article 2

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Struggle for Constitutionalism & Judicial Independence in Asia

Is unjust suffering and intentional infliction of injuries by those with power & authority an intrinsic part of human civilization? Can we say as human society we have really progressed when we continue to brutalize each other? Can anyone price the social and generational impact of torture on entire communities by state forces? Are we doing enough in our family, community, nation and beyond boundaries, to stop human beings from becoming victims of torture?

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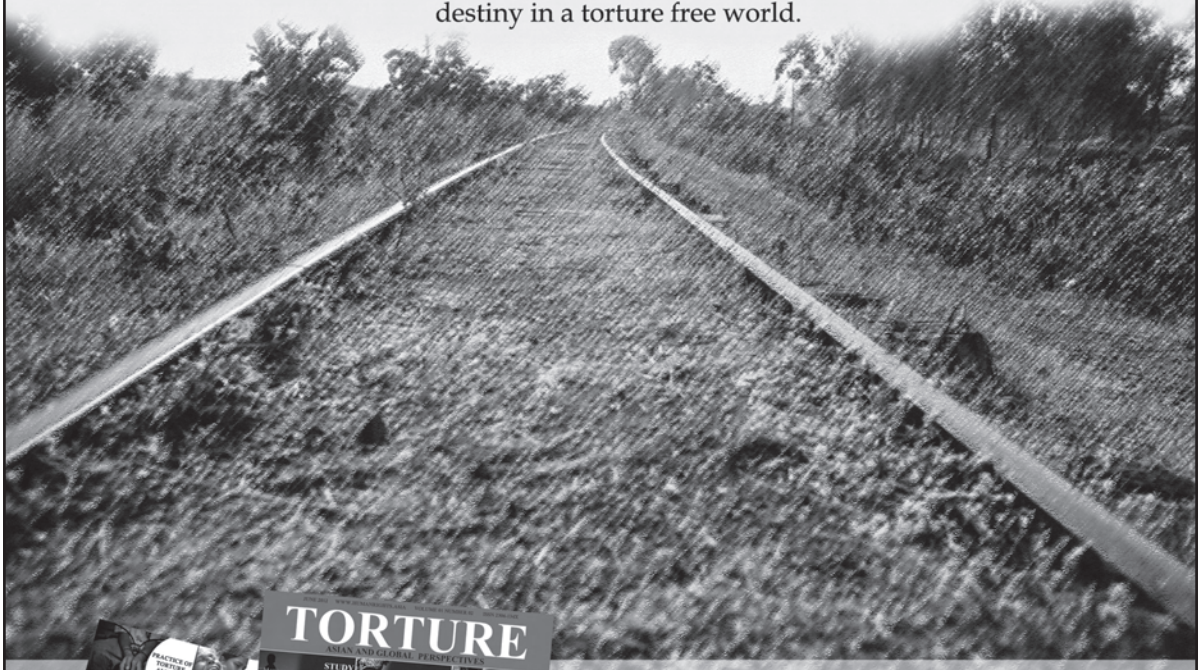

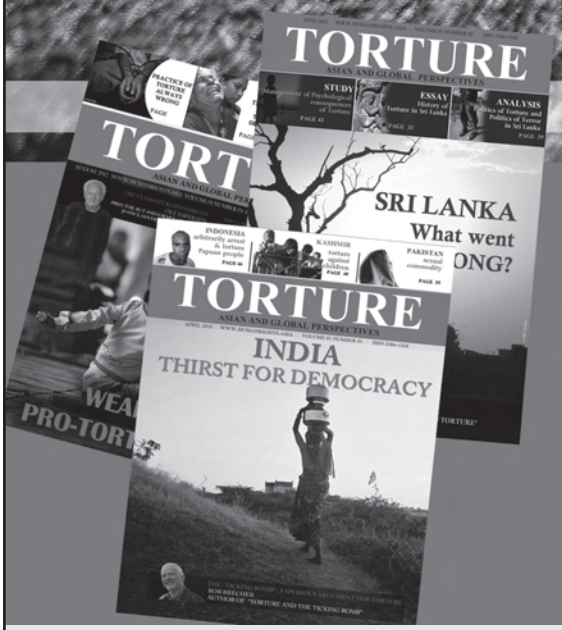

BELIEVE IN ONE GOAL: TORTURE FREE SOCIETY

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Introduction: Judicial role and judicial independence

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In this issue of *Article 2* the central theme is judicial independence. Judicial independence is under threat everywhere in Asia. Therefore the selection of the theme is quite timely.

In a very recent order from the Supreme Court of India, the court stated as follows:

> *For this Court, the life of a policeman or a member of the security forces is no less precious and valuable than any other person. The lives lost in the fight against terrorism and insurgency are indeed the most grievous loss. But to the State it is not open to cite the numbers of policemen and security forces killed to justify custodial death, fake encounter or what this Court called "Administrative liquidation". It is simply not permitted by the Constitution. And in a situation where the Court finds a person's rights, specially the right to life under assault by the State or agencies of the State, it must step in and stand with the individual and prohibit the State or its agencies from violating the rights guaranteed under the Constitution. That is the role of this Court and it would perform it under the all circumstances. We thus, find that the third plea raised in the counter affidavit is equally without substance.*

Suresh Singh vs Union of India & Another - Writ Petition (Criminal) order dated January 4, 2013

In this issue the threat faced to the independence of the judiciary in Sri Lanka by way of the arbitrary removal of the Chief Justice, Dr. Shirani Bandaranayake, is discussed. An extract from the report on the impeachment of Sri Lanka's Chief Justice by Sir Geoffrey Robertson on behalf of the Human Rights Committee of the Bar Association of England and Wales gives a succinct exposition of all the factors relating to this removal and why the removal was wrongful.

It is quite relevant to note that this bold attack by the Executive to remove the Chief Justice for the first time in the long history of the Supreme Court of Sri Lanka, the first chief justice of which was appointed in 1802, did not happen by way of an accident.

There was a long process leading up to the gradual undermining of the Supreme Court.

Close examination of the conflict between the Supreme Court and the Executive would show that one of the very important causes (perhaps not the sole cause) of the conflict between the Executive and the Judiciary also lies in the area that the Indian Supreme Court stated, in its judgment on *Suresh Singh vs. Union of India*, as: 'administrative liquidation.'

In Sri Lanka, from1971 following a minor insurrection, the government and with the complete support of the opposition at that time, engaged in a ruthless spree of killings of between 5-10,000 persons. The victims were mostly youths who were killed in custody after their arrest. There has never been a proper judicial intervention to inquire into these killings, and the manner of which could be considered as an: 'administrative liquidation'. From then on there has been a continuous extrajudicial killing often by way of enforced disappearances and the number of such disappearance would easily exceed 50,000. The government appointed commissions and they themselves recorded the complaints of enforced disappearances of around 30,000 persons between 1987 and 1991 mostly in the south. The conflict with the LTTE (Liberation Tigers of Tamil Eelam) has caused large numbers of disappearances in the north and east and all these have not been counted. It was recently reported that about 5,000 complaints were made to the United Nations Working Group on Enforced or Involuntary Disappearances (WGEID) and the Sri Lankan government only accounted for 17 out of the 5,000.

What is relevant in the *Suresh Singh vs. Union of India* case was that these killings, if applied in the Sri Lankan context, are considered to be as a legitimate form of 'Administrative liquidation'. However, the inability of the Supreme Court of Sri Lanka and the judiciary to challenge these arbitrary killings by Sri Lanka security forces and its willingness to be silent on the issue has undermined the Judiciary more than any other reason. The silence of the courts has created a vast gap between the people and the courts. The courts have failed in proving that it is capable of intervening on this crucial issue by demanding accountability from the government in power.

This was perhaps the reason why the Executive was able to move to the extent of arbitrarily removing the Chief Justice herself. Had the courts maintained their moral authority by way of a proper judicial intervention to require accountability, for example when the government takes the lives of some of its citizens, the people would not have allowed the Executive to strangulate the Judiciary by way of such an arbitrary removal. The Judiciary, having failed to play its role in the protection of the most precious of all rights: the right to life; has bared its throat to an extent that the Executive is now able to take away its own life.

In Pakistan the judiciary played a great role in bringing to an

end a long period of military coups in the country. When the Chief Justice, Iftekhar Choudhry, was removed by the Executive the people intervened and brought the Chief Justice back to his chair. The Supreme Court in turn by way of an historical judgement declared that any arbitrary overthrow of the government as unlawful and that the Judiciary will stand against it. In this way the Judiciary paved the way for the stability of the democratic system. The Supreme Court, too, played a crucial role in the protection of the right to life by taking *so motu* action on cases of enforced disappearance and extrajudicial killings.

In fact, the role that the Pakistan's judiciary prior to March 2007 had taken, by way of protecting the constitutional rights of the Pakistani to life, helped in having its judicial independence restored by way of a popular movement after four months of bitter struggle by the lawyer's movement. However, six years on there are some concerns as to whether the Supreme Court has overstepped its boundaries in some instances. This is discussed in this edition.

In Philippines, the overthrow of the dictatorial Marcos regime in February 1986 by a popular people's power, known as the EDSA revolution, give rise to the 1987 Philippines Constitution. The Filipino's experience in the dark years of martial rule made a huge contribution in the impeachment of the former Supreme Court Chief Justice, Renato Corona, over allegations of corruption. The Constitution's provision on impeachment of high officials has also legitimized the impeachment process of the country's former highest officials: Joseph Estrada in 2000 and Corona in 2012.

Corona's linked with former president Gloria Macapagal-Arroyo, who appointed him month before the then newly elected president, Benigno Simeon Aquino III, was to assume office, has tainted his credibility to uphold the integrity and independence of the judiciary. Corona's predecessor, Reynato Puno, was popularly known for his judicial interventions, by promulgating the *writ of amparo* and *writ of habeas data*, during his term. In contrast, Corona's alleged use of his authority to frustrate or block investigation against former President Macapagal-Arroyo for widespread violation of human rights, notably of extrajudicial killings of human rights and political activists, has aggravate his unpopularity and the lack of support to his defense from the Filipino people.

Moreover, the experience of the Philippines in the impeachment of Corona, and former president Joseph Estrada, who were both accused of corruption, is also discussed in an article of critiquing the Philippines and the Sri Lanka impeachment of chief justice.

In conclusion, the judicial role in the protection of the life and liberty of the people and judicial independence are inseparable. The Judiciary needs to be independent in order to play the role of the protector of the individual. On the other hand the courts need to play that role effectively so as to justify their existence

legally and morally.

Thus, when threats to the independence of the judiciary are posed, as in Sri Lanka, the responsibility of the Executive as well as the responsibility of the Judiciary itself should also be examined. The Judiciary that fears to expose itself to risk, by way of defending the rights of the individual, will sadly expose itself to the Executive who would not fear to attack the Judicial independence. It is even more evitable when the Executive knows full well of the great gap that existed between a Judiciary whom the people believe lacked courage in protecting their constitutional rights. Therefore, the lesson to be learnt that comes from the recent Indian case cited above should be considered quite seriously in discussions on the independence of the Judiciary.

By exposing the current events in Asia, we hope that this edition could contribute to the ongoing discourse on constitutionalism and judicial independence, and of the utmost role of the judiciary on the protection of fundamental rights.

Editor's note: Danilo Reyes would like to thank his colleagues, Marya Zaborowski and John Stewart Sloan, for their assistance in copy-editing. He also wishes to thank Prof. Michael Davis of the Department of Law at the University of Hong Kong, for his insights that contributed to this theme during their discussion.

To his colleagues: Basil Fernando, Baseer Naweed and Prof. Akmal Wasim for their contributions and invaluable insights as shown in the articles that they have written for this edition of *article 2*.

On January 13, 2013, the 1978 Constitution is fulfilled

Basil Fernando, Director, Policy and Program Development, Asian Human Rights Commission & Asian Legal Resource Center

Today, with the President of Sri Lanka signing the removal notice of the Chief Justice of Sri Lanka, Dr. Shirani Bandaranayake, the 1978 Sri Lanka Constitution that perpetuates the absolute power of the Executive President has been fulfilled.

The 1978 Constitution is a representation of the conflict between the rule of law and the absolute power of the Executive President. The historical circumstances in 1978 were not right for the fulfillment of this Constitution. Thirty-four years later, with the progressive deterioration of all the positive factors of the previous period, with the removal of the Chief Justice, the intent of the 1978 Constitution has finally been fulfilled. Now, the rule of law as a logical system has no ground to stand on. The two basic principles of constitutionalism: separation of powers and the independence of the judiciary could no longer be practically implemented.

In 1978, despite the weakening of the system by the 1972 Constitution, there were still many forces which were vigorously supportive of the rule of law system. First of all, and above all, there was the sentiment among the people that was formed by long enduring practices of respect for the rule of law. The British introduced the law as the organizational principle of Sri Lankan society. They introduced laws for almost all aspects of life and these laws constituted the railroads on which all the institutions of Sri Lanka ran.

Over a period of 34 years, Sri Lankans witnessed the collapse of all the basic institutions in their society. The collapse of these institutions means that the basic principles of law on which these institutions were organized and operated have been seriously disturbed. Among the institutions which collapsed were Sri Lanka's policing system, the public service commission, the election commission, the system of controlling bribery and corruption, and the department of the Attorney General. The collapse of these institutions was recognized by the Sri Lankan parliament when they made a limited attempt to give some life

Sri Lanka's Chief Justice Shirani Bandaranayake, accompanied by her legal team led by Presidents' Counsel Nalin Laduwahetty and Gunaratne Wanninayake, arrived at the main entrance of the Commission to Investigate Allegations of Bribery or Corruption in Colombo on March 18. *Photo: mirror.lk*

back to these institutions by way of the 17th amendment. When the 18th amendment was passed, that rescue attempt was abandoned and the very possibility of the survival of the multi-party system and the possibility of a genuinely elected legislature was brought to an end.

In 1978, there was also the necessary critical intellect that could support the rule of law system. The judges were still those of 'the good old tradition,' and so were the lawyers. However, during the last 34 years, there has been a deliberate undermining of the Judiciary in many ways. These are well documented and commented on by many authors. As the Judiciary was undermined, those who still wanted to survive had to adjust to the new environment.

> **"Officially, lip service was done to the principle of the independence of the Judiciary."**

However, there was one factor that undermined the Judiciary and the legal practice more than any other. It was the active cooperation of President Chandrika Kumaranatunge and the then Chief Justice Sarath Nanda Silva to undermine the legal system in favor of the arbitrary power of the Executive President. S N De Silva dealt the death blow to the whole system by unscrupulously manipulating every aspect of judicial practice in Sri Lanka. In a devilish manner, he ignored the procedural aspect of the law. And the rule of law rests as much on the procedural aspect as on the substantive aspect of law. All the nuts and bolts were loosened so that the system could not run anymore.

