Independence of the Judiciary'.

The Constitution provides for an independent Judiciary and protects the citizen's fundamental human rights. This necessarily means a duty is imposed on some others – a duty of accepting and obeying the interpretation of law by the Judiciary and the accepting and not limiting unconstitutionally the rights and freedoms of the individual. The Constitution is the Supreme Law, the argument ends there.

Unconstitutional and illegal

The Attorney General argued before the Court of Appeal that the writ jurisdiction of the Court does not permit it to issue writs in matters relating to the impeachment of judges.The Court declared that if the Constitution wanted to prohibit its writ jurisdiction, the Constitution would have express words laying that down in plain language.

A ruling by a previous speaker of Parliament based on the assumption that the powers of Parliament are unrestricted is also clearly misconceived in law. Under the current Sri Lanka Constitution no organ of the state is supreme, only the Constitution is supreme.

The Court of Appeal of Sri Lanka has issued a writ of Certiorari declaring that the determination and the findings and/or the decision or the report of the Parliamentary Select Committee constituted to impeach the incumbent Chief Justice of Sri Lanka is unconstitutional, illegal, and therefore flawed. The issuance of this writ at one stroke takes away the legal basis for the current process to impeach the Chief Justice.

Notwithstanding this, Parliament has voted to accept the determination of the Select Committee and the Speaker will send an address to the President that the resolution on the findings of the select committee has been accepted by Parliament. The President is expected to issue a warrant purporting to remove the Chief Justice from

office. (There is said to be backdoor negotiations going on, which are not in the public domain.) Commentators describe this as an open and blatant violation of the Constitution of Sri Lanka. Any further steps in this process are illegal and unenforceable in law.
While the incumbent Chief Justice will continue to be in law recognised as the lawful holder of the office, any other persons who is purported to be appointed to this post, would be clearly a usurper to the office. No judge lawyer, litigant or member or members of the court staff could be lawfully asked to serve such person. In fact serving such a usurper would be illegal and in contempt of court. Such a usurper will have no constitutional authority and cannot lawfully preside over a Court as Chief Justice.

The decisions made by such a person would not have any binding in law. Attorneys at law and litigants will have no reason to appear before or present their disputes to a body presided by such a usurper. If the usurper's appointment is challenged, the court would have no option but to declare that the usurper's appointment is unconstitutional and illegal.

Law of Unexpected Consequences

Looking at the chaotic situation which can arise, one cannot but agree with the senior Lord Justice in Britain, who at his felicitation , on retirement, said that his entire career of over three decades as a judge has reinforced his faith in only one basic and fundamental law – the Law of Unexpected Consequences!

Very often the outcomes of an action are vastly different from what was planned, intended or anticipated. When the appointment of the incumbent Chief Justice, from the rarefied atmosphere of academia, to the bench, her elevation to the Head of the Judiciary and the decision to set in train the impeachment process were taken, at different times, these decisions would definitely have been taken with certain outcomes which were anticipated. No one in his right mind would have expected the current imbroglio!

It has been said that a constitution laying down principles of government seeks to solve the problem of how to give sufficient power to the country's rulers to allow them to govern efficiently and yet ensure that the government will not encroach unreasonably on the fundamental liberties of the individual, by seizing more power than was intended and interfering arbitrarily in the citizens way of life.

Thus a constitutional regime has two purposes. First it restricts the actions of individuals. Secondly it protects the individual by defining the power granted to those in authority. The totalitarian idea, that some would-be dictators have, that there is no such thing as law and that there is only power, is untenable in a legal regime with a written Constitution such as Sri Lanka.

However, even when there is no written constitutional document, absolute power, is, in practical terms limited by convention and tradition which inhibits the actions of the ruler. Under the traditional Sinhala Buddhist monarchs of Sri Lanka, power was constrained by the Dasa Raja Dharma, the Buddhist principles of good governance and the Sirith Virith (customs and traditions) of governance. Decrees made by one ruler, would apply in perpetuity, until changed. Indeed the very words of the decree prescribed that the decree should apply 'as long as the sun and moon lasts,' i.e. in perpetuity.

In some stone inscriptions and Ola leaf manuscripts containing the Monarch's decrees, the symbols of the sun and the moon were engraved. Even in the context of an unwritten constitutional regime as in Britain, in which the legislative power of the 'Queen in Parliament' is unfettered, has today undergone change, as described above, by statutes enacted by that legislative institution itself, protecting human rights, devolving power to regional assemblies and subordinating itself to the jurisdiction of the European juridical institutions.

But even before this, conventions – practices regarded as binding – which experience has shown to be necessary for developing, within the law, existing institutions, which are essential for government to be carried out in the true spirit of the constitution exist.

Conventions arise because politics is essentially a matter of human relations, as in our everyday life. Customs are observed which make everyday life harmonious. Obviously such conventions, in the British context vary in importance. Some, as the Monarch having to call upon the leader of the majority party in the House of Commons to form a government, are obviously fundamental. Others like appointing member of the opposition as Chairman of the Public Accounts Committee, may not be fundamental, but are essential for government to be carried out, with a specific constructive and conventional role for Her Majesty's Opposition.

Readers should note that in Sri Lanka, we followed the tradition of an Opposition member chairing the Public Accounts Committee, but in our steady progress to a dictatorship, we jettisoned that convention!

Long-term repercussions

Everything is connected. The current situation regarding the impeachment of the Chief Justice, whatever the outcome, will have irremediable long-term repercussions on our country. Those who set the process in train as well those who executed it will rue the day they did so.

The late environmentalist Barry Commoner said that 'the first law of ecology is that everything is connected to everything else'. This principle will apply equally to constitutional processes, to the investment climate, to confidence in the economy, to

respect for the law, protection of human rights, to the rule of law and to overall good governance.

Lord Justice Bingham, a former senior Law Lord in Britain, in his magnificent work 'The Rule of Law,' says: the core principle of the Rule of Law is 'that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made… and publicly administered'.

This would apply equally to: an investor in a branch of the Janashakthi Banku Sangam of the Hambantota Women's Development Federation, to a detainee suspected of being a cadre of the LTTE in Mullaitivu, to an Imam of a Mosque in Puttalam, to a retired employee of the RVDB in Ampara, to the President of the Republic, as well as to the Chief Justice and other Judges of the Supreme Court of Sri Lanka.

News is that the President has issued a warrant removing the Chief Justice. Await with trepidation the unpredictable results of the operation of the Law of Unexpected Consequences!

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## The President's Choice For CJ Mohan Peiris Is No Respecter Of The Law

by AHRC

This morning, according to reports, the main gates leading to the Supreme Court of Sri Lanka remained closed and heavily guarded in order to prevent the Chief Justice, Dr. Shirani Bandaranayake from entering in order to continue to function as the legitimate holder of the post of Chief Justice. She has rejected the ouster by the president as illegal. Her view is supported by the judgement of the Court of Appeal delivered last week on the basis of the interpretation of the law regarding article 107(3) of the Constitution which deals with the removal of judges of the superior courts.

Meanwhile President Mahinda Rajapaksa has picked Mohan Peiris, who is known to be involved in the business affairs of the Rajapaksa family, as her replacement. Mr. Mohan Peiris who heads many business enterprises after his retirement as the Attorney General has been chosen for no other reason except for his expected blind loyalty to the president and his family.

Blind loyalty to the president is now the criteria and the question of legality has now been replaced with this imperative for such loyalty. With the president dismissing the respect for the Constitution as interpreted by the Supreme Court as an irrelevant factor to the affairs of the state it is quite natural that he no longer wants any kind of loyalty to the law as a criteria to be followed by the Supreme Court as well as other courts of the country.

Mr. Mohan Peiris' record as the Attorney General has amply demonstrated his capacity to prefer expediency over legality. He has quite daringly withdrawn indictments against persons who were initially indicted by the Attorney General's Department on the basis that there is adequate evidence to proceed against them. He has also filed indictments against persons purely on political grounds which are well illustrated by the cases against the former general, Sarath Fonseka who contested the election as the common candidate against President Mahinda Rajapaksa. He has also glaringly abused the Attorney General's powers for personal purposes such as to help the clients he formerly represented. Above all he has abused the powers of noli prosecue in order to acquit persons who were undergoing investigations into serious crimes such as murder. He has a proven capacity to manipulate the law to suit the political requirements or requests by the government or those who are associated with the government.

His task as the Chief Justice would be, above all, to attack the judges who will still want to act independently and whose sole loyalty is to the law. His job will be to subdue them and create a consensus to support the president and those associated with the government unconditionally. An associated aim would be to ruthlessly suppress the lawyers who in recent times have risen to uphold the rule of law and to protect the dignity and the rights of the individuals as against the repression and suppression of the government.

It is quite symbolic that on the morning of the day of his appointment the gates of the Supreme Court were closed and locked. He is expected to keep them closed and locked to ensure that any citizens demanding justice should not enter the premises.

To daringly defy the rule of law in favour of the government is the task expected from him.

On the occasion of the signing of the letter of removal of Dr. Shirani Bandaranayake we stated that this marks the end of an era, the end of "the good old days" where the courts were expected to play the role of the protector of the freedoms and liberties of the citizens. The era that has now begun is when the courts are expected to be instruments of repression supporting the government at all costs.

Mr. Mohan Peiris would be rightly called the President's Chief Justice (PCJ).

The only path that is open for judges, lawyers and the freedom loving citizens is to resist and oppose this whole scheme of constitutional dictatorship.

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## Rule Of 'Aiya-Malo', Instead Of Rule Of Law

by Laksiri Fernando

It was in fact a sad day for the whole of Sri Lanka and all Sri Lankans even living abroad. Some may rejoice with short-sightedness or blindness because of some political affiliation or past loyalty on the order to remove the Chief Justice. The propaganda was so vicious and so venomous that some people must have believed that the Chief Justice was a villain or a conspirator. On the contrary her resistance and defiance were admirable in the midst of all the odds and vicious and violent campaigns.

The indecent hurry shown by the regime to serve the impeachment order has already demonstrated the vicious political intentions behind the whole drama. Even in Saudi Arabia it took over a year to implement the execution order of Rizana Nafeek. Within hours after the thoroughly unconstitutional Parliamentary debate, the President Mahinda Rajapaksa has signed the removal order in Sri Lanka. It is the same President who talked about appointing an Independent Committee few weeks ago

before he takes any decision on the impeachment initiative. What happened to that Committee, Mr President, one may ask?

No one has to believe that the CJ has been white as a lily, as SL Gunasekera has pointed out. That has never been the issue. She should have been given a fair hearing and a fair trial. That was the issue. That was her pleading also. Of course one can also look at the charges or the facts presented by the accusers. But no one could come to a final conclusion without a fair judicial process on such matters. Whatever the mistakes that she has been implicated of are not one sided. The government is equally responsible, if not more, for those deviations. This is a Chief Justice appointed by the President just one year ago and called Ape Minissu or our people. As Prof Tissa Vitarana, a Minster of the same government once correctly remarked, this questions the procedure or the validity of appointments by the President.

The whole governing system is full of 'conflicts of interest' and dubious dealings par excellence at the expense of public interest. If the interests between the CJ and her husband or the CJ and her sister were in conflict on several matters, no doubt, how you could resolve the conflicts of interest between the President and the Speaker, the President and the Defence Secretary and the President and a key Minister of the same family? How can the President or the others be impartial and fair to each other or to the public? How can you prevent them being cohort in misusing and abusing political power as a clique or a family since many others in the same family have been appointed into key positions in the governing system?

No one can say that we need higher standards in the judiciary, but not necessarily in politics. This is not correct although politics has been overwhelmingly accepted in Sri Lanka as 'dirty' and dirty to the core. 'Nepotism' is more dangerous in politics than in any other public sphere especially when the networks created are to do with holding and amassing power if not wealth. This is exactly the case in Sri Lanka today. This is not simply a matter of few members in the same family engaging in politics or holding even some key positions i.e. DS and Dudley, JR and Ranil and Chandrika and Sirimavo etc. As we know, in the past, those members in the same family were not even 'seeing eye to eye' with each other i.e. Chandrika and Anura.

This family is however different. We have come to a new era in family politics surpassing all the others. This is perhaps what it meant by strengthening the 'family institution' in the Mahinda Chinthana Manifesto! It is right there at the beginning of the so-called Chinthana. There is a clear pattern of control by the family even far exceeding a country like North Korea. This is good for an illustrative organigram or organizational chart of this family rule although I don't have time now to do so.

At the top of the 'pyramid' is the President, Mahinda Rajapaksa, perhaps becoming only a figurehead or Bonaparte. Then on the left side you have the all-powerful Defence Secretary, Gotabhaya Rajapaksa, with 'dwifungsi' or dual-functions of the past Indonesian style military rule. He is encroaching into the economy and the public service and already his ministry is called the ministry of 'defence and urban

development.' Kusal Perera has given a detailed exposition of the military encroachment in the system recently. Then in the middle is Basil Rajapaksa with newly acquired Ministry of Divineguma controlling virtually the whole of the economy. Even he can now expropriate private property under an act passed over a year ago in the name of development. This is something Dr Harsha de Silva time and again emphasized as a major danger. Property might be acquired for the family rule. Then on the right is Chamal Rajapaksa, as the Speaker, now virtually controlling the entire Parliament encroaching into the sphere of the judiciary. This is the rule of 'Aiya-Malo.'

What more to control? Only the judiciary is left. Could anyone dispute this? I am not the first one to say about the family rule, but had some restraints myself as an academic to say it so bluntly before. Tisaranee Gunasekara has elaborated on the matter several times quite eloquently. Now the circle is complete and the red-line is passed. I was also partly ashamed, to reveal frankly, as a former supporter of the UPFA to see the dramatic change aftermath of the victory over the LTTE. The victory of course was necessary but the nature of the victory indulging in war crimes and blatant human rights violations perhaps is one reason for the present dramatic change. These things could happen in politics and the important necessity is for the former supporters of the UPFA to understand the change and understand it as quickly as possible. It is a qualitative change and not a marginal one anyone could ignore. The family rule is their defence mechanism. At least three brothers might be directly responsible for many of the atrocities and the other brother is hell bent on saving the siblings.

This is no longer a UPFA government in its true meaning. This is a Mahinda-Gotabhaya-Basil-Chamal (MGBC) government. All those who blindly supported the utterly unconstitutional unwritten 'impeachment motion' are mere puppets minus the two family members (Basil and Namal).

Let me give the most recent example in respect of the impeachment. According to the UNP General Secretary and MP, Tissa Attanayka (Daily Mirror, 13 January 2013), there was no 'impeachment resolution' in the Order Paper of Parliament although there was a scheduled debate on the PSC Report. As reported by the Daily Mirror, "He [has] said Parliament had not made any request for the President to remove the Chief Justice, as such, a resolution was never included in the Order Book." Then who requested the removal of the Chief Justice? Apparently it was the elder brother of the President, the Speaker, Chamal Rajapaksa! His word is the Order Paper or the Address of Parliament. This is the consequence of 'Aiya-Malo rule' (brothers rule) and not the rule of law of the country or the constitution.

This is not the first time when a key Rajapaksa appointee was demoted/removed after stepping out of line and then hounded upon. But this time it will be different. First it was the Army Commander, Sarath Fonseka and now it is the Chief Justice, Dr Shirani Bandaranayake. Both fell foul with two Rajapaksa brothers; first one with Gotabhaya Rajapaksa and the next one with Basil Rajapaksa. There cannot be any

doubt that it was the Supreme Court decision on the Divineguma Bill that decided the fate of the Chief Justice and even her husband. All the facts and charges are supplementary and subordinate. It was after the first decision that the husband was charged of corruption and it was with the second decision that the impeachment charges were brought before the Parliament. It is also not a coincidence that the impeachment debate unleashed in Parliament only two days after the clipped Divineguma Bill became passed with an uneasy two thirds majority.

But there are definite limitations for the Rajapaksa rule however much they rely on coercive power and extra-legal violence of the political goons. This is not Burma or Indonesia. The democratic traditions of Sri Lanka are more profound and long standing. Unlike when Sarath Fonseka was hounded, the judiciary backed their Chief Justice perhaps realising the dangers for their own survival and also as a matter of principle. This is quite unprecedented in a case of an impeachment anywhere in the world. Nothing similar happened when Fonseka was victimised. It was unfortunate that the judiciary could not back him. There have been many omissions and commissions on the part of the judiciary itself that have led to the present predicament.

As far as the present circumstances are concerned there are immense dangers for the rule of law that we and many others have discussed previously somewhat in detail. The most dangerous would be the appointment of a known stooge as the next Chief Justice. They are obviously short of a 'Rajapaksa' to be appointed as the next CJ but someone closer to them can be appointed; a Rajapaksa not by name but a 'raja-paksa' (royal loyal) by deed.

Some of the encroachments to the rule of law so far have come from the Parliament itself. The Parliament has refused to abide by the rulings of the Supreme Court and the Court of Appeal on the matters of the impeachment process. This has made the impeachment 'illegal' and 'unconstitutional' leading to a constitutional crisis although the President has endorsed the decision. Clamouring about the non-existent supremacy of Parliament is not going to resolve this situation and instead it would aggravate the conundrum.

No one is saying that the judiciary is supreme than the Parliament. None is supreme under the constitution other than the people of this country. Even otherwise the people are supreme who can change or create constitutions through peaceful and legitimate means. There appear to be considerable distortions in the representative character of the present Parliament leading to the present situation. This is apart from what has been said time and again about the distorted PR system in the present constitution. The major distortion has occurred through bribing and buying of opposition MPs to the ruling coalition contravening the letter and spirit of the representative system in the country. The present two thirds majority in Parliament is an artificial creation.

The judicial rulings or reviews are a matter of checks and balances in the constitution that all Members of Parliament have taken an oath of allegiance to obey and follow. The Speaker has instigated the Members of Parliament to disobey the rulings that are part of the rule of law. Even the main opposition party, the UNP or its leader, Ranil Wickremasinghe, seems to be trapped in this government quagmire. No one can deny that it is the Supreme Court and the Supreme Court alone that can interpret the constitution according to the constitution. If there is a disagreement or a doubt about the correctness of such interpretation, an appeal can be made to hear the matter again with an enlarged bench and perhaps of all the judges of the Supreme Court sitting.

Instead, the Parliament has opted to sit as a court of justice to find the Chief Justice guilty and ask the President to remove her. A Parliament's role in an impeachment process is different to a court of law or a judicial procedure. It is only after a positive judicial finding that a motion of impeachment should be passed in Parliament. The Speaker has opted to interpret the constitution and ask the MPs to disobey the court rulings in this respect. This is not the rule of law but the rule of 'Aiya-Malo.'

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## CJ: People's Judgement On Your Stand Against Tyrannical Regime Is Absolutely Inspiring

by Vishvamithra

Hon. CJ, just disregard the disgraceful disinformation campaign launched by the Rajapaksa corrupt regime. Simply concentrate your constitutional obligation to the people in a broader perspective i.e. to respect and uphold the rule of law and the will of the people, that is being ridiculed and insulted by the Rajapaksa regime that effectively made Sri Lanka a FAILED STATE in the eyes of the international community. Informed individuals of this country are fully aware of the circumstances that led the impudent Rajapaksa regime to launch this impeachment process against you. Had you simply allowed the amendment to the CPC that permitted the police to keep the citizens who have been taken into custody for 48 hours in the cells, violating their civil liberties enshrined in the constitution. And if you hadn't declared the Divineguma bill that provided one individual, Basil Rajapakse, enormous power and control over public finance of billions of rupees, surely then you would not faced this extremely serious situation, risking your own life. At the same time, remember that people also are well aware of your weaknesses,

like allowing the 18thamendment to the Constitution that gave sweeping powers to the Executive President. The irony is that you yourself became the first victim of your own failure and now entangled in the blunder you made. Yet, the people of this country is prepared to pardon you because you are just another human are bound to make mistakes and at this crucial hour the people cannot think of any other strong individual with total integrity to uphold the office of the CJ and effectively discharge the role of the watchdog of the people.

Therefore, remember that you are not alone. The people have already sacrificed their own security and safety, assuring the protection of your interests. Hope that you had witnessed as to how the criminals employed by Rajapaksa regime mercilessly attacked Mr Thilak Kariyawasam, the President of the Environmental protection agency, who exercised his legitimate right and challenged the sham impeachment. The unfolding of recent events only portray the imminent and ominous end of the Rajapaksa era. The people would demand resignation of President Rajapaksa, his brother Gotabaya and the IGP and the impotent opposition leader, all of who had failed to discharge of their duties effectively as required by law. All these people have absolutely failed in their duty to uphold the rule of law by aiding and abetting criminals to silence the non-violent protest launched by the people against the regime that openly undermined the rule of law. And their conduct is utterly condemned by right-thinking people. Watch the following video clip. This sump ups everything that qualifies Sri Lanka to be declared a FAILED LAWLESS STATE. This along is surely good enough to abandon the Commonwealth head of the state meeting scheduled in Colombo this year, which President Rajapaksa wittingly or unwittingly asking for.

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## Proposing Mohan Peiris As CJ Belies The Claim That The Impeachment Was All About Integrity

by AHRC

It has been reported that the name of Mohan Pieris has been proposed as one of the names for the office of Chief Justice by the Sri Lankan government. If the role of the chief justice is to be that of a stooge of the government perhaps there is hardly anyone more suited to the post that Mr. Peiris.

The proposal of Mr. Mohan Peiris belies the government's argument that the reason to move for an impeachment against Dr. Shirani Bandaranayake was on the issue of integrity.

What integrity can Mr. Mohan Peiris claim? He has worked hand-in-glove in almost every activity that has ended in scandal in recent times. Whether we are speaking about enforced disappearances or blatant abuse of authority to forgive criminals and

to prosecute innocent persons or covering up any of the scandals relating to the government, Mr. Mohan Peiris has a hand in all these matters. The whole world is aware of his attempt to cover up the state's responsibility for the enforced disappearance of Prageeth Eknaligoda. He blatantly lied before the United Nations Committee against Torture and the world media saw him do so. Later, before a Sri Lankan court he stated the very opposite of what he had said before this august treaty body of the United Nations.

The manner in which he abused his position as Attorney General is well documented, published and commented upon by many persons. We do not wish to repeat here the long list of wrong doings that are attributed to him.

The attempt to place Mr. Mohan Peiris in the position of chief justice confirms the fears repeatedly expressed during the impeachment debate that the aim of the government is to destroy the Supreme Court altogether. What the public needs to fathom is the reasons for this scheme of the Rajapaksa government to destroy the Supreme Court altogether.

It is obvious that the government is aware of what it is doing and what it intends to do in the future and that it will cause serious violations of the rights of all citizens. Naturally the citizens are going to be aggrieved and will want to seek protection. The habit of turning to the courts for protection has been well established in Sri Lanka and now the government wants to send the very clear message that the courts are no place for citizens to contest the actions of the government.

The government also wants to suppress all judges who do not fall in line with the government and perform the function of frustrating the people's aspirations for justice.

The government wants the people to abandon all hopes of finding justice in the courts and cultivating this sense of hopelessness has become necessary for the very survival of the government.

It was the will of the government to impeach the Chief Justice, Dr. Shirani Bandaranayake by hook or by crook. It is the same approach that the government is following in trying to appoint their man to the post of Chief Justice.

The people do not owe the obligation of obedience and cooperation for these kinds of schemes of any government and the only way the people can protect their own self interests is to withdraw cooperation for such schemes.

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# Impeachment Highlights Key Role Of Judiciary

by Jehan Perera

President Mahinda Rajapaksa has acted swiftly after the impeachment of Chief Justice Shirani Bandaranayake by Parliament to issue a Presidential decree that removes her from office. This letter has been delivered to the Chief Justice. However, there is considerable support from the legal fraternity that she remains Chief Justice regardless of the Presidential letter. This is on account of a Supreme Court ruling that the impeachment process was not in conformity with the law. A group of leading lawyers has said, "The Lawyers Collective categorically reiterates that Hon. Dr. Shirani Bandaranayake remains the Chief Justice, notwithstanding being unconstitutionally removed." What will eventually transpire in the days ahead is unclear.

The impeachment has polarized the political parties in Parliament. The division of votes in Parliament was on party lines with only the government members voting in favour of the impeachment. But there were also signs of cracks within the government coalition. For the first time since President Rajapaksa assumed office a handful of MPs, numbering five, did not vote along with their compatriots but chose

to abstain. These included Prof. Tissa Vitarana who headed the All Party Representatives Committee that formulated a political solution to the ethnic conflict at the height of the war. Others included the leader of the Communist Party, D E W Gunasakera and Liberal Party leader Prof Rajiva Wijesinha who has been one of the most eloquent defenders of the government on other controversial matters.

There is also a horizontal divide within the population at large. The government may still be able to convince the rural masses of the people about its position on the impeachment and its theory of an international conspiracy through the government-controlled propaganda machine. This accounts for the absence of mass mobilization on the issue of the impeachment. However, the urban intelligentsia appears to be united in opposition to the impeachment. There is no ethnic polarization on the issue of the impeachment as there was on the issue of the war. There is no independent professional, religious or civic organization that has been supportive of the impeachment. All these groups have issued statements either condemning it or urging the government to step back.

**GOVERNMENTAL ANXIETY**

President Rajapaksa's decision to sign the removal decree contradicted his assurance some weeks earlier that he was considering an alternative to acting immediately on the report of the Parliamentary Select Committee. The President said that he was considering appointing an independent committee to advise him on the next steps. This was in the context of the Appeal Court and Supreme Court taking the position that the findings of the Parliamentary Select Committee were a nullity in law. The appointment of an independent committee to advise the President would have given a breathing space, and cooling off period, in which there could have been sober discussion about the possibilities of a compromise solution.

The President's decision to go ahead with the removal of the Chief Justice in hasty circumstances can be best explained in terms of the insecurities felt by the government leadership about a zero-sum game, in which one side must lose all. After the government and judiciary collided it has became virtually impossible for either side to back down. If the government had backed down, it would have given the judiciary the opportunity to take action on a number of outstanding issues, including instances of corruption, abuse of power and even regarding human rights violations that took place during the war. On the other hand, having ruled that the impeachment process is outside of the law, the judiciary also cannot accept a process that gets rid of its head in an extra-legal or illegal manner.

An issue that could be causing considerable anxiety to the government is the assertion by the UNP that it would go to the courts and take legal action against those MPs who won election on the UNP ticket on the proportional system, and later crossed over to the government side. In reality they no longer represent the voters who once voted for the opposition. Earlier Supreme Court decisions denied the right of the UNP to sack their members who crossed over to the ruling party. This enabled

the Government to obtain a two-third majority in Parliament. The UNP has now taken the position that these crossover MPs violated a party call to vote against the impeachment. A newly assertive Supreme Court, conscious of the grave harm that this artificial two thirds majority in Parliament gives, may take steps to remedy this situation. The loss of the 16 crossover MPs would deal a major blow to the government and strip it of its 2/3 majority which it has been using to steamroll its way in the political decision making.

**MOB RULE**

The most important feature of a democratic system is the integrity of its institutions. The government decision to override decisions of the Supreme Court at its discretion, will lead to the judiciary becoming another administrative department of the government to carry out its decisions rather than go by the intrinsic merits or otherwise of the matters in issue before them. In this context there is an increasing fear that Sri Lanka may be heading towards a failed State situation where there is no Rule of Law or supremacy of the Law and the Constitution. Sri Lanka is therefore in a constitutional crisis even though most people in the country may be unaware of this.

Already mobs have celebrated the impeachment outside the Chief Justice's residence. Earlier mobs with clubs in their hands also threatened and assaulted protesting lawyers and civil society activists in the presence of the police who stood by. Photographs of these ugly incidents were published in the media. There is cause for grave anxiety that the ground is being laid for non-democratic processes to gain strength. It is ironic that in attempting to decapitate the Supreme Court, by removing its head, the importance of the judiciary as a check and balance on the abuse of power has also been revealed. If the legitimacy of the national judiciary and Rule of Law is not speedily restored, the case will grow stronger for international judicial interventions in the internal affairs of the country.

There may be no doubt that life in Sri Lanka in general has improved after the end of the war for which the government can claim credit. However the undermining of public institutions is bound to make this improvement unsustainable in the longer term. Where the Rule of Law breaks down, it is inevitable that mob rule will eventually prevail. It is reported in the media that the President had approached several eminent legal personalities and even sitting judges to take on the position of Chief Justice, but so far without success. The Bar Association has decided not to welcome any new Chief Justice appointed under these circumstances. It would be judicious if the President were to try and get a consensus amongst all political parties and the Bar Association regarding the future of the judiciary.

Courtesy: The Isand

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# 13 Jan, 2013 -The 1978 Constitution Is Fulfilled

by Basil Fernando

Today, with the President of Sri Lanka signing the removal notice of the Chief Justice of Sri Lanka, Dr. Shirani Bandaranayake, the 1978 constitution came to be fulfilled.

The 1978 constitution is a representation of the conflict between the rule of law and the absolute power of the executive president. The historical circumstances in 1978 were not right for the fulfillment of this constitution. 34 years later, with the progressive deterioration of all the positive factors of the previous period, the final fulfillment of the 1978 constitution has come. Now the rule of law as a logical system has no ground to stand on as the two basic principles, the separation of powers and the independence of the judiciary, can no longer be practically implemented.

In 1978, despite of the weakening of the system by the 1972 constitution, there were still many forces which were vigorously supportive of the rule of law system. First of all, and above all, there was the sentiment among the people that was formed by long enduring practices of respect for the rule of law. The British introduced the law as the organizational principle of the Sri Lankan society. They introduced laws to

almost all aspects of life and these laws constituted the railroads on which all the institutions of Sri Lanka ran.

Over a period of 34 years, Sri Lankans witnessed the collapse of all the basic institutions in their society. The collapse of these institutions means that the basic principles of law on which these institutions were organized and operated have been seriously disturbed. Among the institutions which so collapsed were Sri Lanka's policing system, the public service commission, the election commission, the system of controlling bribery and corruption, and the department of the Attorney General. The collapse of those institutions were recognized by the Sri Lankan parliament when they made a limited attempt to give some life back to these institutions by way of the 17th amendment. When the 18th amendment was passed, that rescue attempt was abandoned and the very possibility of the survival of the multiparty system and the possibility of a genuinely elected legislature was brought to an end.

In 1978, there was also the necessary critical intellect that could support the rule of law system. The judges were still those of 'the good old tradition,' and so were the lawyers. However, during the last 34 years, there has been the deliberate undermining of the judiciary in many ways, which are well documented and commented on by many authors. As the judiciary was undermined, the lawyers experienced the nature of earthquake that was taking place and those who still wanted to survive had to adjust to the new environment.

However, the factor that undermined the judiciary and the legal practice more than any other was the active cooperation of President Chandrika Kumaranatunge and the then Chief Justice Sarath Nanda Silva to undermine the legal system in favor of the arbitrary power of the executive president. S N De Silva dealt the death blow to the whole system by unscrupulously manipulating every aspect of the judicial practice in Sri Lanka. He ignored the procedural aspect of law in a diabolical manner, and the rule of law rests as much on the procedural aspect as on the substantive aspect of law. All the nuts and bolts were loosened so that the system could not run anymore.

However, officially, lip service was done to the principle of the independence of judiciary and, while the internal system was in great jeopardy, a façade of respect for the system remained.

With the impeachment and then manner of its conduct, this screen was lifted. Belatedly realizing that the final hour has come, the Supreme Court and the Court of Appeal, in what will remain as historical judgments, made an attempt to come to the rescue of the system.

The lawyers and judges also rallied with the kind of solidarity that has never been witnessed before. It was as if all relatives were gathering together on realizing that one of their dear ones was now critically ill. They tried to make a proverbial last minute intervention.

However, those who wanted the system to be dead wanted it to be dead sooner than later. The same hand that crushed the rescue operation by way of the 17th amendment has now decisively signed the declaration of death of the independence of judiciary and the rule of law.

What the Sri Lankans will face now is a completely new situation. In previous statements and articles we have tried to sketch what is waiting for the Sri Lankan society as whole, in all Sri Lankan institutions.

The question that will remain to be answered is as to how the people of Sri Lanka will find their way to a living under a system of law that will protect their liberties.

The system that was based on the ideas of John Locke, Baron de Montesquieu, Jean-Jaques Rousseau and others, which were the basis of French, British, American and all the best constitutional traditions of liberty, has come to an end today.

The experimentation of authoritarianism, which also has traditional foundations from around the world, will be what Sri Lanka experiences now.

The way out is for the present and future generations of Sri Lankans to work out if they are to enjoy the protection of their liberties by the state again.

However imperfect 'the good old tradition' was, it was one based on the global tradition of liberty. What is to come will be the opposite of that tradition.

Perhaps a source for hope could be Tolstoy's short story, "What Men Live By", which is a good read for an occasion such as this.

For an extensive discussion on 1978 constitution, kindly read Gyges' Ring – The 1978 Constitution of Sri Lanka, which is available on the internet.

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## We Don't Know Who Judas Is Behind The Chief Justice

by Wijeyadasa Rajapakshe

Wijedasa Rajapakshe PC - President BASL

Mr. Speaker,

This is for the first time in our parliamentary history, that we are debating an impeachment against a Judge of the superior court namely the Chief Justice of the Republic. Whether it will be left as a grey patch or as a purple patch in our parliamentary history, I leave it to the posterity to decide.

Article 03 of our Constitution precisely and categorically states that in the Republic of Sri Lanka sovereignty is in the people and is inalienable. Sovereignty includes powers of government, fundamental rights and the franchise. These have become a much-debated topic since the impeachment against the chief Justice is moved in the Parliament.

While the incumbent coalition government is vociferous in taking up the position that the legislature is supreme to the judiciary those who are learned in political

science and fair minded people strongly demonstrate that the 3 pillars on which the temple of justice rests are equal within their scope and power. In the absence of evenness of the three pillars, namely the legislature, the executive and the judiciary, the golden shrine that rests upon them would collapse. The Golden Shrine denotes democracy.

There is no debate that people while exercising their franchise, repose their sovereignty in the hands of representatives in the Parliament on a contract basis for a limited period. Therefore Members of Parliament are only the custodians of the people and they are obliged to exercise legislative powers within the parameters of the Constitution. In the absence of checks and balances, objectives of democracy would be rendered nugatory and absurd.

That is the reason why in the 18th century, French political philosopher Charles-Baron de Montesquieu introduced the concept of separation of powers based specially on the system of Westminster Parliamentary democracy in the United Kingdom. During the period of British Colonial domination in this country, they had introduced a system based upon that concept, and it is well enshrined in the Soulbury Constitution as well. Even at present, Article 4 of our Constitution has given due recognition to the concept of separation of powers without any ambiguity, which is regarded as a rule by all jurists all over the world. Concentration of powers in one or in a few, always tempts to dismantle democratic structure and take a lead role towards a dictatorship. That is the reason why Lord Acton said, that;

“Power tends to corrupt and absolute power corrupts absolutely”.

The independence of the judiciary is the greatest achievement of people in the annals of human civilization. It was not bestowed upon people as a sovereign gift but it is the outcome of longstanding struggles launched and sacrifices made at the expense of a multitude of lives. It was 24 centuries ago that the greatest Greek philosopher Aristotle said;

“Every fool in this world thinks that he is born to rule the others”. That is the reason why the great leaders of the world explored the possibility of creating an alternative rule to dictatorship and found the system of democratic governance, after tremendous efforts.

The historical proclamation of Magna Carta by King James, as far back in 1215 is considered the cornerstone in English government, in which it is enshrined that;

“To no one we will sell, to no one deny or delay the right of justice.”

It is in our time that one of the most respected British jurist Lord Denning who said;

"It is the greatest constitutional document of all times – the foundation of freedom of the individual against the arbitrary authority of the despot". It has immensely motivated people to fight against vulnerable rulers.

At a time when the judicial independence was at stake in United Kingdom in 1688, people staged a revolution and King James, II was ousted from the Crown, and people had accepted his successors William and Mary, on the condition among other things, that they shall guarantee the tenure of Judges essential for their true independence of mind and action. That revolution achieved the goal to ensure that in England, brutal intimidation of Judiciary would not occur again, by passing the Act of Settlement in 1701. Thereby the most essential and cardinal duties of all representatives of the legislature as well as of the members of the Judiciary are to protect and safeguard the independence of the Judiciary, above all.

In the midst of the great Civil War to preserve United States as a country, speaking at a dedication of a national cemetery at Gettysburg, in 1863, the 16th U.S. President Abraham Lincoln addressed the nation and stated that; "Democracy is a government of the people, by the people, and for the people" which is considered perhaps the best definition for democracy in the modern world.

It is an inherent and an embedded attitude of human beings that they refuse to be slaves of others and abhor to be subjects of any dictatorship. Article 1 of the UN Charter on Human Rights, as well as Article 12 of our Constitution has guaranteed that all persons are equal before the law. The Rule of Law is a precious right, the people in democracies all over the world enjoy, and that is considered the most vital and predominant concept in law. Theodor Roosevelt, the 26th president of US said that;

"No man is above the law and no man is below it, nor do we ask any man's permission when we ask to obey it. Obedience to the law is demanded as right; not asked as a favour."

From time immemorial Greek philosophy held that;

"Nobody has a more sacred obligation to obey the law than who makes the law.

Former Chief Justice Bhagawathi of India has once said that;

"The Judge infuses the life and blood into the dry Skelton, provided by the legislature and creates a living organism appropriate and adequate to meet the needs of the society."

It is within such parameters that the rulers are obliged to perform their respective duties and obligations.

Notwithstanding all the inimical consequences of the British Rulers, we have inherited an illustrious judicial structure which had been operative even under the British domination. It was in 1930s, Abraham, C.J., Martinez, J., and Sooertz, J. who were appointed by the British Rulers ordered that the British Governor's order to extradite Mark Anthony Bracegirdle, a British planter in Sri Lanka, was illegal and quashed the decision concerned. .

It is all the more significant to note that the said extradition order was given at a time when it was said that the sun never sets on the British Empire.

In the case of Queen Vs. Liyanage in 1960s T.S. Fernando, J., L.B de Silva, J., and Sri Skandarajah, J., who were appointed as members of the Trial-at-Bar to try the coup-d'etat, held that the amendment of Section 440 A of the Criminal Procedure Code to empower the Minister to appoint judges to the Trial-at-Bar was illegal, and held that their own appointments were bad in law. The legislature accepted that judgment without any challenge and with much respect to the Rules of Law.

In an election petition filed by Wijeyananda Dahanayaka against Albert Silva, Nevil Samarakoon, Q.C., the Chief Justice of the Republic decided that while having the powers to make laws on a particular matter under the Constitution and if the Parliament has failed to do so, Parliamentarians should not be given the benefit of their own folly, omissions and negligence. It was in that spirit Asoka de Silva, J., and Hector Yapa, J as then Justices of the Court of Appeal issued a writ of quo warranto nullifying the membership of Parliament of Dr. Rajitha Senarathna, in which Hon.Dilan Perera, MP was the petitioner.

There is no doubt that this government is overwhelmed by triumph and raptures of war victory. It is our duty to remind the rulers that the great leaders in the world, while knowing dire consequences of such conduct never rejoiced and were not under a spell of illusions and hallucinations.

One of the greatest leaders in the world, Winston Churchill, after winning the World War II, said that, he was guided by the maxim that;

"Magnanimity in victory, defiance in defeat". We are also aware that Nelson Mandela, after languishing in prison over 29 years, achieved the freedom for his nation in South Africa. When his advisors suggested celebrating the victory, he scoffed at them and said "Don't celebrate revenge." That demonstrates the humble approach of great leaders in their efforts to effect reconciliation of all communities in their countries. But if they were not prudent enough, they also would have divided their countries by labelling people as patriots and traitors, which would have culminated in catastrophes and devastations. But we have seen that there had been rulers in the recent past who thought that were invincible, for example; President Zine Ben Ali in Tunisia, President Hosni Mubarak in Egypt, and President Colonel Ghadhaffi in Libya. Therefore they had resorted to their own whims and fancies with no regard to repercussions and dire consequences.

It is appropriate to admire the conduct of Nelson Mandela; in 1995 the Constitutional Court of South Africa struck down the proclamation made by President Mandela in an Electoral Boundary Delineation matter. On the same day, President Mandela appeared in the media and said that he honestly believed that the Parliament had given him power for such a proclamation. Since the Constitutional Court found otherwise, he said he respected the decision of the court and added that;

"This decision clearly demonstrates that, in the Republic of South Africa, even the President is subject to the Law".

It was in 2004, when British Government headed by Prime Minister Tony Blaire presented Asylum and Immigration Bill with an ouster clause that no court shall question the validity of the decision arrived at by the Immigration Tribunal, Chief Justice Lord Woolf cautioned the government that it would be a blot on the reputation of the government and in any event, court will not be bound by such a restriction in the exercise of its judicial functions. That government was humble enough to avoid any confrontation among the executive, legislature and the judiciary in a most prudent manner.

At present we have a problem on the rule of law. It is relevant to note what Michael Tamplet said;

"We have a problem when the same people who make the law get to decide whether or not they themselves have broken the law."

In the present scenario, the country has almost come to a state of anarchy. We are not concerned about the individual who is holding the office of Chief Justice, but we are seriously concerned about the Institution.

Anybody who holds that post shall be given due recognition and respect, as Roman Emperor, Justinian the Great, said that;

"Justice is the constant and perpetual wish to render everyone his due."

The present Chief Justice Dr. Shirani Bandaranayake has every right as any other citizen of this country, as guaranteed by our Constitution. At present the coalition government is led by Sri Lanka Freedom Party which was formed by late Mr. S.W.R.D. Bandaranayake, in which his wife as well as his daughter became the head of the State, several times after winning elections. But under the present regime, all Bandaranayaikes have been receded to the background for reasons best known to everybody.

It is the opinion of the greater majority in this country as well as of the international community that the Chief Justice has not been given a fair trial. On the other hand as we understand, the Chief Justice has poised herself with the firm belief that she

should not compromise with this issue as she is innocent. It reminds us that the former Prime Minister and the founder of SLFP who sacrificed his life for it, late Mr. S.W.R.D. Bandaranayaike said, that;

"If you go in search of the Holy Grail, why should you settle for a silvern tankern".

Holy Grail means the plate used by Jesus Christ at his last supper. It may well be that Chief Justice Bandaranayake wishes to see that justice is meted out at the end.

There had been exemplary characters in the world, who were victims of concocted charges and denied of fair trials.

It was in the 4th century BC, Great Greek philosopher, Socrates was charged for corrupting the youth and for his blasphemy. With the majority decision of the Jury, he was convicted and killed by giving him hemlock. (poison) His associate Plato was ready to take him out of the country secretively to save his life. But Socrates firmly said that it was important to obey the law of the State than saving his life. As a citizen he considered the existence of the State with law and order was essential and that every person was bound to be a law-abiding citizen.

Thereafter in the 17th century, Italian astronomer and philosopher, Galileo Galilee, the father of modern science, was convicted for discovering heliocentric theory. Although the teaching in that era was that the Sun was rotating around the Earth he discovered that it was otherwise. Such a discovery in astronomy was considered an offence deserving capital punishment.

In the human history, the most aggrieved victim was nobody else other than Jesus Christ who was denied a fair trial. The only offence allegedly committed by him was that he has said at the last supper that he was above the King. Judas who was one among 13, at the last supper betrayed Jesus Christ and King Herod wanted to kill him on those charges alone.

Although Pontius Pilate found Jesus Christ was not guilty, but due to the influence of the King and the Priests he was crucified while saving the thief Barabbas who had been in fact convicted for crimes. This amply demonstrates that throughout in human history those who deserved to have fair trials were given it, only rarely.

That shows politics of those in the higher echelons, could, at times be stupid.

We do not know in this drama who Judas is behind the Chief Justice. But the fact remains that what has happened today will be written as history tomorrow. Knowing as we are of those happenings, the fate that might befall the Chief Justice, Dr. Banadaranaike, cannot spring a surprise to us.

There is a saying that;

"Advice is least heeded when it is most needed." Specially, people with power are tempted not to heed any good advice, as they are excessively intoxicated with power.

At this juncture, let us not forget what Abraham Lincoln said;

"Let every man remember that to violate the law is to trample on the blood of his father and to tear that charter of his own and his children's liberty."

At last please do not forget what Mahathma Ghandi in his wisdom referring to justice said. that;

"There is a higher court than the court of justice and that is the court of conscience. It supersedes all other courts."

We are shocked and dismayed by the disastrous consequences that would befall our people by this array of events. However, viewed from a political dimension, the opposition is not that bewildered, because we are certain that this coalition government is now expediting its inevitable downfall by this ludicrous tendency to debilitate the judiciary.

Thank you.

*Speech delivered by Wijeyadasa Rajapakshe, P.C., M.P. at the impeachment in the Parliament on 11th January 2013.

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## Constitutional La-la Land: Only In Sri Lanka, Nowhere Else In The World!

by Rajan Philips

"Extraordinary things are taking place right now in Sri Lanka – things which could not be found in anywhere else in the world." - President Rajapaksa, at the 'Swarna Purawara' ceremony, Temple Trees, 9 January

In a famous exchange between GK Chesterton and Bernard Shaw, GK poked fun at Shaw that if visitors to Britain were to see Mr. Shaw they would think there was famine in Britain. "And when they see you", Shaw shot back, "they will know why." For young readers not familiar with the two English literary figures of the early-mid 20th century, GKC was very portly and Shaw was very skinny.

So when the President of Sri Lanka says that "Extraordinary things are taking place right now in Sri Lanka – things which could not be found in anywhere else in the world," we know that the President and his government are the reason why such things are happening in the land. Not just us, even the President has only to look into a mirror to see why extraordinary things are happening. If he is not satisfied

with the mirror image, he can look at his brothers to see why they are happening. On his watch, parliament has just done the most extraordinary thing in Sri Lanka's constitutional history. The President himself is set to follow suit and issue an extraordinary order to remove Chief Justice Shirani Bandaranayake from office.

Almost for the first time after decades of internal and external manipulations, the Supreme Court found its voice to give a ruling to protect the rights of the subject against the power of the rulers. The Court did not deal with the question of supremacy, it adroitly sidestepped the issue of separation of powers under Article 4 of the Constitution, and it addressed the only issue that matters: whether it is fair or just for parliament to make, investigate and rule on allegations against a judge under procedural standing orders without providing for it by law. The Court concluded that "in a state ruled by a constitution based on the rule of law" the impeachment process can be sanctioned "only by law and by law only" and not by Standing Orders. How could anyone quibble with this?

Willful undermining of the Judiciary

The government opted to answer with the muscle of a two-thirds majority in parliament and the force of goon squads on the streets of Colombo. The Speaker in his wisdom chose not to issue another baseless broadside against the courts. And the task of attacking the courts fell to other hired guns. Leading the pack was former Chief Justice Sarath Silva who caviled at the ruling for not taking "any notice of the words 'by Standing Orders' in Article 107-3 of the Constitution which reads, "Parliament shall by law or by Standing Orders provide for all matters relating to an impeachment". It is funny he should say that, for in his day the former Chief Justice appeared to many as if he was not taking any notice of either spirit or the letter of the "law" in dealing with the rights of others. In contrast, the three judges of the present Supreme Court who ruled on the impeachment question took notice of both 'by law' and 'by standing orders' and determined that law and law alone, and not Standing Orders, that should govern the impeachment process inasmuch as it involves the rights of a citizen.

The state media seemed to pull a fast one to discredit the court rulings. On Friday, the Daily News carried a news item and an article to announce that a "brilliant legal luminary", LJM Cooray, has concluded that the impeachment was "full in order" and that the "PSC has fulfilled all requirements." But Cooray's long article is sandwich scholarship: between seven or eight introductory paragraphs and the final citation paragraph of Cooray's impressive credentials, is sandwiched, in its entirety and with due attribution, the Sunday Island political column article that appeared on December 23, 2012. In fairness, only the first part of Cooray's article appeared last Friday and the rest including Cooray's "analysis" is to come next week. In the meantime, we could reflect on what Ludwig Wittgenstein said of a false news story in a newspaper: the story will not become true if people buy fifty copies of the newspapers and read the same story. Nor will it become true, we might add, if it is reproduced in other newspapers.

That said, Dr. Cooray observes in his article that there is no perfect constitution in the world, that in Sri Lanka each constitution was progressively made more imperfect, and that "the source of our problems today around the independence of the judiciary is the two immediately prior Constitutions. The 1948 Constitution was neutral and British conventions relating to independence of the judiciary were observed. The following Constitutions willfully undermined the independence of the judiciary." Without waiting for further analysis, we could rhetorically ask the question, has there ever been an instance in Sri Lanka when the independence of the judiciary was more willfully undermined than at the present time with the impeachment of the Chief Justice?

Dr. NM Perera, in his Critical Analysis of the 1978 Constitution, insightfully observed that "institutional perfection is no antidote for human imperfections and perversities." NM was referring to the transgressions of Felix Dias Bandaranaike against the judiciary during the 1970-77 period. Felix, NM asserted, was acting in spite of the 1972 constitution and not in conformity with it. So did JR Jayewardene in undermining the judiciary in spite of his own constitution and the solemn assurances to protect the independence of the judiciary. JRJ and Felix Dias were third generation lawyers from leading lawyer families, and yet they became embodiments of imperfection and perversity in undermining the judiciary. What they started has now descended to its worst depths under a regime that has too little to show by way of forensic pedigrees, and too much to offer by way of perversity, dishonesty and the lack of attributes that are fundamental to good governance.

Constitutional la-la land

"The Supreme Court judgment is not worth the paper it is written on," External Affairs Minister GL Peiris is reported to have scoffed during the impeachment debate in parliament. That is an assertion and not an argument, unworthy of the Minister's stellar reputation as a law professor but in keeping with his spineless record as a politician. Never known for making legal arguments, Vasudeva Nanayakkara resorted to cursing that the "Supreme Court could go to hell if it did not change its course." It is not the court that is going to hell, but it is the country that is heading to constitutional la-la land.

The President and the government may or may not have a problem in finding someone who is thick skinned enough to accept appointment as the new Chief Justice, acting or permanent. But even if they were to find one, the present incumbent could challenge that appointment in court. There will then be two Chief Justices – a legal CJ and a political CJ; but neither will be functional, so no CJ for a while. Although Shirani Bandaranayake could challenge through the courts her removal and the appointment of her successor, she will not be able to function as CJ. The government will make sure that she will not be able to function.

At the same time, a new Chief Justice, the political CJ, will have difficulty in getting full acceptance and cooperation among the associate justices of the Supreme Court and the judges of the Court of Appeal. It would be morally and professionally impossible for the three justices, Gamini Amaratunga, K. Sripavan, and Privasath Dep, who made the historic ruling on New Year's Day – through the mode of objective inquiry and in faithful fulfillment of their oaths of office, to accept the appointment of a new Chief Justice and work with that person. The government would of course like to see the three Supreme Court judges and their counterparts in the Court of Appeal resign, but they will likely not resign. Why should they? They could instead leave it to the government to fire them if it wants to. By being fired, they could claim compensation for lost career and let the government take further political heat for monkeying with the judiciary. The government would of course like to pack the judiciary with puppets and have the recent impeachment rulings overturned. The more likely scenario, however, would be an unhealthy stalemate in the superior courts.

The government will try to manage, or 'shape', in the midst of protests without overly antagonizing the lower echelons of the judiciary and the legal profession, and by playing favours among them. The system is so rotten that it is more advantageous for individuals to politically fall in line than to push back and fight. The lower courts may go back to normal business but there will be chaos if the courts' rulings are not accepted at one level or another. If the government can disobey the Supreme Court ruling, why cannot somebody else disobey the rulings of other courts? The government could direct law enforcement officers to enforce the lower court rulings, but enforcement would become selective in an environment that is corrupt overall. Some court rulings may turn out to be more important than others. If parliament can punish the Chief Justice under standing orders, what is there to prevent subsidiary legislative bodies – from the Provincial Councils to Pradeshiya Sabhas – to have their own by-laws and procedures to punish their enemies, and acquit their family and friends from normal court proceedings?

The chaotic situation that the Court of Appeal warned earlier is about to unfold. But as I wrote two weeks ago, this government likes chaos, because in a chaotic situation it can do what it wants with no questions asked and no one to answer to. The government would be happy to have a stalemated Supreme Court as long as possible because it can avoid constitutional challenges to legislative and executive actions affecting people's rights. But the government's undoing will be its arrogance, arbitrary entitlements, and overreaching. It has been pushing the limits of political and social tolerance in one instance after another. Alas, at every stage, as in the case of the current impeachment crisis, the government has been able to avoid a decisive political challenge thanks to the political impotence of the Opposition UNP Party and its leader.

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## Democracy Mourns For Judgment Fled To Brutish Beasts

by Kishali Pinto-Jayawardena

As the sun went down this Friday on barebodied ruffians raucously celebrating Parliament's spectacularly unjust impeachment of the country's Chief Justice with crackers and kiribath, judgment fled to brutish beasts and Sri Lanka entered its darkest phase since independence.

This Government with its ineffectual ally, the main Opposition United National Party, could together boast of seemingly levelling a death blow at the last remaining bulwark of a defiantly rebellious judiciary. In truth, LTTE leader the late Velupillai Prabhakaran achieved in death through the monumental follies of 'Dharmishta Sinhala' leaders, what he could not accomplish in life.

The Government's pyrrhic victory

Henceforth, in what manner are Sri Lankan judges supposed to preside over their courtrooms with dignity? In what way can lawyers advocate the law with heads held

high, what will law teachers be able to teach in the classroom and how will analysts in good conscience examine Sri Lanka's conformity with the Rule of Law?

A new and eagerly supine Chief Justice will be appointed during the coming days. But this will be a pyrrhic victory. With the Commonwealth and the world staring in helpless bewilderment at the ruins of a once proud judicial system, we have proved our unfitness for democracy in no uncertain measure. Reports of commissions on lessons learnt and reconciliation may now firmly be relegated to the dustbin.

It is only a suicidal leadership which would have gone heedlessly down this path precisely when the State is being closely questioned in regard to accountability for mass killings of citizens and continuing abductions. This country is now entirely vulnerable to outside assaults. Nay, the leadership has invited such attacks, provoked them rather. We may expect the inevitable consequences therefore.

Responsibility lies on the President

And culpability therein does not lie at the foot of Parliament enthralled with the desperate antics of the Weerawansas, the Vasudeva Nanayakkaras and the GL Peirises nor with the feeble mewling of the opposition United National Party. Neither can the President's brothers be blamed though some may still be beguiled into such foolishness. Rather, full responsibility for the abyss that we have fallen into, lies fairly and squarely on the shoulders of the Mahinda Rajapaksa Presidency itself.

This is the leadership which spurned the requests of the Mahanayakes of the main Nikayas while professing to lead a Dharmishta Government. This is the leadership which brushed aside passionate appeals made by professional bodies, the Catholic Church, business and employment chambers and concerned citizens to step back from the precipice of the impeachment.

This is the leadership which promotes political opportunism, thuggery and greed, exposing Sri Lanka to the world as lacking common decency let alone conformity to law. This is the leadership that took root in our midst much like a monstrously destructive growth, first with the 18th Amendment and then with the spreading of tentacles into every area of government.

It is ironic therefore that erstwhile government propagandists who cheered the demise of the 17th Amendment have now apparently found a belated conscience, if it may be termed as such, to break ranks with the Government. Their dissent however is as much in vain as other reasoned appeals. The whip of dictatorship has been cracked over the heads of all Sri Lankans. This is the final abandonment of decades of even dysfunctional democracy.

Should the judiciary not have challenged the Parliamentary Select Committee (PSC) inquiring into the impeachment? So, was the Chief Justice supposed to stay mum when patent injustice was meted out to her? This was not a run of the mill PSC.

Rather, it was one tasked to enter into a finding of guilt notwithstanding puerile arguments by parliamentary officials that no such findings were entered into. The serious consequences that follow upon PSC findings regarding the constitutional right to hold judicial office underlined the ethos of the recent Supreme Court thinking that Standing Orders cannot be used to impeach a judge. The issuance of a writ of certiorari by the Court of Appeal quashing the purported findings of the PSC in issue was in logical consequence thereof. What could the judiciary have done otherwise if it had a shred of self respect?

Digging of the judiciary's grave

An honest audit still needs to be undertaken as to the manner in which the agonising destruction of Sri Lanka's judicial system has taken place. What we saw on Friday was the mere culmination of what commenced in 1999 when a judge of the unimpeachable calibre of the late Justice Mark Fernando was bypassed for the office of Sri Lanka's Chief Justice with Chandrika Kumaratunga's appointment of former Attorney General Sarath Silva. As is acknowledged with appropriate gravitas by many only now with hindsight, the grave of Sri Lanka's democracy was dug then, well in preparation for the virtual coffin of the judiciary that would be lowered into it more than a decade later.

The few angry voices in the legal community at that time were marginalised as irrepressible idealists or accused of pursing an agenda for individuals. Indeed with the vastly honourable exception of former Supreme Court judge CV Wigneswaran, judges themselves stayed silent as the Court went its political way during the long years that followed. Academics refrained from critiquing clearly politicised judgments in fear of contempt of court. As Chief Justice succeeded Chief Justice, each willingly or forcefully succumbing to political dictates, public respect for the judiciary was severely eroded on the part of the majority as well as the minorities.

Consequentially when the inevitable frontal attack came on the Supreme Court during this Presidency provoked by minimal judicial resistance to an executive juggernaut, there were no powerful intervening barriers to break the free fall. The Bench and the Bar woke up after its decade long slumber but it was a classic case of too little, too late even though the sheer force of the belated reaction took many by surprise. Unsurprisingly, this Presidency dismissed even its one time supporters from the legal community with singular contempt.

Start of popular resistance to a corrupt regime

That said, in this apocalyptic post-impeachment period, we need to look beyond the fact that the Sri Lankan judiciary was fatally stabbed this Friday and left to die bleeding on the road. Perhaps a brighter and better moment may yet dawn.

Scarcely three months ago, a senior 'silk' who (before personal interests and ruder ambitions blunted its edge), arguably possessed one of the finest minds in public law

in the country asked jocularly as to why I continue to condemn a 'popular government'? Now as the lawyers revolt, the judiciary is eviscerated, judgments of the superior courts are thrown to the gutter, illiterate politicians along with dentists interpret the Constitution and common ruffians abuse the Chief Justice, could this same question be posed in quite that same way, even jestingly? Where pray is the popularity of this government, at least among the professionals?

The leadership may not care for what it dismisses as the uselessly educated vote. Yet as history shows us, it is precisely at the highest point of political arrogance that the downfall begins, sometimes swiftly and sometimes gradually. Right now, with the memory of government thugs dancing wild eyed before the Chief Justice's residence and hurling unspeakable filth at her, such optimism may be impossible to conceive. Yet the discarding of a horrendous Constitution along with an administration rooted in injustice may still come to pass.

This is the common objective that the great collectivity of the Sri Lankan citizenry, in cities, villages and towns notwithstanding caste, creed or race, need to work towards in solidarity and profound humility.

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## Rizana, Shirani And The Lankan Reality

by Tisaranee Gunasekara

*"Why couldn't you at least get my child's body down?" Rizana's mother queries the government (BBC – 11.1.2013)*

Rizana Nafik was beheaded at 11.40 am on 9th January 2013. Two hours later, at 1.40 pm, Minister Dilan Perera informed the Lankan parliament that "the government has done everything to save Rizana and she will be released soon" (Gossip Lanka).

That bizarre development was not an anomaly; it was an expression of the way the Rizana Nafik case was handled by the Rajapaksa administration. Just five days before Ms. Nafik's judicial murder, the Ministry of Justice issued a statement announcing that Ms. Nafik might be pardoned: "The Saudi Arabian Ambassador said Rizana may be granted a pardon in response to a request made by President Mahinda Rajapaksa to Saudi King Abdullah Bin Abdul Aziz….. The Saudi Ambassador said President Mahinda Rajapaksa and the Sri Lanka Government had

made a great effort to get Rizana freed and the information he had received was that she may receive a pardon soon" (Daily News – 5.10.2013).

The regime's sanguinity was rather curious because Ms. Nafik's impending execution was no secret. Several international human rights organisations, including the Amnesty International and the Asian Human Rights Commission (AHRC), warned about it publicly. Had Ministers Rauf Hakeem, Dilan Perera or their innumerable officials bothered to check the newspapers or the internet, they could have found out about Ms. Nafik's impending execution and thus refrained from sprouting such asininely insensitive lies.

That indifference is the crux of the matter: the Rajapaksa administration was not really bothered about Ms. Nafik's fate. While politicians and officials used her plight to flay around, the government refused to pay the lawyers who lodged the appeal against her death sentence, as the AHRC revealed. The regime's priority was not to make a real effort on behalf of Ms. Nafik but to put up a show.

The barbaric murder of Rizana Nafik exposes the sordid reality of the Rajapaksa development miracle just as the trajectory of the impeachment motion unveils the iniquitous actuality of Rajapaksa justice.

The Rajapaksas, like all megalomaniacs, think big and abhor dissent. Their idea of development is a series of showpieces, from expressways to satellites. It matters a little that this magnificence is a façade for an economy which is debt-ridden and directionless. The boast of creating a knowledge-based economy is empty rhetoric; apart from the megalomaniac projects of the Rajapaksas, the only growth sector is tourism of a certain variety which aims at turning Sri Lanka into a haven of rest and recreation for the rich and the infamous. This brand of tourism, instead of creating employment opportunities, destroys the livelihoods – and habitats – of entire communities.

The men and women, who labour under extremely difficult, often dangerous, conditions in foreign lands, form one of the mainstays of our economy; their foreign remittances keep Sri Lanka afloat. As a collective, they are indispensable to the very survival of Sri Lanka. As individuals, they are of little account to a nation which prefers to ignore the moral-ethical debt owed to them. (In this sense the situation of Lankan 'House Maids' is somewhat analogous to that of tea-pluckers of Indian origin – another group of workers celebrated in the abstract and ignored and despised in the concrete).
Had Ms. Nafik been a Sinhalese – especially a Sinhala Buddhist – the majoritarian fanatics would have used her plight to fuel their anti-Muslim campaign. By now they would have been on the streets howling against every single Muslim man, woman and child in Sri Lanka. Had Ms. Nafik been executed in a non-Muslim country, Muslim fundamentalists would have mounted their own campaign, decrying this judicial murder as an anti-Islamic conspiracy. Since Ms. Nafik was a Muslim judicially murdered in a Muslim country, her life and her death are of no use to

fanatics of all religious persuasions. Even the mainstream Muslims seem extremely circumspect in expressing their outrage because many of them benefit from the petrodollars of Saudi Arabia's Wahabi rulers.

Ms. Nafik's judicial murder is a timely warning to those who want to reactivate death sentence in Sri Lanka. In justifying archaic and brutal forms of punishments, there is a certain commonality between the Saudi Wahabis and those Sinhala supremacists who lament the absence of 'Raja kale danduwam' (ancient forms of punishments). The horrors of Wahabist Saudi Arabia constitute a warning of what the JHU and Bodu Bala Sena types will do in the name of Buddhism if ever they become dominant in Sri Lanka. Fanatics begin by attacking the 'other' and end by consuming their own. And Wahabism is as unrepresentative of Islam as the JHU or the Bodu Bala Sena is of Buddhism.

According to the New Yorker, the Saudi King too had refused clemency to Ms. Nafik. Had Ms. Nafik been judicially murdered in the West or India, the likes of Wimal Weerawansa and Champika Ranawaka would be screaming from rooftops, with full Rajapaksa backing. But Colombo is unlikely to do anything to anger Riyadh because the Rajapaksas need Saudi support in international forums. Riyadh has consistently supported Colombo on human rights issues; Saudis voted against 2012 UNHRC resolution on Sri Lanka.

In the first half of 2012, 136,245 Lankans left their motherland, the miracle of Asia, in search of employment, according to the Central Bank. So long as living costs increase and jobs remain scarce, women and men will have no choice but to risk their lives in someone else's country to keep their families alive. Until this reality is faced and remedial measures are taken, there will be other Rizanas. Eventually one of them will be a Sinhala Buddhist and the Sinhala fanatics, who are drunk with triumphalism after 'defeating Tamils' and are longing to put the Muslims (and the Christians) 'in their place', will have the excuse they need to unleash the mayhem of their dreams.

Life in Post-impeachment Sri Lanka

Had the Rajapaksa regime been really interested in saving Rizana Nafik, it could have paid the lawyers who were fighting her conviction. Had the Rajapaksa regime been really interested in seeking justice, it could have conducted the impeachment trial in a manifestly free and fair manner.

But that is not the Rajapaksa way. The Siblings are not interested in doing the right thing; they just want to deceive the public into thinking that they are doing the right thing.

That is why there is no point in appealing to Speaker Rajapaksa or writing to President Rajapaksa. The impeachment is their war; they used their parliamentary-serfs unleash the impeachment, in order to bring the judiciary to heel. The Rajapaksas believe that this country belongs to them by the right of conquest, that

they own Sri Lanka because they defeated the LTTE. Even a marginally independent judiciary has no place in this Rajapaksa Sri Lanka. That is why they brought impeached CJ Bandaranayake and did so with such venomous vigour.

The Rajapaksas are not the whole of the problem; but they constitute a large part of it. Removing them will not resolve the Lankan crises. But the Lankan crises cannot be resolved so long as they remain in power.

