A collection of documents

THE IMPEACHMENT MOTION AGAINST SHIRANI BANDARANAYAKE Chief Justice Of Sri Lanka

Reversed Edition
December 21, 2012

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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SHIRANI BANDARANAYAKE
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Compiled 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.

02

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

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

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.

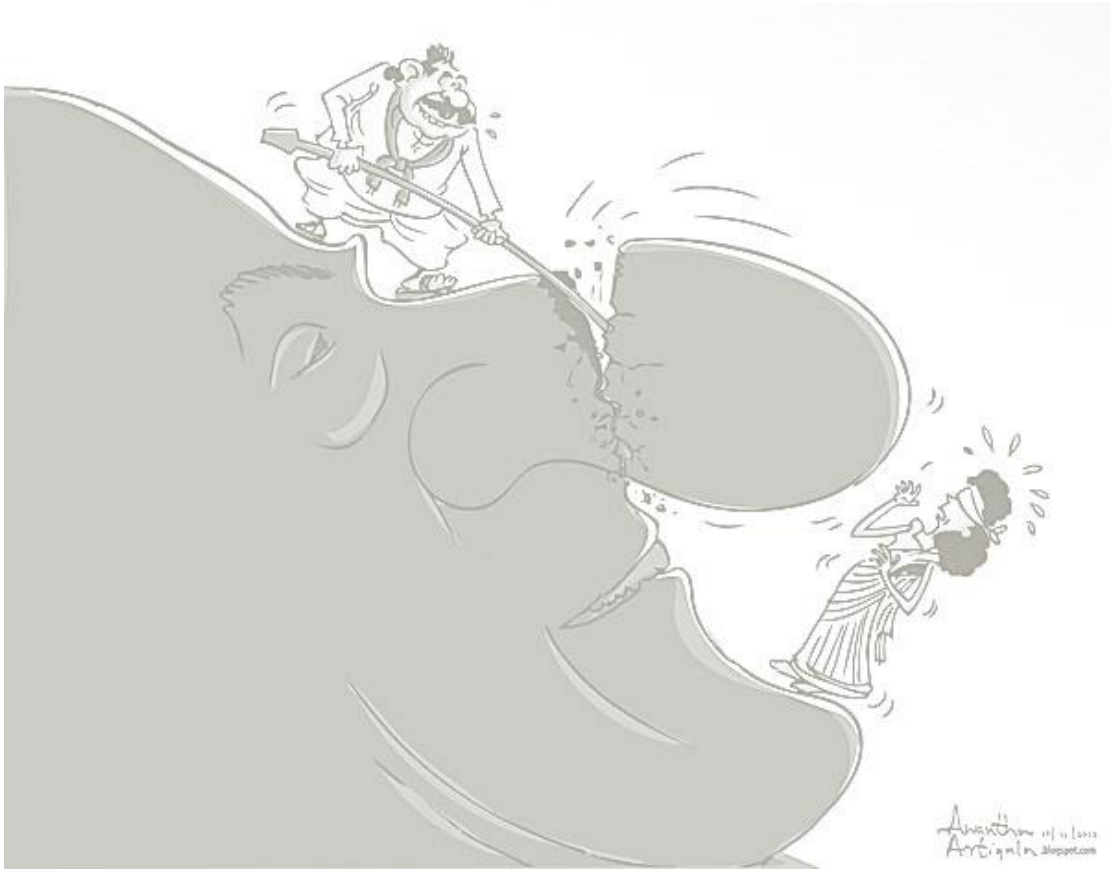
113. The Petitioner states that the purported exercise of the judicial power by the SelectCommittee is unconstitutional and therefore any findings of the said purported Select Committee has no force or effect in law. 114. In the aforesaid circumstances the Petitioner states that(a)exercise of judicial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

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.