Officially, lip service was done to the principle of the independence of the Judiciary. But meanwhile, the internal system was in great jeopardy. Merely a façade of respect for the system remained. With the impeachment and the manner in which it was conducted, this screen has now been unmasked. Belatedly realizing that the final hour had come, the Supreme Court and the Court of Appeal, in what will remain as historical judgments, made an attempt to come to the rescue of the system.

"The experimentation of authoritarianism, which also has traditional foundations around the world, will be what Sri Lanka experiences now."

The lawyers and judges also rallied with the kind of solidarity that has never been witnessed before. It was as if all relatives were gathering together on realizing that one of their dear ones was now critically ill. They tried to make a proverbial last minute intervention. However, those who wanted the system to be dead wanted it to be dead sooner than later. The same hand that crushed the rescue operation by way of the 17th amendment has now decisively signed the declaration of death of the independence of judiciary and the rule of law.

What the Sri Lankans face now is a completely new situation. In previous statements and articles we have tried to sketch what is waiting for the Sri Lankan society as whole and in all Sri Lankan institutions. The question that remains to be answered is how the people of Sri Lanka will find a way, so that they can live under a system of law that will protect their liberties.

The system that was based on the ideas of John Locke, Baron de Montesquieu, Jean-Jaques Rousseau and others, which were the basis of French, British, American and all the best constitutional traditions of liberty, has come to an end today.

The experimentation of authoritarianism, which also has traditional foundations around the world, will be what Sri Lanka experiences now. The way out is for the present and future generations of Sri Lankans to work out, if they are to enjoy the protection of their liberties by the state again. However imperfect 'the good old tradition' was it was one based on the global tradition of liberty. What is to come will be the opposite of that tradition. Perhaps a source of hope might be Tolstoy's short story, "What Men Live By", which is a good read for an occasion such as this.

For an extensive discussion on the 1978 constitution, kindly read Gyges' Ring - The 1978 Constitution of Sri Lanka available at: http://www.humanrights.asia/resources/books/AHRC-PUB-002-2011.

Extract of the report on the impeachment of Sri Lanka's chief justice

Sir Geoffrey Robertson, QC, conducted for the Human Rights Committee of the Bar of England and Wales

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

2. It is a regrettable fact that close scrutiny of the impeachment by independent observers has not been welcomed by the Sri Lankan government. It has refused to grant visas for an International Bar Association fact-finding mission, which was to have been led by the former Chief Justice of India, J.S. Verma. The Sri Lankan Media Minister explained "The impeachment was done in accordance with the Sri Lankan Constitution. Outsiders cannot criticize the Constitution. This is an infringement of the sovereignty of Sri Lanka, which the government is bound to protect".[1]

   On the contrary, the independence of the judiciary is a requirement of every human rights treaty and a requisite for membership of the Commonwealth: when a Chief

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

Sri Lanka's Chief Justice Shirani Bandaranayake (C) walks towards a car outside the Supreme Court in Colombo on November 23, 2012 as lawyers see her off before she travels to the national parliament to face impeachment proceedings. Bandaranayake faces 14 allegations of financial and official misconduct after the Supreme Court gave rulings that were seen as unfavourable for the government of President Mahinda Rajapakse.
Photo: AFP /Ishara S. Kodikara

Justice removed from office, whether in accordance with the Constitution or not, the question for outsiders as well as insiders is whether it has been done in a manner which comports with the judicial independence guarantee in international law. A mission of distinguished lawyers seeking to elucidate the facts cannot possibly infringe the sovereignty of the nation.

3. Nonetheless, it has meant that I have been unable to travel to interview the various parties – fortunately, an exercise which has not been an obstacle to the establishment of such facts as are necessary for this report. That is because I am in possession of all relevant documents – court judgements, 'Hansard' of the parliamentary impeachment process, the fourteen charges against the judge and two volumes (some 1600 pages) published by Parliament which contain the evidence. I have the statement by the four members who walked out of the Select Committee, its Minutes of evidence, and the findings of guilt on three of the charges. I have also read some press coverage of what happened, in papers such as the "Colombo Telegraph", "The Sunday Times", and "The Island online", as well as overseas reporting in journals such as "The Economist" and a collection of documents relevant to the impeachment published by the Asian Human Rights Commission. As will appear, the facts upon which I base my conclusions are either on record or incapable of significant challenge.

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

   - The reason for the impeachment. Were the motives "political" – for example, as a reprisal for some judgement against the government, or was the impeachment process begun out of genuine concern for the public interest because there was prima facie evidence she had committed some crime or serious misconduct?
   - The nature of the charges. Did they relate to the political inconvenience of her judgements, or to allegations of serious misbehaviour?
   - The fairness of the method used for proving them. Did the Select Committee give her a fair hearing and adopt a proper standard of proof?
   - The question of political pressure. Was the Parliament was prejudiced or placed under pressure e.g. by demonstrations against the judge orchestrated by the government.

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

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9. It is generally accepted, and may now be considered an imperative rule of international law, that judges cannot be removed except for proven incapacity or misbehaviour. 'Incapacity' is clear enough, and is not relevant in this case. 'Misbehaviour' is a broad term and should be limited to serious misbehaviour. Criminal offences would normally qualify, although even here there are lines to be drawn: in

England a circuit judge was sacked after his conviction for smuggling whisky, but senior appellate judges have escaped impeachment for drink-driving offences. Criminal offences can at least be 'proven' – namely by the verdict of a judge and/or jury, and subsequent impeachment by Parliament is scrupulously fair to a judge given the opportunity (however unlikely it is to succeed) to claim that his conviction was wrongful.

"Why should a judge be dismissed for conduct which is lawful?"

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

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

    "Judges should be subject to suspension or removal only for reasons of incapacity or misbehaviour that clearly renders them unfit to discharge their duties".[2]

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

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

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

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

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

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

It is essential that the misbehaviour or incapacity be proved. But how? By what procedures and according to what standards? Article107 is deficient in this respect – it requires at least a third of MPs to sign the motion for an address, but goes on: "the investigation and proof of the alleged misbehaviour or incapacity and the right of such judge to appear and be heard in person or by a representative" is left to Parliament to provide, "by law or by Standing Orders…".[3] The President's powers to appoint (Article 122) and dis-appoint (Article 107) judges were, of course, based on the Presidency as a ceremonial position under a ? style constitution. Subsequently, the President became the political leader of the country, with executive power and majority support from his party in Parliament.

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

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

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

3 S107(3).

opportunity to refute the charges.[4] The Beijing Rules insist that "Removal by Parliamentary procedure... should be rarely, if ever, used" because "its use other than for the most serious reasons is apt to lead to misuse".[5] When it is used, "the judge who is sought to be removed must have the right to a fair hearing".[6] The Latimer House principles are similarly emphatic: Principle VII lays down that "any disciplinary procedures should be fairly and objectively administered... with...appropriate safeguards to ensure fairness".

"The impeachment procedure is arcane, the Order is elliptically drafted and at no point does it envisage the involvement of persons other than politicians."

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

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

4 *Evan Rees v Richard Alfred Crane* 1994 1 AC 173.

5 Rule 23.

6 Rule 26.

the impeachment debate, at the end of which, if more than half the MPs favour the motion, the speaker will present the 'address' to the President who may then remove the judge.

20. These rules, which were broadly followed in Dr Bandaranayke's case, are highly objectionable. In the first place, the Select Committee members must all be MPs, and the Speaker may (as he did in this case) appoint a majority of government Ministers. Secondly, the Committee hearings must necessarily be in secret, and remain so until reasons for a 'guilty' verdict are presented to Parliament. This is a plain breach of Article 106 of the Constitution which provides that every "tribunal or other institution established under the Constitution or by Parliament" (which would include a Select Committee established to try a judge and report on whether he is guilty) "shall be held in public and all persons shall be entitled freely to attend such sittings". The Rules are, therefore, contrary to the Constitution, which plainly requires open justice, as do the Latimer Rules and the Beijing principles and the common law. The Standing Order gives the judge a few rights, but the basic protection of openness, and the rights to have time to prepare a defence, and to cross-examine adverse witnesses, are not mentioned. Nor is the most important protection of all, the burden and standard of proof. The burden must fail in or the prosecution and conviction must only come after "proof beyond reasonable doubt". In all these respects, the Standing Orders of Parliament are gravely deficient in fairness.

"Sri Lanka's head of state is not an apolitical figure like the Queen in the UK, but a street-fighting politician who is head of the government and has wide- ranging constitutional powers."

21. There are other aspects to the protection of judicial independence which should be observed when a judge – especially a Chief Justice – is put through the demeaning ordeal of an impeachment. There must be some respected and responsible trigger for this draconian process, yet Article 107 provides that merely a third of the number of MPs can commence it, by signing a request to the Speaker. As this number of supportive members will necessarily be commanded by the party or coalition in power, it is a frail reed indeed to protect a judge from reprisals by the government if his rulings discomfort its Ministers. As for the President, who has the supreme and absolute power to accept or reject the address, this is not the ceremonial President envisaged by Westminster model institutions. Sri Lanka's head of state is not an apolitical figure like the Queen in the UK, but a street-fighting politician who is head of the government and has wide- ranging constitutional powers at his discretion. His party or its supporters will command over half of the MPs, and so can easily round up one third of them to initiate the process to remove a judge. In Sri Lanka, in 2012-13, President Rajapakse and his United People's Freedom Alliance, with supporting parties, had a large majority in Parliament - more than two thirds of its total of 225 members. The President's elder brother, Chamal Rajapakse, was the Speaker of the House who oversaw Dr. Bandaranayke's impeachment. In this situation, the terms of the Constitution afford no real

protection to a judge whose rulings incur the enmity of the ruling President or his family or his party.

> **"In Sri Lanka, as in many other countries, it controls and heavily influences the state media, which endorses its campaigns."**

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

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

"While dialogue between the judiciary and the government may be desirable or appropriate, in no circumstance should such dialogue compromise judicial independence".[7]

7 Guideline I, point 5.

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

“Summoning two of the three judges who were about to deliver a politically important decision, and giving no reason for the summons, was unsatisfactory behaviour on the part of the President.”

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

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

29. It was a surprisingly powerful statement, perhaps issued by a Commission rattled by the demonstrations on the previous day, but it threw down a gauntlet to the government. A week went by before President Rajapakse responded, by telling the media that he had summoned the JSC members not in his capacity as President but in his role as Minister of Finance, merely in order to discuss their budget. If this had been the case, it was very surprising that his secretary failed to mention this purpose at the time. Although the President denied any intention of interfering with the judiciary, I have seen no evidence that he ever condemned the public demonstration against it, and nor did his law officers. The following day (28 September) the JSC secretary claimed that there was a security threat to the Chief Justice and her fellow judges, although it turned out that the most immediate threat was to himself. President Rajapaksa told national newspaper publishers at a breakfast meeting on 4 October that he had instructed the Criminal Investigation Department to look into an allegation of sexual harassment that had been made against the Secretary. This man, a District judge, was assaulted three days later, after dropping his wife and son at school, by unidentified men and suffered serious injuries to his face and head. On the following day, judges and magistrates refused to attend their courts in protest against this attack which they said was incited by the government. Its perpetrators have still not been arrested.

> **"The pressures that were building up in the weeks before the impeachment, partly as a result of the Supreme Court's decision to strike down the Divineguma Bill."**

30. These incidents show the pressures that were building up in the weeks before the impeachment, partly as a result of the Supreme Court's decision to strike down the *Divineguma* Bill. Before explaining its significance, I should mention one other vulnerability of the Chief Justice at this time, namely her husband. Pradeep Kariyawasam had been appointed by the President as Chairman of the National Savings Bank, shortly before his wife was made Chief Justice. Although he was not a politician or a backer of the President's party, some thought at the time that this favour from the President, who then appointed him as director of a public company chaired by another of his brothers (Gotabhyaya Rajapaksa, the Defence Secretary). Some commentators expressed concern that his appointment might incline his wife to repay the favours by more pro-government judgements. However, the bank made a bad investment decision, lost public money, and Kariyawasam tendered his resignation in May 2012. In August, at the very time the argument about the constitutionality of the Divineguma bill was being heard by the Supreme Court, he was summoned by the Bribery Commission to give evidence about the share transaction. This might well have been because the share transaction was dubious, although some thought that it was a means by which the government could put further pressure on the Chief Justice. There was media comment at the time about why he alone had been summonsed, and not others who were more involved in decisions to make the bad investment.

c. The Devineguma bill

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

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

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

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36. The impeachment would soon come. The *Divineguma* decision against the government was handed down on 17 September, angering the government by invalidating legislation that was important to its agenda, followed by the protest of the JSC and the assault on its Secretary. The press on 26 September and again on 4 October reported that the President and a committee of Cabinet members were discussing "strong measures" against the judiciary. It may be that at this point the drafting of impeachment charges began, although Basil Rajapaske was prepared to give the Supreme Court one last chance. On 10 October he tabled the Bill again, reporting that it had now been approved by eight out of nine elected Provincial Councils, and by the Governor who had been imposed on the largely Tamil and war-torn Northern Province. Challenges were made again, to the same Supreme Court bench, headed by the Chief Justice, this time on the grounds that the governor was not authorised to approve the Bill in the absence of an elected Council.

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

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40. …The only reason it could appear on an impeachment charge was that the government and the 117 MP's who had all taken to the government whip, disliked the consequences of the decision, and it is that motivation that strikes at the heart of judicial independence. No honest lawyer, with any respect for the principles of his or her profession, could support such

"The only reason it could appear on an impeachment charge was that the government and the 117 MP's who had all taken to the government whip, disliked the consequences of the decision."

an impeachment and those of the 117 who were lawyers deliberately made a false accusation of misconduct against a judge for doing her judicial duty. I can think of no behaviour more likely to bring the profession into disrepute, although in fact it brings these individual MPs into disrepute. As far as Sri Lanka's membership of the Commonwealth is concerned, there can hardly be a more blatant breach of the Latimer House principles.

"Standing Order 78A(8), which requires secrecy until a 'finding of guilt' is made, appears *ultra vires.*"

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

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

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8 See record, Parliamentary Series No.187, 190.

These proceedings, and particularly the evidence given on December 7th, would have come under public scrutiny and the prejudice of the Committee would have been palpable. It is essential, in cases of this kind, for the public to hear the witnesses, because if they tell lies others will come forward to confound them. The Chairman of the Committee, by refusing to suspend the Standing Order after its protection had been waived, ensured that justice was not seen to be done.