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## If We Really Care About The Rule Of Law, Let The Child Live

**by Sujata Gamage**

Yesterday, the chief justice was impeached through a process that was a sham. I say it is a sham not because I am a legal expert. I say it is a sham because the process looked petty and vengeful to any ordinary person who is not on the pay of the government. An event the day before, where I was verbally abused and physically threatened by government goons for wanting to attend an opposition rally for the purpose, personified to me the pettiness and vengeance of the accusers in no small measure.

There are two options open to the opposition – constitutional crisis or temporary set back.

Going to back to a balmy evening in Peradeniya open air theatre when Henry Jayasena opened the world of Bertolt Brecht to us through Grusha in the Caucasian Chalk Circle or our own 'Hunu Wataye Kathave', I would say, let us go for a

temporary set back and let the child live. The child is the rule of law. Grusha is those who care about the rule of law. We all know who the ugly duchess is.

To men in the audience on that night in seventies in Peradeniya, Asadak was the hero I am sure. As manly and lovable Asadak was, Grusha personified by Manel Jayasena stole the hearts of the women in the audience. When it came time to put the love of the child to the test, Grusha could not bring her herself to get into a contest where the child would have been harmed, proving that she was truly the mother at heart.

I know people who know better have called for a boycott of the new order which is to be established, but, where will that lead us? Will the UNP, the only viable opposition, give the leadership or will Mr. Ranil Wickramasinghe end the show with a private tea party at the Temple trees?

For a moment if I imagined myself to be Shiranee Bandaranayake, what I will do? I will sit up all night, drafting a message from the heart. It will say that the process was not fair, but institutions are more important than individuals. I will implore all who were with me to conserve their strength to continue the pressure on the government to behave. Most of my statement will be dedicated to the incoming chief justice. The message has to be in parables.

A colleague of mine recently told me about this folklore of 'Gal Pererthayas'. These are pathetic life forms that are forced to spend their afterlife under the surface suffering each time the living walked above. They were monks, officials and others who were entrusted with the public welfare but they did not do their duty. They used their powers to benefit themselves. This is a parable that comes to my mind when I think of the ministers, aging and otherwise, who lie to themselves and continue to raise their hands blindly for fear of losing their perks and position and the heads of public institutions who abscond in their duties and use their positions to look after kith and kin. In my version of Buddhism after-life too is in the mind – mano pubbanga ma dhamma, mano setta manomaya. Those who do ill shall remember and suffer, in this life.

My message to the new chief justice would be "the executive has the power to appoint you but once appointed you have the power to do the right thing. Every time you arms are twisted remember the legal profession and the public in this country will lose their patience at some point and you will be out with rest. Even if that day is far away, remember the destiny of public officials who do not do their duty.

*Courtesy: The Colombo Telegraph*

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## Did The CJ Show Any Such Impartiality, I'm Reminded Of Pastor Niemoller

by RMB Senanayake

Why Business should protect the Rule of Law

An elective despotism was not the government we fought for; but one in which the powers of government should be so divided and balanced among the several bodies of magistracy as that no one could transcend their legal limits without being effectually checked and restrained by the others. [James Madison, Federalist No. 58 (February 20, 1788)]

We are today facing a situation where the Rule of Law is being replaced by the rule of a man. Parliament has refused to accept the interpretation of the Constitution given by the Supreme Court, which alone is empowered to do so under our Constitution.

The concept of the rule of law is the principle of nondiscretionary governance of those people currently in authority. It stands in contrast to the arbitrary or discretionary rule of some of our ancient kings although they too were expected to follow custom and law. In shorthand, either we have the rule of law or we have the subjective rule of persons who exercise arbitrary authority. Under the rule of law, government agencies do nothing but faithfully enforce statutes already on the books. Under the rule of persons or authorities, those in positions of executive authority have the discretion to decide any matter as they please and they do not have to follow any existing rules or laws.

Friedrich Hayek in his classic work The Road to Serfdom contrasted "a country under arbitrary government" from a free country that observes "the great principle known as the Rule of Law." "Stripped of all technicalities," he continued, "this means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge."This is necessary for businessmen who plan to invest whether they are local businessmen or foreigners. So don't expect direct foreign investment in the form of factories or long term investments if there is no rule of law and the Courts are not free to decide against the government on any commercial matter.

It is of course true that laws must be executed by people in authority. People in authority can be men who act rightly based on their conscience or men who act only in their self interest and such self interest may involve the perpetuation of their power. The people they appoint to the Judiciary can either be people who impartially enforce the laws or those who decide on the basis of serving their self interest. Did the Chief Justice show any such impartiality in her decision on the 18th Amendment. I am reminded of Pastor Niemoller. Those who are silent in the face of injustice and will not uphold the law, will have their own turn to face similar injustice and unfairness. But the fate of the Chief Justice is entangled with the Rule of Law and hence we have to ensure the Rule of Law for trying her for any offences.

Consider a soccer match referees. They can be people who arbitrarily enforce rules against one team but not the other, or (even worse) who penalize a team for "infractions" of novel "rules" that they have made up in mid–match. When there is no rule of law we will find those in authority making up their own laws and rules like Alice found out in Wonderland.

The rule of law concept has deep historical roots. Hayek quotes David Hume's History of England—written two centuries earlier—on the value of establishing the rule of law in place of the unconstrained discretion of government officials. Hume acknowledges that it is not always convenient in the short run to forego ad hoc measures. He writes that "some inconveniences arise from the maxim of adhering strictly to law," but affirms the lesson of history that in the long run we are better off from adhering to the rule of law. According to Hume, "It has been found, that . . . the

advantages so much overbalance" the inconveniences that we should salute our ancestors who established the principle.

The contrast between the rule of law and the rule of men is sometimes traced still further back to Plato's dialogue entitled Laws. In that work, the Athenian Stranger declares that a city will enjoy safety and other benefits of the gods where the law "is despot over the rulers, and the rulers are slaves of the law." In other words, government officials are to be the servants and not the masters of society.

The rule of law is vitally important because it allows a society to combine freedom, justice, and a thriving economic order. When legal rules are known and government actions are predictable, free people can confidently plan their lives and businesses, and can coordinate their plans with one another through the market economy. Citizens need not fear arbitrary confiscation of their possessions or nullification of their contracts. Entrepreneurs know that if they succeed in turning lower–valued bundles of inputs into higher–valued products, they get to keep the rewards. If they fail, they fail, and they bear the losses. So let businessmen not be silent in this crisis in the Rule of Law.

*Courtesy: The Island*

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## Parliamentary Debate On The CJ: There Wouldn't Be Time For Me To Speak

by Rajiva Wijesinha

This was not delivered as there wouldn't be time for me to speak, but this is what I would have said.

Both this resolution, Mr Speaker, and the manner in which it has been pursued, make very clear the need for radical reform. We have long known that we have an illogical Constitution that confuses all sorts of political principles. Sadly we have not taken seriously the crying need to change it wholesale, not simply engage in piecemeal reforms.

Nowhere is inconsistency more obvious than in the relations between the three traditional branches of government. Underlying this inconsistency is a failure to ensure accountability, despite the claim that power belongs in all instances to the people. The Executive is accountable in that it submits itself to democratic elections

every few years, but the period of six years that is prescribed, and the provision, based on Westminster norms, of having an early election, make this accountability less than perfect. And the system of elections we have for the Legislature makes a nonsense of accountability, since that requires a closer relationship between constituencies and their representatives than the preferential vote system makes possible.

With regard to the Judiciary, there is almost no accountability. Over the last year I have tried, in pursuing action on our National Human Rights Action Plan, to suggest that the Judiciary lays down norms with regard to its activities, but replies when received were not positive. The Secretary to the Ministry of Justice got no reply when she suggested that the Chief Justice convene a meeting on sentencing, and the Institute of Human Rights was not allowed to proceed with a training programme on this subject. Given the gross overcrowding in our prisons, the failure of the Judiciary to act as requested is most depressing.

Depressing too is the failure to institute codes of conduct. The report of the PSC suggests, even on the best possible interpretation, indiscretions that should never have been perpetrated. It is true that many have been responsible for such indiscretions, but in the absence of strict guidelines, that are carefully monitored, a culture of propriety is hard to sustain.

I would have hoped that the Judiciary would draw up its own guidelines but, if this does not happen, it will be necessary for Parliament to do this. The judicial power of the people is exercised by Courts set up by Parliament, and therefore it is our responsibility to draw up guidelines for the exercise of such power even while scrupulously refraining from interference in decisions. It is best then if we leave it to the Judiciary to enforce those guidelines, and only ensure careful monitoring through the financial controls exercised by Parliament.

We should therefore institute Judicial Norms through binding rules to

prevent any judge sitting in judgment in cases in which he or she has any interest (To deal with the Chief Justice buying a flat from Trillium while judging their cases. It is clear she understands this was wrong, inasmuch as she withdrew, immediately after the impeachment resolution, from that Bench)

remove the absolute power of the Chief Justice to allocate cases, and instead set up a panel consisting of the three most senior judges. No changes should be made except by the panel in consultation with the original bench, and in consultation with the entire Supreme Court if allegations of bias have been made (To deal with the Chief Justice replacing the Bench hearing the Trillium cases with a Bench headed by herself)

prevent any spouse of a judge accepting office from government except in the case of those already in government service. No judge or spouse of a judge should be offered or accept office from government for five years following the judge's

retirement, except for appointments to mediation boards and such task bound assignments (To deal with the appointment to high positions of Mr Kariyawasam)

have the Judicial Service Commission appointed either by the Minister of Justice or by a panel of the three of the six most senior Supreme Court judges, with provision for appeals regarding appointments to be addressed to a separate panel of the other three (To deal with allegations of arbitrary actions by the JSC)

We should also institute internal investigation systems within the Judiciary if judges violate judicial orders (To prevent situations such as occurred when the Chief Justice was given a substantial discount on a purchase from Trillium when there was a Court Order enjoining that the highest possible price be obtained for these).

We should also institute rules with regard to the Assets and Liabilities Act to

Ensure immediate remedial action when the Declaration is not make (To avoid situations such as the realization now that the Chief Justice did not submit a Declaration for 2001)

Redraft the form to ensure that manipulation of assets is detected (To prevent concealment of funds by emptying accounts just before March 31st each year, as is alleged was done by the Chief Justice)

To allow for random checks on the accuracy of Assets Declarations by an independent body, such as the Auditor General's Department or the Bribery Commission, though with greater institutional safeguards regarding the independence of those institutions (To prevent accumulation of misleading statements as seems to have been the case with the Chief Justice)

Given what has been reported, it is clear that the 'moral conduct of an exceptional degree' expected from a Chief Justice that the Committee believes is necessary was not forthcoming. But of course the high standards enjoined by the Committee are expected also from Parliament, and we need measures to ensure that as well.

In that regard our failure to amend a Standing Order that violates all judicial principles is regrettable. I gather that the Standing Order was created in a tremendous hurry, like the judgments of the Courts recently and the PSC Report itself. This tendency to simply react to a crisis without looking to deal with underlying causes has created tremendous problems for the country in the last fifty years, and I hope very much that we will instead reflect more carefully, both now and in the future, without hasty decisions and institutionalizing ad hoc measures.

At its simplest, the Constitution talks of proved misbehavior being grounds for removal of judges. However the Standing Order that is meant to 'provide for all matters' relating to an address for removal of a judge does not mention proof or the need to prove, but talks only of defence and disproof.

It is for this reason that comparison with the position in the United States, or in the Philippines, where the Chief Justice was recently impeached, is misplaced. In the

Philippines there was a prosecution, spread over several days, with Senators voting like a jury on what had been placed before them, both by prosecution and defence. Our Standing Order however requires a PSC to investigate and report but makes no mention of the establishment or proving of charges.

Given these flaws in the procedures adopted, it will be difficult to vote for this resolution. The PSC report itself follows the maxim, in discussing the first charge, that 'the appearance of bias…. is sufficient to taint a decision'. Sadly that maxim was not followed in other instances in the report, which is an inconsistency that further taints the conclusions reached.

This is unfortunate, because an inquiry conducted on the lines of that in the Philippines could very easily have led to similar conclusions. That is why, since one should not condone the actions of the Chief Justice, it is equally difficult to vote against the resolution.

In abstaining on this resolution, Mr Speaker, I can only hope that we move swiftly on the institutional and procedural reforms that this country so urgently needs. I have spoken to Parliamentary officials, and written to you, about convening the Committee to amend Standing Orders, which moved so quickly during the first three months of this Parliament and was then suspended because of a trivial dispute. I trust that we will not allow such personal considerations to stand in the way of the changes that are so badly needed. Thank you.

*Courtesy: The Colombo Telegraph*

**123**

## I Address You In A Black Coat And Black Tie Because This Is A Black day

by M.A. Sumanthiran

Mr. Deputy Speaker, are you able to control the proceedings?

Thank you sir. Before I commence my speech I need to deal with two preliminaries, both relating to certain customs. The first one is that I must make a disclosure to this House of my involvement in my professional capacity in many matters relating to the matter under discussion and that is the proper thing to do. Even in this purported Report the first witness has referred to my name as seen in the proceedings of myself having appeared in the Ceylinco Shriram case. I have appeared for Hon. Vasudeva Nanayakkara, the Hon. Minister, as his counsel in the case in which Sri Lanka Insurance Corporation was privatized and the privatization was reversed consequent to which the Hon. Chief Justice's husband was appointed as Chairman of that institution. That's the first disclosure. Secondly, also a matter of custom, I have come to know that in yesteryears when lawyers came to this House as

Members of this House they changed their attire. They did not come with a black tie and a black coat. Hon. Dr. Colvin R. De Silva was the prime example of that. He always came into the chamber in a grey or beige or white suit. I have so far striven to uphold that tradition and today I am breaking with that tradition deliberately and I address you in a black coat and black tie because this is a black day.

[Interruption]…if the House continues like this that only demonstrates…now somebody whose office has been raided and arms discovered is trying to interrupt me.

Mr. Deputy Speaker, I was quietly listening to Hon. Minister of External Affairs

[interruption]…not the Deputy Minister for External Affairs, I won't refer to you…

I'm referring to the Hon. Minister for External Affairs who referred to the Supreme Court ruling. He sought to expound it and surmised it for a long time and he was permitted to do so by the Chair. Yourself was present in the House. Therefore all that he has said and got put on record cannot be allowed to stand. Even though I am much junior to him in the field of law yet I have practised as an Attorney-at-law for twenty one years which he has not been able to do even for a single day. Today I seek to draw from that professional experience in order to lay before this House the true position.

[interruption]…Now the Member who is shouting is giving a demonstration of what he did at the Select Committee – how he abused the Chief Justice. This is what he did there. That also. Your Honourable External Affairs Minister is the one who claimed credit for that appointment. I am not saying it, the Honourable Minister of Fisheries said so in the Parliamentary Select Committee proceedings that it was Prof. Pieris who got her appointed and therefore you objected to him as well. It is there in these proceedings. [interruption]…Mr. Deputy Speaker, I'm asking you most humbly, and I'll ask you just for one time now to please maintain the decorum of this House. I will not ask you again.

In this Constitution…

[Hon. Deputy Speaker intercepts] Is the Hon. Deputy Speaker saying I am not presenting my speech? I am presenting my speech, but there is disturbance and you as the Chair have the responsibility to maintain discipline in this House. You as the Chair have the responsibility to maintain discipline…that is why I said I will say it once and I will say it no more.

The Hon. Prof. G.L. Pieris looked at the judgment, the interpretation given by the Supreme Court. The Hon. Leader of the House also as he opened the debate referred to that. He attacked the interpretation of the Supreme Court based on one word in Article 107(3). The word 'or'. Both of them spoke at length about Court having entered the arena of legislation making, because according to both of them, Court has

somehow misread; Court has not looked at the word 'or'. The Court has not done any such thing. If one cares to look at the determination of the Supreme Court…

[interruption]…this is what I'm saying, sit and listen. You also haven't practiced in any Court…the Supreme Court has very carefully dealt with that issue. [interruption]…No, the Supreme Court did not take one and a half hours, it took much more time. If you don't know, don't show your ignorance. It took several days.

Now, the Supreme Court says, the reason why the word 'or' is there and not 'and' is that with regard to procedural matters in the Select Committee, Parliament has a choice. Parliament can either do it by Standing Orders or it can incorporate it in the Act of Parliament that it can enact. I see Hon. Susil Premajayantha, a man who knows the law, agreeing with me. Thank you. Now, you have to use the word 'or'. You can't say 'and'. You can't say 'provide it in the Act and provide it in the Standing Order'. No, you can't do that. But there are certain matters with regard to standard of proof, burden of proof, mode of proof, that cannot be provided for by Standing Order. There is reason for that. Article 4(c) says that.

[interruption]…Hon. Minister, you did well when you retained me as your Counsel. Now you're faltering. In many matters you retained me as your Counsel. I must remind you of an incident you will remember. On one occasion when I stood up for you in the Supreme Court, then Chief Justice Sarath Silva asked me, and you know that…'You're appearing for this Petitioner too many times'. I said 'So long as he has confidence in me as Counsel, he will continue to retain me.' And I appeared and I obtained judgment for you.

Article 4(c) says 'the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law.' Created and established by law. Only by law. Not written law. Article 170 gives a definition of what a law is and what a written law is. A Standing Order is not law. Any person who can read and understand has to concede to that. Now, that is the reason why in the interpretation of the Supreme Court they have very carefully dealt with that word 'or' and I don't know whether it's ignorance or convenience, Hon. Ministers, including learned Professor of law are seeking to mislead the country by saying Supreme Court has not read the word 'or'.

Now, as I said the Chair permitted the Hon. Professor to make his surmise on this judgment. Before I get to that, the Constitution, which is the Supreme law, and all of us agree with that, there is no dissent on that. It says so, that it shall be the Supreme Law. It gives to the three different organs of government, three separate areas of competence. If anyone is violating the Constitution, it is those who transgress into the area that has been given to the other institution. Accusations are being made that the judiciary has gone into the province of legislation making. I have just explained that the judiciary has done no such thing. They have only interpreted the law. The Hon. Professor will know, he cited English authorities, there are several judgments,

not only from here but even in India, in England, in every civilized jurisdiction, where the Courts, in interpreting, sometimes supply a word, supply a comma, or a dot or a full stop, and that is common. But in this case, our Supreme Court hasn't done even that. They have very clearly explained why that word 'or' is there and they have gone on to say that it's a presumption that Parliament will not use words without a reason. And the reason why Parliament used the word 'law; the reason why Parliament used the word 'or'; the reason why Parliament used the phrase 'Standing Orders' is very clearly laid down in the interpretation of the Supreme Court.

Even if the Supreme Court is wrong, even if the interpretation of the Supreme Court is wrong, that is the interpretation that must stand and so our Speaker said that on the 9th of October. Your Speaker in a ruling given on the 9th of October 2012 very clearly said it is the interpretation of the Supreme Court that must stand. On that occasion also he did not agree, and he asked the Supreme Court to revisit that interpretation and that is the correct course of action.

[interruption]…even if you don't agree, there is no warrant for the Parliament not to agree. Article 125 of the Constitution…one of the three organs of government, you say is a democratic institution, you go and say that this a democratic country, you go and say that there is an independent judiciary, and today, Hon. Minister Vasudeva Nanayakkara in this House is saying that ' we have told the judiciary to go to hell'. We won't allow you to do that. We won't allow you to do that. That is a sure way of sending this country down the slope and that is what you are doing. We will not allow you to do that. This country is a country that has democratic institutions. There must be Rule of Law. If there is to be Rule of Law there must be an independent judiciary. We can't allow you to send the judiciary to hell. Who are you? I am a citizen of this country. I am entitled to say that this country must have every democratic institution. Who are you to say 'Send the judiciary to hell?' You are the conspirator against the country's interests. If you say 'Send the judiciary to hell' you are the one conspiring against this country; against this government. That must be what you must be trying to do. Because you announce to the country that you will vote against this. Two days ago you got scared that your Ministry will be taken away from you and therefore you have changed your stance. This is exactly what you did for the Eighteenth amendment also. You said you don't agree with it in principle, but you will nevertheless vote. Some principled man this is. I feel ashamed that I have ever appeared for you. I'll tell you one more thing. You were one of my boyhood heroes. You were one of my boyhood heroes of this country. You can ask my family. Each time you came to my chambers, I was proud. I told my children, 'This is a man I respect. I count it an honour to appear for this man.' I told my children that. Today I have to take those words back. Because of your shameful conduct. Because of your shameful conduct. All for just a ministry post. For just a ministry post you have turned the tables on all the hallowed principles which you were saying you abided by for all these years. Why did you do this in the last few years of your life? Why did you do this in the last few years of your life?

Article 125 is very clear. Parliament itself when enacting this Constitution was conscious that there might be people like this here. It could have said it's the sole jurisdiction of the Supreme Court or it could have said it's the exclusive jurisdiction of the Supreme Court. No, they said it's the sole AND exclusive jurisdiction, just in case like some people here, they miss that word, they said it twice over. But, there are people here who miss both words. They miss both words. What more can it mean when the Constitution says 'it is the sole and exclusive jurisdiction'? Does this Parliament have jurisdiction?

There you are. The one man who answered. I will deal with you in a moment. You sit down. This is not like taking a tooth out of somebody's mouth. This is law. There are legal principles involved in this. This involves law.

Now, if the Constitution says that it is the sole and exclusive jurisdiction of the Supreme Court to interpret the Constitution, what more can there be? And if after Supreme Court has done just that…I'm thankful to Hon. Professor, he tabled it in this House. Thank you so much. There are instructions given at the gate not to let those judgments come in, but you have tabled it. I must thank you most profusely for your act today. That judgment has been tabled and it is on record. You also must be a conspirator then. Against the government; against what the Speaker has ordered; against what the Deputy Speaker has been saying to the media. Nevertheless, that has now been tabled. Parliament must take notice of it. Is this Parliament to say, 'We can read the Constitution. Article 125 says it is the sole and exclusive jurisdiction of the Supreme Court to interpret the Constitution, but we don't agree with that. Because we don't agree with that, we don't accept that.'

[interruption]…not what we want, but the way the Supreme Court interpreted it…the Speaker said in his ruling, 'It is the interpretation of the Supreme Court that must stand'…

This is the reason why we are participating in this debate without prejudice to our stand that there is no report before this House. There is no report.

[interruption]…I charged fees and I was paid by Janaka Ratnayake for appearing in that case. For every case that I appear I am entitled to charge as a professional and receive it. If you don't know that, I don't blame you if you don't know that. But there are other lawyers there ask them and learn from them. I am entitled to my fees for the work that I do. Only for Hon. Minister there I did not charge any fees because that was in the public interest.

Since I have a short time to conclude, I want to read from this purported report. The Rule of Natural Justice that all institutions must apply when they have a hearing….

[interruption]…ah the new President's Counsel. What do you want to know? He's a true President's Counsel….that's not a point of Order. Sit down…

I want to read, sir, before I conclude from this Report. From the Report that was submitted, volume II, page 1482: Mr. Romesh De Silva is addressing the Chairman:

- 'Mr. Chairman, there must be some decorum in this. I do not like to be shouted at by members of the Select Committee. We have come here to do a job of work. We are making submissions and we must be treated with some kind of decorum. Otherwise, this does not become any kind of process that we can possibly accept. We cannot accept this process. If we have to be shouted at; if we are not being allowed to make submissions. When I'm making submissions to you Mr. Chairman, I'm being interrupted'

Then Mr. Sampanthan, who was a member of the Select Committee has this to say and I want to read it to this House:

- 'Mr. Chairman if I might intervene. I think that you, as the Chairman of this Select Committee has to safeguard the dignity and decorum of Parliament. Because we are functioning as a Select Committee on behalf of Parliament. The Hon. Chief Justice of the country is before us and we are conducting an investigation in regard to certain matters. These are Counsel appearing on her behalf. I think we should conduct ourselves with a sense of decorum and dignity so as to ensure that the prestige of Parliament is preserved. It will be unfortunate if we cannot do that. Let us not forget that the whole world is watching what is going on here, not only the people in this country. The whole world is watching what is going on here and if this is the way that we are going to conduct our proceedings it will be a very very bad reflection on the institution of Parliament and on these proceedings itself.

Now, when Mr. Romesh De Silva and Mr. Sampanthan said this, none of the other members said 'What are you talking about? Who pointed fingers? Who is shouting? We didn't do that. Why are you saying this?' Nothing of that sort. Nothing of that sort. They've agreed that there was shouting. They've agreed that there was abuse of the Chief Justice in that chamber there. It is not audi alterem partem to invite a person and to abuse that person. There was abuse in that Select Committee proceedings and your own proceedings bear that out. How can you say, having abused the Chief Justice of this country and chased her out, how can you say that you adhered to principles of natural justice, of audi alterem partem. Your own proceedings betray you. Aren't you ashamed? The Chairman is here. Aren't you ashamed? You were addressed and you were asked that question. Several times you are telling them 'You address me. You address me.' What does that mean? 'Don't listen to the comments of these others, you address me'. You have conceded in print here that there was abuse going on in that place and you come here and you present this report with these proceedings. You did not utter one word. You did not challenge. When they complained you did not say 'No such thing is happening here'. It is not recorded. That is clear proof as to what you did to a lady; to a Chief Justice of this country; what more will you not do? If that is the kind of justice that you mete out to even the Chief Justice of this country, what chance do others have? What chance do we have? You have been complaining that we are not coming to another

Parliamentary Select Committee. If the Chief Justice cannot get justice in this Parliamentary Select Committee with what faith do you invite us to come to the other Parliamentary Select Committee? If this is the justice that you can do to your own appointee; to the Chief Justice of this country, what will you not do to us? Why do you invite us to the Parliamentary Select Committee? If you abuse and chase even the Chief Justice, how do you treat us? The Hon. Minister wanted to talk about the Tamils. After illegally taking 109 young Tamil women, saying they are being recruited to the army without any process, abusing them in those camps and keeping them, this is no surprise.

[interruption]…if anything is to be deleted from the Hansard on the basis that it is untrue, first you must delete this entire report because this entire report is a false report. This report is a 'no report' because the Court of Appeal has quashed it.

I want to add that. In proceedings no. CA 411/2013 the Court of Appeal has quashed this already. It was the undertaking of the Sri Lankan Government to the UN Human Rights Council in 2003…in the UN Human Rights Council sessions in 2003 at the UPR Sri Lanka gave an undertaking. After having given an undertaking to the UN Human Rights Council that judicial review is available after the impeachment process of a judge under Article 107(3), this House, I say with utmost necessity, adhered to that because otherwise, again, like you have already put the country at peril, you are putting this country at peril once more because all the undertakings you are giving to the UN Human Rights Council you are willing to wily-nily move away from. That will put this country at peril, and it is our responsible reminder to you, don't put our country at peril; don't violate the Constitution; don't put the country at peril. If you do that, it will be regarded as a failed state. You are the ones who are doing that, not anybody else. If you give undertakings and you violate them; if you do not listen to the Supreme Court Order; if you violate the Constitution; you are making this country a failed state.

Thank you very much.

*SUMANTHIRAN'S PARLIAMENT SPEECH ON 10TH JANUARY 2013

**124**

## Lets Peep Into Sri Lanka's Tomorrow After Impeachment

**by Kusal Perera**

There is little or no purpose now in discussing and arguing about the legality and constitutionality or otherwise of the impeachment motion. There is little purpose now in discussing and agitating, asking this government to withdraw the impeachment motion and the Speaker to respect the Constitution. Everything has been already decided to show Chief Justice Bandaranayake the exit door. Today, Friday 11th January, 2013, while this is written, Ranil Wickramasinghe's unconditionally argued supremacy of this parliament would decide on a majority vote at 06.30 pm to remove the incumbent CJ and request President Rajapaksa to appoint another. Tomorrow, Ranil would be left without his "supreme" parliament and the people, without an independent judiciary.

I remain a hard critic of Wickramasinghe in how he played and still plays with the Rajapaksa regime in legitimising all things unconstitutional. He did it with the Budget 2013 and does the same with this impeachment motion right now. His super ego on a self acclaimed status as the most knowledgeable in parliamentary procedures and traditions was simply trashed with all his preliminary objections

thrown out and the debate on the impeachment motion report begun at 01.10 pm on Thursday 10 January, as decided by the Rajapaksa regime. His political bankruptcy does not allow him to accept that 144 MPs from the UPFA, plus his own UNP Members who crossed over to the government, will have no choice but to vote on the impeachment motion report as required by the Executive Presidency. He does not want to accept that would seal the fate of CJ Bandaranayake and drop the curtain down on this tragi-comedy. He also does not want to accept, he too "ordered" his party MPs to participate in a debate and vote on the impeachment determined as illegal by the SC and quashed by the Appeal Court. A parliament that has a collection of about 200 MPs out of the 225, who have been simply "ordered" to obey the Executive President and the UNP leader, two big and small dictators in their own terms, can not represent the sovereignty of the people. Can not be supreme in any way. It is that parliament that would end up today on 11th January, as one that leaves the Constitution violated and the judiciary made invalid. A country with no valid Constitution, with no legitimate parliament and a judiciary tamed to suit the regime.

Today the judiciary stands abstained, not willing to accept the decision of the parliament. The Bar Association of SL, with 78 branch associations all island and well over 7,000 practising members, made a public call to its members to keep away from professional work as a protest against the parliamentary debate on the impeachment motion they called illegal and unconstitutional. For the first time in Sri Lanka almost all Courts went defunct in a protest campaign with most Magistrates and Judges too not getting on the bench. But that would not be the same situation from next Tuesday, when life begins after a 03 day long weekend. When life begins in a country where the Constitution has no validity and the judiciary remains in chaos.

The controversy over the appointment of a new Chief Justice would bring another double barrelled conflict next week. Most probable appointee for now seems Justice Shiranee Thilakawardane. She would have been most probably the first woman CJ, if Dr. Shirani Bandaranayake was not parachuted to the Supreme Court bench by President Kumaratunge on the request of Minister Pieris. With CJ Bandaranayake removed on a majority vote in parliament, Justice Thilakawardne becomes the most senior judge to be appointed CJ and that in a way could pacify certain quarters within the judicial system than having one from the private bar. Yet, the Rajapaksa regime don't seem to be comfortable appointing Justice Thilakawardne. She is thought of as an unpredictable judge and more independent than even the incumbent CJ when tasked to do a job. Those who raise doubts about her from the side of the regime cite the assignment given to her by President Rajapaksa himself, to investigate military procurements during the war period. President has shelved her report on military procurements permanently on that flat phrase "security reasons" as told in parliament by Minister Dinesh Gunawardena.

What this regime wants is a permanent answer with a totally subservient CJ. Not one who takes the responsibility in doing a straight job. Due to lack of acceptable names, the regime may settle with Justice Thilakawardane as a stop gap. But for how long ?

Can the President appoint an Acting CJ ? And will she accept an Acting posting ? If not what ? All riddles the Rajapaksa regime would have to finda answers for, during the next few days and would make more contradictions and conflicts in the process.

On the flip side, any appointment as CJ will not be accepted by the Lawyers' Collective leading the protests. Not even by moderate Sinhala campaigners who stood by this Rajapaksa regime. The whole parliamentary process of impeaching and removing CJ Bandaranayake is considered illegal and unconstitutional by them and they would not compromise on that for sure. Thus the probable conclusion would be, the Courts will not settle to normal day to day responsibilities during the week ahead. Nor would the lawyers, during next week.

Yet the issue is not just that. The issue is what that would be for this Sinhala society. To begin with, this regime now proves it would no more respect the Constitution and the Judiciary the way the Sinhala middle class expected it should, after the elimination of the LTTE. This regime decides on its own selfish agenda and not on how this country could benefit. Such an agenda that stands on unprecedented mega corruption with political patronage, can not be so easily pursued by any regime any where in the world, giving the people an opportunity to challenge the regime on democratic rights. NO, that can never happen anywhere and NOT HERE either !

This is the political context that makes the presence of the military and the defence establishment quite important to this regime after the judiciary is tamed. Lets not forget, this Rajapaksa regime has a gazette notification dated 29 August 2011 in its hands to establish STF camps in every district. It has brought all regulatory bodies required for control of land, the UDA, the Coast Conservation Department and the Land Development and Reclamation Corporation under the defence and urban development ministry. It also has the Department of Registration of Persons and the NGO Secretariat under it. So is the Police Department that for decades have been used more as an auxiliary agency in security, than as a civil department for law and order.

Four years after the war this ministry, lately tagged as "Ministry of Defence and Urban Development", is allocated 290 billion rupees for 2013, an increase of 60 billion over 2012 and 75 billion over 2011. This year, the projection is only 05 per cent of the allocated budget for "urban development" with everything else set aside for defence. Lets keep this in mind. Every year there had been supplementary budget estimates too brought to parliament, asking for extra money.

This is quite an important issue when taken together in a Sinhala society that accepts militarisation of society as a Sinhala patriotic need. This Sinhala society has never opposed the appointment of security personnel to any civil administrative position. From Provincial Governors to Ministry Secretaries to District Secretaries, Board Chairmen, Commissioners of Departments and worst, even as teachers now in Northern schools where in the South, Principals have been trained and inducted as Brevet Colonels of the volunteer force, but within the preserve of the military

Commandant. Where university entrants are given a supposed "leadership training" under the military in military camps. Where universities are provided with security guards from a public firm, run by the defence establishment.

This may not be where the whole story would end. The defence establishment is now into big and small business with their own investments, raised from where and how, not queried about. The "Eagle's Golf Link" claimed as one of Asia's best once its 18 holes are completed, is owned by the SL Air force. So is "Helitours" back again in business. "The Air Travel Services (Pvt) Ltd" sells air-tickets and foreign package holidays. The military owns the controversial "Lake's Edge" hotel in Mullaitivu. 02 holiday resorts one in Kukulegama and the other in Wadduwa for a long time. It was into local vegetable business too and now operates a fair priced "Kottu cafe" in Diyawannawa. Most restaurants and cafes along the A-9 road beyond Omanthai have military affiliations and the "Thal Sevana" guest house in KKS as well. There is serious discussions and plans afoot to build a 5 Star hotel in Colombo and also establish a separate directorate within the military to invest in businesses as emphasised by the army Commander himself (check link – http://www.dailymirror.lk/news/14575-army-to-build-a-five-star-hotel-in-colombo.html) Taking off from there, Navy is operating its "JetLiner" cruiser ship as a profit earning utility, renting it for weddings. There are also boat rides in Colombo and suburban waterways. There could be more businesses that could be added, if one does some nosing into seemingly innocent looking projects that has State patronage.

What makes all these extremely important in the period to come after the impeachment concludes with a replacement of the CJ is, we would be heading into the future with this growing defence establishment, minus a judiciary with any potency and parliamentarians running behind two Pied Pipers going the same way. Any chance of creating checks and balances to such dangerous political evolution would be on the strength of the working class and the urban middle class. Again, they lack political leadership and a programme for the future. This leaves us to discuss what our options could be, for a "Left democratic" future.

*Courtesy: The Colombo Telegraph*

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# Ranil's Silly Statements And Dismissing The CJ By Hook Or By Crook

**by S.L. Gunasekara**

A Requiem For The Rule Of Law

The Court of Appeal, following the interpretation of the Constitution given by the Supreme Court has quashed by way of Certiorari the findings of the Parliamentary Select Committee.

Many are the statements made by members of the Government as well as by the leader of the purported Opposition, Ranil Wickremesinghe who are possessed of over-inflated egos instead of intelligence, to the effect that Parliament being supreme, no finding or verdict of a Court would apply to it. I have little doubt that Parliament will now proceed to go ahead with the purported resolution for the impeachment of the Chief Justice and dismiss her from office.

That would be a sad day for Sri Lanka for it would herald the murder of the Rule of Law by the Government which is bound and obliged to maintain, sustain and nourish it. It would indeed be comparable to a mother murdering an infant child.
The pronouncements of Members of Parliament that Parliament is supreme are not based on any provision of the Constitution – for there is no provision of the Constitution which provides for the alleged supremacy of Parliament. While the Constitution provides that sovereignty resides in the people there is no comparable provision which vests supremacy in Parliament. In these circumstances it is evident from the Constitution itself that the framers thereof did not for a moment conceive of Parliament being supreme or vest such supremacy in Parliament. So important a concept as the 'supremacy in parliament could not, in my view, be vested by implication and/or inference but only by an explicit statement to the effect that Parliament is sovereign or supreme. Indeed, such a concept could not exist side by side with the explicit statement that sovereignty resides in the people.

It is also pertinent to consider Article 12 of the Constitution in terms of which all persons are equal before the law and entitled to the equal protection of the law. This provision applies equally to all citizens whether they are Members of Parliament or not.

It is trite law that where the Court of Appeal quashes a finding or determination by any Court or other body (which includes a purported Select Committee) such quashing renders such finding and/or determination null and void and of no effect in law for all purposes unless it is set aside by the Supreme Court. Thus, the only lawful means of seeking to nullify the effect of the said finding of the Court of Appeal is to appeal there from to the Supreme Court in terms of the Constitution. However, judging from the aforesaid nonsensical and totally idiotic statements made by various Members of Parliament, it is evident that no such appeal will be made.
The attitude of the Government, abetted as I have mentioned earlier, by the silly statements made by the purported leader of the purported Opposition Ranil Wickremesinghe, will be to press on with their stupid and anti-national endeavour to dismiss the Chief Justice by hook or by crook, and that can only result in a state of anarchy setting into the country because it follows that if Parliament which is not vested with any kind of immunity from the decisions of any Court, can proceed to ignore a finding of the Court of Appeal, so also can the people ignore the orders and findings of all Courts.

One can well visualize the absolute chaos and disorder that would result if the people of this country follow the putrid example that will probably be set by Parliament by disobeying the orders of Court on the ground that in their view those findings were erroneous in law. The only institutions that are vested by law with jurisdiction to determine whether a finding of a Court of law is erroneous, whether in Law or otherwise, are the superior courts and not any individual be he/she Member of Parliament or not. In these circumstances one does hope and pray (if one believes in prayer) in the National Interest, that wiser counsel will prevail and that

Parliament will refrain from proceeding with the purported resolution for the impeachment of the Chief Justice.

*Courtesy: The Daily Mirror*

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## The Darkest Hour On Hulftsdorp Hill

by Dharisha Bastians

Every country in the world now being governed by an autocratic regime must have had a week like this one. Barring an eleventh hour reprieve, by sundown tomorrow, for the first time in the history of the Republic, the Sri Lankan Parliament will move to remove a sitting Chief Justice from office. In doing so, the UPFA led legislature will mark another first, by following through with a process deemed unconstitutional and illegal by the highest court of the land. A unilateral decision by parliamentarians to discard the determination by the Supreme Court sounds a death knell for rule of law and the concept of checks and balances so integral in a democracy. The rapidly developing situation may still elude the citizenry at large but for the next 48 hours, Sri Lanka stands upon a razor's edge that could well transform the nature of the state from republic to full blown autocracy

The Lagoon's Edge holiday bungalow has a unique selling point no other resort location in the island can match. Tourists can spend Rs. 15,000 to spend a luxurious

night on the banks of the lagoon in which one of the world's most ruthless terrorist leaders were killed by Sri Lankan armed forces. Nandikadal, a place that will forever be synonymous with the defeat of the LTTE after 30 years of civil war ravaged this island nation is now firmly situated on the tourist map. Recently declared open by President Mahinda Rajapaksa and his brother the Defence Secretary, Gotabhaya Rajapaksa, the military-built, all teak luxury bungalow especially targets hoards of local war tourists, eager to embark on the trail of Eelam War IV which finally saw the end of the Tamil Tigers. The military caters to these visceral pleasures, setting up war museums and carefully marking each war monument – whether it is a destroyed ship, aircraft, gun or terrorist bunker. But the must-see attraction for most travellers from the south are the spots associated with the ethos of Tiger Leader Prabhakaran– his swimming pool, his 'luxury' bunker, even his toilet; and now with the brand new opening of a resort in Nandikadal, the chance to sleep one night in the place Sri Lanka's sworn enemy, clad in only a loin cloth and covered in flies, met his gruesome end.

Reconciliation struggles

There is another side to the story of the Nandikadal Lagoon that often eludes the triumphalism that pervades the Sri Lankan post-conflict psyche. This stretch of land overlooking the brackish water of the lagoon was also the final battleground in which the UN estimates some 40,000 Tamil civilians died in the last months of fighting. The figures are disputed by the Sri Lankan Government – but even by regime estimates, at least 9000 civilians died in the final phase of the war with the LTTE. Under the circumstances, perhaps the more fitting reaction, in a country struggling with reconciliation four years following the conflict's end, would have been the construction of a memorial to honour the dead as a means of making amends for the civilian 'collateral damage' in the country's great triumph over terrorism.

International publicity

Needless to say, the resort at Nandikadal has generated wide international publicity. These are the Channel 4 dubbed 'killing fields' and Lagoon's Edge is being called 'killing fields tourism.' The Sri Lankan Government in its supreme wisdom, despite grappling with the need to account for the civilian deaths in the last phase of the war, decided to draw international attention to the very place the world is screeching about by making a high end tourist destination on its banks. But when this and other damning reconciliation and accountability issues in the country – like the Jaffna University crackdown and the strange fate of the female LTTE cadres inducted into the army – put Sri Lanka in the hot seat when the UN Human Rights Council in Geneva six weeks from now, the Government and its proxies will no doubt be shouting themselves hoarse about international conspiracies driving the UNHRC agenda against the island.

If the UNHRC sessions that commence on 25 February are not top-most in the minds of the ruling regime, it probably should be, even as it proceeds with a move to oust Chief Justice Shirani Bandaranayake from office amidst grave concerns being expressed in that respect throughout the international community.

Wimal's conspiracy theory

Housing Minister Wimal Weerawansa, who is also the regime's conspiracy theorist in chief, alleged last week that the Chief Justice was part of an international conspiracy to make things difficult for Sri Lanka in Geneva this March. Sri Lanka is on the UNHRC watch-list after the Council adopted a resolution against the country last year, demanding that it stops dragging its feet on reconciliation and accountability issues in the post-war phase. Besides drafting a National Action Plan on Reconciliation and vague noises about a military tribunal to investigate military excesses, the Government has done little to escape serious scrutiny and review of its progress one year later. So Minister Weerawansa it would seem is on the lookout for scapegoats. Chief Justice Shirani Bandaranayake who has decided to fight the impeachment motion against her right down to the wire, fits the bill. Since any person dissenting with the Government – even if it were merely to prove their innocence against scurrilous charges brought against them by the regime – is naturally an international conspirator and traitor, Bandaranayake's refusal to 'go quietly' as the regime would have preferred, must mean she is determined to make the country look bad internationally. This claim may have garnered some credence had the Bandaranayake herself brought the impeachment motion against her and then resorted to have it probed by a kangaroo court that vilified and abused her, refused to grant her adequate time to submit a detailed defence, called witnesses in secret and drafted an ex-parte guilty verdict in six hours, one senior lawyer quipped. But it has long since become the norm to vilify and paint as treacherous any civil society movement agitating against state excesses. The fight for individual freedoms and fundamental rights are often touted as being Western ideas, born of Western agendas to change Sri Lanka. Every resistance movement for civil liberties is by definition therefore, anti-Sri Lankan and anti-regime. But this is inevitable. When a ruling party grows more determined every day to strip away fundamental freedoms, the struggle for liberty and a fight to protect institutions that preserve democracy, become essentially, anti-regime.

New threats

A sense of foreboding has dulled this second week of the new year. Potential confrontation and chaos hangs heavy in the air. What began with the delivery of the Supreme Court ruling that the Parliamentary Select Committee probing the impeachment charges against the Chief Justice did not have the authority to make decisions adversely affecting the rights and tenure of a judge of the superior courts, climaxed with the Court of Appeal issuing a Writ Certiorari quashing the PSC report that found Chief Justice Bandaranayake guilty on three charges out of 14 listed.

On the night of Sunday 6 January, on the eve of the Court of Appeal ruling President of the Appeals Court, Justice S. Skandarajah received a telephone call. The anonymous caller told Justice Skandarajah that he was not to proceed to court the next day, when a bench led by him was to take up the Chief Justice's petition against the PSC findings. Around the same time, Justice Anil Gooneratne, another judge on the bench hearing Bandaranayake's petition received a telephone call to his residence. The message was the same – refrain from attending court the next day. Both judges filed complaints against the threats at the Bambalapitiya and Borella police stations and proceeded to court the next day, when they heard submissions from the Chief Justice's legal counsel and the Attorney General for several hours before issuing a verdict that quashed the findings of the PSC against Bandaranayake. Police investigations meanwhile concluded that the telephone calls originated from a public phone booth in Rajagiriya. Whoever the callers were, in attending court the next day and declaring the ruling against the PSC, the judiciary proved once again that in this battle of wills, it was not going to give into intimidation or be cowed by the threat of physical force.

Upon announcement of the judgment, the Government whipped itself up into a frenzy, with several ministers, including Weerawansa and Mervyn Silva making seriously contemptuous statements against the judiciary that were provided wide publicity in the state media. Weerawansa has gone so far as to demand that the Court of Appeal judges who gave the verdict should be summoned before the legislature to be held in contempt. Weerawansa's abysmal knowledge of legal procedure and the separation of powers concepts aside, the statement had a much darker side. Legal circles raised the question as to whether this was a prophesy of things to come, that under the new order that will be established once the incumbent Chief Justice is removed any judge who makes determinations against the Government would be faced with the threat of being hauled up before Parliament to answer for his actions.

An issue of supremacy

Weerawansa's assertion, and indeed assertions by most Government legislators this past week – many of whom have taken to adding the prefix 'uththareethara' or 'supreme' each time they refer to Parliament – draw their courage from the ruling made by Speaker Anura Bandaranaike in 2001 (and repeatedly reinforced by UNP Leader Ranil Wickremasinghe of late), to a parliament that was dissolved before a discussion about or challenge to the claim could be mounted. The ruling was in reference to an injunction imposed on the Speaker by a Supreme Court bench that included then Justice Shirani Bandaranayake, during a hearing of a fundamental rights case challenging the setting up of the PSC to look into the motion of impeachment brought against then Chief Justice, Sarath N. Silva.

As this impeachment battle raged and the Government took a cue from the UNP Leader, whose purported knowledge of Commonwealth parliamentary tradition is suddenly greatly respected by UPFA parliamentarians, former Chief Justice Silva became a key pundit for the state media on the supremacy of parliament.

The concept of Parliamentary Supremacy is an old one, dating back to monarchical Britain when constitutional conflict revolved around the struggle for power between the King and Parliament. Parliament's supremacy was established in the 17th Century when Britain transformed into a constitutional monarchy. The fundamental reason for asserting this supremacy then, was to protect the people from arbitrary rule and lawmaking by the monarch. At the time, with judges serving almost entirely at the pleasure of the king (Charles II sacked 11 judges during his reign), it may have been necessary to ensure the judiciary could not interfere with the laws made by Parliament. No modern constitutional theorist would argue that parliamentary supremacy within the framework of modern democracy, instead of a monarchical system, meant supremacy over the courts of law. It runs paradox to concepts that govern modern democracies to assert the power of one organ of the state over the other in the way ruling party legislators and some UNP members are currently attempting to do. This is a strange assertion, especially since the 1978 Constitution that legislators are currently bound by only refers once to something being "Supreme" in one instance: In its preamble which states thus: "WE, THE FREELY ELECTED REPRESENTATIVES OF THE PEOPLE OF SRI LANKA, in pursuance of such Mandate, humbly acknowledging our obligations to our People and gratefully remembering their heroic and unremitting struggle to regain and preserve their rights and privileges so that the Dignity and Freedom of the Individual may be assured, Just, Social, Economic and Cultural Order attained, the Unity of the Country restored, and Concord established with other Nations, do hereby adopt and enact this CONSTITUTION as the SUPREME LAW of the DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA."

The constitution makes no further reference to any institution of the state holding sway over or being supreme to another. So the question remains, what are Parliamentarians basing this claim upon?

Flawed logic

The concept of separation of powers relates to the separate and unique powers vested in each of the three organs of the state. The Sri Lankan Parliament (and other legislative councils at regional levels) have exclusive jurisdiction in the making of laws and control of public finance. The executive retains the power to declare war and peace and execute actions under the nation's public seal. The Judiciary is vested with the power of judicial inquiry, the examination of evidence, pronouncement of guilt and innocence – and in the case of the Supreme Court, the "sole and exclusive" power to interpret the constitution. In the oldest constitutions, the power to make law and constitutions may lie with the legislature, but the interpretation of those laws is the sole jurisdiction of the courts of law. Head of the Department of Law of the Peradeniya University, Dr. Deepika Udugama, a panellist at recently held Forum with Eran, a panel moderated by UNP National List MP Eran Wickremaratne, explained how the concept of parliamentary supremacy is outdated and does not apply in mature democracies. The logic governing the Sri Lankan parliament's

assertion that it could discard a ruling by the apex court because Parliament was supreme was fundamentally flawed she said.

"If the Constitution is the Supreme Law of the land and the sole and exclusive jurisdiction to interpret the constitution is guaranteed to the Supreme Court by the constitution, then to say parliament is supreme therefore it does not have to abide by Court rulings especially on the interpretation of the constitution is completely flawed logic," Dr. Udugama explained.

In an executive presidential system the question also arises as to whether Parliament's supremacy so widely asserted in the House by the Diyawanna, is also then liable to be asserted over the Executive President and the powers vested with that office. In fact, the inclusion of a clause on the supremacy of the National Assembly in the 1972 constitution was possible only in the absence of an executive president with whose inclusion naturally the power of parliament would be diluted somewhat. That Supremacy clause also referred to jurisdiction over parliamentary affairs, in that no other institution could interfere with the business of parliament. Indeed, the present Parliament also has certain safeguards provided by the Parliamentary Powers and Privileges Act that protects parliamentary proceedings from external control.

The Supreme Court of Sri Lanka in its ruling on 1 January, in reference to interpretation of Article 107 (3) pertaining to the removal of judges of the superior court, helps to make a keen distinction between the allegation that the courts are interfering with the business of parliament and the bounden duty of the judiciary to uphold the constitution and the guarantee of rights to every citizen contained therein. The ambiguity contained in Article 107 (3) which stipulates that: "Parliament shall by law or by Standing Orders provide for all matters relating to the presentation of such an address, including the procedure for the passing of such resolution, the investigation and proof of the alleged misbehaviour or incapacity and the right of such Judge to appear and to be heard in person or by representative," prompted the Court of Appeal to refer the clause to the Supreme Court for constitutional interpretation. Given the apex court's sole and exclusive jurisdiction in this regard the Supreme Court seeks to derive logical and constitutionally sound resolutions from ambiguous phrasing of the section by the framers of the constitution.

Ex-CJ's doubts about SC ruling

Former Chief Justice Sarath N. Silva, during whose tenure discussions on a ruling by the Supreme Court could only be whispered in dark corners for fear of being hauled before his court on charges of contempt, has waxed eloquent on state media regarding the fact that the Supreme Court had ignored the words "or standing order" contained in Article 107 (3) in its interpretation.

Dr. Udugama during the panel discussion, sought to clarify this tangle. She explains that the Supreme Court ruling conveys that while Parliament may by Standing Order make provisions for the presentation of an impeachment address and procedure for passing a resolution of impeachment as stipulated by 107 (3), the investigative aspect of the impeachment process must be provided by for by 'law and law alone'. The Supreme Court reasoning for this is simple. The Court ruled that because the investigation procedure could adversely affect the legal rights of a serving judge – legal rights that are entitled to every citizen under the constitution – the process for judicial inquiry of the charges must be provided for through legislation that vests a particular tribunal with the power of inquiry. It is the Court's assertion that this would ensure that the right of a judge to be granted a fair hearing would be upheld.

Standing orders subject to constitution

In other words, a Standing Order cannot vest a body of parliamentarians with judicial power, if it means that power could affect the rights of the person under investigation, since that is an inalienable power vested solely with the courts of law or tribunals set up through the passing of legislation. The question of parliamentary supremacy over its affairs by an 'external body' does not arise in the investigation process of an impeachment against a judge, because it not simply a case of 'the business of parliament' but an issue of a citizen's fundamental rights – and jurisdiction over guaranteeing a citizen's rights under the constitution, is undeniably vested with the courts of law and cannot be transferred to a legislative committee through a Standing Order. In fact, as the panel's moderator, Suren Fernando Attorney at Law pointed out, Article 74 (1) of the constitution stipulates that Parliament may make Standing Orders "Subject to the provisions of the Constitution". In effect, a Parliamentary Standing Order may not read contrary to the provisions of the Constitution. If Standing Order 78A which makes provision for the setting up of a PSC to inquire into impeachment charges against a judge contradicts articles in the constitution pertaining to judicial power of the people or the rights of a person to fair trial for instance, the standing order is liable to be challenged in court for being inconsistent with the constitution as set out in Article 74 (1).

Unfortunately, the Government cares not a whit for these technical discussions on the principles governing the rule of law, the independence of the judiciary and a modern democracy. Having dragged the issue this far, blinded by a desire for vengeance against a judiciary that has dared not only to deny it what it badly wanted but for refusing to bow to pressure brought to bear upon it, the Government of President Mahinda Rajapaksa finds itself with no option but to push through and damn the consequences. Opposition parties are putting up valiant resistance against the Speaker's moves to push through with the Impeachment debate and vote, in violation of the Supreme Court ruling and the Writ issued by the Court of Appeal, making the PSC findings legally void. According to UNP General Secretary Tissa Attanayake, there was no legal basis upon which to debate an impeachment

resolution because the report of findings had been declared null and void by the courts.

'CJ' must go'

But none of this is of any consequence. The UPFA Government is determined to have its way. Bandaranayake must go and it will risk international condemnation and reprisals, unceasing legal battles and even force to get it done. If the threat of having the Commonwealth Heads of Government Meeting later this year being taken away was a concern a week or two ago, it is no longer a major impediment with the Government having made a decision that it needed to move the national discourse away from the impeachment as soon as possible. In fact, the discussion on impeachment, separation of powers and the independence of the judiciary is getting too widespread for comfort as far as the ruling regime is concerned. Its calculation is that it needs to remove Bandaranayake from office as soon as possible and divert public attention from the issue and in this the Government is convinced that the peoples' short term memory will help to cushion the post-impeachment aftermath. The Presidential Secretariat has been blowing hot and cold over the impeachment, with the Presidential Spokesman denying on Tuesday a news item that appeared on the Government Information Department's website indicating that the President had appointed a four member independent panel to review the PSC report. Presidential Spokesman Mohan Samaranayake who was quoted in some sections of the foreign press as saying the panel had been constituted and would commence deliberations on 7 January, retracted the next day, claiming that no committee had been set up so far. The confusion in the Government camp indicates that there is some degree of trepidation despite the conviction that the process must go through, with the legal fraternity throughout the country mobilizing at hectic pace. Even as the Impeachment Motion is scheduled to be taken up for debate today and tomorrow, the Lawyers Collective will be joined by the UNP and other opposition parties as they march on Hulftsdorp Hill in against the move to oust the Chief Justice. The Bar Association of Sri Lanka has also decided to go on strike today and tomorrow as Parliament prepares to debate and vote on the motion despite the court ruling annulling the process. Several branches of the Bar have also declared court boycotts and many of these organizations will join the lawyers' march today. The UNP also appears to be contemplating future legal action against MPs that have crossed over to the Government after being elected to office under the elephant symbol. On Tuesday, the Party decided to issue writs on all MPs in Parliament that contested under the elephant symbol – including the eight SLMC members – that they were to vote against the impeachment. UNP Senior Vice President Lakshman Kiriella charged earlier this week that every MP that had taken an oath to protect the constitution could be expelled for working contrary to an order by the apex court that the process to impeach the Chief Justice was unconstitutional.

All this notwithstanding, by sunset tomorrow, Chief Justice Shirani Bandaranayake will stand impeached – unconstitutionally and illegally perhaps – but removed from office with a Government "approved" new Chief Justice already waiting in the

wings. Former Attorney General, presidential advisor and Chairman of Seylan Bank Mohan Pieris is the chief contender for the new appointment. It is learned that several other retired officials approached have refused to accept the position under the circumstances. However, Pieiris enjoys the support of senior regime officials and is widely speculated to have been involved in drafting the impeachment motion against Chief Justice Bandaranayake.

These facts now seem inevitable. How the legal community and civil society continue to react in the post-impeachment phase and how long the struggle can be sustained will remain to be seen.

There is a school of thought that this attempted removal of the head of the country's judiciary is creating more of a hue and cry than it should. Sri Lanka's judiciary has rarely been free of political interference and indeed, has made more than its share of grave errors of judgments that have cost the country dearly. But this much is obvious. The desire to remove a top judge of the country for political reasons has never been more clear and more adamant. According to President's Counsel Srinath Perera, there is a reason why this battle is more than just a storm in a teacup. If it were to become so easy for a Government in power to drag a sitting judge out by the ear each time they met with the regime's disapproval, the condition and situation of Sri Lankan judges would be similar to that of Sri Lankan police officers. There is a reason judges are granted tenure, why their appointments and removals are supposed to be so stringently fair. Imagine, for instance, Perera says, if walking into a courtroom was similar to walking into a local police station where political power and influence hold complete sway? The judiciary, flawed and broken as it might be, in need of reform though it might be, remains still the citizen's final hope of redress against the politically powerful and the excesses of the state. Activist lawyers say this is why this struggle may the last true battle for liberty Sri Lankans may need to fight.

Shadows of the future?

Many dire predictions have been made for the next 72 hours. There is speculation that a presidential proclamation for Bandaranayake's removal may come on Saturday (12) and her successor appointed on Monday (14). Rights watchdogs and members of the legal fraternity worry that the doors of the Supreme Court Complex will be locked against the incumbent Chief Justice and that she will be prevented from entering the courts by force if necessary. But it may well be that the transition will be smoother than ever, once the Government gets its way and breathes a sigh of relief following many months of battle.

In every anti-democratic and autocratic state in the world, there must have been a week like this one. It may have been that in those societies too, the citizenry at large did not realize what was unfolding. The journalistic fraternity have learned to dub this month as Black January, because an astounding number of atrocities committed against the free press have occurred in the first month of the year. Perhaps in the years to come, Sri Lankans will call it a black month because it was also the month in

which Sri Lanka ceased to be a constitutional democracy. It may not all end in a single day, but just like some lights in this democracy were turned off with the passing of the 18th Amendment, the impeachment of Chief Justice Shirani Bandaranayake tomorrow, may also prove a harbinger of what is to come. Coming events, they say, cast their shadows long before. Liberty, justice, democracy and the rule of law – these are fragile, tenuous concepts. They require constant watching over, constant stewardship, constant reinforcement and strengthening. The damage to democracy over the years in Sri Lanka has already weakened the struggle to keep these concepts alive. How much can be done to reverse this trend in the next 24 hours and the days and weeks ahead by civil society, opposition parties and the legal fraternity will determine the country's future course. Blink now, and it's over.

Courtesy Daily FT

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## The Real Hulftsdorf Coup Which Heralds The Jungle

**by Tisaranee Gunasekara**

*"Find out what any people will quietly submit to and you have found out the exact measure of injustice and wrong which will be imposed upon them…."* ***Fredrick Douglass (Speech on 3.8.1857 – The Fredrick Douglass Papers)***

The real 'Hulftsdorf Coup', plotted and unleashed by the Rajapaksa Brothers, is nearing its appointed end.

The parliament will 'debate' the PSC Report on the 10th and the 11th (once again Ranil Wickremesinghe provided the Rajapaksas with a desperately needed fig-leaf by opting to participate in this charade). The UPFA majority will vote to impeach the Chief Justice on 11th evening. The President will 'sack' the CJ and appoint a 'new CJ' (or an 'Acting CJ') over the weekend.

Since the CJ cannot accede to her dismissal without violating the Supreme Court and Appeal Courtrulings, she will have to continue with her duties on Monday. The violent phase of the Rajapaksas' Hulftsdorf Coup' will commence then: "According to reliable sources, the Chief Justice is planning with a coterie of so called supporters to storm Hulftsdorf and remain in the premises, even if she is impeached. This is similar to the drama in which another person in uniform turned politician refused to budge from a city hotel until this person was forced out. If this kind of drama is enacted, the people will have a proper answer with broomsticks this time, an observant wag said" (Daily News – 9.1.2013).

The Rajapaksa plan is clear. The armed might of the state (augmented perhaps with UPFA henchpersons) will be used to prevent the CJ form entering her office; or to evict her from it, if she does manage to get in. Rajapaksa foot-soldiers, masquerading as Golden Key depositors, may even try to prevent the CJ from leaving her official residence.

Since the President has reiterated that "There are attempts to topple this government backed by the spirit of separatism and those who supported the LTTE" (Daily Mirror – 9. 1.2013), all those who resist the illegal impeachment could be labelled 'traitors' and dealt with accordingly.

Concurrently, efforts will be taken to confer a faux-legality upon these violent and illegal measures. According to Minister Susil Premajayantha, "the Supreme Court interpretation of the impeachment could change in the future" (Sri Lanka Mirror – 9.1.2013). The regime may try to clobber together a five member bench under the aegis of the 'new chief justice' to confer a mantle of legality on the PSC and thereby the impeachment. The usual Rajapaksa combination of threats and rewards will be used to cow judges of superior courts into submission.

In a Medamulana-style response to the Appeal Court ruling, President Rajapaksa proclaimed that "all powers regarding leave matters pertaining to Supreme Court judges and their foreign visits etc. and the approval thereof will now by default be vested with him as the Executive" (Daily News – 8.1.2013). The message is simple: the life of disobedient judges will be made extremely uncomfortable and unpleasant. Overt threats of the lethal variety will help create a climate of fear; already two of the Appeal Court judges who ruled on the PSC have reportedly received threatening calls. Those judges willing to play the Rajapaksa-game will be rewarded blatantly, to drive home the message to the recalcitrants. If all else fails, there is always the threat and the reality of impeachment, witch-trial style, to depose those judges who believe in the rule of law and resist the law of the rulers.

From 'Helping Hambantota' to Impeachment

The manipulative manner in which the 'Helping Hambantota' case was resolved provides a tiny indication of whatSri Lankacan expect from a post-impeachment judiciary.

In September 2005, Chief Justice Sarath N Silva saved Mahinda Rajapaksa's presidential prospects by ordering a temporarily halt to the 'Helping Hambantota' investigation. As a prelude, he arranged the transfer of the Magistrate who had given the CID the go-ahead to investigate the alleged misappropriation of Rs.83 million of tsunami funds by the then Prime Minister.

That fateful decision of the country's highest court was based not on legal or moral-ethical grounds but on partisan political ones. According former CJ Sarath N Silva, "We did this expecting Mahinda Rajapaksa in turn would safeguard the rights of other people but it is not happening today. There are many complaints that it was I who was responsible to bring Rajapaksa into power. I admit it since Mahinda Rajapaksa was freed to become President because of this decision by the Supreme Court…. President Rajapaksa is now able to carry out wrongful acts because of the order we delivered then" (Daily Mirror – 16.10.2012).

So, according to the Sarath Silva of October 2012, Sarath Silva, the CJ, lied with the intent of deceiving the public, when he "strongly criticised the police for initiating an 'informal' investigation based upon newspaper reports" (BBC – 28.9.2005). According to Sarath Silva of October 2012, Sarath Silva, the CJ, acted contrary to law when he ruled that Mahinda Rajapaksa should be paid compensation because the investigation into 'Helping Hambantota' violated his fundamental rights. Worse still, by admitting that the 'Helping Hambantota' ruling was a partisan decision aimed at saving Mahinda Rajapaksa's presidential prospects, Mr. Silva has undermined the credibility of the other judges on that SC bench: Justice NE Dissanayake and Justice Shiranee Thilakawardane.

A CJ who is willing to manipulate and violate the law on demand is what the Rajapaksas want. Such a CJ can help construct a judiciary which will accept all Rajapaksa 'laws' unquestioningly; a judiciary which will equate fidelity to Rajapaksas with law-abidingness and opposition to Rajapaksas with law-breaking; a judiciary which will believe the absurdist productions of the police (and the AG's Department) – such as the museum robbery was the work of a single drug addict; an infantalised judiciary which will become a willing tool of Rajapaksa Rule.

Barring a serious threat of a Commonwealth boycott, the impeachment will rampage ahead (the Siblings only pretend to venerate the Mahanayake Theros). Clearly the Rajapaksas think that the sooner they can oust this CJ and replace her with a total stooge, the better it will be for them. In the months ahead, they can conjure a return to normalcy, so that when the time for the Commonwealth Summit arrives, the impeachment is but a distant memory.

But thanks to the valiant resistance of the CJ and the judiciary, that Rajapaksa plan may not work. The Rajapaksas wanted an easy impeachment victory; that has already been denied to them. The Rajapaksas wanted to depict the impeachment as a legal if not legitimate measure; it has already ceased being either legal or legitimate.

The Rajapaksas can win the impeachment battle only by using brute force, and thereby exposing some of their abhorrent proclivities and dangerous intents. Next week, the Rajapaksas are likely to declare the impeachment battle won, but that victory will be a pyrrhic one, because of the political damage done to the Siblings and their dynastic project.

