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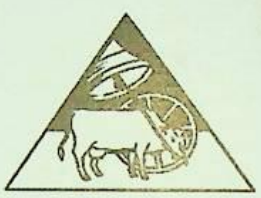

# PARLIAMENT & THE IMPEACHMENT OF SUPERIOR COURT JUDGES

LAW & SOCIETY TRUST

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*-Geoffrey Robertson QC-*

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*Editor's Note... ... ...*

This Double Issue of the ***LST Review*** is themed around the February 21st judgment of a Divisional Bench of the Supreme Court (SC Appeal No 67/2013; SC (Spl) LA Appln No 24/2013; CA Writ Appln No 411/2012, SCM 21.02.2014) concluding *inter alia* that parliamentary processes relating to the impeachment of superior court judges cannot be judicially reviewed. It also contains supplementary submissions relating to the factual and legal context in which the impeachment of Sri Lanka's 43rd Chief Justice took place in late 2012/2013 and the unhealthy precedent that this has set for the future.

The Divisional Bench ruled that the Court of Appeal (CA) had erred in issuing writ of certiorari on 7th January 2013 quashing the report of the Parliamentary Select Committee impeaching the 43rd Chief Justice. In that earlier order, the Court of Appeal was acting in consequence of a finding made by the Supreme Court itself (Writ) No. 358/'12/SC Ref No. 3/'12, SCM 01.01.2013) utilizing the well established Public Trust Doctrine. The Supreme Court was responding, at that time, to a request by the Court of Appeal regarding the constitutional interpretation of Article 107 of the Constitution.

The basic components of the 2013 ruling in the context of the Public Trust Doctrine, as explained by a three member Bench of the Supreme Court (presided over by Gamini Amaratunga J.), were simple. First, the basis of the Constitution is the Rule of Law which postulates the supremacy of the regular law as opposed to exercise of arbitrary power. Second, the power of removal of a Superior Court judge conferred on the President upon an address of Parliament is a check provided by the Constitution to sustain the balance of power between the three Organs of Government. It is not to resolve conflicts and for any one Organ to tame and vanquish the other. Rather, this power exists as a check to be exercised, where necessary, in trust for the people.

Third, the constitution of a Select Committee under Standing Order 78(A)(2) was not proper as the relevant Standing Order did not provide for due process safeguards. Therefore, matters relating to proof, mode, burden and the degree of proof in relation to an impeachment process need to be provided for by law to avoid any uncertainty as to the proof of the alleged misbehavior. Otherwise, such matters will be left to the subjective discretion of parliamentarians. The Court emphasized that 'the scope of the

right to be heard, such as the right to cross examine witnesses, to call witnesses and adduce evidence, both oral and documentary' should be clearly provided for by law.

In consequence of this ruling, the Court of Appeal issued writ on the impugned report of the Parliamentary Select Committee (PSC) relating to the impeachment of Sri Lanka's 43rd Chief Justice. These 2013 judicial orders were publicly acclaimed as providing a salutary check on the arbitrary use of executive and legislative power stripping away even the remaining vestiges of Sri Lanka's independence of the judiciary (see ***LST Review***, Volume 23 Issue 305 March 2013). Nonetheless, it is a particularly abysmal reflection on what passes for parliamentary process today that the Government proceeded with the impeachment.

In characterizing the Supreme Court order in 2013 as a 'distortion of the law' and 'altogether erroneous', Saleem Marsoof J, (writing for the Divisional Bench comprising also Chandra Ekanayake J, Sathya Hettige J, Eva Wanasundera J and Rohini Marasinghe J) stressed that this interpretation rendered nugatory that part of Article 107 which stated that Parliament may provide for the impeachment of superior court judges by law 'or by Standing Order'. The Divisional Bench expressly took the view that the Court has no power to examine the actions of a PSC when impeaching judges.

The most important consequence of this February 2014 order is the affirmation by the Court that a PSC has unfettered powers to deal with the impeachment of superior court judges as it wishes, unrestrained by due process safeguards or indeed, rudimentary rule of law norms. Drawing no differentiation between Parliament itself as opposed to a PSC, the Divisional Bench opined, following a sweep of relevant case law, that Parliament/PSC cannot be considered as 'inferior' to the Court of Appeal exercising writ jurisdiction and that writ jurisdiction of the appellate court cannot be exercised against 'superior' or 'equal ranking' bodies

In so doing, the Divisional Bench read an implied constitutional ouster into the wording of Article 107 using the doctrine of parliamentary powers and privileges as set out in Article 67 of the Constitution and the relevant statute.

Saliently this ousting of judicial review was an approach explicitly rejected by the Supreme Court and the Court of Appeal in 2013 even though the Attorney General had strongly argued that 'judicial involvement in the removal proceedings, even if only for

purposes of judicial review or interpretation of the Constitution, which forms part of such removal is counterintuitive because it would eviscerate the important constitutional check placed on the judiciary by the framers of our Constitution' (see Writ) No. 358/'12/SC Ref No. 3/'12, SCM 01.01.2013).

In dismissing that contention, the Supreme Court had observed in 2013 that the specific language of the applicable constitutional provisions did not lend themselves to such a restrictive application. The Court of Appeal also cited well known precedents to hold that its jurisdiction to issue writs was wide and untrammeled under Article 140 while there was no specific bar in Article 107 itself to judicial review.

This thinking was departed from by the Divisional Bench in 2014 in no uncertain terms. The application of the Public Trust Doctrine was eschewed. The unfortunate impact of this judicial approach is, of course, the rejuvenation of an outdated notion of parliamentary supremacy even though the Divisional Bench chooses to refer to the concept of 'sovereignty of the people' declaring that judges should not judge in their own cause. In fact, the point of that order by the 2013 Bench was not to enable judges themselves to intervene in the impeachment process but to prescribe due process requirements therein to be enacted by law. Post-impeachment, Parliament has to-date refused to accede to requests made to enact such a law

Supplementary to the publication of the Divisional Bench's decision, we publish three additional contributions. The first relates to an *amicus curiae* brief of the Commonwealth Lawyers Association and the Bar Human Rights Committee of England, (which was not accepted by the Divisional Bench), rebutting the argument that impeachment procedures are summary in nature in the United Kingdom.

The second contribution comprises extracts from a 2013 Report of the International Bar Association's Human Rights Institute (IBAHRI)) illustrating the nature of the profound - and yet un-redressed – injustice caused to a sitting head of the country's judiciary and pointing to regional and comparative best practice. Lastly the Issue contains extracts from the findings of an inquiry conducted in regard to the contested 2013 impeachment by ***Geoffrey Robertson QC*** for the Human Rights Committee of the Bar of England and Wales.

***Kishali Pinto-Jayawardena***

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

In the matter of an application for Special Leave to Appeal against the Judgment of the Court of Appeal under and in terms of Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

**PETITIONER - APPELLANT**

**-Vs-**

Dr. Upathissa Atapattu Bandaranayke Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake,
Residence of the Chief Justice of Sri Lanka
No. 129, Wijerema Mawatha,
Colombo 07.

Presently at: No. 170, Lake Drive,
Colombo 08.

**PETITIONER - RESPONDENT**

**SC Appeal No. 67/2013**
SC (SPL) LA Application No. 24/2013
CA (Writ) Application No. 411/2012

1. Chamal Rajapakse, Speaker of Parliament, Parliament of Sri Lanka, Sri Jayawardenepura, Kotte.
2. Anura Priyadarshana Yapa, Eeriyagolla, Yakawita.
3. Nimal Siripala de Silva, No. 93/20, Elvitigala Mawatha, Colombo 08.
4. A. D. Susil Premajayantha, No. 123/1, Station Road, Gangodawila, Nugegoda.
5. Rajitha Senaratne, CD 85, Gregory's Road, Colombo 07.

6. Wimal Weerawansa,
No. 18, Rodney Place,
Cotta Road, Colombo 08.

7. Dilan Perera,
No. 30, Bandaranayake Mawatha,
Badulla.

8. Neomal Perera,
No. 3/3, Rockwood Place,
Colombo 07.

9. Lakshman Kiriella,
No. 121/1, Pahalawela Road,
Palawatta, Battaramulla.

10. John Amaratunga,
No. 88, Negambo Road,
Kandana.

11. Rajavarothiam Sampathan,
No. 2D, Summit Flats,
Keppitipola Road,
Colombo 05.

12. Vijitha Herath,
No. 44/3, Medawaththa Road,
Mudungoda, Miriswaththa,
Gampaha.

Also of
Parliament of Sri Lanka,
Sri Jayawardenepura, Kotte.

13. W.B.D. Dassanayake,
Secretary General of Parliament,
Parliament Secretariat,
Parliament of Sri Lanka,
Sri Jayawardenapura, Kotte.

**RESPONDENT - RESPONDENTS**

**Before** : Hon. Saleem Marsoof, PC., J,
Hon. Chandra Ekanayake, J,
Hon. Sathyaa Hettige, PC., J,
Hon. Eva Wanasundera, PC., J and
Hon. Rohini Marasinghe, J.

**Counsel** : Palitha Fernando, PC, Attorney General with

Shavindra Fernando, DSG., Sanjay Rajaratnam DSG., Dilip Nawaz, DSG., Janak De Silva, DSG., Nerin Pulle, SSC., and Manohara Jayasinghe, SC, for the Petitioner-Appellant.

Petitioner-Respondent is absent and unrepresented.

M.A. Sumanthiran with Viran Corea and Niran Ankatell for the 11th Respondent-Respondent.

J.C. Weliamuna with Sunil Watagala, Pulasthi Hewamanne and Mevan Bandara for the 12th Respondent - Respondent.

**Argued on :** 28.11.2013

**Written Submissions:** 12.12.2013 (Petitioner-Appellant)

12.12.2013 (12th Respondent-Respondent)

17.12.2013 (11th Respondent-Respondent)

**Decided on :** 21.02.2014

**SALEEM MARSOOF J.**

By its orders dated 30th April 2013 and 28th June 2013, this Court has granted special leave to appeal against the judgment of the Court of Appeal dated 7th January 2013 on two questions of "public or general importance" within the meaning of the proviso to Article 128 (2) of the Constitution of the Democratic Socialist Republic of Sri Lanka (hereinafter referred to as "the Constitution of Sri Lanka" or "the Constitution").

These questions concern the ambit of the writ jurisdiction of the Court of Appeal, in particular, whether the Court of Appeal had the power to issue a writ of *certiorari* in terms of Article 140 of the Constitution with respect to proceedings and actions of Parliament or of a Parliamentary Select Committee within the process of impeachment of a Chief Justice of Sri Lanka under Article 107 of the Constitution. Before considering these questions in greater detail, it will be useful to outline the material facts and circumstances from which they arise for determination.

*Impeachment Motion and the Report of the Select Committee*

On or about 1st November 2012, a notice of a resolution for the removal of the Petitioner-Respondent, the 43rd Chief Justice of Sri Lanka, prepared in terms of the proviso to Article 107(2) of the Constitution, signed by 117 Members of Parliament, setting out therein, 14 charges pertaining to

alleged misbehavior on the part of the Petitioner-Respondent, was presented to the 1st Respondent-Respondent, who is the Speaker of the House of Parliament. The 1st Respondent-Respondent entertained the said motion, placed it on the Order Paper of Parliament on 6th November 2012, and acting in terms of Order 78A(2) of the Standing Orders of Parliament, made by Parliament pursuant to powers conferred by Articles 74(1)(ii) and 107(3) of the Constitution, proceeded to appoint on 14th November 2012, a Parliamentary Select Committee consisting of the 2nd to 12th Respondent-Respondents, to consider the same.