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59. ….There is no rule in the Standing Orders that the judge should be given reasonable time or facilities to prepare a defence: the timing is left to the Select Committee. Since it is under an international law duty to give fair trial, the Committee itself should have ensured that the judge was given ample opportunity to contest the charges.

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

61. In my opinion, these facts demonstrate a clear breach of the fair trial rules relating to particularised charges and to adequate time to prepare defences. It is possible that the Chairman was misinforming the Chief Justice when he said that no witnesses would be called – it would be surprising

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

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

"The President had power, of course, to stop it, but had fanned the flames and may have authorised the rejoicing when the impeachment motion was passed."

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

67. By this time, the independence of the Sri Lankan judiciary had ended, and the Beijing and Latimer House principles had been abandoned. The Chief Justice had been impeached by the government and its supporters, firstly by the charges brought in November which had accused her of misconduct for doing her conscientious duty in *Devinegama* and as Chief Justice at the JSC, and secondly by putting her through a grotesquely unfair secret trial at which she was abused and denied her rights, while outside parliament demonstrators brought on government buses bayed for her blood.[9] On any view, this constitutes a shameful abuse of judicial independence. The President had power, of course, to stop it, but had fanned the flames and may have authorised the rejoicing when the impeachment motion was passed, at 7pm on Friday 10 January. Celebratory fireworks were

9 30 Much of the contemporary press coverage collected by the Asian Human Rights Commission reports on a government publicity campaign against the Chief Justice by posters and leaflets (p. 303), bussing in demonstrators, state media bans against her (p.230-231). See, AHRC, 'Collection of Documents', Revised Edition, 21 December 2012.

Lawyers and civil representatives gathered held a silent protest carrying placards urging to stop the harassment on Sri Lanka's Chief Justice Shirani Bandaranayake. *Photo: mirror.lk*

set off outside parliament, without intervention from police or military, and according to the press reports four of the brothers Rajapaske – President, Speaker, Environment Minster Basil and Defence Secretary Gotabaya, along with other ministers, appeared on a balcony to watch a special fireworks display put on by the Sri Lankan navy. For four hours a jubilant crowd surrounded the Chief Justice's home, in the knowledge that Mrs Bandaranayake and her family were inside. A "milk rice celebration" took place, a free meal was served and fireworks were lit (presumably at government expense) and later the mob (said by some reporters to be members of the civil defence force in plain clothes) was addressed by members of the Select Committee and told to urge Mrs Bandaranayake to resign. They did so – when not singing and dancing to loud music.

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

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87. The attack on the Chief Justice cause great dismay among Sri Lankan civil society: hundreds of articles were written in her support in non-government media, lawyers protested and even went on strike, judges at every level below the

"The attack on the Chief Justice cause great dismay among Sri Lankan civil society: hundreds of articles were written in her support in non-government media, lawyers protested and even went on strike."

> **"The Supreme Court released statements insisting that due process and judicial independence had been violated."**

Supreme Court released statements insisting that due process and judicial independence had been violated. A joint statement of the High Court and District Court judges and the Magistrates Association deplored the attacks on the Chief Justice, the judiciary in the state media,[10] and the Judicial Service Association protested as well at the contempt of court committed by "certain media institutions maintained by taxpayers money" but with apparent impunity from any action by the Attorney General. But the only real protection she had, like anyone else, against abuse of government power was the law, and ironically she had to appeal to her old colleagues to help. It is not, in my experience, the case that judges are necessarily biased in judging their own colleagues – they are usually unforgiving of fellow professionals who have acted unbecomingly, and the bench is a place where hostilities fester as often as friendships form. However, it does not *look* good, which is why many other countries insist first on criminal jury trials for charges of judicial misbehaviour which amount to a criminal offence or (in the Commonwealth) bring in respected jurists from other Commonwealth countries, like Lord Mustill in the *Sharma* case, to decide on guilt or innocence.[11]

88. So far as judicial review is concerned, the courts are historically reluctant to intervene in the affairs of Parliament. The Bill of Rights of 1689 lays down that proceedings in parliament, the ultimate court, may not be questioned. However that may be in the UK – a country without a written constitution – the precise limits of the separation of powers in other countries will depend on what their Constitution says…

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89. What exactly did this mean? Could a Standing Order provide, for example, that the hearing should be in secret, or that there should be no burden of proof? There was a genuine question of interpretation which the Select Committee refused to address. So the Chief Justice and some other petitioners took the issue to the Supreme Court on 20 November. On 22 November the Supreme Court (3 judges, excluding of course, the Chief Justice) politely and deferentially asked the Speaker, given "the mutual understanding and trust" between the judiciary and Parliament, to adjourn the Select Committee hearing until after it could deliberate and deliver its judgement. The Speaker announced that he would do no such thing – the court had no right to intervene. On January 3rd, however, the Supreme Court ruled that Article 107(3), properly interpreted, meant that Parliament had to pass a

10 Joint statement of the judges, December 3rd 2012, Asian Human Rights Commission, 7.

11 Judicial Service Association Statement.

law to fix the burden of proof and to guarantee the judge's right to be heard and other basic matters: Standing Orders, which were made by the Speaker and were not in any sense "law", could only govern matters of procedure. That was because any "finding of guilt" by the Select Committee was a final decision which adversely affects the right of the judge to remain in office: it was an exercise of judicial power and Article 4(c) of the Constitution says in terms that any such exercise (except in the case of Parliament in respect of its own members) must be by a body "established by law". The Select Committee had been established by Standing Order, so its proceedings and its determinations of guilt were *ultra vires* the Constitution and so null and void.

"The Select Committee had been established by Standing Order, so its proceedings and its determinations of guilt were ultra vires the Constitution."

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

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

justify what happened to the Chief Justice, whereas they are really about the separation of powers under the relevant constitution. The government has a case – not a particularly good one, but at least arguable – that the Supreme Court was wrong to intervene. It has no case at all to claim that what happened was not a grave assault on judicial independence. (Editor's note: see also Danilo Reyes, "*Impeachment of two Chief Justice: A critique on the Sri Lanka and Philippine cases*")

"The two cases are a world apart, and the Philippines Constitution, with Spanish and US legal influences, was not the same as the Constitution of Sri Lanka."

92. It is necessary, therefore, to disentangle the two issues. Professor Peiris made the main speech for the government on the impeachment, beginning with a reference to "the English Court of Appeal in the Pinochet case" which decided that "in respect of impeachment proceedings, the responsibiity is that of Parliament and not of the courts." The English Court of Appeal was not, in fact, involved in the *Pinochet* proceedings and the House of Lords (which was) decided nothing of the sort. He then expatiated on the *Corona* case, claiming that "the Chief Justice of the Philippines did exactly what the Chief Justice of Sri Lanka did" and the Courts in the Phillipines declined to intervene to halt his impeachment. The two cases are a world apart, and the Philippines Constitution, with Spanish and US legal influences, was not the same as the Constitution of Sri Lanka. Corona was appointed by the disgraced President Arroyo at midnight, just before she was to be replaced by Benito Aquino. Parliament impeached the judges, in televised proceedings lasting several months, in which he was accorded every defence right by Senate President Ponce Enrile, who frequently refused prosecution motions and allowed the defence team of 8 leading lawyers the time, whenever they asked for it, to obtain and study documents. Senators frequently criticised the prosecution and it was Corona, eventually, who could not face questioning over his undeclared bank accounts so he went on television to blame the bank. Interestingly, the Supreme Court did intervene by issuing an order restraining its own employees from testifying, and Speaker Enrile obeyed the order against the wishes of the Parliamentary prosecutors. So the *Corona* trial was probably as fair as an impeachment by Parliament can be: the Supreme Court was obeyed by the Speaker when it ordered witnesses not to appear, and no one has doubted the verdict, reached upon clear evidence. Professor Peiris explained none of this to Parliament.

CONCLUSION

95. The denouement was as unseemly as the procedures used to bring it about. On 12 January, 2 days after receiving the "address" from his brother, the President summoned the remaining 10 Supreme Court judges to his office for a 90 minute meeting. It is not known what he said – the meeting was highly improper – although it seems that he asked them

to pass on one threatening message to the Chief Justice, namely that if she resigned without further fuss, she could keep her full pension entitlements. The Chief Justice, who appears to have behaved throughout with great dignity, remained with her family at her official residence. The following day she received a Presidential order removing her from office, and (in a despicably petty gesture) her security guards were withdrawn, while threatening demonstrators remained outside. On the next day, a holiday Monday, police ordered the Registrar to pack up all her belongings in her chambers, to make way for the next incumbent. A large phalanx of military police occupied the court building overnight and a riot squad (with water cannon) arrived the next morning along with a government rent-a-crowd who shouted slogans in praise of the new Chief Justice. He was Mohan Peiris, a man without judicial experience, who served as the legal advisor to the cabinet and Chairman of a bank and of an arms procurement firm established by Defence Secretary Rajapanske. He was sworn in by the President and that afternoon took over the Chief Justice's chambers whilst a large number of lawyers stood outside the court holding candles "to symbolise the onset of darkness". Dr Bandaranayake was confined to her residence until her successor was installed in her former chambers, and then required to leave in her own car without speaking to the media or (as she had requested) being given an opportunity to thank her staff. She did issue a dignified and moving statement, pointing out that the rule of law to which she had devoted her life had been shattered. She would not resign in order to save her pension, but she could not resist the power of the state to remove her physically from the Court.

"A large number of lawyers stood outside the court holding candles "to symbolise the onset of darkness"."

96. I have done my best to recite the facts, which are on record, as objectively as possible. That Dr Bandaranayake was not even conceivably guilty of misconduct on 12 of the 14 charges is palpable, and the evidence does not support Count 1 (that she made decisions in a case which somehow benefited her sister) and charge 4 (that she had "assets", in the form of an empty bank account, that were undeclared). The evidence shows that she was impeached as a reprisal for her decision in the *Divineguma* case and perhaps for the outspoken stance that her Judicial Services Commission took in defending what it saw, no unreasonably, as threats to judicial independence. Some commentators have suggested that the Rajapaske clan had a long-term plan to neuter the independence of the country's judiciary lest it put difficulties in the way of their future hegemony. Others claim that the impeachment removes any danger of unruly judges if the government is forced by international pressure to put a few of its military leaders on trial for war crimes committed during the 2009 conflict: I have no comment to make on these suggestions. I have tried to confine this Report to the law and practice of judicial independence, as applied to Dr. Bandaranayke's case. Although there is an interesting intellectual debate over

> **“ It undermines the rule of law to such an extent that the country which suffers it will suffer the loss of that independent power which is essential to make democracy work. ”**

the precise constitutional borders that separate legislative, executive and judicial powers, I do not regard it as impinging on the question of whether the Chief Justice was properly impeached. To that question, the only answer is: “no”.

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

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

99. There are international fora in which Sri Lanka may be politely condemned- during periodic review in the UN’s Human Rights Council, for example, where it will doubtless be “thrashed by a feather” when member states wring their metaphorical hands and evince “concern”. The Commonwealth is an organisation which pretends to uphold democratic principles, and on occasion expels or suspends member states which disregard them. It cannot be taken seriously, however, if it permits Sri Lanka to showcase its destruction of judicial independence at the Commonwealth Heads of Government meeting planned for Colombo in November this year. A government which trashes the Latimer House principles and gets away with it – to such an extent that it is permitted to host the most prestigious event in the Commonwealth calendar – would make the whole organisation a mockery. At very least, governments which respect the rule of law should not attend. Nor should the Queen or any Royal family member, to provide a photo-opportunity for President Rajapaske, Speaker Rajapaske, Defence Secretary Rajapaske and Minister for Economic Development, Bail Rajapaske.

Royal seals of approval serve the propaganda interests of people like this, and no-shows by powerful nations would signal the unacceptability of their behavior.

100. But it was behaviour in which many MPs – 117, to begin with – were complicit, and then the seven Ministers. These identifiable people are collectively responsible for an unlawful attack on the rule of law, and unless made to suffer for it others will do the same dirty work in other countries, in clashes with the judiciary which are yet to emerge. What might deter them, or at least give them pause? There is a new tool available to name, shame and actually cause pain to people like this – the train-drivers to Auschwitz, so to speak – those who are necessary for the perpetuation of a human rights atrocity, even though their part is minor, and their hands unbloodied. It is called a Magnitsky Act, named after Sergei Magnitsky, the Russian whistleblower jailed when he tried to expose corruption and who was killed in prison. The Act, passed by the US Congress and ratified by President Obama in December last year, identifies all the people – police, lawyers, criminals and judges – who were in some small way morally responsible for Magnitsky's arrest imprisonment and death. The Act denies them visas for travel to the US, and their funds in US banks are frozen. The Act caused fury in Russia, and Mr. Putin rather pathetically responded by stopping US couples from adopting Russian orphans. But the Act is being taken up in the Council of Europe, Canada and other countries, and would seem appropriate to a case where there is no doubt as to the identity of those responsible, and where some of these Ministers and MPs are likely to want to go to Britain and may well have undisclosed funds in British banks. If a number of countries were to "Magnitsky" them, they might live to rue the day they chose to humiliate and vilify their Chief Justice.

"These identifiable people are collectively responsible for an unlawful attack on the rule of law, and unless made to suffer for it others will do the same dirty work."

Impeachment of the Chief Justice: A critique on the Sri Lankan and Philippine cases

Danilo Reyes, Editor, *Article 2*

In Asia, the struggle for constitutionalism and the rule of law became evident by the removal of two Chief Justices, Renato Corona of the Philippines on May 29, 2012 and Shirani Bandaranayake of Sri Lanka on January 13, 2013. Corona's case could be described categorically as an impeachment proceeding, while Bandaranayake's could not. Why was Corona's removal legal and constitutional while Bandaranayake's was not? Like Bandaranayake, the charges against Corona are grounded on allegations of corruption.

Of the eight allegations against Corona in the Articles of Impeachment, by a vote of 20-3, the Senate sitting as an impeachment court rendered a guilty verdict on May 29, 2012. This stems from article 2 for "culpable violation of the Constitution" due to a failure to "disclose to the public a statement of his assets, liabilities, and net worth" as required by law. Section 17, article XI of the 1987 Philippine Constitution requires:

> Section 17. A public officer or employee shall, upon assumption of office and as often thereafter as may be required by law, submit a declaration under oath of his assets, liabilities, and net worth. In the case of the President, the Vice-President, the Members of the Cabinet, the Congress, the Supreme Court, the Constitutional Commissions and other constitutional offices, and officers of the armed forces with general or flag rank, the declaration shall be disclosed to the public in the manner provided by law.