The impeachment marks the end of the long moment of Rajapaksa hegemony. The Rajapaksa rule will continue, but devoid of legitimacy and with its democratic façade in tatters.

The road to Nandikdal lies through the jungles of abuse and impunity.

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## Rape Of The Constitution – Murder Of The Supreme Court!

by Elmore Perera

A Supreme Court that has, in Judge Weeramantry's estimation, been "a great pride to the country and has been highly esteemed both Domestically and Internationally" is faced with the threatened ignominy of sudden extinction.

The character of "Braveheart" who dared to retrieve the irretrievable, if not fatal damage caused to the esteem of the Supreme Court, has been effectively assassinated and the assassins duly rewarded with "plum patronage appointments".

The politicisation of the Judiciary that commenced with the Republican Constitution of 1972 and continued under the 1978 Constitution was arrested and reversed by Chief Justice Samarakoon, an "outsider" who was able to command the respect of the entire judiciary by his firm but fair actions carried out unobtrusively. When the Executive found that the Judiciary was keeping the Executive within their legally defined boundaries and was a hindrance to their brazen manipulations, it sought the

connivance of the servile legislature to impeach the Chief Justice. This move was thwarted by a few MPs who had the courage of their convictions and took a stand for Justice and fairplay.

With the retirement of this "outsider" the Judiciary was deprived of strong leadership and "patronage appointments" to the Judiciary resumed. The commitment and resolve to resist extraneous considerations steadily weakened and corrupt practices proliferated due to weak leadership and overt patronage from the powerful Executive. The process of Court was increasingly abused by seemingly lawful acts of sections of the Bench and Bar. Had Raja Wanasundera J and Mark Fernando J been duly appointed Chief Justice, this slide would have been arrested and reversed. But the Executive ensured the subservience of the Judiciary by making patronage appointments at will.

The end of the 20th Century saw the "fast-tracking" of blatant overt corruption in the Judiciary with the patronage appointment of Sarath N. Silva as Chief Justice. His exploits as Chief Justice are too well known by the Sovereign People of this Country, to need any recounting. He escaped certain impeachment by appealing to his political guardian (the President) to prorogue and then dissolve Parliament. Having successfully politicised the Official Bar as Attorney General, he made startling headway in politicising the Private Bar and even the Judiciary. He outsmarted J.R.Jayawardena by mis-interpreting the relevant Constitutional provisions to permit Opposition MPs to crossover to the Government at will, without losing their seats in Parliament. He revelled in issuing permits for sand-mining, directing the UGC to admit under-qualified candidates to Faculties of their choice, and directing the Judiciary to deliver judgments as desired by him. However, he overreached himself by purporting to decide on the retail price of Petrol. When he had to step down in mid – 2009, the Judiciary was in shambles.

In patent intentional violation of the Constitutional provisions under the 17th Amendment, President Rajapaksa conferred on Asoka Silva J the patronage appointment of Chief Justice. This Chief Justice zealously carried out the dictates of the Executive without reversing any of the myriad unjust and unlawful acts of his predecessor.

Having successfully repealed the 17th Amendment and enacting the 18th Amendment to replace it, there was no Constitutional barrier to prevent the President from making a "patronage appointment" of his choice as Chief Justice. However, this was conferred on the only other "outsider" to be appointed to the Supreme Court after Samarakoon CJ, viz. Bandaranayake J who was, in any event the most senior Supreme Court Justice.

Contrary to the expectations of the President this bravehearted lady CJ set about undoing the extensive damage caused to the Judiciary with the active support of most Judicial Officers, in her typically unobtrusive and gentle, but firm manner. Covert and even overt pressure from the Executive was politely but firmly resisted.

The President was in no mood to let the aura of an all-conquering, all powerful ruler, slip or diminish in any manner. His grandiose vision of omnipotence could not be dimmed. She could not be permitted to be a thorn in his flesh for eleven more years. She had to be impeached, come what way!

If, as Senior Minister Tissa Vitarana believed, Bandaranayake J had truly requested the President to give a "patronage appointment" to her spouse, then all that the President needed to do was to charge her, even belatedly, with sexually harassing him into making this "patronage appointment". There was no need to direct/permit his elder sibling, the Speaker, to get 117 MPs to sign a blank sheet of paper and thereafter fabricate 14 misconceived charges.

The fact that the President has not done so leads to the inevitable conclusion that Tissa Vitharana has surely mis-heard or mis-interpreted what the President had in fact told him. On the contrary Vitharana not only continues to believe this but has also convinced his fellow-professional Vasudeva Nanayakkara to vote with him for the impeachment.

Where does all this manipulation leave us? The Supreme Court, in the exercise of its sole and exclusive jurisdiction to interpret the Constitutional provisions governing the limits of the powers specifically delegated to or conferred upon the legislature by the Sovereign People via. the currently valid Constitution, has unambiguously ruled that the power to decide on the guilt of a Judge can only be conferred by a law and not by Standing Orders of Parliament. The Deputy Speaker, a lawyer himself, declared unequivocally that the mandate given to the PSC by Parliament was strictly limited to investigation and report only, and specifically excluded arriving at any finding of guilt. The necessary implication is that the Speaker's celebrated ruling on the matter was restricted to any proceedings of the PSC in respect of that specific mandate.

The Court of Appeal, in spite of death threats received, quashed the PSC findings on the CJ. The Speaker who had, on 8th December, 2012 already announced in the House that the CJ had been found guilty of 3 Charges refrained from making the much publicised ruling that he was to make on 8th January. The Deputy Speaker, lawyer, in a drastic departure from his confident assertion re the limitation of the mandate given to the PSC, speaking on behalf of the legislature said the impeachment motion has been already placed on the Parliamentary agenda of business scheduled for this week and nobody could reverse it. He also said that there was no need for a ruling by the Speaker as he had already made a ruling re notices to appear in Court.

Disregarding the unambiguous rulings of the Courts, the legislature, relying on the Speaker's interpretation of the Constitution, now plead that they are powerless even to postpone the debate, based on an arbitrary finding of guilt by the PSC, admittedly outside the mandate issued to the PSC. Even if, as claimed by the Deputy Speaker, Standing Orders do not provide for removal of an item placed on the agenda, the

inherent power of Parliament certainly empowers them to save valuable Parliamentary time, by avoiding the discussion of a nullity. Taking a vote and purporting to confer validity to a finding already quashed by the Courts will be tantamount to a total breakdown of Law and Order and invalidate any claims to democratic government. Sri Lanka is on the brink of disaster! The only option available to a Statesman confronted with a situation such as this, is to somehow avoid such a catastrophe, by respecting the Court Orders and suspending further proceedings on the impeachment until a lawful procedure is put in place. The President can, if he wants to, act like a Statesman, or turn a blind eye, and continue to assert that "The Supreme Court had no right to go against the legislature" in accordance with his own interpretation of the Constitution, whilst at the same time reiterating his respect for the independence of the Judiciary as a Senior Attorney-at-Law. The choice between serenity and certain turmoil is now in his hands. The ensuing few hours will determine the future of our blessed motherland.

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## Scheduled Impeachment Debate Is Not Constitutional

**by Laksiri Fernando**

With the quashing of the Parliamentary Select Committee (PSC) 'Report, findings and decisions' by the Court of Appeal, the highest judicial authority in the country on this matter, the impeachment procedure so far conducted by the ruling Rajapaksa regime has come to a dead end. If they try to bypass or jump over this ruling and conduct the impeachment debate based on the quashed PSC report it would be highly controversial, morally repugnant and contrary to the letter and spirit of the Constitution.

It is not only a ruling by the Court of Appeal. The Supreme Court previously determined that Standing Order78A is not law and contravenes Article 107 (3) and several other provisions in the constitution which governs and should govern any impeachment procedure against a judge in the Supreme Court or the Court of Appeal.

Missing Component

What is terribly missing in the impeachment procedure in Sri Lanka is an 'independent judicial component' where any charge against a judge could be investigated before debating an impeachment motion in Parliament. There is a judicial component in the impeachment procedure for the President, but not for the Chief Justice or any other judge.

Therefore, if the ruling Rajapaksa regime stubbornly goes ahead with their scheduled impeachment debate on 10-11 January, it would not be a proper procedure and not even a proper Parliament, but a mock one like their Kangaroo Court of the PSC. Both the moral and the legal legitimacy of such a debate would be at the lowest ebb. Any sensible President who wishes to respect the rule of law and the constitution of the country cannot consider a resolution based on such a debate a valid 'Address of Parliament' to remove the Chief Justice.

It is not merely a question of the weak nature of the charges levelled against the Chief Justice on which the President has already expressed his opinion at the meeting of the Institute of Chartered Accountants some weeks ago, but the flawed procedure followed by the PSC now quashed by the Court of Appeal. There was a clear admission by the President that the 'charges were weak' and it is the nature of the Sri Lankan culture to 'hammer a person when the person is at the receiving end' and his 'conscience was pricked' for one or the other reason. Whether those utterances were genuine or not is completely a different matter. In view of the all above there are two options left for the government.

First, if the Rajapaksa regime is serious about the alleged 'misbehaviour' of the Chief Justice and genuinely believes that there is still a prima facie case against this highest officer in the entire judiciary then what it should do is to take the rulings of the Supreme Court and the Court of Appeal seriously and bring proper legislation to create an independent judicial procedure under Article 107 of the constitution to impeach the Chief Justice by abrogating the now much maligned Standing Order 78A.

Second, if the Rajapaksa regime frankly admits, as the President has hinted in his above mentioned speech, that the charges are frivolous and that he may have to appoint 'another independent committee' to look into the matter, then in view of the judicial determinations, what they have to do is to honourably withdraw the impeachment proposal in Parliament without complicating the constitutional and political matters in the country. There is no point in appointing another committee to look into the matter.

Flawed Procedure

It is more than ironic and an obvious indictment on the impeachment procedure in Sri Lanka that the highest officer in the judiciary, the Chief Justice, had to plead before the Court of Appeal that she was 'not given a fair hearing' by the PSC based on 'natural justice' and to point out that the 'root cause' behind the whole debacle

perhaps is the unconstitutional procedure followed on the basis of the 'mere standing order' without proper law and legislation on the matter.

It should be noted that she never questioned before the Court of Appeal the impeachment proposal before Parliament initially signed by 117 members and this means that the right to bring an impeachment proposal in Parliament is not at all a dispute in her view. Those MPs were not respondents in her application. What was at dispute was the procedure followed without a constitutionally sanctioned law governing the procedure ensuring a fair trial for any judge who would be accused now or in the future.

The Deputy Speaker, Chandima Weerakkody, has given an interview to the Daily Mirror (6 January 2013) in which he has interestingly stated that the task of the PSC was to make a report on the impeachment charges but not to find the Chief Justice guilty or innocent! This has contradicted what the PSC Chairman, Anura Priyadarshana Yapa, stated to the media after the conclusion of the PSC proceedings that they investigated five charges and the Chief Justice was proved guilty for three charges. It appears that the regime is now changing the position in view of the court determinations and they are making the law and the constitution of the country a mere mockery in the eyes of the public and the international community by resorting again and again to untenable arguments.

The whole debacle started because of some of the megalomaniacs in the legislature probably on the advice of the executive President, first were not happy with the recent independent decisions of the Supreme Court (i.e. Divineguma Bill) and then thought perhaps they should also exercise judicial powers or should usurp them from the judiciary for the conveniences of their arbitrary rule of the country. A crude form of this argument was repeatedly expressed by MP Wimal Weerawansa claiming that the 'judiciary is subordinate' to the legislature and it is only an 'instrument of the legislature.' It is the same argument in slightly a sophisticated form that Weerakkody has attempted to advocate.

New Argument

First he rejected any 'judicial review' of the impeachment process based on a ruling by the Speaker, Chamal Rajapaksa. He argued that "as per Article 4 (c) (i) the jurisdiction regarding the powers of Parliament is not delegated to the judiciary to exercise. The Parliament directly exercises the jurisdiction regarding the powers of Parliament." What he conveniently forgot to mention is that the impeachment is not solely a power of Parliament. It is and should be a combined effort of the Parliament, a judicial tribunal and the executive. The task of the Parliament is to properly legislate for its procedure following the democratic norms without relying merely on untenable standing orders.

Then he denied even the very clear constitutional position that it is only the Supreme Court which has the sole authority in interpreting the constitution if there is any

dispute. Therefore, his or the Speaker's interpretation of Article 4 (c) (i) is not the valid interpretation. He said the following quite alarmingly and factually contradicting even the impeachment provisions in the constitution under Article 107.

"In the instance of the power to removal of the judges, the word used is the removal of the judges of the Supreme Court and the Court of Appeal, is a power entrusted on the Parliament by Article 107. Article 107 (3) is very clear that it is the Parliament that should conduct these proceedings by law or by standing orders as per the provisions of the constitution."

It should be mentioned that the removal of the judges according to Article 107 is not vested in Parliament. It is factually incorrect. It is vested in the President on the basis of an Address by Parliament after the procedure of an impeachment investigation. In his second sentence he has disputed not only the ruling by the Supreme Court but also given his own interpretation in essence usurping the powers of the Supreme Court to the Parliament.

Mere Lunacy

It may be possible that the mere lunacy of the present ruling regime might want to consider the sessions scheduled for the impeachment motion on 10 and 11 January what they claim as an 'exercise of the judicial power of Parliament' in respect of the impeachment motion against the Chief Justice.

If the PSC has not found the Chief Justice guilty on any of the charges according to the Deputy Speaker then who is going to find her guilty or not?

Obviously it would be the Parliament itself. They even might find the Chief Justice guilty of all the 14 charges instead of the three that the PSC has declared to be proved. This is quite possible given the recent most salvos by the President against the Supreme Court saying that the 'SC has no right to go against the legislature' at the Swarna Purawara award ceremony yesterday. Going against the legislature is not the point but ruling on constitutional interpretations is the right and the obligation of the Supreme Court under the country's constitution. If the Supreme Court cannot perform that function without the interference or threats of the executive what is the point in talking about independence of the judiciary as the President has uttered?

It is unfortunate that the President as the appointing and the removing authority of the highest officers of the judiciary has himself got embroiled in the impeachment saga of the Chief Justice expressing his biases and partiality blatantly. This is a conflict of interest at the highest order. He is expressing his pre-judgements even before the impeachment proceedings are over. This merely shows that the impeachment against the Chief Justice is not a matter of 'misconduct' but a matter of 'independence.'

There had been several transgressions of constitutional provisions and constitutional rights of citizens in recent times by the ruling regime. The frivolous and unconstitutional impeachment effort against the Chief Justice is not the only issue. The disregard of the constitutional rulings by the Supreme Court and the Court of Appeal, the denial of the Supreme Court's power to interpret the constitution and making their own arbitrary interpretations and going ahead with the scheduled debate on the impeachment tomorrow are some of the others.

It is in this context that it might be appropriate for the Leader of the Opposition to ask for a clear clarification from the Speaker on the scope and the intentions of tomorrow's debate before participating in anything unconstitutional in the eyes of the discerning public and the international community. What is at stake is not only the independence of the judiciary but the whole constitutionality and rule of law of the system of governance in the country. If a joint opposition of all parties fail to safeguard the constitutionalism and rule of law in the country or at least mark a strong opposition to the cause of action that the government is going to unleash it is going to be a quick slippery slope for open authoritarianism and even dictatorial rule. All the checks and balances existing today at least partially will be destroyed totally very soon.

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## The Idea Of Parliamentary Supremacy Is As Much Colonial As It Is Obsolete

**by CPA**

The Centre for Policy Alternatives (CPA) welcomes the judgment of the Court of Appeal quashing the decision of the majority of members of the Select Committee of Parliament delivered on 7th January 2011, and the determination of the Supreme Court issued last week in respect of the question of constitutional interpretation referred to it by the Court of Appeal. The determination of the Supreme Court held that the investigation and proof of charges brought against a judge in an impeachment motion must be exercised by a body established by an Act of Parliament, and not by one established by Standing Orders of Parliament. The Court further held that matters concerning the mode of proof, burden of proof and standard of proof relating to the charges in an impeachment motion must also be specified by legislation.

The Court's robust defence of the "immutable Republican principle of the independence of the judiciary," and its reiteration of the fundamental importance of the rule of law underpin its interpretive arguments. For this reason, the determination represents an important precedent for the supremacy of constitutional values over claims of parliamentary immunity. Moreover, by asserting the jurisdiction to review the legality of Standing Orders that affect the rights of citizens, the determination decisively rejects the notion that Parliament is supreme. The idea of parliamentary supremacy is as much colonial – being a feature of English constitutional law – as it is obsolete. The Court's determination, which emphasizes the sovereignty of the people and the supremacy of the constitution, is an important judicial reminder that the plausibility of constitutional arguments must be judged by reference to first principles of constitutionalism, and not inappropriate invocations of unconstitutional values and outdated doctrines.

Of more immediate relevance, given that questions over the legality of the impeachment process against the Chief Justice have now been settled definitively by the Supreme Court and Court of Appeal, it is imperative that all parties concerned comply with the law. Failure to do so will not only be in open contempt of court, but will also precipitate a dangerous constitutional crisis that the country can ill afford. In this respect, we are deeply concerned that the government has taken steps to hold a debate on the Resolution against the Chief Justice. We express our sincere hope that the rule of law will prevail, and that judicial determinations will be fully complied with.

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## Has The Deputy Speaker Let The Cat Out Of The Bag?

**by Elmore Perera**

In a comprehensive interview after the Supreme Court determination that the PSC (that found the CJ guilty) was unconstitutional, the Deputy Speaker who is an Attorney-at-Law asserted on 4th January 2013 that "the government does not wish to see the country descend to anarchy". He defended the PSC process by stating that "the PSC was only mandated to investigate and report" and "it was not mandated to make a "finding of guilt". This is tantamount to an assertion that the purported finding of guilt in respect of three charges, arrived at by the PSC, is outside the mandate given to the PSC by Parliament, and therefore ab initio void. The irresistible presumption is that all advice tendered by him to the Speaker, the Chairman and Members of the PSC and anyone else who thought it fit to seek his opinion on this matter, prior to the aforementioned determination of the Supreme Court, would have been consistent with that unambiguous view of his.

That was indeed the mandate given to the PSC chaired by R. Premadasa and including Ranil Wickremasinghe, appointed on 4th April 1984 in terms of Standing Order 94 to investigate and report regarding allegations against Chief Justice Samarakoon. That PSC conducted an ex-parte investigation for more than four months and submitted their report on 9th August 1984 recommending that appropriate action be taken.

In terms of Standing Order 78A which had been hurriedly adopted in Parliament on 4th April 1984, a PSC with Lalith Athulathmudali as Chairman was appointed, also to inquire into and report to Parliament on the allegations referred to in a Resolution of 57 MPs placed on the Order paper of Parliament on 5th September 1984.

Chief Justice Samarakoon had refused to recognise the right of the earlier PSC to question him. He was, in any event, due to retire shortly thereafter on reaching the age of mandatory retirement on 21st October. He asserted that the action taken by the PSC was not in accordance with the Constitution and he had to protest at the very outset against the PSC proceeding with the inquiry as he did not want to be a party to the erosion of the independence of the Judiciary of which he was the Head. The six Government members of the PSC reported that the standard of proof required is very high and that they cannot come to the conclusion that the CJ was guilty of proved misbehaviour. The three opposition members, viz. Anura Bandaranaike, Dinesh Gunawardena and Sarath Muttetuwegama reported that "in seeking through this PSC to act under the provisions of Standing Order 78A, the Constitution of Sri Lanka was in fact being violated", urged the President to refer this matter to the Supreme Court for an authoritative decision and recommended amendment of Standing Order 78A along the lines of the Indian provisions where the process of inquiry which preceded the resolution for the removal of a Supreme Court Judge should be conducted by Judges chosen by the Speaker from a panel appointed for this purpose.

That limited mandate to inquire and report was presumably the only mandate given to the PSC that Speaker Anura Bandaranaike appointed on receipt of the resolution to impeach Sarath N. Silva Chief Justice in 2001, and therefore could not be restricted by the Supreme Court. It was because Sarath N. Silva could not accept any other's right to investigate what he considered to be his "squeaky clean" activities that, without making any attempt to have Standing Order 78A invalidated or amended, he prevailed on the President (who had appointed him as Chief Justice in spite of wide ranging protests) to prorogue and then dissolve Parliament exercising the powers vested in her by the same Constitution, as that was the only possible means of his escaping impeachment. Not surprisingly, the said Sarath N. Silva is now pontificating on the virtues of Standing Order 78A.

On 31st December 2012, Cabinet Minister and member of the PSC Susil Premajayantha, also an Attorney-at-Law, stated that "the impeachment inquiry is not a legal probe but a legislative process and therefore proving of charges is not necessary".

On 2nd January 2013 Leader of the House, Minister and member of the PSC, Nimal Siripala de Silva, Attorney-at-Law stated that the government was not worried about criticism by the International Community and would not, under any circumstances reverse the impeachment process.

On 3rd January 2013 the Supreme Court determination that "the PSC has no legal power or authority to find a judge guilty, as Standing Order 78A is not law," was announced in the Court of Appeal.

On 4th January 2013 as aforementioned, the Deputy Speaker stated what he honestly believed were the limits of the mandate given to the Parliamentary Select Committee.

Even as the Court of Appeal is considering submissions in the Court of Appeal for the issue of a Writ quashing the purported findings of guilt made by the PSC, the Party Leaders have met this (7th January 2013) morning, at the Parliamentary Leaders meeting. On being informed by the Speaker that the relevant Supreme Court determination was not recognised by Parliament, the representatives of all opposition parties walked out of the meeting. The Deputy Speaker, in a vain attempt to put the cat back into the bag, had stated that the government representatives and the Speaker have decided to debate the PSC report on the 10th and 11th of January and take a vote at 6.30 p.m. on the 11th.

The obstinacy displayed by the Government will inevitably translate into anarchy in the event that the Court of Appeal quashes the "findings" of the PSC and the Government insists on having its own way in this matter. We are, indeed, living in momentous, if not disastrous times. The clock keeps ticking.

Will sanity prevail? Or, will we have to moan, "Oh Justice, thou art fled to brutish beasts and men have lost their reason."

Quo vadis, Mother Lanka?

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## Rules To Prevent Judicial And Other Abuses

**by Rajiva Wijesinha**

Given the plethora of worries about the financial integrity of the Chief Justice, it may seem redundant to demand higher standards also from the Select Committee looking into her case. But the Select Committee itself provided the principal reason for circumspection when it declared that 'The office of the Chief Justice is a position which demands maximum confidence of the public. A moral conduct of an exceptional degree is expected from a Chief Justice unlike from an average citizen. Your Committee observes that any discredit to such conduct leads to a decrease in the confidence of the public towards a holder of such office'.

That being the case, it must be obvious that Parliament, which is, or should be, an even more exalted entity, must also have the confidence of the public. It must therefore be even more careful not to seem to be biased in its conduct or hasty in its decisions.

Given that the misdemanours the Chief Justice is alleged to have committed would, if proved, constitute criminal conduct, they must be investigated in accordance with criminal procedures. This includes presenting evidence systematically and allowing adequate opportunities for it to be challenged. If that is not done, and clearly seen to be done, public confidence in Parliament would be eroded.

Unfortunately the Standing Orders governing impeachment do not come up to the expected standard. This is obvious from the many cases cited to justify the procedure since, in other countries where Parliament acts judicially, there are several safeguards which do not exist in our system. In particular that function is entrusted to a second chamber, where members are more clearly independent individuals than lower house members who – even without our preposterous election system – are more inclined to divide on party lines.

It is also important to ensure formal procedures comparable with what happens in the Courts. Mutual respect should characterize proceedings, and this is facilitated by allowing them to be public. The request of the defence that this be permitted should not have been summarily dismissed, on the grounds that the Standing Orders forbade this, since Standing Orders are not sacrosanct, unlike the Constitution, and may be waived when those involved agree.

Comparison with what happened in the Philippines, the most recent instance of a Chief Justice being impeached, makes it clear that what amounts to a judicial process was followed there. The first statement of the Liberal Party on this subject drew attention to that case, and our second statement suggested that our Standing Orders should be amended. Alternatively, we suggested the Select Committee could have a Sub-Committee consisting of former judges of the Supreme Court to assist it.

Unfortunately the Select Committee not only decided to proceed on its own, but dismissed all objections raised and requests made. Some of these may have seemed unreasonable, and the dissent of opposition members should not be taken as proving prejudice on the part of government members, given the oppositional nature of Sri Lankan politics. However a fair minded observer would wonder about allowing only a week for the statement of defence when six weeks had been requested. Even more startling is the fact that the defence was asked to commence 'to disprove' two charges one day after the documents relevant to those charges had been handed to them.

While the Chief Justice should not have walked out of the Committee, the claims made with regard to the language used suggest some doubt as to whether the assertion that she would not get a fair trial was unreasonable. Certainly the Committee should not have dismissed summarily the contention of opposition members that a written submission they made should be considered and the Chief Justice requested to appear before the Committee again.

However the opposition members should not have walked out, and I cannot stress enough the irresponsibility of opposition politics in Sri Lanka, in expressing through sulking what should be clearly stated and recorded. In 1981 the SLFP opposition was not present to vote when the UNP government passed a vote of No Confidence in the Leader of the Opposition, Mr Amirthalingam, and it was only Mr Thondaman and Shelton Ranaraja who stood against the overwhelming tide of their government colleagues and abstained. So too the manner in which the current opposition has made a nonsense of the 18thAmendment by not expressing their views on appointments such as that of the Chief Justice indicates a childishness that makes one despair. Had the opposition for instance expressed and put on paper its opposition to the appointment of Shirani Bandaranayaka as Chief Justice, the President would have found it embarrassing to have appointed her, and even more embarrassing to have encouraged impeachment when he had ignored advice offered on a constitutional basis.

But, as noted, our incapacity on all sides to use the procedures we have is what encourages contempt for procedural norms. Thus, where they do not exist, we do not even understand what problems we create for ourselves.

*Courtesy: The Colombo Telegraph*

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## Impeachment Of The First Woman CJ And Beginning Of The Spring In Sri Lanka?

by Jude Fernando

*"Natural justice is a pledge of reciprocal benefit, to prevent one man from harming or being harmed by another."* ***Epicurus***

The iniquitous ex parte guilty verdict of Sri Lanka's first female chief justice—which according to the Parliamentarian Vijitha Herath is an order from above—is not primarily about her alleged misconduct. Rather, it is about the Sri Lankan justice system's struggle to maintain its ability to deliver natural justice independently and against the constraints of country's Constitution, which has been evolving since British Colonial period, and also against the legislature which uses any means necessary to subordinate the Judiciary to its own particular interests, thereby denying the scope within which the Judiciary can deliver natural justice.

Impeachment is not a random blunder, but a survival strategy (a structural necessity) of a regime that derives its legitimacy and security from the forces of capitalism, ethno nationalism, executive presidency, militarism and nepotism, all of which are interconnected and some of which derive their legitimacy from (or unintended offsprings of) the Constitution. Relaxing any of these, forces, means collapse of the others and begs significant constitutional changes. To maintain the status quo, the State has effectively asserted itself as the interpreter of the Constitution. It has appropriated the functions of the judiciary, and consequently, it has done away with one of the few remaining institutions that safeguards the country's democracy and prevents a slide into despotism and lawlessness.

The protests against the impeachment are evidence that concerned people around the country, including some intellectuals who are ardent supporters of the state, are overcoming the 'culture of fear' and demanding that natural justice be upheld. Perhaps, we are witnessing the end of the long winter of discontent and a beginning of spring in Sri Lanka. Any compromise with the government — other than annulling the Parliamentary Select Committee report, holding the State accountable for its misconduct and allowing the courts to determine the best course of actions for the allegations against the CJ — would miss this historical opportunity to restore democracy and would provide further legitimacy to the very forces that brought the crisis.

This three-part series takes a broad look at the tensions between the judiciary and the legislature to make the argument that at this moment in Sri Lanka, protecting the independence of the judiciary is of utmost importance because the tyranny of the legislature is a greater obstacle to natural justice than the alleged misconduct of the CJ. Part I will draw on the findings of numerous legal scholars to outline typical methods used to interpret the Constitution while defending the argument that judges are better suited than elected officials for this task. Part II will be an account of how the Constitution and its reforms since the British colonial period limits the ability of the judiciary to deliver natural justice, particularly because of the Constitution's affinity with capitalism, ethnoreligous nationalism, executive presidency, and national security. Part III will outline a more concrete account of why the government lacks the legal and moral authority to impeach and that, therefore, the Parliamentary Select Committee Report must be declared a mistrial and those responsible for it must be held accountable.

Part I: Judges, not the politicians, should interpret the constitution

"[E]very act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid." — Alexander Hamilton

Interpretation Constitution is the sole responsibility of the Judiciary, which means that the Constitutional authority of the legislature to impeach a judge must originate with the Judiciary: Thus, this responsibility of interpreting the law must not be removed from the Judiciary under any circumstances, and it absolutely should not be placed in the hands of elected officials.

Interpreting the Constitution is a delicate exercise, because according to legal scholars, in all constitutions there exist "core uncertainties" and "penumbra of doubts," also known as the "fringes of vagueness" and "areas of open texture. The rationale, logic and structure behind all laws are determined by the widely-held values and power structures within a society. Laws are not value-free; laws are political and are a collection of beliefs and prejudices that legitimize the injustices of society. Perhaps the best way to understand this delicate is to explore the limitations of three interpretive frames that we find in legal literature: doctrinal, historical and responsive.

According to Robert C. Post of Yale Law School:

If doctrinal interpretation rests on the equation of constitutional authority with law, actual text of the Constitution is remitted to one end of a growing line of precedents. What I shall call 'historical interpretation' rests instead on the equation of constitutional authority with consent. If Doctrinal interpretation portrays courts as merely the instruments of the law, if historical interpretation portrays courts as merely the instruments of an original democratic will, responsive interpretation portrays courts instead as arbiters of the fundamental character and objectives of the nation. In responsive interpretation, judges determine the meaning of the Constitution in reference to the society's current ethos, or morality, from the perspective of natural justice.

If the courts use a purely doctrinal approach, courts may become merely the instruments of the law and subject to the values of the law, which may not be universally shared and which will not adapt to the times. If the Constitution is the law, the courts are constrained by the values of the law, which makes it impossible to reconcile the values and intentions of the authors of those laws with those of the present. Robert Post argues that the doctrinal interpretation rests on an unacceptable notion of the Constitution that applies not the words of the document, but legal rules that judges have subsequently created. The underlying assumption is that "rules elucidate the meaning of the text." Yet the outcomes of doctrinal interpretation are shaped by the values underlying the hermeneutics of the interpreters.

Treating the Constitution as an objective document dissociates an issue—and its subsequent legislation— from its own historical context and intent. When doctrinal interpretation upholds the sanctity of private property and generalized market exchange in a capitalist society, it is safeguarding the very institutions that are responsible for existing economic and social inequalities. Political dissent against

inequality is then treated as a "law and order problem". Thus, a doctrinal interpretation legitimizes the State's suppression of dissent and criminalizes any force used by the dissenters. Despite this reality, one cannot discount the potential for natural justice by doctrinal interpretation by an independent judiciary.

A constitution is a historical document and it can neither be abandoned nor can it morph 'instantly' to satisfy society's needs of the present and future. At the same time, the past is not the present; the past cannot be allowed to maintain an unthinking tyranny over how natural justice is served in the present.

A constitution is a political compromise among the elites and it tends to be drafted without the participation of the public. This makes it difficult to discern the individual and collective intentions of these elites. Even the United States Constitution was drafted in closed sessions where its authors swore a lifelong oath of secrecy. George Washington famously disposed of any evidence of the Founding Fathers' deliberations. James Madison's notes revealed that the U.S. Constitution was a compromise between merchants, ship owners, planters, and slave owners. These compromises define the limits of the Constitution to deliver natural justice, particularly in situations where the social forces they unleashed are responsible for ensuing injustices. A constitution evolves over time and undergoes changes as a result of the tension between compromise and natural justice.

The historical approach runs the risk of making courts merely the instruments of those who drafted the laws, thereby rendering these laws irrelevant. Attempting to discern the original intent of the Constitution is problematic because it presupposes that the interpreters, as Kenneth Thomas notes, "would be comfortable utilizing historical documents contemporaneous with the drafting and ratification of the Constitution to help inform Constitution doctrine." One would expect such informed interpretation of the Constitution in countries where there is research-oriented legal scholarship and where historical influences are subject to legal scrutiny, particularly when a country's history itself is at the root of the issues in question. Even if one is aware of the historical context of a legal document, he or she may not know whether the authors intended a fixed meaning over time. Hence, the passage of time could make any interpretation vulnerable to the "preexisting rules of controlling precedents."

The historical approach also rests on the assumption that current national ethos identifies with the drafters and ratifiers of the Constitution. But in situations where the Constitution is a product of "only discrete individual preferences," and where the nation does not have any national ethos, the consent of those long dead should not hold any particular authority for the present generation, notes Robert Post.

The historical approach legitimizes the Constitution's responsibility to protect a country's sovereignty. When the sovereignty is contested by groups within the country who feels that it denied them of equal rights and privileges, then the sovereignty becomes a source of denial of natural justice. In such situations, demand

for nationhood based on natural justice automatically becomes a violation of the Constitution.

Elected officials' claim that they are protecting the sovereignty of the nation based on historical interpretations of the Constitution may be superficial and misleading when they use such claims to concentrates power in the hands of a few which result in undermine economic and political sovereignty. Historical interpretations provide less room for judges to maneuver interpretations if they are bound by the intentions of its original framers. This becomes an issue they such intentions in the past are used as a way of legitimizing the inequalities in the present. The framers and ratifiers of Constitutions may not fore see the destructiveness of the social forces that Constitutions could generate.

Over time, the society may recognize that the original intentions and interpretive frameworks have caused an injustice upon which political power rests. In such circumstances, historical interpretations that attempt to remain truthful to the original intentions of the Constitution may obstruct natural justice and appropriate constitutional changes to address injustices. This is an issue in constitutions that are racially, religiously, and ethnically exclusive, when exclusivity is a violation of natural justice. Those oblivious to this history simply subscribe to the myth that the Constitution was crafted through divine intervention in the same way that God wrote the Ten Commandments on the tablets.

The framers of the Constitution are seen as having risen above partisan interests to safeguard national interests, and are elevated to the status of patriots and founding fathers of the nation. As time passes, though, differences and conflict among the framers could easily 'disappear' or become 'marginalized' in the interpretation. The Constitution increasingly gets treated as an objective document in which justice is not what is equal and fair but what is legal. This tends to become the "technical wrangling of lawyers and Judges," argues Bertell Ollman. Yet in this wrangling, the discovery of the meaning of the objective intent continues to be a matter of subjective interpretation. The power that wins given interpretation in a court of law does not necessarily reside within the technicalities or competence of the lawyers and judges, but in the larger political economy and popular culture.

Yet historical interpretation should be dismissed. Rather, constitutional interpretation requires an attempt to discover its original meaning and the principles that underlie the text, but how they should be applied cannot be expected to be obvious in the original meaning. The text of a constitution does not necessary change with an amendment, but its interpretation and application change when people become aware of the injustices that stem from or are encouraged by its original meaning.

In responsive interpretation, judges become arbiters of the fundamental character and objectives of the nation. As Philippe None and Philip Selznick put it, law submits to "the sovereignty of purpose" by functioning "as a facilitator of response

to social needs and aspirations." As United States Justice Oliver Wendell Holmes notes, the Constitution is far from being a single coherent document that suggests the consent of all. Instead, "it continues to inhere in the national being that the Constitution has called into life." The guidelines and authority for interpretation need to be "derived from neither rules laid down in judicial precedents or the original intention of the framers. Rules and authority for interpretation flow from the whole experience of nationhood." In situations where the evolution of nationhood is responsible for inequalities and injustices, the judicial system becomes the interpreter of nationhood.

The goal of responsive interpretation, according to Robert Post, is to uncover present values, where the "Constitution is understood as having 'called into life a being' that, like any 'organism,' must grow and develop on the basis of its 'experience.'" The danger of denying national ethos (as we find in the doctrinal interpretation) is that "rules will be the preservation of order," and those subject to constitutional rules will necessarily be reduced "to mere objects of the administered life and the constitution becomes a form of "repressive law" that "gives short shrift to the interests of the governed"

At the same time, Post has also pointed out that that it would be "inappropriate for judges to appeal such 'national' ethos as a form of constitutional authority," as it runs the risk of making judges partisan. In fact, "any attempt to interpret the Constitution on the basis of the authority of a national ethos will necessarily degenerate into an unwarranted imposition of private judicial preferences." Furthermore, "if there are only discrete individual preferences, and if the nation does not have any national ethos, there is no reason why the consent of those long dead should hold any particular authority for the present generation." Dissolving the responsive interpretation could potentially lead to dissolution of "the Constitution as a specific written text."

Responsive interpretation becomes compelling when the doctrinal and historical interpretations of the Constitution are in fact root causes of the injustices (under the tyranny of the majority, military, and property-owning class). On the one hand, judges who do not take the national ethos into account will render them incapable of delivering justice and fairness; on the other hand, bending to the national ethos will make the justice system unpredictable and incoherent.

Despite these complexities, the Constitution and its interpretation cannot be separated. The Constitution can only exist with interpretation. Regardless of the constitution or its interpretive framework, the basis for its interpretation should at least be natural justice, defined as follows by Robert Moor:

> We don't have to do anything to earn them, and thus there is equality in their distribution that survives the obvious inequalities that exist between persons with respect to their efforts, their natural endowments, or their social advantages. It is in this sense that natural rights philosophies are egalitarian in character.

Moor's claim is that natural justice is self-evident simply because we humans have basic need for survival and "what we have right to is a matter of principled Generality. "Natural justice is based on the notion that laws and morals are inseparable; hence, judges should be sensitive to how the law advances natural justice. Looking at the Constitution from the perspective of natural justice, the courts appear to be far better suited to interpret the Constitution than elected representatives because they are organized as the most appropriate institutions to achieve equality, generality, and morality.

The courts have more time and flexibility to incorporate doctrinal, historical and responsive interpretations than do politicians. Unlike politicians, judges' interpretations do not necessarily challenge their material and social existence, even if politicians appoint them. In particular, the capacity of the elected officials to deliver natural justice is limited when they are complicit with and directly contribute to the inequalities and injustices arising from a capitalist, ethno-nationalist, patron-clientalist and kinship-based governance. In such situations, even if elected officials resort to direct politicization and harassment of the Judiciary, the Judiciary can better anchor their decisions in natural justice.

According to Robert Moor of the Fordham Law School, the courts are relatively insulated from politics and do not represent the majority's interests. In fact, majoritarianism does not lie at the heart of the courts as it does in the democratic legislature; therefore, courts are not as tempted to slide from majoritarianism to utilitarianism. The courts are used to non-utilitarian forms of reasoning that involve seemingly conflicting norms. In fact, according to Moor "More intense preferences tend to receive more intense political expression by voters, and more intense political expression by voters tends to generate more intense representation by legislators; legislation emerging from such a process will often accord with what 'the most prefer,' i.e., with utilitarianism."

Morality and justice are not congruent with majority preference, and 'such "utilitarianism is incompatible with natural justice." '"If justice, is a virtue of social institutions then formal justice is the virtue of judicial institutions courts," Moor concurs with John Ralws.

For Max Weber, modern societies are a form of legal domination because the exercise of political power is considered intrinsic to the law. This reasoning implies that the law is an exercise of legitimate power because it derives its legitimacy from the formal properties of law. Morality, then, is independent of law, and law has its own intrinsic rationality. However, the original enactments of laws are not independent of the moral worldviews of their authors. In modern states, enactment involves combating corruption and inequality and maintaining human dignity and justice. Enactment is about exercising morality because morality gives the public the right to enact the law. Moral reasoning and argumentation is enacted through the law. If morality is rejected in favor of formal properties or because it undermines the

rational basis of the law, it also provides legitimacy to legal domination enacted by politicians. These reasons make the interpretation based on fusing morality with law a necessity for neutral justice.

Although popular bodies are elected and they express popular will, the policies of seated elected officials may not express popular will. Alternatively, they automatically provide a space for the people to express their will regarding their reforms or the interpretation of constitutions. The elected officials may privilege particularistic interests of the party at the expense of natural justice, primarily because they are simply instruments of (perhaps even blackmailed by) those who control party decision making. As such, they cannot freely express their views.

Moreover, that which appears as popular will may be the private interests manufactured as public interests. Popular will may mask the fact that power is concentrated in the hands of a minority. Elected officials may use such popular will to justify use of abstract clauses of the Constitution to prevent judicial oversight of the affairs of the legislature.

Even if popular will expresses the will of the majority, the will of the majority may be the root cause of the denial of natural justice to minorities. Demand for justice by disenfranchised minority groups may be considered as a violation of the constitution, when constitution is an expression of majority interests. The point is not to entirely dismiss popular will, but to assess its proximity to natural justice within the prevailing context of the political economy and culture.

The executive president can appear neutral by using immunity to distance him/herself from the particular interpretation of the Constitution and its resulting consequences. In Sri Lanka, the president represents a particular political party, and therefore, heads important bodies of decision making and intervenes in the matters concerning law and order. The executive President is a de facto elected official and he should not be precluded from judicial review if the president irresponsibly uses immunity to obstruct natural justice.

Moor goes on to argue that unlike the judges legislature need not justify the vote they get or return to the voters seeking justification of their decisions nor his job is to find "where truth of the matter lies, " which makes job accepted by many legislators is less compatible with the reasoned justification needed to protect natural rights." Because the legislature is a place for businesslike compromises "they capture the popular imagination less than courts, and have as a result less capacity to educate a citizenry in the long run about the moral rights of people." Unlike legislature courts are not agencies of compromise and thus have less need of the kind of common metric offered by monistic theories like utilitarianism."

The Constitution controls the actions of the legislature because it is the highest law. As Melvin Aron Eisenberg notes, because the "courts are the mere instruments of the law," they are peculiarly fitted to interpret a Constitution, the authority of which lies

in its character as law. If the Constitution predominates because it is law, then its interpretation must be constrained by the values of the rule of law. (Osborne v. Bank of the United States, 1824) The courts must construe it through a process of reasoning that is replicable, remains fairly stable and is consistently applied. However, when the values of the rule of law undermine justice, judges' interpretation of the laws—according to natural justice—becomes necessary. The purpose of the interpretation here should create conditions for a minimalist sense of "the good society."

Judiciary rather than the elected officials are better positioned to interpret the constitution by supposing the coherence of the Constitution as a whole, and then asking whether the norm or norms are applicable to the case in question or fit closely with the majority of related norms. If the norms are unclear, the court will have to choose or devise a norm that is consistent with the whole. The court alone has the right to choose or formulate norms by deliberating conflicting positions and determining whether the choice is consistent with the whole system.

The Constitution itself is about power relations as it disciplines the society to function in a certain way. A common challenge to all three forms of constitutional interpretation is the power in the society, as power could be both positive and negative. Interpretations and their translation into action are exercise of power. Moreover, exercise of power can evade the intentions of the interpreters and produce unintended consequences. The purpose of Judiciary in a democratic society is to minimize the abuse of power. In this regard, the judiciary compared to legislature is better positioned to analyze power maintain greater distance from the place where power resides and put into action, and its interpretations is less likely to threaten its existence of judiciary as an institution.

Elected officials are expected act in "good faith" regarding judges' decisions. This does not mean that judges in infallible not vulnerable to same forces that corrupt the elected officials hence should not be held accountable. In fact, a tyrannical Judiciary could be worse than a tyrannical majority. Elected officials, though not supreme has the legitimate right to ensure the ethical conduct and competencies of the judges and they must ensure that judges are responsive to concerns of the citizens at given moment in time…

This does not necessarily mean that elected officials have the authority to impeach judges when even the Constitution permits them to do so. Authority is not the same as right, and authority needs to be granted by the Judiciary. Elected officials make the decision to impeach based on majority vote. Majority vote is a brokered power relation which may or may in accordance of the law and natural justice. This is particularly true in situations where the decision making in the legislature is tampered with bribery, nepotism, authoritianism and militarism, all of which is used to mobilize tyranny of legislative majority, and there is widespread public dissent against it. Judiciary on the other hand is less susceptible to these because in ideal

settings their interpretation of the constitution is derived from rules of natural justice.

The Judiciary has the sole power to declare that a particular act does not constitute a high crime, an ethics violation, or a misdemeanor worthy of impeachment. The Court determines if Parliament follows the due process and has exceeded its power in removing a public official. Any doubts concerning impeachment need to be resolved by judges, ideally in favor of the independence of the judiciary. Otherwise, the independence of the judicial system could be tampered with, allowing elected officials to use impeachment as a means to crush political adversaries or remove them from public office. Nothing could be more destructive to natural justice and democracy.

*Courtesy: The Colombo Telegraph*

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## "Impeachment, A Perfect Blunder – 2"

by Dayan Jayatilleka

Special interview for mirror.lk with Dayan Jayatilleka.

His first interview, given to Harasha Gunewardene, since completing his assignment as Ambassador to France. We publish below the full interview;

Your thoughts on the Impeachment crisis?

Having spoken in support of President Rajapaksa in his re-election campaign in December 2009 – which I do not regret for a moment – I criticized the detention of Gen Sarath Fonseka, in an article in the Daily Mirror and The Island published on Feb 15th 2010, under the title 'A Perfect Blunder', in which I listed ten reasons for characterizing it as such. I would call the impeachment motion and the manner of its implementation 'A Perfect Blunder – 2'.

All religions preach that one should do unto others as you would have them do unto you and that one should not do unto others as you would not wish them to do unto you. It is on this basis that Immanuel Kant put forward his dictum of the Categorical Imperative, which means that one should take action only if one wishes those actions to be raised to the level of a universal practice. Therefore, those who rightly decry unfairness in the accusations and indictments of the Sri Lankan authorities by international bodies must not be so hypocritical as to practice blatant unfairness in domestic processes.

I view this impeachment as a diplomat, or more accurately an ex-diplomat, a political scientist, and as a citizen. I am appalled that in a context in which we are scheduled to host the Commonwealth summit and are subject to a growing campaign of hostility by the anti-Sri Lanka movement in the UK, the government has made this country a larger target and has made the task of these lobbyists easier by embarking on this impeachment motion in this crude fashion. I am aghast that we have undermined our own argument that the TNA should enter the PSC, and reinforced the TNA's argument as to why it is reluctant to do so, by permitting a PSC to treat the Chief Justice in the manner that it has!

As a political scientist I am appalled that alongside and behind this impeachment motion there is a claim that the legislature does not have to adhere or respond to the strictures of the judiciary. While it is indeed the legislature that draws up laws, it is none but the judiciary that can decide on the legality and constitutionality of such laws. Just as we go to a trained and professionally credentialed doctor in the matter of ill-health, we turn to the judiciary to rule on whether a move is legal or not. While the 1978 Constitution– unlike the '72 Constitution in which parliament was supreme –grants pre-eminence to the elected President, pre-eminence does not mean monopoly, or else the Sri Lankan political system would be classifiable as absolutist. The irreducibly autonomous spheres of competence and authority of the three arms of government must be respected.

It is with excellent reason that the old adage has it that 'justice must not only be done, it must be seen to be done'. Our most internationally renowned and distinguished jurist, Judge CG Weeramantry has enunciated the basic protocols that must be observed if justice is to be done and be seen to be done. Given his strictures, it is clear that due process has not been observed in the manner that the impeachment motion has proceeded.

Today there is a dangerous disequilibrium between two pillars of the state and the third and a consequent polarization in the polity. If the parliament does not accept the rulings of the court on matters of legality and constitutionality, who then decides on what is legal? How then to avoid a situation in which the very legality of parliament and the legislation that issues from it, are called into question? There may be a serious crisis of legality and legitimacy of the government itself. We had an

analogous situation with JR Jayewardene's coercive and fraudulent referendum of December 1982. We seem to be on a time-machine back to that period.

The only way I see out this dangerous mess is the appointment of an Independent Presidential Commission consisting of or headed by Justice Weeramantry, to review the whole issue andrestore equilibrium. We need a neutral umpire or referee.

You appear to be quite adamant in not seeking another term? Why? It is the country who will be the loser…

While I still believe that President Mahinda Rajapaksa's historical contribution and merits outweigh his de-merits; while in the absence of a better alternative I regard him as part of the solution and refuse to cast him as the villain of the piece, still less demonize him,it is also my no less strongly held conviction that in the postwar period, the government has deviated from the path that would lead to social progress and a sustainable peace. This deviation has led to a deterioration of policy and distortion of the policy process, which in turn has resulted in degeneration of the System. From a strategic standpoint, Sri Lanka can no longer be successfully defended internationally without renewing its stock of moral capital and re-taking the moral high ground which it has lost in the postwar years. Defending Sri Lanka internationally now requires reforming and democratizing Sri Lanka domestically. The struggle to defend Sri Lanka in New York and Washington, Geneva and Delhi, Pretoria and Brasilia, and in the court of world opinion, now requires a struggle for democratic transformation as well as a struggle against undemocratic measures and the dominant political culture at home.

In this context, seeking another term or even an extension would mean continuing a relationship with the status quothat I do not wish to maintain unaltered, given my deep disgust at the dominant ethos and the degree of decay and decrepitude in the System. The famous Cuban national hero Jose Marti used a phrase that became legend; he said he had "been in the belly of the beast and knew its entrails". He was of course referring to the Biblical legend of Jonah who was in the belly of a whale. I too have been in the belly of the beast that is the Sri Lankan Establishment, the System, and I no longer can abide the thought of continuing to inhabit itwhile its ethos remains unchanged.

As to the loss to the country that you mention, it is my firm conviction that Sri Lanka's international position is deteriorating and the country will be placed at great risk, precisely because of domestic dynamics, i.e. the positive reforms that are not being undertaken and the negative actions that are underway. In today's situation I would be harming the country more if I did not point out the dangers to the national interest and to our strategic and security situation, of the grave mistakes and distortions that are taking place.

In the recent past, it was Ambassador Kunanayakam, and then followed by Ambassador Godage and now yourself? Your thoughts…

There are commonalities but also differences in our situations. Having beaten back in full public view, a vicious attack on me from within the System early in 2012, I served out my full term in France – carried my bat through the innings as it were – gave three months notice and clearly and publicly disengaged of my own accord. It's a great pity that an outstanding senior professional such as Mr. Godage on the one hand and a European educated multilingual woman of Sri Lankan Tamil ethnicity such as Ms Kunanayagam were so shabbily treated by the System and that the country was deprived of their services in the international arena.

You are going back into the corridors of academe in SL. Your thoughts on the future of university education in the context of the unprecedented recent FUTA strike.

The FUTA struggle was an important one, in that it represented an awakening of one of the most vital social sectors in this or any country. Not since the general election campaign of 1970 has there been such a mobilization of the university academics. The future of any society resides with its educated youth and therefore with its institutions of higher education, especially the universities. A country that boasts of 7-8% growth must surely invest more in higher education, including in its cadre of university teachers which constitutes the segment in society with the highest levels of education. A highly educated populace is a foundation of national security and sovereignty. Absolutely nothing can justify the declinein the spending on education in postwar Sri Lanka. How is it even conceivable that a country spends less on education in peacetime than it did in wartime? This will make Sri Lanka far less able to deal with the challenges it faces in the Cold war that is being waged against it by the separatist faction of the Tamil Diaspora. We can win the Cold war only if we have the highly educated and internationally competitive human resources to do so.

This having been said, I must add that there were tactical errors and a rhetorical inflation in the FUTA struggle, which brought it to a risky impasse. It is good that Dr. Nirmal Ranjith Devasiri and Ven Dambara Amila Thero, who are politically literate, managed to avoid a July 1980 type defeat that would have resulted from the tactic of frontal confrontation.

One of the weaknesses of the FUTA strike was that there were a large number of academics who did not sign up; who did not participate. I do not refer to the handful who took the side of the Establishment; I refer to the middle ground. So it seems to me that FUTA should have continued the public pedagogy and agitation for a longer period, broadening and deepening its support base, convincing the middle ground among the academics, before it resorted to strike action.

Your greatest achievements in both spells as Ambassador?

In my first spell, as Ambassador in Geneva, they were:
• Firstly, preventing the EU from being able to table a resolution to stop the war before it had ended in victory for Sri Lanka.

• Secondly, after the war had been successfully concluded, preventing the same group from passing a critical resolution calling for war crimes investigations and accountability at the UNHRC in May 2009.

After the sessions, two people immediately sent text messages of congratulations to a member of our delegation and through him to me while we were still in the UNHRC hall after our victory in the vote. They were the (then) Army Commander Gen Sarath Fonseka and Navy Commander Admiral Wasantha Karannagoda.

The recently released Charles Petrie Report on the role of the UN during the Lankan war and its last stages has almost two pages on the UN Human Rights Council April-May 2009. It reveals or rather, confirms, that the West had tried to get a Special Session on Sri Lanka through the UN Human Rights Council in April 2009 in order to stop the war, but failed to do so because it was thwarted from obtaining the requisite 16 signatures by the efforts of the Sri Lankan delegation.

As to the second achievement, it is better quote from hostile sources in the interest of objectivity:

• The Cage by Gordon Weiss
"On 27 May at the Palais des nations in Geneva, the UN High Commissioner for Human Rights, NavanethamPillay, addressed the Human Rights Council and called for an international inquiry into the conduct of both parties to the war. While the EU and a brace of other countries formulated and then moved a resolution in support of Pillay's call, a majority of countries on the council rejected it out of hand. Instead they adopted an alternative motion framed by Sri Lanka's representatives praising the Sri Lankan government for its victory over the Tigers…" (p229)

In his concluding chapter Weiss describes my role: "Dayan Jayatilleka, one of the most capable diplomats appointed by the Rajapaksa regime, had outmaneuvered Western diplomats to help Sri Lanka escape censure from the UN Human Rights Council in Geneva". In his Notes he makes this evaluation: "Jayatilleka was the most lucid of the vocal Government of Sri Lanka representatives…" (p 330)

• Nirupama Subramanian in the The Hindu:
"As Sri Lanka mulls over last month's United Nations Human Rights Council resolution, it may look back with nostalgia at its 2009 triumph at Geneva. Then, barely a week after its victory over the LTTE, a group of western countries wanted a resolution passed against Sri Lanka for the civilian deaths and other alleged rights violations by the army during the last stages of the operation. With the blood on the battlefield not still dry, Sri Lanka managed to snatch victory from the jaws of diplomatic defeat, with a resolution that praised the government for its humane handling of civilians and asserted faith in its abilities to bring about reconciliation." (The Hindu)

• Research scholar David Lewis at the University of Edinburgh:

"Many of the battles over conflict-related norms between Sri Lanka and Europe took place in UN institutions, primarily the Human Rights Council (HRC)…it was Sri Lanka which generally had the best of these diplomatic battles…Although this process of contestation reflects shifting power relations, and the increasing influence of China, Russia and other 'Rising Powers', it does not mean that small states are simply the passive recipients of norms created and contested by others. In fact, Sri Lankan diplomats have been active norm entrepreneurs in their own right, making significant efforts to develop alternative norms of conflict management, linking for example Chechnya and Sri Lanka in a discourse of state-centric peace enforcement. They have played a leading role in UN forums such as the UN HRC, where Sri Lankan delegates have helped ensure that the HRC has become an arena, not so much for the promotion of the liberal norms around which it was designed, but as a space in which such norms are contested, rejected or adapted in unexpected ways…" (Lewis: 2010, 'The failure of a liberal peace: Sri Lanka's counterinsurgency in global perspective', Conflict, Security & Development, 2010, Vol 10:5, pp 647-671.pp. 658-661)

In my second spell as Ambassador, in Paris, my task was rather different from that in Geneva, and therefore required a different skills-set and brought to the forefront a different aspect of my personality. I had extricated myself from a two year renewable contract as Senior Research Fellow of the Institute of South Asian Studies at the National University of Singapore, in answer to the President's invitation and the External Affairs Minister's request to return to representing my country so as to help protect it from the adverse effects of the UN Secretary-General's Panel of Expert's report, aka the Darusman Report, which was on the horizon. Since France is a P-5 member of the Security Council, this posting was doubly important and challenging.

I would regard my main achievements in Paris as:

• Having come in at a time that France was fairly strident in supporting the call for full-on international accountability on the final stages of the war, and to have succeeded through honest, sincere, and open dialogue at the policy making and academic levels, in communicating the complexities of the Sri Lankan situation, and establishing common ground and concord based on shared or compatible values.

• Having been an active, frontline participant in the successful battle for the recognition of Palestine by UNESCO.

• Initiating and organizing a UNESCO international scholarly symposium on "The Contribution of the Buddha's Teachings to Universality, Humanism and Peace", in commemoration of the 2600th anniversary of the Buddha's Enlightenment, in partnership with the Asia-Pacific group and the participation of scholars from 7 countries.

• Practicing a policy of outreach, non-discrimination, multi-ethnicity, multiculturalism,multi-religiosity and integration; maintaining a dialogue with the moderate segments of the Tamil Diaspora, and for two years running, being invited by the Tamil cultural association in the Parisian suburb of Bondy which has a large Sri Lankan Tamil population, to be the chief guest and distribute certificates along with my wife Sanja, at the Tamil school.

• Recruiting to the Embassy a multiethnic, multi-religious cadre of second generation Sri Lankan students with excellent French academic training and credentials and encourage their effort to reach out to and network their peers, resulting in a sparkling cluster of French-Sri Lankan postgraduates and young professionals, calling itself What's Next, which hopes to be a bridge between France and Sri Lanka.

Your thoughts on the current situation regarding the Jaffna University?In Sri Lanka the LTTE has been defeated on ground. What is the situation now – is it triumphalism still, or is reconciliation possible?

My view is rather different from the two extremes, the liberals and radical leftists on the one hand and the neoconservative securocrats on the other. If we take the example of India and Kashmir, it is obvious that any country, however democratic, which has a restive separatist sentiment in a vulnerable buffer/border region across which there exists an unfriendly pro-separatist populace, tends to be ultra-sensitive and super-vigilant on security issues.I disagree with those who regard the students' commemoration of Mahaveera day as justifiable or excusable and therefore regard any counteraction as reprehensible, just as I disagree with those who regard the students' commemoration as heinous and therefore deserving of the crackdown by the state. If the need was to commemorate the Tamil dead, including those who fought on the side of the LTTE, a different day could have been chosen. The fact that it was Mahaveera day clearly shows sympathy for and some tacit endorsement of the LTTE, whose remnants are active across the border in Tamil Nadu and in the Western Diaspora. Only the naïve will fail to recognize the interlock and overlap of separatist proxies, front organizations and fellow travelers, and the Sri Lankan Security Forces and majority of the country's citizenry are not that naïve. The TPNF of Gajan Ponnambalam is clearly pro-separatist. The TNA is neither pro-Tiger nor pro-separatist, but there are a few elements within its fold who are. It is asked whether it is wrong for the dead Tigers to be commemorated on MahaveeraDay while JVPers who died in the neo-barbaric surge of the late 1980s are commemorated on Mahaviru day. That is a valid and important question but the bottom-line is that the LTTE is a proscribed organization in Sri Lanka (and India) while the JVP is not. Furthermore, in many countries, there is a difference in the manner in which Stalinist, Maoist or ultra-leftist excesses are regarded and separatist and fascist atrocities are viewed.The argument of iconic scholars such as Eric Hobsbawmis that leftist crimes arose from a distortion, debasement and derangement of praiseworthy original universalistideas of social justice, while those of a separatist or fascist movement do not originate from such noble impulses and are not a distortion of lofty

ideals. Look at neighboring secular democratic India: public opinion, the mass media and the intelligentsia regard the Naxalites with their savage excesses, very differently from the manner in which they regard the Khalistani or Kashmiri separatist terrorists. However, I regard the Sri Lankan state's current crackdown as dangerously counter-productive.

The erroneous ideas of the students who commemorated Mahaveera day can be combated only by correct political ideas; by debate and ideological engagement and challenge. This should have been left to the anti-Tiger Tamil political tendency. The question should for instance have been posed as to whether those Tigers who killed Jaffna University academic Dr Rajani Tiranagama, and those LTTE leaders who ordered the killing, are Mahaveeras or not, and whether and when the Jaffna university students will commemorate the killing of Rajang and denounce her killers, the Tigers. Naming and shaming is the right way to go, not beatings and detention without due legal process. Though they may be enamored or remain uncritical of the LTTE and its war, these youngsters are not hardcore Tigers and probably not even hardcore separatists.Repression will only radicalize them further, when what is required is precisely a contrary policy of de-radicalization. As for the rehabilitees, generous start up loans and 'decent work', to borrow the ILO's slogan, are the best method of de-radicalization.

In 1972, dozens of Tamil youth were arrested and incarcerated for putting up black flags, and now, forty years later, it is for lighting lamps in however misguided a cause. Those arrests in 1972 did not help stabilize the situation; they sowed the seeds of conflict. My father, Mervyn de Silva who was editor of the Daily News, warned against it in an editorial in that newspaper in early 1972. Nobody listened. We know the consequence of that. After all we've been through, is anybody listening today? Why are we repeating the same blunders—and in a far more seriously hostile external environment?

As for the second part of your question, I fear that triumphalism has afflicted the vision of the leading elements of the State but reconciliation is still possible. Having fought and won a basically Just War, the state and the country's leadership have failed to establish a Just Peace. The crisis of the state is partly a crisis of reconciliation. It must be understood that there are only three possible pathways to reconciliation: equal citizenship, eliminating all forms of discrimination against or for any segment of the populace on the basis of ethno-lingual or religious markers; a reasonable sufficiency of devolution of power to the provinces; or a hybrid of elements of both approaches, with improvements in one realm offsetting inadequacies in the other. For the moment though, I count far less on the state for the process of reconciliation, and far more on interactions and initiatives in the social and artistic domains, especially by the educated young people. It alarms me that there is an absurd tendency to denounce as separatist conspiracies, any attempt by lawyers, academics, students and youth activists, to build bridges between North and South or even to mobilize on a multiethnic or non-ethnic basis.

Any suggestions for making our diplomatic missions more relevant to the country's need?

In the first place we need a coherent foreign policy, which is conformity with the enlightened self interest of Sri Lanka. Today we do not have such a policy. There is no single centre or stable collection of designated individuals who make foreign policy decisions and oversee their implementation. There is a strange combination of semi-anarchy and the pressure of parasiticpatronage networks. What passes for a patriotic foreign policy is an attitude of truculent parochialism. It is discordantly irrational to invoke indigenous cultural values as an immunity defense in UN forums such as the Human Rights Council—something I never did in May 2009 – because of the glaringly obvious fact that UN forums are founded precisely on universality; on shared values and norms that we have all subscribed to.

We must understand that on the one hand, foreign policy cannot be a simple projection of domestic policy; a propaganda discourse that may sell in a protected domestic market – the provinces of Sri Lanka – does not travel well, does not do well under international standards and norms. On the other hand we must also realize that there cannot be a growing disconnect between our international stance and domestic practices and that what happens in the country is quite transparently seen by the world and impacts upon world opinion, which former UN Secretary General Boutros Boutros-Ghali designated 'the other superpower'. We have almost depleted our soft power and we continue to erode it with every irrational move.

We have deviated from and forgotten the basic objectives of diplomacy, namely serving the national interest by maintaining a continuous dialogue with the state and society to which the Embassy is accredited and honestly, intelligently, presenting the case for Sri Lanka to the host state and society. The Embassy is an institutional bridge between Sri Lanka and the state in which it is based, while the diplomats are a living bridge. The basic function of diplomacy is not to serve the émigré Sinhala community, centers of religious worship and partisan lobbies back home! Furthermore: Sri Lankan diplomatic practice must not alienate the professionally and academically accomplished elite of the Sri Lankan Diaspora, Sinhala and Tamil, Muslim and Burgher, in favor of émigré strata with resentful views and no niche in the society of the host country. We must be capable of harnessing the best brains of the Diaspora, especially its youth—but the profile, attitudes and sub-culture of our Missions are such that the educated youth of Sri Lankan parentage—the second generation– feel utterly alienated from them. Sri Lankan diplomacy must realize that no country or may I say no other country, regards its diplomatic missions as places of religious worship and ritual, nor permits diplomatic decision making to be intruded upon by religious clerics. Currently Sri Lankan diplomacy is strangled by intersecting networks of political patronage, religious sectarianism and ultranationalist political partisanship. If we do not break through this suffocating net, how is the country to compete with and prevail over the sophisticated campaign that is underway to isolate and encircle Sri Lanka? Unless we change for the better, unless we change the System for the better, we shall be unable to raise our diplomatic game

to the highest international levels and we shall be unable to win the Cold war that is ongoing on all continents against our country. We must exit the Matrix!

*Couretsey: The Sri Lanka Mirror*

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## Un-Truths And Distortions About The Impeachment Process

**by Chandra Kumarage**

The campaign justifying the impeachment of the CJ is forging ahead regardless with enhanced vigour even after Supreme Court has pronounced through the Court of Appeal that "it is mandatory under article 107(3) of the Constitution for the Parliament provide by law the matters relating to the forum before which the allegations are to be proved, the mode of proof, burden of proof and the standard of proof of any alleged misbehaviour or incapacity and the judge's right to appear and to be heard in person or by representative in addition to matters relating to the investigation of the alleged misbehaviour or incapacity."