The said Select Committee, investigated 5 of the 14 charges contained in the motion, and by its undated report, allegedly prepared on 8th December 2012, a copy of which was produced by the Petitioner-Respondent marked 'P17' with her petition filed in the Court of Appeal dated 19th December 2012, found the Petitioner-Respondent guilty, by majority decision, of charges 1,4, and 5, which were considered by the Select Committee to be "of such a degree of sufficiency and seriousness as to remove" the Petitioner-Respondent from the office of Chief Justice of Sri Lanka. The said report was signed by only the 2nd to 8th Respondent-Respondents, since the 9th to 12th Respondent-Respondents had staged a walk out from the Select Committee on 7th December 2012, after the Petitioner-Respondent herself walked out midway through the proceedings before the Select Committee on 6th December 2012, but the Committee had nonetheless proceeded with its business without their participation.

On 19th December 2012, the Petitioner-Respondent filed an application for orders in the nature of writs of *certiorari* and prohibition in the Court of Appeal, citing the Speaker of the House of Parliament, the Chairman and members of the aforesaid Parliamentary Select Committee, and the Secretary General of Parliament as respondents, but except for the 11th and 12th Respondent-Respondents, none of the other respondents had responded to the notice issued by the Court of Appeal. However, the 11th and 12th Respondent-Respondents appeared in the Court of Appeal and through their Counsel informed court that they are instructed to accede to the jurisdiction of court and inform court that they do not intend to file any objections in the case, but would assist court.

While the said writ application was pending before the Court of Appeal, the Speaker of the House reported the findings of the Select Committee contained in the report marked "P17" to Parliament, which debated the resolution to impeach the Petitioner-Respondent on 11th January 2013, and passed the same with 155 Members of Parliament voting for it, and 49 voting against it. This paved the way for an address of Parliament for the removal of the Chief Justice to be presented to the President of Sri Lanka as required by Article 107(2) of the Constitution and Order 78A(9) of the Standing Orders of Parliament, and thereupon, on or about 12th January 2013, the President made order in terms of Article 107(2) of the Constitution removing the Petitioner-Respondent from the office of Chief Justice of Sri Lanka.

*The Decision of the Court of Appeal*

By the application filed by her in the Court of Appeal dated 19th December 2012, the Petitioner-Respondent sought the following substantive relief:-

(a) a mandate in the nature of writ of *certiorari* quashing the findings and / or the decision of the report of the 2nd to 8th Respondent-Respondents marked 'P17' and or quashing the said report marked 'P17';

(b) a mandate in the nature of writ of prohibition, prohibiting the 1st and / or 2nd to 13th Respondent-Respondents from acting on or and / or taking any further steps based on the said purported report marked 'P17';

The aforesaid relief were prayed for on the basis of the alleged procedural irregularities in the manner in which the Select Committee was constituted and / or conducted its affairs. It was also contended that the exercise of judicial power by the Select Committee was unconstitutional, and alternatively, that the functioning of the 2nd to 8th Respondent-Respondents as the Select Committee even after the withdrawal of the 9th to 12th Respondent-Respondents was wrongful, unlawful and *ultra vires* the Standing Orders of Parliament, and that the Petitioner-Respondent was deprived of a fair hearing. It was further contended that in the aforesaid circumstances, the 2nd to 8th Respondent-Respondents failed to adhere to the rule of law, breached the rules of natural justice, acted unreasonably, and / or capriciously and / or arbitrarily, and had prejudged matters.

It is significant that neither the 1st Respondent-Respondent, who is the Speaker of the House of Parliament, nor the 2nd to 8th Respondent-Respondents, who were the members of the Parliamentary Select Committee, responded to the summons issued by the Court of Appeal. Only the 11th and 12th Respondent-Respondents appeared in the Court of Appeal, and acceded to the jurisdiction of court and further informed court that they do not intend to file any objections in the case. The Court of Appeal, first disposed of the applications made by two persons, namely, Don Chandrasena and Sumudu Kantha Hewage, to intervene into the case By its order dated 3rd January 2013, the Court of Appeal refused the applications for intervention, and by the same order it decided to invite the Petitioner-Appellant, who is the Attorney-General of Sri Lanka, to assist court as *amicus curiae*.

At the hearing of the Court of Appeal into the substantive application held on 7th January 2013, learned Counsel for the Petitioner-Respondent and the 11th and 12th Respondent-Respondents made submissions, and the learned Attorney-General also assisted Court as *amicus curiae*. It is noteworthy that the learned Attorney-General, in the course of his submissions, stressed that the Court of Appeal is devoid of jurisdiction to hear and determine the application as the jurisdiction of that court conferred by Article 140 of the Constitution, is "subject to the provisions of the Constitution", which excluded judicial review of the process of impeachment of Judges of the Supreme Court and the Court of Appeal.

By its judgment dated 7th January 2013, the Court of Appeal held that since its power to exercise judicial review on findings or orders of persons "exercising authority to determine questions affecting the rights of subjects" is wide, and has been conferred by the Constitution of the Democratic Socialist Republic of Sri Lanka, it cannot be "abridged by the other arms of the government, namely the Legislature or the Executive." In arriving at this conclusion, the Court of Appeal sought to follow the principle enunciated by this Court in *Atapattu and others v People Bank and others* [1997] 1 Sri LR

208 at pages 221 to 223. The Court of Appeal reasoned as follows:-

> "The Constitution in Article 80(3), 81 and 124 expressly ousts the jurisdiction of courts. If the legislature had intended that the jurisdiction of the court should be ousted under Article 107 of the Constitution to impeach judges, it ought to have specifically provided for such an eventuality. As such, in my opinion the Legislature has clearly placed no such obstacle either directly or by necessary implication in the way of entertaining the present application."

Having thus taken a considered decision to exercise jurisdiction in the case, the Court of Appeal purported to apply the determination of this Court in SC Reference No. 3/2012, which was made in terms of Article 125 of the Constitution on a question of constitutionality that was considered to have arisen in CA (Writ) Application No. 358/2012. In SC Reference No. 3/2012, a Bench consisting of 3 judges of the Supreme Court, had determined that-

> ".....it is *mandatory under Article 107(3) of the Constitution for the Parliament to provide by law* the matters relating to the forum before which the allegations are to be proved, mode of proof, burden of proof and the standard of proof of any alleged misbehaviour or incapacity and the Judge's right to appear and to be heard in person or by representative in addition to matters relating to the investigation of the alleged misbehaviour or incapacity". (*Emphasis added*)

The Court of Appeal considered itself bound by the said determination, and upheld the submission of the learned President's Counsel for the Petitioner-Respondent that by reason of the aforesaid determination, "a Select Committee appointed under and in terms of Standing Order 78A has no power or authority to make a finding *adversely affecting the legal rights of the judge* against whom the allegation made in the resolution moved under the proviso to Article 107(2) is the subject matter of its investigation." The Court of Appeal accordingly concluded that the power "to make a valid finding, after the investigation contemplated in Article 107(3), can be conferred on a court, tribunal or body, *only by law and by law alone*", and went on to hold that the finding and / or the decision or the report of the 2nd to 8th Respondent-Respondents marked as 'P17', "has no legal validity, and as such this court has no alternative but to issue a writ of *certiorari* to quash 'P17', thus giving effect to the determination of the Supreme Court referred to above."

It is significant to note that the Court of Appeal did not make any findings on any of the other allegations, including those of impropriety and non-conformity with rules of natural justice, made by the Petitioner-Respondent in her petition, and it also declined to grant a mandate in the nature of writ of prohibition as prayed for by the Petitioner-Respondent. The Court of Appeal expressly stated in the impugned judgment that insofar as the Petitioner-Respondent had failed to cite as party respondent to her writ petition, the 117 Members of Parliament who had signed and presented to the 1st Respondent-Respondent the impeachment motion under consideration, "the quashing of the impugned decision will not affect the members who subscribed to the impeachment motion, as it does not prevent the Parliament from proceeding with the said motion to impeach the petitioner [the present Petitioner-Respondent]".

*The Application for Special Leave to Appeal*

The Petitioner-Appellant, in his capacity as the Attorney-General of Sri Lanka, applied to this Court on 15th February 2013 seeking special leave to appeal against the decision of the Court of Appeal dated 7th January 2013 on the basis of several substantive questions of law. The Petitioner-Respondent responded to the notice issued on her by the Registrar of this Court by way of motion dated 16th March 2013, in which the said Respondent has stated as follows:

> "The Court of Appeal gave its Order on 7th January 2013. The Court of Appeal Order was not followed and / or was not adhered to by most of the Respondent-Respondents.
>
> The Petitioner-Respondent has at all times maintained that her impeachment is null and void and is of no force or effect in law and will continue to be so. Consistent with the Petitioner-Respondent's position, the Petitioner-Respondent will not participate in these proceedings.
>
> Thus the Petitioner-Respondent's view is that her purported removal as Chief Justice is of no force or effect in Law. In any event, the Petitioner-Respondent fails to see how a party invited to assist Court could appeal against the said order."

This Court, after hearing submissions of the learned Attorney-General who appeared in support of the application for special leave to appeal, made order on 30th April 2013, granting special leave to appeal against the impugned judgment of the Court of Appeal in terms of the proviso to Article 128(2) of the Constitution on two substantive questions of law. Court also fixed the appeal for hearing on 29th May 2013 after the filing of written submissions.

The 11th and 12th Respondent-Respondents thereafter filed motions dated respectively 21st May 2013 and 22nd May 2013, informing the Court that they could not file *caveat* or appear in this Court on 30th April 2013 for the purpose of objecting to the grant of special leave to appeal against the judgment of the Court of Appeal as they had not received any notice from this Court requiring them to do so. After examining the contents of the aforesaid motions, the supporting affidavit affirmed to by the 12th Respondent-Respondent, and all other relevant material, this Court made order on 29th May 2013 that the Attorney-General had duly taken out notice on all parties cited as respondents, and that there has been substantial compliance by the Petitioner-Appellant of the Supreme Court Rules, 1990.

However, in view of the position taken up by the 11th and 12th Respondent-Respondents that they had not in fact received the notices sent out through the Registry of this Court, it was considered necessary to permit the 11th and 12th Respondent-Respondents, in the interests of Justice, "an opportunity to participate in the proceedings for the grant of special leave to appeal." Accordingly, Court set aside its own order granting special leave to appeal with respect to the 11th and 12th Respondent-Respondents, to enable them to file *caveat* within one week, and fixed the case for consideration of special leave to appeal against these respondents for 10th June 2013. on which date the Court also considered certain preliminary objections that had been taken up by the 11th and 12th Respondent-Respondents against the maintainability of the application for special leave to appeal.

In view of certain submissions made by learned Counsel in the course of the hearing of this appeal, it may be opportune to mention that one of the preliminary objections raised by the 11th and 12th Respondent-Respondents was that the Attorney-General, who had not been a party to the writ application before the Court of Appeal, and was invited by that court to assist court as *amicus curiae*, was not entitled to appeal against the decision of the said Court. This Court dealt with this and the other objections raised by the said respondents in its unanimous order dated 28th June 2013, by which all of the objections of the 11th and 12th Respondent-Respondents were overruled. In particular, this Court followed its decision in *Bandaranaike v Jagathsena* (1984) 2 Sri LR 397, and held that the Supreme Court has a wide discretion under Article 128(2) of the Constitution to entertain an application for special leave to appeal *from a person who was not a party to the proceedings before the Court of Appeal*, where it is of the opinion that the question or matter in issue is "fit for review by the Supreme Court". This Court further held that where, as in this case, the Court is satisfied that "the question to be decided is of public or general importance", the *Court has no power to refuse leave to appeal* in view of the proviso to Article 128(2) of the Constitution.

Accordingly, this Court granted leave to appeal against the 11th and 12th Respondent-Respondents on the same two substantive questions of law on the basis of which special leave to appeal was previously granted on 30th April 2013 against all respondents. The two substantive questions of Law on which special leave to appeal was granted by this Court, are as follows:-

1) Did the Court of Appeal err in holding that the writ jurisdiction of that Court embodied in Article 140 of the Constitution extends to proceedings of Parliament or a Committee of Parliament?