Here, the enactment of Republic Act No. 6713 or the "Code of Conduct and Ethical Standards for Public Officials and Employees has satisfied the "required by law" and "provided by law" provisions of the Constitution. This Act obligates public officials "to accomplish and submit declarations under oath, and the public has the right to know, their assets, liabilities, net worth and financial and business interests (section 8)." Corona's removal from office and his acceptance of the guilty verdict was seen as a victory for democratic constitutionalism. It went a long way in restoring the people's trust and confidence in the judiciary and cementing the Filipino people's democratic aspirations in their Constitution.

While Corona's ouster was a victory, Bandaranayake's impeachment and removal were a defeat. Bandaranayake's removal abolished constitutionalism and judicial independence. They had already been diminished in value by article 35 (1) of the 1978 Sri Lanka Constitution. This Constitution guaranteed absolute immunity for the President from prosecution for private or public actions, official or non-official. The impeachment cemented the absolute power of the Executive.

"While Corona's ouster was a victory, Bandaranayake's impeachment and removal were a defeat."

In Sri Lanka, article 107(2) and 107(3) on matters involving impeachment, as stipulated below, was applied to justify Bandaranayake's removal, mocking the notion of constitutionalism. For a detailed and authoritative discussion on this, please see the report of Sir Geoffrey Robertson on the impeachment of Sri Lanka's chief justice in this edition of *Article 2*.

Independence of the Judiciary

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

107 (2) 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:

(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 misbehavior or incapacity and the right of such Judge to appear and to be heard in person or by representative.

In his report, Sir Robertson concluded that the impeachment of Bandaranayake had no constitutional or legal basis. Another Sri Lankan lawyer, Dr. Jayantha Guneratne, has also observed that the 1978 Constitution itself bears: "inherent and replete mutual contradictions that reduces itself to a democratically unworkable document." Thus, the 1978 Constitution could not have been considered a democratic Constitution, but one that perpetuates absolute power and dictatorship.

I highlight four points for comparison, which indicate why the Philippine impeachment restored public trust and confidence in the judiciary, while its Sri Lankan counterpart abolished it, instead cementing absolute power: first, the constitutional and legal basis of the impeachment; second, the procedural and substantive issues during the impeachment process; third, the interpretation of the Constitution and the application of judicial precedents; fourth, how public opinion and discourse developed as a result of the impeachment proceedings.

First, article XI, section 2 of the 1987 Philippine Constitution was the constitutional basis for Corona's impeachment and his subsequent removal:

Thousands of anti-Estrada supporters celebrate outside Malacanang Presidential Palace, 20 January 2001, after the ouster of President Estrada following a decision by the Supreme Court to vacate the presidency. *Photo: AFP /Romeo Gacad*

ARTICLE XI

ACCOUNTABILITY OF PUBLIC OFFICERS

Section 2. The President, the Vice-President, the Members of the Supreme Court, the Members of the Constitutional Commissions, and the Ombudsman may be removed from office on impeachment for, and conviction of, culpable violation of the Constitution, treason, bribery, graft and corruption, other high crimes, or betrayal of public trust. All other public officers and employees may be removed from office as provided by law, but not by impeachment.

"The 1987 Philippine Constitution and the 1978 Sri Lanka Constitutions stipulates on a constitutional basis for the impeachment of a chief justice; however, they differ in the interpretation."

And, section 3, sub-sections 1 to 3 and 5 to 8 of article XI of the Constitution stipulates that the Chief Justice, as a member of the Supreme Court, "may be removed from office on impeachment" and provides the rules and procedures of how this should be done:

1. The House of Representatives shall have the exclusive power to initiate all cases of impeachment.
2. The Committee, after hearing, and by a majority vote of all its Members, shall submit its report to the House within sixty session days from such referral, together with the corresponding resolution. The resolution shall be calendared for consideration by the House within ten session days from receipt thereof.
3. A vote of at least one-third of all the Members of the House shall be necessary either to affirm a favorable resolution with the Articles of Impeachment of the Committee, or override its contrary resolution. The vote of each Member shall be recorded.
5. No impeachment proceedings shall be initiated against the same official more than once within a period of one year.
6. The Senate shall have the sole power to try and decide all cases of impeachment…
7. Judgment in cases of impeachment shall not extend further than removal from office and disqualification to hold any office under the Republic of the Philippines, but the party convicted shall nevertheless be liable and subject to prosecution, trial, and punishment, according to law.
8. The Congress shall promulgate its rules on impeachment to effectively carry out the purpose of this section.

The 1987 Philippine Constitution and the 1978 Sri Lankan Constitution stipulate on a constitutional basis for the impeachment of a chief justice; however, they differ in the interpretation of the Constitution and in what procedures and rules should be used. In the Philippines, article XI, section 2, stipulates that only the Senate has "the sole power to try and decide all cases of impeachment" and the Congress to promulgate "rules on impeachment to effectively carry out the purpose of this section."

Acting on this constitutional requirement, the Senate passed Resolution No. 890 of 2000 on rules of procedure and practice to govern impeachment proceedings. It was passed in anticipation of the impeachment of former Philippine President Joseph Estrada, the first head of State to have been impeached in 2000. This Resolution laid down the procedural and substantives rules of the impeachment court in hearing Corona's case. In the Bandaranayake case no rules were laid out. This explains why the outcome of the Parliamentary Select Committee gave rise to

questions on "the mode of proof, burden of proof, standard of proof," which did not arise in the Corona impeachment.

"In the Corona impeachment there were no questions at all on the authority of the impeachment court and the legal basis of its rules and procedures."

Thus, in the Corona impeachment there were no questions at all on the authority of the impeachment court and the legal basis of its rules and procedures, including question of proof and evidence. It was unlike the Bandaranayake case where the Parliamentary Select Committee (PSC) both had questions on the authority of its body and the procedures they were using. In comparison, though, Sri Lanka's Constitution also had proceedings for impeachment. The PSC that held Bandaranayake guilty however, had neither the authority to sit as an impeachment court, nor was its verdict credible. It had no rules and procedures as required by law.

It is clear that in the impeachment process, Bandaranayake was deprived of her right to a fair trial—first, by being convicted by the PSC which had no constitutional mandate to try her; second, by being deprived of making an adequate defense due to the lack of lawful rules and procedures.

Regarding the procedural and substantive issues during the impeachment, unlike Bandaranayake's case, before Corona's impeachment was heard by the Philippine Senate, the House of Representatives (the lower house), which has "the exclusive power to initiate all cases of impeachment" under the Constitution, had reviewed the articles of impeachment. This Committee at the lower house is obliged to review the complaint "in form and in substance" and has the authority to either reject or accept the Articles of Impeachment. Once it is accepted, "a vote of at least one-third of all the Members of the House is necessary to affirm a favorable resolution" before it can be elevated to the Senate which will then convene as an impeachment court.

In Bandaranayake's case, the Supreme Court (SC) held as "mandatory under 107(3) of the Constitution for the Parliament to provide by law matters relating to the forum." The implication of this decision is that the PSC as a body that had conducted the investigation on the allegations against Bandaranayake, and the guilty verdict it rendered, are lacking a constitutional and legal base. Moreover, the decision of the SC, which has the power to interpret the Constitution, was disregarded out-rightly when President Mahinda Rajapaksa ratified the impeachment motion.

Here, the creation of the PSC by the Speaker of the Parliament appears to be constitutionally justifiable by the 1978 Constitution. But, the PSC and its impeachment procedures were not created by law—as also required by the Constitution and as reaffirmed in the interpretation of the SC. Therefore, the authority of the PSC as 'impeachment court' and a credible body to determine the guilt of Bandaranayake on allegations of misbehavior indicates serious flaws in Sri Lanka's constitutionalism and application of rule of law.

Unlike in Sri Lanka, in the Philippines, the Executive, Legislative and Judicial branches of government, during any impeachment trials, exercise 'self-restraint' by observing the limits

of their power. The impeachment of Corona is not the first to have taken place in the Philippines. In the past, there were failed attempts to impeach the former Chief Justice of the SC. The most controversial impeachment trial in the country's history however, was that of former President Joseph Estrada. His impeachment did not come to a conclusion though, as it was interrupted and overturned by yet another people's revolution that ousted him from office.

"Unlike in Sri Lanka, in the Philippines, the Executive, Legislative and Judicial branches of government—in times of impeachment trial, exercise 'self-restraint'."

When Corona was impeached, he also filed a petition questioning the validity of the impeachment in his own court. Before the Supreme Court rendered its decision on July 17, 2012, they were engaged in a 'dialogue' with the Senate, which responded to the SC's allegations of partiality in the impeachment proceedings. The extract of the SC's Resolution below demonstrates that each branch exercised limits to its power:

> In the Comment Ad Cautelam Ex Superabundanti12 filed on behalf of the respondents, the Solicitor General argues that the instant petition raises matters purely political in character which may be decided or resolved only by the Senate and HOR, with the manifestation that the comment is being filed by the respondents "without submitting themselves to the jurisdiction of the Honorable Supreme Court and without conceding the constitutional and exclusive power of the House to initiate all cases of impeachment and of the Senate to try and decide all cases of impeachment [Corona v. Senate of the Philippines, 10 G.R. No. 200242, July 17, 2012, p. 10].

In response to the comments of the Senate, the SC resolved to reaffirm the constitutional provision that the Senate, when they were sitting as an impeachment court, has the "sole power to try and decide all cases of impeachment":

> Given their concededly political character, the precise role of the judiciary in impeachment cases is a matter of utmost importance to ensure the effective functioning of the separate branches while preserving the structure of checks and balance in our government. Moreover, in this jurisdiction, the acts of any branch or instrumentality of the government, including those traditionally entrusted to the political departments, are proper subjects of judicial review if tainted with grave abuse or arbitrariness.
>
> Impeachment refers to the power of Congress to remove a public official for serious crimes or misconduct as provided in the Constitution. A mechanism designed to check abuse of power, impeachment has its roots in Athens and was adopted in the United States (US) through the influence of English common law on the Framers of the US Constitution.

In the case of Bandaranayake's impeachment, the principles of 'checks and balances' and 'separation of powers' were rendered meaningless in three ways. First, when both the Parliament and the Executive ignored the interpretation of the SC on the mandatory requirement that the forum for the impeachment has to be "provided by law." Second, when President Rajapaksa appointed Peter Mohan Peiris as the new Chief Justice, deliberately leaving the constitutional and legal questions unresolved. Third, the views and opinions on the supremacy of the Parliament over the judiciary in interpreting the constitution. These events completely abolished the notion of constitutionalism and judicial independence, cementing absolute executive power within the ambit of the 1978 Constitution.

Philippines Chief Justice Renato Corona (on wheelhair) is seen at his impeachment trial in Manila Manila on May 22, 2012. The Philippines' top judge denied he was a crook as he testified at his own trial, denouncing his impeachment as an illegal conspiracy orchestrated by President Benigno Aquino. *Photo: AFP /Pool/Erik De Castro*

In his writings, Tom Ginsburg, an expert on constitutional law who has studied constitutionalism in new democracies, argues that the idea of parliamentary sovereignty, as it is now invoked in Sri Lanka to justify the impeachment, is in conflict with the idea of constitutionalism. This idea is "more often than not, used by undemocratic regimes." The evidence of this is seen in the way in which both the Sri Lankan Parliament and the Executive branch disregarded the SC's constitutional authority to interpret the 1978 Constitution on how the impeachment should be conducted.

With regards to the interpretation of the Constitution and the application of judicial precedents, the Parliament has deliberately disregarded an earlier opinion made in 2001 both by the Supreme Court of Sri Lanka, notably by Justices Gamini Ameratunge, K Sripavan and Priyasath Dep, and former Speaker of Parliament, the Late (Hon) Anura Bandaranayke, on the need to introduce fresh legislation on the motions of impeachment. This legislation is an Act of Parliament as opposed to the Standing Order, on the motions of impeachment against judges of Superior Courts.

Unlike Sri Lanka, the Philippine Senate promulgated their rules and procedures, as required by the Constitution, even before and in anticipation of the first impeachment of a head of State, former President Estrada in 2000. This preparedness by the Senate in dealing with impeachment is not extraordinary. Rather, they are actions undertaken as a result of the country's experience during the authoritarian Marcos regime, where he used the Constitution to consolidate his power to perpetuate immunity.

"The grounds invoked by seven of the 20 Senators who rendered guilty verdict on Corona were consistent with a case-law involving an administrative complaint."

Also, the grounds invoked by seven of the 20 Senators who rendered a guilty verdict on Corona were consistent with a case-law involving an administrative complaint against Delsa Flores. She was a former court interpreter tried for non-disclosure of a statement on her assets and liabilities as required by law of all government employees. The Supreme Court upheld the recommendation for dismissal from judicial service by the Court Administrator of Flores in May 1997. In her decision the SC held

> Section 8 of Republic Act No. 6713 provides that it is the "obligation" of an employee to submit a sworn statement, as the "public has a right to know" the employee's assets, liabilities, net worth and financial and business interests. Section 11 of the same law prescribes the criminal and administrative penalty for violation of any provision thereof. Paragraph (b) of Section 11 provides that "(b) Any violation hereof proven in a proper administrative proceeding shall be sufficient cause for removal or dismissal of a public official or employee, even if no criminal prosecution is instituted against him.
>
> XXX
>
> In the present case, the failure of respondent to disclose her business interest which she herself admitted is inexcusable and is a clear violation of Republic Act No. 6713.
>
> WHEREFORE, in conformity with the recommendations of the Office of the Court Administrator, Interpreter III Delsa M. Flores is hereby DISMISSED from service with FORFEITURE of all retirement benefits and accrued leave credits and with PREJUDICE to re-employment in any branch or instrumentality of the government, including government-owned or controlled corporations.
>
> SO ORDERED [NARITA RABE, complainant, vs. DELSA M. FLORES, Supreme Court En Banc decision, A.M. No. P-97-1247, May 14, 1997].

Thus, the application of this precedent by seven of the 20 Senators who rendered a guilty verdict on Corona has reaffirmed the idea of equality before the law and equal application of the law on all government employees on matters involving accountability.

It is common knowledge in the Philippines that court employees, including judges, are often involved in corrupt practices, and court employees use their position for personal benefit and privilege. The effect of invoking Flores's case reaffirmed the notion of consistency, legal certainty and the equal application of the law. More importantly, it reaffirmed that 'no one is above the law, not even the chief justice.' It had the effect of restoring the trust and confidence of the public in the judiciary in a bid to eradicate corruption.

This brings us to the fourth point of comparison--why the removal of Corona was legitimate and reaffirmed the constitutional aspirations of the people. As in Bandaranayake's impeachment,

"It is common knowledge in the Philippines, that court employees, including judges, are often involved in corrupt practices."