Despite that legality of the impeachment proceedings are continued to be discussed in public even by members of the Parliamentary Select Committee. Minister Susil

Premajayantha, himself a lawyer has stated that a burden of proof is not a crucial ingredient in the impeachment inquiry of a judge. If it was said by Minister Wimal Weerawana one can ignore it as balderdash but when it is said by a lawyer the reader will be bewildered as to whether he is bluffing or is lacking in his knowledge of the basic tenets of law. Surely he should be aware of that Article 12 (1) and 13(5) respectively of the Constitution of Sri Lanka stipulate that all persons are equal before the law and every person shall be presumed innocent until he is proved guilty. Although the Supreme Court has given a final verdict rebutting all these so-called 'law points' raised by many lawyers, journalists and others, it will be still pertinent to have a look at the procedures adopted by some countries in impeaching their judges which have relevance to our jurisprudence on the subject.

The necessity of a burden of proof and the degree of proof required to impeach a judge has been discussed by the panel of Senator-judges in the impeachment of Chief Justice Renato Corona of the Philippines, a country which follows the American System of Law in general and impeachment of judges in particular. The panel quoted with approval and favour, a book titled 'Impeachment – A Handbook written on the impeachment' of Presidents, judges and other officers of state in USA by a renown professor of the Yale University, Charles Black Jr, where he has stated "the Burden of Proof required in the impeachment proceedings is 'overwhelming preponderance of evidence', not merely preponderance of evidence followed in civil cases, but a more stringent proof." Rule No. 133(1) of the Rules of Court of the Supreme Court of the Philippines which stipulates the Court may consider all the facts and circumstances of the case, the witnesses, manner of testifying, their intelligence, their means and opportunity of knowing the facts to which they are testifying, the facts to which they are to testify, the probability or improbability of their testimony, their interest or want of interest and their personal credibility so far as the same may appear upon the trial.

The Senator- judges drawing from Black Jr.s' Hand Book were agreed that the degree of proof must be one of "clear and convincing proof" a much more stringent standard the in preponderance of evidence but less than proof beyond reasonable doubt. But in a close reading by a trained legal mind it will appear that clear and convincing proof is nothing more in the final analysis than proof beyond reasonable doubt.

The impeachment procedure in the US is not a totally one sided affair as that followed presently in Sri Lanka. The sole power of impeaching the President of USA as well as other judges and public officers is vested in the House of Representatives (the House) Article 1(2) clause 5 of the U.S Constitution. The Senate on the other hand is vested with the power to conduct the Impeachment trial (Article 1(2), clause 6 and 7). Sitting for the purpose of impeachment trial they shall take an oath and affirmation "to the trial of the respondent judge now pending I will do impartial justice according to the Constitution and law," When the President of the USA is tried under impeachment the Chief Justice of the USA presides.

The power to determine whether the impeachment is appropriate in a given instance vests solely with the House of Representatives. The Constitution places the responsibility and authority to determine whether the impeachment and the draft articles of impeachment (charges) in the hands of the House of Representatives. The ultimate decision both as to whether to impeach and to what articles of impeachment shall be presented to the Senate for trial rests in the hands of the House of Representatives.

Should the House decide to impeach and vote articles of impeachment specifying the grounds upon which the impeachment is based the matter is then presented to the Senate for trial. Under the Constitution the Senate has the sole power to try the impeachment. A conviction must be supported by two thirds of the Senators presents. Under a Judicial Conference of the US certifies to the House of Representatives its determination to impeach someone and notice the respondent to attend the House(28USC 355 b(1). A Task Force on Judicial Impeachment is established by the House Judicial Committee to pursue the investigation. When Judge Porteous was to be impeached the investigation was not completed during its 100th Congress because the House of Representatives is not a continuous body, the House Judiciary Committee had to be reappointed at the 111th Congress. That was done on January 13 2009. The Task Force on Judicial Impeachment (TFJI) established by the House Judicial Committee on January 22 2009 concluded recoding evidence in January 2010. While the Constitution provisions provide the basic framework for impeachment they do not address issues that may arise in the process of impeachment or an answer to all questions of procedure. In the Senate trial the House of Representatives is represented by Managers (five) who may be assisted by counsel. The impeached person too can have legal assistance.

The Senate Judicial Committee of late consists of 12 senators six from the Republican Party and six from the Democratic Party not on the basis of party strengths in the Senate unlike in Sri Lanka but on that of equality. The trial is like a criminal trial. The prosecution leads the evidence of its witnesses who will be subjected to cross-examination by the respondent judge's counsel. An additional feature is that there is provision for re-re-examination and re-cross examination. Once when the complainant's case is closed the respondent judge can call his witnesses who will also be subjected to the same order of cross examination etc.

After the Senate has considered the evidence presented before it, it has to determine whether or not to convict the respondent upon the articles. To convict the respondent on each article a two thirds majority is essential. Under Rule 1X of the Senate Rules of Procedure in a trial of any impeachment the presiding officer of the Senate, if the senate so desires shall appoint a committee of Senators called Managers to receive evidence and to take testimony at such times and places the Committee may determine.

The impeachment procedure in the USA is a lengthy and transparent procedure which guarantees all fair trial and due process guarantees to a respondent judge

facing impeachment. Some self acclaimed 'legal experts' in Sri Lanka have been disseminating wrong information of these matters by quoting reports and documents of such procedures wrongly and out context to mislead the people.

Moreover the Foreign Minister of Sri Lanka G.L. Peiris briefing the diplomatic corps in Sri Lanka recently is reported to have quoted William Rehnquist CJ of the Supreme Court of the USA in the case of the impeachment of Judge Walter L.Nixon in 1993 endorsing the views expressed by Justice White that "Encroachment into the right of the Senate to impeach a judge is a violation of the law." The Minister is also reported to have stated further that governments that condemn Sri Lanka in cavalier fashion should pay attention to such types of judgments.

However what the learned Minister failed to tell his audience is how fair, transparent and nonpartisan is the impeachment procedure in the USA compared to that of Sri Lanka by a Parliamentary Select Committee, the decisive majority of members of which belongs to the government coalition, how this committee violates the principle of equality, and is devoid of any of those fair trial, due process and natural law guarantees. He also does not say that the ongoing impeachment motion against the incumbent Chief Justice was initiated after the CJ together with two other judges of the Supreme Court made a determination unpalatable to the government and therefore was politically motivated and biased. When he was question about the feasibility of getting foreign judges to hear the Impeachment inquiry the Minister had responded that, It is illegal to do so in Sri Lanka…as the Supreme Court of Sri Lanka ( Sarath N.Silva as CJ ) had held that Sri Lanka cannot invest a foreign body/court with jurisdiction in respect of matters that arise with respect to the legal framework of this country. There again the learned Foreign Minister being an author of many an essay on international law had sought refuge in a highly controversial finding of a highly controversial Chief Justice putting Sri Lanka's obligations under international law as a state party to the Optional Protocol 1 of the ICCPR to the back burner. With due respect to the Supreme Court of Sri Lanka it must be stated that the Supreme Court exercising the judicial power invested in it by the people as sovereigns has no right to take away a basic right conferred on the people, per incuriam and in excess of the Jurisdiction of the Court. It is not something unknown to the erudite Minster that a treaty solemnly entered into by the Sri Lankan State in the exercise of its executive power and in compliance with the provisions of the Vienna Convention on the Law of Treaties (VCLT) is not subject to judicial review. It is a basic maxim of international law that a State may not invoke its domestic law to justify its failure to fulfil its international obligations and that every treaty in force is binding on the parties to it and must be performed by them in good faith (pacta sunt servanda). The question must be posed to the Minister as to why he as Minister in charge of the subject did not bring in enabling legislation to transform the provisions of the Optional Protocol into our legal system despite numerous requests made by the UN Human Rights Committee (UNHRC) and civil society organisations. Had the late Laksman Kadirgamar, that illustrious Foreign Minister of Sri Lanka who was instrumental in the accession to the Optional Protocol 1 of the Covenant been alive he would have definitely capped his achievement with the incorporation of the

individual petitions procedure under the Optional Protocol into our legal system. It is common knowledge now that in countries like India, Singapore, Malaysia, New Zealand and Australia, impeachment inquiries are conducted by Judicial bodies with full guarantees of fair trial and principles of natural justice.

IN the United Kingdom the power to impeach is vested in House of Commons. It appoints Managers to process evidence and prosecute at the trial. The mover of the impeachment is commanded to go to the House of Lords declare that the defendant is impeached in the names of the House of Commons and commons of the UK. House of Lords then hears the case like an ordinary trial with all fair trial guarantees. At the end of the trial the lords decide by a majority as to whether the defendant is not guilty or guilty. But the impeachment in the UK has become a thing of the past as there had been no impeachments in the country since 1795 and 1806 after the impeachments of Warren Hastings the Governor General of India and Henry Dundas respectively. This article has addressed the same as it is implemented in other polities in the world that are relevant to our legal system. The legislature and the executive must respect the interpretation pronounced by the Supreme Court which has been vested with the judicial powers by the people who are both de jure and de facto sovereigns according to the Constitution. They must seek another way to resolve any matter arising out of the pronouncement of the Supreme Court adhering to the rule of law and the principle of separation of powers.

"For he that is delighted by concord
And who abideth in to the Law
Falleth not from Security."
Gauthama Buddha- Iti-Vuttaka – *Courtesy: The Colombo Telegraph*

*K.D.C.Kumarage, Attornet-at-law, Co-convenor, Lawyers for Democracy

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## The Danger Behind The Bipartisan Agreement On Parliament's Supremacy

**by Jehan Perera**

The Rule of Law means that everyone in a society is compelled to abide by the prevailing laws. These laws are interpreted by the courts of law in the light of the supreme law as stated in the Constitution. If anyone refuses to accept the decision of the judiciary, they are punished. If the government refuses to abide by the decisions of the judiciary the Rule of Law will break down. This is the uncertainty that Sri Lanka faces, now that the highest court of all, the Supreme Court, has decided that the power of the Parliamentary Select Committee appointed to decide on the validity of the charges against the Chief Justice is a nullity in law.

The manner in which some of the members of the Parliamentary Select Committee are reported to have behaved in their face to face interactions with the Chief Justice has not improved public confidence in the justice of their decision. They found the

Chief Justice to be guilty of three of the five charges out of 14 that they were tasked to inquire into. The speed and manner in which these findings were made, and that the target was the Chief Justice has done nothing to improve the situation. In the public mind the judiciary remains the most trustworthy institution capable of meting out justice to victims of injustice.

Sri Lankans who desire the wellbeing of their country and of its people, and who are not blinded by the prejudices of partisan party politics, will be hoping and praying that the government finds a better way of dealing with the problem. Too much is at stake for it to be otherwise. If the government disregards the Supreme Court, it will send out a message to other wrongdoers that they too can hope to disobey the law and get away with it. What is sauce for the goose will be sauce for the gander as well. The intimidation of judges and empowerment of wrongdoers will invariably paralyse the system of justice at all levels, and not merely at the very top.

COMMON POSITION

The ambivalent approach of the main opposition party to the crisis that is engulfing the country might appear to be perplexing. The UNP's refusal to permit its members to participate in the Court of Appeal hearing into the petition challenging the Parliamentary Select Committee was no different in practical terms from that of the government. The government members of the PSC also did not go before the court to argue their side of the case and explain themselves. Their common ground is the supremacy of Parliament to conduct its affairs without interference from the judiciary. The question is whether judicial oversight is interference or a guarantee of protection of the rights of every citizen which is the bounden duty of the judiciary.

The common position on the judiciary's role vis a vis the Parliamentary Select Committee adopted by the government and UNP reveals a mindset of ruling politicians and governments that goes back several decades. When Sri Lanka received its independence in 1948 its political leaders were steeped in the British tradition of respecting the role of the judiciary. But this broke down in the succeeding decades. In 1972 the government of that time decided to make a break with those colonial legacies that they felt were holding back the country's power surge into the future. The so-called autochtonous or home-grown constitution of 1972 gave pride of place to Parliament and downgraded the judiciary and also brought the public service under the elected politician.

The desire of the government leaders of 1972 was to give Parliament and the ruling party virtually unfettered powers to do what they deemed necessary for the country's progress and development. The stated aim was an advanced socialist democracy in which prosperity would be evenly distributed to the masses of people. However, the results of excessive government intervention and nationalization of economic enterprises were not encouraging and economic development plummeted to the point that people had to stand in line to buy bread. Unfortunately the lesson

that power corrupts and unchecked power corrupts even more was not taken to heart.

DANGER SIGNS

The Constitution of 1978 was designed with the aim of promoting rapid economic development. Once again power was centralized for the purpose of making those decisions that would propel the country on the path of economic takeoff on the lines of East Asian countries. But instead of Parliament being the repository of centralized power as in the 1972 Constitution, much of the centralized power was handed over to the newly introduced Executive Presidency. The first President under this constitution was happy to say that he was now freed from the "whims and fancies" of Parliament to do as he willed. But the promised economic progress was not sustainable and to make matters worse, the disempowerment of the ethnic minorities plunged the country into ethnic war.

The fact that the two small political parties that had members in the Parliamentary Select Committee decided to go before the Court of Appeal demonstrates their assessment of the need for a countervailing power and system of checks and balances. Unlike the UPFA and UNP, the TNA and JVP can never hope to control the majority in Parliament. Therefore they appreciate the role of the judiciary that would ensure the justice they cannot get from the Parliamentary majority. In addition, the appearance of a bipartisan consensus between the government and UNP in refusing to appear before the Courts on the issue of the impeachment of the Chief Justice may be a tactical one on the part of the opposition party. It is significant that the UNP has also said that the government should obey the Supreme Court order. They may well be giving the government the rope to hang itself.

There is also the role of the international community to consider. Already the government is on the back foot internationally on account of alleged war crimes and human rights violations during the war. In March last year the majority of countries in the UN Human Rights Council voted that Sri Lanka should implement the recommendations of the Lessons Learnt and Reconciliation Commission. Among the key recommendations of the LLRC were to strengthen the Rule of Law and for the government to respect the integrity of public institutions, including the judiciary. The flouting of these recommendations can provide the international community with the opportunity for a stronger recommendation that troubles the government the next time the UN Human Rights Council meets in March of this year.

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## Impeachment And Future Actions – A Liberal View

**by Kamal Nissanka**

Sri Lanka is facing a grave crisis as a result of intolerance. Once the Supreme Court the sole authority that possesses the right of interpretation of constitutional provisions had delivered its interpretation on the impeachment of the Chief Justice, the executive and the legislators who had taken oath to protect and safeguard the constitution must uphold the interpretation though it may be a bitter medicine.

Liberals all over the world are keen on upholding three major areas of vital importance in any democratic society namely, independence of judiciary, and rule of law and separation of powers.

So in the present imbroglio liberals cannot see any other option other than obeying to the Supreme Court determination of the constitutionality of Standing Orders in

parliament regarding impeachment of superior court judges. Of course Supreme Court decision has made recommendations as to what options are available to the legislature.

If the charges framed against the chief justice were brought on political grounds as a result of the judgments of Town and Country Planning Bill (Amendment) and Divineguma Bill that obstructed the political path of the government, the present judgment on the impeachment resolution might create more deeper vengeance towards the judges of Supreme Court and as well as for those in Court of Appeal. Are you legislators going to impeach all judges?

Therefore it seems that the executive as well as the legislature are in a deeper crisis now. In the present context they cannot believe, trust or rely on in any judge in the Superior Courts. Even if a judge is appeared to be a loyal to the executive, once appointed as Chief Justice he/she might turn against some of the policies of government as our experience with Mr. Sarath Nanda Silva manifests.(He was initially loyal to both President Chandrika Kumaratunga and President Mahinda Rajapaksa)

Bringing an alien stooge to the Supreme Court as Chief Justice after kicking out the incumbent by unlawful forces of intolerance will create a further crisis as international pressure would gather in due course.

Of course superior court judges are not saints or demigods, they are also human beings. They may have their incapacities, misbehaviors and dictatorial tendencies and that is why there is a methodology in advanced democracies to impeach them based on all accepted legal principles and norms.

Now we know that the appointment of a chief justice is also as grave as impeaching a chief justice. The sovereignty is vested in the people and the people's executive power is exercised by the President. The President should exercise his executive power in a transparent manner in appointing superior court judges. When a mission of Human Rights Institute of International Bar Association with members in 183 countries visited Sri Lanka on the 29th August 2001 on a fact finding mission, it recommended that

"Appointments of judges by the President without an independent process of assessment should cease. All judges should be appointed by an independent process of assessment, based on merit, with names being forwarded to the President or Minister of justice for final appointment."(Report of the International Bar Association 2001-Sri Lanka: Failing to Protect the Rule of Law and The independence of judiciary, -page 37)

Therefore at this crisis best option is to make proper legislation (a parliamentary act) to impeach the superior court judges and high officials if need arises. What will be the outcome of a debate in the parliament on impeachment? The main questions will

be whether standing orders are law or not law, and whether PSE proceedings and findings are lawful or unlawful? As Supreme Court is vested with the sole jurisdiction to determine questions of interpretation and as it has already determined the matter in issue and therefore the debate in the parliament will be a waste of time from the stand point of a law abiding person. All subsequent anti judgment actions and utterances by the legislature, by any single legislator or by any citizen are unlawful.

*Courtesy: the Colombo Telegraph*

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## The Comments Of Sarath Silva The Archenemy Of Rule Of Law In Sri Lanka

by Basil Fernando

Sarath Nanda Silva is heavily quoted in SLBC programmes trying to criticize the Supreme Court judgment relating to the question on the interpretation of law referred to it by Court of Appeal. He says that the Supreme Court has not properly interpreted the words "or standing orders" as found in Article 107(3) of the constitution. As usual, the great trickster, who misinterpreted law to shroud the government he supported, is trying once again to come to the rescue of this government – which he was not long ago condemning vehemently.

Silva ignores the following paragraph of the judgment:

"In a State ruled by a Constitution based on the rule of Law, no court, tribunal or other body (by whatever name it is called) has authority to make a finding or a decision affecting the rights of a person unless such court, tribunal or body has the power conferred on it by law to make such finding or decision. Such legal power can be conferred on such court, tribunal or body only by an Act of Parliament with is "Law" and not by Standing Orders which are not law but are rules made for the regulation of the orderly conduct and the affairs of the Parliament. The Standing Orders are not law within the meaning of Article 170 of the Constitution which defines what is meant by "law"".

It is no surprise that Silva is excited because he is fully aware of the manner in which he fooled Sri Lanka in order to safeguard JR Jayawardane's tomfoolery with the constitution, to serve his political bosses Chandrika Kumaranatunga and Mahinda Rajapaksha. He was shameless enough to admit this himself when he was publicly stating his regrets regarding his misinterpretation of law in the case now known as the Helping Hambantota Case.

Silva understood JR's tomfoolery with the constitution, done to safeguard his power. Having understood this, he proceeded to use the same warped logic to serve his own political masters. The great damage he did to the rule of law in Sri Lanka has not yet been fully exposed to the Sri Lankan public. That he managed to survive without a severe assault from Sri Lanka's legal community is also a matter that still remains to be fully discussed. However, in order to have his way, the manner in which he bullied lawyers and clients is quite well recorded in the memory of lawyers.

Silva's record as a bully is well borne out by the case relating to Tony Michel Antony (Tony) Fernando. That case will remain to challenge any claim by S N Silva to be an expert in law. It is only a coward who uses his official position to take his revenge; he wrongly convicted and sentenced a layman who requested that he should not hear a case, for contempt of court, sending him to jail for one year, and even refused his appeal by hearing the appeal himself.

Such souls are destined to be reborn again and again to repeat their follies. His reappearance in television shows that are blatantly used to attack and undermine the judiciary is no surprise. The same man who twice sentenced two persons (Tony Fernando and SB Dissanayake) for contempt of court is now taking part in media shows which are deliberately staged in contempt of courts for political purposes.

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# Will The Constitutional Logjam Be Shattered With A Political Cudgel?

**by Tisaranee Gunasekara**

*"The arbitrary and apparently irrational, antiutilitarian nature of life under such regimes….disarms all attempts by reasonable men to understand and explain the course of events". Tony Judt (Reappraisals)*

Hasitha Madawala was shot dead on the night of January 5th, outside his house. His murderers rode a motorcycle, wore hoods, and got away.

Mr. Madawala was not a member of the opposition or a Rajapaksa-opponent. Like Bharatha Lakshman Premachandra he was a loyal SLFPer; and a UPFA member of

the Kelaniya Pradesheeya Sabha. His grisly fate is a reminder that under Rajapaksa rule, life can be short and death brutish to all but the Rajapaksas and their kin.

One year ago, on the night of January 7th 2012, another attempt was made to kill Mr. Madawala: "He claimed that Minister Mervyn Silva has ordered to kill him as well as the Chairman, the Deputy Chairman and another member of the Kelaniya PS. A murder contract has been given to notorious underworld operatives Roshantha of Hikkaduwa and Majeed of Maligawatte, Mr. Madawala alleged" (Sri Lanka Mirror – 8.1.2012).

Just before he was killed Mr. Madawala was arrested by the police, allegedly for behaving in an 'unruly manner' at a meeting presided over by DIG Anura Senanayake. The police even opposed bail for him. That episode indicates that Mr. Madawala had fallen from favour, that he had ceased being a member of 'protected species' and become vulnerable to political-abuse like the rest of Lankans. Incidentally, DIG Senanayake was to retire this month, but was granted a one year extension just this week.

Welcome to Rajapaksa Sri Lanka, a land like no other, a paradise in which life, liberty, security and the pursuit of wealth and happiness is guaranteed only for the Ruling Siblings and their kin. For everyone else, it is – or can be – a jungle; including for loyal servitors.

The impeachment drama and the venom and the unreason with which the Rajapaksas are pursuing it become perfectly explicable within this context. Shirani Bandaranayake, as a Supreme Court justice and as Chief Justice, bent over backwards to satisfy Rajapaksa political demands. She headed the benches which rejected Gen. Fonseka's petition for bail, approved the 18th Amendment in just 24 hours, gave a free passage to the Expropriations Bill and rejected petitions against Leadership Training and the blocking of anti-government websites. In a classified cable (revealed by Wikileaks), the US Ambassador claimed that Dr. Bandaranayake was a 'Rajapaksa loyalist'.

But all that loyalty counted for nothing in the end. She made one ruling against Rajapaksa needs (because the 13th Amendment is crystal clear on the matter) and the Siblings launched volley after volley of Greek fire at her. The Supreme Court, had it approved the Town and Country Planning (Amendment) Bill or the Divineguma Bill, would have acted in barefaced violation of the constitution. But such logic matters nothing to the Rajapaksas who believe that their will, and not the constitution, is supreme.

This is a lesson which must be borne in mind by every top official, especially judges. The Rajapaksas do not want loyal supporters; they want mindless, supine serfs who do as they are told. And even a lifetime of loyalty counts for nothing against one act of 'disloyalty'. The next CJ will have to agree to every Rajapaksa demand, including orders which are as illegal as hell. Only a man or a woman who is willing to abandon

honour, dignity and conscience can become Sri Lanka's next chief justice and avoid an impeachment a few months down the road.

The Fight for the Chief Justice is a fight for Justice

The impeachment of Chief Justice Shirani Bandaranayake was never meant to be a legal exercise. It was conceived of, planned and implemented as a political act. Its aim was never the uncovering of the truth or the dispensing of justice. Its aim was to punitively dislodge a retainer who dared to disobey the wishes of Sri Lanka's ersatz royals. The Rajapaksas are utterly intolerant of disobedient tools. Shirani Bandaranayake had to be evicted in a way which would definitively discourage others from following in her footsteps. That was why the impeachment was conducted in the most unfair and unjust manner possible, from the very outset. It was never meant to convince; it was meant to threaten, frighten and warn.

When the impeachment travesty commenced, the million-dollar question was whether the CJ and the judiciary will have the capacity to withstand the Rajapaksa juggernaut. The Rajapaksas thought – and those of us who oppose the Rajapaksas feared – that the CJ could be hounded out of office and the judiciary could be rendered malleable via a combination of threats and favours.

That worse case scenario did not happen. The CJ is standing like rock-solid and the judiciary is putting up a valiant fight to defend the rule of law. Their spirited resistance has provided the democratic forces with the ideal platform to wage their own battle against the impeachment, for judicial independence and for basic rights.

The constitutional logjam will not be resolved on the basis of law; it will be shattered by the use of political power. The Siblings are not going to abide by the Supreme Court ruling, because doing so would create a precedent which will severely undermine their power project. The Speaker – who has become Sri Lanka's pre-eminent constitutional expert, followed by the Deputy Speaker – will rule that the PSC is more supreme than the Supreme Court. The parliament will then 'debate' the impeachment and the charade will end with the UPFA voting against the CJ en bloc. The decision will then be sent to the President, who will immediately remove Shirani Bandaranayake and appoint a more proven stooge in her place. Once the new CJ is in, naked force can be used to deal with those judges, lawyers and other activists who refuse to accept the illegal and illegitimate status quo. The Siblings will equate any resistance with a legal coup and use the police, the army and the PTA to subjugate resisters.

The CJ and the judiciary have gone as far as they can. The task of impeding the regime from violating the Supreme Court ruling belongs to us, those elements of political and civil society who have not succumbed to the Rajapaksas. The opposition must boycott the impeachment debate, because participation will lend this illegal exercise some credibility. The rest of the battle will be more political than judicial; as

such it will have to be waged in the media, in parliament, provincial councils and pradesheeya sabhas, within the UPFA and in the streets.

Plus the international arena; this battle must be taken to the UN and the Commonwealth. The only real snag the Rajapaksas would see in taking a political cudgel to the constitutional logjam is the impact such naked and illegal use of force would have on the Hambantota Commonwealth Summit. Making a roaring success of the Hambantota Summit is a presidential passion. An illegal and violent resolution to the Impeachment drama would not advance the prospects of the Hambantota Commonwealth Summit – or the chances of obtaining the next IMF loan.

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## Reconciliation: Looking Forward viii – Rules To Prevent Judicial And Other Abuses

**by Rajiva Wijesinha**

Problems connected with the attempted impeachment of the Chief Justice require solutions. I believe that impeaching the Chief Justice is no solution to anything, and will in fact lead us to forget the actual problems.

In suggesting the following practical solutions to the problems, I realize I am probably wasting my time, since we have developed a culture of addressing problems with sledgehammers designed for other uses. We generally land it on our

own toes as well as the toes of those connected peripherally with the problem, instead of the people or the procedures that are the root cause of those problems.

Thus the United Nations as a whole is attacked for the Darusman Report, when they should have been our most trusted allies in refuting the propaganda of those who pushed the Secretary General into such a selective analysis. Tamara Kunanayagam gets dismissed for the Geneva Disaster, and those who contributed to it are permitted with impunity to deceive the President about leading lights in India as well as in the Sri Lankan Freedom Party, which should be the President's closest allies in fulfilling his developmental agenda.

I have no doubt then that the same propagandists who accused Dayan Jayatilleka and me of precipitating the crisis in Geneva will claim that the solutions I propose are based purely on personal ambition. But that will be a small price to pay if there is greater awareness of the need for proper procedures as well as clear guidelines for the conduct of public officials.

Problems relate to two areas, namely the conduct of the Chief Justice and the procedures adopted by the Select Committee. With regard to the first, while the improprieties highlighted do not necessarily deserve impeachment, and certainly not through the present effort, we need mechanisms in place to ensure that the two relatively serious wrongs of which she is accused cannot again be committed, whatever mitigating factors might be advanced in mitigation.

We should therefore institute Judicial Norms through binding rules to

a) prevent any judge sitting in judgment in cases in which he or she has any interest (To deal with the Chief Justice buying a flat from Trillium while judging their cases. It is clear she understands this was wrong, inasmuch as she withdrew, immediately after the impeachment resolution, from that Bench)

b) remove the absolute power of the Chief Justice to allocate cases, and instead set up a panel consisting of the three most senior judges. No changes should be made except by the panel in consultation with the original bench, and in consultation with the entire Supreme Court if allegations of bias have been made (To deal with the Chief Justice replacing the Bench hearing the Trillium cases with a Bench headed by herself)

c) prevent any spouse of a judge accepting office from government except in the case of those already in government service. No judge or spouse of a judge should be offered or accept office from government for five years following the judge's retirement, except for appointments to mediation boards and such task bound assignments (To deal with the appointment to high positions of Mr Kariyawasam)

d) have the Judicial Service Commission appointed by a panel of the three of the six most senior Supreme Court judges, with provision for appeals regarding

appointments to be addressed to a separate panel of the other three (To deal with allegations of arbitrary actions by the JSC)

We should also institute internal investigation systems within the Judiciary if judges violate judicial orders (To prevent situations such as occurred when the Chief Justice was given a substantial discount on a purchase from Trillium when there was a Court Order enjoining that the highest possible price be obtained for these).

We should also institute rules with regard to the Assets and Liabilities Act to

a) Ensure immediate remedial action when the Declaration is not make (To avoid situations such as the realization now that the Chief Justice did not submit a Declaration for 2001)

b) Redraft the form to ensure that manipulation of assets is detected (To prevent concealment of funds by emptying accounts just before March 31st each year, as is alleged was done by the Chief Justice)

c) To allow for random checks on the accuracy of Assets Declarations by an independent body, such as the Auditor General's Department or the Bribery Commission, though with greater institutional safeguards regarding the independence of those institutions (To prevent accumulation of misleading statements as seems to have been the case with the Chief Justice)

Given what has been reported, it is clear that the 'moral conduct of an exceptional degree' expected from a Chief Justice that the Committee believes is necessary was not forthcoming. But of course the high standards enjoined by the Committee are expected also from Parliament, and we need measures to ensure that as well.

*Courtesy: The Colombo Telegraph*

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## The Judiciary Refuses To Be 'Tamed And Vanquished'

**by Kishali Pinto-Jayawardena**

Predictably, Government propaganda hitmen wasted little time in rushing to condemn the Supreme Court's most extraordinary and exceptional Determination this week that the parliamentary impeachment of a superior court judge has to be determined by law and not by Standing Orders. The level to which this Government has deteriorated was amply seen by the fact that while party seniors preferred to remain quiet, with one or two even cautioning that the time has come to take a step

back, the stage was taken over by the distasteful antics of newly come propagandists dancing like hysterical puppets on a master's string, in clear contempt of court.

Would Sri Lanka become a 'non-law' country?

Let us examine what this Determination, forwarded to the Court of Appeal on a reference made to the Supreme Court, was all about. Fundamentally, the Bench comprising Justices Amaratunga, Dep and Sripavan affirmed the Rule of Law as the basic structure of the Constitution and relying on established precedent, warned that the power of impeachment of a superior court judge cannot be used by a Government 'to tame and vanquish' the judiciary.

Their ruling was underlined by the serious consequences which arise from a judge being thrown arbitrarily out of office by politicians. In obedience to the constitutional scheme and linking the concept of legal power to the process of impeachment by applying definitive rules of constitutional interpretation, Standing Orders were declared to be limited to regulating the orderly conduct and affairs of Parliament. Standing Order 78A which currently regulates the impeachment process was disallowed as not being 'law.' The Court stated that legislative power to impeach should conform to indispensable checks and balances mandated by the Constitution itself.

Whether one may agree or disagree with the content of this Determination, it is a decision of the highest court of the land. It stands as such until reversed by a Divisional Bench or a Full Bench of the Supreme Court itself. Thus, to go ahead with the impugned impeachment would mean a direct flouting of the Constitution. The very basis of the law in this country would be shaken to its foundations. Sri Lanka would henceforth be a country where 'non-law' prevails. The consequential impact on every sphere of government, including the investment climate, would be ruinous.

Several vital components of the ruling

The crux of this Determination could be broken down into several vital components of judicial reasoning, all flowing logically from each other. Thus, the investigation contemplated by Article 107(3) of the Constitution into the alleged misbehavour or incapacity of a judge as charged and the finding that the charges are proved, were pointed out to be essential steps to the ultimate removal of such judge by the President through an address of Parliament. The impeachment of a judge of the superior courts before Parliament affects the constitutional right to hold judicial office. Therefore such a finding amounts to the exercise of legal power and as such, can only be utilized by a court, tribunal or other body which has such a power conferred upon it by law.

Relying on the explicit inclusion of the word 'law' in Article 107(3), Parliament was enjoined to establish by law, a body competent to conduct an investigation and hand down 'a legally valid finding.' The law should reflect all aspects of the right to

natural justice including the right to cross-examine witnesses, to call witness and adduce evidence, both oral and documentary as well as matters relating to proof being matters of law including the burden of proof, the mode of proof and the degree of proof. This was imperative in order to avoid any doubt about the ultimate determination of guilt.

Distinguishing between legal power and judicial power

Wisely meanwhile, the judges declined to rule on submissions made before it that a Select Committee of Parliament, in investigating the allegations contained in a resolution of impeachment, 'exercises judicial power and as such it is contrary to Article 4 (c) of the Constitution and that Standing Order 78A is contrary to the Constitution, especially to Articles 12(1), 13(5) and 14(l)(g).'

The Bench determined that careful consideration of the question referred to the Supreme Court by the Court of Appeal made it clear that 'it was not necessary' to examine those submissions in answering the question in issue. The distinction drawn between legal power (declared by the Supreme Court to be exercised when an impeachment process gets underway in the House) and judicial power (declared by the Supreme Court as not being necessary to decide in this instant reference) would undoubtedly be of particular jurisprudential interest both locally and internationally.

The Government's direct responsibility in provoking this ruling

Thus the law was declared and laid down by the highest court in the land. Now, let us come to politics and this Government's direct and monumentally foolish actions in provoking a stern judicial response leading to a constitutional crisis of such high magnitude.

Contrast this deliberately written order of the Supreme Court with the crass stupidity of government members of parliament in declaring even within the last week that there was no burden on a PSC investigating the misbehavior or incapacity of a judge, to 'prove' the allegations against such an individual as this was not a court of law. Amusingly, we were treated to the sorry spectacle of politicians, parliamentarians and parliamentary officials taking it upon themselves to interpret the Constitution in blissful ignorance of the fact that this is the 'sole and exclusive jurisdiction' (Article 125 (1) of the Constitution) of the Supreme Court let alone brushing aside the fact that Article 107 specifically refers to 'proved' misbehavior or incapacity.

From some government members vulgarly insulting the Chief Justice as borne out by her statements to the indecent haste in which the impeachment was rushed through, it seemed that this Government was determined to say and do the things most calculated to show its boorishness and contempt for the law. It has now got the return in good measure. A judicial reprimand was therefore well in order.

Abandoning ourselves to the wolves outside our gates

This week's opinion entered into through a spirit of 'detached objective inquiry' as the Court reminded, effectively reverses an earlier judicial timorousness in responding to abuse of executive power. Clearly this is a Court now made critically aware of the exact danger in which it finds itself from an executive excessively drunk with political power.

Importantly, the ruling must not be seen as directed exclusively to meet the injustice meted out to the incumbent Chief Justice. Certainly her trial by fire before a Parliamentary Select Committee (PSC) consisting only of government representatives was the proximate cause for the ruling. However, the Determination goes far beyond individual interests and embodies salutary safeguards in relation to the security of tenure of judges and the independent functioning of courts.

If we are to brush aside this injunction, we are abandoning ourselves to the wolves that howl outside our gates. The responsibility in that regard would be ours and not that of the politicians (government and opposition) who have ruined this county for far too long. Let us be very clear on that.

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## The Year Of Judgement

**by Rajan Philips**

The Supreme Court and the Court of Appeal could not have timed it better. The former delivered its judgement on New Year's Day and the latter made it public the following day. Following a laudable work ethic and a working calendar, rather than the customary astrological considerations, the two superior courts have ushered 2013 as the Year of Judgement for Sri Lankan politics. It is now for the Executive and the Legislature to either fall in line with the courts, as they must, or consult astrologers

and constitutional devil's advocates and cut their noses to spite the courts, as they might.

No matter how it ends, the political and constitutional unfolding through the rest of the year will be influenced by the New Year's Day ruling. Regardless of what course politics will take, the six superior court judges have quite unassumingly and unflappably written themselves into Sri Lanka's constitutional history. It is in the shadow of their ruling that Mahinda Rajapaksa, Ranil Wickremasinghe and even Shirani Bandaranayake are now left to play out what remains of their roles in public life.

A comprehensive ruling

The court ruling has identified, anticipated and addressed every political and constitutional question that could be raised in regard to the court's jurisdiction and determination on the impeachment question. Even though the government parliamentarians chose to ignore the Court's 'invitation', and this was an entirely serious, sincere, and proper judicial invitation unlike the executive invitation extended to the Chief Justice to visit Temple Trees, the court had the benefit of hearing the Attorney General as well as counsels for intervener petitioners who were objecting to the Court exercising jurisdiction on the impeachment matter. As a result the Court heard as broad a cross-section of submissions as possible and went through the time tested process of argument, deliberation and determination. Quite different, you will notice, from the way the Parliamentary Select Committee on impeachment, claiming constitutional authority, conducted itself in arriving at its determination against the Chief Justice.

The ruling first outlines how the Court established at the very outset that there was no one among the parties including the Attorney General and intervener petitioners, who objected to the particular Bench of judges hearing the constitutional case. Everyone was asked and everyone was happy with the Bench hearing them even though there was, as the ruling indicated, averment to the contrary in the intervener petitions. This should silence the government voices, in parliament and elsewhere, which have been comically and ignorantly harping about a conflict of interest in the Chief Justice selecting judges for hearing the constitutional reference on impeachment. Regardless of the procedures for assigning cases, the allusion of conflict of interest is really an affront to the individual judges assigned to the bench. It may be that government parliamentarians having become presidential puppets have forgotten that there are still judges and other professionals in Sri Lanka who carry out their duties honestly, intelligently, independently, professionally and fearlessly. Without them Sri Lanka would have lost even the little hope in hell that is still out there for preserving even a semblance of constitutional governance.

Second, the ruling establishes that there was a proper referral to the apex Court to determine the question of the constitutionality of the impeachment process created under a Parliamentary Standing Order. The ruling deals extensively with the

arguments over the validity of the referral including previous Supreme Court rulings in coming to the proper conclusion that the Court had before it a valid referral for determination. Anything else would have defied common sense. While it is not a legal issue, it is a failure of politics that until the current challenges made their way to the Supreme Court via the Court of Appeal, the apex court has had no occasion to determine the constitutional question pertaining to the impeachment of judges.

The question of constitutionality was first raised by the late Mr. S. Nadesan, QC during the impeachment of Chief Justice Neville Samarakoon. The UNP government at the time did not refer the matter to the Supreme Court despite the request by Sarath Mutwettugama, Anura Bandaranaike and Dinesh Gunawrdena who were the Opposition Members in the PSC on impeachment of the then Chief Justice. Of the three, two are dead and third member, Dinesh Gunawardena is a cabinet minister in the present government. It would be interesting to see which way he will vote if the government proceeds with the address in parliament for removing the Chief Justice notwithstanding the Court ruling.

Be that as it may, the present SLFP-led government under a different leadership tried to change the impeachment process as part of a constitutional change in 2000. And the Supreme Court has now drawn attention to the fact that Anura Bandaranaike in his 2001 ruling as the then Speaker of Parliament invited parliamentarians to consider the need to "introduce fresh legislation to amend the existing Standing Orders regarding motions of impeachment against Judges of the superior courts" in line with the provision "already included in the draft Constitution tabled in House in August 2000." The Court noted that the "2000 draft Constitution did not see light of day as a new Constitution.

The people know that it was the UNP that torpedoed the draft Constitution of the year 2000. However, in 2002, a UNP-led government gave an undertaking to UNHRC that the decisions of a Parliamentary Select Committee on the impeachment of judges would be subject to judicial review if such a committee "were to misdirect itself in law or breaches the rules of natural justice." The UNP government report to the UNHRC went on to assert that there was no intention "either in the relevant constitutional provisions or the standing orders … to exclude judicial decisions of the inquiring committee."

Notwithstanding this assertion, during the current impeachment saga, Mr. Ranil Wickremasinghe rose on his hind legs more than once in parliament to lead the chorus on parliamentary supremacy to the distinct delight of Speaker Rajapaksa. On the other hand, the government MPs led by the President not only went back on their constitutional commitments in 2000 but also cited the impeachment of Chief Justice Neville Samarakoon as 'precedent' even though they were dead against that impeachment process in 1984. Mr. Dinesh Gunawardena is a silent accomplice in this political reversal. Worse, the President and his MPs admitted that the process for impeaching judges should be changed but only after impeaching the present Chief Justice. In other words, both the UPFA government and the UNP opposition

have jointly and incompetently made such a mess of the impeachment process that the superior court judges have had to step in to show the way to clean up the mess.

The Supreme Court's ruling also points out the difference between the Soulbury Constitution and the 1972 Constitution, on the one hand, and the 1978 Constitution, on the other, in regard to their respective provisions for the removal of superior court judges. The two former constitutions identically provided for judges to continue in office during good behavior and for removal for misbehavior or incapacity upon an address by parliament and an order by the Head of State. The 1978 Constitution, on the other hand, provided for an ill-defined process of investigation to precede an address by parliament. The reason for the difference, in my view, is that the two former constitutions were based on parliament and the Head of State acting sensibly, responsibly and in good faith in regard to the removal of a judge based on conspicuous and incontrovertible evidence of misbehavior or incapacity.

President Jayewardene may have wanted to provide for a specific process of investigation with the good intention of preventing parliament from acting arbitrarily and in bad faith to remove a judge. Ironically, JRJ himself created a flawed process by acting in bad faith against his own appointments. The Rajapakse government went further and has turned the impeachment process into a political witch hunt and asserting it as a constitutional right and parliamentary privilege. The Supreme Court has now ruled conclusively and in no uncertain terms that:

"In a State ruled by a Constitution based on the rule of law, no court, tribunal or other body (by whatever name it is called) has authority to make a finding or a decision affecting the rights of a person unless such Court, tribunal or body has the power conferred on it by law to make such finding or decision. Such legal power can be conferred on such court, tribunal or body only by an Act of Parliament which is 'law' and not by Standing Orders which are not law but are rules made for the regulation of the orderly conduct and affairs of the Parliament. The Standing Orders are not law within the meaning of Article 170 of the Constitution which defines what is meant by 'law'. The power to make a valid finding, after the investigation contemplated in Article 107 (3), can be conferred on a court, tribunal or body or only by law and by law alone."

In passing, the Court also disagreed with the submission of the Attorney General and Counsel for the intervener petitioners that the "power of removal of the judges of the Supreme Court and the Court of Appeal is a power of parliament. " Parliament can only move a resolution for impeachment and make "an address of Parliament to be presented to the President for the removal of such judge for proved misbehavior or incapacity." The Court ruled that "The power of removal of such judge is the power of the President." Interestingly, the ruling stops short of saying whether the President has the discretion of not removing a judge after receiving an address by parliament for the removal of that judge.

Considering the fact that they were dealing with a matter that affected the superior court judges, the three judges in their ruling reiterated the "spirit of detached objective inquiry" in which they "attempted to find an answer to the question" referred to them, and that they have performed their duty faithfully bearing in mind the oath of office taken by them when they assumed judicial office.

Political implications

The Supreme Court ruling has posed an insurmountable hurdle of constitutional credibility to the government's plan to move ahead with the removal of the Chief Justice. The bottom line in constitutional governance is that a government must accept the constitutional determination of the Supreme Court even if it does not agree with the Court's ruling. In this instance, the Supreme Court has given a ruling that hardly anyone can seriously argue against. And the government knows that it cannot credibly argue its way out through another Speaker's ruling, not that previous rulings passed serious muster. The easier and the only honest option for the government would be to fall in line with the Court's ruling as I indicated at the outset, and stop the current impeachment process. The more difficult and utterly dishonest and irresponsible option would be to defy the court ruling and plunge the country into constitutional and political chaos.

It is time that those, who are friends of both the President and the Chief Justice and who keep calling upon the Chief Justice to step down for the sake of national interest, turned their appeals for once to the President. Why is it that they do not ask the President even once, not to step down, but to halt the impeachment process? It is not the Chief Justice who is sullying the country's name abroad but the government's threat to remove her from office. If the government abides by the Supreme Court's ruling it would restore some normalcy at home and somewhat compensate for its battered credibility abroad.

It should now be clear to the government that the impeachment process was ill advised from the beginning and that it has bitten a lot more than it could chew. Equally, the UNP Opposition has boxed itself into ineffectuality by being dishonestly evasive in regard to the impeachment process. With Machiavellian intent, the UNP leader wanted the Chief Justice removed and the government fatally discredited. It has backfired on the UNP because it has lost its identity in the whole impeachment debate. It has talked from both sides of its mouth – asserting parliamentary supremacy and railing against the PSC process, and has lost its own credibility as an alternative to the government.

Unlike at the time of the passage of the 18th Amendment, proceeding with the impeachment in defiance of the Court ruling will have immediate repercussions. Disregarding the Supreme Court's ruling will nullify the superior courts and destabilize the entire judiciary. The government is in no position to do what JRJ did in the 1980s and get away with it, namely, to send home all the superior court judges and repack the courts with new judges. There will be a revolt, and rightly so.

Also, if the government has learnt anything from the appointment of judges after 1977, it must know that even handpicked judges cannot be relied upon to deliver favourable judgments at all times. In fact they become independent in their own way while in office. Of the more recent controversial appointees, it could be said that Neville Samarakoon demonstrated independence consistently, Sarath Silva has done it perversely, and Shirani Bandaranayake has been showing independence belatedly.

Before 1977, the parliamentary system served the country well in avoiding such aberrations as we are experiencing now. The impeachment of judges was unheard of as the ethos of cricket was observed in politics in accepting even unfavourable judicial decisions. More importantly, the governments were also held in constant check by a strong, vigorous and well informed opposition led by the Left. Apart from their extraordinary parliamentary abilities, the Left leaders derived much of their political clout from the working class mass movement outside parliament. The trade unions were the main 'bulwark of democracy' in Sri Lanka, as AJ Wilson used to say. Now there is neither a strong leadership in parliament nor a bulwark of democracy outside parliament.

The courts can only partially fill this void. Without the sword and the gun, as Alexander Hamilton has said, there is very little that the judiciary can do except delivering good judgements. The Supreme Court has delivered a good judgement that would be the touchstone for Sri Lankan politics for the rest of this year, if not longer. The government could persuade itself to abide by the ruling and stop the current impeachment process or, it could choose to defy the ruling at its own peril. To the country at large, the ruling provides a rallying point from which the people will hold the government's feet to the constitutional fire.

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## An Early Warning: The Beginning Of Sri Lanka's Year Zero

**by Bijo Francis and Basil Fernando**

On the 8th of January, the President of Sri Lanka will address a proposal to parliament to remove the incumbent Chief Justice Shirani Bandaranayake, based on a report by a Parliamentary Select Committee (PSC). The entire PSC process has been declared unconstitutional and null and void by the Supreme Court of the country. For two days, the illegal proposal will be debated in the parliament and on the 11th it

will be put to a vote. The government has the required majority to get it through the parliament. Immediately after passing the resolution, the Chief Justice of Sri Lanka will be removed by force and will be prevented from entering into the Supreme Court premises. A new Chief Justice will be appointed.

In all likelihood, in the course of these events, she will be arrested on some pretext. As there a strong resistance to this, many persons, including members of the legal community, including some judges, are very likely to be arrested. Many persons from political and civil society organizations will also be arrested or otherwise dealt with.

As Sri Lanka has a fearsome tradition of using forced disappearances, torture and ill treatment, arbitrary arrests and illegal detention to deal with any opposition to the government, the government will, in all likelihood, resort to such practices.

The new Chief Justice will not be easily accepted by the legal fraternity, and the protests will be suppressed ruthlessly. This has become a quite a common practice in Sri Lanka.

Thus, by passing the resolution to remove the Chief Justice of Sri Lanka, the government will usher in a period of serious repression, which they will have no capacity to control. As it has happened in such times before, for example in 1971 after JVP uprising; 1980 after the general stike;1983 racial riots; 1988 -1991, generally referred to as period of terror; and the suppression which took place in the North and East from 1983 to May 2009, there can be serious acts of repression.

The state media will be used to attack the removed Chief Justice, the legal fraternity and all those who oppose these moves by the government. All free media will continue to be suppressed.

The most marked difference from the earlier periods of repression will be the open undermining of the judicial role in Sri Lanka. There will be serious monitoring of the judiciary and those judges who act to uphold the rule of law will particularly be exposed to reprisals. Creating serious divisions in the judiciary – so as to prevent future actions against the government on the basis of rules – will be a major feature of this period of repression, which makes it worse than the earlier periods of state repression.

As the judicial role is displaced, the most dominant institution of Sri Lanka will be the Ministry of Defense. The paramilitary forces, such as the Special Task Force (STF) and the intelligence services – which, in the recent times, have acquired enormous experience in repression and enjoy immunity – will play the major role in social control. As the rule of law is relegated into an unimportant position, the activities of the Ministry of Defense will not be deterred by legal rules.

The Asian Human Rights Commission wishes to draw everyone's attention to the events that are to unfold in the coming few days as the government moves to remove the Chief Justice through a legal process that the Supreme Court of Sri Lanka has declared to be illegal. The government will also proceed to appoint a new Chief Justice, the appointment of whom will be invalid from the start, as the removal of the incumbent Chief Justice is illegal. Under these circumstances, the government will unleash repression to force these decisions on the people.

The AHRC issues this statement as an urgent alert and a warning to all, to caution everyone about the situation that will unavoidably arise under these circumstances. We wish to draw attention to the events that began in Cambodia in 1975, a period which is known as the year zero; the events that unfolded in Indonesia in 1965, which lasted for decades, causing enormous destruction to the life and liberties of people; the period that began in Myanmar with Ne Win's military coup in 1962, the consequences of which have lasted for many decades; several military coups in Pakistan, which displaced the rule of law system; the period under Ferdinand Marcos in the Philippines; and many other catastrophic political situations that several nations in Asia have faced.

Sri Lanka now enters into a similar period.

Sri Lanka's tragedy has not received attention in the international media, in the same way that most of these tragedies did not receive attention at the time they were beginning. Such a lack of notice by the rest of the world was one of the reasons that enabled such political catastrophes to cause such havoc on the people of those countries. We urge the international media to take notice of what is taking place in Sri Lanka and thus avoid complicity in such a situation.

Above all, we urge the people of Sri Lanka to take note of what is taking place and to do all that they can to avoid this catastrophe falling on themselves, even at this last moment.

We urge the international human rights movement to do their utmost to assist Sri Lanka in this moment. To not do so would be to be guilty of complicity with what is to come.

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## 2011: LLRC; 2012: Impeachment; 2013: Year Of Political Destruction?

**by Rajan Philips**

Last year on 16 December, after much hesitation, foot dragging and translation excuses, the government tabled in parliament the report of the LLRC Commission that had been hand delivered to the President more than a month earlier. This year on 8 December, ignoring calls for patience, due process, fairness and natural justice, a Parliamentary Select Committee – reduced to government members only – rushed to

judgment against the country's Chief Justice, Shirani Bandaranayake, and reported to the Speaker that she is guilty enough to cause an address by parliament for her removal by the President as early as January 2013.

There is a glaring inconsistency in the government's approach to the professionally produced and generally well received LLRC Report on national reconciliation, on the one hand, and its approach to the unprofessionally botched and generally ridiculed PSC report to get rid of the Chief Justice, on the other. The government would rather not have had the LLRC Report come into being, but is belligerently determined to proceed with the PSC report and send the Chief Justice packing regardless of its consequences for the people at home and the country's reputation abroad.

The government seems unconcerned about the damage the impeachment will do to its image before it hosts the Commonwealth summit in Sri Lanka scheduled for 2013. In February, the government will have to face an IMF review in Colombo, and will have to present its case again to the United Nations Human Rights Commission in Geneva in March. But nothing deters this government. It has got used to getting away with whatever it does regardless of protestations at home or abroad.

The Rajapakse government is behaving like the Republican Party in Washington in getting ready for the New Year. The latter too is belligerently intransigent and would rather risk America fall off the fiscal cliff of middleclass tax increases and government spending cuts including unemployment allowances (and take down much of the Western world with it) than to agree to increase the tax only on people earning more than $250K an year. It does not matter to the diehard right wingers that the rich themselves do not mind paying higher taxes and President Obama has agreed as a compromise to raise the no-increase maximum for taxation to $400K.

Similarly, the Rajapakse government would rather have the country plunge into what the Court of Appeal has measuredly called "a chaotic situation" than heed the advice to prorogue parliament and prevent an unnecessary constitutional crisis.

To be clear, the Left Alliance in the UPFA must not be allowed to get away with the feeling that they have done their duty by the country in advising the President to prorogue parliament, when they have in fact let the country down by not taking the lead in vigourously and openly admonishing from the outset that the impeachment initiative is a roguish aberration unworthy of even this government. The Left Alliance leaders will be called again to show their hands in parliament if the government proceeds to have a vote on the impeachment question in January. They will have to come up with something better this time than saying 'No' in principle, but 'Aye, Aye, Sir', in practice, as they did when they voted for the 18th Amendment.

Judicial sanity in a sea of political madness

Legalities aside and politically speaking, independence of the judiciary was the most recurrent profession of the framers of the 1978 Constitution, who even included

'Independence of the Judiciary' in the preamble to the Constitution as one of its founding principles along with Representative Democracy and the assurance of Freedom, Equality, Justice and Fundamental Human Rights to all Sri Lankan Peoples. Representative democracy and independence of the judiciary are thus given equal weight in the constitution and one does not exist without the other in practice. The positive purpose of Article 107 Section (2), which is placed under the subhead: 'Independence of the Judiciary' in Chapter XV of the Constitution dealing with 'The Judiciary', is the assurance of tenure for superior court judges. The removal of a superior court judge is an extreme exception and is exceptionally dealt with, unlike the removal of any other state official, by requiring an address by parliament and an order by the President. But removing a superior court is not a 'constitutional right' bestowed on parliamentarians.

Government parliamentarians especially the worthies who made up the impeachment select committee have got it wrong in claiming that the removal of the Chief Justice is their 'constitutional right.' No, it is an exceptional remedy to avoid the judiciary being embarrassed and paralyzed by the misbehavior or incapacity of an individual judge independent of any action by the government or anyone else. It is the government that is now paralyzing and embarrassing the judiciary by its ill-intended impeachment motion. The Constitution confers no 'right' on MPs to remove judges, but only assigns them the role they have to play in a process that even the government has agreed needs change but only after the present Chief Justice is removed from office. It is not natural justice to insist that the present Chief Justice should be dealt with under the current process and that the process should be changed only after the incumbent is removed.

The process of impeachment is now under challenge before the Supreme Court in regard to its constitutionality and before the Court of Appeal for its lack of conformance with the requirements of natural justice. The Courts cannot wash their hands off these matters like Pontius Pilate. In terms of the Constitution and adhering to the principles of natural justice the two superior courts will have to hear arguments and make their determinations. The courts have not questioned the privileges of parliament but are constrained not to ignore the alleged denial of natural justice to a person, in this instance the country's Chief Justice, by an action of parliament which has nothing to do with the privileges of parliament. The courts have not issued summons to the Speaker and the PSC members but only notices of proceedings and invited them to give the courts the benefit of their arguments so that the courts could hear all sides and make the best possible determinations on the matters before them. Parliament and the President must exercise prudence and let the courts make their determinations by proroguing parliament instead of proceeding to act.

In refusing to prorogue parliament the government is being perversely consistent with the mala fide intentions with which it started the impeachment process in the first place. The government is known to be angry over the temerity of the Supreme Court and the Chief Justice exercising the Court's "Constitutional jurisdiction" in

regard to Divi Neguma Bill. The apex court has also annoyed the government by picking pertinent holes in the Appropriation Bill. A presidential minion was reportedly peeved over alleged actions of the Chief Justice and the Judicial Services Commission affecting a lower court magistrate. Additionally, it has been suggested that the government wants the CJ removed so that there will be no judicial interference in regard to future legislations and transactions that are inconsistent with or in violation of the constitution.

Then there is sheer hubris and ire over the highhandedness of a woman who may have been handpicked to do the political bidding as Chief Justice and who might have been expected to step down when directed. The woman needed to be taught a lesson seems to have become the consensus in the ruling cabal, even though, as grapevines would have it, the President manifesting his sharp survival instinct did note that the impeachment road carried the potential for political destruction. In the end, as has now become the standard for this government, the impeachment decision has come to betray all the native trickery in intent and incredible amateurishness in execution.

The entire process – from the drafting up of the allegations, inviting a sitting Supreme Court Justice to give ex-parte evidence, and to finally completing a partisan PSC report, is shot through and through with cheap trickery and chronic amateurism. The assertion that the PSC process was 'objective' because it followed the Constitution is laughable. This was followed by the lunatic claim by a PSC Member who is also a Minister about a Tamil-Muslim conspiracy in the Court of Appeal against the government, based on his ignorant assumption that two of the three Court of Appeal judges hearing the impeachment petitions are Tamils and the third is a Muslim. On the contrary, the three Court of Appeal judges include a Sinhalese, a Tamil and a Muslim. Not that ethnic composition of the Court should matter but that is the standard which government Ministers have lowered themselves to.

The government's unworthy attempts to divide the judiciary and to divide the Bar Association, not to mention the decision of the government to withdraw funding support for the Annual General Meeting of Judicial Services Association, have backfired. Although, no formal resolution has been adopted for boycotting a new Chief Justice if one were to be appointed after removing the present incumbent through the ongoing impeachment process, the bandying of the very idea of a boycott should send shivers down the spine of aspiring individuals.

Public office has a way of transforming incumbents in extraordinary ways, and none more so than a judicial office. Some may recall the somewhat aristocratic remark of a former Chief Justice, Victor Tennekoon, which he made when he was Attorney General during a ceremonial sitting of the Supreme Court to welcome two new judges: "no amount of learning or professional competence will make an ordinary man anything more than ordinary judge." It is encouraging that the six superior court judges now in national limelight are proving themselves to be extraordinary.

In the circumstances and whichever way the impeachment dust might settle, the country owes a great deal of gratitude to the three Justices of the Court of Appeal – S. Sriskandarajah, Anil Goonaratne and AWA Salam, and the three Justices of the Supreme Court – Gamini Amaratunga, K. Sripavan and Priyasath Dep, for providing islets of judicial sanity in a treacherous sea of political madness.

A government that likes chaos

Although the Court of Appeal is duly concerned of an impending chaotic situation constitutionally speaking, the country is already in a chaotic situation in several other respects. But the government is unconcerned. Indeed, this government seems to prefer chaotic situations in which it can do anything it wants rather than normal situations when it will have to explain everything it does or it fails to do. Things will only get worse in the New Year. Routine government business, already mismanaged in the past year, will be even more neglected in the coming year. Wrongheaded decisions affecting the economy and equity will be taken without due scrutiny and corrections. There is more time and energy spent on impeaching the Chief Justice than providing redress to the thousands of flood victims.

The Divi Neguma initiative will be out of its controversial starting block and will muddle forward, or backward and sideward, from ill-conceived policy to ham-handed implementation in the rural hinterland. There will be new burdens on the poor while politicians wield power and throw away money in the name of poverty alleviation. In the Colombo heartland, condo-mania will continue with the selling of valuable Colombo properties to foreign developers over sweetheart deals and unaccounted infrastructure costs that the country will have to ultimately pay. And god knows what other overseas real estate investment (may be a villa in Greece?) will be undertaken by the entrepreneurial Governor of the Central Bank before anyone comes to know of it.

Already the government has finessed the passage of the Appropriation Bill without changing two key provisions in it as directed by the Supreme Court. The two problematic provisions, as Opposition MP Eran Wickremaratne has pointed out, would allow government ministers taking loans and making withdrawals from the Consolidated without parliament's scrutiny and express approval. The legal advice to the government has indicated that these problematic provisions could be passed with a two-thirds majority! In other words, and thanks to this legal advice, parliament can use a two-thirds majority to abdicate itself of its fiduciary responsibilities.

This is unheard of! When was the last time an Appropriation Bill was challenged before the Supreme Court? How could an appropriation bill have been prepared to allow for transactions and withdrawals to be made without the express approval of parliament? And why would this be necessary in a parliament where more than half the members allegedly signed on to the signing sheet supporting the impeachment petition against the Chief Justice without even seeing the petition? The manifest

answer is to avoid financial transactions becoming public by including them on the order paper even though there is no doubt about the requisite majority for their passage in parliament. But how more irregular could a government get? If this is not setting up for daylight robbery of the public purse, what is? How could people like Tissa Vitarane, Sarath Amunugama and DEW Gunasekara sit on their hands and put up with such nonsense?

Now that a precedent appears to have been established in passing the Appropriation Bill ignoring the directives of the Supreme Court against violating the Constitution, what is the guarantee that the government will honestly make the changes to the Divi Neguma Bill as stipulated by the Supreme Court? Who is to check? MPs like Eran Wickremaratne, Harsha de Silva and MA Sumanthiran do bring to the notice of the public the frequent transgressions and irregularities of the government. But they are reduced to being voices in the opposition wilderness by the Leader of the Opposition who has no fire in his belly and who has proven that he is 'constitutionally' incapable of political outrage. To modify what Dennis Healey said of Sir Geoffrey Howe in the British House of Commons: "To be politically attacked by Ranil Wickremasinghe would be like being savaged by a dead sheep!" No one knows this better than Mahinda Rajapaksa.

Mr. Wickremasinghe has been Leader of the Opposition for 28 years, save the two years or more when he was Prime Minister. Mr. Rajapaksa has been President for seven years and was Prime Minister for less than two years before that. The President has at least four more years left in his second term, and thanks to 18A there is no term limit to stop him from running again to be President. Mr. Wickremasinghe has got his own version of 18A within the UNP giving him control of the Party for six years. His expectation to win power is more by default – when the country is finally tired of Mahinda Rajapaksa, than through effort – by exposing the myriads of government misdoings and providing serious alternatives in policies and programs.

In other words, Ranil Wickremasinghe wants power delivered to him on a platter. By his calculation his day could come as early as 2014, the end of a long cycle of 20 years (a nice enough number and generously longer than the 17 year run the UNP had) that an SLFP-led alliance would have been in power. Never mind if you hear the brothers laughing. But it is no laughing matter for the country and its people, for whom the question ought to be what good does it do to have these two gentlemen go on indefinitely in their current or future positions?

From Mark Anthony Bracegirdle to Shirani Bandaranayake

There is a third player on stage in the impeachment drama, the Chief Justice. It is not my purpose to discuss the political potentialities of Shirani Bandaranayake. Of the two main candidates in the 2010 Presidential election, Mahinda Rajapaksa has dared the Chief Justice to enter the ring. If this was a move of pre-emptive intimidation on the part of a seasoned politician who also considers himself to be a senior lawyer, his

former adversary and military hero Sarath Fonseka has once again showed his panache for political malapropism by inviting the beleaguered Chief Justice to enter politics. What the Chief Justice will or will not do, politically or otherwise, after she ceases to be Chief Justice is of no concern at this stage, but what she will do for the rest of the time she could be in office is of utmost concern.

The unfolding impeachment drama has affixed personal monikers to the three institutions of the State: Mahinda Rajapaksa for the Executive, Ranil Wickremasinghe for Parliament (i.e. leaving out the Speaker and the government side of the legislature who are really part of the Executive), and Shirani Bandaranayake for the Judiciary. Whether or not Shirani Bandaranayake appreciated this when she was plucked out of academic obscurity into judicial limelight and later elevated to being the Chief Justice, one would hope that the belated baptism of impeachment has given her a proper historical perspective to realize that of the three actors on the impeachment stage she represents the oldest institution in Lanka's modern history. The weight of history should be enough to humble as well as enlighten even the most unprepared of incumbents.

The executive presidency, only thirty five years old, is an upstart in historical terms. It is prone to behave like an upstart. The legislature has been in existence for 65 years, or 81 years if counted from 1931, the year when universal franchise was introduced. The Supreme Court, on the other hand, has been a fixture almost from the beginning of British rule in this country. Admittedly manned by British judges for over a hundred years, the Supreme Court nevertheless was in the forefront of incremental constitutional changes during the British rule. As historians have noted, the conflicts between the Governor and the Chief Justice dominated the British rule of the colony in the 19th century. The judiciary was regulated by separate charters and the Supreme Court established its independence from the Executive Governor from the beginning of constitutional rule in the island.

Perhaps the most sensational manifestation of this independence was the ruling of the Supreme Court in the celebrated Bracegirdle case in 1937. Mark Anthony Lyster Bracegirdle was a maverick British planter who joined the Lanka Sama Samaja Party a year after it was founded in 1935 and threw himself into its activities against colonial rule. Alarmed by this 'treason', the British Governor at that time, Sir Reginald Stubbs, ordered Bracegirdle arrested and deported. The LSSP filed a writ of Habeas Corpus application against the arrest and the Supreme Court comprised of three British judges granted the application, declaring the Governor's order illegal and ordering the release of Bracegirdle instead.