2) Did the Court of Appeal err in holding that the words "any Court of first instance or tribunal or other institution or any other person" in Article 140 of the Constitution extends to the Parliament or a Committee of Parliament?

In my view, it is convenient to consider these questions in converse order, and hence I would prefer to consider Question 2) ahead of Question 1). In any event, though formulated as two separate questions, in the context of the factual settings of this case, the essence of the substantive questions of law on which this Court has granted leave to appeal is whether the Court of Appeal was possessed of jurisdiction to issue an order in the nature of a writ of *certiorari* in terms of Article 140 of the Constitution with respect to proceedings and actions of Parliament or of a Parliamentary Select Committee, within the process of impeachment of a Chief Justice of Sri Lanka under Article 107 of the Constitution, and I would prefer to adopt a general approach towards these questions.

*The Submissions of Counsel*

As already noted, the two questions on which this Court has granted special leave to appeal relate to the ambit of the writ jurisdiction of the Court of Appeal. We have heard extensive submissions of learned Counsel on the substantial questions of law on which special leave to appeal has been granted, and have considered these as well as the additional written submissions filed by the learned

Counsel as directed by this Court on 28th November 2013. It will be useful to begin with a summary of the submissions of learned Counsel. The learned Attorney General has submitted that the Court of Appeal exceeded the jurisdiction vested on it by Article 140 of the Constitution in entertaining the application filed by the Petitioner-Respondent and making its several orders including the judgment dated 7th January 2013 which sought to quash the report of the Parliamentary Select Committee. He has premised these submissions primarily on the *sui generis* nature of the power of impeachment conferred on the President and Parliament by Articles 4 and 107 of the Constitution based on a system of checks and balances inspired by the doctrine of separation of powers.

He has submitted that historically, the power of removal of superior court judges has been vested in the legislative and executive branches of the State, and the courts had no role to play in the process, which position is also reflected in the present Constitution. He has highlighted the limitations placed on the jurisdiction and powers of the Court of Appeal by reference to various provisions of the Constitution of Sri Lanka including Article 140 itself, and stressed that the Court of Appeal has not only overlooked other relevant provisions of the Constitution but also has paid scant respect to the exclusive jurisdiction of Parliament in regard to its own proceedings and decisions. In particular, he relied on what he described as a "constitutional ouster" of the jurisdiction of Court which arises from the incorporation by reference of Section 3 and other provisions of the Parliamentary (Powers and Privileges) Act into Article 67 of the Constitution.

It was the submission of the learned Counsel for the 11th Respondent-Respondent that the Court of Appeal had acted within its jurisdiction in entertaining the application of the Petitioner-Respondent and making the several orders it did, and in doing so, it had acted objectively and with due deference to the legislative arm of government. He argued that the contention of the Attorney General that Article 67 of the Constitution had the effect of elevating the provisions of the Parliamentary (Powers and Privileges) Act into a "constitutional ouster" of the jurisdiction of the Court of Appeal is not supported by the text of that article, by decided authority, or by the principles of constitutional theory. He emphasised that the express provisions of the Constitution conferring on the Court of Appeal its jurisdiction to issue orders in the mature of writs, and the presumption in favour of jurisdiction entail that in the absence of contrary provisions in the Constitution, the jurisdiction of that court would be preserved. Relying on the decision of *Stockdale v Hansard* [1839] EWHC QB J21, 112 ER 1112 (1839), he stressed that while Parliament could regulate its own affairs, where the rights of a third party was concerned, the Courts would not be denuded of jurisdiction, and that in any event, the scope of the ouster did not affect the material subject matter of this case.

Learned Counsel for the 12th Respondent-Respondent has submitted that the impugned judgment of the Court of Appeal is well conceived in law and is an affirmation of the independence and dignity of that court and a manifestation of the willingness of that court to defend the Rule of Law and the independence of the judiciary, whereas the very grounds of appeal relied on by the Attorney General are an attack on these fundamental concepts. He submitted that in terms of Article 3 of the Constitution, sovereignty is in the hands of the People, and that in Sri Lanka, unlike in the United Kingdom, Parliament is not supreme and it is only the Constitution that is supreme. Referring to certain observations of this Court in *Heather Therese Mundy v Central Environmental Authority*, SC 58-60/2003 (SC Minutes of 20th January 2004), he submitted that the scope and ambit of writs have

been extended from time to time through judicial activism, and that "orders in the nature of writs" issued in terms of Article 140 of the Constitution constitute one of the principal safeguards against excess and abuse of executive powers. He submitted citing *Kesavananda Bharathi v State of Kerala and Anr* (1973) that the safeguarding of the basic structure of the constitution is the task of the courts, but the validation of the removal of the Chief Justice is not a function that falls within the jurisdiction of the Supreme Court of Sri Lanka.

I take this opportunity, to thank all the learned Counsel, for the assistance rendered to this Court in the hearing of this appeal, particularly for all their efforts in making available to this Court in a timely manner, the relevant authorities, some of which were hard to find, and I do so, on my own behalf as well as on behalf of the other members of this Bench.

*The Writ Jurisdiction of the Court of Appeal*

It is convenient to first consider Question 2), on which special leave to appeal has been granted by this Court, which is whether the Court of Appeal erred in holding that the words "any Court of first instance or tribunal or other institution or any other person" in Article 140 of the Constitution extends to the Parliament or a Committee of Parliament. In answering this question, it is necessary to examine Article 140 of the Constitution, which provides as follows:-

> "Subject to the provisions of the Constitution, the Court of Appeal shall have full power and authority to inspect and examine the records of any Court of First Instance or tribunal or other institution, and grant and issue, according to law, orders in the nature of writs of *certiorari*, prohibition, *procedendo*, *mandamus* and *quo warranto* against the judge of any Court of First Instance or tribunal or other institution or any other person:
>
> Provided that Parliament may by law provide that in any such category of cases as may be specified in such law, the jurisdiction conferred on the Court of Appeal by the preceding provisions of this Article shall be exercised by the Supreme Court and not by the Court of Appeal."

It is noteworthy that there have been some instances in which the jurisdiction of the Court of Appeal to grant and issue "orders in the nature of writs" in terms of Article 140 of the Constitution has been vested in the Supreme Court by legislation, and that the jurisdiction of the Court of Appeal to issue the specific writs enumerated in Article 140 as well as orders in the nature of *habeus corpus* under Article 141 are concurrently vested in the High Court of the Provinces by virtue of Article 154P(4) of the Constitution. These provisions do not concern us in this appeal.

The learned Attorney General has submitted that the words "or any other institution" occurring in Article 140 of the Constitution have to be read *ejusdem generis*, and has invited our attention to two early decisions of this Court, namely, *In the Matter of an Application for a Writ of Habeas Corpus on the Body of Thomas Perera alias Banda* 29 NLR 52 (SC) and *In re Goonesinha* 43 NLR 337 (SC), which show that this Court has, following the common law of England, held that the phrase "other

institution" does not include a superior court. He has argued that though in terms of Article 4(c) of the Constitution, the judicial power of the People may be directly exercised by Parliament in regard to matters relating to the privileges, immunities and powers of Parliament, neither Parliament nor a Select Committee thereof appointed as contemplated by Article 107(3) of the Constitution read with Order 78A(2) of its Standing Orders, is a court of first instance or inferior court within the meaning of Article 140 of the Constitution.

Learned Counsel for the 11th Respondent-Respondent has, on the other hand, relied on the presumption in favor of jurisdiction adverted to by this Court in *Atapattu v People's Bank* (1997) 1 Sri LR 208 at page 222, and contended that since the 2nd to 8th Respondents-Respondents, who signed the impugned report of the relevant Select Committee of Parliament, fall within the words "or other person" used in Article 140 of the Constitution even if they may not be a "judge of the any Court of First Instance or tribunal or other institution" within the meaning of that article, they were amenable to the writ jurisdiction of the Court of Appeal.

Learned Counsel for the 12th Respondent-Respondent has invited our attention to the decision of this Court in *Mundy v Central Environmental Authority and Others* SC Appeal 58/2003 (SC Minutes dated 20.1.2004), where this Court has noted that orders granted and issued by the Court of Appeal under Article 140 of the Constitution "constitute one of the principal safeguards against excess and abuse of executive power, mandating the judiciary to defend the Sovereignty of the People enshrined in Article 3 against infringement or encroachment by the Executive, with no trace of any deference due to the Crown and its agents." He has also submitted, citing recent decisions of our courts such as *Harjani and Another v Indian Overseas Bank and Another* (2005) 1 Sri LR 167, that the dynamism of law has driven the traditional remedy of *certiorari* away from its "familiar moorings by the impetus of expanding judicial review".

The six mandates in the nature of writs mentioned in Article 140 of the Constitution of Sri Lanka had their origins in the common law of England which recognized the prerogative power of the Crown to grant and issue writs initially through the Star Chamber, and after its abolition in 1642, through the Court of King's Bench to ensure that inferior courts and authorities acted within their jurisdiction.

After Sri Lanka came under British rule, the prerogative powers of the British Crown were recognized by the local courts as a consequence of annexation, which applied the English common law in issuing mandates in the nature of writs, and Section 42 of the Courts Ordinance, No. 1 of 1889, which may safely be regarded as the predecessor to Article 140 of the present Constitution, provided that-

> "The Supreme Court or any Judge thereof, at Colombo or elsewhere shall have full power and authority to inspect and examine the records of any Court, and to grant and issue, according to law, mandates in the nature of writs of mandamus, *quo warranto*, *certiorari*, procedendo and prohibition, against any District Judge, Commissioner, Magistrate or other person or tribunal".

The learned Attorney General has submitted that the writ jurisdiction of the Court of Appeal is confined in its purview to courts of first instance and tribunals and other institutions exercising judicial or *quasi-judicial* powers, and do not extend to the Parliament or a Select Committee of Parliament, which are part of the legislative arm of State. In interpreting Article 140 of the Constitution, this Court has to give impetus to the words "subject to the provisions of the Constitution", which in the present context would take us to Articles 3 and 4 of the Constitution, the implications of which will be considered later on in this judgment, and before doing so, it is desirable to deal with the learned Attorney General's submissions on the applicability of the *ejusdem generis* rule.

The learned Attorney General has argued that the words "or any other institution" must be read *ejusdem generis*. These Latin words literally mean "of the same kind", and it is generally accepted that the *ejusdem generis* rule is applicable when particular words pertaining to a class, category or genus are followed by general words, and that unless there is something in the context that suggests otherwise, the general words are construed as limited to things of the same kind as those specified. The rule reflects an attempt to reconcile incompatibility between the specific and general words in view of the other rules of interpretation, which require that all words in a statute are given effect to, that a statute be construed as a whole, and that no words in a statute are presumed to be superfluous.

As Lord Wright observed in National *Association of Local Government Officers v. Bolton Corp.* (1943) AC 166, "the *ejusdem generis* rule is often useful or convenient, but it is merely a rule of construction, not a rule of law". Craies on *Statute Law* 7th Edition, has stressed at page 181 that-

> ".....to invoke the application of the *ejusdem generis* rule, there must be a *distinct genus or category*. The specific words must apply not to different objects of a widely differing character but to something which can be called a class or kind of objects. Where this is lacking, the rule cannot apply."(*Emphasis added*)

Farwell L.J., has explained in *Tillmanns and Co. v. SS. Knutsford* 1908 2 KB 385 at pages 402 to 403 that "there is no room for the application of the *ejusdem generis* doctrine unless there is a genus or class or category – perhaps category is the better word....", and as Lord Thankerton put it in *United Towns Electric Co. Ltd. v. Attorney General for Newfoundland* 1939 1 All ER 423 at page 428, the "mention of a single species – for example, water rates, does not constitute a genus". Hence the question that arises here is whether we can identify a genus or category within the words that are used in Article 140 in setting out or identifying the bodies that were sought to be conferred "full power and authority" to inspect and examine records and grant and issue orders in the nature of writs. The key words in Article 140 are "*any Court of first instance or tribunal or other institution*" which are used in relation to the power to examine records, and "*the judge of any court of first instance, or tribunal, or other institution or any other person*" when it comes to the power to grant and issue orders in the nature of writs. We are here concerned with the second set of words in the context of the power of the Court of Appeal to grant and issue orders in the nature of writs, but should also be mindful of the first set of words in order not to lose sight of the objectives of that article.