Filipinos following the discussion on Corona's impeachment were also divided, including the legal community. This division is based on the lack of clarity on what constitutionalism ought to mean, and certainly not on the question as to whether or not Corona's impeachment process was illegal or unconstitutional. Corona took advantage of the lack of clarity on the part of the public. The aim of an impeachment case in a constitutional democracy is not to deepen divisions. For his good, for his defense and to gain public sympathy, he argued that this was not a case against him, but one that could undermine judicial independence in order to consolidate a dictatorship by the Executive.

On December 14, 2011, Corona alarmed the public. He inferred that should the impeachment succeed, a dictatorship by the Executive Branch would occur. Below is the unofficial translation of his speech before members of the judiciary in Filipino:

> Should this impeachment against me succeed, what do you think will happen? It's very simple my beloved countrymen—President Aquino already has the control of the Cabinet, he has already the control of the Congress, and the Supreme Court will also be under his control. They repeatedly say and demand on checks and balances of the three co-equal branches of government, but by the way they do things they are heading towards complete control of the whole system of the government. What he (President Aquino) planted to me will inevitably result in a dictatorship; a dictatorship rooted in deception aimed at poisoning the minds of our fellow countrymen"

But Corona's alarmist and populist approach did not gain support from the domestic or international communities. Bandaranayake's case gained support from UN experts, the European Union and other foreign governments, but it did not prevent her from being removed. Her impeachment raised questions on the constitutionality of her removal and the legitimacy of her replacement. Why this strong condemnation failed to prevent her from being removed, is a question that needs to be asked by the international community on the effectiveness of its intervention.

Bandaranayake's concern was more real than Corona's. Albeit grounded on unsolved questions of constitutionality and legality, notably on the cementing of absolute power of the Executive, the outside world failed to grasp her concerns. Below is the extract of her speech two days after she was removed:

> It is not only the office of Chief Justice, but also the very independence of the judiciary, that has been usurped. The very tenor of rule of law, natural justice and judicial abeyance has not only been ousted, but brutally mutilated.
>
> I have suffered because I stood for an independent judiciary and withstood the pressures. It is the People who are supreme and the Constitution of the Republic recognizes the rule of law and if that rule of law had prevailed, I would not have been punished unjustly.

In Corona's case, however, his complaints of being "lynch-mobbed" did not gain ground. In fact, his acceptance of the Senate's guilty verdict put closure on his claims. The outcome of Corona's impeachment thus reaffirmed the Filipino people's aspiration of constitutional supremacy, accountability by a

check and balances system and separation of powers. It had a legitimizing effect, not only on the credibility and integrity of the Judiciary, but also the Legislative and Executive Branches, for holding the highest officials accountable under the Constitution. Needless to say, the limits of the power of each Branch were exercised in the process. Its legitimizing effect can be explained by the smooth process in the subsequent selection of Corona's replacement.

"The experience of citizens during the Marcos regime, I argue, made a huge contribution to the people's political awareness."

But in Bandaranayake's case, her removal did not put an end to the questions of succession in the judiciary. It mutated her into being a *de-jure* Chief Justice of Sri Lanka and her replacement, Mohan Peiris, as the *de facto* Chief Justice. The Parliament and the Executive did succeed in removing Bandaranayake. They used their consolidated power on the pretext of constitutional dictates. However, unlike the effect in Corona's case, where it reaffirmed the separation of powers, in Bandaranayake's impeachment, it further cemented and reaffirmed that the Executive power is absolute and above the law. Thus, though the Parliament succeeded in invoking the idea of 'parliamentary supremacy,' sadly, it also yielded its power to the Executive President.

Conclusion

These two impeachment cases have led to three particular observations.

First, in Sri Lanka, the 1978 Constitution itself is problematic, thus Bandaranayake's impeachment was rather more inevitable than surprising. This was aggravated by the absence if not lack of opportunity to discuss the impeachment issue, without being subject to retaliation and attack by the government. The government's propaganda and distortion of the impeachment process denied the possibility of a well-informed discourse.

Second, in the Philippines, the experience of citizens during the Marcos regime made a huge contribution to the people's political awareness. They demanded an answer to the allegations of corruption against Corona as an aspiration of the 1987 Constitution. They were sensitized to the fact that Marcos had exploited the Judiciary and other legal institutions in his favor. He also wielded concentrated power without being accountable to other institutions. In fact, these impeachment proceedings, similar to those of former President Estrada, have since become the last resort and a remedy for the Filipino people to use against abuses by high officials, plus a warning to anyone in the future.

Third, Corona's removal put an end to the tension of the Judiciary against the Executive and the Parliamentary Branches of Government. The principles of separation of powers and the supremacy of the 1987 Constitution had been affirmed. On the contrary, Bandaranayake's removal did not end any tensions. The existence of a *de jure* and a *de facto* Chief Justice is evidence of this reality. It only reaffirmed the obvious fact that indeed the Executive under the 1978 Constitution is above the law coupled with absolute power. Anything that emanates from him as Executive with absolute power cannot be challenged.

Has Pakistan's judiciary overstepped its power?

Baseer Naweed, Senior Researcher on South Asia,
Asian Legal Resource Centre

After the Supreme Court Chief Justice, Iftikhar Chaudhry, was restored in July 2007, for the first time in the country's judicial history it has, for the last six years, been able to exercise judicial power independent from the military and the civilian government. However, as the judiciary exercises its power as an independent institution—a realization of the aspirations of the legal profession—it is overstepping the powers of the other branches: the Executive and the Legislative. The emergence of the judiciary as a powerful institution now becomes a threat to the Constitution it should be protecting.

Firstly, from February to June 2012, the judiciary was in a direct confrontation with the Executive and the Legislative on the pretext of eradicating corruption when the judiciary ordered the reopening of the corruption case against President Asif Ali Zardari. And when the former Prime Minister, Yousuf Raza Gilani, refused to implement the court's order citing presidential immunity under the Constitution, he was cited for contempt, convicted and disqualified to sit as the Prime Minister. He was replaced.

Here, Mr. Aitzaz Ahsan, one of the leaders of the 2007 lawyer's movement, questioned the constitutionality of the judiciary's action to prosecute President Zardari knowing full well the president's immunity under Article 248(2) of the Pakistan Constitution. The judiciary has already acted beyond the ambit of its judicial power in the Constitution. When asked in an interview by the BBC's Hard Talk in August 2012, he said:

> No criminal proceedings whatsoever can be instituted or continued against the President in any court during his tenure of office. As long as Zardari is the incumbent head of State, and constitutionally elected President of Pakistan—you may like him, dislike him, you may charge him with corruption or any other offence (but he) cannot be sent for trial...

Mr. Ahsan was referring to the judiciary's order to reopen an old case involving allegations against President Zardari that he and his deceased wife Benazir Bhutto, former Prime Minister who was killed in a bomb attack, were keeping ill-gotten wealth in Swiss banks. The court's order to prosecute President Zardari did not progress; however, the conviction and disqualification of Gilani from office were seen to have undermined the power of

the Legislative branch. After Mr. Gilani's ouster from office, his replacement Prime Minister Raja Pervaiz Ashraf in June 2012 had to appear in person in court proceedings to explain what actions they have taken regarding the court's order.

> **"If the judiciary continues to nourish political thinking it will lead to unrecoverable loss."**
>
> **-Ms. Asma Jahangir**

Mr. Ahsan's concern over the judiciary overstepping other branches was supported by parliamentarians and leaders of the lawyer's movement that helped restore the judiciary. They are concerned that, not only Mr. Chaudhry is overstepping other branches he is acting 'too independently.' The members of the ruling party also accused the judiciary of undermining the Legislative branch.

Ms. Asma Jahangir, former President of the Supreme Court Bar Association, has expressed concern that if the judiciary continues to nourish political thinking it will lead to unrecoverable loss. Ms. Jahangir argued that when the courts act in variance to the constitution and show political bias, the common man loses confidence in the courts. The court's failure to deal with the corruption charges against Mr. Arsalan Iftikhar, the son of Mr. Chaudhry, as I have explained subsequently already demonstrates the court's bias and double standard in prosecution of corruption cases.

Secondly, when it was revealed that Mr. Arsalan Iftekhar had been involved in corruption in August 2012, the zealousness of the judiciary, and particularly the Chief Justice, against the Executive and Legislative branches by issuing orders to investigate, prosecute and arrest on the pretext of eradicating corruption did not happen to his son's case. Chief Justice Chaudhry rather allegedly took advantage of his position in the judiciary to prevent any such investigation. Mr. Chaudhry was alleged to have known full well of the corrupt practices of his son. The allegations against Mr. Arsalan should have been duly investigated.

Mr. Arsalan's accuser, Mr. Riaz Malik, a property dealer, claimed Mr. Arsalan had allegedly taken bribes in a form of a luxury flats in London and hotel accommodation in Park Lane. He gambled in Monte Carlo allegedly in exchange for favorable decisions from the court cases that his father was handling. Allegedly he has received cash of over 2 million pounds sterling. Chief Justice Chaudhry was accused of using his influence to prevent the investigation. To his son's defense, Chief Justice Chaudhry argued that the allegations were an attack, not to him or his son, but on the independence of the judiciary.

To suppress the attack on Mr. Chaudhry's son, the Supreme Court's Divisional Bench stopped the investigation by giving a stay order for the proceedings. Also, to indirectly remind the media—who were exposing these allegations at the time in public—of the limit of their free speech and in doing so the judiciary imposed de facto censorship. In a petition concerning obscenity, the judiciary entrusted the Pakistan Electronic Media Regulatory Authority (PEMRA) with the role to compel the media to abide by the strict rules on 'guided freedom' in keeping the Islamic identity of the country.

Thirdly, the clash between the Judiciary and the Legislative did not end with the ouster of former Prime Minister Gilani from office for contempt of court. Seven months after Prime Minister Ashraf took office, he and the 27 top officials of the government became the object of an attack by the judiciary. The judiciary, once again, overstepped the powers of the Executive by giving orders to initiate arrest and investigation concerning a case on the Rental Power Project.

"The clash between the Judiciary and the Legislature did not end with the ouster of former Prime Minister Gilani from office for contempt of court."

On January 15, 2013, the judiciary gave orders to the National Accountability Bureau (NAB) to arrest Prime Minister Ashraf in the Rental Power Projects (Cases HRC No: 7734G of 2009). This case has been pending for three years, and the judiciary's activism to revive this case drew criticism even from the anti-corruption body that is investigating the case. Admiral Fasih Bokhari, chairman of the NAB, expressed concern that for them to be given orders by the judiciary the latter has "over reached its judicial power and all boundaries of its jurisdiction." Mr. Bokhari said the court neither has the power to give orders to them nor to monitor the progress of their investigation.

Mr. Bokhari said the court should have not acted on the report submitted to it by his predecessor. The report that was submitted earlier to the court was inaccurate, it did not contain complete records and the officers investigating failed to provide proof to pursue criminal prosecutions. In addition, Mr. K.K. Agha, the Prosecutor General of NAB, also said the judiciary has no power to review the records of the NAB. The judiciary, however, argued otherwise invoking that the constitution had given them supervisory powers in the adjudication of cases.

Pakistani lawyers disperse after police fired teargas shells during an anti-Musharraf demonstration against the sacking of Chief Justice Iftikhar Muhammad Chaudhry near the Supreme Court, in Quetta, 21 March 2007. Thousands of lawyers and Islamists called on President Pervez Musharraf to quit as fresh protests erupted over his removal of Pakistan's top judge. *Photo: AFP /Banaras Khan*

The court's justification of its authority to supervise investigations raised serious questions on whether there is a role by the judiciary in the investigation of cases. The judiciary's insistence of its supervisory power in the matter also gives rise to question on the fundamental rights of the accused to impartial investigation. Article 10-A of the Pakistan Constitution stipulates that "for the determination of (a person) his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process." Also, in giving orders to deprive liberty the effect of the right in article 9 of the Constitution means that liberty can only be deprived by due process of law.

"The judiciary, by issuing arrest orders on the Prime Minister and 27 other high officials, effectively usurped the investigative power of the Executive."

The court, in the case of *Jogindar Kumar v the State of UP* (1994 (4) SCC 260), also established a judicial precedent in this principle. The judiciary's order for arrest not only usurped Executive power, it is also abrogating its earlier precedents on protection of fundamental rights to fair trial and liberty:

> ....the existence of the power to arrest is one thing. The justification for the exercise of it is quite another. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer affecting the arrest that such arrest is necessary and justified.

The judiciary, by issuing arrest orders on the Prime Minister and 27 other high officials, effectively usurped the investigative power of the Executive. It has assumed authority to investigate and not only adjudicate criminal cases submitted before them. If the judiciary has the power to direct the investigation, then who now has the power to conduct constitutional judicial review of cases with impartiality? In a constitutional democracy, it is the Constitution, not the judiciary; and not the Executive and the Legislative, that is supreme. It is the Constitution. But what is happening in Pakistan is the undermining of democratic constitutionalism on the pretext of judicial independence.

Fourthly, the comments of Mr. Chaudhry that: first, it can stop the Legislative from making amendments to the Constitution and its inclination to legitimize Emergency Regulations should the military impose it in Balochistan province, also raised concerns on the utmost role of the judiciary to protect fundamental rights under the Constitution in a constitutional democracy. This signals further abrogation of the judicial power to protect fundamental constitutional rights where it is desperately needed: in a place where the military, not the court, is more powerful.

On the first concern, if the judiciary now claims it can override Legislative power, it would also mean that the judiciary subsumes not only the power of the Legislative, but a clear and open declaration that it is superior to the Constitution. Mr. Ahsan, the former president of the Supreme Court Bar Association (SCBA), has already expressed concern that the judicial activism the judiciary is taking is biased and unequal. The position taken by Mr. Chaudhry in his son's case contradicts the court's own decision. Also, Mr. Ahsan said the court can only review amendments of the Constitution made through simple majority

for any discrepancy, but "amendments passed with a two-third majority cannot be challenged in court."

> **"The imposition of emergency would rather cement the military's impunity rather than protect the people's fundamental freedoms."**

Mr. Ahsan once again drew attention as to how the judiciary failed to uphold judicial fairness in the corruption case against Mr. Chaudhry 's son, Mr. Arsalan. The court proceedings on the allegations of corruption against Mr. Arsalan and the Chief Justice's alleged complicity to it, demonstrates that the judiciary is not impartial and is "diverting from the prevailing principles of investigation," Mr. Ahsan said.