In a twist of history 77 years later, a passage from the judgment of Chief Justice SS Abrahams in the Bracegirdle case has been cited in defence of Sri Lanka's current Chief Justice in the Court of Appeal and is reproduced in the latter's ruling. The citation itself is from a1918 English court ruling that the "jurisdiction of the judges … is the only refuge of the subject against the unlawful acts of the Executive, the higher

officials, or more frequently subordinate officials," and that "… it will always remain the duty of … judges to protect those people."

Howsoever damning it might be to the Executive and the Legislature that the Bracegirdle ruling should be invoked now, it is also not an edifying experience for the public to see the country's Chief Justice implicated in all manner of allegations no matter if they are provable or not. In a sense, the predicaments of the Chief Justice are indicative of a mobile society in which families and extended families of professionals are in a hurry to expand their financial and social capitals as much as possible and as soon as possible. I have referred to Ms. Bandaranayke's spousal burdens a number of times in my articles. On a lesser note, she has also been caught up in the not uncommon sibling nexus through which Sri Lankan expatriates invest in expensive real estate purchases in the natal country using their legitimate earnings in their naturalized countries.

The Chief Justice may not have done anything wrong at all, but with the benefit of hindsight she might be thinking that she has rather done nothing at all. There is no one, however, who cannot see through the cynical machinations of her accusers who are picking on the Chief Justice while letting the real robbers get away with their loot.

Shirani Bandaranayake deserves a fair process to vindicate her from the allegations against her. The real question is if she deserves to remain as Chief Justice until retirement even if she is vindicated now. If the people were to get tired of Mahinda Rajapaksa and Ranil Wickremasignhe before their indefinitely desired terms are up, there could be a similar disenchantment with Shirani Bandaranayke as well. It will not be a bad thing for the country if all three of them could leave on their own terms without being pushed out, but sooner than later. And it will be a good thing for the country if all three of them, while they are in office, could be pressurized into contributing to reforming the constitution including the provisions for appointing and removing superior court judges.

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## Amend Divineguma Bill, Don't Impose It On North

**by Friday Forum**

The Divineguma Bill now before Parliament provides for the setting up of a new department called the Divineguma Development Department, the main object of which is the administration of a poverty alleviation programme. The Bill was challenged before the Supreme Court and the Court held that as much as fifteen clauses of the Bill dealt with matters enumerated in the Provincial Council List.

Article 154G (3) of the Constitution requires every Bill in respect of any matter set out in the Provincial Council List to be referred by the President to every Provincial Council for the expression of its views before it is placed in the Order Paper of Parliament. The Divineguma Bill had not been so referred to Provincial Councils and, as such, the Supreme Court held that the Bill could not become law unless so referred. As the Bill had been placed in the Order Paper without complying with Article 154G (3), the Court made no determination on the other grounds of challenge.

The Bill was then withdrawn and referred to the eight Provincial Councils which have been constituted and to the Governor of the Northern Provincial Council. All existing Provincial Councils agreed to the passing of the Bill. The Northern Provincial Council not being constituted yet, the Governor of that Province purported to express agreement to the passing of the Bill, on behalf of the Council. The Bill was then placed in the Order Paper and was challenged before the Supreme Court. On the ground of challenge that the Bill has not been referred to all Provincial Councils and therefore could not have been placed in the Order Paper, the Supreme Court held that "every Provincial Council" must be interpreted to mean every Provincial Council that had been established and constituted. It follows from the decision of the Court that the Bill could therefore have been placed in the Order Paper.

Divineguma- Implications for Devolution

If the Divineguma Bill becomes law, many functions of Provincial Councils will be taken over by the Divineguma Development Department. Among the matters that the Supreme Court observed to have a co-relation to items in the Provincial Councils List are: implementation of provincial economic plans, rural development, food supply and distribution, construction activities, roads, bridges and ferries within a Province, rehabilitation of destitute persons and families, rehabilitation and welfare of physically, mentally and socially handicapped persons, market fairs, co-operatives, regulation of unincorporated societies and associations, agriculture, promotion and establishment of agricultural, industrial, commercial and trading enterprises and other income generating projects and relief for the disabled and unemployable. The Divineguma Development Department will become a super-department not only at the expense of other central government departments but Provincial Councils as well.

While programmes for poverty alleviation and guaranteeing social equity may be undertaken by the Centre, it is important that they be implemented without transgressing on the functional competences of Provincial Councils. In fact, Provincial Councils should be made implementing partners of such national programmes. We therefore call upon the Government to make suitable amendments to the Divineguma Bill to ensure that where functions relating to the programme envisaged are within the competence of Provincial Councils, such functions are carried out by the Provincial Councils and not the Divineguma Development

Department. The Department would, of course, co-ordinate the implementation of such programmes by the Provincial Councils.

The Bill also provides for the setting up of Divineguma organizations at community, regional and district levels under the supervision of the Divineguma Department. The objects and powers of such organizations are mostly related to matters enumerated in the Provincial Council List. We therefore urge the Government to amend the Bill suitably so that Provincial Councils would not be denied of their functions under the Constitution.

An eleven-member Divineguma National Council is to be established to assist the Department in respect of the policy and management of divineguma development programmes. The Council will have no representation from Provincial Councils. We urge that the Council be expanded to include four nominees of the Chief Ministers' Conference.

The Supreme Court has held that several provisions of the Bill are inconsistent with the Constitution and suggested amendments to make the provisions consistent with the Constitution. We call upon the Government to amend those provisions as suggested by the Supreme Court rather than using the two-thirds majority it has to pass the provisions.

Imposing Divineguma on the Northern Province

Article 154 G (3) of the Constitution provides that where every Provincial Council agrees to the passing of a Bill on a matter in the Provincial Councils List, such Bill could be passed in Parliament by a simple majority. However, where one or more Councils do not agree to the passing of the Bill, such Bill must be passed by a two-thirds majority if the Bill is to become a law that is applicable to all nine Provinces. If passed only by a simple majority in Parliament, the Bill would become a law applicable only to the Provinces which had agreed to the Bill.

An important question that arose before the Supreme Court was whether the Governor of the Northern Province could have expressed agreement to the passing of the Bill on behalf of the Northern Provincial Council. On this issue, the Court held that the views of the Governor cannot be considered as the views of the Northern Provincial Council and as such, the Bill would be required to be passed by a two-thirds majority. What follows from the Court's determination is that if the Bill is not passed by a two-thirds majority, the Bill would not become a law applicable to the Northern Province.

Under Section 10 of the Provincial Councils Elections Act, the Commissioner of Elections is required to call for nominations within one week of the dissolution of a Provincial Council. However, in the case of the first election to a Provincial Council, the Commissioner could call for nominations only after the President gives him a direction to hold the election. Thus, the Northern Provincial Council has not been

constituted only because of the President has not made such a direction. The President has, on more than one occasion, stated that the first election would be held in September 2013.

The importance of holding elections to the Northern Provincial Council need not be emphasized, especially when the Lessons Learnt and Reconciliation Commission (LLRC) appointed by the Government has stated that a political solution is imperative to address the causes of Sri Lanka's ethnic conflict and that there should be more devolution. Since the end of the separatist war in May 2009, presidential, parliamentary and local elections have been held in the Northern Province but not elections to the Northern Provincial Council.

In the above circumstances, we urge Parliament not impose the Divineguma Bill on the Northern Province by passing it with a two-thirds majority. The people of the Northern Province have not been able to express their views on the Bill through their Provincial Council only because no direction has been made to hold elections to that Council and it would be against the spirit of devolution to impose the Bill on the people of the Northern Province.

Friday Forum especially calls upon those political parties and Members of Parliament who believe in a political solution to the ethnic conflict and have been speaking out on the need to strengthen devolution not to be a part of a two-thirds majority that would impose the Divineguma Bill on the Northern Province and its people. Once the Northern Provincial Council is constituted, appropriate legislation could be brought to extend the new law to the Northern Province and the Northern Provincial Council given an opportunity to express its views on the Bill in the same manner in which the other Provincial Councils were given an opportunity.

In the post-war period, the Centre has found various means of weakening of the Provincial Councils, a good example being pressurizing them not to collect Business Turnover Tax in violation of their own statutes. Passing the Divineguma Bill in its present form and imposing it on the Northern Province would further weaken Provincial Councils and also have a negative effect on efforts at reconciliation.

Jayantha Dhanapala Dr. Jayampathy Wickramaratne

On behalf of Friday Forum, the Group of Concerned Citizens

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## Sri Lanka Sets For A Constitutional Crisis!

**by Laksiri Fernando**

It was incumbent on the Court of Appeal today, 3 January 2013, to rule an order on the writ applications filed by seven petitioners against the impeachment proceedings initiated by the ruling party in Parliament against the Chief Justice on 6 November 2012, coinciding with the Supreme Court ruling on the controversial Divineguma

Bill. This Bill was initiated by the brother of the President, Minister Basil Rajapaksa. The Supreme Court ruling pointed out major flaws in the Bill in addition to several contraventions of the country's constitution, which is supreme.

The ruling of the Court of Appeal says, based on its reference of the matter to the Supreme Court on 20 November 2012, as the writ applications had a major bearing on constitutional interpretation that the Standing Orders are not law and thus the Parliamentary Select Committee (PSC) has no constitutional power to inquire or to determine any misbehaviour on the part of the Chief Justice.

This should have been common sense, at least after the matters were raised, if not for the inglorious political campaign conducted by the ruling party and its media outlets. There are several PSCs under various standing orders, but can they or have they ever prosecuted anybody except on a matter of Parliamentary privileges which is allowed under the constitution? The latter is also a matter that needs to be carefully thought about in a review of the present constitution in the future. Giving any judicial power to Parliamentarians is like giving a razor to a monkey, however much the monkeys call themselves supreme.

It is true that a mock trial was conducted in 1984 against the then Chief Justice, Nevil Samarakoon, but no verdict was given having realized the inherent contradictions of the whole process. The governments in Sri Lanka have so far failed to rectify the situation irrespective of the promises given before the UN Human Rights Committee in 2002. Of course they can even call the UN imperialist or Western conspiracy. What is lacking in the impeachment procedure is an 'independent judicial component' outside of Parliament.

Parliamentarians are primarily law makers and not judges. They should bring good laws to the country without relying on the law of the jungle. When they try to transfer roles, trying to be judges instead of being legislators, it is like the donkey trying to do the dog's job and then getting a good beating. We have a good example of their mockery of trying to act as a judicial tribunal in the PSC's Kangaroo Court. They undoubtedly surpassed King Kekille.

We should guard ourselves, however, of excessively rejoicing at the Appeals Court ruling or excessively amusing ourselves about the hilarious acts, no doubt, that they conduct because of the serious political implications of the situation. This is a plain and simple, but a serious constitutional crisis. There had been no such a thing in the past. Even the colonial governor finally decided to abide by the decision of the Supreme Court in the Bracegirdle case in 1937. There had been no confrontation between the judiciary and the legislature backed by the executive before. There had been tensions or disagreements which are normal in a democracy under separation of powers. But there had been no head on clash between the two even during JR's time involving fundamental constitutional issues.

People normally know that the politicians especially when they are in power open their big mouths. But such a venom and hatred against the judiciary as unleashed at present are completely unprecedented. Sri Lanka has experienced industrial strikes, aborted military coups, communal violence, insurrections and even terrorist separatism. But none of these events had led to an institutional or structural crisis in the constitutional framework of the basic democratic system in the country. There had been a decline and a deterioration, but not complete negation. The most problematic factor in the situation is that the onslaught against the so far accepted norms of the judiciary comes from the elected members of Parliament. Have they alienated themselves to such an extent from the accepted norms or do they have or work on a different agenda, knowingly or unknowingly?

There are indications that the country is at cross roads. We have come to a junction where the rulers wanted us to go further in the authoritarian direction. They are promising luxury for a few and only subsistence for the many. They have been painting the surface of the economy but not the substance. They have been neglecting education, health and the poor but emphasising on entertainment and luxuries of the few. First the academics resisted and now the judiciary is resisting in a different and an institutional manner. Some people may be confused because they are the ones who defeated terrorism. But instead of winning peace they are now creating new animosities between the communities.

There are some dangerous pronouncements. President's brother who holds the armed forces under his tutelage recently announced that there is a foreign conspiracy against the country. He implicated the judiciary directly in this foreign conspiracy. A Sinhala extremist Minister who was a so-called judge in the Kangaroo Court went further and talked about an emerging situation of dual power, between the judiciary and parliament engineered by foreign forces. Many others have been talking in the same lines. These theories or theories of conspiracies cannot be easily dismissed as political rhetoric.

The vehemency of this propaganda must be having an agenda. It cannot simply be to oust the CJ or subjugate the judiciary. The government is undoubtedly is becoming unpopular day by day. They cannot deliver what they have promised. The country is running by leasing the resources to dubious quarters. The surface of the economy is inflated through IMF and Chinese loans. The inflated bubble might burs at any time. There is a widening gap between the expectations and possible achievements among the middle classes and the poor and the rich. The type of economy that they are now running is very much similar to North Korea that requires the squeezing of the democratic system, dissent and freedom of expression further.

We are in a crisis. The term crisis in Chinese parlance is not necessarily a bad thing. It means problems; it means prospects. The prospects are to seize the opportunity and change the situation. The coming months and weeks would be decisive in this respect. Wimal Weerawansa addressing the 7th Hour (Sathveni Paya) at Rupavahini recently lamented that the crisis was initiated by the judiciary. There is some truth in

it in the sense that the judiciary has started asserting its independent role after so much of pressure and bullying in the past. It is a good sign.

With all the best prospects for the people to pressure the government to drop the impeachment charges and respect the independence of the judiciary, one sad thing in the present situation is the ambiguous policy of the main opposition party, the UNP. Their members have declined to respect the summons of the Court of Appeal very much similar to the position of the ruling UPFA. It is an internationally accepted norm that impeachments are subject to judicial review if constitutional transgressions are involved. The present impeachment in Sri Lanka is a clear case in this respect. It is hoped that the UNP soon makes a correction of this position without being too late.

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## Siripala, Wickremasinghe And The Validity Of Parliament's Interpretation Of The Constitution

by Elmore Perera

Prior to the autochthonous Constitution of 1972, under Dominion Status granted in 1948 Parliament enjoyed a very limited supremacy. The Monarch of the UK was considered Sovereign. Parliament was vested with the power to make laws for the

peace, order and good government of the Island. Executive power vested in Her Majesty was exercised by the Governor General who was required to exercise such powers in accordance with Constitutional conventions of the UK. In effect Executive powers were exercised by the Cabinet of Ministers headed by the Prime Minister. Parliament enjoyed a limited supremacy.

In 1972, the Republican Constitution provided that Sovereignty was in the people, is inalienable and shall be exercised through a National State Assembly. Established as the Supreme Instrument of State Power, the National State Assembly or Parliament was mandated to exercise:

(i) Its legislative power directly,

(ii) Executive power through the President and Cabinet of Ministers, and

(iii) Judicial power of the people through Courts and other institutions created by law except in the case of matters relating to its powers and privileges, wherein the National State Assembly may exercise such powers directly.

This Constitution also established a non-executive/ceremonial President as Head of State, Head of the Executive, Commander-in-Chief of the armed forces with the power to declare war and peace, providing clearly that he shall act always on the advice of the Prime Minister or the Cabinet Minister to whom the Prime Minister may have assigned such functions. The National State Assembly, in fact enjoyed "absolute Supremacy".

On 20th October 1977, the 2nd Amendment to the 1972 Constitution effected the transition to the Presidential form of government and established the National State Assembly and the President as the Supreme instruments of State power, repealed the requirement that the President shall act on the advice of the Prime Minister or Minister and elevated the President to be the sole and untrammelled repository of Executive Power.

The 1978 Constitution, adopted on 31st August 1978, incorporated the wording of the 2nd Amendment to the 1972 Constitution, institutionalised the removal of the requirements in the 1946 and 1972 Constitutions for the Head of State to act on the advice of the Cabinet of Ministers or the Minister and consolidated this power in the President as the sole repository of Executive power and the defence of Sri Lanka. Purportedly to strike a balance, Article 42 provided the fiction that "The President shall be responsible to Parliament for the due exercise, performance and discharge of his powers, duties and functions under the Constitution and any written law." This was a mere illusion in view of the fact that the President was empowered to assign and withdraw Executive power to the "legislators elected by the people", at his will and pleasure and thereby exercised a stranglehold on the legislature. Effectively reduced to a mere rubber stamp of the Executive, Parliament could not stake any claim to a mythical "supremacy." The Preamble to the 1978 Constitution,

significantly gives particular emphasis to Justice and the independence of the Judiciary. Article 4(c) has brought about a functional separation of Judicial power from (the amalgamated) Executive and Legislative powers. The domain of Judicial power of the people (except for the limited area specifically assigned to Parliament) has been entrusted solely and exclusively to the Judiciary, to be exercised strictly upholding the solemnity and sanctity of the Rule of Law.

Whatever motivated the freely elected representatives of the people of Sri Lanka, or however ill-advised these provisions may be, this 1978 Constitution is still the Supreme Law of the land and unless and until lawfully amended is binding on all Sri Lankans. Observance of these provisions has necessarily to be preceded by a reading, understanding and interpretation of the relevant provisions. All who do so are not likely to agree on the interpretation of these several provisions. As such disagreement cannot be permitted to lead to endless arguments, fisticuffs, murders or even politically motivated assassinations, several safeguards have been provided in this admittedly flawed Constitution:

(i) Articles 120 and 121 provide for the sole and exclusive jurisdiction of the Supreme Court to determine any question as to whether any Bill tabled in Parliament or any provision thereof, is inconsistent with the Constitution.

(ii) Article 125(1) of the Constitution provides that "The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the interpretation of the Constitution and accordingly whenever any such question arises in the course of any proceedings in any court or tribunal or other institution (certainly including the Parliament) empowered by law to administer justice or to exercise judicial or quasi judicial functions, such question shall forthwith be referred to the Supreme Court for determination. The Supreme Court may direct that further proceedings be stayed pending the determination (within two months from the date of reference) of such question and make any consequential order as the circumstances of the case may require.

(iii) Article 129 provides that the President or Speaker may invoke the Consultative Jurisdiction of the Supreme Court to obtain the authoritative opinion or determination of not less than 5 judges of the Supreme Court including the Chief Justice, in respect of a matter of public importance or of any allegation that the President is permanently incapable of carrying out his duties, respectively.

On 28th September 2012, the OPA called on the President to refrain from undermining the Independence of the Judiciary. However the Executive and the Legislature have moved swiftly thereafter, to impeach the Chief Justice. Many Parliamentarians and a wide range of Professionals supported such moves, arguing that Parliament was Supreme.

In the Public Interest, the Jurisdiction of the Court of Appeal was invoked on 19th November, 2012 seeking a Writ Prohibiting the Parliamentary Select Committee from

continuing to inquire into allegations of misbehaviour by the Chief Justice, in the exercise of Judicial power, purportedly vested in them by Standing Order 78A in violation of Article 4(c) of the Constitution.

The Court of Appeal referred the question of whether Standing Order 78A was violative of Article 4(c) of the Constitution, or not, to the Supreme Court for an authoritative interpretation in terms of Article 125(1) of the Constitution. Having considered the submissions, on 22nd November 2012, out of mutual respect and trust between Parliament and the Judiciary, the Supreme Court recommended to the members of the PSC that they defer the inquiry until the Supreme Court determined the question of law interpreting Article 107(3) of the Constitution referred to it by the Court of Appeal.

On the 23rd of November, 2012, the members of the PSC rejected this request of the Supreme Court and proceeded with the inquiry as the CJ had presented herself for same.

On the 29th of November, 2012 the crisis between the Legislature and the Judiciary took a dramatic turn when the Speaker, claiming to act in terms of Article 107 and the ruling of Speaker Anura Bandaranaike on 20th June 2001, (which ruling, according to the Speaker, had upheld "Legislative Supremacy"), declared that he deems Court notices irrelevant and that notices served on him and members of the PSC appointed by him are a nullity and entail no legal consequences, and that his ruling as Speaker would apply to any similar purported Notice, order or determination in respect of the proceedings of the PSC which will continue solely and exclusively under the authority of Parliament. Senior Vice-President of the SLFP and Leader of the House, Nimal Siripala de Silva, Attorney-at-Law, declared that "Parliament was Supreme and Court cannot challenge the impeachment motion." The Leader of the UNP and the Opposition, Ranil Wickremasinghe Attorney-at-Law said that "No one can issue notices on the Speaker, or the PSC."

In spite of being treated shabbily on the 23rd November, the CJ submitted a statement of Defence, on 30th November and was present on 4th December as requested. To her request that the list of witnesses and the documents to be used against her be furnished to her, she was requested to be present on 6th December at 2.30 p.m. However, at about 4.30 p.m. on 6th December 2012 she was informed that there would be no oral evidence led against her, furnished with about 80 documents consisting of over 1000 pages, and told that the inquiry would commence on the afternoon of the next day. Protests that more time was necessary to even read the documents resulted in her being abused, particularly by certain members of the Parliamentary Select Committee, in choice, unprintable language, that is sadly, now accepted as "Parliamentary Language". At about 5.30 p.m. Brave heart CJ was intimidated into withdrawing from further proceedings of this PSC.

When their requests re the trial were rejected by the Chairman of the PSC and by the Speaker himself, the 4 opposition members of the PSC withdrew from the

proceedings in the afternoon of 7th December 2012. Thereafter, the seven Government members of the PSC proceeded to record the statements of 15 witnesses and compiled a 30-page report by 7.30 a.m. on 8th December 2012, presented it first at 8.30 a.m. to Basil Rajapaksa for approval and thereafter to the Speaker, who announced in Parliament that Brave heart had been found guilty of 3 charges.

On 11th December 2012 Judge Weeramantry felt compelled to make some observations in regard to the crisis facing the Sri Lankan Judiciary which had been highly esteemed both domestically and internationally. He outlined certain unassailable propositions that require observance and protection and stated that "where the issues involved are as grave as misconduct of the Chief Justice of a country, these general principles of law need to be applied with the greatest strictness that is possible and it is the duty of the inquiring authority to ensure these basic safeguards which human rights demand."

On 19th December, 2012 the Chief Justice filed an application in the Court of Appeal contending that there is no evidence to conclude that charges 1, 4, and 5 are proved, challenging the PSC findings against her and seeking a Writ quashing these findings and the decision.

On 21st December 2012 the Court of Appeal stated that a prima facie case had been made out and issued notice on the Speaker and the members of the PSC returnable on 3rd January, 2013. Court also expressed the view that any steps taken in furtherance of the findings and/or decision of the 7 members of the PSC would be void if, after hearing, Court issues a Writ of Certiorari to quash the said findings and therefore the relevant authorities should advise themselves not to act in derogation of the rights of the Chief Justice until the application is heard and concluded, since any decision disregarding these proceedings to alter the status quo, may lead to a chaotic situation. Referring to the Speaker's aforementioned ruling on 29th November, 2012, (that the purported Notice issued to him and to the members of the PSC are a nullity and entail no legal consequences, and that his ruling as Speaker would apply to any similar purported Notice, order or determination in respect of the proceedings of the PSC which will continue solely and exclusively under the authority of Parliament) Court recorded that the order to issue Notice was a legal obligation of the Court to afford the Respondents an opportunity of being heard, in keeping with the concept of audi alteram partem.

On 31st December 2012, at a news briefing Attorney-at-Law, Cabinet Minister and member of the PSC Susil Premajayantha said that "the Impeachment inquiry is not a legal probe but a Legislative process" and therefore "proving of charges is not necessary". This apparently reflects the view of the President and his numerous "advisors", and most MPs and the vigilant state media. If that were so, all that was necessary was for the Speaker to accept the motion without any scrutiny, place it on the Order paper, fix an early date in consultation with the party leaders, take the tabled charges as read and submit same to the elected representatives of the Sovereign People for a vote.

On 2nd January, addressing the media at the Mahaveli Centre Senior Attorney-at-Law and Leader of the House Nimal Siripala de Silva said that the government was not overtly worried about criticism of the ongoing impeachment process by the international community, ruled out the possibility of proroguing Parliament to pave the way for a fresh inquiry and asserted that the government would not, under any circumstances, reverse the impeachment process. The Deputy Speaker, an Attorney-at-Law himself, has warned that any PSC Member who responds to the notice issued by the Court of Appeal will face dire consequences.

To-day, (3rd January 2013) the Court of Appeal has read out the interpretation of the Supreme Court that "The PSC has no legal power or authority to find a Judge guilty because Standing Order 78A is not a law."

The Chief Government Whip, Dinesh Gunawardena is older and wiser now than he was in 1984 when his then tender mind compelled him, in association with Anura Bandaranaike and Sarath Muttetuwegama to feel strongly that:

(i) the President should refer Standing Order 78A to the Supreme Court for an "authoritative opinion" thereon,

(ii) the process of inquiry which precedes the resolution for the removal of a Supreme Court Judge should be conducted by Judges chosen by the Speaker from a panel appointed for this purpose, and

(iii) Standing Order 78A should be amended accordingly.

When this Chief Government Whip cracks the whip, the highly disciplined government MPs– including those who obediently signed a charge sheet which had no charges thereon – will, with undisguised glee, vote overwhelmingly in support of impeachment, irrespective of whether they even know what the charges are. They will, undoubtedly, commend the 7 eminent government members of the PSC (including Susil Premajayantha and Nimal Siripala de Silva aforementioned) for the Herculean achievement of summoning and recording the evidence of 15 witnesses, coming to a judicial finding of guilt recorded in a 30-page finding, and compiling a 1575 page report, all in the incredibly short period of 17 hours, without any assistance from the Chief Justice and her lawyers or even the four Opposition Members of their Committee, who walked out in protest at the patently unreasonable procedure adopted.

An unprecedented Constitutional crisis and the very real prospect of a chaotic situation are imminent.

The President, being a senior Attorney-at-Law himself, well knows that save and except for a brief period between 1972 and 1977 when the National State Assembly enjoyed some supremacy, Parliament has never enjoyed the kind of supremacy that

is now being vociferously claimed, as now confirmed unequivocally by the Supreme Court's determination aforementioned.

In these present circumstances this ominous, accelerating race towards absolute anarchy and destruction can only be effectively reversed by a display of exemplary statesmanship by the President and therefore the OPA earnestly urges the President, in the long term interests of our motherland, to take timely steps to avoid a catastrophe by suspending the process of impeachment already in place, and permitting saner counsel to prevail.

*Elmore Perera, Attorney-at-Law, Past President OPA

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## The SC's Decisive Intervention Against The Impeachment

**by Basil Fernando**

The Supreme Court of Sri Lanka, marking perhaps the greatest day of its 200 year history, today declared in a historic opinion that the Standing Order of the parliament, bearing no. 78/A, is null and void and has no effect in law. By this opinion, the Supreme Court of Sri Lanka has nullified the impeachment process

against the Chief Justice Shirani Bandaranayake, which it was pursuing with extraordinary haste and unprincipled vigor.

Public opinion in Sri Lanka and the international community, including the UN Rapporteur for the Independence of Judges and Lawyers, had said in no uncertain terms to the government that the course that it was pursuing in relation to this impeachment was against universally accepted norms and standards relating to proceedings for the removal of judges of the superior courts in any democracy. The Supreme Court today confirmed this view and put the matter to rest.

The course open to the government is either to abandon the impeachment move altogether or to pass a law incorporating the international norms relating to the removal of judges, and thereafter place the inquiry before a competent and impartial tribunal. A proposed law by an opposition member and the president of the Bar Association, Mr. Wijedasa Rajapaksha, is already before the parliament. Given the majority that the government enjoys in parliament, this bill can be passed as a law in the shortest possible time.

The government's claim, that since 117 members of parliament have placed a motion calling for the impeachment of the Chief Justice and that the Parliamentary Select Committee has already been appointed, and that the government members of that Select Committee have already made their report, is in no way legally justifiable now as the Supreme Court has declared that the Standing Orders under which such actions were done were null and void.

The Asian Human Rights Commission calls on the Sri Lankan government to respect the interpretation of law given by the Supreme Court, which, under the constitution, has the last word on the interpretation of law. We also call upon the people to now come forward ensure that their Supreme Court is respected by their government. It is also the duty of the international community to intervene so as to avoid any unnecessary confrontation at this moment.

If the government, instead of respecting the Supreme Court, enters into a collision course with it, the responsibility for that decision will be entirely on the government itself. There will be nothing to justify such an action. People have a right to resist any illegal move that the government may take and, whatever the consequences of such a situation, they will be squarely on the shoulders of the government itself.

The government now has an opportunity to correct many of the violations relating to the constitution that have been taking place for a long period of time. Thus, the government has an opportunity to act in a manner that ensures respect for the rule of law in the country. If the rule of law is further undermined, the government is doing so at its own peril.

We take this opportunity to convey our respect to the Supreme Court which has at last woken up to its responsibilities to be the guardian of the dignity and the rights of the citizens of Sri Lanka. This responsibility alone is the justification for its existence.

In the past there were at least four occasions on which the Supreme Court could have intervened to prevent fundamental abrogation: when the bill relating to the new constitution was placed before it in 1972; or in 1978, relating to the UNP constitution; or in 1984, when the then President brought the first impeachment motion against the then Chief Justice, it could have declared that the Standing Order number 78/A was illegal; or in 2010 when the 18th Amendment was. If they had intervened then, much of the historical tragedies thatSri Lanka has suffered during this period could have been avoided.

We reiterate that position which the Asian Human Rights Commission has repeatedly declared, that the extreme violence that took place in Sri Lanka in the recent period was a direct result of the constitutional aberrations that were done to deviate the country's path from a democracy towards dictatorship. Now, there are people who declare victories over "a war". However, the reality is that war could have been avoided and that bitter period with a large number of lives lost would not have happened if not for the failure of the courts to defend constitutionalism against the attacks that the executive was making.

The present decision thus paved the way for dealing with a number of pressing constitutional issues in the country. As Justice Wigneswaran stated last month, there is a situation of political instability created by the 1978 Constitution, and particularly by the 18th Amendment to that constitution.

The country has been pushed down a perilous course for over 30 years now and the impeachment motion, if it had succeeded in the manner in which it was pursued by the government, would have pushed us further down the cliff of lawlessness.

The three judges who made the present judgment have acted not in of the passion of the moment but with a chill of reasoning as the judges of the highest court are expected to do. This should be a sobering moment for the legal community in particular, to rally together purely on the basis of democratic duties to safeguard the system. The people of Sri Lanka, we fervently hope, will intervene to define the country's future course.

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## Is The Anura Bandaranaike Ruling Relevant Today?

**by Nihal Jayawickrama**

The current debate on the parliamentary resolution to impeach the Chief Justice appears to be clouded, and sometimes distorted, by several misconceptions.

Is Parliament above the law?

It is believed in some quarters that Members of Parliament are above the law and are not subject to the jurisdiction of the Courts. This belief is entirely misconceived. It is probably due to a provision that was included in the 1972 Constitution which read as follows:

"30. No court or other institution administering justice shall have power or jurisdiction in respect of the proceedings of the National State Assembly or of anything done, purported to be done, or omitted to be done by or in the National State Assembly."

That provision was included in the context of the National State Assembly being "the supreme instrument of state power" under the 1972 Constitution. There is no provision similar to Article 30 in the present Constitution. Under the present Constitution, Parliament does not enjoy that status.

Is the Anura Bandaranaike ruling relevant today?

The ruling given by the late Speaker Anura Bandaranaike on 20 June 2001 is now being recited, almost like a mantra that would shield Members of Parliament from any intrusion by the Judiciary. On that occasion, the Speaker had received notice of a resolution signed by the requisite number of Members of Parliament from the ranks of the Opposition. They sought the appointment of a Select Committee of Parliament to inquire into a complaint of misbehaviour against the then Chief Justice Sarath Silva. The Supreme Court made an interim order that sought to prevent the Speaker from dealing with that resolution until the Court had heard and determined a fundamental rights application filed before it. Speaker Bandaranaike ruled that the Supreme Court had no jurisdiction to issue the interim order, and therefore he had no legal obligation to comply with it. He relied on section 3 of the Parliament (Powers and Privileges) Act of 1953 which stated that:

"There shall be freedom of speech, debate and proceeding in Parliament and such freedom of speech, debate or proceedings shall not be liable to be impeached or questioned in any court or place out of Parliament".

It was Anura Bandaranaike's view that the Speaker was obliged to appoint a Select Committee upon receiving a duly signed resolution, and that that was a "proceeding" of Parliament which could not be questioned in any court. In fact, section 3 protects only the "freedom" of speech, debate and proceeding. He was probably correct in reaching that conclusion, since the regulation of parliamentary business is a matter within the Speaker's legitimate province. A tribunal with power to give a binding and authoritative decision had not yet been established. The interim order of the Supreme Court was, therefore, perhaps premature.

The issue today is one that is completely different to that dealt with by Speaker Anura Bandaranaike. There is now before the Court of Appeal an application by the Chief Justice for a writ of certiorari to quash the "decision" of the Select Committee. These findings affect her legal rights. The Constitution has vested the Court of Appeal with "full power and authority" to inspect and examine the records of any institution or person, and to grant and issue an order in the nature of a writ of certiorari quashing any decision that is contrary to law. A decision may be contrary to law for a variety of reasons: the decision-making body may have suffered from bias; the principles of natural justice may not have been observed, the decision-making body may have misdirected itself on the law or on the facts. Every individual living in Sri Lanka has the right to seek judicial review of any decision that adversely affects, or is detrimental to, him or her.

Is the Select Committee report subject to judicial review?

In 2002, the Government of Sri Lanka, acknowledged the existence of the constitutional right to seek judicial review of the findings of a Select Committee. It conveyed the following assurance in writing to the Human Rights Committee established under the International Covenant on Civil and Political Rights. That body had expressed concern about Standing Order 78A which enabled a Select Committee to inquire into the conduct of a Judge:

"Non-adherence to the rules of natural justice by the inquiring committee would attract judicial review. Indeed, nowhere in the relevant constitutional provisions or the standing orders seeks to exclude judicial review of the decision of the inquiring committee. Thus, it is envisaged that if the inquiring committee were to misdirect itself in law or breaches the rules of natural justice, its decisions could be subject to judicial review." (sic)

That was a solemn, official, and authoritative declaration by the Government of Sri Lanka that the report of a Select Committee appointed under Standing Order 78A is subject to judicial review by the Court of Appeal. It was an assurance of Sri Lanka's compliance with Article 14 of the Covenant which guarantees that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".

Why did Parliament provide for trial by select committee?

On 14 March 1984, Chief Justice Samarakone, who was due to retire in October of that year after five years in office, made a wholly inappropriate speech at a private tutory. He was critical of the Government and the President. The Government's response was immediate. It decided to bring him before Parliament, but then discovered that the procedure for doing so had not been prescribed, as required by the Constitution. Accordingly, two steps were taken simultaneously. On 3 April 1984, Parliament resolved to appoint a Select Committee under Standing Order 78, to inquire into and report whether the Chief Justice had made the statements attributed

to him in the press, and if so, to recommend what action should be taken. That was a legitimate exercise, since Parliament has the power to establish a select committee to inquire into and report on any matter. It was a fact-finding exercise.

On 4 April 1984, Parliament added a new Standing Order 78A, which empowered the Speaker to appoint a Select Committee for the purpose of investigating and reporting on an allegation of misbehaviour or incapacity against a Judge of a superior court. To give itself the power, through a standing order, to conduct what is virtually the trial of an offence, was clearly outside the powers of Parliament. Even under the Parliament (Powers and Privileges) Act, Parliament may directly deal with only very trivial matters, such as disrespectful conduct within the precincts of Parliament, or creating a disturbance when Parliament is sitting. The maximum punishment that Parliament may impose, in the exercise of its "judicial power", is admonition or removal from its precincts. Many breaches of parliamentary privilege may only be tried in the Supreme Court.

The first Select Committee, chaired by Prime Minister Premadasa, held six meetings between 17 April and 20 July 1984. The Chief Justice declined to attend in protest against the new Standing Order 78A, but did not deny the statements attributed to him. The Committee reported on 9 August 1984 that the impugned speech was "not befitting the holder of the office of Chief Justice", and recommended that appropriate action be considered.

On 5 September 1984, a resolution signed by 57 Members of Parliament, requesting the presentation of an address for the removal of Chief Justice Samarakone, was placed on the Order Paper. On the following day, the Speaker, acting under Standing Order 78A, appointed a Select Committee chaired by Minister Lalith Athulathmudali. At its first meeting, the three Opposition Members, Sarath Muttetuwegama, Anura Bandaranaike and Dinesh Gunawardena raised a preliminary objection. They submitted that the Select Committee could not determine "proved incapacity or misbehaviour" unless it had been judicially proved. The Select Committee held 14 meetings between 11 September and 27 November 1984, during all of which Mr. S. Nadesan QC and his team of lawyers appearing for the Chief Justice argued that the Select Committee was an unconstitutional body. Before the Committee concluded its sittings, the Chief Justice reached the mandatory retirement age. In its report to Parliament, the Committee concluded that the Chief Justice was not guilty of misbehaviour.

The desire to humiliate a lawyer with no previous judicial experience who had been elevated to the highest judicial office, and had then become critical of his benefactor, obviously led Parliament to adopt the swiftest procedure in the shortest possible time in order to achieve that purpose. Resorting to legislation, and establishing a special tribunal, as is the practice elsewhere in the democratic world, could not have been accomplished before Chief Justice Samarakone reached his mandatory retiring age.

Can the Select Committee ignore the court notice?

The Deputy Speaker of Parliament was reported to have stated that the members of the Select Committee, who have been informed by Court of the filing of an application for judicial review, will not respond to it. Indeed, they may choose not to respond, either in person or through counsel. Every citizen has the right not to seek to justify his or her actions in a court of law. However, if the Court were to quash the findings of the Select Committee, that would be a binding and authoritative judgment on the matter. If Parliament were to ignore that judgment and proceed regardless to debate the resolution for the removal of the Chief Justice, a very serious constitutional crisis will arise. It is a conflict that will affect the legitimacy of our entire judicial system.

The stability of our country rests upon the strength of the three great pillars of the state – the Legislature, the Executive and the Judiciary. These pillars are interdependent. Together, they deliver the checks and the balances, and the accountability factor that is so vital to the health of the state. If one pillar weakens, especially because of a concerted attack by another, the entire structure will surely collapse. Prorogation, or taking one step back, as has been suggested by some, will only serve to prolong this utterly self-destructive conflict. In fact, prorogation, under our present Constitution does not result in the lapse of pending matters; such matters may be proceeded with at the next session. It is time for this conflict to end.

It will be wise for those who now exercise state power to reflect on how judicial decisions that caused embarrassment to governments were dealt with in the past. The response to the judgment in the 1962 Coup Trial, and to the verdicts in the 1966 Coup Trial, are examples that come to mind. The political maturity with which such adverse judgments were received was testimony to the desire of those governments to respect and to keep alive the Rule of Law. Under our Constitution, and in our system of governance, the Judiciary is the final arbiter. That must surely be accepted and respected.

What is the international impact of this exercise?

The state regulated media has attempted during the past month to prevent the Sri Lankan public from learning of the extremely adverse international reaction to the impeachment exercise. Astonishment has been expressed, not only at a process in which the accusers and the judges were all members of a government parliamentary group, but also that the "judges" have thereafter made public statements from political platforms defending their "judgment".

Critical statements made in international forums, national legislatures and by governments, and by professional organizations globally, have not been shared with the Sri Lankan public. Of particular significance is the reaction of Commonwealth institutions. Sri Lanka is expected to host the next Conference of Commonwealth Heads of Government in 2013. When it assumes the chairmanship of that body, Sri

Lanka will become the custodian for the next two years of Commonwealth values and principles. Among these principles is the following:

"In cases where a judge is at risk of removal, the judge must have the right to be fully informed of the charges, to be represented at a hearing, to make a full defence and to be judged by an independent and impartial tribunal."

It is now been asked, in voices that are becoming louder and more strident, whether the Government of Sri Lanka can be entrusted with that responsibility?

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## 'Using The Judiciary To Destabilise Sri Lanka'

**by Kishali Pinto-Jayawardena**

This week, newspaper reports quoted Sri Lanka's Defence Secretary and President Mahinda Rajapaksa's brother accusing foreign elements of 'using the judiciary to destabilise Sri Lanka'. This is a classic instance of doublespeak. It is abundantly clear that, rather than so-called foreign interests, it is the Government itself which is destabilising the country.

Its sheer brute force in ramming an arbitrary impeachment of Sri Lanka's Chief Justice through Parliament against the express injunctions of judges and lawyers, professional bodies and religious leader across all major faiths speaks for itself. Are all these individuals and bodies supposed to be part of this convenient foreign conspiracy? Have we not played these childish games long enough?

Rule of Law replaced by Rule of Politics

These games are symptomatic not of benevolent authoritarianism but a ruthless quasi-dictatorship which acts contrary to the greater good of the country, contrary to the Rule of Law and contrary to the interests of the Sri Lankan people. The genial mask has now been stripped away to expose an insatiable thirst for power that would sacrifice all before it.

As much as a worthless gift may be wrapped in appealingly bright paper, the gilt only hides the rotten core of a regime which has abandoned the Rule of Law for the Rule of Politics.

Doubtless (barring a miracle in this season of miracles) this impeachment will go ahead. President Mahinda Rajapaksa's rejection of a sensible compromise to prorogue Parliament thereby allowing the impeachment to lapse, as suggested by the leftist parties of his coalition, was unsurprising.

If Sri Lanka had been put first, over and above the arrogance of its political rulers, this compromise would have been the best solution. But the fury of the administration in being challenged by a Chief Justice that it once thought was fully amenable to its own will, sweeps all before it. Its leftist partners are only likely to grumble at being thus ignored, much like the uncaringly sheep-like members of the ruling party who will follow their leader blindfolded over a cliff if that is so demanded. The only concession to emerge from the regime is a ludicrous proposal that even though this impeachment will go ahead, a better procedure may be laid down for subsequent cases.

Justifying the unjustifiable

Government propagandists meanwhile furiously work overtime to justify the clearly unjustifiable. For example, the allegation of conflict of interest on the part of the Chief Justice in hearing particular matters has been loudly trumpeted. On her own part, the Chief Justice has publicly stated that no specific objection was raised to her hearing any case by any party or their lawyers. These matters will not be discussed

further given that they are presently before the Court of Appeal. However some general reflections may well be appropriate at this point.

Earlier, tradition and good sense dictated that when a party to an action objected to a judge hearing a case, that judge was obliged to recuse himself or herself from the matter. In fact, even in the absence of an objection being raised, a judge is supposed to abstain from sitting on the matter in the first instance if a conflict of interest is apparent to his or her mind. This was the old tradition of the Sri Lankan judiciary.

But significant departure from this principle was evidenced not in the current Chief Justice's time but during the Sarath Silva Court when objections arising from express conflict of interest were summarily dismissed as a matter of course throughout that ten year period.

Among the plethora of such cases is the Tony Fernando case where in defiance of all norms of propriety, Fernando's petition citing the Chief Justice as a respondent was heard before a Bench presided over by the Chief Justice himself who dismissed all objections to his hearing the case without further ado. Fernando himself, a lay litigant and middle aged teacher of English, was then sentenced to rigorous imprisonment for contempt of court. As may be recalled, the United Nations Human Rights Committee quoted this case as an excellent example of judicial abuse of power when a plea by Fernando was brought before the Committee.

Those who protest now at the incumbent Chief Justice's alleged conflict of interest may well be asked as to where their outrage was when far more serious conflicts of interest were evidenced in far greater measure during that period, when the rot actually set in so as to speak? Are these matters that become relevant only when a Government is determined to crucify a Chief Justice? In any event and given the specific allegation leveled against the incumbent Chief Justice to which a full answer has been forthcoming from her, is this really an impeachable offence?

A range of weapons being used by the government

Another canard being floated by propagandists is that the Chief Justice is manipulating the benches of the appellate court in regard to matters connected to the impeachment.

On the contrary, it must be said that the Chief Justice has no authority whatsoever in the listing of judges to hear particular matters in the Court of Appeal. This is exclusively the prerogative of the President of the Court of Appeal. It is therefore absurd to contend that the Chief Justice is somehow capable of influencing the judicial response to the writ petition filed by her. What other recourse does she have, when subjected to a parliamentary process devoid of natural justice? The Court of Appeal's initial response to this petition was, in fact, carefully guarded and entirely proper. It is hard to imagine as to what other order could have been handed down in the circumstances.

But to return to the larger issue of the quasi-dictatorship that we are inflicted with, it is simplistic to point to a newspaper on any given day and contend that the prevalence of opposing views indicates that democracy is yet present. Contrary views would be tolerated so long as they are marginalized and do not pose any real threat to the regime's political stability.

Mere irritants would be dealt with through persistently crude and vulgar attacks which we see now while a range of weapons including targeted killings may be applied against more serious threats. The cacophony of hysterical voices using the state media to damn all those who advise a calmer rethink of the impeachment process amply bear this out.

A Government devoid of respect for the law

Now more than ever, public opinion is needed to support a braver and stronger institution of the judiciary that would grapple with the terrible challenges of the present as well as the profound failures of the past. What is at stake is not the fate of a single Chief Justice but the judicial institution itself. Some may argue quite justifiably that, in the past decade, the very concept of the independence of the judiciary has become worthless in this country. True, the integrity of the judicial branch may have become tarnished as a result of actions of former Chief Justices, as dwelt on in past columns. Further, the legal process itself may be deeply flawed in terms of its archaic rules, laws delays and general insensitivity to the litigant.

However, these entirely valid points of critique cannot be stretched so as to say that Sri Lanka's judicial institution itself is not worth fighting for. Spruced up cities, the profusion of luxury hotels and gleaming new roads snaking throughout the country cannot disguise the fact that this is a Government devoid of any respect for law. Strategic wisdom is needed therefore for the long struggles ahead.

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## Judicial Independence Is Limited To Hearing Cases Says Minister Rajitha

**by Basil Fernando**

In a morning programme on SLBC today (29th December) Minister Rajitha Senaratne was interviewed. Here are some of the basic points from what he stated in this interview:

That the independence of the judiciary recognized within the 1978 constitution is only for the purpose of hearing cases; citing articles of the constitution, he took time to explain that the only independence that this constitution recognizes is for hearing cases, where no one can interfere with the powers of the judges to hear and determine cases. Besides that, there is no other independence. The implication of the statement was that universally recognized principles relating to the independence of the judiciary, which include, among other things, that the removal of judges should be done only on the rarest grounds and that it should only be after fair inquiry by competent tribunal, are not recognized by Sri Lankan constitution. This way the objections that have been raised locally and internationally – that the hearing by the PSC did not amount to inquiry by free and fair tribunal – was made out to be irrelevant in terms of the 1978 constitution. This also implies that judges have no right to interpret the constitution.

That those who did not raise objections to the standing orders under section 107(3) have no right to raise those objections now; he said that there were 28 years to raise these objections, and if they failed to raise those objections then, they have no right to raise them now.

That, according to the provisions of the constitution, the president controls all the matters relating to judges and that therefore the president also has the power over the dismissal of judges. This is similar to the position earlier taken up by Dr. Nath Amarakoon, that the Chief Justice is an employee of executive and therefore should behave accordingly.

That what is important is not the process but the substance of the charges. He then went on to demonstrate how gravely wrong the issues in terms of substance are. Going into process without talking about substantive issues was described as not entering into the field but talking about it from outside. According to this argument, if a man is charged with a gruesome murder, nobody is should be talking about providing a fair trial for such a person as the substance of what he has done is gravely wrong. Also implied is that there is no presumption of innocence when you are charged on matters that are grave.

That, according to the constitution, the parliament has all the powers and once the parliament decides on any matter there is no right for court to issue writs or summons to members of parliament regarding such matters. That, he said, is the tradition in England.

That the opposition to the impeachment arose due to the people being unprepared when the impeachment motion was filed. As the people were ignorant of the charges, they were surprised. He has in fact told the president that all these problems

arose due to people not being aware of the charges beforehand. Had they been given the time of one month before filing the motion for impeachment, none of these problems would have arisen.

As these matters mentioned above are so important, this broadcast will be aired again in the afternoon, said the chairman of the Sri Lanka Broadcasting Corporation, who was the moderator of the programme.

By way of comment, it may be said that the government is now very clearly indicating that it will not recognize any independence of the judiciary other than the right of judges to hear and determine cases. In essence, this is a complete rejection of the recognition that the judiciary is an independence branch of government. The argument is that the concept of the separation of powers as recognized within a democracy is not what is found in the 1978 constitution.

A similar view was expressed in the English counterpart of this programme, under the inappropriate title 'Peoples Power', which also stated that the issue of process is irrelevant as everything was done according to the book, meaning the 1978 constitution. What is blatantly expressed is that the 'democracy' in Sri Lanka is a very unique one as defined by 1978 constitution and it should not be criticized on the basis of other principles that are recognized in other democratic countries. This also implies that even the right to a fair trial is not a substantive part of Sri Lankan law.

In my previous article, "Why People Oppose The Undermining Of The Judiciary", I mentioned how Cambodians used to do things by their book and how in Myanmar the book that Ne Win gave was followed. Now, the constitutional tomfoolery that JR Jayawardene did with the Sri Lankan constitution has become Sri Lanka's book. The government's argument is that, if this book was okay for the last 28 years, it is also okay for the future.

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## Independent Judiciary In A Dependent (ill)Democracy

by Suren Raghavan

His Excellency Percy Mahendra Rajapaksa beside his many other talents, proves to be a great crisis manager. His ability in this area is so rich that his daily rule is

cluttered with some form of crisis not as an issue to manage but as a mode of governance. Recently may have stepped on one of the complex and thorny areas in term of the impeachment of his own Chief Justice, yet the signs are that he will turn this to his own popularity. The duel modality by which he, on one hand initiates and encourages the ousting of the CJ while on the other distancing from the same process or even denying it, is surely the mark of Mahinda. This is a brief reflection to probe the possibility of an independent judiciary if ever, in the fragile and fractured democracy of Lanka.

All undergrads of Political Science are taught the doctrine of separation of power in a working democracy. We often start with the French Jurist Montesquieu, who basing his conceptual analysis on Aristotle and John Locke presented a framework of analysis on the same. Montesquieu possibly did not even imagine the despotic rule of dictators and their bloody regimes of the 20th /21st century. He maintained that for human liberty, it is essential to have checks on governments as political power has the inbuilt ability to corrupt. His answer was to separate and maintain three independent yet cross-pollinating centers of power: the legislature, executive and the judiciary- each performing a specific function relating to others independently. For Montesquieu-very basically – the legislature is to debate and enact laws, the executive is to defend the state and the judiciary to interpret law in dispute settling and awarding judgment. He argued that I) all three of these functions should be clearly separated, II) one institution should not interfere with the other and III) one (same) person should not be involved in all three institutes. On the judiciary he said;

There is no liberty, if the power to judge is not separated from the legislative and executive powers. Were the judicial power joined to the legislative, the life and liberty of citizens would be subject to arbitrary power. For the judge would then be the legislator. Were the judicial power joined to the executive, the judge would acquire enough strength to become an oppressor (1977:245).

It is obvious that this extreme separation is a classical and theoretical position than any empirical/practical sense especially in the analysis of modern multi-functioning multi layered governments. What the doctrine aims to achieve is not an existence/operation of these agencies alien to each other but the avoidance of one (individual or institution) a tyranny of dominance over the others. It is this delicate balance/mutual respect and volunteer accountability that is expected in any democratic constitution and the politics governed by such constitutions. Again not all democratic constitutions are drawn on this principle (i.e. in the US). It is mostly a Westminster form of governance. The entire commonwealth hopes to govern its peoples by this. Lanka is soon to become the chairperson of that forum.

Politically speaking the concept of law and the independence of judiciary is very infant and alien concept in Lanka. Like to the entire commonwealth, it is a British colonial legacy and a postcolonial continuation.

The colonial rule did not work on the Montesquieu framework. It supported and upheld the (illegal and immoral) rule of colonialism. It interpreted and imposed the colonial law and its rules. To the average citizen like 'Sillindu' of Baddegama, the judiciary was the cruel hand of colonialism. I doubt even after six decades, if the judiciary of Lanka had managed to change that opinion in a postcolonial setting. It will be a good time for those who vigorously argue and agitate on the issue of the independence of judiciary to stop and find what the average 'citizen' attitude/experience in regards to our legal system, its persons and practices. I imagine one could find some valid reasons for the present status of disconnection between the impeachment process and the way average (non-urban) voter views it. This, I suppose is common in many so-called 'developing-democracies' in Asia/Africa. One key reason for this frozen status is that often in states like Lanka, neither the legal system nor the constitution is a production of a consultative process but an elitist impose on the citizens. None of the enacted constitutions (1947, 1972 and 1978), new proposals (1995, 2000) or any of the 18 amendments made to the constitution in Lanka preceded with a wider consultation or socio-political debate. Instead, they were imposed, often against the will of the citizens. As a result, citizens do not own the guarantees that are presented for the independence of judiciary, human rights and other issues of liberty in the constitution. They stand as mere reluctant answer to the political anxiety of the elites. The extended result of this is that in the minds and experience of the average citizen, the judiciary that is bound to protect and implement such constitution becomes a natural part of the elitist control over the masses. Is this the basic reason why there is such lackadaisical activism even amongst the southern Sinhalas, except for a tiny section of their urbanite/academic fraternity in the face of the present impeachment crisis that is pregnant with such grave dangers to the state that they fought hard to keep intact? Justice P.N. Bhagwati, considered a modern philosopher of constitutional law says:

The judiciary stands between the citizen and the state as a bulwark against executive excesses and misuse or abuse of power or transgression of constitutional or legal limitation by the executive as well as the legislature (1989:23).

Unfortunately, in Lanka, the judiciary and its practitioners have not stood this test. As witnessed in the unprecedented speed and urgency with which the 18th amendment was approved, the judiciary has served and legitimized some of the most illiberal moves of the rulers. It is a paradoxical irony now that legal practitioners are expecting the masses to rally around its cause after summarily dismissing the political liberty of the citizens. So in terms of the case in Lanka, it appears that the judiciary which one time (un)willingly mortgaged its independency is now expecting the masses to redeem it from the bondage. The more surprising issue in term of the political liberty of citizens is that even at this point the judiciary or its eminent practitioners have not presented how they will reverse to a system that wishes to work towards the reestablishment of the liberty of the people. The recent keynote speech by justice Vignashwaran to his judiciary colleges reminds the ability/validity of the independence of their practice but fails to urge the

practitioners to return to the solemn duty of making the legal system a citizen based institution.

Traditionally, the impartiality/independence of the judicial arm means that judges are left without influence or threats to make their judgments even if are against the state because the main responsibility of the legal system is to safeguard the liberty of the citizens. Taken this definition, it means a judge to be free of personal biases and prejudices. S/he must not be committed to a political party or to one side in the litigation or to his/her caste, class, community, language, linkage, politics, region, religion, or race, when s/he comes to judgment. Can the average citizen in Lanka testify that the Lankan judiciary has acted in such manner? During the early period of independence when a systemic ethinicization of the state, its politics happened in such unreserved manner and the judiciary became the willing partner of it. Colvin R D Silva's 1972 constitution declared 'Sri' Lanka a 'unitary' 'Buddhist' state. I have no contest with it. It is the ground reality. However, what set in motion was not mere hegemonizing an ethnic majority political system but also mechanism to erode the minority liberty, their political rights and very multi-cultural nature of the state. The civil war and the 30 years of state/non-state terror were the natural results. Who can honestly say that all verdicts, judgments and settlements awarded during this period was apolitical and unbiased or at least put the legal honestly before the any political considerations? Answer to such soul-searching question should come from the judiciary and its guardians. They should show their bare chest and clean palms open if they wish to have the citizens to rally around their call for an independent judiciary.

The reality -in most states- is that the legal system is part of the state. However, in Lanka it is part of the state and the government. Appointing and expelling of judges and CJs have always been a political act because the SC is considered (and operates) as a state funded 'government' institution. While the independence of judiciary in many states means the judiciary answerable only to the constitution, in Lanka there seems a history of willingness to obey the government in power as well. The case of the present CJ allowing her husband to accept a purely political appointment at a state bank and work to such an extent that the president even after this crisis refers to him as a "Ape minihek' (our man), is a classic example. In this sense, the Lankan judiciary beside all its august achievements has very little difference to the colonial rule. Still citizens in Mannar and Jaffna and other similar places are experience what Sillindu faced nearly a century ago. Even worse, thanks to the 'lap-top' journalism, no one is bothered record the citizen's plight as Woolf- a colonial servant did. There cannot be an independent Hultsdorf, while its vital sections elsewhere are acting as uncensored arm(y) of the government. What the current a debate has comfortably avoided is to find the necessity, urgency and mechanism to revert to a citizen based judiciary and move away from its colonial nature. Because, what is important (and possible) is not an abstract conceptual independence of the Judiciary but the prevention of judiciary becoming a ethno-religious institution and a tool of the corrupt, power hungry political thugs.

On the other hand, it is the rights and responsibility of the citizens to win over and establish an independent judiciary. A judiciary that would work for the wider liberty of every citizens irrespective of their ethnicity, religion and political affiliation – the three most fundamental social identities that defines the citizenship of modern Lanka. One cannot expect a moral/ethical legal culture from a society that has betrayed its foundations but thrives on popular political/power culture. Thus, the present crisis and its political implication should generate a new debate not just on the independence of the judiciary. Such is an abstract and elite position. The urgent need is to debate for a judiciary that will stand and advocate the liberty of its operation and for liberty of the citizens of Lanka particularly because Buddhism – the civilizational foundation of Lanka readily provides such discourse within its philosophy.

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References

1 M. Richtel, The Political Theory of Montesquieu, pp. 245, (1977)

2 Justice P.N. Bhagwati, "The Pressures on and Obstacles to the Independence of the Judiciary," Centre for the Independence of the Judges and Lawyers (CIJL) Bulletin 1989, No. 23 at 15

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## Impeachment Of The CJ: Candid Request To President Rajapaksa By A Well-Wisher

by Nagananda Kodituwakku

When President Rajapaksa campaigned for the second term in office most people, including me, did our part to make sure that he would return to office, hoping that

he would put into practice what he preached to the people. In fact an article written by me and published in the Internet was published in the President's official website. (visit here for the full article)

I honestly believe that no one can take away his boldness when he was brought under a tremendous pressure by the EU community to stop the onslaught launched against the LTTE and his courage and determination to bring the war to an end that resulted loosing of precious life of hundreds of thousands sons of mother Lanka belongs to both Tamil and Sinhalese communities. Yet, none of us thought that President Rajapakse would become so drunk with power and resort to engage in an undemocratic campaign to strengthen his powerbase by eliminating all institutions that he considered would be a threat to his survival.

It is very unfortunate that all his commandants seem to be dumfounded and fatally failed to advice the President when it matters most. Particularly when his actions are blatantly wrong and baseless. When a wrong is committed, whether it was committed by the President or any other person, right thinking people with insight should have the courage to tell the leader that he is in fact at fault. Otherwise at the end of the day nobody would bother pay a least respect towards him like the awful fate faced by CBK who got everything wrong and had what she rightly deserved at the end.

Dear President, before your own eyes you can simply see the plight of those who followed the Machiavelli's political ideology and got burned to ashes. Best living example is the decomposed CBK, your predecessor; the one who shamelessly abused the great faith and confidence placed in her by the people of this country. Probably she is the one who was given an overwhelming mandate of over 60% to put things rights. Yet, peoples' judgement on her was proved absolutely wrong. At the end she proved that she was a monumental failure and that she was nothing more than a common and unenlightened autocrat. Look back and see her sorry plight today.

Do you want to follow the same footstep and fall into the same trap if you want to be the "peoples leader ever"? The choice is yours and if you want to be just another Machiavellian like JRJ, RW, R Premadasa, and CBK and rule the nation by deception then you would suffer the same fate; just another addition to the so-called 'democratically elected leaders' who betrayed the nation with total impunity.

Remember, you still have the full potential to be a model leader like Mahathir Mohamed (Malaysia), or Lee Kwan You (Singapore). You have already proved some characteristics of a good leader. You stood firm against the Western pressure and refused to betray your people and won the hearts and minds of the people. If Ranil or CBK had been the President then there is no question that they would have kneeled down to the pressure from the West. Surely people loved your good qualities, you are known for your modesty and people naturally compare you with egotistic CBK. Yet, please be aware that the public are not delusional of your true character. Behind the scene there exists a darker individual and people do have

serious concerns about your integrity and honesty. Yet, people are willing to pardon your obvious wrongdoings, after all we are humans and one must learn to forgive another if truly committed to rectify wrongdoings. You must shun all bad qualities and become a true leader with firm commitment to deliver.

There is so much to gain simply by being honest and committed. Just shun the rule by deception, which will only bring your downfall. Be brave enough to redesign your policies on strictly disciplined economic policy based on "dasaraja dharma" and zero tolerance of any form of wrongdoing. In the name of your motherland, give up all forms of misdeeds; reject all habit of pleasing cronies and other bad practices that only help ruining your chances to be the most successful democratically elected leader. Get rid of all criminal elements around you. Renounce all mannerisms of egoism and refrain from promoting and tolerating any individual that do. Be courageous to select and rely on a team of committed to serve the people [your cabinet] with proven character to deliver. Reject the ones whose prime concern is to embezzle public funds by improper means.

Please take your hand off the judiciary. Respect the rule of law and let it play its constitutional obligation as the 'watchdog' of the people. If any member of the judiciary is at fault follow a transparent process to deal with any such individual and afford them every opportunity to prove their innocence. Truly the process adopted to impeach the CJ Bandaranayake is grossly inappropriate in the eyes of right thinking people of this country who reject the undermining of the judiciary by improper means. Plainly, the process adopted for the removal of the CJ is just another demonstration of arrogance and abuse of office of the President. Follow the accepted norms and respect the rules of natural justice and afford the CJ a fair hearing before a duly constituted tribunal, this is what the people of this country yearning for and no way they demand that the CJ be off the hook if there is any credible evidence of misconduct of bringing the office of the CJ to disrepute.

People want you to displays that you are a worthy person with magnanimous qualities. One cannot deceive all the people all the time and if you want to win the hearts and minds of the people the time is right for you to prove your character. Show that you are not just another Machiavellian anymore or a ruler govern the nation by deception but a man with an integrity and commitment to fulfill all objectives set by the supreme law of the land, the Constitution.

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## Impeachment, Moving Towards The Final Act?

by Ravi Perera

*"To every subject in this land, no matter how powerful, I would use Thomas Fuller's words over 300 years ago: "Be you never so high, the law is above you."* ***Lord Denning MR in Gouriet v Union of Post office Workers (1977) 1 QB 729,761-762***

The seven odd Billion humans inhabiting this planet (and surely all other living beings) would have given a collective sigh of relief as the sun set on the 21 of December. Luckily for us, the Mayans who had predicted the end of it all on that day seem to have got their calculations wrong. Not too surprising, when we consider the fact that they could not even predict the coming of the Spanish (and other European races) that had such a fatal impact on their out-dated show in what is today referred to as Central America. It now seems that in the excitement of Christmas celebrations the much talked about ending of the world will soon recede into insignificances , another doomsday prophesy consigned to the bin of forgotten things in the endless cycle of life. Strangely, while most rejoice at the new lease of life, some are apparently disappointed that the apocalypse did not happen. Apparently they even witnessed the harbingers of the coming doom, strange appearances in the sky, rains of fish and the sea turning yellow. When it comes to the human psychology, nothing is impossible it seems.

Although the Mayan apocalypse failed to show its face, in our little Sri Lanka, particularly its constitutional/legal landscape resembles a disaster field. Once stable and seemingly immaculate legislative and judicial institutions lie low their reputations dented grievously. In the face of the relentless assertion of power by the Executive, the only role for the legislature/judiciary it appears is one that of abject compliance. As presently constituted, from the legislature the President can expect only an admiring chorus of support, whatever his action. But since of late, our judiciary, confounded in recent times by the ethos of the Chief Justices Sarath and Asoka Silva leadership, had begun to show signs of straining at the leash.

Theirs was an era when judges in the superior courts took pride in alluding to personal friendships with the Executive/Legislature, creature comforts including limousines were negotiated, various benefits were obtained for spouses and children, and on retirement even rewarded with sinecures. All this was going on while they heard cases deeply political. It was evident that the third arm of the government, the judiciary, chose to adopt the same values and methods as of the other two. Even under the present Chief Justice as recent as six months back there were no signs of a transformation of this culture. On the contrary, we watched in deep despair when her husband was appointed by the Executive to a plum government job. Any hopes of a judicial challenge to untrammeled greed for power were dashed when the Supreme Court led by Shirani Bandaranayke let the 18 Amendment to the Constitution pass without a murmur. Last year when the President's son was sworn-in as a lawyer, not only was the President, quite understandably accommodated ceremoniously, but privileges were extended to the young lawyer as well. Thereby, the judiciary acknowledged the current (unwritten) political dictum that the family is special and above the rest. Like in George Orwell's famous fable the "Animal Farm", having supped together for long, it was hard to distinguish between man and pig. The choice of pigs as the main characters in the Orwell story could not be more poignant.