In interpreting these words, it is important to consider how our courts exercised writ jurisdiction prior to the present Constitution. I note that the language of the first paragraph of Article 140 of the present Constitution seems to follow the words of section 42 of the Courts Ordinance No. 1 of 1889, which vested the jurisdiction in the Supreme Court. It is noteworthy that while the phrase "court of first instance" is not found in section 42 of the Courts Ordinance, this Court has examined the ambit of that section in several celebrated decisions. However, before adverting to the Sri Lankan decisions interpreting these provisions, I would like to commence my examination of the ambit of the writ jurisdiction of our courts with an analysis of the English common law, which is the source from which the six mandates in the nature of writs mentioned in section 42 of the Courts Ordinance originated.

One of the oldest cases that explored the writ jurisdiction of the old English courts was that of *Ex parte Jose Luis Fernandez* (1861) 142 ER 349, in which the Court of Common Pleas (Earl CJ., Willes J., and Byles.J) concluded, after careful examination of early authorities on the point, that it had no jurisdiction to issue a writ of *habeus corpus* for the release of a witness who had been convicted by the Court of Assize for contempt of court for his refusal to answer questions put. In separate judgments, Earl C.J., observed that "the jurisdiction to try in the country all the civil cases that ought otherwise to have been tried in the Superior Courts of Westminster" was devolved upon the justices of assize by the Statute of Westminster enacted in 1285, and that "there are direct authorities for affirming that the court of assize is entitled to the authority of a court of *a superior degree*."

It is noteworthy in the context of this appeal that Willis J., in his concurring judgment, noted that Judges of Assize "belonged to that *superior class* to which credit is given by other Courts for acting within their jurisdiction, and to whose proceedings the presumption *omnia rite esse acta* applies *equally as to those of the Supreme Court of Parliament itself.*"

In later decisions such as *Queen v. The Judges and Justices of the Central Criminal Court* 11 QBD 479 (writ of mandamus refused) and *Regina v. Boaler* 67 L.T.354 (writ of *certiorari* refused) a similar reasoning was followed, and in the latter case, Lord Coleridge C.J. stressed that:-

> ".....there is no authority for saying that this writ can go at all to the Central Criminal Court, which is a Superior Court. It is a court at least as high as the assizes, as the criminal court on the circuit; and it has been held, expressly with regard to those courts, that no *certiorari* will go *to bring up a conviction obtained at the Assizes,* for the purpose of being quashed here." (*Emphasis added*)

The rationale behind these decisions may be discerned from the following *dictum* of Justice Willis in *R. v. Parke* [1903] 2 K.B. 442: –

> "This Court exercises a vigilant watch over the proceedings of *inferior Courts*, and successfully prevents them from usurping powers which they do not possess, or otherwise acting contrary to law."(*Emphasis added*)

Similarly, in *Rex v. Woodhouse* (1906) 2 KB 501. Fletcher Moulton L.J. observed that the writ of *certiorari* :–

> "is a very ancient remedy, and is the ordinary process by which the High Court brings up for examination the acts of bodies of *inferior jurisdiction*. In certain cases the writ of certiorari is given by statute, but in a large number of cases it rests on the common law." (*Emphasis added*)

The learned Attorney General has relied on two decisions of this Court which have followed the wisdom of the English common law in regard to the ambit of the writ remedy. The first of these was the decision of the Supreme Court in *In the Matter of an Application for a Writ of Habeas Corpus on the Body of Thomas Perera alias Banda* 29 NLR 52 (SC), in which dealing with the question whether *habeus corpus* would lie to review a warrant of commitment issued by a Commissioner of Assize remanding a prisoner to custody, Schneider A.C.J observed at page 56 of his judgment that –

> "The *writ of certiorari* is *a writ issued out of a superior Court and directed to the Judge or other officer of an inferior Court of record*, requiring the record of the proceedings in some cause or matter depending before such inferior Court to be transmitted into the superior court to be there dealt with."(*Emphasis added*)

Similarly, when considering the question whether a writ of *certiorari* would lie against a judge of the Supreme Court who is nominated by the Chief Justice under Article 75(1) of the Ceylon (State Council Elections) Order in Council, 1931, for the purpose of trying an election petition, Howard C.J. in the case of *In re Goonesinha* 43 NLR 337, examined section 42 of the Courts Ordinance, and observed at page 342 that:-

> "The Supreme Court does not require a special provision of law for authority to inspect and examine its own records. Moreover, if "any Court" included the Supreme Court, the words "Judge of the Supreme Court" would be included in the latter half of the paragraph. In my opinion therefore, "any Court" in this paragraph does not include the Supreme Court. From the fact that a Judge of the Supreme Court is not specifically mentioned in the paragraph, the inference is of necessity drawn that *the writs mentioned can only be issued to inferior Courts*. The words "other person or tribunal" in this context cannot, in accordance with the *ejusdem generis* rule, be understood to include a Judge of the Supreme Court". (*Emphasis added*)

The correctness of this decision was confirmed on appeal by the Privy Council in *Goonesinha v The Honourable O.L.De Kretser* 46 NLR 107, in which Lord Goddard, after examining a large number of authorities observed at page 109 that their Lordships are of opinion that the true view is that cognisance of the election petitions "is an extension of, or addition to, the ordinary jurisdiction of the Supreme Court, and consequently *certiorari* cannot be granted to bring up an up any order made in the exercise of that jurisdiction."

These decisions no doubt are relevant in interpreting Article 140 of the Constitution, which only

confers on the Court of Appeal the power and authority to grant and issue orders in the nature of the specified writs "according to law". This Court will also take into account the judicial hierarchy in existence in Sri Lanka and be guided by the provisions of the Judicature Act No 2 of 1978, which specifically declares in its preamble that it has been enacted *inter alia* "to provide for the establishment and constitution of a system of Courts of First Instance in terms of Article 105(1) of the Constitution". Section 2 of the Judicature Act identifies as "the Courts of First Instance", the High Court of the Republic of Sri Lanka, the District Courts, the Family Courts, the Magistrates'

Courts and the Primary Courts. It is easy to see that these are all *inferior* courts, just as much as the District Judge, Commissioner and Magistrate's Court mentioned in section 42 of the Judicature Act were. It is therefore clear from the forgoing analysis that the courts mentioned in Article 140 of the Constitution belong to one genus or category, namely that of *inferior courts*. Hence, when construed *ejusdem generis*, not only the words "or tribunal" but also the words "or other institution or other person" refer to tribunals, institutions and persons *which are inferior* to the court that are possessed of jurisdiction to issue the writs, which in the context of this case, is the Court of Appeal which purported to issue the writ of *certiorari*.

In view of certain submissions made by all the learned Counsel who appeared in this appeal, it may be material to mention that following the famous *dictum* of Lord Atkin in *R v Electricity Commissioner, ex parte London Electricity Joint Committee Co. Ltd.*, [1924] 1 KB 171, which made amenability to the writ of *certiorari* dependent on the existence of "a duty to act judicially", in decisions such *Dankoluwa Estates Co. Ltd., v The Tea Controller* 42 NLR 197 and *Nakkuda Ali v Jayaratne* 51 NLR 457, our courts had refused relief where the decision or order challenged by the writ was purely administrative.

However, the celebrated decision of the House of Lords in *Ridge v Baldwin* [1964] AC 40 exploded the restrictive reasoning adopted in earlier decisions, and simply laid down that the mere fact that the exercise of power affects the rights or interests of any person would make it "judicial" and requires compliance with natural justice. As Lord Reid observed at page 114 of his judgment :-

> "No one, I think, disputes that three features of natural justice stand out, (*i*) the right to be heard by an unbiased tribunal, (*ii*) the right to have notice of charges of misconduct, and (*iii*) the right to be heard in answer to these charges."

The reasoning in the decision in *Ridge v Baldwin* was adopted by our Courts, which have progressively expanded the scope of judicial review of administrative action, expanding its benevolent protection to various authorities and bodies of persons which are not courts, on the basis that they too exercised judicial or quasi judicial power. These developments triggered further horizontal expansion of the parameters of the writ jurisdiction in Sri Lanka as elsewhere, and it has been held in decisions such as *Harjani and Another v Indian Overseas Bank and Another* (2005) 1 Sri LR 167 that even private bodies exercising public functions are amenable to the writ of *certiorari*. Learned Counsel for the 11th and 12th Respondent-Respondents, have not been able to cite any local or foreign authority in support of the proposition that there has been a similar expansion of the writ

jurisdiction on a vertical plain on an upward direction, to enable review of decisions and actions of superior or even equal ranking courts and bodies.

Having thus concluded that on an application of the *ejusdem generis* rule, not only the words "or tribunal" but also the words "or other institution or other person" found in Article 140 of the Constitution can only refer to tribunals, institutions and persons *which are inferior* in status to the court that issues the order in the nature of a writ in any case, the question whether the Court of Appeal in fact was possessed of the jurisdiction to grant or issue an order in the nature of the writ of *certiorari* to Parliament or a Select Committee of Parliament needs to be considered. It is in this context that I wish to examine in turn (a) whether Parliament, and in particular, a Select Committee thereof, is in the constitutional setting of Sri Lanka, inferior to the Court of Appeal, and (b) in any event, whether the powers, privileges, and immunities of Parliament would preclude the grant of such a remedy.

*The Court of Appeal and Parliament in Sri Lanka's Constitutional Setting*

The learned Attorney General as well as the learned Counsel for the 11th and 12th Respondent-Respondents highlighted the words "subject to the provisions of the Constitution" found at the very commencement of Article 140 of the Constitution. They have all referred to Articles 3 and 4 of the Constitution, in the light of which they sought to interpret Article 107(2) and (3) of the Constitution which established a process for impeachment of Superior Court Judges in terms of which the Petitioner-Respondent was sought to be removed from the office of Chief Justice.

Learned Counsel for the 11th and 12th Respondent-Respondents have emphasized that in Sri Lanka Parliament is not supreme but the Constitution is, and have cited before us certain *dicta* from the several judgments in the celebrated decision in *Stockdale v Hansard* [1839] EWHC QB J21, 112 ER 1112, and the learned Attorney General has done likewise. However, while the *dicta* quoted by the learned Counsel dealt with questions relevant for the considering of issues relating to the parliamentary privilege, which I shall advert to later on in this judgment, what I found helpful in regard to the question of relative superiority now being considered was from the judgment of Coleridge J. at page 1196, where his Lordship observed as follows:-

> "*Vastly inferior as this court is to the House of Commons, considered as a body in the state, and amenable as its members may be for ill conduct in their office to its animadversions, and certainly are to its impeachment before the Lords,* yet, as a Court of law, we know no superior but those courts which may revise our judgments for error; and in this respect there is no common term of comparison between this Court and the House. In truth, the House is not a court of law at all, in the sense in which that term can alone be properly applied here; neither originally, nor by appeal, can it decide a matter in litigation between two parties: it has no means of doing so; it claims no such power: *powers of inquiry and of accusation it has, but it decides nothing judicially, except where it is itself a party, in the case of contempts.*"(*Emphasis added*)

It is important to remember that the English common law which regulates the relationship between

the Crown, the legislature and the judiciary is the product of centuries of struggle between these organs of State, details of which it is unnecessary to recount for the purposes of this appeal. Suffice it would be to refer to Erskine May, who in his monumental work *Parliamentary Practice* (21st Edition) at page 145 observes that "after some three and a half centuries, the boundary between the competence of the law courts and the jurisdiction of either House *in matters of privileges* is still not resolved." Hence, when dealing with the comparative superiority or otherwise of Parliament *vis-à-vis* Parliament within the constitutional hierarchy of Sri Lanka, judicial decisions emanating from other jurisdictions can only be of persuasive authority, and it is more important to examine our own constitutional structure and consider local decisions.