Therefore, the judiciary's action to prevent Mr. Chaudhry's son from being investigated for corruption on pretext of protecting the judiciary from attack was wrong. Under the legal process, should there be attacks on the judiciary, it is the Judicial Commission, not the Supreme Court, who has the authority to investigate. Here, the failure of the Commission to do so has undermined not only the peoples' confidence in the judiciary, but also the people's confidence in the Commission as an institution that should protect the judiciary. The Commission's failure to perform their obligation also indicates that it is yielding its power. As a result, it created a perception that there is one rule for one person and another rule for another people.

On the second concern, in May 25, 2012, the inclination of Mr. Chaudhry to legitimize the imposition of Emergency Regulations in Balochistan province raise serious concerns on the court's role to protect fundamental constitutional rights. The imposition of emergency would rather cement the military's impunity rather than protect the people's fundamental freedoms. In practice, even though victims and families of disappeared persons are taking cases to courts to seek remedy, the military is completely ignoring the court. The military routinely refuses to disclose records of persons they have arrested or abducted. This is despite family members testifying in court that they had witnessed the military taking their relatives into their custody.

Not even the police can do anything. The police themselves had evidence that the Frontier Corp is abducting people using the military's official vehicles. The military routinely takes people from police custody without showing any official orders or legal documents giving them the power to do so thereby leaving no record of the persons whom they have arrested. The impunity of the military establishment was a clear message to the courts not to impose their authority on them and the intelligence agencies.

This blatant arrogance is obviously the source of the Mr. Chaudhry's impatience. It may be argued that his anger could be fully justified since the Balochistan provincial government also turned a blind eye to the almost daily forced disappearances and extrajudicial killings. However, in his eagerness to fix this problem, to legitimize the would-be declaration of emergency, he is taking the wrong path. The imposition of emergency regulations would rather give the military and the intelligence agencies more impunity in addition to what they are already enjoying. This province is now the scene of murders and abductions committed by the military with the tacit approval and cooperation of the police and the local government. Due process is non-existent in

Balochistan. No protection whatsoever also exists for victims and their families.

Rather than giving the military more power, Mr. Chaudhry should have instead be asking: why the orders of the court cannot provide remedies for the violations of fundamental rights in this place? He should have also looked at dismantling the deeply entrenched impunity the military has acquired. They have not been held accountable for thousands of deaths in the last decade in Balochistan. It is good that Mr. Chaudhry has done something, but unless the military, who consider themselves as judge and executioner, are held to account for their atrocities, the court as protector of fundamental rights is meaningless because it is unable to give remedies of any sort.

"The political frictions generated by the overreach of the judiciary will be far more damaging to people of Pakistan and the country."

The people of Pakistan struggled to restore Mr. Chaudhry and because of their efforts the judiciary is now able to exercise its judicial independence. But when the military, notably in Balochistan, can abduct and murder people with impunity, it is failing to live up to the people's expectations and their aspirations for rule of law rooted in justice and human rights. Mr. Chaudhry's indirect approval of the emergency declaration is devoid of what the role of the judiciary ought to be. If such words are used by the highest judicial officer of the country this will provide the military the opportunity they have been waiting for: to take over the government, re-impose martial law, usurp all power and abrogate the fundamental rights of the people, as it has repeatedly happened in the not so distant past.

In conclusion, the political frictions generated by the overreach of the judiciary will be far more damaging to people of Pakistan and the country. The question before the judiciary is very simple: would it like to become part of the democratization in Pakistan, or would it prefer to be an isolated institution in quest for popular opinion?

Pakistani Supreme Court Chief Justice Iftikhar Muhammad Chaudhry (C) arrives at the Supreme Court building in Islamabad on March 24, 2009. Pakistan's top judge Chaudhry called on lawyers to wipe out corruption in the judiciary, greeted with a standing ovation on his first day in court for 16 months. *Photo: AFP / Aamir Qureshi*

An interview with a lawyer: Why Pakistan's Judiciary must exercise 'judicial restraint'

[*An interview*[i] *with Prof. Akmal Wasim, a lawyer and professor of law at the Hamdard University, on why the Supreme Court of Pakistan needs to exercise 'judicial restraint' after gaining judicial independence which was restored on July 20, 2007. Prof. Wasim is the son of the late Chief Justice of Pakistan Muhammad Haleem, who is known to have laid down the architectural foundation of public interest litigation in Pakistan.*]

On July 20, 2007, the Supreme Court (SC) of Pakistan held as unconstitutional the order of former President Pervez Musharraf suspending Supreme Court Chief Justice (CJ) Iftikhar Muhammad Chaudhry. The judicial crisis continued until 2009 ending two years of widespread protests, notably from the legal community, demanding the reinstatement of CJ Chaudhry. Two years after CJ Chaudhry was restored, the SC is now emerging as a powerful entity.

In recent years, the SC of Pakistan has been taking judicial action even on government policies. They have issued orders and summons to the country's President and Prime Minister, to answer allegations of corruption, and so on. The SC's action, however, divided the country on what ought to be the role of the judiciary. The legal community for instance, who fought hard for the restoration of the judiciary, now expresses concern over the court's encroachment on other branches of government. People looking for expedient solutions to their problems, like litigants, are also concerned.

i This article is based on the interview conducted by Danilo Reyes, editor of *article 2* and the transcripts by Liliana Corrieri, an intern of the AHRC, of Prof. Wasim's talk during his recent visit in Hong Kong.

Since most of the country's history is dominated by military and dictatorial regimes, the aspirations for judicial independence to become a reality have been very difficult. The country's judicial history has been of either subjugation of its power, or a brief assertion of its power to a limited extent, even during martial law. Judicial independence has also been active during martial law. Thus, with this historical background, the effect of the 2007 restoration movement has raised important questions on what ought to be an independent Judiciary.

"When the courts validated the emergency proclamation, the entire focus of advocates, politicians and people were towards the judgment, but not to the crisis."

In this interview, we asked Prof. Wasim about his opinion on the state of Pakistan's judiciary after it was restored in 2007:

How do you think the people in Pakistan understand the actions of the Supreme Court these days? Do they see it as right or wrong?

It is a very interesting question because what you have pointed out goes to the very root problem of our social system, of our political system and how the Supreme Court is reacting today. I would not say in any particular way, but I would look at it as a natural reaction. From my humble and respectful view, it should be taken more soberly because what is happening today is something unique.

For one, the Supreme Court as an institution, for the first time, has actually become independent. As the Constitution of Pakistan directs, it is today holding that position of independence. That is very, very good for democracy.[ii] However, we cannot take up this question immediately without going back into the political history of Pakistan.

Pakistan initially had what we called the Federal Court. This court was working under the 1935 Act, inherited from the British colonial period, adapted by India and by Pakistan by way of the Indian Independence Act 1947. We find the first problem arising somewhere in 1954, when the judiciary submitted to the will or the desire of the Executive.

While the Constituent Assembly of Pakistan was drafting its first Constitution, there were different opinions on the powers of the Prime Minister. Amendments were made to the 1935 Act giving the Prime Minister all power. He/she could run the country similar to the concept of a western model of democracy. So Pakistan used this same principle, which ended up in the 1935 Act.

But while this was being done, the Governor General proclaimed emergency powers, and the Constitutional Assembly was dissolved. This is the first time that the Supreme Court validated an Act done through "proclamation." This in fact was a very weighty issue and it heavily jolted the people.

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i This interview was conducted before the Election Commission of Pakistan (ECP) began a selective exercise screening candidates on the criteria laid down in articles 62 and 63 of the Constitution.

When the courts validated the emergency proclamation, the entire focus of advocates, politicians and people was towards the judgment, but not to the crisis which generated the judgment. A few years later, we find another case where the imposition of martial law for the first time in Pakistan was again validated by the Supreme Court.

> **"From 2007, Pakistan had become a new country, a new society. So far as the issues of democracy and judiciary were concerned, I would say, civil society had become active, and very motivated."**

In 1958 there was another case, known as the Dossa case. Later on, we find a martial law declaration being brought up in 1969. But this was one time that the Supreme Court stood up and said 'No'. It was one of the most remarkable judgments even though martial law was over and a sovereign government was in place, headed by Shahed Zulfiqar Ali Bhutto. He was the leader who brought democracy, for the first time, to Pakistan in 1971-72.

From 1972 to 75, we find the Supreme Court very vigorously refusing to validate any law that had been part of martial law. I think of it as the golden period of the Supreme Court, a time of its greatest honor. It was the time when the Supreme Court had shown its independence.

And then, on July 5, 1977 the civilian government was toppled. This time the situation was different. This time, the Chief Justice and all of the senior judges, were part of the conspiracy in validating martial law. As a result they also committed the judicial murder of the Prime Minister of Pakistan. They created resentment and a serious concern in the people.

Prof. Wasim explains why the restoration movement was significant in upholding the independence of the judiciary, and the people's struggle against the military dictators under the regime of former President Pervez Musharraf:

In 2007, we find judges asserting themselves; we find a new split arising. It was the period where they asserted their right to interpret the Constitution, an assertion of their independence as judges. Another area is the galvanization of the society with the development of 'populism'. We must understand that 'populism' is quite different from a social movement.

From 2007, Pakistan had become a new country, a new society. So far as the issues of democracy and judiciary were concerned, I would say, civil society had become active, and very motivated. And here is where, in my view, problems began creeping in.

Today the Supreme Court asserts itself as an independent body, looking towards popular support, which could work both ways. The people are now looking at the Supreme Court as the panacea of their problems.

It is common knowledge that the people of Pakistan have suffered greatly, from the executive, from the judiciary and from other myriad authorities. People would run to anyone who comes forward offering them what they think is a ray of hope, because they are so frustrated. Life has becoming unlivable in Pakistan due to the economic and law and order problems they face.

For them, the Supreme Court has become a symbol. Relative to this symbolism, I would say that some sobriety is required; sobriety of the judiciary first of all.

“Should the courts go by what popular opinion demands from them?”

We asked Prof. Wasim if it is possible to have an in-depth discussion on why the Supreme Court ought to exercise judicial restraint. The encroachment of the Supreme Court over the authority of the executive and legislative branches of the government is already undermining the gains it had made from the restoration movement.

It is very difficult, but the question is: should the courts go by what popular opinion demands from them? Or, should the courts go by established principles of law?

As far as the Supreme Court is concerned, it is independent and it has the right to deliver judgment as it would.

Do you think the court is struggling for its survival, too?

Well, in certain ways I would agree. In other ways I would differ when it comes to populism looking towards popular opinion, especially when popular opinion is somehow trying to influence judgments made. This is a gray area because judges are not bound to popular opinion. They must go by the letter of the law.

We find this populism and this issue looking towards popular opinion during a very interesting episode in the American judicial history. We go back in time to the 1930's in the U.S. when President Roosevelt was in power. The Supreme Court was comprised mostly of conservative judges. Laws promulgated by the Congress, to counter the effects of the Great Depression, were often struck down by the Supreme Court. To them, according to their judicial philosophy, President Roosevelt and the Congress were working against the interests of the people. However, the US Congress and the President had been elected by the people. So there came a point where it was a matter of public recourse.

We asked Prof. Wasim about the effects of the restoration movement, and how the idea of judicial independence and separation of powers is understood.

You mentioned that after the restoration of the Supreme Court in 2007, it was never as independent as it is now?

Yes. And the answer to your question would be that, this independence also requires a great deal of restraint. Because we are entering into the most fragile areas of democracy, we cannot afford friction between institutions. Today, the Supreme Court should be using what is generally termed as 'judicial restraint'.

So why do you think that the Supreme Court does not observe judicial restraint?

When I look at the cases that the Supreme Court has taken up, I find that it is over- reaching its power. It's crossing the line of the separation of powers. That should be avoided.

Do you think the concept of separation of powers is clearly understood by people in Pakistan?

"The problem is, this issue of separation of powers has not been taken up."

Unfortunately not. We have very important and educated judges and retired judges who should look into this. Of course, they will be looking into this to pose their own views on the subject, because now is the time for debate.

Not by way of any contempt do I think that a temperate, critical appreciation or an examination is a must. We need to examine public policy, to examine how Parliament is working. In this day and age, I think that the Supreme Court must also be subject to academic scrutiny. It should be pointed out clearly what areas need to be addressed. One area is the over-reach of the court; the other is the separation of powers.

So do you think this kind of discourse is coming forward in Pakistan now?

Not yet. We do find criticism taking place but not on an academic level.

I wish there were more debates about this. I wish academics would get involved in this area rather than relying on the influence of personality. Now, if we go by this logic, populism, and anyone who demands that another person be punished, sentenced or convicted, what impact will this have in terms of the law? I think it goes against the very spirit of the law. It goes against the spirit of justice.

Do you think that Pakistan's history, from martial law and courts validating emergency powers perpetuating martial law, has had impact on how the separation of powers is understood?

Yes. The problem is, this issue of separation of powers has not been taken up. I cannot find it in the Constitution of Pakistan either. It was never there, this separation of powers, because this question of independence, as it is asserted today, is absolutely a new idea in Pakistan society. It is a new concept coming into Pakistan.

So this concept has to be taken up in its own context and addressed by everyone; all citizens should take up this issue for debate. Civil society is the most important of all. It now has to play a very important role. Intellectuals, professionals, journalists should also join in and have discourse on these vital issues.

Text of the judgment on *Suresh Singh vs Union of India & Another*

IN THE SUPREME COURT OF INDIA
CRIMINAL/CIVIL ORIGINAL JURISDICTION
WRIT PETITION (CRIMINAL) NO.129 OF 2012

EXTRA JUDICIAL EXECUTION VICTIM FAMILIES ASSOCIATION (EEVFAM) AND ANOTHER PETITIONER(S)

VERSUS

UNION OF INDIA & ANOTHER RESPONDENT(S)
WITH

WRIT PETITION (CIVIL) NO.445 OF 2012

SURESH SINGH PETITIONER(S)

VERSUS

UNION OF INDIA & ANOTHER RESPONDENT(S)

ORDER

These two writ petitions, each filed under Article 32 of the Constitution of India, raise some disquieting issues pertaining to the State of Manipur. In writ petition (criminal) No.129 of 2012, it is stated that, over the years, a large number of people, Indian citizens, have been killed by the Manipur Police and other security forces while they were in custody or in stage-managed encounters or in ways broadly termed as 'extra-judicial executions'. In writ petition (civil) No.445 of 2012, it is stated that for a very long time, the State of Manipur is declared as "disturbed area" and is put under the Armed Forces (Special Powers) Act, 1958, subverting the civil rights of the citizens of the State and making it possible for the security forces to kill innocent persons with impunity.

In this order, we deal with the first writ petition, i.e., writ petition (criminal) No.129/2012.