The depth of our discontent was reflected even at the meeting of the Bar Association which was convened to pass two resolutions protesting the impeachment motion against the Chief Justice. While it was obvious that the resolutions had the overwhelming support of the legal fraternity, the conveners decided ,at the spur of the moment, not to take a vote ,instead opting for a show of hands, at the best of times a doubtful method. They argued that taking a vote was cumbersome, there was a possibility of an attempt to sabotage and also that the policy of the Bar Association was to arrive at an unanimous view. It is obvious that in the circumstances prevailing that day the latter (unanimity) was out of the question. We can only observe that if a government were to take the same attitude of avoiding an actual vote or were to demand unanimity of opinion, it would surely be called a dictatorship. In a situation where the government simply could not win the argument on the morality of the impeachment procedure, the Bar Association was running the risk of losing its moral ascendency by resorting to a kind of sophism.

The President's statement that he would consult an independent committee before he acts on a recommendation (a vote) from the Parliament to impeach the Chief Justice has further confounded an already confused situation. If the Parliament is the proper forum for an impeachment motion, and if the that inquiry was held in an acceptable manner, there is no reason to have further consultations with any other body. The mere idea of an independent committee suggests that even in the mind of the President there are doubts about the correctness of the impeachment hearings. In any event, every right thinking citizen in this country, aware of our political culture, will surely have doubts about the independence and the impartiality of those hearings. Whether a committee appointed by the President could correct that perception is a moot point.

Can the President rectify the defects in the impeachment procedure by appointing a so called independent committee? To start with, the President who will appoint the Committee is a major player in the whole impeachment process and therefore is an interested party. Thus, the committee will be appointed by one party in this dispute. It is not clear the basis on which the members are to be appointed to this committee. We do not know of the arrangements which would ensure the independence of the committee members. Is that person known to the President in a personal way? Has he got a spouse or a child who wants a favour from the government sometime in the future? Going by recent happenings, the potential to compromise the integrity of such a committee is endless.

The truth is that all the Kings horses, men or committees cannot put Humpty Dumpty together again now. Before the whole world our legislature has shown its true nature. By arrogating to itself the right to be both accuser and the judge it displayed scant regard for the concept of justice. The hurried impeachment motion launched out of the blues, against a judge who had begun to show signs of independence, offends our sense of fair play. On the other hand, the public airing of the happenings in the highest courts of this country cannot but diminish their standing. Many of the judges have been shown to be deeply flawed personalities

with an eye to the main chance. It is clear that their appreciation of the judicial role was very faulty.

Given the culture and the character of the leading personalities of this saga we can safely predict the opposite of the things they promise. Therefore the chances are; that there would be no independent committee, the Chief Justice would be impeached at the will of the President and then replaced by a more "reliable" judge. It is also unlikely that the legal fraternity would take the battle to a finish.

A government so inured to total subjugation is unlikely to respond to faint protests. Short of a total and indefinite boycott of all courts, nothing else will register.

We must not forget what is at stake here; "be you never so high, the law is above you". That is the meaning of the rule of law.

But in the end, it is unlikely that anything we do could correct a system so fundamentally rotten. There is hope for the better only if the system carries within it the seeds for a resurgence and renewal. Presently, neither our institutions nor their leaders give us that hope.

That being the case perhaps to predict the final act we will have to turn to TS Eliot who wrote "This is the way the world ends, not with a bang but a whimper"

*Courtesy: The Colombo Telegraph*

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## Why People Oppose The Undermining Of The Judiciary

**by Basil Fernando**

"The court system is skewed against ordinary folk," says Malinda Seneviratne, writing a comment on my last article. His argument is that the people will not defend the courts as the court system is skewed against the people. However, people do have a reason to defend even the highly inadequate and problem ridden justice system as it stands now, rather than having a system that is totally controlled by the executive.

During the last twenty years, I have written almost daily about the defects of the existing judicial system in Sri Lanka and repeatedly demonstrated that the system is mostly dysfunctional. I have also reported on literally thousands of cases of torture and ill-treatment to demonstrate how deeply flawed our system of justice is. Such argument was made not for the purpose of having the system abolished, but rather to have it improved. What the people demand is an improved system which fearlessly defends the people against the powerful forces and against the authoritarian assaults to their dignity and their liberties. Why the system has been defective is due to very many reasons, but the most important reason is heavy interference of the government against the independent functioning of the system.

This may be illustrated by one of the cases we have supported. This is the case of the torture and the murder of Gerald Perera. After his arrest on a mistaken identity, he was severely assaulted, which caused kidney failure. On the basis of his complaint, two cases were filed against the police officers who tortured him. In the fundamental rights case, the Supreme Court held that the police have in fact tortured him and violated his fundamental rights. The Supreme Court awarded the highest compensation to date, both for medical expenses in a private hospital and as compensation for injuries.

The Attorney General thereafter filed a criminal case against the police officers under CAT Act No. 22 of 1994. A week before Gerald Perera was to give evidence at the Negombo High Court, he was shot dead on a public bus. The first accused in a torture case and another person were indicted by the Attorney General's Department for the murder of Gerald Perera and this case is still pending before the Negombo High Court.

In the criminal case for torture, the Negombo High Court made its judgment after several years and acquitted all the six police officers, despite its finding that these officers arrested Gerald and that torture had taken place inside the police station. This verdict of the court was challenged by way of an appeal and the Court of Appeal gave its verdict on October 2012, altogether ten years after the incident, holding that the High Court judge has erred in acquitting four of the accused as there was adequate evidence against them for conviction. The Court of Appeal ordered retrial. Now these officers have filed an appeal in the Supreme Court against the Appeal Court verdict.

Looking from any reasonable point of view, it is obvious that the torture, murder and prolonged and undue delay are serious defects of the justice system. There is enough

data gathered through this case to criticize very many fundamental flaws in the system.

In almost every other case, in the more than thousand cases we have reported, similar and even more glaring problems can be pointed out.

However, does that call for the annihilation of the system? That is what the executive controlled system means. That is not what the widow of Gerald Perera and all who supported him are demanding. They demand a more efficient system of justice.

The contrast can be explained by way of examples from countries where the court system is under the control of the executive.

Cambodia

Around 1992, the United Nations Transitional Authority for Cambodia opened, among other things, a human rights office where people could come and make their complaints about human rights abuses. As a senior officer, I had occasion to record many such complaints.

One complaint was from a man of about forty, who said that his father, mother and two other family members had been kept in prison for about six years. When asked for the reason for their incarceration, he said that his wife had committed suicide but the commune police had taken the entire family under the suspicion of having murdered this lady. When asked why he, as the husband, was not taken by the police, he said that he was out of town that day and the police took only the persons who were in the house on suspicion. When asked whether anybody had investigated into the matter, he said yes, and mentioned that the person who did the investigation is now the prosecutor of a neighboring court.

I visited this court the next day and met this prosecutor, and explained to him the purpose of my visit, which was to look into the complaint made by this man. He put his hands together in the form of traditional greeting and told me, “Please help this family and if you can get them out you will go to heaven”. I replied to him saying, “You are the prosecutor, so why don’t you take the steps to release them, since you have come to the finding that this was a suicide and not a murder?”

The prosecutor replied politely, “Sir, you do not understand and you have no idea about our system at all. In our system, I do not have the power to recommend the release of prisoners once the police or military bring them and put them in jail. Not just me; even if you go to the judge, there is nothing that even the judge can do to release them. The police and the military control this whole system”.

Then I asked him for his advice on the way to get this family released. He said that perhaps we could go to the governor of the province and make a request. We accordingly went to the governor’s house and discussed the matter with him. He

said he was fully aware of the case and that the prosecutor we talked to was his uncle. But there was nothing that he could do. After much discussion, he was persuaded to take the matter up with the head of the state himself. After about six months, the head of the state made an order for their release.

That is an illustration of a system controlled by the executive. Judges in such a system do not enjoy judicial power. They are just servants of the executive and all power belongs to the executive. Many such examples can be cited from what we came across in Cambodia.

Myanmar

A similar situation of total control of the judiciary took place in Myanmar after General Ne Win in 1962, and for most part this system is intact even up to now. It is only during the last few months that there has been some loosening of the rigor of the system. However, even now, as far as the courts are concerned, they are controlled by the military administration.

Within the last few months, I have had occasion to meet with and have discussions with many lawyers and human rights activists from Myanmar. In a weeklong meeting we had with a group of twelve persons, there were persons who had been in prison purely due to things that we would not consider criminal acts at all. For an example, one senior lawyer's proxy was withdrawn by a client on the ground that the client had lost faith in the court. The lawyer was imprisoned and his license to practice as a lawyer was removed for allowing the client to withdraw the proxy on that ground. There was a young lady who had been sentenced to prison for 65 years for sending some emails in support of some protest. She was released after four years due to a general amnesty given due to some political changes. On all such matters of arrest, detention, imprisonment and torture, there was nothing that the courts could do to help anyone. The idea of fair trial has disappeared altogether.

It is true that the torture, murder and serious delays in Sri Lanka's court system, as manifested in Gerald Perera's case and others, are extremely bad. However, that is not to say the situation is the same as in Cambodia or Myanmar as explained through the incidents cited above. The distinction is between a defective system where judicial power is still enjoyed by judges and another kind of system where the judges are mere agents of the executive.

The people in Sri Lanka do want a better system of justice; they naturally do not want a worse system. The demand of the people is not for the executive to take the judicial system under its thumb, but for the executive to provide the necessary funds and other resources so as to enable the judicial system to function better. What people of any democracy want is not a less independent judiciary but a more independent judiciary.

Hong Kong

In Hong Kong, where I live, it is not even possible to imagine a situation similar to Gerald Perera's case or other instances mentioned from Myanmar and Cambodia happening at all. The independent judiciary is one of the systems that is highest valued and appreciated by the people. This has made the judiciary capable of playing a supervisory role over all other institutions, such as the police, the corruption control agency – which enjoys the confidence of the people – and the civil service. In the recent decades, Hong Kong has earned the reputation of a place where bribery has virtually been eliminated. The functioning of the rule of law system heavily depends on the role played by the judiciary.

Impeachment

The reason why there is resistance against the impeachment move is because of the manner in which it was done, which undermines the independence of judiciary. The aim of the impeachment is, as senior lawyer S L Gunasekara has said, to create a stooge judiciary. This is not what people want.

People want a judiciary that can protect them against illegal arrest, illegal detention, torture and ill-treatment, and which can assure them a fair trial. People also want the judiciary to be able to protect their property from those who wish to grab their lands or to profit by way of corrupt means. They would certainly want a judiciary that is able to stop abduction and forced disappearances. Naturally they would want a judiciary that is able to prevent undue interference of any sort against their basic freedoms.

Thus, to use the frustration that people have against the flaws in the judicial system now to justify further interference with the independence of the judiciary is distorted logic and certainly not an attempt to promote the interests of the people.

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## Uncontested Findings Against The CJ By The PSC

**by Vishvamithra**

On going tussle between the Judiciary, Executive and the Legislative (absolutely nothing more than puppets conduct themselves according to the whims and fancies

of the Executive President) is surely a step forward for restoring democracy proper in this inland nation. Particularly since the 1972 Constitution, separation power between the three organs of the government was not worth the paper (the Constitution) it was written. Since then the judiciary, headed by the CJ in most cases plainly deliver what the Executive desired and failed to uphold the role of the watchdog of the people, whose inalienable judicial power it exercises.

Incidence of betrayals of the people, who had placed their trust in the judiciary are in abundance in the recent history. Probably the best is the unbecoming conduct of Asoka De Silva J who was appointed over Srirani Bandaranayake J to approve the 18th amendment to facilitate MR contest for a third term with no issues whatsoever raised when contested before the Supreme Court. Then this very same person simply to please MR had audacity to declare that the Court Martial that found Gen Sarath Fonseka guilty for charges levelled against him without a fair trial afforded to him also a Court. For the job well-done Asoka Silva was given a special presidential advisor post on top of the full pension afforded to him. The judges in the Apex Court are given a pension of 100% salary drawn at the time of retirement for a reason; that is to lead a respectable and exemplary life after retirement sans becoming stooges of any politician or political party.

Next come Sarath N Silva J who let the MR off the hook, in a case where serious allegations were levelled against MR for defrauding tsunami funds. Sarath Silva J, removed all impediments faced by MR and simply allowed him contest the Presidential Election. Later bringing insult to injury Sarath Silva had the audacity to admit that he made a monumental blunder and that he was directly responsible for not dealing MR appropriately as required by law. He publicly admitted that had he acted according to law MR should have been behind bars. It is hard to believe the character of this person who appears to have lost all his senses when he make various public utterances, defending all actions taken by MR regime and the inquiry proceedings conducted by the PSC against the CJ that lacked transparency, fairness that is guaranteed to any citizen in this Country.

Yet, from the peoples' view point what is unfolding before them seems to be good for the democracy. At least from now if the judges in the Apex Court have little bit of insight should realise their constitutional obligation to the people of this country and that the judicial power they enjoy emanates from the people (who enjoy the sovereignty over all three institutions) and not the Executive.

People with little bit if insight knows that there some public officers appointed to the Apex Court from the Attorney General's department by the Executive in an effort to have some influence in the Supreme Court. Surely in most of these subservient officials lacks character, will and commitment required to uphold the judicial power of the people, particularly when it matters most like situations where there is serious threat pose to the democratic rights and fundamental freedom guaranteed by the constitution by the Executive or the Legislature.

In this backdrop the right thinking people earnestly believe that judges in the Superior Courts would learn a costly but good lesson from this impeachment saga that is not to betray the people of their rights when there is threat to their rights either by Executive or the Legislature. People cry nothing more nothing less that justice from the Supreme Court headed by the CJ that is to deal with any member or group in the Executive and the Legislature, who had taken a constitutional oath to uphold the rule of law and to perform their respective offices with utmost honestly and integrity, appropriately and as required by law without any fear or favour. Lessons to be learnt are many from neighbouring countries, particularly from Pakistan where the Supreme Court headed by the Chief Justice fearlessly discharge their constitutional duty to the letter, safeguarding rule of law, the democratic rights and fundamental freedom of the people.

Role vested in the Supreme Court headed by the CJ becomes heavier, particularly since the country is under siege by Rajapakse Wickramasighe top-secret pact that had effectively made the opposition redundant and impotent.

With a single pronouncement, President Mahinda Rajapaksa has cleared the air of all false hopes, unreasonable expectations and rational imaginings. In his reply to the begging-letter by Ministers Tissa Witarana, DEW Gunasekera and Vasudeva Nanayakkara, the President has stated that the impeachment will go ahead, the Daily News reported on Christmas day. There will be no compromise or détente; not one step back or even aside. The impeachment will move forward inexorably, profaning everything in its path, spewing venom in its wake.

The state media and the Rajapaksa shock-troops (notably Ministers Wimal Weerawansa, Rajitha Senaratne and Mervyn Silva) are spending the holiday season in full combat-mode. Insults are being hurled not only at the Chief Justice but also at the judiciary and the Bar Association, plus anyone or anything seen as an impediment to the impeachment.

Let's assume for a moment that the state's derogatory cacophony is factual and that Shirani Bandaranayake, the chief justice handpicked by President Rajapaksa, is a seasoned criminal seeped in depravity. If so, it is not only Shirani Bandaranayake who should be impeached; Mahinda Rajapaksa, the man who elevated her to the august position of chief justice and the Fourth Citizen of the land, too must be impeached, for criminal insanity.

Only a man of unsound mind would have picked a woman of criminal persuasions to be the country's chief justice.

If the President's handpicked chief justice is a hardened criminal that is proof enough of the President's unsoundness of mind and thus unfitness to govern. If the CJ's rightful place is Welikada, the President who appointed her belongs in Angoda.

So, if the wild accusations of the state media and the UPFA ministers are accurate, only one conclusion is logically possible: not only the 'criminal chief justice' but also the 'insane president' must be impeached.

If Shirani Bandaranayake is removed but the president who appointed her remains, and appoints another chief justice, what guarantee do we have that the whole unseemly spectacle will not be repeated a few months from now? Unless the new chief justice is a Rajapaksa serf, not conjuncturally but structurally, a tool willing to do Rajapaksa bidding unreservedly, all the time (like the former AG Mohan Peiris who lied to the whole world, in Geneva, to save his masters) the regime will develop issues with him/her sooner rather than later. And another impeachment travesty will commence.

According to media reports, the President has asked all parties to come up with proposals for constitutional reforms. The rest of the script is easy to imagine. The Rajapaksas will pick those suggestions which will enhance their powers (while debasing the judiciary and the legislature still further) and ram the resultant constitutional changes through a compliant judiciary and a servile parliament. But

before that Shirani Bandaranayake, that handpicked tool who developed a conscience and a backbone unexpectedly, must be got rid of and a new chief justice, who will give all the despotic constitutional changes the freest passage, put in her place.

The impeachment is the second 'humanitarian operation', for the advancement of the Rajapaksa-agenda. It too will be fought no-holds-barred, sans restraint. And if the President did not listen to the four Mahanayakes, he is unlikely to listen to the whining of ministers who owe their political existence to his charity. If anything can make the Rajapaksas rethink, it will be a boycott-threat of their Hambantota Commonwealth.

The President's inflexible stance reveals why the regime is acting like a maddened rhino in a bone-china shop, from North to South. The real reason is not unmannerly ministers or bad advisers (though both types are ubiquitous); the real reason is the President and his Siblings. Mervyn Silva, Wimal Weerawansa and Rajitha Senarathne are not the disease but its symptoms. The real disease is the Rajapaksas, and their fanatical pursuit of total power.

Vellupillai Pirapaharan's pathological maximalism rendered a political solution to the ethnic problem or a negotiated end to the war impossible. Not only did he want a Tiger Eelam under his sole suzerainty; he also wanted to win it on the battlefield, so that he could become the modern day equivalent of the great Tamil empire-builders of yore. The Rajapaksas have a hunger for power and a greed for glory equal to their vanquished opponent. They too are becoming increasingly hostile to reason, inimical to good sense and blind to enlightened self-interest. They too are becoming merchants of chaos, pushing the country from crisis to crisis to promote their political project and wreak vengeance on their opponents.

The Patriotic Lie and the Racist Slip

Since the Rajapaksas equate themselves with the nation/state, they regard all those who oppose them, however democratically and peacefully, as traitors. Thus the regime's repeated references to a 'Hulftsdorf coup'; according to Minister Keheliya Rambukwella, "Local and foreign conspiratory forces are attempting to use the Supreme Court Complex in Hulftsdorf to achieve the objectives which the LTTE failed to achieve through military means… the anti-national forces once used the former Army Commander as a tool to gain their objectives and currently they are using the CJ's Impeachment issue to attain their ulterior motives" (Daily News – 18.12.2012).

If the judges and lawyers protecting judicial independence are traitors, then any attack on them is 'patriotic'. As 'patriotic' as attacking and arresting Jaffna university students and forcing some of them into 'rehabilitation', while mollycoddling Tiger finance-cum-procurement chief KP; as 'patriotic' as planning to do to the 13th Amendment what was done to the 17th Amendment. Because under Rajapaksa rule,

only a Rajapaksa serf can be a true patriot, while any Rajapaksa opponent is a traitor, ipso facto.

Deplorable as this fallacious equation is, something even uglier, more toxic and more deadly is emerging from under the Rajapaksa mantle, as the impeachment heats up. UPFA ministers and state media have begun to use racism in their attack on the CJ and the judiciary. For instance, some of the state media outlets castigated the CJ for picking a 'Tamil law firm' to defend her. They argued that the CJ's failure to pick a 'Sinhala law firm' exposes her as a Tiger stooge. In an article to the Sri Lanka Guardian, academic Thrishantha Nanayakkara pointed out that Minister Wimal Weerawansa "mentioned the ethnic background of the three judges in the Appeals Court that examined the defence of the Chief Justice…. Two of the judges being Tamil and the other being a Muslim (the ITN interviewer assisted here) was used as part of his argument that the defence action on the part of the Chief Justice was a coup with possible international links" (quoted in Ceylon Today). These abhorrent attacks are not anomalies; they are an inevitable function of the Sinhala-racism which lurks just beneath the surface in Mahinda Chinthanaya.

The Rajapaksas are proving to the North and the South that democracy is a sham, and that any protest however peaceful, any dissent however legal will be regarded as a crime. That is not the way to peace or stability in a land which had suffered through one long war and two short albeit brutal insurgencies.

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## The CJ And The Report Of The PSC

**by Rajiva Wijesinha**

I have now had an opportunity to go through the report of the Parliamentary Select Committee that looked into the conduct of the Chief Justice, and its contents amply confirm the position I have advanced, namely

a) Shirani Bandaranayake has not always acted properly

b) She should not be impeached

With regard to the first point, the main problem is her getting rid of other judges and appointing herself to head a Bench looking into Trillium matters. It was quite improper that, following a request for a ruling on a very different matter, she should arbitrarily have put herself in charge of those cases instead of a senior judge of proven competence. And it was particularly deplorable that she should have done this when engaged in business deals with concerned parties.

One problem with regard to which the Select Committee finds her guilty does not seem at all appalling. To accuse her of misconduct because she is in overall charge of judicial procedures at a time when her husband might be subject to them is not at all reasonable. Had she tried to influence the judiciary in such a situation, she would certainly have done wrong, but to find her guilty because she is in a position to do wrong is a strange interpretation of justice. All she need do to ensure nothing improper occurs is recuse herself from decision making with regard to cases involving her husband.

The other point on which she has been found guilty is not declaring various accounts in her annual declaration of assets and liabilities. Several other improprieties in this connection are also noted in the Report, some of which also seem reprehensible. However, there is provision for prosecution for any serious misdemeanours in this regard. Given that there is a judicial process laid down for those suspected of offences, it is best that that process be followed. For Parliament to sit in judgment on such matters, without ensuring due judicial process, is inappropriate, and worries in this regard have been increased by the haste with which the Parliamentary Select Committee went about its business.

That is why I think it would be wrong for the Chief Justice to be impeached on the strength of this Report. The Report itself, in asserting that Mrs Bandaranayake was guilty of misconduct, cites several cases to claim that, 'the appearance of bias, even if there is no actual bias', is sufficient to taint a decision. It has been observed that the test of bias is whether the fair minded and informed observer, the tribunal was biased'.

Unfortunately the Parliamentary Select Committee has certainly given the impression of bias. Initially, when the lawyers for the Chief Justice asked for six weeks to submit the case for the defence, the Committee granted one week. Subsequently, after copies of various documents relevant to the case were given to

her lawyers on December 6th, they were told that the investigation into the first two charges would being the next day.

The Report notes that the defence could then send for witnesses to disprove the charges, but no mention is made of proving the charges. The Chief Justice and her lawyers then walked out of the Committee, on the grounds that 'the defence was not provided sufficient time and precise information with regard to the procedures of the Committee was not made available'.

A fair minded observer would have no doubt that insufficient time had been provided. With regard to procedures, worse was to come, because the Report says that, on the day after the Chief Justice walked out, witnesses were called, and gave their evidence. There is no record that the Chief Justice had been told that these witnesses were to be called to give evidence. The fact that she had been told she could send for witnesses to disprove the charges, before the charges had been substantiated by the witnesses the Committee had decided to call, would suggest bias to any fair minded observer.

In such a context Parliament would be wrong to impeach the Chief Justice without an objective review of the Report of the Committee. The President has declared that he will appoint a Committee to advise him. That might not be formally a satisfactory solution, but if he constituted the Committee in a manner acceptable to the Chief Justice as well as the Select Committee, and allowed a fair time for written representations, we might begin to move towards the fairness required with regard to so grave an undertaking as impeachment of a Chief Justice.

Ministers Rajitha Senaratne and Wimal Weerawansa who were members of the PSC have taken unto themselves the campaign against the Chief Justice Shiranee Bandaranayake whom they found guilty of three charges contained in the impeachment motion. The readers will remember that the CJ at the outset of the inquiry took up the objection inter alia that the two members of the Committee Rajitha Senaratne and Wimal Weerawansa are biased against her in that she was one of the members of two panels of the Supreme Court which dismissed two cases filed by the wife of the former and the latter himself respectively.

The objection had been overruled by the chairman of the PSC reportedly without consulting other members of the Committee and also without giving any reason for his decision which in itself is a violation principle of procedure established by law. The bias averred by the C.J. has now become highly manifest and visible considering the way how the two members themselves have taken upon the vehement attack on the integrity and the character of the CJ by their disparaging and derogatory remarks using the state media at will with impunity. Out of nearly 230 MPS on the government side only these two members have been resorting to this illegal, unethical and unprecedented campaign. The way how the two carry it out unceasingly and vigorously proves the high degree of manifest bias harbours by them against the CJ which is tantamount to malice coupled with personal vengeance, solely due to the decisions made by the CJ who was only one of the judges out of three of the Panel of judges of the Supreme Court who dispensed justice according to law.

One may not find it difficult to infer the kind of language that they might have used against and the attitude shown towards the CJ who was arraigned before their domain of power, the PSC in parliament which manifestly had not, followed any rules of procedure or conduct, or afforded the equality of arms rights of fair trial to her. The derogatory and disparaging remarks and behaviour of these two ministers in their post inquiry scenario is similar to that of two judges in a case who found and accused guilty on the charges going out of the court house and starting an incessant campaign of vilifying and insulting the accused whom they found guilty. It is submitted that this illegal, unethical and immoral behaviour of these two Mnister members of the PSC are unacceptably in any civilised polity and violate all tenets and norms of the law, justice, fair play and decency. This practice should be condemned and denounced by all reasonable and law abiding citizens. They must call upon the President of Sri Lanka who is the President of all people in Sri Lanka to prevent these vilification of Shiranee Banadaranayake who is still the Chief Justice of Sri Lanka.

It is common knowledge that a person who has even the slightest personal bias against an individual should not sit in judgment over a dispute, case, a complaint or a matter in which such person is a respondent. Rules of natural justice require that the decision maker approaches the decision making with 'fairness'. What is fair in relation to a particular case may differ. As pointed by Lord Steyn in Loyd v. McMohan [(1987) Ac 625], " the rules of natural justice are not engraved in tablets of

stone." The first rule is that nobody may be a judge in his own case. Any person who makes a judicial decision that includes, e,g, a decision of a public authority … must not have any personal interest in the outcome of the decision. If such interest is present, the decision maker must be disqualified, even if no actual bias can be shown, i,e, it is not demonstrated that the interest has influenced the decision."

The rules of natural justice also may require that they are given an oral hearing and that their request should not be rejected without giving reasons. We may be able to examine and object to the evidence when the decision is judicial in nature, like the dismissal of an official or punishment for improper conduct the rules of natural justice require a hearing and the person questioned must know the case against him.

It was reported in the print media the Chairman of the PSC Minister Anura Priyadarshana Yapa as saying that in the Impeachment inquiry of Neville Samarakoon CJ only one lawyer was allowed to represent him. One may find it difficult to believe as to whether the Minister who headed the Committee read the Report on the Impeachment of Neville Smarakoon C.J. or is deliberately making statement which are not true to the public to justify their findings. It must be stated for the information of the general public that Mr. S..Nadesan Q.C. appeared with three more lawyers namely, N.S.A.Gunathillake, S.S.Ratnayake. and Mervyn Canage Ratne on behalf of Neville Samarakoon C.J.

Minister Rajitha Senaratne has reportedly stated both in parliament and outside that no initiative had been taken by anyone who claim that the procedure adopted to impeach the CJ was wrong to get the same rectified by initiating necessary procedures or actions. It is evident again that the minister had not either read the Report of the Neville Samarkoon C.J. or is suppressing to the truth. The writer wishes to state that three members of the opposition representing the Committee, Sarath Muththetuwegama, Anura Bandaranaike and Dinesh Gunawardena, in the Neville Samarakoon Impeachment submitting a separate report unanimously requested the President of the country as follows, "The signatories to this statement while conceding that Mr. Nadesan's argument have considerable cogency –are not in a position to come to a definite conclusion on this matter. We would urge the H.E., the President could refer this matter to the S.C. for an authoritative opinion thereon-under Article 129(1) of the Constitution." (See Parliamentary Publications Series No.71 dated 13-12-1984, p.185)

The three members also made reference to the submissions made by Mr. Nadasen Q.C. on behalf of Neville Samarakoon C.J. with agreement, in their separate report as follows, "The point made by Mr. Nadesan, was that in the context of a Constitution as that of our country, in which the separation of powers was jealously protected, the committee is seeking to go on with the inquiry as to whether or not Mr. Samarakoon was guity of "proved misbehaviour", was violating the provisions of Article 4(c) of the Constitution which stipulates that except in matters concerning parliamentary privilege-the judicial powers of the people shall be exercised exclusively through courts."(ibid)

Those three MPs stated therein further that "The signatories to this statement however feel strongly that the procedure that parliament finally adopts should be drafted along the lines of the Indian provisions where the process of inquiry which precedes the resolution for the removal of a Supreme Court Judge should be conducted by judges chosen by the Speaker from a panel appointed for the purpose. We the therefore urge the House to amend Standing order 78A accordingly.(ibid). Minister Rajitha Senaratne as well as other proponents of the correctness of the procedure adopted in impeaching incumbent Chief Justice might be well advised to consult Minister Dinesh Gunawardane, the present chief Government Whip cum Cabinet Minister of their government, the only surviving member of the three MPs who submitted that separate report to the Speaker at the conclusion of the Neville Samarakoon impeachment inquiry, for his advice and guidance on this matter, provided Minister Gunawardane has not forgotten the past.

It is also reported in the media that Minister Wimal Weerawansa as stating that the Chief Justice has shown bias by appointing judges to hear her own case. Any reasonable person other than an ignoramus is aware that a chief appoints a panel of judges to hear cases cannot influence them in their judgment. It must be stated in the same breadth that anyone and everyone with a modicum of knowledge were aware of the verdict of that seven members appointed to represent the governing coalition in the PSC inquiring the impeachment inquiry of the incumbent Chief Justice.

It must be reiterated that what should be done in the interest of justice is not to vilify the goodwill of the incumbent Chief Justice by making unwarranted, disparaging and derogatory statements with impunity using state power but to answer the only relevant question as to whether she was given a fair trial under the principles of natural law and justice, accepted principles of law and procedure to which other persons in the country are entitled to in their fullness and totality.

Reference should be made in fairness to the beleaguered Chief Justice using this space to draw the attention of the general public of Sri Lanka to a feature written by a gentleman who claims to be a f'riend' of the chief Justice. He is none other than Professor Carlo Fonseka 'an acclaimed member of the intelligentsia' of the country. Having consumed about four fifth of his article on the 'Techniques of Avoiding bias & the law using a technique called "Randomised Placebo-controlled double blind clinical trial on the use of drugs, by which process he says that even in the entirely material business of judging the efficacy of drugs it is necessary to avoid rigorously the inevitable bias and prejudice in eliminating the bias of doctors and patients on the efficacy of drugs. Having said that he jumps into a highly anticlimactic conclusion that " the equivalent to of this procedure in judging a case would be for the judge not to know whose case he is judging and the client not knowing by whom he is being judged." As this procedure is not practicable in cases he states that he advised his friend the Chief Justice to apply for leave of absence from the exalted office during the period that spouse's case being investigated. He further opine that

in his judgment her continuing in power at a time in such a situation would in his judgment constitutes a serious case of conflict of interest.

Firstly responding to his example of the it must be stated that cases have and never will be placebos. Every judge knows the cases that he will have to have to hear and every client knows the judge who will hear his case in advance. If a judge does not like to hear a given case he can give reasons and withdraw from same. Similarly if a client does not like a particular judge hearing his case he can give reasons for same and get his case transferred to be heard before another judge by making an application to the Court of Appeal under section 46(1) of the Judicature Act. The writer wishes to state that the learned professor had acted as the devil's advocate of his friend by giving this advice if that advice was actually given by him. The country begs an answer from the erudite professor had he not been biased twice in writing this article, firstly, against the CJ, and secondly, in favour of the government which has sought to impeach the CJ because he is enjoying perks and favours from this government? The people of this may also wish to pose the question to the erudite professor as to what steps did he take as a member of the intelligentsia to prevent the former Chief Justice brazenly and shamelessly subverting the cause of justice and bringing the whole judicial system of Sri Lanka in to shame and disrepute by handpicking a judge to hear and conclude the divorce case in which he was a defendant in his favour in the absence of the plaintiff, harbouring and protecting criminals. I am sure he was either silent or on the side of that delinquent Chief Justice who had the blessing and protection of then president who was his nephew's wife.

It is also pertinent to ascertain from the professor who is so much concerned about bias and prejudice of judges against litigants as to why he did not use his influence and stature in society to request the government to give a fair trial under accepted laws and norms of fair trial and rules of evidenece and procdure devoid of bias and prejudice. Dear professor may I say that, " Your slip is showing."

The answer given in unison inter alia by the esteemed and reverend Mahanayaka Theros of all Nikayas of Buddhism, His Highness the Cardinal of the Raman Catholic Church, most reverend, pontiffs of the other Christian Churches in Sri Lanka, high priests of the Hindu religion and the Islam faith in Sri Lanka including the Bar Association of Sri Lanka, all political parties the opposition, multitude of trade unions and civil society organisations in Sri Lanka and the governments inter alia of the USA, UK and the European Union, the United Nations Special Rapporteur on the Independence of the judiciary, the Secretariat of the Commonwealth of Nations (of which Sri Lanka is a member), International Commission of Jurists (ICJ), International Bar Association(IBA) and Justice C.G. Weeramantry the doyen of Sri Lankan Judges(who was also the Vice President and Acting Chief Justice of the most prestigious and august judicial tribunal in the world the International Court of Justice (ICJ) is that the Chief Justice Shiranee Bandaranayake has not been given a fair trial. Their unanimous 'request and plea' to the authors of the impeachment motion are to withdraw IT and to give her a fair trial/inquiry under universally and nationally guaranteed laws, norms, and rules of evidence and procedure.

Nahi Verena Verani

K.D.C.Kumarage, Attorney at Law, Co-Convenor, Lawyers for Democracy

Izzeth Hussain in his article filed "Chief Justice and the struggle for democracy" published in the Island of 28th November 2012 stated that "There does seem to be a broad national consensus that the government has acted hastily and put itself in the wrong. On one point there seems to exist a virtual unanimity: the Government is acting unconstitutionally in arrogating to Parliament judicial functions in regard to the alleged misdeeds of the Chief Justice, whereas under the Constitution Parliament can exercise such functions only in regard to its own immunities, privileges and powers. The question of whether the Standing Orders of Parliament can legitimately negate or modify a Constitutional provision has still to be determined by the Judiciary. For various reasons the Government seems to be in a no-win situation. It would therefore be well advised to stop the impeachment proceedings."

He went on to say that: "Governments have been notorious for making political appointments, the beneficiaries of which are expected to side with the government. Her husband has reportedly been the beneficiary of privileged treatment by the Government. The Chief Justice is a separate legal person and she cannot be blamed for what her husband does. But it is a fact that we cannot ignore that the nexus in the public mind between political appointments and influence is very powerful. There could therefore (without citing any rhyme or reason) be a case for the Chief Justice to bow out gracefully – after meeting the charges made against her – in the interest of establishing the highest norms for the Judiciary." (The rationale for this statement continues to baffle my simple mind). "JRJ gave the impression that he and Parliament were supreme over the people. That misconception which still seems to be prevalent must be corrected. The Sovereignty of the people entrenched in our Constitution must be asserted loudly". "The entrenchment of democracy in this country requires that the arrogance of power, which lurks behind the assertion of Parliamentary supremacy, be tamed. We do have a democracy, though a deeply flawed one, which might be called a quasi-democracy. We can take action towards a stable and fully functioning democracy. Or, we can be our own executioners."

Mr. Hussain followed this up with an article published in the Island of 17th December, 2012. He reiterated that the "Government seems to be in a no-win situation. It would therefore be well-advised to stop the impeachment proceedings" and stated that "the reasons for holding that the Government is in a no-win situation have become much stronger. The PSC has moved with a stunning celerity (swiftness) to push the proceedings towards what must seem to most unprejudiced observers as the predetermined conclusion of impeachment. So the CJ is impeached either on sufficient or on insufficient grounds. Either way the Government stands damned ….. Sri Lanka could even get kicked out of the Commonwealth. No Government in its right mind will feel complacent if it gets into a position of international isolation, and that is precisely where Sri Lanka is going by compounding the nonsense on the ethnic problem by even more outrageous nonsense on the Chief Justice. Sri Lanka has no international clout, potential or actual, worth speaking about. It will be stupendous folly on the part of our leaders to put Sri Lanka in a position of international isolation. I suggested that the Government stop the impeachment

process, and the CJ resign after facing the charges against her. She cannot be blamed for her husband accepting privileged treatment from the Government, but the fact is there that in the public mind there is a powerful nexus between politically privileged treatment and political influence. Her resignation would therefore be seen as being given in the interest of establishing the highest norms for the judiciary, and not as a quid pro quo arrangement. In any case we cannot expect that the Executive, the Legislative and the Judiciary will work together in harmony, and that certainly would be an unsatisfactory situation. The President himself has stated that he will appoint an independent Committee to report on the findings of the PSC. It is mainly through the violation of democratic norms that Sri Lanka could come to be targeted for punitive action. Therefore our priority should be to struggle towards a fully-functioning democracy."

Having said that Democracies are not usually addicted to the warrior ethos, he concluded by saying that, "after all, under a quasi-democracy with only some of the blessings of modernity, at the age of eighty five, he too was "still having a damn good time, and that only a mutt would want war today, and then said, 'Let's opt for democracy.'

I was even more baffled with his considered conclusion that "her resignation would result in establishing the highest norms for the judiciary." On the contrary, it will certainly be construed as an implicit admission of guilt and set the dangerous precedent that any judge who fails to deliver a judgment that pleases the Executive will have to resign, thereby establishing the lowest possible norms for the Judiciary. I was convinced that Mr. Hussain could not have been serious in making such a preposterous suggestion but, being only 79 years old and not "having a damn good time myself ", I refrained from questioning his logic.

I was, however, greatly relieved when "Concerned woman" took the words out of my mouth in her response to Mr. Hussain in the Island of 19th December 2012. I must confess that I could, in fact only interpret his suggestion that "the CJ resigns after facing the charges against her" as a 'sordid quid pro quo arrangement' and nothing else. However his response to "Concerned woman" published in the Island of 22nd December leaves me dumbfounded in disbelief.

Having twice affirmed that 'she cannot be blamed for her husband accepting privileged treatment from the Government' he goes on to reiterate that there is in the public mind a
very powerful nexus between politically privileged treatment and influence and that her resignation in that context, even if the rationale behind it is not declared, will strengthen democracy, the rule of law and the independence of the Judiciary, and further that her resignation could then be seen as an act of self-sacrifice in the interest of establishing the highest norms for the Judiciary. He seeks to justify this preposterous suggestion by citing what he sees as a practical problem that cannot be evaded, viz. that if she continues as CJ the Executive and the Judiciary cannot work together in harmony whereas good democratic governance needs a degree of

equilibrium between the Executive, the Legislature and the Judiciary. Drawing attention to the fact that the Executive and Legislature are directly elected by the people while the Judiciary in not, he contends that it seems to be anomalous that the Judiciary should be able to set aside the will of the people expressed through the elected Executive and Legislature. His view appears to be that the elected Executive and Legislature are in fact acting in accordance with the actual will of the people and that the decisions of the Judiciary should be more recommendatory than mandatory. This is tantamount to a repeal of Article 125 of the Constitution which vests in the Supreme Court the sole and exclusive jurisdiction to hear and determine any question relating to the interpretation of the Constitution (including the extent of the Executive, Judicial and Legislative and Powers of the Sovereign People delegated to the President, the Judiciary and the Parliament respectively) and make any such consequential order as the circumstances of the case may require. Then, and only then, will be President and the Speaker be empowered to determine the limits of the Executive and Legislative powers delegated to them by the Sovereign People, in the Constitution. Will that not be tantamount to giving them the "freedom of the wild ass" and a prescription for certain anarchy?

by Basil Fernando

In today's SLBC program, most inappropriately called "People's Power" – a better name would have been "A Voice from the Political Gutters" – Rajpal Abeynayake, the commentator, labeled America's greatest judge a "cunning" and "devious" person. The commentator also called one of the most respected retired judges of the Supreme Court, CV Wigneswaran, a schizophrenic. Abeynayake stated that a well-respected lawyer, SL Gunasekara, is somehow a person who has been misled by those who are political opponents of the government. Abeynayake also accused one of the best known human rights lawyers in Sri Lanka, JC Weliamuna, of attempting to cause a street uprising to overthrow the government.

This SLBC program is a totally politically program, designed to do Squealer's function, as described in Animal Farm by George Orwell. The character of Squealer represented the Russian media, which spread Stalin's version of the truth – meaning lies – to the masses. What this SLBC program does is to mention the names of persons who have written articles or otherwise talked against the impeachment move by the government, and then the commentator gives the government version. The commentator, while calling all critics "political", claims that he has an utterly objective view that is not coloured by politics at all. In actual fact, there is nothing in the program except an inept attempt to create an excuse for the government's move for impeachment. The appropriate translation for Squealer's role in Sinhala is "wandi battaya". Rajpal fits into the role quite well.

He says that the only thing that the critics say against the impeachment is regarding the process. This means that the criticism is that, on the removal of the Chief Justice of the country, there has not been a fair inquiry done by a competent tribunal. Rajpal fails to even grasp the importance of a fair and impartial tribunal to arrive at any conclusion regarding the guilt or innocence of any person. When this elementary truth is ignored, any person can be hung by the clamour of anyone who makes some allegations. The judicial function is all about fair trial. A fair trial could be conducted only by a competent tribunal. If even a criminal were to be "sentenced" to death by anyone other than a competent court, it would be ridiculous to say that the only thing that is lacking is a verdict by a competent tribunal and that it is just a trivial matter. That is exactly what this program keeps on repeating a thousand times over, day and day after.

The commentator conceded to the argument by SL Gunasekara that, prior to the 1978 Constitution, the decisions of courts by way of judicial review was respected. And then the commentator argues that, after 1978, a new order has come into being and that JR Jayawardene certainly did severely undermine the judiciary. Then he argues that what this government has to do is to follow the recent practice, that is, the practice after 1978, and that the government cannot be expected to go back to a period before that. Thus, he concedes to the argument made by everyone that the impeachment move severely undermines the independence of the judiciary.

The gist of Justice CV Wigneswaran's argument was that the 1978 Constitution is a product of constitutional tomfoolery, and that the 18th Amendment completed the process started by the 1978 Constitution, creating a situation of political destablisation in the country. SLBC's commentator does not disagree with that view. In fact, he seems to quite happily agree with that view, and his whole argument is that we are doing what JR Jayawardene did. He wants to know what else anyone would expect a government to do than to follow the more recent example over the examples from a remoter time (one decade previous to the time he recommends), despite the fact that during that time things may have been done more appropriately.

The most ludicrous part of his monologue was on the greatest judge in American history, Chief Justice John Marshall, who Rajpal repeatedly called a "cunning" and "devious" person. In doing this, Rajpal showed not only his ignorance of history and law, but also showed why he should not be taken seriously at all.

John Marshall understood that the separation of powers made the judiciary a separate branch of government. The most central function of this separate branch was to protect the dignity and the liberties of the individual against the all powerful executive. Article 3 (1) of the constitution of the United States gives that, "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." It is this judicial power that John Marshall used against the executive power. When the executive or legislature did any act which interfered with the liberties of the individual, it was the duty of a judge to use his judicial power to oppose and to annul such acts of the executive or the legislature.

The constitutional provision granting judicial power would have no meaning if it could not oppose the legislative power or the executive power when appropriate and when the law requires it to do so. What this comes down to is the ultimate power of the judiciary to interpret the law. This presupposes that the law is supreme and, if the legislature or executive does any act that contravenes law, the judges have the power to declare what the law is and to annul any act that is contrary to law.

Rajpal also failed to understand CV Wigneswaran's reference to the appointment of judges in the United States. Vigneshwaran referred to the practice since 1978 of abusing the presidential power to appoint judges. He stated that in the United States, even the President of the United States does not have such power, as Presidential nominations are reviewed by the Senate. Then Rajpal goes onto say that the Parliamentary Select Committee is similar to the United States Senate; so we not only have constitutional tomfoolery but also media tomfoolery, with Rajpal Abeynayake and his like to play the jester's role.

All this could have been taken as comic if not for the fact that it is taxpayers' money and the citizens' valuable time that is wasted by such political lying and absurdities.

Listening to Rajpal shouting justifications for the indefensible, one is reminded of Aesop's fable about the ass who tried to develop an association with a lion.

One day, when the lion was going for a hunt, the ass asked, "Sir, may I come with you?"

Rather amused by the request, the lion agreed. When the other animals felt the presence of the lion, they fled and hid themselves in the hollow of a tree. The lion, who thought of using the ass for a good purpose, asked the ass to go behind the tree and shout as loud as he could. Having got an opportunity to impress the lion, the ass shouted with all the strength in his body. The sound was so abnormal that the other animals feared that some new animal had come to the jungle and fled from the tree and started running. The lion, who was waiting some distance away, did his hunt easily and started his meal.

A little later, the ass approached the lion and asked, "Sir, how did you like my shout?"

The lion replied, "If I did not know that you were an ass, even I would have gotten frightened."

Of course, when Rajpal tries to take on persons like the late Chief Justice John Marshall, or retired Supreme Court judge CV Wigneswaran and senior lawyers like SL Gunasekara and JC Weliamuna, one cannot help thinking about the ass who wanted to impress the lion.

**by C.V.Wigneswaran**

Gurur brahma gurur vishnuhu gurur devo maheshwaraha guru saakshaat para brahma tasmai shree gurave namaha

Mr.Chairman, Your Ladyship, Distinguished Guests, my dear Brothers and Sisters!

I was indeed pleasantly surprised when your President invited me to address you today. It is eight years since I retired. Though I have been very busy addressing here and abroad many a meeting on legal, social, religious, literary, historical and many other allied subjects, and sometimes writing about them, the Original Judiciary to which I belonged and the tenure of which I cherished so much never invited me so far.Perhaps it was because I spoke and wrote of matters that were not appreciated until now! At least, the fact that when a sense of apprehension, uncertainty and confusion has enveloped you, thanks to what is happening around you in Sri Lanka, you have thought of those who stood for the Independence of the Judiciary, and lived their life under much stress and indignity steeped in such Independence, speaks well of you. It was not very long ago that this speaker together with another senior member of the Original Judiciary had to remind the Secretary to His Excellency the President of the undesirability of interfering with the Independence of the Judiciary when we were called upon to inquire into the dismissals of several Original Court Judges during the tenure of office of Justice Sarath N. Silva. We politely declined to serve on the special committee and indicated that if the request came from the Judicial Services Commission we were prepared to assist.

What is Independence of the Judiciary? Why is it important?

I have been called upon to speak today on your event theme "Independence of the Judiciary" just as my esteemed friend Justice Salaam, the other speaker, today. We seem to be in the habit of attending conferences together – only a week ago Justice Salaam and I were at a USAID Legal Workshop for the Northern and Eastern Lawyers together. I hope our discussions do not overlap.

What is Independence of the Judiciary? Why is it important? Are these not pertinent questions to answer? Let me briefly define this much maligned phrase in my own way. Independence of the Judiciary means simply that the Judiciary needs to be kept aloof as far as possible from the other branches of Government and other interest groups. In other words, Courts should not be subject to improper influence be it from other branches of the Government, that is the Legislature as well as the Executive,or from private or partisan interests. If Judges in a country could decide cases and make rulings in applications before them according to the rule of law and according to heir judicial discretion, even if they be unpopular and even if they may embarrass powerful vested interests, then we might say there is Independence of the Judiciary in such a country.

Independence of the Judiciary has two facets – extrinsic and intrinsic or the outside and the inside. The extrinsic component is made up of the structural, systemic and environmental factors that form the set up within which Judges function. The extrinsic component therefore includes the constitutional procedures for appointment of judges, their security of tenure, salaries and perks, as well as their personal security, including threats and inducements. The intrinsic component includes how Judges think, react and behave. This component is what is truly within our power. However, even the most altruistic would agree that the extrinsic component greatly shapes the intrinsic.

What you are facing today with the impeachment of the Chairperson of the Judicial Service Commission and the physical assault on the Secretary to the Judicial Service Commission are the extrinsic dimension. When the Eighteenth Amendment to the Constitution was allowed to be passed by the Supreme Court, some of us were of opinion such outer aberrations might be the result. We had read as Law Students in 1961 or so as to what Lord Acton had said in 1887- "Power tends to corrupt, and absolute power corrupts absolutely" said he.

Checks and balances were not designed by Law for cosmetic reasons. The concentration of power in one arm disturbs the delicate balance of power among the three arms of Government. When there was already an imbalance of power, further concentration was a recipe for disaster. To understand the extrinsic evolvements in our Country we must understand what took place in the field of Constitution making in Sri Lanka.

For constraints of time I will not start from 1947. Let me begin with the pre- natal period of the present Constitution. The 1978 Constitution laid the foundations for a changeover from the Anglo – Saxon model of a Parliamentary Democracy to a centralised, almost absolute Presidency, modeled on the German/American Presidential system, though paying pious lip service to Parliamentary Democracy and Parliamentary traditions. While seemingly following the American model, the strict division of powers, between the executive, legislative and judicial, contemplated by Montesquieu, was conveniently ignored.

Before introducing the 1978 Constitution, Article 4 of the 1972 Constitution which read as

"The sovereignty of the People is exercised through a National State Assembly of elected representatives of the People" was changed to read as follows: 'The sovereignty of the People is exercised through a National State Assembly of elected representatives of the People and the President who shall, subject to the provisions of the Constitution, be elected by the People".

So too Article 5 of the 1972 Constitution was amended to replace the National State Assembly, with the "National State Assembly and the President", as being the supreme instruments of state power of the Republic.

The more important amendment relevant to our deliberations here was that the Executive power, including the defense of Sri Lanka, which was exercised by the President and the Cabinet of Ministers according to the 1972 Constitution, after the Second Amendment, was to be exercised solely by the President, who happened to be the Executive President, unlike the earlier President who was a creature of the Legislature. The Cabinet of Ministers was to thereby lose its importance. Still the Cabinet is sterile. You hardly know these days whether a Cabinet of Ministers exists and what its views are!

This changeover sought by the Second Amendment to the 1972 Constitution completely metamorphosed the institutional set up introduced by the 1972 Constitution.

The Second Amendment to the 1972 Constitution was the catalyst that produced the 1978 Constitution. First the Second Amendment, and then the 1978 Constitution, transformed the office of the President of the Country from a creature of the Legislature to be the controller of the Legislature.

The President of the Democratic Socialist Republic of Sri Lanka was not only going to be the Constitutional President but also the Executive head of the country as well. Like the President of the United States he was to be a Constitutional head plus the Prime Minister, two roles rolled into one.

He would appoint the Prime Minister and the other Ministers of the Cabinet. (Vide Article 43(3) and 44 of the 1978 Constitution).

He would appoint other Ministers not of cabinet rank too. (Vide Article 45-ibid).

He would not cease to be the leader of his political party and therefore it would be his policy that would be implemented.(Vide Article 31( 1) and 33(a)- ibid). So the fertilization and conception for the Chintanayas of the future had taken place then.

The President would not be a member of the Legislature but from time to time he would use his right of audience to address the Parliament very much like the President of the United States who would address the Congress when he felt disposed to deliver a message (Vide Article 32 (3)- ibid).

In other words the President was to become the supreme instrument of State Power of the Republic under the 1978 Constitution. But he was much more than a mere primus inter pares as far as the institution of the President and the Legislature were concerned.

The President was to become the head of the Cabinet of Ministers. (Vide Article 43(2) ibid).

The whole administration was to be brought under his control (Vide Article 54 – ibid). By virtue of his office he could give orders directly to any department or official. He could call for any report, documents or any other information from any department directly.

The role of the President appears to be fashioned in the image of a King

It was said that the President of the United States was a dictator for four years. In the case of Sri Lanka not only is this dictatorship extended by two more years, but it applies with far greater force here! The Cabinet is the President's creature. Most importantly, by allowing Members of Parliament to become members of the Cabinet, Parliament as an institution has became emasculated. Members of the Cabinet are beholden to the President, as they hold office at the President's will and pleasure. (Vide Article 44(3) –ibid). They serve their Master and do not hold any allegiance to the institution of Parliament. In the US, the House of Representatives and the Senate are completely divorced from the Executive. The Legislature is not an appendage to the Executive, but actually acts as a check on the Executive. With the evisceration of this separation, the Executive in Sri Lanka becomes even more powerful. It is no surprise then that much respected stalwarts of Parliamentary Supremacy and Democracy in Sri Lanka have become starlets kept by the Executive today.

Worse still the President was to keep himself insulated from blame for acts of omission and commission committed by him because it would be the Ministers who would be questioned and criticised in the House for such acts for which the President may himself be responsible. Were there to be a challenge of no confidence in the Government, the Prime Minister and the rest of the Cabinet would have to face it, since the President was not there to answer the criticisms that were to be leveled at the Government of which he is the fountain-head. The President of the Republic according to the Standing Orders of the Parliament cannot be the subject of any adverse comment. And Article 35 of the Constitution assured immunity to the President from suits. As you can see the role of the President appears to be fashioned in the image of a King. In fact Mr.J.R.Jayewardene once said that he is the last of the lineage of Royalty in Sri Lanka!

Since the Presidential Elections would not coincide with the election to the Legislature the possibility of the Legislature and the Executive sporting different political complexions was definitely possible, as indeed we did have such parties of different hues called upon to co-habit after the 2001 Election. However, this was hardly a check on the powers of the Executive. The manner in which the then President cut the Gordian knot by taking over three Ministries stultifying the then existing Legislature's performance thereafter, proves the point. The emasculation of Parliament is almost complete with the power the President wields to prorogue and dissolve Parliament.

What was to be noted was that the Presidential System initiated by Mr.J.R.Jayewardene offered virtually unlimited scope for wielding absolute power,

albeit for a limited period then. But the taste of unlimited power grows with time and office and the lust cannot be easily satiated. So the changeover brought about by Mr.J.R.Jayewardene must be deemed to have been designed to keep the incumbent in office of the President of the Democratic Socialist Republic of Sri Lanka in absolute and unfettered power. In consequence, fundamentals of good governance such as accountability, transparency, consideration of conflict of interests and the avoidance of certain actions thereby, were all sacrificed at the altar of self interest. Yet after the demise of President Ranasinghe Premadasa it was not Mr.JRJ's Party which reaped the benefits of his constitutional tomfoolery.

This brings us on to the state of the Law under the Constitution pertaining to the Judiciary. It is important to examine whether there are provisions in the Constitution which favour the interference by the Executive vis a vis the Judiciary. A Constitution tailor-made for the enhancement and the stabilising of the power of the Executive President must no doubt have such secret innovations. Until the passing of the Seventeenth Amendment to our Constitution the discretion of the President with regard to the appointing process was essentially absolute. The 17th Amendment restored some balance to the system and made the separation of powers contemplated in Article 4 meaningful.

Upper echelons of the judiciary

Before getting on to the calamity that befell our Constitution thereafter, a word relating to the Office of the Attorney General may not be out of place. The Attorney General is the first Law Officer of Sri Lanka and the chief legal adviser to the Government. He and his officers are legal advisers of the national Government of which the Executive President is the head. The close relationship between the Attorney General's Department and the Executive is thus visible. The relevancy of this would be referred to anon.

Dr.Colvin R. de Silva once pointed out "in the field of independence of the judiciary and of judicial independence it is the upper echelons of the judiciary that most matter being the final guardians of such independence against executive intermeddling and even legislative invasion." (vide Socialist Nation of 09/08/1978).

The new 1978 Constitution provided for a transitional provision (Article 163) whereby all judges of the Supreme Court and the High Court established by the Administration of Justice Law No: 44 of 1973 holding office on the day immediately before the commencement of the Constitution ceased to hold office thus ensuring that thence onwards the appointments to the Higher Judiciary could be kept within the Executive President's control. It is to be noted that Article 164 categorically stated that all minor judicial officers and such officers and employees could continue in service or hold office on appointment under the same terms and conditions as before (the 1978 Constitution came into effect).But why were judges of the superior courts handpicked to "cease to hold office" while the minor judicial officers were allowed to continue? Did it give the then President the liberty to pick and choose for

appointment to the Higher Judiciary those favourable to the Executive, leaving out others?

Since then there has been an unhealthy practice of appointing comparatively very young State Officers from the Attorney General's Department to the Higher Judiciary in large numbers thus effectively debarring older and experienced Original Court Judges as well as senior members from the Unofficial Bar or even senior educated Academics from the Universities entering and/or reaching the higher echelons of the Judiciary. By virtue of their long stint at the Attorney General's Department these Judges carried with them a conditioned reflex which favoured the State generally. They were also necessarily quite close to the Executive by virtue of their having had to hobnob with politicians during the course of their day to day official life at the Department. This is perhaps the type of judges who, in the words of Lord Atkins' famous dissent, become "more executive-minded than the Executive"!

Today the Superior Courts consist of large majority of Judges who entered the Higher Judiciary directly from the Department. They have had no experience at the Original Courts, especially the Civil Courts, except for some who came up from the High Courts, which mainly did Criminal cases at the time they were recruited from the Attorney General's Department. I had noticed the ability to appreciate the nuances of Civil Law notably lacking among these recruits from the Department when I was on the Bench. You cannot blame them. The appointing authority if it was circumspective and farsighted instead of being offensively selfish could have seen through the consequences of such appointments. A long stint at the Original Judiciary is expected to mature and sober the incumbents before they take on responsibilities in the Higher Judiciary.

The role of the Attorney General and so-called Independent Commissions of Inquiry in relation to the Executive Presidency came into focus a few years ago. The International Independent Group of Eminent Persons (IIGEP) who were invited by the current Executive President himself from a number of Countries to observe the work of the Commission of Inquiry to Investigate and Inquire into Serious Violations of Human Rights, in their final Public Statement released before withdrawing from their responsibilities in disgust said as follows

"An astonishing event occurred in November 2007 at the plenary meeting held between the Commission and the IIGEP. A letter dated 5th November 2007 from the Presidential Secretariat and addressed to the Chairman of the Commission was revealed to the meeting. It stated that: 'The President did not require the Commission to in any way consider, scrutinize, monitor, investigate or inquire into the conduct of the Attorney General or any of his officers with regard to or in relation to any investigation already conducted by the relevant authorities'".

The report goes (vide page 13 under the heading (a) The role of the Attorney General):-on to say "It was the single most important event prompting the IIGEP to decide shortly thereafter that it should bring its presence in Sri Lanka to an end"! In

this case the IIGEP had been expressing its concern about the role of the Attorney General from the very beginning of its work saying there was a fundamental conflict of interest since the Attorney General while being legal adviser to all levels of the Government including the armed and security forces and the police was at the same time potentially in the position of being a subject of the inquiry where the incriminating hand by the dependents of the victims pointed at the armed services, police and paramilitary armed units.

It would therefore not be wrong to conclude that the Executive Presidency is in a position to interfere with the Judiciary on account of its close relationship with the Attorney General's Department. The appointment of personnel in large numbers from the Attorney General's Department to the Higher Judiciary can be seen as an extension of the process of such interference.

18th Amendment has destabilised the Sri Lankan political system

It might be argued that in the United States the appointments to the Supreme Court are made by the President. There is a glaring difference. The President of the United States, it must be noted, is hamstrung by the concurrent power of approval conferred by the Constitution on the Senate. As stated earlier, the Senate is not a mere appendage to the Executive, and thus takes its tasks seriously. The Senate does not toss aside its obligations as a mere formality. That august body delves deep into the integrity, moral uprightness and the general demeanour of the President's nominee. We saw this independence manifest itself a few years ago with one of the nominees of President George W. Bush.

Let me now come over to the national calamity – the Eighteenth Amendment.

The Eighteenth Amendment has fundamentally transformed Sri Lanka's political system, stripping away even the façade of democracy. It ended Presidential term limits, eliminated the Constitutional Council, increased the Executive's control over appointments and gave the President the power to regularly attend and address Parliament, without being subject to question. It has removed vital checks on Executive power and has further undermined Sri Lanka's imperfect democracy. As we traced at the outset the Executive was already hegemonic. Now the hegemonic Executive President had been made a juggernaut!

Were the consequences of removing vital checks on the Executive unknown to our Higher Judiciary?

Rebecca Buckwalter-Poza of the Asian Human Rights' Commission had said quite some time ago, that

"Presidential term limits are critical to democratization. The concept of Executive term limits has been a part of discussions of democracy since its inception in ancient Rome and Athens. Without term limits, an individual and party may accumulate

tremendous power. Incumbency advantages allow them to increase and preserve that power perpetually. The incumbent may rely on popular support, regime tactics, and opposition fragmentation to stay in office and set the country's agenda ad infinitum. The consequences extend beyond the immediate issue of individual accumulation of power over a lifetime. As power becomes concentrated with a single individual and party, the range of views within the party decreases and opposition parties weaken and fragment, diminishing the representation of diverse views in democracy. The weakening of opposition parties undermines electoral choice, as voters have fewer alternatives to the party in power. Government and politics stagnate."

She further continued-

"In the absence of a Presidential term limit, corruption will increase within and outside of government. As an Executive and ruling party accumulate power, they become more likely to abuse that power. Parties are less vigilant in rooting out vice and officials are more prone to corruption when they perceive little threat of removal or electoral repercussion. Conversely, without the potential for political turnover, businesses and other non-governmental actors have a greater incentive to invest in bribing and corrupting government officials, whose positions are more likely to be long-term and secure."(unquote)

All that this Political Consultant had said even before the Eighteenth Amendment became Law here, have found confirmation in Sri Lanka later.

The drama taking front pages in the Newspapers these days

The Eighteenth Amendment expanded the power of the Executive to make appointments, eroding the independence and power of other government actors and branches. Changes to the appointment process within the Eighteenth Amendment has presented a special threat to the independence of the Judiciary. The President's expanded appointment powers has extended to the selection of the Chief Justice and the Judges of the Supreme Court, the President and the Judges of the Court of Appeal, the Members of the Judicial Service Commission other than the Chairperson, the Attorney-General, the Auditor-General, the Parliamentary Commissioner for Administration, and the Secretary-General of Parliament. Additionally, the Eighteenth Amendment's expansion of the President's privileges with regard to Parliament has compromised the autonomy of Parliament. The prerogative to address Parliament and the acquisition of full Parliamentary privileges has significantly increased the President's influence on the Legislative branch, virtually eliminating the separation of powers between the Executive and the Legislature.

Thus the 18th Amendment has destabilised the Sri Lankan political system. Its effects will only grow with time. The drama taking front pages in the Newspapers these days is only proof of such demoralizing effects. The Amendment has removed essential limits on Executive power and has crippled the Judiciary and reduced the

independence and influence of the Parliament; further, it has ensured political stagnancy and precluded progress. By, passing the Eighteenth Amendment, Sri Lanka has destroyed what democratic framework that was in place rather than improving it. When the Supreme Court decided on this issue it ought to have borne in mind the precarious balance of power and ought to have realised that changes of this nature change the essential structure of the Constitution and as such the very nature of a democracy.

Thus the Executive power under the 1978 Constitution, which is the Constitution still in vogue with many amendments so far, is reposed absolutely in the President. But the checks and balances on his arbitrary activities have been effectively blunted. The office has all the hallmarks of a veritable dictator. The desire to hold on to power by any means seems to have motivated the enactment of the existing Constitution which was passed effectively with the help of the steamroller majority that Mr.J.R.Jayewardene enjoyed during his tenure of office and now the majority enjoyed by the present incumbent has given birth to the Eighteenth Amendment. Use of violence, deception, and unethical means characterized JRJ's tenure in office. Stoning of Judges' residences found its origins during J.R.'s time.

He effectively established a constitutional structure which appeared democratically feasible but in actual fact was a design for dictatorship. His deception lies in his successful enactment of the present Constitution. The present incumbent seems to be proving himself to be a worthwhile political progeny. And he is a self-confirmed artiste with histrionic abilities!

No one had dared to assault a Judge until recently

It is in the light of such constitutional provisions one has to look at the unfortunate assault effected on the Secretary to the Judicial Service Commission and the Impeachment process now enacted on the present incumbent to the post of Chief Justice.

No one had dared to assault a Judge until recently, just like none had stoned Judges' houses until it was done during J.R's time. It is the gumption that none would punish them because they are protected that allows such thugs to resort to such acts. There are some politicians who would raise the bogey of foreign conspiracies, and magnify insignificant incidents, as reasons for such happenings, forgetting that such occurrences, whatever be the reasons that prompted them, cannot be condoned. Then again the process adopted to impeach the present holder of the office of the Chief Justice has been roundly condemned as unconstitutional and violative of any notion of Natural Justice or fair play. The public domain is filled with learned discourses on this debacle and there is little that can be added, except that it is the logical extension of the process of aggrandizement of power by the Executive to the detriment of the judiciary and democracy. And if I may say so, honest reflection will show that the Judiciary played its role in allowing this to happen.

To state that the extrinsic dimension of the independence of the Judiciary is in a perilous state would be an euphemism.

Let me now move over to the intrinsic dimension.