It is important, in this context, to remember that the present Constitution of Sri Lanka, which was enacted in 1978, derives its validity from, and was enacted in conformity with, the provisions of the Republican Constitution of Sri Lanka, proclaimed in 1972, which in every sense was an "autochthonous" constitution having decisively broken away from the constitutional regime of the Ceylon (Constitution) Order-in-Council, 1946 and other enactments together collectively known as the "Soulbury Constitution", and derived its authority entirely from the will of the People of Sri Lanka. It is therefore significant that Chapter I of the Constitution of the Democratic Socialist Republic of Sri Lanka, 1978, headed "the People, the State and Sovereignty" commences with Article 1 which declares that Sri Lanka is "a Free, Sovereign, Independent and Democratic Socialist Republic". Article 2 states that Sri Lanka is a Unitary State, and Article 3 enacts that:-

> "In the Republic of Sri Lanka sovereignty is in the People and inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise".

Article 4 of the Constitution outlines the manner in which the Sovereignty of the People shall be exercised and enjoyed, and expressly provides that :–

> "(a) the legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum;
>
> (b) the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People;
>
> (c) the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law....."

A Bench of Seven Judges of this Court, in the course of its determination in *Re the Nineteenth Amendment to the Constitution* [2002] 3 Sri LR 85, had no hesitation in characterizing Article 4, when read with Article 3, as enshrining the doctrine of separation of powers, and at pages 96 to 97 went on to elaborate that:-

"The powers of government are separated as in most Constitutions, but unique to our Constitution is the elaboration in Articles 4 (a), (b) and (c) which specifies that each organ of government shall exercise the power of the People attributed to that organ. To make this point clearer, it should be noted that sub-paragraphs (a), (b) and (c) not only state that the legislative power is exercised by Parliament; executive power is exercised by the President and judicial power by Parliament through Courts, but also specifically state in each sub-paragraph that the legislative power "of the People" shall be exercised by Parliament; the executive power "of the People" shall be exercised by the President and the judicial power "of the People" shall be exercised by Parliament through the Courts. This specific reference to the power of the People in each sub-paragraph which relates to the three organs of government demonstrates that the power remains and continues to be reposed in the People who are sovereign, and its exercise by the particular organ of government being its custodian for the time being, is for the People."

Further clarifying our constitutional provisions, this Court also observed at page 98 of its determination that:-

"This balance of power between the three organs of government, as in the case of other Constitutions based on a separation of powers is sustained by certain checks whereby power is attributed to one organ of government in relation to another."

It will also be seen that the legislative power and judicial power of the People is vested in Parliament, subject to certain qualifications, which are worthy of elaboration. Article 4(a) is carefully worded to vest in Parliament, consisting of elected representatives of the People, the legislative power of the people which it can directly exercise, that is to say, to the exclusion of the legislative power of the People that has to be exercised by the People at a Referendum in terms of the Constitution. Similarly, according to Article 4(c) of the Constitution, the judicial power of the People is vested in Parliament to be exercised through the courts, tribunals and institutions as specified therein, except in regard to matters relating to the privileges immunities and powers of Parliament and of its Members, which may be exercised directly by Parliament according to law. Article 4(b) vests the executive power of the People directly on the President, who too is elected by the People.

It is significant that the legislative, executive and judicial power of the People is vested either on Parliament or the President, both being elected by the People, so as to maintain accountability and transparency, and the courts and other like tribunals and institutions which are not elected by the People, are accountable and responsible to the People through Parliament, which does exercise the kind of superintendence and accountability envisaged by Coleridge J. in the above quoted *dictum* from *Stockdale v Hansard, supra.* All this is no different from the constitutional structure that exists in England, and as Lord Mustill observed in the *Fire Brigades Union* case [1995] 2 AC 513 at 567-

"It is a feature of the peculiarly British conception of the separation of powers that Parliament, the executive and the courts have each their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws it thinks fit.

> The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws, and see that they are obeyed"

I conclude that, in the light of the constitutional arrangements contained in Article 4 and other provisions of our Constitution, there is no room for doubt that Parliament including its select committees cannot be regarded as *inferior to our Court of Appeal* when it exercises its writ jurisdiction conferred by Article 140 of the Constitution, and would therefore not be amenable to such jurisdiction. Accordingly, I would answer Question 2) on which special leave to appeal has been granted in this case in the affirmative, and hold that the Court of Appeal erred in concluding that the words "any Court of first instance or tribunal or other institution or any other person" in Article 140 of the Constitution extends to Parliament or a Committee of Parliament.

*The Impeachment Process*

It may now be appropriate to consider Question 1). on which special leave to appeal was granted by this Court, namely, the question whether the Court of Appeal erred in holding that the writ jurisdiction of that Court embodied in Article 140 of the Constitution extends to proceedings of Parliament or a Committee of Parliament when it performs its constitutional function under Article 107(2) and (3) of the Constitution and Order 87A of the Standing Orders of Parliament. For this purpose, it would be necessary to examine in depth the provisions of Article 107(2) and (3) of the Constitution, which set up a mechanism for the removal of a Chief Justice, Judge of the Supreme Court, President of the Court of Appeal and Judge of the Court of Appeal.

Before looking at the provisions of the relevant provisions of the Constitution in greater detail, it may be useful to mention that Section 52(2) of the Ceylon (Constitution) Order in Council, 1946 provided that:-

> "Every Judge of the Supreme Court shall hold office during good behaviour and shall not be removable except by the Governor General on an address of the Senate and the House of Representatives."

Similar provisions were found in Section 122 of the Republican Constitution of 1972, which provided as follows:-

> "(1) The Judges of the Court of Appeal, of the Supreme Court or of the Courts that may be created by the National State Assembly to exercise and perform powers and functions corresponding to or substantially similar to the powers and functions exercised and performed by the aforesaid courts, shall be appointed by the President.
>
> (2) Every such Judge shall hold office during good behaviour and shall not be removed except by the President upon an address of the National State Assembly"

It is significant that the Constitution of the Democratic Socialist Republic of Sri Lanka, 1978, went

beyond the simple system of removal of Superior Court Judges upon an address made by the Head of State to the legislature, and introduced a more elaborate mechanism for the impeachment of Superior Court Judges in Article 107 as follows:-

> "(1) The Chief Justice, the President of the Court of Appeal and every other Judge of the Supreme Court and Court of Appeal shall be appointed by the President by Warrant under his hand.
>
> (2) Every such Judge shall hold office during good behaviour and shall not be removed except by an order of the President made after an address of Parliament supported by a majority of the total number of Members of Parliament (including those not present) has been presented to the President for such removal on the ground of proved misbehaviour or incapacity:
>
> Provided that no resolution for the presentation of such an address shall be entertained by the Speaker or placed on the Order Paper of Parliament, unless notice of such resolution is signed by not less than one-third of the total number of Members of Parliament and sets out full particulars of the alleged misbehaviour or incapacity.
>
> (3) Parliament shall *by law or by Standing Orders* provide for all matters relating to the presentation of such an address, including the procedure for the passing of such resolution, the investigation and proof of the alleged misbehaviour or incapacity and the right of such Judge to appear and to be heard in person or by representative." (*Emphasis added*)

As noted by Wansundera J. in *Visuvalingam and others v. Liyanage and Others No. (1),* (1983) 1 Sri LR 203 at pages 248 to 249 and Wadugodapitiya J. in *Victor Ivan and Others v. Hon. Sarath N. Silva and Others* (2001) 1 Sri LR 309 at page 331, the process outlined in Article 107(2) and (3) is the "only method of removal" of a superior court judge found in the Constitution, and is not vested exclusively in Parliament or the President, and requires Parliament and the President, to act in concurrence. In other words, neither the President of Sri Lanka, nor Parliament, can by himself or itself remove the Chief Justice, a Judge of the Supreme Court or the President of the Court of Appeal or a Judge of the Court of Appeal, and the Constitution requires *two organs of State, both elected by the People, to act together* in the important process of impeaching a superior court judge.

The learned Attorney General as well as the learned Counsel for the 11th and 12th Respondent Respondents have, in the course of their submissions before this Court, highlighted the words "subject to the provisions of the Constitution" found at the very commencement of Article 140 of the Constitution, and they have all invited our attention to Articles 3 and 4 of the Constitution in the light of which they sought to interpret Article 107(2) and (3) of the Constitution in terms of which the Petitioner-Respondent was sought to be impeached.

Learned Counsel for the 11th and 12th Respondents have stressed that there is no reference to Article

107 in Article 4(c) of the Constitution, and submitted that if it was intended to include within the purview of the "judicial power of the People" that can be exercised directly by Parliament the impeachment power contained in Article 107(2) and (3), it would have been easy to include expressly in Article 4(c), some provision to that effect in the same way as "matters relating to the privileges, immunities and powers of Parliament and of its Members" have been therein expressly adverted to. They have contended that since the process of impeachment outlined in Article 107(2) and (3) is not expressly excluded from Article 4(c), the necessary inference is that the power can be exercised by Parliament only "through the courts, tribunals, and institutions created and established, or recognized, by the Constitution, or created and established by law."

The learned Attorney-General has attempted to meet this submission by arguing that powers of Parliament include not only such powers that are legislative and judicial in nature, but other powers in a general sense, and he has sought to illustrate his argument by adverting to respectively Articles 38(2) dealing with the removal of the President, Article 104E(7)(e) read with Article 104E(8) dealing with the removal of the Commissioner-General of Elections and Article 107(2) and (3) dealing with the removal of a Judge of the Superior Courts including the Chief Justice. In my view none of these powers are exclusively powers of Parliament or the exclusive province of any other governmental organ, as all those provisions adverted to by the learned Attorney General seek to create mechanisms which are unique and are *sui generis* in the sense that they are the only mode of removal of the incumbents of those offices known to the Constitution. The power of removal of the President of Sri Lanka, the Chief Justice and other Judges of the Supreme Court, the President and other Judges of the Court of Appeal and the Commissioner General of Elections in terms of the aforesaid provisions of the Constitution, have to be exercised by one organ of State in concurrence with one or more governmental organ or organs, and *this feature constitutes a system of checks and balances which is essential for the preservation of the Rule of Law.*

The power of removal of the President of Sri Lanka, for instance, consists of a meticulous procedure which could be initiated by a Member of Parliament with specified number of Members required to sign the relevant notice of resolution, with the Speaker of the House of Parliament, the Supreme Court and the Parliament itself play important roles. It is noteworthy that Article 38(2)(c),(d) and (e) provide that after a resolution to impeach the President is passed in Parliament with the specified majority, the Speaker shall refer the allegations contained in the resolution to the Supreme Court for inquiry and report. If and when the Supreme Court reports to Parliament that in its opinion the President is permanently incapable of discharging the functions of his office, or has been guilty of any of the other allegations contained in such resolution, Parliament may, by a resolution passed by a specified number of Members voting in its favour, remove the President from office.