In this writ petition it is stated that during the period May, 1979 to May, 2012, 1528 people were killed in Manipur in extra-judicial

execution. The statement is mainly based on a memorandum prepared by 'Civil Society Coalition on Human Rights in Manipur and the UN' and submitted to one Christof Heyns, Special Rapporteur on extrajudicial, summary or arbitrary executions, Mission to India, 19-30 March, 2012. The Memorandum compiles the list of 1528 people allegedly killed unlawfully by the State Police or the security forces. The writ petitioners later on filed "Compilation 1" and "Compilation 2". In "Compilation 1" details are given of ten (10) cases relating to the killings of eleven (11) persons (out of the list of 1528); in "Compilation 2", similarly details are given of thirteen (13) cases in which altogether seventeen (17) persons (out of the list of 1528) are alleged to have been killed in extra judicial executions.

A counter affidavit is filed on behalf of the State of Manipur. In the counter affidavit there is not only a complete denial of the allegations made in the writ petition but there also seems to be an attempt to forestall any examination of the matter by this Court. The plea is taken that the National Human Rights Commission (NHRC) is the proper authority to monitor the cases referred to in the writ petition. It is stated that in regard to all the ten (10) cases highlighted in "Compilation 1" filed by the petitioners, reports have been submitted to it and in none of those cases the NHRC has recorded any finding of violation of human rights. It is stated that the occasion for this Court to examine those cases would arise only if it holds that the NHRC had failed to perform its statutory functions in safeguarding the human rights of the people in the State. This Court should not examine this matter directly but should only ask the NHRC to indicate the status of the cases listed and highlighted in the writ petition. We are unable even to follow such a plea. The course suggested by the State will completely dissipate the vigour and vitality of Article 32 of the Constitution. Article 21 coupled with Article 32 of the Constitution provides the finest guarantee and the most effective protection for the most precious of all rights, namely, the right to life and personal liberty of every person. Any indication of the violation of the right to life or personal liberty would put all the faculties of this Court at high alert to find out the truth and in case the Court finds that there has, in fact, been violation of the right to life and personal liberty of any person, it would be the Court's bounden duty to step-in to protect those rights against the unlawful onslaught by the State. We, therefore, see no reason not to examine the matter directly but only vicariously and second-hand, through the agency of the NHRC.

A reference is next made in the counter affidavit to an appeal pending before this Court against the judgment of the Bombay High Court and a writ petition, also pending before this Court, filed by the State of Gujarat on the subject of fake encounters and it is stated that this case should be tagged with those other two cases to be heard together. We fail to see any relevance of the two cases referred to in the counter affidavit and, in our view, the plea that these two writ petitions should only be heard along with those two cases is meant to detract from consideration the grave

issues raised in the writ petition. It is thirdly stated in the counter affidavit that the State of Manipur is faced with the menace of insurgency for many years and details are given of policemen and civilians killed and injured by the insurgents. There are about 30 extremist organizations in the State out of which six are very powerful and they are armed with sophisticated weapons. Their aim and object is to secede from the Republic of India and to form an independent State of Manipur. For realization of their objective they have been indulging in violent activities, including killing of civilians and members of security forces. It is stated in the counter affidavit that during the period 2000 to October, 2012, 105 policemen, 260 security forces personnel, and 1214 civilians were killed; the number of injured during the same period is 178 for the policemen, 466 for members of security forces and 1173 for civilians.

There is no denying that Manipur is facing the grave threat of insurgency. It is also clear that a number of the insurgent groups are operating there, some of which are heavily armed. These groups indulge in heinous crimes like extortion and killing of people to establish their hegemony. It is also evident from the counter affidavit filed by the State that a number of police personnel and members of security forces have laid down their lives or received serious injuries in fighting against insurgency. But, citing the number of the policemen and the security forces personnel and the civilians killed and injured at the hands of the insurgents does not really answer the issues raised by the writ petitioners.

In People's Union for Civil Liberties v. Union of India and another[1], this Court earlier dealt with a similar issue from Manipur itself. In that case, it was alleged that two persons along with others were seized by the police and taken in a truck to a distant place and shot there. In an inquiry by the District and Sessions Judge, Manipur (West), held on the direction of this Court, the allegation was found to be correct. In that case, dealing with question of the right to life in a situation where the State was infested with terrorism and insurgency, this Court in paragraphs 5 and 6 of the judgment observed as follows:

> "5. It is submitted by Ms S. Janani, the learned counsel for the State of Manipur, that Manipur is a disturbed area, that there are several terrorist groups operating in the State, that Hamar Peoples' Convention is one of such terrorist organizations, that they have been indulging in a number of crimes affecting the public order — indeed, affecting the security of the State. It is submitted that there have been regular encounters and exchange of fire between police and terrorists on a number of occasions. A number of citizens have suffered at the hands of terrorists and many people have been killed. The situation is not a normal one. Information was received by the police that terrorists were gathering in the house on that night and on the basis of that information, police conducted the raid. The raiding party was fortunate that the people inside the house including the deceased did not notice the police, in which case the police would have suffered serious casualties. The police party was successful

1 (1997) 3 SCC 433

in surprising the terrorists. There was exchange of fire resulting in the death of the terrorists.

6. In view of the fact that we have accepted the finding recorded by the learned District and Sessions Judge, it is not possible to accede to the contention of Ms Janani insofar as the manner in which the incident had taken place. It is true that Manipur is a disturbed area, that there appears to be a good amount of terrorist activity affecting public order and, may be, even security of that State. It may also be that under these conditions, certain additional and unusual powers have to be given to the police to deal with terrorism. It may be necessary to fight terrorism with a strong hand which may involve vesting of good amount of discretion in the police officers or other paramilitary forces engaged in fighting them. If the version of the police with respect to the incident in question were true, there could have been no question of any interference by the court. Nobody can say that the police should wait till they are shot at. It is for the force on the spot to decide when to act, how to act and where to act. It is not for the court to say how the terrorists should be fought. We cannot be blind to the fact that even after fifty years of our independence, our territorial integrity is not fully secure. There are several types of separatist and terrorist activities in several parts of the country. They have to be subdued. Whether they should be fought politically or be dealt with by force is a matter of policy for the Government to determine. The courts may not be the appropriate forum to determine those questions. **All this is beyond dispute. But the present case appears to be one where two persons along with some others were just seized from a hut, taken to a long distance away in a truck and shot there. This type of activity cannot certainly be countenanced by the courts even in the case of disturbed areas.** If the police had information that terrorists were gathering at a particular place and if they had surprised them and arrested them, the proper course for them was to deal with them according to law. "Administrative liquidation" was certainly not a course open to them."

(emphasis added)

We respectfully reiterate what was earlier said by the Court in People's Union for Civil Liberties.

In 1997, in the Peoples' Union for Civil Liberties this Court, dealing with the case of killing of two persons in Manipur had cautioned the State against "Administrative liquidation". But, after 15 years in this case, we are faced with similar allegations on a much larger scale.

For this Court, the life of a policeman or a member of the security forces is no less precious and valuable than any other person. The lives lost in the fight against terrorism and insurgency are indeed the most grievous loss. But to the State it is not open to cite the numbers of policemen and security forces killed to justify custodial death, fake encounter or what this Court had called "Administrative liquidation". It is simply not permitted by the Constitution. And in a situation where the Court finds a person's rights, specially the right to life under assault by the State or the agencies of the State, it must stepin and stand with the individual and prohibit the State or its agencies from violating the rights guaranteed under the Constitution. That is the role of this Court and it would perform it under all circumstances. We, thus, find that the third plea raised in the counter affidavit is equally without substance.

Lastly, the counter affidavit, and the Supplementary Counter Affidavit filed by the State give the State's version of the 10 cases highlighted in the Compilation 1, filed by the petitioners. But on that we would not like to make any comment at this stage. The Union of India has also filed a separate counter affidavit. It is a more responsible affidavit in that it does not evade the issues nor does it try to dissuade the Court from examining the cases of alleged extra-judicial executions brought to its notice by the writ petitioners. In the counter affidavit filed by the Union, first a reference is made to different legal provisions (Section 146 and Sections 129 to 132 of the Criminal Procedure Code, Sections 99 to 106 in Chapter IV of the Indian Penal Code and Section 4 of the Armed Forces (Special Powers) Act, 1959) and it is contended that subject to the conditions stipulated in those provisions, killing of a person by a police officer or a member of the armed forces may not amount to an offence and may be justified in law. It is stated in the counter affidavit that all the cases listed and/or highlighted in the writ petition and described as extra-judicial executions are cases of persons who died during counter-insurgency operations or in performance of other lawful duties by the police and the personnel of the armed forces. It is emphasized that in most of the cases the socalled victims might have been killed in the lawful exercise of the powers and/or in discharge of official duties by the police and the armed forces personnel. It is further said that "public order" and, by implication, the maintenance of "law and order" are primarily State subjects and the role of the Central Government in deploying the armed forces personnel in the State is only supportive in aid of the law and order machinery of the State. The State of Manipur has the primary duty to deal with the issue of investigation in relevant cases, except where provided to the contrary in any other law for the time being in force. It is stated that the "very gloomy picture" of the State of Manipur sought to be presented by the writ petitioners is incorrect and misleading. It is asserted that Manipur is fully and completely integrated with the rest of the country and it is pointed out that in the 1990 elections the voting turnout for the 60 assembly seats in the State was 89.95%. Similarly, during the recent 2012 assembly elections, the voting turnout was 83.24%. It is added that the voting percentage in Manipur is amongst the highest in the country as a whole and it clearly shows that the people of Manipur have taken active participation in the elections showing their full faith in the Constitution and the constitutional process.

Coming to the issue of insurgency, it is stated in the counter affidavit as under:

> "It is only a handful of disgruntled elements who have formed associations/ groups that indulge in militant and unlawful activities in order to retain their influence and hegemony in the society. These groups also challenge the sovereignty and integrity of the country by following aims and objectives which are secessionist in nature. It is emphasized that only around 1500 militants are holding a population of 23 lakhs in Manipur to ransom and keeping the people in constant fear. The root cause of militancy in Manipur is the constant endeavour of these insurgent groups so that they can continue to extort money and the leaders of such groups can continue to lead luxurious life in foreign countries. The tribal divide

and factions in the society and the unemployed youth are being exploited by these militant outfits to fuel tension in the society."

It is further stated in paragraph 13 of the counter affidavit as under:

"It may also be submitted that the ethnic rivalries amongst the different tribal groups viz. Meities, Kukis and Nagas are deep-rooted and the militant groups fervently advance their ideologies by taking advantage of the porous international border with Myanmar which is 256 km long, heavily forested and contains some of the most difficult terrain. The border area is inhabited by the same tribes on either side. These tribes have family relations and for social interactions a free movement regime for the locals to move up to 16 kms on both sides is permitted. Taking advantage of this situation the militant outfits utilize the other side of the border (which is beyond the jurisdiction of the Indian Armed Forces) for conveniently conducting their operations of extortions/ kidnapping/ killing/ looting and ambushing the security forces."

The counter affidavit goes on to explain that the operations of not only the State Police but the different security forces under the control of the Central Government are being strictly monitored and kept within the parameters set out by the different laws under which those forces operate. It is stated that different statutory agencies acting as watchdog ensure that the armed forces do not overstep the Constitutional or the legal limits in carrying out the anti-insurgency operations.

Ms. Guruswamy, the learned amicus has, on the other hand, presented before us tables and charts showing the inconsistencies in the materials produced by the State of Manipur itself concerning the 10 cases highlighted in "Compilation 1" filed by the petitioners. She also submitted that though enquiries were purported to be held by an Executive Magistrate in the 10 cases described in "Compilation 1", in none of those cases the kin of the victims came before the Magistrate to give their statements even though they were approaching the court, complaining that the victims were killed in fake encounters. She further pointed out that in some of the cases even the police/security forces personnel who were engaged in the killings did not turn up, despite summons issued by the Magistrate, to give their version of the occurrence and the Magistrate closed the enquiry, recording that there was nothing to indicate that the victims were killed unlawfully. In some cases the Magistrate, even while recording the finding that the case did not appear to be one of fake encounter made the concluding observation that it would be helpful to sensitize the police/armed forces in human rights. She submitted that the so-called enquiries held by the Magistrate were wholly unsatisfactory and no reliance could be placed on the findings recorded in those enquiries.

Apart from the criticisms made by the amicus against the Magisterial enquiries held in the 10 cases of "Compilation 1" it is important to note that a number of cases cited by the petitioners had gone to the Gauhati High Court and on the direction of the High Court, inquires, of a judicial nature, were made into the killings of (1) Azad Khan, age 12 years (according to the State, 15 years) (from "Compilation 1"), (2)Nongmaithem Michael Singh, age 32 years, (3) Ningombam Gopal Singh, age 39 years, (4) (i)

Salam Gurung alias Jingo, age 24 years, (ii) Soubam Baocha alias Shachinta, age 24 years (5) (i) Mutum Herojit Singh, age 28 years (ii) Mutum Rajen, age 22 years (6) Ngangbam Naoba alias Phulchand Singh, age 27 years (7) Sapam Gitachandra Singh, age 22 years (8) (i) Kabrambam Premjit Singh, (ii) Elangbam Kanto Singh (9) Longjam Uttamkumar Singh, age 34 years (10) Loitongbam Satish @ Tomba Singh, age 34 years (11) Thockhom Inao @ Herojit Singh, age 31 years, (12) Khumallambam Debeshower Singh (13) (i) Km. Yumnam Robita Devi (ii) Angom Romajitn Singh (14) Thoudem Shantikumar Singh (all from "Compilation 2").

In all those cases the judicial inquiry found that the victims were not members of any insurgent or unlawful groups and they were killed by the police or security forces in cold blood and stage-managed encounters.

It is stated on behalf of the petitioners that though it was established in the judicial enquiry that those persons were victims of extra-judicial executions, the High Court simply directed for payment of monetary compensation to the kins of the victims. Learned Counsel for the petitioners submitted that payment of rupees two to four lakhs for killing a person from funds that are not subjected to any audit, instead of any accountability for cold blooded murder, perfectly suits the security forces and they only get encouraged to carry out further killings with impunity.

On a careful consideration of the averments made in the writ petition and the counter affidavits filed by the respondents and on hearing Ms Guruswamy, the amicus, Mr. Gonsalves the learned counsel appearing for the writ petitioners, Mr. Kuhad, the Additional Solicitor General appearing for the Union of India, Mr. Ranjit Kumar, senior advocate appearing for the State of Manipur and Ms. Shobha, advocate appearing for the NHRC, we find it impossible to overlook the matter without further investigation. We are clearly of the view that this matter requires further careful and deeper consideration.