Whatever may be the extrinsic outward offensives undertaken and orchestrated by ill-advised political stooges and others vis a vis the Judiciary, there is an inner dimension which Judges must not lose sight of. By virtue of his or her office a Judge has per force to be independent. If a Judge has a condition of mind that sways judgment to one side or the other and renders such Judge unable to exercise his or her functions impartially in a particular case then his or her Independence could be said to have been lost. It is an elementary rule of natural justice that a person who tries a cause should be able to deal with the matter before him or her objectively, fairly and impartially. No one can act in a judicial capacity if his or her previous conduct gives ground for believing that he or she cannot act with an open mind. The Law requires even handed justice from those who occupy judicial office. It expects the Judge to come to his or her adjudication with an independent mind without leaning towards one side or the other in the dispute. A judge must not be oppressed by the high status of a party in the dispute. In Courts of Law there cannot be a double standard- one for the highly placed and another for the rest. A Judge should have no concern with personalities who are parties to the case before him or the lawyers appearing for them but only with its merits. Judicial bias may be inferred sometimes from the manner in which a judge conducts the proceedings. Not granting a fair hearing to one of the parties may also lead to an inference of judicial bias.

While it would be naïve to think that the extrinsic aspects have no effect on the intrinsic elements of independence, the ultimate power to resist adverse extrinsic elements lies in how Judges control the intrinsic elements. It is the proper exercise of the intrinsic elements that is the true source of power for a judge. A judge who deals purely on the merits of cases and who respects the Bar whilst being firm will get the reciprocal respect from the Bar. There is no substitute for this respect. There is also nothing that a tyrant fears more than an independent judge. A Dictator is not as worried about protesting or striking judges as he is about judges who uphold the Law. As Judges we must remember that manipulating crowds and processions are in the domain of the political animal. Judges who, by virtue of their office, are isolated cannot win that battle easily. The battle that can be won of course is the battle in their domain – the legal domain.

You have lost a good opportunity to teach that fellow a lesson

Being independent does not mean holding against the powerful, but being unafraid to do so. A reaction which results in holding against the Executive merely because the Executive is interfering with the Judiciary is as bad as being afraid of the Executive or seeking to curry favour from the Executive. Such a situation will only

play into the hands of those who seek to undermine the Judiciary. Balance, though difficult at times, must be maintained.

After I made my speech in all three languages on being welcomed by the Bar consequent to my elevation to the Supreme Court, there was heavy criticism by a senior lawyer which appeared in the papers. This irritated my close friends. I laughed it off. A week or so later that senior lawyer appeared before me. I had studied the case the previous night and found merit in his case. I allowed both Counsel on either side to address me, as they would normally do and gave the determination in favour of the senior lawyer who had castigated me in the papers. My lawyer friends were even more annoyed. One of them phoned and said "You have lost a good opportunity to teach that fellow a lesson" meaning the senior lawyer who criticised me. "You should have dismissed his case and taught him a good lesson" he said. I retorted "What nonsense! A lawyer fights his client's case. If a Judge does not like the Counsel and therefore make a one sided order purposely, his client would suffer. My problem with the lawyer is something else. Don't talk like that" I warned him. I did not allow the conduct of the lawyer turning abusive towards me, to colour my judgment.

Let me point out some of the common contributory causes, which lead to judicial bias-Political pressures brought about directly or indirectly. Desire on the part of a Judge to curry favour for his or her future prospect. Pecuniary interest of the Judge in the subject matter of the case before him or her. A desire to patronize any former colleague at the Bar or elsewhere. Inherent tendency in a Judge to show favour to certain classes of cases. Interest of the Judge in one or the other litigating parties for any reason whatsoever. There are many more.

A Judge needs to be alert with regard to his or her conditioned reflexes when hearing a case. We are all human. But it would do us good if we know ourselves – know our biases, prejudices, predilections and so on. Inter alia gender bias, communal bias, racial bias and political bias have been noticed in recent times. I know of a Lady Judge who would not seriously consider the need to have corroborative evidence to support that of the complainant in a rape case, regardless of how reliable the evidence was. I know of a Judge of an Original Court who refused to read a judgment of the Supreme Court produced in his Court by Counsel, which recommended corroborative evidence to support the confession given by the accused in a case under the Prevention of Terrorism (Special Provisions) Act with regard to the actual happening of the event mentioned in the charge sheet. The principle there was, even if a confession might be considered to have been voluntarily made, if the act confessed did not take place in reality how could an accused be convicted. Since the Judge refused to accommodate the Supreme Court Judgment in his anxiety to convict the accused, the matter is now in appeal.

The Judge overheard the lawyer telling a client in Sinhalese "Work is done

There are other interesting cases of judicial bias. A senior High Court Judge told me this about thirty years ago. This Judge had been recently appointed a High Court Judge and sent to this station. A senior lawyer who practiced in that Court had been a batch mate of the High Court Judge at the Law College. The lawyer would daily come into the Judge's Chambers and wish him "Good Morning" and inquire about his health and conveniences at the Official Bungalow, about his family, children and so on. The Judge attributed the lawyer's concerns to their friendship at Law College until one day the Judge casually walked up to the window overlooking the pathway within the Court's premises. The lawyer had just left after inquiring into the health and well being of the Judge. Standing behind the curtain in his Chambers, the Judge overheard the lawyer telling a client in Sinhalese "Work is done. I have given the Judge's dues. You will be acquitted. You must bring me extra Rs.5000/- before evening today after you are acquitted"! The Judge was shocked. On looking into that day's trial cases he found the one in which his Law College friend appeared, there was hardly any evidence to convict the accused. The lawyer knowing that the accused would be acquitted had made use of the Judge's name to make a fast buck.

The Judge was furious. What did he do? He while hearing the case put many matters into witnesses' mouths, made out a case which was not there and convicted the accused sentencing him with maximum punishment. I inquired from him "Sir! Was it correct to punish the client for a mistake made by the lawyer?" He said "May be you are right. But at that time I was furious and until I convicted him I could not control my anger. I refused permission to any lawyer thereafter to come into my Chambers." Judicial bias thus could be the outcome of anger and annoyance.

A senior lawyer had played out several clients. While hearing the criminal cases against him I had shown my disapproval of his conduct at some stage. That was good enough for the accused and his lawyer to say I was prejudiced and have the case transferred to another Judge when in fact the lawyer's cases were at their tail end after leading so much of evidence. I was annoyed with the transferring authority for not asking me anything or calling for my observations. I discussed this with Justice Jameel, who was then a High Court Judge. He said "The fact that you are annoyed and angry confirms the fear of the accused. What does it matter if a few cases are less for you? Whether this lawyer will ultimately get convicted or not is not your concern. You have done your part. Just leave it at that!" The lawyer died soon thereafter – due to natural causes of course!

Faith in the administration of justice is one of the pillars on which democratic institutions function and sustain. To establish that faith, Judges must do what is right both legally and morally. Whatever difficulties you face from outside agencies you must try your best to do what is legally and morally expected of you. For that we must require a degree of detachment and objectivity in judicial dispensation. If we think that we might not be impartial in a case it is best to have it transferred to somebody else. Nothing should be done which creates even a suspicion that there has been an improper interference with the course of justice. But if it is necessary to act without fear or favour you must do so.

I give you two minutes to take the Army personnel and your vehicles out of the Court premises

When I was District Judge/Magistrate, Mallakam the Army had shot dead a lame person traveling in a cycle near their Camp in Atchuveli. I had to go for the Inquest. They said in consequence of a shot from the direction in which the cyclist was traveling they had shot in self defense. Since the killers were known I asked the Police to take into custody the two soldiers who had shot and after Inquiry into the question of self defense they could be released. This had irked the Army. The next day when I walked up to my Chambers from my Official Bungalow behind the Courts there were over 25 soldiers with guns pointed at my direction standing outside the Courthouse. There were a number of Trucks and Jeeps inside the premises of the Court. When I went into my Chambers I inquired from my Arachchi why they were there. "May be because you had ordered the arrest of two soldiers" he said. I asked him to call the Commanding Officer of that unit. One Major Wijeyeratne came into my Chambers. When questioned he said that they had come to give protection to the two soldiers. I told him protection to all prisoners is given by the Police. I further said there was need for the Army to be in the Court premises. Then I looked into his eyes and told him "I give you two minutes to take the Army personnel and your vehicles out of the Court premises."He just stood there stunned. "I hope you heard me Officer!" "Yes Sir!." There was a salute and the vehicles were all out within two minutes.

But another Officer could have refused. I had thought if that happened the Court was not going to function that day, prisoners were to be in Police custody and litigants and Staff would wait for the Army to leave even until 4.30 p .m. I was going to inform the Chief Justice of what was happening.

The Officer, Major Wijeyeratne, I must say was a gentleman! Therefore I had no problem!

If you are known to be serious in carrying out your duties I believe those who are used to violence still respect you.

I know these days there is much stress in carrying out your duties. Your personal security is at stake. Interference extends not just to your duties, but to other areas as well. Even this Conference was sabotaged. That is why I attempted to give one tenth of my pension to your Association as my meager contribution to defray your expenses. But your President said I am a Guest and that they would not like to tax me.

I, however, see a silver lining at the end of all this. If the powers that be feel threatened by the Annual Conference of the Judges, surely that is a sign of fear. That is a sign of weakness. That is a sign that what you do and say matters. That is a sign that together you are strong. That is a sign that the tide has turned, that a battle has

been won and that intrinsic independence shines strong amongst you – the younger members of the Judiciary.

You must continue performing your duties however challenging they are, bearing in mind the need to be balanced. You must continue to remain together, for you can be certain that there will be moves to split asunder the unity. You must continue this historic struggle for extrinsic independence. Not just for the judiciary but for democracy. Thank You!

*The full text of the KeyNote address delivered at the Annual General Meeting of the Judicial Services Association held yesterday, December 22, 2012 by Justice C.V.Wigneswaran

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## A Stinging Judicial Rebuke To The Government

**by Kishali Pinto-Jayawardena**

As Sri Lanka heads into a New Year made dangerously uncertain by the precipitation of the worst constitutional crisis since independence, mindless revelry needs to be replaced by this Government's sober rethinking of where it wants to take this country and its people.

Is it down the road of quasi-dictatorship pitting itself with an increasingly angry and mutinous populace, with the courts and the legislature in an open clash or is it to step back from the precipice that yawns before us?

Wise reflection is therefore needed even though such calls to sobriety may be but calls in the wilderness. The alternative course of action may lead to consequences that are too monstrous to contemplate.

Monstrous consequences of adverse actions

Concerns arising from this week's shooting incident outside the house of the Bar Association President as well as threats issued to other lawyers involved in the anti-impeachment struggle cannot be assuaged by a visit of the President or empty promises to investigate.

These assurances have become ludicrous given legion past incidents where no perpetrators have been apprehended. The attackers of the Secretary of the Judicial Service Commission as well as those involved in the attack on the Mannar Magistrate's Court remain at large.

This Friday, in response to a writ petition filed by the Chief Justice against the adverse findings of the majority government members of the Parliamentary Select Committee, the Court of Appeal issued a stinging rebuke to the Government. As much as a previous order by the Supreme Court stopped short of issuing a stay on parliamentary proceedings, the Court of Appeal also refrained from granting interim relief but warned in no uncertain terms that any steps taken in consequence of the parliamentary findings would be void if the Court finds it appropriate to grant writ at the conclusion of argument.

In assuming the power of judicial review to examine the plea brought by the Chef Justice, the authorities were adjoined by the judges to 'advise themselves' to refrain from acting in derogation of the rights of the Chief Justice until the final hearing. Moreover, the Court reminded the Government that it was its legal obligation to issue notices on the Members of Parliament cited as respondents in the petition in order to enable them to put forward their point of view.

Greater good of the country

These are measured judicial views that ought to be hearkened to. The immediate response by Parliamentary officers and by some government ministers that they

would disregard this judicial order was unsurprising. However, this view should be rethought for the greater good of the country.

Meanwhile vituperative rhetoric peddled by government propagandists to confuse the discussion and to muddle the primary issue of justice not only being done but being seen to be done to the Chief Justice, needs to yield to commonsense and rationality.

Some of these misconceptions are indeed laughable. One prominent allegation, for example, is that advocates leading the anti-impeachment struggle are the very same as those who pressed for the impeachment of retired Chief Justice Sarath Silva some years ago. This is a ridiculous canard. On the contrary, chief actors in this drama (including members of the legal team of the Chief Justice) certainly did not take such fiercely consistent views in the context of the investigation of the misconduct of retired Chief Justice Silva. Excepting for a few dissenting voices at that time, the legal community itself was largely silent. Now, ten years down the line, it is heartening that, at last the Bench and the Bar has realised what is at stake for its own survival.

A more compromising but still inaccurate view put forward by some is that the Chief Justice's supporters see her as an angel whilst those who are against her, paint her as the devil. This depiction of the extreme is also not correct. Anti-impeachment contenders only insist that the Chief Justice ought to be given the right to a fair inquiry. Surely is this something that Sri Lanka has to debate so ferociously at the expense of the country's good name?

To argue this point is not to contend that the Chief Justice should not be subjected to any inquiry at all. As a friend queried from me the other day 'do you see the Chief Justice as blameless?' My answer to this question was short and to the point. 'No Chief Justice since 1999 can be considered as blameless in regard to the current plight of Sri Lanka's judiciary.' On Saturday, former Justice of the Supreme Court, CV Wigneswaran put the matter very well when speaking at the meeting of the Judicial Services Association and after dwelling on the evils of the 18th Amendment, he reminded that 'honest reflection' shows that the judiciary itself played a part in the gradual aggrandizement of the executive.

Redeeming a forsaken courage

The Chief Justice's admonition at this same meeting was that sitting judges should stay out of politics. Certainly when the judiciary becomes politicised internally, it is worthless talking of ideals and principles. What needs to be done is now to save what we have left and to painfully work back to regain what we have lost. Perhaps that task may be impossible. Yet we need to try. In that process, educating the ordinary citizen in regard to the value of an independent judiciary may be insuperably difficult when the practical meaning of that word has been lost to us for the past so many years.

But it is imperative that this is done.Otherwise, if the anti-impeachment struggle is merely seen as an abstract clash between the judiciary and the legislature/executive, then its sustainability will inevitably be doubtful. The next few months will prove these truths in good measure. But for the moment and for the first time in years, we can rest assured that this Government has been taken aback at the ferocity of the opposition that it has seen so far.

by Shirani Bandaranayake

It is indeed a great pleasure, privilege and an honour to be with you this morning. It is certainly not only due to the importance of the Annual General Meeting of the Judicial Services Association, which consists of our Magistrates and District Judges who are serving in different parts of the country. Of course I am fully aware and mindful of the significance of today's gathering, but what I most admire is the strength and the courage that was shown by the organizers in making this event a reality amidst so many debacles thrown at them at very short notice. The courage they mustered, the unity that was exhibited and the determination that was expressed in unison on the need of that hour had made today's sessions a reality and had shown in no uncertain terms the true independent nature of our judiciary. The support all of you had given over a period of time on many burning issues which all of us had to face during the last few months, no doubt was the foundation for the courage, unity and the determination that was exhibited. My heartfelt congratulations go to all of you and especially to the organizing committee for not only making today's event a reality, but also for the unity shown at this difficult hour to strengthen the independence of the judiciary.

There are several important features in this annual get together. Out of all these, what I would appreciate mostly is to see all of you together under one roof so that you as Judges would get an opportunity to meet your fellow brothers and sisters and to exchange your experiences on issues that are common to all the judges.

The theme of this year's conference, based on the independence of the judiciary, is not only timely, but also opportune since socially, economically and historically we are at an important juncture.

The Judiciary, being one of three important pillars of the State, has a duty cast upon it to look beyond the frontiers, in its proceedings with the administration of justice. It has been increasingly acknowledged that in order to uphold the Rule of Law in a Democratic society that it is necessary to have an independent judiciary. The judicial independence could be given different definitions and could take a variety of forms, but the underlying theme would be that the Judges would act independently. Such independence is assessed for a variety of reasons, which includes public confidence, which is essential for the effectiveness of the Court system.

An independent judiciary is an essential feature for a functional democracy, where the courts are regarded as temples of justice. The judiciary has been throughout the centuries and is the formidable protector of the rights and individual liberty of every citizen in a democracy. As all of us are fully aware the three branches of Government, that being the Executive, the Legislature and the Judiciary, rest upon the basic and the firm foundation of the Rule of Law. It is therefore an unwritten law that if the Rule of Law is not observed, the three main organs of the Government cannot function and there would be irreparable damage to the basic concepts of equality and freedom.

Therefore for the existence of an independent judiciary it is not only necessary, but would be essential to ensure that the basic principles of Rule of Law should be observed at every level to all citizens on an equal basis. In order to guarantee that there is strict observance of the Rule of Law, it is necessary that a fair hearing is given to every citizen, who is called upon to defend himself before a Tribunal on matters affecting his rights. These are not new concepts, which had emerged overnight nor are they just theories, which had been said without any basis.

For centuries, our Judiciary had been held in high esteem. Such prestige had not been earned overnight, but gradually garnered through the decades due to the cumulative effect of high traditions, hard work and the desire to uphold the independence of the judiciary. Our Judges of yester years had jealously guarded their fierce independence and several instances could be quoted in this regard. Particular reference had been made to the Supreme Court praising its independence.

There were those who sat where you sit today and there would be many more that would do so in the years to come. However, the common thread that binds us here today is the fact that we are all judges.

As Judges we have a heavy burden placed upon our shoulders in discharging our duties to the society. We should always act within the framework of the adversarial process, established by law. Under no circumstances a Judge could abbreviate or change the critical aspects of the adversary process established by our Constitution. In doing so, as has been summed up by the National Judicial College of the USA, a Judge should possess several important qualities for him to carry out his duties. A Judge should be in a position to assure without being offensive, firm but fair, not yielding to every request, but yielding to some, calm under pressure, moving the case or calendar, but not shoving people, listening, inquisitive without being obnoxious, firm, but not abusive, diligent and intelligent without being arrogant. Of course, it goes without saying, sitting judges should never get involved in politics.

These principles stand as testament to the paramount importance of giving a fair trial to an accused, which in its self is a stalwart cornerstone of our Constitution. No person's rights will be infringed without a fair trial before an impartial and independent tribunal operating according to fair procedure.

We are all aware of the proverbial legal maxim; justice should not only be done, but should manifestly and undoubtedly be seen to be done. The robes we don, the traditions and principles we live by are but all akin to the proliferation of the latter. Fairness in dispensing of justice is the foundation upon which trust has been established upon our noble profession amidst society. It is upon this basis that we presume a person to be innocent until he is proved guilty. Article 13(3) of our Constitution clearly states that any person charged with an offence shall be entitled to be heard at a fair trial by a competent court. In order to ensure that justice is meted

out, the judges must be able to carry out their functions in the calmness, serenity and safety, which are necessary for their independence.

In order to uphold independence, a Judge must be willing and able to make many sacrifices. A Judge must be willing and able to sacrifice what others are capable of enjoying, in order to uphold independence. He must stand firm through any and all apprehensions and want of personal benefits in the name of justice.

In 1867 Walter Bagehot commented that, the worst judge is a deaf judge. I believe it is apt to amend his sentiment in relation to this crucial judicial and socio-economic juncture of our country. The worst judge is not merely one who is deaf, but one who also succumbs to pressure. It is as much the responsibility of the judge to stand above it, without any fear or favour as it is the responsibility of the Legislature, the Executive and the society at large to ensure that they are capable of discharging their constitutional duties without undue adverse intimidation.

I have the fullest confidence that our Judges have the ability to stand firm and stand strong. Duty before self and Justice before all.

Thank you.

*Speech delivered at the Annual General Meeting of the Judicial Services Association held on 22nd December 2012 By Dr. Shirani A. Bandaranayake, Chief Justice of the Republic of Sri Lanka

Within this week alone there were three events directed against the lawyers who are opposing the impeachment of the Chief Justice. These were: the attempted attack on the lawyer, Gunaratne Wanninayaka, the President of Colombo Magistrate's Court Lawyer's Association and the Convener of People's March; the shooting incident near the residence of the President of the Bar Association and Member of Parliament, Wijedasa Rajapaksa and the withdrawal of the security at the house of parliamentarian MA Sumanthiran who was among the most active lawyers working against the Impeachment.

All this has taken place when the local and international community has focused their attention on a single issue of demanding a fair enquiry by a competent and credible tribunal regarding the allegations against the Chief Justice. The government is in no position to answer the criticism brought against it of attempting the removal of the country's Chief Justice without a fair inquiry.

The government's problem is that it will have to take a step backwards from one of its highly advertised aims of removing the Chief Justice immediately if it were to do the right thing by way of providing for a credible inquiry. To admit that the Parliamentary Select Committee is not an acceptable avenue for such an inquiry and to admit that, anyway, the manner in which the PSC conducted the inquiry was shockingly unfair by any standards, seems to be something that the government finds hard to stomach.

The problem is that the government cannot be sure that a fair and impartial tribunal may arrive at the conclusions it wants. Indeed, such a tribunal may even come out with findings which may be adverse to the government. It may even reveal things that the government might not wish to have exposed, such as skeletons in its cupboard.

Faced with this situation the government appears to be falling back on the method that several governments in recent times have resorted to, that is to intimidate their opponents. Manufacturing chaos by acts of violence done by unidentified persons is one of the well-tested methods used in Sri Lanka quite successfully in recent times. In every case those who do such acts of violence are hidden and well protected and the government can always deny that it has anything to do with such acts of violence. On the other hand the would-be victims of such violence and the society as a whole can be intimidated by such acts.

There are well-trained cadres to carry out such actions. The Ministry of Defence has within itself total control of the methodologies by which society can be terrorised at any time. There are the paramilitary forces and the intelligence services and these are well provided with vehicles, communication technologies and personnel to carry out these operations.

While the lawyers and the Chief Justice herself have resorted to the courts as the ultimate resort on matters of law the government is boycotting the courts under various pretexts such as parliamentary privilege. Even one of the most primary notions of a society based on the rule of law and constitutionalism that the ultimate authority in the interpretation of the law is the courts ,is also ignored by the government.

It is starkly clear that it is the law itself that the government considers as the enemy. The Chief Justice is perceived as the enemy, not for any ethical reason as it is pretended, but the fact that she has interpreted the Constitution in a manner that is adverse to the government. The government wants judges who will interpret the Constitution in favour of the government. The heart of the conflict between the Chief Justice and the government at the moment is the law itself.

The senior lawyer, S.L. Gunasekara in his letter to the executive committee of the Bar Association clearly pointed out the attempt by the government to create what he calls, a 'stooge judiciary' as against an independent judiciary. The difference in the two is that while an independent judiciary treats the law as supreme a stooge judiciary treats the government as supreme.

Many commentators for and against the impeachment who are discussing acts which are ethical or otherwise, allegedly committed by the CJ, are missing the heart of the matter at the moment. That is the future of the law in Sri Lanka. What the government wants is a judiciary that will not oppose the proposed acts of the government on the basis of such actions being illegal. Legality and illegality is being made into a matter that is irrelevant.

The acts of violence that are taking place now are a reminder that all these concerns for the law will not be treated as friendly acts by the government. What the government demands is loyalty to itself, not loyalty to the law.

**by Rajiva Wijesinha**

*Edited Extracts with regard to current political issues from the Leader's Address by Prof Rajiva Wijesinha, delivered at the Annual Congress of the Liberal Party, December 16th 2012*

The Liberal Party stands today in a very interesting position. To a great extent because of the enthusiasm of our Youth Wing, we have had very interesting workshops at two venues, in Hambantota and Kurunagala. At the former in particular we had remarkable input from youngsters, who are keenly interested in politics but miss the absence of a coherent philosophy in the political movements they have had experience of through elections.

Given the sophistication of these youngsters, who have a more adult view of politics than the rent seeking many people think is the main business of electoral politics, I think the commitment to principle of the Liberal Party will have increasing resonance in the coming months. In particular the position we have taken up with regard to the proposed impeachment of the Chief Justice will be recognized in time as the only balanced approach to an issue that seems to be tearing our society apart.

I refer not only to my own refusal to sign the impeachment resolution, but also to the thoughtful statements our Secretary General has issued on behalf of the party. Today in the newspapers there is reference to the impeachment of the Chief Justice that took place in the Philippines earlier this year, but it was our statement that, a couple of weeks ago, noted the differences between that incident and what is happening in Sri Lanka today. Though clearly there were political issues involved, that impeachment was through a process that was universally seen as fair.

Unfortunately, the general impression created by other commentators was either that the Chief Justice was a monster who was wrong on a multitude of counts, or else that she was a saint who was persecuted for no reason at all by a malign government. Both these positions are absurd.

Again, when the Parliamentary Select Committee delivered its report, it indicated that several of the charges made against the Chief Justice did not need to be investigated. In our second statement we had made it clear that we thought only a few of the charges were serious. Unfortunately, the general impression created by other commentators was either that the Chief Justice was a monster who was wrong on a multitude of counts, or else that she was a saint who was persecuted for no reason at all by a malign government. Both these positions are absurd.

But this oppositional politics, in which prejudice is privileged and balanced argument of no account, is what has characterized Sri Lankan politics for the last quarter of a century. In fact the reactions to our response bear this out. On the one hand, it is claimed that I have at last discovered how bad this government is, and therefore I should part company with it and resign at once from Parliament. On the other it is alleged that I am only critical of government on this count because I am

upset that I have not been made a Minister, and that I will soon cease to be critical in order to curry favour.

But this type of malign interpretation, that refuses to look at facts, has dogged the Liberal Party from the start. In the eighties Chanaka Amaratunga was reviled for betraying the UNP which it was held had facilitated his education. It was only later that there was widespread appreciation of the seminal critiques he made of the appalling constitution President Jayewardene introduced, when previously the excesses of that authoritarian government had come only from a socialist perspective. Later that same elite Colombo dispensation, that had reveled in Jayawardene's perversities, attacked Chanaka for supporting President Premadasa. And of course that outlook finds President Rajapaksa even more reprehensible than President Premadasa, given that he is at an even greater remove from Colombo and its interests.

The Liberal Party continues to believe that this is the best possible government for Sri Lanka at this stage, and we will continue to support it. This does not mean that we share the views of those elements in the government that uphold a more narrow view of Sri Lanka than we have. This is a problem Liberals all over the world face for, in presenting a balanced perspective, they need usually to work in coalition with others. Thus, recently, the Dutch Liberals were in coalition with conservatives who were more sympathetic than they should have been to a racist party that propped up the government. I know our friends in the Dutch Liberal Party were not happy about this, and about measures that seemed in line with the politics of that extreme party, but they had to endure, and do what they could to prevent unacceptable measures.

When the coalition proved impossible to maintain, there was another election, and now they are in government with more moderate forces. But I don't think any of us thought that they had betrayed their principles when they had to work with extremist forces. The point is, they would accept compromises that did not go against their principles, even though this meant they could not implement measures they thought ideal. However, what they would not do was go against essential principles, and that is precisely our position in the current context.

I should add that I see no reason to assume that on the principle issues we need fear extremism. And we will not forget the achievements of this government which have made possible a return to democracy all over the country. Though the Liberal Party has always believed that problems were caused by majoritarian measures, and we need to do more to ensure that the minorities in Sri Lanka feel they are equal citizens of the country, we have also been categorical in our opposition to terrorism. The fact that this government was able to put a stop to terrorism after so many decades is something we should always keep in mind. Of course we now need also to win the peace, and for that there is much more to do. But the very fact that discourse and debate are not in the shadow of violence gives us much to be thankful for.

With regard to the proposed impeachment of the Chief Justice, it is profoundly ironical that the only member on the government side who has been pointing out problems with the Judiciary is now the only one being criticized for not signing the impeachment resolution. But I suppose this is understandable in a political dispensation that waits for problems to come to a head before any attempt is made to solve them. And that in turn will lead to concentration on what are in fact symptoms of problems rather than root causes.

I have been arguing that there should be no interference with the independence of the judiciary as regards the decisions it makes, and I fear that the manner in which the impeachment process has been conducted will give the impression that it is that independence that is under attack. But what should be changed is the notion that the Judiciary is independent as regards the processes it follows. On the contrary, it must follow the law of the land and, where there is scope for interpretation, it must formulate rules so that there is consistency on which citizens brought before the Judiciary can rely. And surely we should realize that, if there is too much ambiguity in the law, it leaves the field open for a range of interpretations, which is why the legislature must amend confusing laws in accordance with the basic principles laid down in the Constitution.

I have no idea how the present drama will work itself out. But I hope that, without relying on what seem ad hominem solutions, dealing with individuals rather than issues, we move instead to looking at the issues that must be resolved, to make our judicial system more reliable and more efficient. Impeaching the Chief Justice will not solve the real problems this country faces. That requires reflection and analysis on the basis of principle, as the Liberal Party has advocated since its inception.

*Courtesy: The Colombo Telegraph*

Karl Marx said "the task is not just to understand the world but to change it." Of course the implication of this is that "if you want to change the world you would better understand it first." One doesn't need to be a Marxist to agree upon the above two propositions.

In the case of Sri Lanka, we have a situation where there is a clear attempt on the part of the executive to subjugate the judiciary using the legislature as its cat's paw. Legislature has lost or losing its proper representative character. This was not the case before although some inroads had already been made. This is in a background of a mammoth military build-up. The executive has a preeminent advantage in this scenario given the present form of presidential constitution and the subsequent 18th Amendment and the parliament has become a mere appendage of the executive both through politics and other measures of corrupt practices. There is a considerable apathy among the masses mainly due to the absence of a strong opposition although both economic and social disparities have been increasing creating vast contradictions between the rulers and the ruled; the rich and the poor. Instead of promised reconciliation, tensions in the North are simmering and a major strategy of the ruling elite or the family has been to propagate Sinhala chauvinism in the guise of patriotism.

No one would argue that the judiciary has been a perfect institution in the past. Its independence has been compromised many a time, not by one but by many. Particularly during the war, many improvements or reforms to the judiciary had been postponed or neglected. However, the judiciary is the only institution that has come forward to challenge the arbitrary rule of the executive and the supine character of the legislature. It is a matter of survival I believe. This effort has to be unequivocally supported whatever were our criticisms in the past about this or that action of certain individuals. There is no need to repeat them and some of the matters could be raised and discussed further, in my opinion, after the impeachment matter is concluded. There are three matters in respect of the impeachment that are almost beyond doubt.

First is the fact that the impeachment against the Chief Justice is the central issue of the independence of the judiciary at present. If the CJ is removed or forced to step down, it would be easy for the executive to appoint a complete stooge and coerce the other judges. Are we going to allow that?

Second is the fact that the impeachment is a political move and has nothing to do with any of the charges that have been levelled against the CJ. The sequence of events testifies to this fact completely coinciding with the Divineguma verdict of the Supreme Court.

Third is the fact that the impeachment procedure of the PSC has been completely faulty both by local and international standards and the CJ has not been given a fair

hearing that has to be denounced by all sections unequivocally. In addition, the vilification campaign has completely damaged the dignity of the judiciary.

There has been a mighty hurry for the PSC to complete the proceedings. In the event, both the CJ and the opposition members had left the PSC leaving no credibility. Only three charges are supposed to have been proved out of 14 and nine charges have been dropped whatever the reason. The report of the PSC is still not published or given even to the opposition members of the PSC creating doubts that the text is still being manipulated.

In addition to the independence of the judiciary, there is the question of personal injustice to the Chief Justice. No one could deny that or should ignore. She was blatantly abused.

Among the three charges supposed to have proved, two are to deal with the complicated issue of 'conflict of interest' and there are no standard rules that have been formulated in Sri Lanka on the 'judicial conflict of interest.' Partly, the judiciary is responsible for this matter. 'Conflict of interest' is an easy accusation to make but a complicated one to substantiate unless there is proof. If the conflict of interest is raised in its loose form against all judges, they all may have to go and there is no reason why only Dr Shirani Bandaranayake should be punished. There are more acute conflicts of interest on the part of the executive, particularly the Ministers.

Let me make some preliminary observations on the so-called proved charges. In the case of charge 5, the conflict of interest is quite hypothetical and not something that has objectively happened. If at all it is not a conflict of interest that the CJ has created; but something purposely created by the government. This is about the bribery case against her husband. In the case of charge 1, there is no clear connection between the outcome of the case that she was hearing and the interest that she was supposed to have had with a party to the case. No one has raised the issue during the case. As she has pointed out, the former Chief Justice also was in the same position, perhaps quite inadvertently in both cases. Then why only she should be punished?

The charge 4 is about some supposed to be undeclared bank accounts and she has given plausible explanations. The question is whether any lacuna due to misunderstanding or misinformation, if there was any, could be considered an impeachable offense unless wilful non-declaration is proved. Non declaration should have been raised by the Inland Revenue Department first. If complete accuracy in asset declaration is a criterion for impeachment or removal, then perhaps 90 per cent of the government officers and politicians might come under that category.

When impeachment or conflict of interest issues are raised, they look bad whether the charges are correct or not. That is why an impeachment has to be a carefully thought out business unless it in itself is a fraud. Judges normally shy away from impeachments. But our CJ has not done so. Why? Whatever the misgivings I have had about her past, I believe that she was feeling a strong injustice perpetrated

against her to fight back so firmly. Of course this is not to deny that she made a terrible blunder by allowing her husband to accept a government position. But the government is more responsible than her for that muddle.

Normally the impeachments are not backed by political campaigns on the part of the proposers i.e. governments. But the campaigns that the government has launched and still continue give the impression that the impeachment is fraud. Therefore the impeachment against the CJ doesn't look that bad. Instead, it has given much courage for the legal profession and even the community of judges to stay put. It is more than staying put; it is like another replica of a FUTA struggle.

After the convictions of the former Army Commander, Sarath Fonseka, this is the most vicious political trial conducted in Sri Lanka, ironically this time against the Chief Justice. The present trial is equally or more vicious than the former. The question arises why two key people in the establishment were convicted in such a manner within a pace of two years. Whatever the answer you get, it may speak volumes about what kind of future at stake in Sri Lanka, if the trends continue and if not halted.

The issue at stake is not only about setting standards for a perfect or a better judiciary. It is about its institutional independence from the coercive power of the executive. It is about its independent existence from the 'whims and fancies' of the politicians. There is nothing wrong for anyone to raise issues of functional independence of the judiciary even at this 'fatal stage,' if they wish to, about class or ethnic biases of the judiciary. There is no question that they do exist and there had also been series of issues of conflict of interest visible and not so visible; advertently or inadvertently. However we should not allow the enemies of democracy, if I may use that term, to use our constructive criticisms to destruct the independence of judiciary.

Whether we believe in a socialist, mixed or a capitalist future, democracy is important and thus the independence of the judiciary is important. We may need to distinguish between the institutional independence from the functional independence of the judiciary and if there is no institutional independence demarcated through proper constitutional and political means, then the functional independence also will fail.

by Pradeep Jeganathan

Virtue, then, being of two kinds, intellectual and moral, intellectual virtue in the main owes both its birth and its growth to teaching (for which reason it requires experience and time), while moral virtue comes about as a result of habit, whence also its name ethike is one that is formed by a slight variation from the word ethos (habit). Aristotle, Nicomachean Ethics, Book 2.

On the 22nd of March, 1952, D.S. Senanayake, first Prime Minister of independent Ceylon, passed away after falling off his horse, during his morning ride at Galle Face.

It is widely known that his son, Dudley Senanayake succeeded him. It is not so widely known that the circumstances of the succession were controversial, and Sir John Kotalawala, then Senior Vice President of the UNP, and more importantly Leader of the House, had fully expected to be called by the Governor General, Lord Soulbury to form the next government as Prime Minister.

But he never was; Soulbury who was away from his post, had left instructions with the acting Governer General, the then Chief Justice, Sir Alan Rose, QC to either call on Senanayaka Junior, or await his return. And so he did.

Kotalawala himself accepted this desicion at the time after much protest, but in a pamphlet written a few months later suggested that among the much back stabbing and deal making that went on, was a quid pro quo: Senanayake would offer the Governor Generalship to Solbury, who chaired the Royal Commission investigating the suitability of Ceylon's Independence, if he would ensure the succession of his son, upon his demise.

I should underline that the paragraphs above deal with allegations, not proven fact. I am not in possession of new facts either, all what I say above was in the public domain in 1950s.

But I will say I find it rather persuasive, as much as I find articles of impeachment against the current Chief Justice Dr. (Ms) Bandaranayake unpersuasive.

But often, as we are caught up in urgent, partisan political struggles, we lose sight of the larger issues. In this case, what is paramount, is an ethos of ethics which we have clearly lost. I present a historical example, at the dawn of what we call independence, to underline that two important British royal officials were implicated in the controversial, and arguably sordid, transition from Senanayake Senior to Junior.

It militates against the often expressed view, that the decline of an ethos of ethics we see in Sri Lanka happened the day before yesterday. To me it is sobering to wonder if we ever had one. If I am right, the task of an Ethos of Ethics is much harder, yet necessary.

Often, we adults know right from wrong. But we carefully lull ourselves into thinking that some small wrong, doesn't matter if it benefits us, and doesn't seem to do much wrong to others. And then we continue along that path, as the unethical behavior grows in magnitude.

It is not just a matter of conscience, even one's conscience could be an important starting point in an ethos of ethics. It is certainly not a matter of law, even though legal arguments are important seeing that justice is done.

It is, I submit, a matter of habit, custom and manner. Such needs to go far beyond law. Certainly at this late stage, the only right thing to do in the matter of the impeachment of the Chief Justice, is to step back, making clear amendments to the Constitution, allowing the impeachments of the members of the Superior Courts to follow common and well understood protocols of Justice rather than an unhappy combination of the custom and manner of the Kings Rajasingha II and Kakkille.

But is this really enough? For that would be to end the matter in a question of law. It is not. We do not need to learn right from wrong. But we need to think of how we teach such to children, and teach this again, to ourselves.

The matter becomes deeper, when we begin to understand, that both loyalty and fairness are virtues, deserving a place in an Ethos of Ethics. Often they come into conflict. Loyalty is certainly slippery, for it can contain implicit or explicit quid pro quos. You do this for me, I will do that for you — even if it seems unfair to others. Each situation may be different, but navigating that boundary is some thing we need to teach ourselves.

Even after the constitution of two republics, we haven't yet even begun.

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The impeachment proceedings against the Chief Justice has now arrived at critical point, and regardless of its final outcome the independence and public confidence of the judiciary should be maintained. In this regard the citizens of Sri Lanka hope that the Supreme Court in hearing the petitions submitted by the CJ and others will honor the two principals of natural justice upon which the integrity and public confidence of the judiciary rest. The first principle stems from maxim "Audi alteram partem" which means no one should be condemned unheard. This maxim contains two elements: (a) The opportunity to make representation must be afforded ; and (b) such opportunity must be reasonable. Opportunity depends to the facts and circumstances of each case.

The second, principle stems from the maxim that one 'Nemo iudex in re sua' 'meaning that Judge is disqualified from determining any case in which he may be, or may fairly be suspected to be, biased (personal, pecuniary, personal or official bias.) In any civilized democracy this means even if the legislature does not specifically provide for principles of natural justice, unless principles of natural justice are specifically excluded in the legislative laws, the Supreme Court must read natural justice into a provision of law.

In the regard Justice Ms. Shiranee Thilakawardane should excuse herself from hearing any petition relating to impeachment of the Chief Justice since she gave evidence at the Parliamentary Select Committee, and the fact that, according to reports, two judges of the panel, S. I. Imam and Chandra Ekanayake refused to hear cases with Ms. Thilakawardena. Regardless of the Ms Thilakawardana's stand on the impeachment and outcomes of these petitions Ms. Thilakawanrada participation in the any hearing relating to PSC will only serve to undermine the integrity of the Judiciary.

*Courtesy: The Colombo Telegraph*

Rajapaksa regime is using one of my articles on the independence of the judiciary to justify their witch hunt against the Chief Justice. As Spinoza said this is not to laugh, not to lament, not to detest, but to understand.

The government has created a television advertisement with my article and an opposition MP's speech and broadcasting it repeatedly. Regime-support journalists like my friend C. A. Chandraprema has been quoting the same article for weeks. This article was also highlighted this week at the Diplomatic Briefing by External Affairs Minister G.L. Peiris.

They used my article in talk shows. Last week, in the state-run television programme, Wedikawa (Platform) Parliamentary Select Committee Member Rajitha Senaratne also highlighted this article. Senaratne said: "This is what my friend Uvindu Kurukulasuriya wrote earlier although he now writes against this."

Rajitha was wrong. I never wrote anything against my stance. What is this article? I wrote an article when the NSB scandal occurred. It was titled "Not Only The Chairman Husband; Chief Justice Wife Must Also Resign!" I wrote;

"The Chief Justice is automatically the Chairperson of the Sri Lankan Judicial Service Commission. This means that, effectively, she is the boss. While much of the work is delegated to others, it is the Chairperson who is ultimately responsible for the 'corporate culture' in the operation of any organization. This is how organizations operate on a psychological level. The leader sets the tone. The relationship between the Chief Justice of Sri Lanka and her spouse cannot be private. Not when that spouse holds key positions in government institutions leading to a conflict of interest. A conflict of interest is also corruption. It is worthwhile quoting Dr. Colvin R. De Silva when he said, while participating in a no-confidence motion against the then Prime Minister Sirima Bandaranaike, "the service exacts from itself a higher standard because it recognizes that the state is entitled to demand that its servants shall not only be honest in fact but beyond the reach of suspicion of dishonesty".

I said;

"We do not need to go for India or to the west for best practices. Sri Lanka already has a good example. When the husband of the head of the Bribery Commission Nelum Gamage was allegedly involved in corruption, she resigned."

But people who quote this particular article forget other articles which I wrote as soon as Shirani Bandaranayake was appointed as Chief Justice. One was "Chief Justice Or Her Husband Must Resign"

I wrote;

"Within the Asian region, the sixth Conference of Chief justices of Asia and the Pacific in Beijing in August 1995 adopted the statement of Principles on the Independence of the Judiciary. Sri Lanka was represented by the Supreme Court Judge P.R.P. Perera voluntarily who agreed to the Principles on behalf of the then Chief Justice G.P.S. De Silva.

Principle 39 of the Beijing statement says, " Inducements or benefits should not be offered to or accepted by judges if they affect, or might affect, the performance of their judicial functions."

The Chief Justice must explain how her husband was appointed as the Chairman of Sri Lanka Insurance Corporation, and to the Lanka Hospitals Corporation PLC as a member of its Board of Directors along with Defence Secretary and Presidential sibling Gotabhaya Rajapakse, who was Board Chairman. How was he also appointed as Chairman of the National Savings Bank? Has he applied for the job? Was he interviewed? Who were the other applicants? Weren't there any qualified applicants other than her husband? She must also explain how these things are consistent with international standards concerning judicial independence. If she cannot, she or her husband must resign. After all, "Caesar's wife must be above suspicion."

I wrote;

"Dr. Shirani Bandaranayake was sworn in as the new Chief Justice of Sri Lanka on 18 May 2011. While some remained silent most local media outlets published news items and features supporting her appointment. Certainly none were willing to do their jobs as journalists. I phoned a couple of editors and inquired of them, "are you forgetting the past? Why do you ignore the blatant conflict of interest issue here because of her husband's position in a government job? Why do you not focus on the wider issues of rule of law and independence of the judiciary?"

"It was easy for the local media to gloss over the real issues as Shirani Bandaranayake would, on May 18, become the first woman Chief Justice of Sri Lanka. And it was convenient for the media to focus on this positive aspect rather than grapple with the more uncomfortable and more dangerous issue of a country descending into democratic failure."

Week after week I raised serious issues related to the misconduct of judges, but none of the Sri Lankan journalists, academics or Civil Society leaders raised the issues I raised until the impeachment motion against Shirani B. was handed over to the Speaker.

In another article titled "Wither Independence When Judges Host Parties For Politicians?" I wrote;

"There were editors who fought for the independence of the judiciary. Ravaya Editor Victor Ivan, Sunday Times editor Sinha Rathnathunga, then Deputy editor now Lakbima News editor Rajpal Abenayake and the late Lasantha Wickrematunge. Sadly, since Rajapaksa came to power, we can't see any of these acts of misconduct discussed in the Sri Lankan media. The editors who fought for the independence of the judiciary are sleeping, or converted to the Mahinda Chinthana or they can't write because of media suppression. But what is sad is that these editors say there is no media suppression in Sri Lanka or they are not fighting against media suppression. How did these journalists and activists who stood for democracy get into this blind alley? Especially Victor Ivan, the one who wrote hundreds of article about such issue and he later published a book called " An Unfinished Struggle". When Sarath Silva was appointed as CJ Ravaya printed a black front page with the picture of the oath ceremony upside down. When Shirani Bandaranayaka was appointed to the supreme court Ravaya attacked her appointment week after week, and headline after headline. When Victor Ivan and Ravaya exposed corruption in the judiciary he was criticized by some others saying he had personal problems with Sarath N Silva and Chandrika Kumaratunge. He is proving that allegation now criticizing only the former Chief justice."

But sadly, instead of raising the issue of independence of the judiciary, Victor Ivan started a printed debate with me in Ravaya. He criticised me for writing while living in exile. The debate went for four weeks. You can read Ivan's responses here and my replies to Ivan here and here. It was not even about independence of the judiciary; his intention was to protect Rajapaksa and attack me (Rajapaksa's critics). But one can find an interesting untold stories behind the struggle of the independence of the judiciary.

If the media had done their job most probably we could have got her husband to resign, Then the CJ may not have had to face this sad situation.

Last month, Dr Laksiri Fernando analysed my last article as follows;

"When the bribery charges were raised against her husband, whether he is innocent or not, the Chief Justice could have gracefully resigned, because the first mistake was already committed. That was unfortunately not done. These and related matters were raised impartially by Uvindu Kurukulasuriya before. Holding onto positions some way or the other whether politicians, government officials, academics or judicial officers is not a good practice for democracy and transparency or as a personal principle. It is my personal impression that the bribery charges are vindictively framed up."

Laksiri is correct but as he also wrote several times now the issue is giving her a fair trial. I have to agree with even my friends like Chandraprema when he says; "We Have Reached A Situation Where The CJ Refuses To Acknowledge That There Is A Conflict Of Interest." It is sad, she does not acknowledge it, not only her, none of our CJs at least Sarath Silva to Asoka De Silva acknowledged it.

But now the issue has shot up to politics since the case against her husband was fixed. Her husband is the Non Executive Chairman of the NSB. Charitha Ratwatte raised this issue clearly.

I quote Charitha Ratwatte;

"Now it is strange that only the Non Executive Chairman is the accused in this case. The bank being referred to, a statutory organisation, in which it is presumed, its officers and servants follow due process. When the board of a statutory organisation, approves a purchase, when the executive officers, especially the accounting staff and other executive officers sign off on checks, for any purchase, we have to presume that the process has been followed, authorisation, approval and certification.

Then why is the Non Executive Chairman the only accused? At least the other board members of the bank and its executive officers and the other financial sector employees must be charged with dereliction of duty, at the very least? Whether this has been done is not in the public domain. A newspaper reports that Chairman of the Bribery Commission has refused to comment on why this particular case against the Non Executive Chairman is being fast tracked."

We all know how Rajapaksa is fixing cases against his opponents. The President angrily banging his palm on the table and told me, "We can fix cases and we can free people." That is my experience. I wrote this last year. He told me this in front of Minster Anura Priyadarshana Yapa (Chairmen of the PSC against CJ) and SLFP General Secretary, Minister Maithripala Sirisena,

Having a 2/3 majority in the parliament, Rajapaksa is determined to remove her now. So she has to go and she must go, in my opinion she is dishonest, I have no question about it, but it should be after setting up an international standard relating to judicial removal. Her fight will, at least, create the standards. The whole charge sheet against her is based on violating standards. So give her a fair trial according to the standards.

Meantime I urge columnists like Chandraprema and those who only attack Shirani to raise the misconduct/conflict of interest issues related to other judges! How many other Supreme Court judges are corrupt? Why do thiese spin doctors only want to attack Shirani?

*Courtesy: The Colombo Telegraph*

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## All Frosts, No Thaws In Impeachment Imbroglio

**by Dharisha Bastians**

"I think he knows what Rome is. Rome is the mob. Conjure magic for them and they'll be distracted. Take away their freedom and still they'll roar. The beating heart of Rome is not the marble of the senate, it's the sand of the colosseum. He will bring them death – and they will love him for it" – 'Gladiator,' the movie (2000)

Prior to the decline of the Roman Empire, the emperor and aristocrats regularly provided cheap food and entertainment to the people of Rome to keep them good humoured and approving of their leaders. The Gladiatorial games and circuses both inflamed and gratified the passions of the populace, making them less inclined to engage and interfere with politics and neglectful of civic duty.

This appeasement of the citizenry's base desires for 'bread and circuses,' the rulers believed, was the most effective way to rise and then hold on to power. The bread and circus tactic is still used by regimes across the world to great effect, temporarily blinding the people to economic burdens and injustices perpetrated upon them by their rulers. Sri Lanka last week seemed a case in point.

Night racing

After several weeks of hectic prepping, the spectacle that was the Colombo Night Races unfolded last weekend at the makeshift track at Galle Face. In the run up to the event, army soldiers were hard at work, piling up sandbags and setting up the spectator stands for audiences that were expected from around the city and other parts of the island to witness the popular drag race style sporting event get underway in the streets of the capital.

Flashy sports cars fixed with special lighting effects make this a particularly entertaining spectator sport and proved vastly popular when the Carlton Sports Club pulled the races off last year. This year the organisers took the event one step further, even introducing a three wheeler race, with drivers decked in full black racing outfits and sporting helmets.

Every year the races come with their share of controversy, due to road closures and general inconvenience to the public and hotels and restaurants in the Fort area. This year however, thanks to the racing car duty concession which became the highlight of the Government's budget for 2013 and came just weeks before the racing event took place, opposition parties found more fodder than ever to wrap the Night Races in scandal and allegations of corruption.

The JVP has charged that the Carlton Sports Club with its affiliations to the ruling family, had received Rs. 200 million in tax concessions to import fancy racing cars and notified of the duty reduction well ahead of the budget presentation. The main Opposition UNP made the Lamborghini-Badagini slogan the keystone of its anti-Budget rhetoric, which constantly reiterated that the UPFA Budget for 2013 was a bonanza for the one per cent and created further economic distress for the rest of the country. But all this notwithstanding, the Colombo Night Races drew large crowds

throughout the weekend and was generally heralded as a much needed boost to the city's seasonal night life, with fireworks displays and after-parties for revellers once the races were over.
Almost as soon as the races ended, the Government slapped a mammoth Rs. 10 increase on petrol prices, once again fulfilling economic predictions that price increases would be inevitable before the end of the year in order to help to bridge the growing trade deficit.

Distractions

But also providing much needed distraction were reports of 'strange lights in the sky' on which the Sri Lanka Air Force claimed it was keeping a 24 hour vigil. The Government also asked the public to hand over any alien granites that were found in the areas above which the lights were hovering to the Medical Research Institute. Coupled with 'red rain' in Monaragala which scientists claim could be a result of pollution and fish rain in Matara which the Ruhuna University is reportedly probing, the strange phenomena are all contributing to the end of days conspiracy theories circulating in the country in the backdrop of the much-hyped Mayan calendar end of the world predictions for 21 December 2012. The truly apocalyptic weather patterns wreaking havoc around the country, killing and injuring dozens and displacing thousands are contributing to the overall doomsday predictions.

Even as the country grappled with the news of Navy and Air Force rescues in flood-stricken areas and landslides that were burying mothers and children alive, there seemed to be a temporary lull on the focus on Hulftsdorp Hill, where Chief Justice Shirani Bandaranayake is engaged in the battle of her career, against a ruling regime that is adamant to remove her from office.

CJ fights back

The Chief Justice yesterday struck back at the Parliamentary Select Committee that found her guilty on three charges contained in the impeachment motion, by filing action in the Court of Appeal seeking to quash the PSC report and prohibit the Speaker from acting on its findings. The senior team of lawyers headed by Romesh De Silva PC are being instructed in this case by Neelakandan and Neelakandan, Attorneys at Law. In the petition, Bandaranayake's lawyers have sought to break down the findings of guilt, with documentary evidence, including bank statements and clarifications of account information. The petition also seeks to refute the testimony provided to the PSC by Supreme Court Justice Shiranee Tilakawardane.

Undoubtedly, the Government's decision to pit one justice of the Supreme Court against another in this trial against the Chief Justice will have serious consequences for the Judiciary, no matter what the ultimate result of the saga will be.

Chief Justice Bandaranayake was granted a major vote of confidence last Saturday when in a highly charged meeting of some 3000 lawyers in the Bar Association of Sri

Lanka, pledged not to recognise the next Chief Justice appointed if the Government proceeds with what they called the illegal impeachment of Bandaranayake, as exclusively reported in Daily FT, which obtained a copy of the resolution prior to the BASL meeting.

Senior lawyers said that although several pro-Government lawyers had been present at the meeting and some of them attempted to disrupt proceedings and stand against the resolutions, the majority of the Bar including several attorneys that have recently represented the members of the Rajapaksa family stood firmly against the process undertaken to impeach Chief Justice Bandaranayake, as lacking in due process because it refused to grant her a fair trial. At the end of the meeting, BASL Vice President Anoma Goonethilake who stood against the resolutions adopted quit her post. However BASL President Wijedasa Rajapakse said later that Goonethilake was prejudiced in the matter pertaining to the Chief Justice because her husband was the investigating officer at the Bribery Commission that was investigating a complaint against Bandaranayake.

Violence

As the legal fraternity takes up arms against moves by the regime to interfere with the Judiciary and bend it to executive will, the battle promises to become very ugly. On Monday (17), an outspoken critic of the impeachment process and Convenor of the Free March movement which is a constituent association in the Lawyers Collective that leading the anti-impeachment campaign, Guneratne Wanninayake was set upon by an armed gang who attempted to attack him while he was in his car on the way home.

According to Wanninayake who reported the incident immediately to the Borelasgamuwa police, the men escaped in a white van. The daytime attempted assault reeked off similar intimidation moves including the recent attack on Judicial Services Commission Secretary Manjula Tilakaratne who was pistol-whipped in Mount Lavinia and several other incidents that resulted in fatal circumstances, including the daytime murder of The Sunday Leader Editor Lasantha Wickrematunge. Each time, the perpetrators of these attacks on regime detractors, somehow escape the net of the law.

Former UNP Deputy Leader Karu Jayasuriya has become a vocal critic of what he calls the regime's strong-arming of dissidents. Having fallen foul of UNP Leader Ranil Wickremesinghe, since he contested the latter for the party leadership in 2011, Jayasuriya is no longer provided the Opposition Leader's office at Marcus Fernando Mawatha for press briefings. Undeterred, Jayasuriya sets up a weekly media briefing at his private Kirulapone office, where for 20 minutes he addresses journalists from behind a desk upon which is placed a green table-cloth and an elephant paperweight. The humble premises in no way stems the senior lawmaker's determination to oppose the incumbent administration on a range of issues from oppression, rule of law, good governance to the wastage of public monies.

Over the last few weeks, Jayasuriya has focused on the war the regime is waging on the highest Judiciary, which he calls another 'step in the administration's march to dictatorship'. This week, the UNP MP strongly condemned the attack on Attorney Wanninayake, saying that these eerie coincidences had made the public fully aware of who was behind the white van attacks. "The people will not be suppressed by tear gas and guns forever," Jayasuriya charged, claiming that the Government was making use of the complete breakdown of the rule of law to suppress any form of dissent.

Resistance

Opposition to the impeachment is building from every quarter. Last week the Commonwealth Judges and Lawyers issued another statement criticising the parliament's arbitrary actions to remove the Chief Justice in a trial that violated Commonwealth Principles on governance and separation of powers. UNP MP Mangala Samaraweera earlier this month wrote to the Commonwealth Secretariat urging the Commonwealth Secretary General to take action against Sri Lanka for violating the Latimer House Principles in attempting to remove the head of the country's Judiciary.

Last Friday, the Congress of Religions in Sri Lanka issued a hard-hitting statement said that "the Government appears to have been motivated more by a series of decisions of the Supreme Court in recent times, which went contrary to its expectations, than by a prima facie case for impeachment. If that be the case, the independence of the Judiciary, which is a cornerstone of a democratic polity and the last bastion of Justice for the people, will be in grave jeopardy."

The statement was signed by Buddhist, Hindu, Christian and Muslim religious leaders. It came as a shock to the Government of President Mahinda Rajapaksa that the signatories also included Archbishop Cardinal Dr. Malcom Ranjith and Bellanwila Wimalaratne Anunanayake with whom the regime maintains very good relations.

In the face of this groundswell of pressure from legal and civil society, the Government shifted gear and went into damage control mode last week. With the PSC report having been drafted and presented in unseemly haste, for better or worse the Government found itself with little option but to convince the people of Sri Lanka and the wider world of the report's legitimacy even as the legal fraternity mobilised to denounce the report as biased, ex-parte and incompatible with the laws of natural justice.

Over breakfast

Following his remarks at the opening of new building of the Chartered Institute of Sri Lanka in Colombo last Tuesday, where he announced that an independent

committee would be appointed to review the PSC report, President Mahinda Rajapaksa invited newspaper editors to breakfast at Temple Trees on Thursday (13). Also present at the breakfast pow-wow were several Government members of the PSC, including Chairman Anura Priyadarshana Yapa, Wimal Weerawansa and Dilan Perera. Both Perera and Weerawansa were in the limelight after news broke that the two Government members had allegedly cast derogatory remarks at the Chief Justice during her last appearance before the Committee.

Chief Justice Bandaranayake's lawyers on Friday wrote to Speaker Chamal Rajapaksa detailing the specifics of the abuse by certain Government members on the Committee and urged action against them. At the breakfast meeting however, Yapa flatly denied that the two Ministers had been abusive towards Bandaranayake. Perera quipped during the breakfast that it appeared that the UNP had a syndrome with regard to all the Chief Justices whose names began with S – "Samarakoon and Sarath Silva. Now even when it comes to Shirani, they are creating a big fuss," he said.

The President and the Government team justified the impeachment saying it was the opposition UNP and JVP that first called for her removal after the dubious share transaction at NSB during her husband's tenure as Chairman of the bank. The President and his team also struck back at the agitating legal fraternity saying that the Chief Justice was banding together with lawyers to make political mileage out of the issue in a manner that was unbecoming of her office. The Government has been irked by scenes in front of Supreme Court each time the Chief Justice answered PSC summons, with hundreds of lawyers turning out to express solidarity with her.
Mingling with editors over the kiribath and string-hoppers, the President bemoaned the fact that all other major issues in the country were taking a backseat to the news about the impeachment which was dominating the headlines. He told editors that even the budget had gone largely ignored as a result. President Rajapaksa also said that the last times the UNP had begun impeachment proceedings against a Chief Justice they had not asked for judges for the Commonwealth, even though the party was pushing for it now, with a private members bill to enact a procedure for impeaching judges of the superior court.

C'wealth judges

The UNP struck back at this remark by President Rajapaksa on Tuesday (18) by releasing a letter issued from Sri Lankan High Commissioner to the UK in 2003, Faiz Mustapha PC to Prime Minister's Secretary Bradman Weerakoon informing him that further to a discussion with Minister Milinda Moragoda, the Mission in London had made inquiries from the Commonwealth Secretariat about obtaining the services of sitting judges from the Commonwealth to inquire into the allegations for impeaching then Chief Justice Sarath N. Silva in the event the UNF Government decided to proceed with the impeachment.

The letter also includes a response from Lord Brenan of the Secretariat, who had suggested the names of several retired judges from New Zealand, India, UK and Australia and Canada to go into the inquiry against the Sri Lankan Chief Justice.

The response of Lord Brenan about the criteria to make it possible to create a tribunal made up of retired judges of the Commonwealth was as follows:
1.To be paid reasonable remuneration and expenses for travel and accommodation and any necessary secretarial or administrative help.
2.They be given immunity from suit, either within parliament or without including any indemnities to costs or damages should they actually get involved in any parliamentary or civil proceedings
3.The tribunal hearings take place in a neutral building, ie: neither Parliament nor the courts
4.The hearings to be in public
5.During their stay in Sri Lanka they be housed in private and secure accommodation
6.Subject to the Standing Orders of Parliament they should have control over their proceedings.
The appointment of the independent committee to review the PSC report meanwhile remains in flux, as the Government tries to find ways to legitimise the PSC report. With fresh challenges against the report now in court, following the Chief Justice's petition to the Court of Appeal, the ruling coalition is adamant to tell the world that the process undertaken to impeach Bandaranayake was perfectly constitutional.

The Government's argument to the international community is that even in the United States, the process to impeach a Supreme Court judge is undertaken by the legislature – the two houses of Congress. However, with the US Constitution's commitment to the separation of powers and checks and balances being acute, safeguards have been put in place to ensure fair trial for judge under scrutiny. In Nixon V. United States, the US Supreme Court states that "judicial involvement in impeachment proceedings even if only for purposes of judicial review is counterintuitive because it would eviscerate the important constitutional check placed on the Judiciary by the framers".

Accusers cannot judge

But the judgment goes on to say that the framers of the US constitution also sought to place two major constitutional safeguards on the legislature to keep it in check regarding impeachment proceedings. The first is that the whole of the impeachment power is divided between the two legislative bodies with the House given the right to accuse and the Senate given the right to judge. "This split of authority avoids the inconvenience of making the same persons both accusers and judges; and guards against the danger of persecution from the prevalence of a factious spirit in either of those branches."

The second safeguard is a two thirds super majority required to pronounce on the guilt of a judge. The last time a Supreme Court judge was impeached – meaning a resolution of impeachment was moved by the House of Representatives in the US was in 1804. In that instance, trial was held in the Senate which found the judge innocent and proceeded to allow him to continue to serve on the bench until 1811.

The premise that no man shall be judge in his own case, or as in Nixon V. US, that accuser and judge are not the same, significantly is the due process that legal experts and the wider world community see as lacking in the impeachment proceedings undertaken against Chief Justice Bandaranayake.

As the Government struggles to find a way out of the impeachment imbroglio by achieving Bandaranayake's removal without too much loss of legitimacy, its greatest trump card is the lack of unity amongst sections of civil society and the opposition that are raising their voices against the process. A fractured Opposition and reluctant civil society are being borne along on the anti-impeachment tide by the sheer grit of the legal community that is flatly refusing to be divided and remain as resolved as ever to fight the regime on the issue all the way, by lobbying internationally and mobilising locally.

True liberty struggle

Some analysts say this is how it should be, if this is in fact a true struggle for liberty in Sri Lanka. They illustrate the example of the Magna Carta which was signed following a rebellion of the barons against arbitrary action by King John. These rebellions were not uncommon during a monarch's tenure in this period, but historians say that in 1209, the rebels could find no ready replacement for King John around which they could rally. The King was forced to sign the Magna Carta which required the monarch to proclaim certain liberties and safeguarded the citizen from his arbitrary control by proclaiming that free citizens could only be punished according to the law of the land. Instead of overthrowing the monarch in order to put another potentially autocratic ruler in his place, the Barons swore fealty to King John in exchange for the systemic change that better guaranteed the people's safety from the arbitrary will of their rulers.

Political leaders have failed the Sri Lankan citizen time and again, with each ruler perpetuating a feeling that his predecessor was comparatively the ultimate democrat and pluralist.

This battle to safeguard the Judiciary cannot be entrusted to politicians because it is fundamental to a citizen's liberty, and it is that understanding that is driving the civil society movement to ensure that political machinations do not create a systemic breakdown that will place the people under the jackboot of political authority with absolutely no way out.

Courtesy Daily FT

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## The Impeachment And The Independence Of Judiciary

**by Sumanasiri Liyanage**

Many are trying to interpret the attempt by the UPFA members of the Parliament to impeach the Chief Justice as a blow for the independence of judiciary, a highly valued element of democracy. Judiciary if operates independently, is posited as the last bastion of democracy in which people can seek justice when the two branches of the government, the legislature and the executive, wittingly or unwittingly, take unjust decisions affecting the citizens. Since the impeachment motion was presented to the Speaker of the Parliament, almost all have argued that it has been an attempt to scotch the independence of judiciary as some of the determinations of the Supreme Court affected adversely some of the bills the UPFA government wanted to pass quickly. It has also been mentioned that powerful politicians were unhappy over some of the decisions of the Judiciary Service Commission. The Secretary of the JSC was attacked by an unidentified gang in Sunday morning just prior to the handover the impeachment motion. The Sri Lankan police that are highly efficient in uncovering cases of non-political nature have so far failed to arrest or to identify the perpetrators. So I shall agree fully and unconditionally with the argument that the impeachment is undoubtedly an attempt to attack the judiciary. Nonetheless, I beg to differ in using the adjective, independent. Was the Sri Lankan judiciary independent of the legislature and the executive in the past? Was it independent, at least in relative sense, from the dominant social forces that include hegemonic Sinhala nationalist as well as economically dominant rich? Hence I would suggest that the impeachment discourse should be broadened if we really seek to understand the inner logic that operate beneath the surface. As my friend, journalist Kusal Perera (the Editor of Subhavitha), puts it in a private conversation, we should distant ourselves from 'Hulsdorf Mentality' in our attempt to theorize what is happening today. Let me begin with my conclusion that is in fact an extension of the argument advanced in my previous article, 'Systems are Collapsing, So What?'. Then I will try to substantiate it. My submission is that the systems and institutions that have been created and modified by the Second Republic Constitution of 1978 have now evolved and transformed into parts of totally undemocratic, unjust and exploitative machine. Judiciary is no exception. It is also another decadent rotten and moribund institution that has been constantly making an attempt to negotiate with the executive in order to reach a 'better deal'. It showed a semblance of independence when it had failed to reach such an agreement. One may say that the pre 1978 history was relatively better as far as the relationship between the legislature, the executive and the judiciary was concerned. Three branches of the government enjoyed relative independence from each other. However, even then, judiciary was not independent from the dominant and hegemonic social forces. As Selvakumaran and Edrisinghe have argued, post-independence judiciary acted with strong Sinhala nationalist bias in giving its views and verdicts. I do not here intend to harp on how the Supreme Court and lower courts made their determinations when it comes to laws and regulations affecting workers and other poor masses. Focusing on the recent past, let me pose some questions that would help in unraveling the true nature of the judiciary. Was the appointment of Dr Shirani Bandaranayake as a supreme court a result of a political decision? Was the appointment of Sarath Nandasiri Silva as Chief Justice a political decision? Was the SC determination to imprison S B Disanayaka a political decision? Was Sarath Fonseka given a fair and just trial following the due process? Was the

decision to reverse SC decision on P B Jayasundara an independent one? One may add many questions of similar nature to the above list and come to his or her own conclusion.