Likewise, the power of removal of the Commissioner General of Elections consists of a mechanism in which Members of Parliament, the Speaker, the Election Commission constituted under Chapter XIVA of the Constitution and Parliament itself, play important roles, just as much as the procedure for the removal of a Judge of the Supreme Court including the Chief Justice or a Judge of the Court of Appeal envisages initiation by specified number of Members of Parliament, with the Speaker of the House and the Parliament itself and the President of Sri Lanka discharging important functions. None of these powers are vested *exclusively* in one single organ of government, and *one or more organs of*

*government are required to act in concurrence*, providing a system of checks and balances as envisaged by Charles de Montesquieu and William Blackstone, who gave the doctrine of Separation of Powers its initial momentum. Here lies the explanation as to why there is no mention of the process of impeachment of the President, the Commissioner of Elections or the Chief Justice and the Judges of the Superior Courts of Sri Lanka in Article 4(a),(b) or (c), all of which seek to vest the legislative, executive or judicial power of the People *exclusively* in one elected entity or the other.

In the context of the appeal at hand, it is also significant that the procedure for the removal of the President of Sri Lanka outlined in Articles 38(2) of the Constitution, contemplates certain findings in regard to the capacity of the President to hold office or of his guilt in regard to allegations set out in the impeachment resolution to be made by the Supreme Court as a pre-condition for the passing of the resolution to remove the President from office. This may be contrasted with the procedure for the removal of the Commissioner General of Elections which does not envisage any role to be played by the Supreme Court in regard to the proof of the alleged misbehavior or incapacity of the Commissioner-General of Elections, and Article 104E(8)(b) of the Constitution provides that-

> "Parliament shall *by law or by Standing Orders*, provide for all matters relating to the presentation of such an address, including the procedure for the passing of such resolution, the investigation and proof of the alleged misbehaviour or incapacity and the right of the Commissioner-General of Elections to appear and to be heard in person or by representatives."(*Emphasis added*)

It is significant that a similar system has been prescribed by the Constitution with respect to the impeachment of a Judge of the Supreme Court including the Chief Justice and of a Judge of the Court of Appeal including its President. Article 107(3) of the Constitution, as already noted, provides that-

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

The provisions of Article 104E (8)(b) and Article 107(3) of the Constitution may perhaps be contrasted with Article 40(3) of the Constitution which provides for the procedure for electing a new President from amongst Members of Parliament who are qualified to be elected to the office of President, in the eventuality of a vacancy arising in the office of President prior to the expiration of the term of office of a President who was elected at a Presidential Election. It is significant that Article 40(3) provides that:-

> "Parliament shall *by law* provide for all matters relating to the procedure for the election of the President by Parliament and all other matters necessary or incidental thereto its Members who is qualified to be elected to the office of President."(*Emphasis added*)

Here, Parliament has no option but to provide for all required matters by law, and law only, unlike in

the situations contemplated in Article 104E (8)(b) and Article 107(3) of the Constitution, *where Parliament has been expressly conferred a discretion whether to provide the required matters by law or Standing Orders of Parliament.*

It is also obvious that the makers of the Constitution had considered whether the procedure of reference to the Supreme Court of the task of examining the justifiability of the resolution for the removal of the Chief Justice and other Judges of the Supreme Court in the lines of Article 38(2) of the Constitution, and decided against it perhaps in view of the very same reasons that moved Rehnquist CJ., to observe in *Nixon v. United States* 506 U.S. 224(1993) at page 234 that:-

> "....judicial review would be inconsistent with the [Constitution] Framers' insistence that *our system be one of checks and balances. In our constitutional system, impeachment was designed to be the only check on the Judicial Branch by the Legislature*.....Judicial involvement in impeachment proceedings. even if only for purposes of judicial review, is counterintuitive because it would eviscerate the "important constitutional check" placed on the Judiciary by the Framers. See *id.*, No. 81, p. 545. Nixon's argument would place final reviewing authority with respect to impeachments *in the hands of the same body that the impeachment process is meant to regulate.*" (*Emphasis added*)

Furthermore, there can be little doubt that any arrangement which enables the Supreme Court to play any role in the impeachment of the Chief Justice or a Judge of the very same Court, would go against the maxim *nemo judex in causa sua,* which was explained succinctly by Browne-Wilkinson, L.J. in *In Re Pinochet* (1999) UKHL 52, in the following words:-

> "The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behavior may give rise to a suspicion that he is not impartial, *for example because of his friendship with a party.* This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial."(*Emphasis added*)

These are pointers as to the thinking of the framers of our Constitution, who have in Article 107(3) of the Constitution, left it to the good sense of Parliament to decide whether all matters relating to the presentation of the address relating to the removal of the Chief Justice and other Judges of the Superior Courts, including the procedure for the passing of such resolution, the investigation and proof of the alleged misbehaviour or incapacity and the right of such Judge to appear and to be heard in person or by representative, should be provided for "by law or by Standing Orders" in the lines of

Article 104E (8)(b) of the Constitution, and in both situations, Parliament has decided to do so by Standing Orders.

It is the *constitutionality of this decision made by Parliament* that came in for consideration on references that had been made in terms of Article 125(1) of the Constitution to this Court in the wake of the proceedings before the Court of Appeal that gave rise to the impugned judgment. No reference was made by the Court of Appeal in CA (Writ) Application No. 411/2012 from which this appeal arises, but the Court of Appeal in its impugned judgment dated 7th January 2013 considered itself bound by the determination of this Court in SC Reference No. 3/2012 in which the question referred to this Court in the course of CA (Writ) Application No. 358/2012, was formulated as follows:-

> "Is it mandatory under Article 107(3) of the Constitution for the Parliament to provide for [by law] matter *(sic)* relating to the forum before which the allegations are to be proved, the mode of proof, burden of proof, standard of proof etc., of any alleged misbehavior (sic) or incapacity in addition to matters relating to the investigation of the alleged misbehavior *(sic)* or incapacity?"
> (*Words within Square Brackets added by me to make the question meaningful*)

A Bench consisting of three judges of this Court, in its determination dated 1st January 2013, observed that :–

> "In a State ruled by a Constitution based on the rule of Law, *no court,* tribunal or other body (by whatever name it is called) has authority to make a finding or a decision *affecting the rights of a person unless such court, tribunal or body has the power conferred on it by law to make such finding or decision.* Such legal power can be conferred on such court, tribunal, or body by an Act of Parliament which is "law" and not by Standing Orders which are not law but are rules made for the regulation of the orderly conduct and the affairs of the Parliament. The Standing Orders are not law within the meaning of Article 170 of the Constitution which defines what is meant by "law".
>
> A Parliamentary Select Committee appointed in terms of Standing Order 78A derives its power and authority solely from the said Standing Order which is not law. Therefore a Select Committee appointed under and in terms of Standing Order 78A has no legal power or authority to make a finding adversely affecting the legal rights of a Judge against whom the allegations made in the resolution moved under proviso to Article 107(2), is the subject matter of its investigation. *The power to make a valid finding, after the investigation contemplated in Article 107(3). can be conferred on a court, tribunal, or a body, only by law and by law only."*(*Emphasis added*)

With the very greatest of respect to the honorable Judges of this Court constituting the said Bench, the above quoted observation has the effect of deleting or rendering nugatory the words "*or by Standing Orders*" found in Article 107(3) of the Constitution, purportedly for the preservation of the rule of Law. It is unfortunate that the Divisional Bench of this Court failed to realize that when Article 107(3)

was formulated, the makers of the Constitution were fully conscious that they were providing a mechanism for the removal of the Chief Justice and other Judges of the Superior Courts by an order of the President made pursuant to an address of Parliament supported by a specified majority which is presented to the President for such removal on the ground of proved misbehavior or incapacity, and *chose to delegate to Parliament the function of providing for by law or Standing Orders*, "all matters relating to the presentation of such an address, including the procedure for the passing of such resolution, the investigation and proof of the alleged misbehaviour or incapacity and the right of such Judge to appear and to be heard in person or by representative". The words "by law *or by Standing Orders*" clearly conferred the discretion for Parliament to decide whether the matters required to be provided for by that article should be provided for by law or by Standing Orders.

By so deleting or rendering nugatory clear words of the Constitution, the Divisional Bench has flouted the concept of Sovereignty of the People enshrined in Article 3 of the Constitution and the basic rule reflected in Article 4(a) of the Constitution that the legislative power of the People may be "exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum". The determination of this Court in SC Reference No. 3/2012 does not offer any acceptable reasons for ignoring basic provisions of the Constitution, except for the observation that "no court, tribunal or other body (by whatever name it is called) has authority to make a finding or a decision *affecting the rights of a* person unless such court, tribunal or body has the power conferred on it *by law* to make such finding or decision". The "person" envisaged by the Court of Appeal in the above quoted observation in its factual setting was the Petitioner-Respondent, who had to face impeachment proceedings contemplated by Article 107(2) and (3) of the Constitution read with Standing Order 78A, for which the makers of the Constitution had expressly provided in Article 107(3) that the necessary procedures may be formulated by Parliament "*by law or by Standing Orders*".

It is significant that Article 107(3) of the Constitution does not contain any words indicating that *only certain matters* contemplated by that provision may be provided for by Standing Orders *and certain other matters* must be provided for by law. If that was the intention of the makers of the Constitution, they would probably have adopted language sufficient to convey such a meaning, and used, for instance, the formula "by law *and* Standing Orders". They would also have indicated clearly *what matters should necessarily be provided for by law.* Thus, in my view, the determination of this Court in SC Reference No. 3/2012 is not only erroneous but also goes beyond the mandate of this Court to interpret the Constitution, and intrudes into the legislative power of the People.

In my opinion, to conclude, as this Court did, in SC Reference No. 3/2012, that it is mandatory for Parliament to provide for the matters in question by law, and law only, not only does violence to the clear language of Article 107(3), but also takes away from Parliament, a discretion expressly conferred on it by the Constitution itself. In my opinion, this Court has no authority, whether express or implied, to do so. As this Court observed in *Attorney General v Sumathipala* (2006) 2 Sri LR 126, at page 143,

> "A judge cannot under a thin guise of interpretation usurp the function of the legislature to achieve a result that the judge thinks is desirable in the interests of justice. Therefore the role

of the judge is to give effect to the expressed intention of Parliament as it is the bounden duty of any court and the function of every Judge to do justice within the stipulated parameters."

It is my considered opinion that the determination of this Court in SC Reference No. 3/2012 manifestly exceeded the mandate conferred on this Court by Article 125(1) of the Constitution to interpret the Constitution, and was made in disregard of the clear language of Article 107(3) and other basic provisions of the Constitution. The determination is a blatant distortion of the law, and is altogether erroneous, and must not be allowed to stand. This Court hereby overrules the said determination of this Court in SC Reference No. 3/2012.

As already noted, the power to remove the Chief Justice, Judges of the Supreme Court, the President of the Court of Appeal and Judges of the Court of Appeal through the process outlined in Article 107 of the Constitution and Standing Orders made thereunder, is not a power exclusively vested in either the President or the Parliament, but is a power that is unique and is *sui generis* in the sense that it is vested jointly in the Parliament and the President. These are both governmental organs that are elected by the People, and when they act in concurrence, they act in the name of the People of Sri Lanka. It is unthinkable that a court such as the Court of Appeal, which derives its jurisdiction from Article 140 of the Constitution, which is expressly made subject to other provisions of the Constitution such as Article 107, and whose jurisdiction is further limited, as we have seen, by the requirement to grant and issue orders in the nature of writs "according to law", by which is meant the common law of England as developed by our own courts, which confines the ambit of these writs to inferior courts and tribunals, would seek to impeach a decision taken with the walls of Parliament by a Parliamentary Select Committee, or to quash the same by *certiorari*.

It may now be appropriate for me consider, in some detail, the writ jurisdiction of the Court of Appeal, in the context of the privileges, immunities and powers of Parliament.