The writ petitioners make the prayer to constitute a Special Investigation Team comprising police officers from outside Manipur to investigate the cases of unlawful killings listed in the writ petition and to prosecute the alleged offenders but at this stage we are not inclined to appoint any Special investigation Team or to direct any investigation under the Code of Criminal Procedure. Instead, we would first like to be fully satisfied about the truth of the allegations concerning the cases cited by the writ petitioners. To that end, we propose to appoint a high powered commission that would tell us the correct facts in regard to the killings of victims in the cases cited by the petitioners. We, accordingly, constitute a three-member commission as under:

1. Mr. Justice N. Santosh Hegde, a former Judge of the Supreme Court of India, as Chairperson
2. Mr. J. M. Lyngdoh, former Chief Election Commissioner, as Member
3. Mr. Ajay Kumar Singh, former DGP and IGP, Karnataka.

We request the Commission to make a thorough enquiry in the first six cases as detailed in "Compilation 1", filed by the

petitioners and record a finding regarding the past antecedents of the victims and the circumstances in which they were killed. The State Government and all other concerned agencies are directed to hand over to the Commission, without any delay, all records, materials and evidences relating to the cases, as directed above, for holding the enquiry. It will be open to the Commission to take statements of witnesses in connection with the enquiry conducted by it and it will, of course, be free to devise its own procedure for holding the enquiry. In light of the enquiries made by it, the Commission will also address the larger question of the role of the State Police and the security forces in Manipur. The Commission will also make a report regarding the functioning of the State Police and security forces in the State of Manipur and in case it finds that the actions of the police and/or the security forces transgress the legal bounds the Commission shall make its recommendations for keeping the police and the security forces within the legal bounds without compromising the fight against insurgency.

The Commission is requested to give its report within twelve weeks from today.

The Central Government and the Government of the State of Manipur are directed to extend full facilities, including manpower support and secretarial assistance as may be desired by the Commission to effectively and expeditiously carry out the task assigned to it by the Court.

The Registry is directed to furnish a copy of this order and complete sets of briefs in both the writ petitions to each of the members of the Commission forthwith.

Put up on receipt of the report by the Commission.

.....J.
(Aftab Alam)

.....J.
(Ranjana Prakash Desai)

New Delhi;
January 4, 2013.

Appendix I

Statement of CJ Shirani Bandaranayake

January 15, 2013

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

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

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

In the circumstances, in my country which is a democracy, where the rule of law is the underlying threshold upon which basic liberties exist, I still am the duly appointed legitimate Chief Justice.

It is not only the office of Chief Justice, but also the very independence of the judiciary, that has been usurped. The very tenor of rule of law, natural justice and judicial abeyance has not only been ousted, but brutally mutilated.

I have suffered because I stood for an independent judiciary and withstood the pressures. It is the People who are supreme and

the Constitution of the Republic recognizes the rule of law and if that rule of law had prevailed, I would not have been punished unjustly.

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

Since it now appears that there might be violence if I remain in my official residence or my chambers I am compelled to move out of my official residence and chambers particularly because the violence is directed at innocent people including judges, lawyers and committed members of the public.

The 16 years I have spent in the Supreme Court have been dedicated to uphold the rights of the people in this country. I have always considered it my solemn duty to protect, to the best of my ability, the life and liberty of human beings and the rights of children and their education. I have always acted to that end.

I thank all those who stood with me and the greater cause to fight for the independence of the judiciary. Even though I have not been meted out with justice today; time and nature will justify what I have done and what I and others who shared my beliefs have stood for.

Many will come and many will go. What matters is not the person who is the incumbent custodian of this position. What matters is the continued existence of an independent judiciary.

Thank you.

Appendix II

Statement of ICJ Concerning the removal of Chief Justice Dr. Shirani Bandaranayake

January 23, 2013

High Excellency President Mahinda Rajapakse
Honorable Speaker of the Parliament Chamal Rajapakse
Sri Jayawardenepura Kotte
SRI LANKA

Your Excellencies,

The International Commission of Jurists and the undersigned senior judges and eminent jurists from around the world condemn the recent removal of Chief Justice and urge you to act immediately to restore the independence of the judiciary by reinstating the legal Chief Justice, Dr. Shirani Bandaranayake. We are gravely concerned that recent actions to remove the Chief Justice have been taken in contravention of the Constitution, international human rights law and standards, including the right to a fair hearing, and the rule of law.

Judicial independence and the separation of powers are the bedrock of the rule of law. International standards such as the United Nations Basic Principles on the Independence of the Judiciary stress that judicial independence is a fundamental requirement in promoting human rights and preserving rule of law. The United Nations General Assembly in Resolution 65/213 of 1 April 2011 reaffirmed that an independent and impartial judiciary is essential for the protection of human rights, the rule of law, good governance and democracy.

The irremovability of judges is a main pillar of judicial independence. Judges may be removed only in the most exceptional cases involving serious misconduct or incapacity. And in such exceptional circumstances, any removal process must comport with international standards of due process and fair trial, including the right to an independent review of the decision. Members of the judiciary must never be subject to removal on the basis of judicial decisions rendered in the legitimate exercise of their professional functions.

The United Nations Special Rapporteur on the Independence of Judges and Lawyers and the United Nations Human Rights Committee have raised concerns that the procedure for removing judges under Article 107 of the 1978 Constitution and the complementary Standing Orders do not adequately guarantee the right to a fair trial rights and due process under Article 14 of the International Covenant on Civil and Political Rights.

Sri Lanka's actions further violate the core values of the Commonwealth of Nations enunciated in the Singapore Declaration 1971, the Harare Declaration 1991 and the Latimer House Principles on the Three Branches of Government 2003. The Latimer House Principles call on member States to uphold the rule of law by protecting judicial independence and maintaining mutual respect and cooperation between Parliament and the Judiciary.

Finally, Sri Lanka's actions run against the regionally applicable standards set out in the Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region.

The threats to the separation of powers, independence of the judiciary and rule of law in the impeachment case in Sri Lanka are revealed by the following sequence of events:

On 1 November 2012, a resolution signed by 117 Members of Parliament was presented to the Speaker of the House, Chamal Rajapakse, to initiate impeachment proceedings against the Chief Justice. The resolution contained fourteen allegations relating to misconduct and non-disclosure of financial assets.

On 14 November 2012, a Parliamentary Select Committee was established pursuant to Parliamentary Standing Orders 78A and Article 107(3) of the 1978 Constitution to investigate the charges. The Parliamentary Select Committee was composed of seven Cabinet Ministers and four members from the opposition political parties.

On 22 November 2012, the Supreme Court of Sri Lanka requested Parliament to suspend the impeachment proceedings until the Court could decide on the constitutionality of Parliamentary Standing Orders 78A. Parliament disregarded the Supreme Court's request and the Chief Justice appeared before the Parliamentary Select Committee for the first time on 23 November 2012.

On 6 December 2012, Chief Justice Bandaranayake walked out of the impeachment hearing in protest over the denial of a fair hearing. The Chief Justice was not provided timely and full disclosure of the evidence in relation to the charges; was not given adequate time to respond to the charges; was denied the right of crossexamination; and was treated in a derogatory and disrespectful manner by Members of Parliament and denied the right to a public hearing. On the same day, the four opposition Members withdrew from the Parliamentary Select Committee.

On 7 December 2012, the seven remaining members of the Parliamentary Select Committee concluded their investigation on the first five charges, finding the Chief Justice guilty on three charges.

On 1 January 2013, a three-member panel of the Supreme Court ruled that the impeachment procedure set out in Standing Orders 78A was not constitutionally valid, holding that such procedures could only be established 'by law' enacted by Parliament.

On 7 January 2013, the Court of Appeal, relying on the judgment of the Supreme Court, issued a writ quashing the findings of the Parliamentary Select Committee on the basis the Committee lacked authority to make such a finding.

On 11 January 2013, in utter defiance of the Supreme Court judgment and the Court of Appeal order, Parliament passed a motion with 155 votes, to impeach Chief Justice Dr. Shirani Bandaranayake.

On 13 January 2013, President Mahinda Rajapakse signed a decree removing the Chief Justice from her post and delivered the document to her official residence in the morning.

On 15 January 2013, President Mahinda Rajapakse nominated three candidates to replace Chief Justice Bandaranayake. Former Attorney-General Mohan Peiris was approved by the Parliamentary Council and sworn in as Chief Justice. Prior to his appointment, Mohan Peiris served as the legal advisor to President Rajapakse and was widely known for defending the conduct of the Sri Lankan government and consistently blocking efforts to hold State officials accountable for gross human rights violations.

On the same day, Chief Justice Bandaranayake issued a public statement strongly denying all of the charges against her and asserting her status as the legal Chief Justice of Sri Lanka. She said, "The accusations leveled against me are blatant lies. I am totally innocent of all charges…Since it now appears that there might be violence if I remain in my official residence or my chambers I am compelled to move…" Attacks against the judiciary have escalated to the point of physical violence 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 2012, four individuals assaulted the Judicial Service Commission Secretary Manjula Tillekaratne in broad daylight.

The undersigned jurists urge your High Excellency President Mahinda Rajapakse and Honorable Speaker Chamal Rajapakse to act immediately to restore the independence of the judiciary by reinstating the legal Chief Justice Dr. Shirani Bandaranayake and enacting a law in Parliament to govern the impeachment process. Such a law must comply with Sri Lanka's obligations under international human rights law and standards.

Yours Sincerely,

Justice Md. Abdul Matin

Former judge at the Appellate Division of the Supreme Court, Bangladesh

Justice Md. Abdur Rashid Former Judge at the Supreme Court, Bangladesh

Justice Ajit Prakash Shah Former Chief Justice of the Delhi High Court, India

Justice Bharat Raj Uprety Former Justice at the Supreme Court, Nepal

Justice C. Baardman Judge at the Court of Appeal of The Hague, the Netherlands

Justice Dragana Boljevic Judge at the High Court of Belgrade, Serbia

President of Judges' Association of Serbia and Secretary General of MEDEL (Magistrats Européens pour la Démocratie et les Libertés)

Justice E.D. Bonga-Sigmond Judge at the Court of Amsterdam, the Netherlands

Justice Gerrard Boot Judge at the Court of Amsterdam, the Netherlands Board member of Judges for Judges

Justice Azhar Cachalia Judge at the Supreme Court of Appeal, South Africa

Justice Moses Hungwe Chinhengo Former judge at the High Court, Zimbabwe and Botswana

Justice Anaclet C. Chipeta Judge at the High Court, Malawi

Justice Fernando Cruz Castro Judge at the Constitutional Chamber of the Supreme Court, Costa Rica

Justice E. de Rooij Judge at the Court of Amsterdam, the Netherlands

Justice Radmila Dicic Acting President of the Belgrade Court of Appeal and Judge of the Supreme Court, Serbia

Justice Rodolfo Gonzalez Judge at the Constitutional Chamber of the Supreme Court, El Salvador

Justice Augusto J. Ibáñez Guzmán Former President of the Supreme Court, Colombia

Justice Åsne Julsrud Judge at the District Court of Drammen, Norway

Justice Maclean Kamwambe Judge at the High Court, Malawi

Justice Kalthoum Kennou Investigative judge at the Tribunal of Tozeur, Tunisia

Justice César Landa Former President of the Constitutional Court, Peru

Justice Ketil Lund Former Judge at the Supreme Court, Norway

Justice Qinisile Mabuza Judge at the High Court, Swaziland

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Justice Mbufto Mamba Judge at the High Court, Swaziland

Justice José Antonio Martín Pallín Emeritus Judge at the Supreme Court, Spain

Justice Thomas Masuku Former Judge at the High Court, Swaziland

Justice Florentín Meléndez Judge at the Constitutional Chamber of the Supreme Court, El Salvador

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Justice E.J. van der Molen Judge at the Court of Noord-Holland, the Netherlands

Justice Gerritjan van Oven Judge at the Court of Appeals of The Hague, the Netherlands President of Judges for Judges

Justice T.N.I. van Voorst Vader Judge at the Court of Amsterdam, the Netherlands

Justice T. Wolters Judge at the Court of Appeal of Leeuwarden, the Netherlands

Antonio Cluny Assistant Prosecutor-General at the Audit Court, Portugal President of MEDEL (Magistrats Européens pour la Démocratie et les Libertés) Commonwealth Magistrates' and Judges' Association

Asma Jahangir Advocate at the Supreme Court, Pakistan Chair of the Human Rights Commission, Pakistan

Appendix III

Extract of the Basic Principles on the Independence of the Judiciary

Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985

The following basic principles, formulated to assist Member States in their task of securing and promoting the independence of the judiciary should be taken into account and respected by Governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general. The principles have been formulated principally with professional judges in mind, but they apply equally, as appropriate, to lay judges, where they exist.

Independence of the judiciary

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

Freedom of expression and association

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.

9. Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.

Qualifications, selection and training

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

Conditions of service and tenure

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.

14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.

Professional secrecy and immunity

15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.

16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

Discipline, suspension and removal

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

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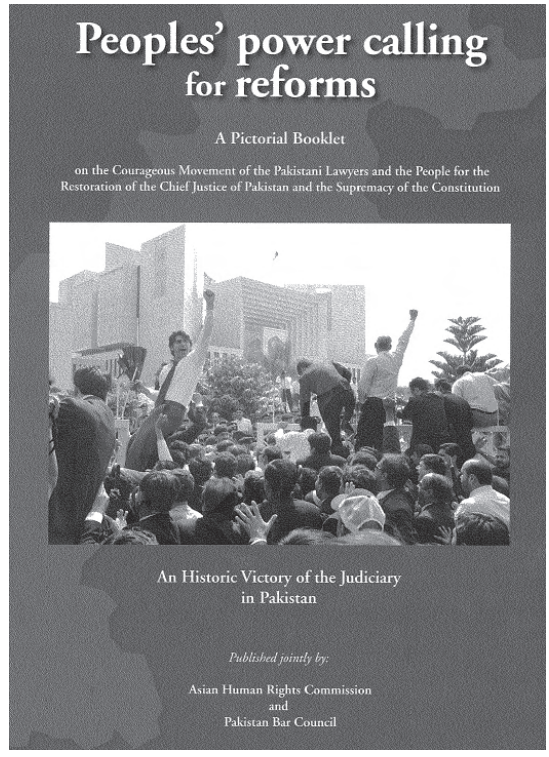

In this issue of *article 2*

STRUGGLE FOR CONSTITUTIONALISM & JUDICIAL INDEPENDENCE IN ASIA

Cover photo: Thousands of anti-Estrada supporters celebrate outside Malacanang Presidential Palace, 20 January 2001, after the ouster of President Estrada following a decision by the Supreme Court to vacate the presidency. (see story inside: Impeachment of the Chief Justice) *Photo: AFP /Romeo Gacad*

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