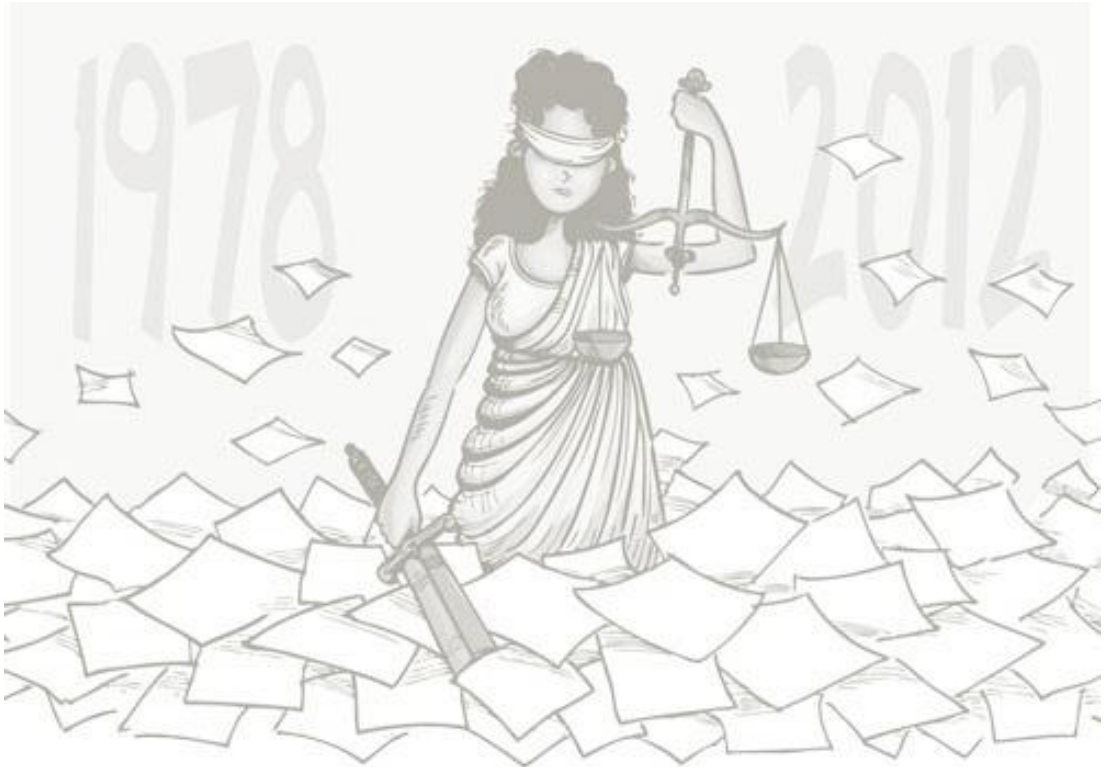
I am attaching herewith a copy of a statement issued by the Asian Human Rights Commission pointing out the basic threats faced by the JSC and the independence of the judiciary in general in Sri Lanka.

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

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.

** Jasmine Joseph is a professor of law at the National University of Juridical Sciences, India.*

(Courtesy: The Colombo Telegraph)

2-A

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.

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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.

**Elmore Perera, Attorney-at-Law, Founder, Citizen's Movement for Good Governance,Past President, Organisation of Professional Associations*

(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)

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)

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)

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)

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)

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)

18

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)

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J.C.Weliamuna- Impeachment of CJ-An Unconstitutional Witch Hunt (Colombo Telegraph)
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(Courtesy: The Colombo Telegrpah)

19

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)

20
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.

30

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.

32
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)

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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)

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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)

45
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)

48

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)

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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)

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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.

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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)

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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)

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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.

(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.

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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

93

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.

"The select committee has no jurisdiction to exercise judicial powers. I request that an inquiry be held by lawfully appointed body consisting of eminent and independent persons not politically affiliated."
Shirani Bandaranayake
Chief Justice of Sri Lanka
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"The chief justice or her lawyers must be provided an opportunity to cross-examine witnesses and documents collected. It is only then that the select committee has to determine whether the chief justice is required to disprove the charges"
UNP parliamentarian John Amaratunga
Member of the PSC on the impeachment motion against CJ
****

"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."
Basil Fernando
Asian Human Rights Commission
****

"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."
Jasmine Joseph
Professor of law at the National University of Juridical Sciences
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"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."
Sergei Golubok
Attorney-at-Law, St. Petersburg Bar Association, Russian Federation
****

"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."
Kishali Pinto Jayawardena
Law & Society Trust

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