*Parliamentary Powers and Privileges*

The learned Attorney-General has relied on Section 3 of the Parliament (Powers and Privileges) Act No 21 of 1953, as subsequently amended, which he submitted, ousted the jurisdiction of the Court of Appeal to grant any order in the nature of writ against Parliament or a Select Committee of Parliament. Section 3 of the Parliament (Powers and Privileges) Act proclaims that :–

> "There shall be freedom of speech, debate and proceedings in Parliament and such freedom of speech, debate or proceedings shall not be liable to be impeached or questioned in any court or place out of Parliament."

It is noteworthy that although the said Act which was enacted in 1953 and has since been amended several times, section 3 of the Act, which is relied upon by the learned Attorney General, has not been amended after its original enactment, and in fact echoes section 1 art. 9 of the English Bill of Rights. 1689, which provided that :–

"……the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament."

In view of the citation before this Court of several decisions and authorities from England and other common law jurisdictions, it is necessary to mention at the outset that as Erskine May, in *Parliamentary Practice*, (22nd Edition) at page 65 observes, the privileges of Parliament are "the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals." However, as Dr. D.M. Karunaratna has pointed out in his valuable work, *A Survey of the Law of Parliamentary Privileges in Sri Lanka* (2nd Revised Edition), page 8:-

"The privileges of Parliament are also considered part of the common law of England. They are part of the common law not in the sense that they are judge-made, but in the sense that the courts recognize their existence and claim jurisdiction to keep the House within the limits of the recognized privileges. *On the other hand, some of the privileges have been enacted (for example, article 9 of the Bill of Rights) and hence, the entire law of parliamentary privileges cannot be regarded as part of the common law*". (*Emphasis added*)

The present appeal involves the nature and ambit of the privilege relating to the impeachment outside Parliament of parliamentary proceedings, particularly those that transpired before a Select Committee of Parliament constituted for the purpose of considering a resolution for the removal of a Judge of the Supreme Court or the Court of Appeal in terms of Article 107(2) and (3) of the Constitution read with Order 87A(2) of the Standing Orders of Parliament, in the context of the writ jurisdiction of the Court of Appeal under Article 140 of the Constitution.

At the hearing of this appeal, the learned Attorney General has stressed that the word "Parliament", as used in Section 3 of the Parliament (Powers and Privileges) Act, included a Select Committee of Parliament, and has invited our attention to Section 2 of the Act, which defined "Parliament" to mean "the Parliament of Sri Lanka, and includes a committee", and further defined a "committee" to mean "any standing, select or other committee of Parliament". This is in line with the decisions of English courts in cases such as *Dingle v Associated Newspapers Ltd., and Others* [1960] 2 QB 405, *Rost v Edwards* [1990] 2 QB 460 and *Neil Hamilton v Mohammed Al Fayed* [2001] 1 AC 395, and there can be no doubt that proceedings of any standing, select, or other committee of Parliament is as sacrosanct as proceedings of Parliament itself.

While there is no definition of the term "proceedings in Parliament" used in Section 3 of our Act or the term "proceedings in parliament" found in section 1 art. 9 of the English Bill of Rights, there seems to be some ambiguity in the language used in both statutes, and the courts have been concerned with the question whether the words were intended to mean that *the freedom* of debates or proceedings in Parliament ought not to be impeached or questioned, or whether they meant, in a wider sense, that *debates or proceedings in Parliament* ought not to be impeached or questioned. William Blackstone, adopted the wider approach when he observed in his *Commentaries on the Laws of*

*England,* (17th Edition, 1830), vol. I, page 163, that "whatever matter arises concerning either House of Parliament, ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere".

Much has been said in the course of argument about the celebrated decision in *Stockdale v Hansard,* [1839] EWHC QB J21, 112 ER 1112, and much of its *dicta* quoted by learned Counsel, but it must be noted, as the learned Attorney General has stressed. that *Stockdale v Hansard* was not a case in which whatever was said or done in the House of Commons was being sought to be impeached. That case involved an action for defamatory libel instituted by one Stockdale against James Hansard and three other members of his family, who were responsible for publishing the contents of a prison inspector's report ordered to be printed and published by the House. It is noteworthy that in deciding this case, the court adopted the wider interpretation of the Bill of Rights, as when Lord Denman observed at page 1156 that "whatever is done within the walls of either assembly must pass without question in any other place", and Patterson J. said at page 1191 that "whatever is done in either House should not be liable to examination elsewhere". In the same case, Coleridge J observed at page 1199 that –

> In point of reasoning, it needed not the authoritative declaration of the Bill of Rights to protect the freedom of speech, the debates or proceedings in parliament, from impeachment or question in any place out of parliament; and *that the House should have exclusive jurisdiction to regulate the course of its own proceedings, and animadvert upon any conduct there in violation of its rules, or derogation from its dignity, stands upon the clearest grounds of necessity.* (*Emphasis added*)

Learned Counsel for the 11th and 12th Respondent-Respondents have invited our attention to the following passage that appears at page 1192 of the judgment of Patterson J:-

> Where then is the necessity for this power? Privileges, that is, immunities and safeguards, are necessary for the protection of the House of Commons, in the exercise of its high functions. All the subjects of this realm have derived, are deriving, and I trust and believe will continue to derive, the greatest benefits from the exercise of those functions. All persons ought to be very tender in preserving to the House all privileges which may be necessary for their exercise, and to place the most implicit confidence in their representatives as to the due exercise of those privileges. *But power, and especially the power of invading the rights of others, is a very different thing: it is to be regarded, not with tenderness, but with jealousy; and, unless the legality of it be most clearly established, those who act under it must be answerable for the consequences.* (*Emphasis added*)

It was the contention of learned Counsel that insofar as in the case at hand the rights of the Petitioner-Respondent, who is not only a citizen of this country but also at the relevant time, its Chief Justice, have been seriously affected by what transpired before the Parliamentary Select Committee, the powers, privileges and immunities of Parliament must give way.

I have several difficulties in agreeing with this contention of leaned Counsel for the 11th and 12th

Respondent-Respondents. Firstly, the appeal before us does not relate to all what transpired before the Parliamentary Select Committee. In fact, the Court of Appeal in its impugned judgment, refrained from going into the allegations of procedural irregularities and bias that had been made by the Petitioner-Respondent in the proceedings that had taken place before the Select Committee, and was content to hold that the appointment by the Speaker of the House of Parliament of the said committee, purportedly in terms of Article 107(3) read with Order 87 A (2) of the Standing Orders of Parliament, was invalid, and that in consequence, the Select committee was not properly constituted. That was the only justification offered by the Court of Appeal for quashing the report of the said committee, and from that perspective, the challenge, was not to what transpired before the committee, but was to what was done by the Speaker of the House within the walls of Parliament to constitute the committee in terms of the Constitution and applicable Standing Orders.

Secondly, unlike in *Stockdale v Hansard, supra,* what was sought to be impeached in this case was not a publication of the contents of a report of some public official such as the prison inspector, but the proceedings of the Select Committee of Parliament, which took place within the walls of Parliament, and the report of the said Select Committee. Thirdly, the provisions of Article 107(2) and (3) are, as already noted by me, unique to our Constitution, and to which there was no parallel in the common law of England as it stood at the time *Stockdale v Hansard* came to be decided. Furthermore, the process outlined in Article 107(2) and (3) read with the relevant Standing Orders of Parliament, constitute the only mechanism found in our Constitution for removing a Chief Justice and other Judges of the Superior Courts of Sri Lanka, and envisage Parliament, which is an elected body vested with legislative power, to act in co-ordination with the President, being the elected Head of the Executive. As I have already observed, the power of judicial review, which applies to courts of first instance and like tribunals, institutions and persons, cannot extend to Parliament, in which the judicial power of the People is theoretically vested.

Coming back to the analysis of judicial decisions emanating from England relating to parliamentary privileges, I note that almost forty-five years later, in *Bradlaugh v Gossett* (1884) 12 QBD 271, Lord Coleridge CJ endorsed the views expressed by the judges in *Stockdale v Hansard, supra*, and reiterated at page 275 of his judgment in that case, that what "is said or done within the walls of Parliament cannot be inquired into in a court of law". After another seventy-four years, In 1958, the wider view of privilege once again found favor with Viscount Simonds, who when deciding *In re Parliamentary Privilege Act 1770* [1958] AC 331, at page 350 noted that "there was no right at any time to impeach or question in a court or place out of Parliament a speech, debate or proceeding in Parliament".

I would like to pause for a moment in time, at *Dingle v Associated Newspapers Ltd. and Others* [1960] 2 QBD 405, in which in the course of an action for damages for libel, it was sought to impugn the validity of a report of a select committee of the House of Commons on the ground that the procedure of the committee was defective. In refusing permission for any party to mount such an attack on the validity of the report, Pearson J. explained the reasons for his decision at page 410 of his judgment in the following manner:-

> ".....in my view, it is quite clear that to impugn the validity of the report of a select

committee of the House of Commons, specially one which has been accepted as such by the House of Commons by being printed in the House of Commons Journal, would be contrary to section 1 (art. 9) of the Bill of Rights. No such attempts can properly be made outside Parliament.

The next point was that the Solicitor-General and Mr. Cumming-Bruce made a submission or a request that no comment on the report should be permitted in the course of the trial. That, as a matter of construction of the relevant provision in the Bill of Rights might have raised a more debatable question, but it seemed quite clear at the time, and still is clear, to my mind, that it was easy to give effect to that request because, *once the question of the validity of the report had been excluded as outside the scope of the court's inquiries, any comment on the report, or how it was obtained, and the proceedings leading up to it, would have little or no materiality:* indeed, to a large extent, any such comment would not be relevant at all."(*Emphasis added*)

Twelve years later, in *Church of Scientology of California v Johnson Smith* [1972] 1 QB 522 at page 529 Browne J acknowledged the correctness of the broader view of parliamentary privilege, and stated that "what is said or done in the House in the course of proceedings there cannot be examined outside Parliament for the purpose of supporting a cause of action even though the cause of action itself arises out of something done outside the House". In the same vein, in *British Railways Board the Pickin* [1974] AC 765 at page 799 Lord Simon of Glaisdale observed as follows:-

"I have no doubt that the respondent . . . is seeking to impeach proceedings in Parliament, and that the issues raised . . . cannot be tried without questioning proceedings in Parliament".

In *R v Secretary of State for Trade, ex p Anderson Strathclyde Plc* [1983] 2 All ER 233 at page 239, Dunn LJ noted that it could not examine an extract from *Hansard* in order to determine what were the proper inferences to be drawn from them, since this:-

".....would be contrary to [section 1] art 9 of the Bill of Rights. It would be doing what Blackstone said was not to be done, namely to examine, discuss and adjudge on a matter which was being considered in Parliament. Moreover, it would be an invasion by the court of the right of every member of Parliament to free speech in the House with the possible adverse effects referred to by Browne J."

In short, judicial authority up to the decision of the House of Lords in *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 clearly reflected the wider meaning of the words used in Article 9 of the Bill of Rights. However, it is noteworthy that the House of Lords in Pepper *(Inspector of Taxes) v Hart* overruled more than two centuries of precedent when it decided that courts could refer to and rely on *Hansard* to aid in construing enacted laws. Since then, there have been many decisions that took a more liberal view in regard to the use of legislative history for the interpretation of legislation, which is an aspect of the law that is not relevant to the question arising on this appeal, and on which I shall not make any further comment. The decision in this case did not in any way impinge on the traditional

position that had prevailed for centuries, that the proceedings of Parliament are sacrosanct, as would become clear from the following observation of Lord Browne Wilkinson in *Prebble v. Television New Zealand Ltd.* [1995] 1 A.C. 321 at page 332:-

> "In addition to article 9 itself, there is a long line of authority which supports a wider principle, of which article 9 is merely one manifestation, viz. that the courts and Parliament are both astute to recognise their respective constitutional roles. *So far as the courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges*: *Burdett v. Abbott* (1811) 14 East 1; *Stockdale v. Hansard* (1839) 9 Ad. & E.C. 1; *Bradlaugh v. Gossett* (1884) 12 Q.B.D. 271; *Pickin v. British Railways Board* [1974] A.C. 765; *Pepper v. Hart* [1993] A.C. 593. As Blackstone said in his *Commentaries on the Laws of England,* 17th ed. (1830), vol. 1, p. 163: 'the whole of the law and custom of Parliament has its origin from this one maxim, "that whatever matter arises concerning either House of Parliament, ought to be examined. discussed and adjudged in that House to which it relates, and not elsewhere."