To witness the decadence of the system in its worst form, one may see what is happening in lower courts. How many years do people have to be under remand custody before cases were filed against them? How Tamil prisoners are waiting in prisons/ open camps to know what would be the charges eventually filed against them? As far as I am concerned these are much more important issues. It is totally unwarranted to put the issue independence before these issues since those issues have serious impact on poor, marginalized people. Once again journalist Kusal Perera reminded me of budgetary allocation of some 600 mn rupees in 2011 to improve court condition to make the execution of justice expedient. What happened to this money? Were there any follow-up actions? Was there a mention of this in 2012 budget? It is absurd to portray this rotten system as independent and the guardian of 'final' justice. Of course, one may quote some of the decisions that were given by the judiciary as independent verdict. When a large number of Tamil prisoners were forcefully and arbitrarily transported to Vavunia somewhere in 2007, the Supreme Court gave a verdict that action was illegal and ordered those people should be brought back to Colombo. When I filed petition against the non-appointment of Constitutional Council set up by the 17th Amendment, the SC even declared that none is above the law so that petition can be filed making even the President a respondent. How do we explain these phenomena? These things happen when the SC especially the Chief Justice had engaged in a battle with the executive branch of the government. However, it is incorrect to portray these decisions as a result of the Judicary exercising its independence. The system of bribe does not always run smoothly. It faces fissures and contradictions that should not be depicted as positive aspects of the system although outcome may be beneficial to the people. What we are witnessing to days is not an attack on pure and clean branch of the system by a dirty and authoritarian branch of the government. It is a conflict between two parts of the same corrupt and rotten machine. All the parties involved seem to have vested interests created by the system. Hence this reminds me a saying by Spinoza that Leon Trotsky prefers to quote many a time: "not to laugh, not to cry, but to understand'. Only such understanding will assist us to build a system that is just, democratic and humane.

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*Courtesy: The Colombo Telegraph*

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## The Constitution And The President's Conscience

**By Kishali Pinto-Jayawardena**

Is the Constitution or the President's conscience paramount in deciding the notion of legality in Sri Lanka?

Abandoning the courts and the law books

A person's conscience is of course, variable. A Presidential conscience cannot certainly be any different. In contrast, the very core of the concept known as the Rule of Law is its fixed application to all, the powerful and the powerless, a Chief Justice and a common criminal. If we are to be a country governed by the conscience of whichever Head of State who is in office at a particular time, then we may as well abandon our courts, our law books and our self respect as a people bound by the law.

These matters spring immediately to mind in the wake of President Mahinda Rajapaksa exerting his considerable thespian talents this week to claim that, despite the government driven impeachment process finding Sri Lanka's Chief Justice culpable on certain charges, he would act 'according to his conscience' and appoint an 'independent committee' to further inquire into the findings handed down by a majority of the Parliamentary Select Committee (PSC).

Undeterred and unsurprisingly, his detractors promptly argued that this signified a Presidential double-take and an admission that the PSC process, driven by his own government, was flawed. These gleeful reactions then led to the sorry sight of the President tying himself up in proverbial knots in trying to explain in one breath that he had all confidence in his Select Committee members whilst saying that the proposal of a further inquiry was mere 'procedure', whatever that meant.

Legal justice required and not executive mercy

But before we venture to address this rider regarding an 'independent committee', certain important questions need to be examined. And we return to our original question as to what is paramount, the Constitution or the President's conscience? As a wag shouted with pertinent purpose during the 2nd Special General Meeting of the membership of the Bar Association of Sri Lanka convened on Saturday December 15th unprecedentedly within two weeks of the last such Meeting, what needs to be shown is legal justice for the Chief Justice and not mercy from the executive. This is a crucial distinction that needs to be maintained at all costs

First and foremost, has the Chief Justice has been impeached in a manner that is constitutionally proper? To be clear, we are not talking here of the constitutional propriety of Members of Parliament inquiring into the misbehavior or incapacity of a superior court judge over which much hot air has been wasted since the beginning of this fracas. The issue is more basic and far simpler. It goes to the roots of a fair inquiry which underwrites all the rights that the Constitution guarantees us. A person is therefore innocent until proven guilty by an impartial inquiry before a competent body. These are fair trial and natural justice rights which in the context of

the Sri Lankan law, have been expanded to span the entire breadth of the criminal, constitutional and administrative law spheres. For decades, the courts have themselves been applying these rights to all categories of persons, even common criminals. In particular, appointments to, and removal from public offices must be open, fair and accountable. As much as public officers can claim these rights, surely judicial officers of the superior courts are similarly entitled when impeachment motions are lodged against them? To argue to the contrary would be an absurdity.

Violation of all rights of due process

So let us examine as to whether the PSC process which found Sri Lanka's Chief Justice culpable, satisfied these basic requirements. The PSC operated sans due and proper procedure, the majority of its members denied her the right to cross examine adverse witnesses and claimed that oral testimony would not be called, only to promptly go back on their word once the Chief Justice and her lawyers withdrew from the proceedings after being repeatedly insulted. They refused to allow her more time to answer allegations contained in a humongous bundle of documents handed over to her to which she was peremptorily ordered to respond within the next day.

This is quite apart from the vulgar abuse leveled against her by some government members of the PSC as detailed in a letter issued by the Chief Justice through her lawyers, copies of which were passed around at the BASL meeting this Saturday. Unconvincing denials by the Chairman of the PSC in that regard carry no credence. Even with the Chief Justice requesting that the hearings be held in public, this was not allowed. Up to now, the purported findings of the majority members of the PSC have not been furnished either to her or to the opposition minority members of the PSC who also walked out in protest.

Notwithstanding this excruciatingly painful spectacle which is undoubtedly without parallel in the Commonwealth, we had the Deputy Speaker of Parliament protesting that the Chief Justice had been afforded all facilities and had been even offered lunch at the House. To what depths of profound farce have we descended to? Are we expected to weigh the offer of a lunch as against the basic requirements of natural justice in the scales of equity?

Predictably the Chief Justice had no recourse but to issue letters through her lawyers to the general public, describing the humiliation that she had undergone and the indignities that she had been subjected to. It is unfortunate that President Mahinda Rajapaksa, in this week's meeting with national editors, chose to rebuke the Chief Justice for making public statements under the quite mistaken impression that 'she is a public servant' (Daily Mirror, December 14th 2012). Yet the President, being a lawyer himself, should be quite aware that judicial officers are assuredly not public officers. In any event, his lawyers, assuming that they possess the necessary competence which is by no means a given, should surely advise him to that effect.

An unholy mess of the government's doing

If the Government thought that they could wrap up the inquiry against the Chief Justice clothed in a garb of secrecy, frighten off independent commentary and generally enter into adverse findings without critique, it was sadly mistaken. Indeed, these clumsy attempts have led to far more opposition than it ever bargained for, ranging from the Congress of Religions to the heads of religious bodies and judicial bodies both here and in the Commonwealth.

Moreover, the activism displayed by Sri Lanka's Provincial Bar Associations has been astounding. The President of the Bar demonstrated deft and highly commendable handling of the record numbers that turned up this Saturday, culminating in the passing of three resolutions including an unequivocal assertion that the Bar would not welcome a new Chief Justice if this unjust impeachment is proceeded with. Anti-impeachment contenders dominated the meeting to the extent that an opposition parliamentarian and signatory to the impeachment motion who tried to parrot the government line, found himself unable to proceed and was forced to retreat in vastly amusing disorder.

This shameful impeachment cannot be reversed through a supposed 'independent committee' appointed by the President. Indeed, given the circumstances, it is hard to believe that any person of erudition or integrity will agree to serve on it. The issue can only be resolved through strict adherence to a new inquiry process adhering to constitutional guarantees of fairness that the Chief Justice is entitled to, through amendment of the relevant Standing Orders if needs be.

It is this minimum that should prevail and not reliance on the President's conscience, an uncertain force as this must undeniably be. Let us acknowledge this essential truth, even at this late juncture.

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## 15th Of December; A Day To Remember

**by Basil Fernando**

The Bar Association of Sri Lanka passed a historical resolution today opposing the impeachment motion and avowing that, if the incumbent CJ is removed, the Bar Association will not welcome anyone who is appointed in her place. The following is a summary of the resolution given by the Lawyer's Collective.

"The President of BASL formulated the resolution based on the two sets of resolutions that have been received. He presented it to the House. In summary the resolutions had three items:

(a) President to reconsider the impeachment, in the light of his recent statement on the report.

(b) If the parliament proceeds with it, then to enact a procedural law, guaranteeing Rules of Natural Justice

(c) If the CJ is removed without following Rule of Law and Natural justice, then the Bar would not welcome the new appointee"

The Bar Association meeting was a response to a letter written by Mr. SL Gunasekara, a senior lawyer, who wrote,

"My suggestion is that the Bar Association adopts a resolution and/or makes a public pronouncement that it requests all its members to refrain from accepting appointment as Chief Justice in the event of the incumbent Chief Justice being impeached. Similarly I believe that the Bar Association should call upon all others who are not members of the Bar Association also to decline to accept that post if it was offered to any of them; and also that the Bar Association should call upon all its members and others to boycott and boycott completely, both socially and professionally, any person whoever it may be who accepts appointment as Chief Justice in the event of the Impeachment of the incumbent Chief Justice being effected. Such boycott should in my considered view go to the extent of refusing sit with such new Chief Justice (if any) on the Bench of the Supreme Court [if a Judge], or to appear before such new Chief Justice (if any) as the case may be. [if an Attorney-at-Law]."

It was also reported that about 3000 lawyers attended the general meeting. This is the largest reported number that have ever attended such a meeting of the Bar Association. The lawyers came from all parts of the country. The response of the lawyers on this occasion is a welcome change to many years of apathy and inaction. However, as the members of the bar have begun to grasp the gravity of the situation, they have moved to respond.

Earlier this week, the Judicial Services Association also, in a clearly worded statement, expressed their opposition to the Parliamentary Select Committee "trial" and urged the President not to take any actions on the basis of the recommendations

of the PSC. They further explained that the removal of a judge should only be done by following the internationally accepted norms and standards.

Thus, the lawyers and the judges of Sri Lanka have spoken, and they have let the President and the country know that the impeachment process as it stands now is unacceptable and illegal, and that they would oppose it.

With these expressions of clear opposition in unambiguous terms, one of the most vicious aspects of the 1978 Constitution has now been challenged. This constitution was passed with the clear intention of displacing democracy and the rule of law, and to give the Executive President absolute power. An early application made by the President to the Supreme Court through a Solicitor General clearly expressed his wish to have the same status as that of a monarch. The Supreme Court, even in the early years after the passing of the 1978 Constitution, rejected this view.

However, from the passing of the 1978 Constitution up to now has been a long period, during which the independence of the judiciary has been severely undermined, and the system of rule of law and due process, well established back then, have seen alarming setbacks during this period.

However, what was in favour of President Jayewardene were the long years of internal conflict, which finally blew up into a civil war. As a result of this internal conflict, the entire society was silenced on all other matters. One of the results was that the reaction against the authoritarian move on the part of the Executive President went unchallenged. There was even an idea that, during a time of internal conflict, an authoritarian leader may be a better alternative. Ideological developments during this period and the way they were manipulated have already been exposed by many and much written material exists on that issue. What is important to note is that there was a silencing of the society during that period, and the emergency regulations, the anti-terrorism laws and the intense violence that existed at the time prevented strong opposition to the undermining of the rule of law and democracy.

The move by the present government to remove the Chief Justice herself in an arbitrary and very rude fashion has created a backlash and perhaps the most important constitutional crisis that has taken place in Sri Lanka since the promulgation of the 1978 Constitution.

The lawyers, the judges and the civil society in general are beginning to reckon with the danger that the society is faced with under the Executive Presidential system. The opposition that the lawyers, judges and civil society have demonstrated against the impeachment move by the government is only a manifestation of a much larger protest and even anger that exists in the country today against the political development that tends towards the establishment of the hegemony of security forces taking the place of the institutions of the rule of law.

In these circumstances, these protests, if they achieve their ultimate aim, should be directed towards then ending of the Executive Presidential system and bringing about significant constitutional changes to re-establish democracy and rule of law. We hope that the firm determination shown on the 15th of December 2012 will be the beginning of a serious reckoning on the part of the society as a whole against the threats forced against it.

The times they are a'changing. Hopefully a better time is beginning.

**by Rajiva Wijesinha**

It is ironic that, having been the only government Member of Parliament to complain over the year of the failure of the Judiciary to administer justice either effectively or efficiently, I seem now to be the only one who thinks impeaching the Chief Justice would be a mistake. This struck me when Ravaya was interviewing me about the matter, which was when I also realized how quickly history is forgotten, and in particular the perversion of justice that this Constitution seems to have entrenched.

My first active political intervention in this country occurred when I resigned from my job with Peradeniya University to protest the manner in which Mrs Bandaranaike's Civic Rights had been taken away for seven years, the maximum punishment possible under the law. That was the most egregious instance of Parliament acting as a judicial body, and it was a horrifying sight. I can still recall then Prime Minister Premadasa claiming that one reason to punish Mrs Bandaranaike was because she was an example of absolute power corrupting absolutely. He said this with no sense of irony while nearly 140 government parliamentarians cheered and jeered. The TULF had left the chamber, so Mrs Bandaranaike had barely half a dozen supporters, and the dignity she displayed on that occasion has remained the most impressive of my political memories.

The manner in which Mrs Bandaranaike was condemned shows the perversity of both the judiciary and the legislature. She was tried by members of the judiciary, two Supreme Court judges and one judge of the Court of Appeal, handpicked by President Jayewardene who then claimed that the judgment against her was made by senior judges. Before that he had shown exactly what he thought of judicial independence, in that he had sacked all judges through his new Constitution, and only appointed to the bench those he thought would play ball with him. Thus brilliant intellects such as Noel Tittawella were left out, and characters such as Joe Weeraratne, known to be dim if devoted, made the Bench. President Jayewardene then appointed him to the Special Presidential Commission to try Mrs Bandaranaike.

But worse was to come. Mrs Bandaranaike's lawyers appealed for a Writ to halt the grindstone, and this was granted. Jayewardene promptly amended his Constitution to prevent such appeals. This provision was made retrospective, which made clear his total contempt for judicial process as well as his own Constitution, which prohibited retrospective legislation. He had indicated earlier that he did not take such matters seriously, in that Mrs Bandaranaike was charged with actions that did not constitute an offence when they were alleged to have been committed.

The Special Presidential Commission was chaired by Justice Sharvananda who was subsequently made Chief Justice, leapfrogging Raja Wanasundara who was renowned for integrity as well as independence. Sharvananda went on to become Governor of a Province, in the first outrageous example of a judge accepting a further

office of profit, in effect putting paid to the idea of judges being immune from such temptations.

So Mrs Bandaranaike was found guilty of four charges, with the judges pronouncing on decisions which obviously were the prerogative of the executive. The effrontery with which they presumed to judge how the executive should have responded to an armed insurrection was matched only by the sycophancy with which they found her guilty of a charge pertaining to the treatment of President Jayewardene's son while he was in prison.

Though she was cleared of the majority of the charges, Parliament decided to go for the maximum penalty possible, namely expulsion from Parliament and deprivation of Civic Rights for 7 years. Jayewardene clearly had no qualms about making it clear that his principal purpose was political, namely to prevent her from standing against him at the next Presidential election, due in 1984 (in fact he later changed the Constitution yet again, in an equally cynical move based on his declining popularity, to enable him to advance the date of the Presidential election, with the ridiculous provision that an incumbent would take office at a later date than any challenger who might have won).

I am not sure if my distaste for impeachment is based on my continuing abhorrence of what Jayewardene did in 1980, and my knowledge of the appalling consequences of such a cynical use of power both for himself and the country. I know quite well that Sirimavo Bandaranaike and Shirani Bandaranayake are very different characters, and that the latter has not behaved with the dignity and the discretion that her position required, even though since the impeachment was mooted she has corrected the worst of her errors. But I do believe that Parliament must be very careful about using powers it has conferred on itself, by law or by Standing Orders, and that justice must not only be done, but must also be seen to be done, by whatever body sits in judgment.

# SLBA Resolution Will Test Of The Lawyer's Determination To Defend The Independence Of The Judiciary

**by Basil Fernando**

Tomorrow, December 15 will be a day that tests the will of the lawyers of Sri Lanka to defend their own profession and the independence of the judiciary in the country which is the foundation on which the legal profession stands.

In more simple terms the resolution presented to the lawyers that they are to vote on is about preventing the degrading of the judiciary to be a stooge judiciary. The executive is hell bent on making an end of an independent judiciary. There are ideologues that are supporting the executive as is quite evident from those who are speaking over radio programmes such as the one which is inappropriately called 'Peoples' Power' and in newspapers and other media. For example, Dr. Nath Amarakoon wrote that the Chief Justice is an employee of the executive and should behave in that manner. There are others who have vociferously argued that the judiciary should be silenced.

If the executive succeeds then it is not only the judiciary that will be degrading but the legal profession as a whole. The task of the lawyers would be to engage in unscrupulous practices as middlemen for unprincipled negotiations and even to be bribe carriers.

Therefore it is a critical time now either to succumb to this pressure or to take a very decisive position to fight back.

In a moment like this it is most useful for lawyers and judges in Sri Lanka to take a critical look at themselves. It must be admitted that the legal fraternity in Sri Lanka has failed society. It is no exaggeration to say that we have failed miserably.
The task of protecting the liberties of the citizens has not been a priority of the legal community. The people justifiably accuse the lawyers as well as the judicial system on so many counts. Just to take one example, take the case of the extraordinary delays in adjudication. The postponement of cases is unscrupulously pursued so as to defeat the ends of justice. A litigant who has no just cause can manipulate the system against the other party by paying for lawyers and getting a case postponed for many years with the hope that the other party will give up due to lack of resources or other problems arising out of such postponements. Poorer persons dragged into cases which are often fabricated may end up in suffering jail terms or other losses purely because of their poverty and the capacity of the other party to manipulate the system in their favour. There is truly a cruelty and heartlessness in the manner the justice process has been allowed to be manipulated in Sri Lanka.

Often the judiciary has also failed in their management of the system of justice. The judges cannot be unaware of the unscrupulous manner in which the court proceedings are manipulated so blatantly. However, very little attempt is made to

give their minds to this problem collectively and find solutions including firm action to demand from the government the allocation of resources in order to ensure that the system of justice functions without defeating the very objectives of justice.

The other most glaring betrayal of justice is the manner in which the Attorney General's Department has been allowed to degenerate and to use its powers unscrupulously to do actions which are illegal and unjust. The most recent example is the manner in which the power of Noli Prosequi of the AGD is so blatantly abused to do favours for those who are close to the government or are friends to someone in the department. In so many cases letters are issued to the magistrates informing them not to proceed against a suspect and to release them purely for political or personal reasons. Even a member of the Civil Defense Force (Grama Arakshaka) who doused his 16-year-old lady partner in kerosene and set fire to her was able to obtain a letter from the Attorney General's Department requesting the magistrate to discharge him from the proceedings. And in another case a coroner in the Perediniya Teaching Hospital who was attempting to conduct a death inquest on a body found floating in the Mahaweli River, who was prevent ed to carrying out his work by the director of the Perediniya Botanical Gardens and his assistant filed a complaint. The director and the assistant were released due to a letter from the AGD in the same manner.

It is not possible to narrate here the depth to which the utterly abysmal justice system in Sri Lanka has fallen. The gist of the matter is that the possibility of seeking justice in Sri Lanka has become an impossible dream. The legal community cannot wash their hands and merely blame the politicians. It is the duty of those concerned with justice to resist everything that obstructs justice and the lawyers and judges of the country cannot claim that they have discharged this duty.

It is necessary to face this at this critical time and tomorrow's (December 15) of the Bar Association should be a day to demonstrate to the people that the legal community is willing to mend their ways. By demonstrating their determination to resist the executive's pressure to reduce the judiciary to the position of a stooge and by standing for the independence of the judiciary the legal profession can demonstrate they are beginning to reckon with the situation. This is not the end of the matter but it could be a beginning of them demonstrating their determination to begin a new chapter in the struggle for justice. Much needs to be done and a beginning needs to be made.

There are questions whether the parliamentary select committee observed due process in its inquiry of the charges against Shirani Bandaranayake

There has been an air of inevitability in the current showdown between the administration of President Mahinda Rajapaksa and its latest bête noire, Dr. Shirani Bandaranayake. Her fall from grace shows that the Rajapaksa juggernaut does not warm up to dissent easily, even if, as in this case, it measures up to the expected norms of checks and balances in a self-described democracy.

The Parliamentary Select Committee (PSC), inquiring into the 14 charges of professional and financial impropriety listed the impeachment motion against her, rushed to bring its proceedings to an end last Saturday. Undeterred by the walkout by four Opposition parliamentarians, the PSC ruled that Bandaranayake was guilty of three charges of misconduct. Parliament, where President Rajapaksa's party has more than two-thirds majority, is expected to vote on the committee's findings in January.

Just 19 months after Bandaranayake was appointed with much fanfare as the first female to head Sri Lanka's judiciary, the fate of the 43rd Chief Justice appeared to have been sealed following a ruling a she gave to a Bill introduced in Parliament by the Economic Development Minister, Basil Rajapaksa, one of the many presidential siblings controlling the levers of power. The Supreme Court ruled that the Bill, which wanted to empower the Central government to control a $614-million development budget, violated the constitution. The court added that it had to be first approved by nine provincial councils.

In early November, when 117 government parliamentarians handed over an impeachment motion against the Chief Justice to the Speaker of the legislature (Chamal Rajapaksa, another sibling), the process that followed affirmed how heavy the odds were stacked against Bandaranayake. The Sri Lankan constitution has ensured that the President and his ruling party hold all the cards in filing an impeachment motion, conducting a parliamentary inquiry and voting in the House to unseat the holder of such a hallowed seat as the Chief Justice.

An inquiry or inquisition?

But last Thursday, a dramatic twist was added to a predictable plot. After four hours of its third sitting, the Chief Justice and her legal team walked out of the government-dominated, 11-member PSC. Her lawyers said their client had "no faith" in the PSC and that it violated the rules of natural justice.

The walkout underscored the question on many minds: was the PSC an inquiry or an inquisition? The question stemmed from what Bandaranayake was subjected to that day. Not only was a procedure for the inquiry still to be spelled out, but the accused

was given close to 1,000 pages of documents to respond to in a day, no witnesses were listed, no oral evidence would be permitted, cross-examinations would be denied and two government parliamentarians on the PSC heckled the beleaguered Chief Justice during the proceedings, calling her a pissu geni ("a mad woman," in Sinhala).

Making bank accounts public

Such has been the haste to get rid of Bandaranayake that due process and legal consistency have both been given the go-by. In a now familiar political tactic of the regime, the government-controlled media held its own trial to vilify the latest enemy of the state. The state's media have, for instance, repeatedly made public Ms Bandaranayake's private bank accounts — a brazen violation of banking secrecy protected by law.

The state-run Daily News has been in the vanguard. Commentaries and reports in its pages have carried details of the alleged accounts Bandaranayake had and supposed amounts and transactions in each. Her private finances feature in two of the 14 charges in the impeachment motion (which implies that the 117 legislators who signed it have seen the bank accounts).

Such a display of impunity on a vital feature of the economy was not used even in the 30 years that Sri Lanka fought the Tamil Tigers. When government investigators wanted to follow the financial trail of Tamil Tiger operatives, a court order was often sought to access bank accounts, despite the Emergency laws in operation then and the Prevention of Terrorism Act.

Pakistan parallel

Given such political mud she has been dragged through, it is no surprise that Bandaranayake has won support from a broad constituency of jurists, lawyers, academics, activists and religious leaders. Some have now begun to draw parallels between her quest to defend the independence of the judiciary against an all-powerful President and the epic struggle between the Pakistan Chief Justice Iftikhar Muhammad Chaudhry and the country's then military President, General Pervez Musharraf.

Chaudhary's sacking triggered a protest led by lawyers that fast drew in others; he was eventually reinstated, and the movement was one of the factors that saw off Musharraf.

Unfortunately for Bandaranayake, such parallels are only in the realm of ideas. The number of supporters on her side is still very few and far from the required critical mass for a movement to defend the independence of the judiciary. Muscle and power on the streets are still controlled by the well-oiled Rajapaksa political machine.

If the inevitable occurs, and she is impeached early next year, Bandaranayake's plight would affirm who the real winners are in a post-war country trying to promote itself internationally as a "Wonder of Asia." It would clearly not be those who think that the judiciary has a legitimate role in reining in unbridled political power through a system of prescribed checks and balances. Bandaranayake's successor is sure to be acutely aware of the political sword dangling over his head.

*Marwaan Macan-Markar is a Sri Lankan journalist covering South Asia and Southeast Asia for an international news agency.This article is first published as Hindu op-ed today.

*Courtesy: the Colombo Telegraph*

The Friday Forum made a recent statement which drew the public's attention to the deeply flawed nature of the procedures adopted for investigating the charges made against the Chief Justice. This statement analyzed the procedures from the perspective of the Constitution and other legal provisions. We recommended that in the absence of essential safeguards, the impeachment proceedings should be terminated.

Our worst fears have been confirmed by the manner in which the Select Committee of Parliament has conducted the investigation and arrived at its conclusions. The public is aware that the basic requirements of a fair investigation have been flouted by the members of the Select Committee representing the government, who constitute the majority on the Committee. From the very first sitting of the Committee, there appears to have been an arrogant disregard of the laws and standards of natural justice and fair procedure that ought to be followed according to Sri Lankan law as well as International law and practice. The members representing the opposition parties on the Select Committee also failed in their duty to ensure that the basic elements of fair investigative procedures were in place before the Chief Justice was summoned before the Committee, and she and her lawyers attended its sittings. This appears to have resulted in confrontational arguments during the sittings, vain protests on their part, and an eventual withdrawal from the proceedings by the Chief Justice and her lawyers.

Even worse the Chief Justice and her team of lawyers are alleged to have been subjected to attempts to intimidate them at every sitting they attended, two members of the government on the Committee even resorting to vituperative abuse. That legislators and senior government officials who have acted in this way in their interactions with the public in the recent past have not been held accountable for such conduct has encouraged the unimaginable behaviour of the present Parliamentary Select Committee.

The Select Committee's report and findings were arrived at in unseemly haste, after the withdrawal of the Chief Justice and her team of lawyers and the representatives of the opposition parties. They were all protesting against the arbitrary and unfair manner in which the proceedings were conducted. In these circumstances it is fair to surmise that the findings and report are seriously flawed, and indicate unjust, unfair and discriminatory investigative procedures.

We wish to remind parliamentarians that the proceedings of the Select Committee are being challenged before the courts on the basis that they are ultra vires the Constitution.

The public has a right to expect its elected representatives to act with decorum and dignity. We ask that the Chairman of the Select Committee and those who abused the Chief Justice tender, to the Chief Justice, her team of lawyers, the judiciary, Parliament and the people of Sri Lanka, a public apology for their conduct.

We call upon the Speaker to advise Parliament that the report is not acceptable, and persuade the House not to base an address to the President on the Report. We also call upon the President not to act on any address of impeachment based on this report, even if presented to him by Parliament.

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## President Reveals True Nature Of His Governance!

**by Laksiri Fernando**

It was shocking, outrageous and deplorable, but not necessarily surprising. It was shocking since he didn't have any qualms to reveal it openly. It was outrageous and deplorable because it came from the country's Head of State more than the Executive President! It was not surprising however since many people had come to doubt or know about it for a long time.

Here we have a President who says "we tried to cover it up quietly since he was our man. That is how we do things, No." His speech was in Sinhala and this is a reasonable translation or interpretation.

The matters he was referring to were not only on the impeachment motion against the Chief Justice, which has already boomeranged on the government, but also about one of the most publicised corruption cases against the Chief Justice's husband in the history of the country, excessively publicised by the state media. The occasion was the opening ceremony of the new building for the Institute of Chartered Accountants (ICA) at Malalasekera Road, Colombo, on 11 December 2012. All quotations here are translated from and the interpretations are based on the Final Cut unedited on 11 December 2012 from News First (MTV). This is undoubtedly a minefield of spicy political material; I would have given this for my final year Political Science special students for their analysis in terms of 'good governance and ethics of politics.'

General Comments

He started with general comments on development and achievements of the ICA. Commenting on the accountants, he said they are perceived as obstacles particularly in the government sector, as they raise so many questions and rules. This is the same in semi-government corporations. Then he came to the point of referring to some corporation Chairmen and said that "they even hoodwink the Accountants." "Then the opposition shouts and we go and punish them. But when we punish, the opposition goes and defend them." The whole system of democracy, dissent and criticism appeared a joke to him.

He further claimed that "we most of the time listen to the opposition and when we listen and try to punish, they say the procedures are wrong." This was like a rehearsal to blame the opposition for the impeachment! He added that "when a wrong is done what we have to look at is the facts and facts alone." He implied that the procedures are not that important and that was obvious from his gestures. In essence he questioned the legal principle that "not only must justice be done; it must also be seen to be done." The question of a fair trial was not at all referred to although he soon started talking about 'laws and the importance of the constitution from a different point of view.'

He emphasised that "under the present JR's constitution, if I do wrong only the Parliament can punish me. I cannot be taken before the courts," he laughed. "Parliament can bring an impeachment. But when an impeachment is in motion, I

cannot dissolve the Parliament. That is a limitation I have. Likewise, if a superior judge does any wrong he/she cannot be taken before a court, there is no higher court, and the method is also an impeachment."

He also referred to a case against a judge in Kegalla rather hilariously who was apparently forced to resign by passing a resolution in Parliament perhaps as a precedent that needs to be followed in the future. Then you don't possibly need a Judicial Services Commission (JSC), independent or not. Then he referred to the case of impeachment against Neville Samarakoon and emphasised that "it was only due to a word that he stated against the President of that time." He implied that the powers of the President are that powerful. He asked someone in the audience whether he is correct or not also adding that "I am subject to correction, because what I say should be correct." He also referred to the impeachment against Sarath N Silva briefly. But what was important at this juncture was how he referred to politics and opposition politics.

"In general, whatever the impeachment is about, the opposition is always against it. We are the people who shouted when the impeachment was brought against Samarakoon; it was unreasonable and so on. That is the task of the opposition; otherwise it is not an opposition. When I was in the opposition, whatever the matter, I used to go to the street and shout. That is the duty of the opposition, whether it is correct or not. That is not a concern for me, when we were in the opposition. It is the same at present."

Apart from an effort to discredit the current opposition, the whole attitude on politics and opposition politics was alarming. The impression cultivated is that democratic politics is a joke or at best a game.

Impeachment Issue

He said that he is commenting on the issue of impeachment because it was raised. Otherwise he didn't want to. That can lead to misunderstandings. He said that it was the opposition who raised the issue first. The full text of his declaration was the following.

"They were our appointed Chairman and our appointed Chief Justice. There was an allegation about the Chairman, who was at the NSB, I believe, about financial matter that he sold some shares, at a lower prize when they were higher. There was a big shout, in the newspapers and in newspaper headlines every day. I urgently called the people and asked them to take the shares back by giving money back. It was covered up with difficulty. That is how we do it for our man, no." (yanthan eka vahala dala shape kela. Ehemane keranne ape minihata).

Apart from being incorrect in his interpretation of the NSB scandal, the way he had concealed or tried to conceal the matter was outrageous. The interpretation was incorrect as it was not a case of selling NSB shares but buying The Finance Company

shares at a higher price (Rs. 50 per share) when the market price was mere Rs. 20. It was reportedly was a question of NSB being forced by the government to buy a stake (13 per cent) in the bankrupt The Finance Company involving Rs 390 million rupees. Non-executive Chairman possibly could have been a mere scapegoat.

The main effort of the President was to blame the opposition for the impeachment motion. The argument went as follows, reminiscent of the famous King Kekille. "The opposition not only went and made a complaint before the Bribery Commissioner. They also said that for the wrong that the Chairman had done, the wife also should be punished. That is also something the opposition said and not me. The governing party was silent. It was also the General Secretary of the UNP that said first that they would bring an impeachment motion."

It is a fact that the opposition raised the NSB issue and also raised some issues against the Chief Justice. But what triggered the impeachment process on the part of the government is not the NSB issue but the Divineguma issue as many discussions on the subject has already established. The President wanted the public to believe that the 117 members signed the impeachment motion because of the pressure from the opposition!

If that is the case then it would be very easy for the government now to withdraw the impeachment motion without confusing the people, disrupting the judicial process and creating a bad name for the country within the international community. If the impeachment motion is withdrawn by the signatories even now the whole report of the PSC will become defunct. Instead what the President has proposed is another Committee, allegedly an independent one, to scrutinize the already completed PSC report! It is in effect is a government report.

Other Issues

There are two other statements which are quite alarming in the President's speech. One is about how misdeeds of people should be handled in the country or in the judiciary in general. Second is about why he has come to the conclusion of appointing another committee. The two are not necessarily one after the other but all mixed up as usual.

He said "When I was silent, members of Parliament signed an impeachment motion saying that we cannot be at the receiving end all the time (meaning the opposition criticism). I was not happy even at that time but after it has been gone through the Parliament what is left is to appoint a committee and get a report."

He gave the impression that he didn't believe the charges were grave. He made a comment saying that "when somebody is fallen, then all the enemies give a hammering and that is the status of the country." He in fact betrayed all the MPs who signed the impeachment motion sans the Rajapaksas who cunningly evaded signing the motion for some reason. He also said that "I regret the situation, I am also

a lawyer and a professional, I don't like to demean (helluwata lakkaranne) the judiciary. If somebody has done wrong, I don't think it should be discussed openly, it is not good for the judicial system. Things have gone to that extent and regrettably though we are forced to discuss these matters. He also said that the matter has become unnecessarily politicized."

He said that "before I take action on the report I want to get the opinion of an independent committee." The reasoning went like the following. "I am only answerable to my conscience (mage hadawatai mama uththera diya uththay). I have to satisfy myself before I act, that it is correct. This is my own conviction and it is not there in any book or law." This comment has already generated criticism people asking whether the President is not answerable to the people or not.

There were of course few other comments at the end referring to the duties of the people to the country and professionals going abroad and sending or not sending money back to the country, but those were not directly relevant to the theme of this article.

Conclusion

It was undoubtedly a remarkable speech, a minefield for further study, revealing rather unashamedly how Sri Lanka is governed today. There is clear cynicism regarding dissent, political criticism and opposition in the country, based on his own experience as an oppositional agitator and even the leader of the opposition. Even the present agitators and leaders of the opposition should do a soul searching exercise to see whether they come under the same category or not.

Most alarming is the way he has revealed how he was trying to fudge a scandalous share deal between the NSB and the TFC without thinking of punishing the culprits especially when the savings of pensioners and ordinary people were at stake. This undoubtedly is the way the whole economy is run. The President is also the Minister of Finance. Even in respect of the judiciary, he said that the wrongs (varadha) should not be made public in his opinion, at a second occasion in the speech.

To him the procedures are not very important in a disciplinary case, only facts are important. He appeared to view that the Parliament could punish the judges, referring to a dismissal of a judge in Kegalle in the past. He however washed his hands like Pontius Pilate to show he is not responsible for the present impeachment. He even betrayed his Parliamentarians, like Judas Iscariot, who prepared the impeachment motion, apparently on his behalf or on behalf of the family.

Many times he pointed out his powers as the Executive President under the 'JR's Constitution' and that is the phrase he used. He said he is responsible only for his conscience or heart (hadavata). He is apparently not responsible for the people. The President revealed the true nature of his governance in a single speech.

The President tried to argue that the impeachment motion was brought because of the opposition. If that is the case then it would be very easy for the government now to withdraw the impeachment motion without confusing the people, disrupting the judicial process and creating a bad name for the country within the international community.

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## Parliamentary Select Committee Is A Mistrial: Annul The impeachment Report

**by Jude Fernando**

*"Bonaparte throws the whole bourgeois economy into confusion, violates everything that seemed inviolable to the Revolution of 1848, makes some tolerant of revolution and makes others lust for it, and produces anarchy in the name of order, while at the same time stripping the entire state machinery of its halo, profaning it and making it at once loathsome and ridiculous."* ***(Karl Marx in Eighteenth Brumaire of Napoleon Bonaparte, 1852)***

We need an independent committee or a panel of judges not to evaluate the report of the Parliamentary Select Committee report but to examine whether its conduct is consistent with the law and the accepted national and international norms about impeaching Judges. The impeachment proceedings so far should be declared a mistrial (i.e. a trial rendered invalid through improper and prejudicial errors in the proceedings leading to a leading to the impossibility of an impartial resolution) because in any civilized society a person cannot be tried twice for the exact same offence. It's called double jeopardy.

Is it a responsible use of immunity by the President not to take responsibility for the conduct of the PSC? Perhaps, the core problem here is executive immunity.

Typical reasons for a mistrial are the lack of jurisdiction a court may have over the case, improper admittance of evidence or testimonies, misconduct of any individual that prevents due process, a hung jury, or disqualification of a juror, and when legal counsels of the litigants find that unfair statements or comments have been made or crucial evidence or testimonies are not admitted or distorted. It prevents an innocent person from being tried and tried again and again for the same crime until finally being found guilty by a jury or committee that is unprofessional and corrupt.

What the government has done so far is to impeach the constitution, justice system and parliamentary privilege by ignoring the requests by the Supreme Court to postpone the impeachment proceedings until it hears the petititions against it and violating the conventions and procedure of impeachment of judges in any civilized society. To make matters worse the government appointed an all men committee some of whom insulted the CJ in most sexist language. Rather than taking responsibility for its misconduct, the government now is trying to find ways out of it, and there is no reason to believe that it changes its original motives that lead to the impeachment in the first place. Judiciary's failure to declare the PSC a mistrial is an insult to the country's justice system, will reinforce the very forces that led to the mistrial and set dangerous precedence for the future.

President's statement in the Daily Mirror makes it clear that he has his agenda only to satisfy himself: "I have only to answer my conscience because at the end of the day, I have to be satisfied with the outcome of this report; I have to be satisfied that I have done by job properly. The instructions to appoint a further committee to look into this are my instructions. They aren't found in a paper or book nor are there a law to it but I will do it in order to satisfy myself." (12/12). Is it a responsible use of immunity by the President not to take responsibility for the conduct of the PSC? Perhaps, the core problem here is executive immunity. I think government was irked

by CJ's decision on Divinaguma Bill because the hidden aim of the Bill was to overcome the limitations imposed by the 13th Amendment on the concentration of power in the hands of the few who currently control the central government.

In other occasions, President's attempt to maintain his innocence of the impeachment has several implications. This First, President's claim for innocence of the impeachment runs counter to numerous media reports about the Presidents active involvement in expediting the final report of the impeachment proceedings. Second, he absolutely has no control over what the 117 ministers who signed the motion, hence he has lost control over the Party. Thirdly, he has no proper legal counsel to handle delicate issues such as the impeachment. If these implications are true then one cannot expect that the President has the capability or legitimacy to appoint a credible committee re-try the CJ. It is not fair to let CJ go through another trial to compensate for the misadventures of the President and his legal counselors.

The impeachment of CJ is not simply about her misconduct, but government attempts to discipline the judiciary to function according to the government agenda. It needs a judiciary that is obedient and predictable and at the same time to provide legal legitimacy for its agendas. It also raises questions about responsible use of immunity by the executive President. Giving into government's attempts to re-start the impeachment is to miss an opportunity to place checks and balances on a country that is rapidly descending into lawlessness, anarchy, disorder, and international isolation.

In fact the appointment of another committee and Panel of judges proposed by is so called Leftist allies may very well be a tack it to distract the protestors and the international pressure. Because this government has learned the benefits of procrastination of its responsibility particularly when it comes to issues that draw international pressure.

CJ should be honored because she willingly participated in the impeachment hearings and had the courage to leave the hearing when the committee lacked civility and professionalism. And her verdicts in cases against the government demonstrate her professional conduct was not influenced by the government appointing her husband as the Chairman of the National Savings Bank and the fact that she was appointed by the President.

Perhaps, the misadventure of CJ's impeachment could initiate the long waited spring in Sri Lanka, provided the concerned citizens moved out of the Lipton Circus to the villages and built a mass movement against anti-democratic forces.
*Courtesy: The Colombo Telegraph*

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## A Mendacious President And A Profaned State

**by Tisaranee Gunasekara**

"We were like people marooned on a dissolving floe of ice; we dare not think of the moment when it would melt away".Czeslaw Milosz (The Captive Mind)

President Mahinda Rajapaksa is lying.

The President is lying when he says that he was not in favour of the impeachment, initially. The President is lying when he says that he knew nothing about the impeachment until it was signed by 117 of his parliamentarian-serfs.

The President wants 'We, the People,' to believe that he and his siblings stand above the impeachment quagmire, that they are not tainted by the most unjust trial in the history of Sri Lanka. He thinks a few barefaced-lies would suffice to convince us of the Rajapaksa-ability to play the role of 'honest and impartial mediator' in this Rajapaksa-made imbroglio.

That is a measure of the total contempt he has for our intelligence. Do we not deserve it?

The impeachment is a 100% Rajapaksa project. Its aim is to subjugate the judiciary to Rajapaksa power and turn the courts of law into tools of Rajapaksa rule.

The brutally unjust modus operandi of the UPFA dominated Parliamentary Select Committee (PSC) was not accidental or even incidental. It was the result of a Rajapaksa plan to destroy the CJ and to frighten every other judicial officer into compliance. The impeachment is an act of political terrorism which targets the CJ plus the entire judiciary; and presidential dissimulation cannot efface the Rajapaksa-fingerprints inundating the scene of carnage.

The multiple experiences of the past seven years conclusively prove Mahinda Rajapaksa's visceral incapacity to appoint or tolerate a truly independent anything. The man, who destroyed independent commissions, assaulted the media and regards judicial independence on par with treachery, is not going to appoint a committee which has the capacity to negate the work of his hand-picked PSC.

If the President appoints a committee its mandate will be clear: find the CJ guilty on at least one count, while, for appearances sake, exonerating her on all others. That way the Rajapaksas can maintain their veneer of 'impartiality' while getting rid of the CJ. It will severely embarrass the seven UPFA members of the PSC, but for the Rajapaksas they are nothing but expendable pawns, to be used and discarded as need commands.

President Rajapaksa's blatant untruths about non-responsibility and his false promises about an 'independent' committee do not signal a real volte face. They merely aim to dissemble and deceive, confuse and confound, divide and conquer. Their sole purpose is to discourage national dissent and prevent the internationalisation of the issue; especially the latter.

The Commonwealth Weak-link

When Mangala Samaraweera directed his appeal to the Commonwealth, he touched a raw-nerve of the regime. It is no secret that President Rajapaksa is looking forward to the 2013 Commonwealth Summit in Hambantota with the same juvenile yearning of a child anticipating a visit to Disneyland. The Chinese can satisfy Rajapaksa-cupidity; but Rajapaksa-vanity requires ministration by the West, especially by our former Colonial Ruler. (That is why Mahinda Rajapaksa earned the dubious distinction of being the sole President at the Commonwealth lunch for the British Queen).

The Commonwealth Summit is thus of enormous emotional and psychological significance to Sri Lanka's ersatz Royals. And in this irrational yearning, the Rajapaksas are at their most vulnerable. The Siblings know that they are safe at the UN, because they enjoy Beijing's protection. With the Security Council rendered ineffective via the Chinese veto,Genevacan do nothing more than pass resolutions. But the Commonwealth is quite another matter; there the Rajapaksas lack the weighty protection of a veto-wielding patron. Even if the venue of the summit is not shifted to another country, the boycott call can gain traction because of the impeachment travesty. And the possibility of a British-snub must be giving the President nightmares.

Thus the sudden pretence at reasonableness, the seeming willingness to compromise; the President will maintain this 'pose' until the impeachment issue is lost in the quicksand of time. Once the veneer of reason and impartiality succeeds in gutting national dissent and muting international reactions, the Siblings will move with flummoxing speed to impeach the CJ and appoint a new chief justice who is willing to place Rajapaksa needs/interests above the constitution and Rajapaksa whims/fancies above the law, all the time.

President Rajapaksa claims that he moved to cover-up the questionable share-transaction of the then NSB Chairman (and the CJ's husband) because "that is how it should be done; after all he is our man" (Colombo Telegraph – 12.12.2012). That presidential statement reveals all about Rajapaksa justice. It explains why Duminda Silva and Mervyn Silva never went to jail while General Fonseka did; it also explains the impeachment. A regime which abuses the law to cover-up for friends will abuse the law to hound enemies. Clearly the Rajapaksa notion of justice dovetails perfectly with the Nazi notion of justice, as explicated by Hermann Göring, "I know two sorts of law because I know two sorts of men: those who are with us and those who are against us" (Quoted in The Monthly Review – March 2009).

The PSC violated natural justice because its mandate was to act according to Rajapaksa justice.

Victor Klemperer argued that the psychological occupation of Germanyby the Nazis commenced with the corrupting and poisoning of words and concepts. For example, the Nazis changed the meaning of heroism, so that the fanatic became the new hero: "If someone replaces the words 'heroic' and 'virtuous' with fanatical for long enough, he will come to believe that a fanatic really is a virtuous hero and that no one can be a hero without fanaticism" (The Language of the Third Reich).

The Rajapaksas aim to forge a similar transformation in our notion of justice and injustice; the impeachment is a critical step in that dystopian journey.

Imagine the plight of the absolute majority of citizens if Lankan courts begin to follow the example of the PSC. Imagine judges like Wimal Weerawansa (abusively partial) or Anura Yapa (silently partial). Imagine trials in which a suspect is always presumed guilty and never given the time and the opportunity to prove otherwise. Imagine a judicial system in which the judge prosecutes and the prosecutor judges. Imagine living with Kekille justice for the rest of our lives.

The impeachment imperils more than the judiciary. As Chandra Jayaratne has pointed out, by making available the account details of a client to the parliamentarians who signed the impeachment motion, in blatant disregard of the due process, the CJ's bank/s violated principles of banking secrecy and best banking practices. Are the Rajapaksas planning to replace normal banking principles and practices with Rajapaksa banking principles and practices? The havoc such a process will wreak on the economy and the investment climate is easily fathomable.

Clearly nothing is safe from the Rajapaksa-contagion. In their pursuit of power, the Siblings will despoil all. Every Lankan institution, public or private, will be profaned. Can anything less extreme be expected from a regime which is persecuting an aged-grandmother for not betraying her grandson?

Are we willing to risk such a future? Are we ready to live in such a country?

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## SLBC Questions Whether The Rule Of Law Is So Sacrosanct

**by Basil Fernando**

On the SLBC radio, in the mornings, there is a program that is inappropriately entitled "People's Power." It is just political stooge programming, which tries to take up some current issues and create justifications for government positions. It is a dull and boring presentation but, since some of the issues discussed and the interpretations given throw some light on the kind of thinking that is promoted in favour of repressive measures, it is worth a short reflection.

In one of the programs (11th of December), the main topic discussed was on the Chief Justice's impeachment. The commentator attempted to give some of his own musings on some matters discussed. Seemingly irritated by constant references to the abuse of the rule of law, he posed a question as to whether the rule of law is so sacrosanct. If you take a lighter view on the separation of powers and the independence of the judiciary, it is quite natural to challenge the fundamental basis of all such notions.

If one has doubts as to whether human liberty is so sacrosanct, then of course it is natural to regard rule of law and all other consequent notions as of little or no importance. The reason why the removal of the Chief Justice of the country is being challenged is to preserve the principle of irremovability of superior court judges, which is central to all such notions related to the protection of human liberty. The contest, therefore, is not about an individual but about an institution. For individuals, to be safe from the greed and carelessness of rulers, there need to be institutions that create limits to what the rulers can do. If these institutions cease to exist or exist only in name, but are incapable of performing their functions, the rulers will have their heyday and the people will have their most miserable times.

That there should be limits to power, as power tends to corrupt, and that absolute power corrupts absolutely, is so axiomatic that hardly anywhere where reasons prevails is this idea ever challenged. But in Sri Lanka, it is now under challenge. To ask whether the rule of law is sacrosanct is to ask whether the rulers have to be bound by rules at all.

This attitude is manifest in almost all the expressions of every government spokesman on the issue of impeachment. Everyone admits that there is something wrong in the standing orders relating to impeachment, namely that it does not provide for an impartial inquiry by a tribunal. While agreeing with this, the government spokesmen tried to make the issue quite a trite and unimportant one. For example, Vasudeva Nanayakkara, a one-time radical with Marxist claims, in an interview with the BBC, said that he was of the view that there is something wrong in the Sri Lankan procedure as compared, for example, to that of India, where it is a tribunal consisting of three judges who will conduct the inquiry.

However, he said that since we have to take what we have, it is good enough. On the one hand, to admit that the Sri Lankan procedure is unfair, on the other hand to state that it is good enough, is of course contradictory, but this veteran politician saw not much significance in such contradictions.

The SLBC radio program took it even further. The commentator quoted some articles which have raised an issue as to how judges conducting an inquiry into a fellow judge's misconduct can be impartial. The judges meet each other privately, he went on to say, and therefore there is no guarantee of impartiality. Of course, the commentator failed to mention that any judge who is called upon to an inquiry who feels that he has some personal interest in the matter is under obligation to recuse

themselves, or face penalties. The idea that a judicial inquiry is so called because the inquiry would be conducted according to universally accepted norms was not considered significant enough to be mentioned.

The idea was to say that seven party members conducting an inquiry into allegations that the same party has made is no problem because whoever conducts an inquiry, there may be some objections that may be taken. That is how far the trivialization of rules and norms has sunk for people who are defending the indefensible.

In the BBC interview, when Mr. Vasudeva Nanayakkara was asked how a person who is given over 1000 pages to answer to the following day could do so, he took the same approach of making it into a trifling issue by saying that, well, she could have answered two or three pages on one day, and asked for more time to answer the rest.

Mr. Vasudeva Nanayakkara was aware of the list of accusations filed by the four opposition party members against the manner in which this inquiry was being conducted. However, none of those matters on very basic and fundamental issues mattered to him at all. The principle on which his triflings were based was that the rules do not matter.

In such an intellectual atmosphere, it is no wonder than the government allows the state media to be used to propagate the idea that the rule of law is not that sacrosanct.

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## The Greatest Product Of Our Own Political Laboratory

**by Basil Fernando**

Mr. Thinking Citizen asked the ruler, "Why don't you make a law against forced disappearances? It is such a terrible and ugly thing."

The ruler replied, "You Mr. Thinking Citizen, you make me laugh. You cannot understand what a great political laboratory our Sri Lanka has been and you try to undermine the greatest achievement that has come out of that laboratory?"

Mr. Thinking Citizen asked, "What is that achievement?"

The ruler replied, "It's our own utopia. Not the one you are educated about. In your utopia, reason is the king or queen. But what we have demonstrated to world is that there is a better way to rule. When every mother or father knows in their hearts that their child is not immune to be counted among the disappeared, we have the key to control the young. When we control the young, we can rule forever. See how we control insurgencies since 1972. Who else has been so successful? We have a lesson for the whole world."

"What is that lesson?" asked Mr. Thinking Citizen.

"It is that the body is all that there is. No soul, no sprit. See this UN and other pundits come and demand inquiries, prosecutions. When there is nothing to found by way of exhumation, what comes of their demands?" The ruler laughed. "There are no souls to come and tell tales. Only the body tells tales. That is the lesson, you fool, that we have found from the experiments in our own laboratory. Fellows like you do not know how to be proud of our own great achievements."

Pointing his finger at Mr. Thinking Citizen, the ruler said, "I want to be alive so that I can illustrate the contrast between your utopia and mine. So few of you are around. Others have been dispatched or fled to other worlds… Do not worry, I will let you live, so long as I need you… But don't take too much liberty, my guarantees are conditional."

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## The King Asserted That He Was Competent To Exercise Judicial Power: What The CJ Said?

**by Nihal Jayawickrama**

We do not seem to appreciate the fact that in this country it is the Constitution that is supreme; not the President, not Parliament; not the Judiciary, but the Constitution. It is explicitly stated in its preamble, that the Constitution is the supreme law of the Democratic Socialist Republic of Sri Lanka. It means not only that every institution of government is subject to the Constitution, but also that all power flows only from the Constitution. The legislative power exercised by Parliament, the executive power

exercised by the President, and the judicial power exercised by courts and other institutions established by law, are derived from, and defined by, the Constitution.

The Constitution also makes it explicit that only the Supreme Court has "sole and exclusive jurisdiction" to hear and determine any question relating to the interpretation of any provision of the Constitution. If any such question were to arise in the course of any proceedings in any other court, tribunal or institution that is performing a judicial or quasi-judicial function, such question is required to be referred forthwith to the Supreme Court. Under the 1972 Constitution, it was the Constitutional Court that performed this task. When that Court was examining the Press Council Bill, a question arose whether the requirement to convey its decision to the Speaker within 14 days of the reference was mandatory or directory. Amidst angry rumblings in the National State Assembly where the Speaker had ruled that it was directory, the President of the Court declared that the Court would sit even until doomsday, until all the counsel had been heard, because, as he explained:

"The duty of interpreting the Constitution is ours and ours alone. To interpret it, we have to first understand it. For that understanding, we have to rely on our own judgment, assisted, if need be, by the opinions of learned counsel. Any other course of action involves an abdication of our own functions. It therefore follows that our duty by the Constitution and the People in whom Sovereignty resides, is to continue to perform the function which the Constitution enjoins on us. That we intend to do."

It is from the Constitution (unlike in England) that the three principal branches of government derive their powers. Legislative power is exercised by Parliament and by the People at a Referendum. Executive power is exercised by the President elected by the People. Judicial power is exercised by "courts, tribunals and institutions, created and established, or recognized, by the Constitution, or created and established by law". The only exception is in respect of the privileges, immunities and powers of Parliament and of its Members, where "judicial power may be exercised directly by Parliament according to law". When Article 4 of the Constitution states that judicial power is "exercised by Parliament through courts and other institutions" that are "created and established by law", it obviously means that judicial power is exercised by Parliament, not directly, but through institutions that it has created and established by law.

Two important consequences flow from Article 4. Any institution seeking to exercise judicial power must be established by "law". Even the determination and regulation of the privileges, immunities and powers of Parliament is required to be by "law". In fact, Article 67 of the Constitution states that until these are determined and regulated by law, the Parliament (Powers and Privileges) Act of 1953 shall apply. There can be no confusion about what "law" means. Article 170 of the Constitution defines "law" to mean any Act of Parliament and any law enacted by any previous legislature. It does not include the standing orders of Parliament.

Why then does Article 107 of the Constitution give Parliament the option of acting either through law or standing orders in providing for matters relating to the presentation of an address for the removal of a Judge, "including the procedure for the investigation and proof of the alleged misbehaviour"? The answer to that question appears to be quite simple. If Parliament chooses the option of legislating, it may do, for example, what the Indian Parliament did by the Judicial Standards and Accountability Act of 2012. That is, establish a National Judicial Oversight Committee to which the Speaker of the Indian Parliament is now required to refer any charge of misbehaviour or incapacity against a Judge. That law has prescribed a detailed procedure for the investigation of such charge.

Alternatively, if Parliament decides to proceed by way of standing orders, it may provide for the Speaker to refer the charges to an existing institution vested with judicial power, such as the Supreme Court, as is the case in respect of a resolution for the removal of the President under Article 38 of the Constitution. It cannot, by standing order, establish, say, a new tribunal or other institution for this purpose since, under Article 4, that can only be done by law.

What Parliament also cannot do, is what Standing Order 78A purports to do. It cannot establish a Select Committee of Parliament to investigate the charges and report whether or not the offence of "misbehaviour" has been proved. This is because a Select Committee is not "a court, tribunal or other institution created or established by law to exercise judicial power". That was why, in 2000, by common consent of all the political parties, provision was sought to be made in the Constitution itself for an inquiry to be held, in the case of the Chief Justice, by three persons who hold, or have held, office in the highest court of a Commonwealth country; and in the case of any other Judge, by three persons who hold, or have held, office in the Supreme Court or Court of Appeal. This option was proposed by the United Front Government for the specific purpose of remedying the defect contained in Standing Order 78A.

There are sound reasons why a Select Committee is not competent to find a Judge guilty of "misbehaviour". A tribunal that is called upon to determine whether a charge of "misbehaviour" is proved, has to address three other questions before it can proceed to do so.

The first is the meaning and content of "misbehaviour", an offence not defined in our law. It will be necessary to identify the precise elements that constitute "misbehaviour", perhaps by reference to relevant decisions of courts in other jurisdictions. Without identifying these elements, it is not possible to proceed to the next stage, which is investigation. The purpose of the investigation is to apply the law to the facts as presented by the accusers, in order to determine whether the offence of "misbehaviour" has been committed.

The second is the degree of proof that is required. Is it a balance of probability, or proof beyond reasonable doubt? This matter needs to be clarified before proceedings

begin, because on that will depend the nature, quality and quantity of evidence required. Will a layman serving on the Select Committee be able to distinguish between these two standards of proof?

The third is the burden of proof. On whom does it lie? Under our law, the burden always lies on the person who makes the accusation; in this instance, the 117 members of the government parliamentary group. Every person is, under our Constitution, "presumed innocent until he is proved guilty". Standing Order 78A, on the other hand, states that the Judge who is accused "may adduce evidence, oral or documentary, in disproof of the allegations made against him". To require an accused person to disprove the charge against him, is to turn our system of justice on its head. Under Article 13(3) of the Constitution, it is only by law (and not by standing order) that Parliament may place the burden of proving particular facts on an accused person. On that ground, the standing order is clearly unconstitutional.

The determination of these three questions is a classic example of the exercise of judicial power. It is no different to the situation envisaged in Article 36 of the Constitution where the Supreme Court will need to make similar determinations before a resolution to remove the President from office is voted upon in Parliament.

In this connection, it may be pertinent to recall the celebrated conversation that Sir Edward Coke, Chief Justice of England, had with King James I in 1607. The King asserted that he was competent to exercise judicial power. The Chief Justice records thus:
* Then the King said, that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges:
* To which it was answered by me, that true it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason, but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it; and which protected His Majesty in safety and peace:
* With which the king was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said.
*Courtesy: The Island*

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## Constitutional Supremacy Or Parliamentary Supremacy?

by Kamal Nissanka

When notices were sent to the Hon speaker, President and the members of the Select Committee impeaching Chief Justice by the registrar of courts, the Speaker and leader of opposition were vociferous about the notion of supremacy of Parliament and they seemed not to heed to the Supreme Court request/order to appear before or submit objections on pending cases against them. They by now should know that only the President of the country under the constitution is immune to litigation. If the

parliamentarians concerned had thought that they were also citizens of Sri Lanka as us, they would have readily abide by the Supreme Court directive until the constitutional issue before the court is finally determined. Unfortunately Hon Speaker further kept a step forward and related a speech delivered by Mr.Anura Bandaranaike , then Speaker of Parliament in 2001 upholding the idea of parliamentary supremacy when there was an stay order against the Speaker.

Now if one goes to the root of the logic behind the speaker 's speech one can understand that what the speaker believed was that parliamentary supremacy could not be infringed by any other outside body. It is worthy at this stage to note that belief of Parliamentary supremacy is a notion evolved in United Kingdom where there is no written constitution. In short Parliamentary supremacy can be defined as the power of parliament to make laws and unmake laws. The duty or business of the courts is to follow the legislation already enacted by Parliament and then interpret, adjudicate, redress or punish. Yet, though the courts do not make any legislation judgments of superior court are considered as binding law.

In the post independence period political-legal community followed a tradition to accept the notion of Parliamentary supremacy as experienced in United Kingdom. Yet, although the Soulbury Constitution upheld the idea of parliamentary supremacy; it is interesting to note that Parliaments under the Soulbury Constitution also did not enjoy infinite supremacy to make laws as the constitution under Article 29(2) restricted to make legislation in some areas and subjects.

The 1972 constitution which had only one chamber was consciously framed on the basis of the notion of parliamentary supremacy. Accordingly, legislative power was vested in the National State Assembly, executive power in the National State Assembly through President and the cabinet , while judicial power by National State Assembly through courts except in parliamentary privileges. There was also a Constitutional Court to determine matters relating to constitutionality.

The 1978 constitution which lasted for over 30 years now is somewhat different from the two earlier constitutions. The founders of the constitution have clearly deviated from the British tradition of constitutional theory. Prof.A.J. Wilson, former professor of Political Science, declared that the 1978 constitution had been extensively influenced by the present French Constitution. The 1978 constitution took a quasi federal nature with introduction of 13th amendment and parliament lost some of its powers regarding some subjects and lost sole supremacy over legislation.

On the other hand this parliament does not have executive power as in the 1972 constitution. 1978 constitution explicitly says that executive power shall be exercised by 'the president of the republic elected by the people "(not by parliament). So this is clear deviation from the British tradition of parliamentary supremacy. True that ministers who are also said be in the executive branch are chosen from the parliament but they are subordinated to the president who can keep any ministry or department under him. They do not enjoy the prestige they had under the British

tradition. The president through the cabinet can make the parliament his appendage and the dignity of the parliament is completely eroded, added by the PR system of electoral method which allowed all sorts of anti social elements to enter into parliament. Parliament is further devalued because the President can dissolve it after one year of an election.

The position of judiciary is made explicit under the 1978 constitution. According to the Article 118, the Supreme Court is the 'highest and final court of record' in the Republic. It has jurisdiction in respect of constitutional matters, for the protection of fundamental rights, consultative jurisdiction, and jurisdiction in election petitions including the election of President. It also has jurisdiction whether to determine a bill was consistent with the constitution. This jurisdiction can invoke by president or any other citizen. Its determination is sought of regarding urgent bills which the cabinet thinks to pass urgently for national interest concerns. It has jurisdiction to determine the validity of the expulsion of a member from a political party. It has role to play in the impeachment of a President of the Republic. Therefore it is very clear that the Supreme Court under the present constitution is a very powerful body that is endowed with important national responsibilities. Further the constitution has endorsed the idea of an independent judiciary.

Standing orders cannot be considered as law by any learned person in the legal profession. Under our legal system laws are legislation, decided cases, customs and may sometimes international covenants. Standing orders are procedural regulations. Further they cannot be formulated against the provisions of the constitution. Rules and regulations are there in various corporations, companies, societies to conduct their day to day activities. Can an outsider be brought to face trial on the basis of these regulations? Is that justice? Is that rule of law?

When there is matter before the Supreme Court to be decided, specially a matter of interpretation it is the sacred duty of all law abiding persons to obey its directives. Under our constitution people are sovereign and the constitution is supreme not the parliament. This is what is called constitutionalism, a legal philosophy derived from the famous case in the United States of America, Marbury Vs Madison, 1 Cr. 137 (1803) decided by John Marshall ,CJ. The decision held that:

"Congress did not have the power to add to the original jurisdiction of the Supreme Court; thus, the available remedy mandamus ,was unconstitutional .More significantly , Marshall logically extracted the power of judicial review from the constitution by reasoning that the document was supreme and, therefore , the Supreme Court should invalidate legislative acts that ran contrary to it."

In conclusion it could be said that the idea of parliamentary supremacy which both the Hon. Speaker and the Leader of the Opposition attempted to uphold in a holy manner is an outdated and obsolete political-legal concept which has no relevance in the present constitutional framework of Sri Lanka.

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*Courtesy: The Colombo Telegraph*

"Impeachment" is an arcane process whereby Parliament tries the misconduct charges and requests the head of state to remove a guilty jurist. Normally the judge will first have been convicted of a crime by the courts and will be impeached on the basis of that finding, which would have been reached by an independent and impartial tribunal. But the principle of judicial independence requires that no judge should be impeached for doing his or her duty merely because the decision has upset the government. That is exactly what the Rajapaksa government has done in the case of Bandaranayake.

- GEOFFREY ROBERTSON QC

About AHRC: The Asian Human Rights Commission is a regional non-governmental organisation that monitors human rights in Asia, documents violations and advocates for justice and institutional reform to ensure the protection and promotion of these rights. The Hong Kong-based group was founded in 1984.