In *Neil Hamilton v Mohammed Al Fayed* [2001] 1 AC 395, the House of Lords followed the aforesaid line of authorities, and dismissed an application for judicial review of a decision of the Parliamentary Commissioner on the grounds that such matters were properly within the exclusive cognizance of Parliament. In the course of his opinion in this case Lord Browne Wilkinson referred to his above quoted *dictum* in *Prebble v. Television New Zealand Ltd., supra,* and observed at page 407 that:-

> "The normal impact of parliamentary privilege is to prevent the court from entertaining any evidence, cross-examination or submission which challenge the veracity or propriety of anything done in the course of parliamentary proceedings. *Thus it is not permissible to challenge by cross-examination in a later action the veracity of evidence given to a parliamentary committee.*" (*Emphasis added*)

In the more recent decision in *Jackson v. Attorney-General* [2005] UKHL 56 [2006] 1 A.C. 262, the House of Lords had the opportunity of reviewing the validity of certain English Acts of Parliament. The decision involved a challenge to the validity of the Hunting Act of 2004, which had been passed in the House of Commons but not in the House of Lords. The challenge was on the ground that the Parliament Act of 1949, which permits a Bill which has not been passed in the House of Lords to become an Act under certain conditions, was itself not validly enacted. A unanimous nine-member House of Lords Appellate Committee agreed with a unanimous Court of Appeal (and before that, the Divisional Court) that the 1949 Act was not invalid, and on that basis, upheld the validity of the Hunting Act 2004.

What is of some significance in the context of what is in issue before this Court in this appeal is that the Attorney-General did not oppose in *Jackson's* case the courts entering into judicial review, and the lower courts and the House of Lords justified their decisions, by holding that they were not considering the mode of passing Bills but engaging simply in a matter of statutory interpretation,

namely, whether the 1949 Act was permitted by the terms of the 1911 Act. The decision of the House of Lords contains interesting but inconclusive *obiter dicta* impinging on the concept of Supremacy of Parliament, and on one end of the spectrum was Lord Bingham, who at paragraph 9 of the opinion, described the supremacy of the Crown in Parliament as the "bedrock" of the British constitution, observing that then as now "the Crown in Parliament was unconstrained by any entrenched or codified constitution", and at the other end of the spectrum was Lord Steyn, who at paragraph 102 of the opinion, noted that the "classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom". It is noteworthy that the following comment of Lord Steyn in the same paragraph has generated much speculation as to what the future holds for the United Kingdom:-

> "Nevertheless, the supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a compiaisant House of Commons cannot abolish. It is not necessary to explore the ramifications of this question in this opinion. No such issues arise on the present appeal."

Nor is it necessary for the purpose of this appeal to go into these concepts, as we are here interpreting and applying the principles of our own Constitution, which differs in many ways from the British constitution. As far as Sri Lanka is concerned, under the Republican Constitution of 1972 as well as the Constitution of the Democratic Socialist Republic of Sri Lanka 1978, Sovereignty is expressly, and manifestly vested in the People, and Article 4 of the Constitution outlines very clearly the manner in which the "Sovereignty of the People" is to be exercised and enjoyed, particularly by the legislative, executive and judicial organs of government.

Let me at this stage turn to the only local decision in point, which has been referred to by the learned Attorney General in the course of his submissions before us. In *The Attorney General v. Samarakkody and Dahanayake* 57 NLR 412 two members of the House of Representatives were noticed by this Court, on an application by the Attorney General, to show cause as to why they should not be punished for offences of breach of privilege of Parliament. On a question of conflict of jurisdiction between this Court and the House of Representatives having being raised by learned Counsel for the respondents, this Court had no hesitation in holding that, even if the conduct complained of was disrespectful, it was not justiciable by the Supreme Court, as the conduct in question fell within the scope of sections 3 and 4 of the Parliament (Powers and Privileges) Act and could not therefore be questioned or impeached in proceedings taken in the Supreme Court under section 23 of the Act. After examining the English authorities and relevant Standing Orders of the House, H.N.G. Fernando J. observed as follows at page 427 of his judgment:-

> "The jurisdiction to take cognisance of such conduct was exclusively vested in the House of Representatives. The respondents are accordingly discharged from the notices served on

them."

It remains for me to consider the submissions made by learned Counsel on the question as to whether Section 3 of the Parliament (Powers and Privileges) Act amounts to a constitutional ouster of the writ jurisdiction of the Court of Appeal conferred by Article 140 by reason of its embodiment in Article 67 of the Constitution. Article 67 enacts as follows:-

> "The privileges, immunities and powers of Parliament and of its Members may be determined and regulated by Parliament by law and until so determined and regulated, the provisions of the Parliament (Powers and Privileges) Act, shall, *mutatis mutandis,* apply."

While the learned Attorney General has forcefully contended that Article 67 brought about a constitutional ouster of the writ jurisdiction of the Court of Appeal, learned Counsel for the 11th and 12th Respondent-Respondents have argued with equal force that the mere reference to the Parliament (Powers and Privileges) Act in Article 67 of the Constitution does not elevate section 3 of the said Act into a constitutional ouster of jurisdiction, and that a jurisdiction conferred by the Constitution cannot be denuded by an ordinary "law" which has not been enacted in the manner set out in Chapter XII of the Constitution. For this proposition, they have relied on the decision of this Court in *Attapattu and Others v People's Bank and Others* (1987) 1 Sri LR 208, in which this Court dealt with an apparent conflict between the ouster clause found in section 22 of the Interpretation Ordinance, as amended by Act No. 18 of 1972, and the power of judicial review conferred principally on the Court of Appeal by Article 140 of the Constitution, and expressed the view at pages 222 to 223 that:-

> "Apart from any other consideration, if it became necessary to decide which was to prevail - an ouster clause in an ordinary law or a Constitutional provision conferring writ jurisdiction on a Superior Court, "subject to the provisions of the Constitution" - I would unhesitatingly hold that the latter prevails, because the presumption must always be in favour of a jurisdiction which enhances the protection of the Rule of Law, and against an ouster clause which tends to undermine it (see also *Jailabdeen v. Danina Umma* 64 NLR. 419, 422). But no such presumption is needed, because it is clear that the phrase "subject to the provisions of the Constitution" was necessary to avoid conflicts between Article 140 and other Constitutional provisions - such as Article 80(3), 120, 124, 125, and 126(3). That phrase refers only to contrary provisions in the Constitution itself, *and does not extend to provisions of other written laws, which are kept alive by Article 168(1).*" (*Emphasis added*)

The learned Attorney-General has submitted that at best the above passage is an *obiter dictum* having no binding effect on this Court, as the case was decided on the basis that upon the death of an applicant for relief in proceedings for the redemption of land under section 71 of the Finance Act, No. 11 of 1963, as subsequently amended, a "specified heir" or a testate heir may be substituted, and whether the application was duly constituted, or whether the Bank ought to exercise its discretion, to vest the premises, in favor of the substitute, should not be considered at the stage of substitution, but only after a substitute has stepped into the shoes of the deceased and has acquired the necessary status to present his case.

However, I do not have to go into this question as Article 67 of the Constitution incorporates into that article *mutatis mutandis* all the provisions of the Parliament (Powers and Privileges) Act that were in force at the time of the enactment of the Constitution in 1978, and the effect of such incorporation by reference is to write into that article the provisions of the aforesaid Act as if they were part of the Constitution. As Lord Esher M.R. observed in *In Re Woods Estate* (1886) 31 Ch.D 607 at 615:–

> "If a subsequent Act bring into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into the new Act just as if they had been actually written in it with the pen, or printed in it, and the moment you have those clauses in the later Act, you have no occasion to refer to the former Act at all. For all practical purposes therefore, those section of the Act of 1840 are to be dealt with as if they were actually in the Act of 1855".

Learned Counsel for the 11th and 12th Respondent-Respondents have stressed that Article 67 itself has empowered Parliament to determine and regulate "by law" its privileges, immunities and powers, and that since the word "law" as used in that article envisages an ordinary Act of Parliament that may be enacted with a simple majority in Parliament, the provisions of the Parliament (Powers and Privileges) Act including section 3 thereof cannot be regarded as constitutional provisions. However, I find that there are several provisions in our Constitution such as Article 12(4), the proviso to Article 13(5), Articles 15, 74(2), 101(2), 154A (3) and 154G (3)(a) that are expressly permitted to be varied or amended by an ordinary majority, and in my view, the simple fact that variation is permitted by an ordinary majority in Parliament, would not deprive the provision of its constitutional status.

It is in this context important to note that Article 67 does not stand alone and must be read with Article 4(c) of the Constitution which makes express reference to "the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised by Parliament according to law". The direct vesting of the judicial power of the People with respect to the privileges, immunities, and powers of Parliament and its Members in Parliament, by Article 4(c) of the Constitution means, as has been explained in the judgments of this Court in decisions such as *Stockdale v Hansard*, [1839] EWHC QB J21, 112 ER 1112, *Bradlaugh v Gossett* (1884) 12 QBD 271, *The Attorney General v. Samarakkody and Dahanayake* 57 NLR 412, *Dingle v Associated Newspapers Ltd. and Others* [1960] 2 QBD 405, *Prebble v. Television New Zealand Ltd.* [1995] 1 A.C. 321 and *Neil Hamilton v Mohammed Al Fayed* [2001] 1 AC 395, that no Court can exercise any supervision of that power. I therefore hold that section 3 of the Parliament (Powers and Privileges) Act No. 21 of 1953 read with Articles 4(c) and 67 of the Constitution would have the effect of ousting the writ jurisdiction of the Court of Appeal in all the circumstances of this case.

I accordingly answer Question 1) on which special leave to appeal had been granted by this Court in the affirmative, and hold that the Court of Appeal erred in holding that the writ jurisdiction of that Court embodied in Article 140 of the Constitution extends to proceedings of Parliament or a Committee of Parliament which performs its constitutional function in terms of Article 107(2) and (3) of the Constitution read with Order 87A of the Standing Orders of Parliament.

*Conclusions*

For the foregoing reasons, I would conclude that the Court of Appeal possessed no jurisdiction in terms of Article 140 of the Constitution to review a report of a Select Committee of Parliament, which was constituted in terms of Article 107(3) of the Constitution read with Order 87A(2) of the Standing Orders of Parliament, or to grant and issue an order in the nature of a writ of *certiorari* purporting to quash the report and findings of the Parliamentary Select Committee on the basis that it was not properly constituted.

I would accordingly, allow the appeal and set aside the impugned judgment of the Court of Appeal dated 7th January 2013. The application filed by the Petitioner-Respondent in the Court of Appeal shall stand dismissed due to lack of jurisdiction.

In all the circumstances of this case, I do not make any order for costs.

**JUDGE OF THE SUPREME COURT**

**Chandra Ekanayake, J,**

I agree.

**JUDGE OF THE SUPREME COURT**

**Sathyaa Hettige, PC., J,**

I agree.

**JUDGE OF THE SUPREME COURT**

**Eva Wanasundera, PC., J,**

I agree.

**JUDGE OF THE SUPREME COURT**

**Rohini Marasinghe, J.**

I agree.

**JUDGE OF THE SUPREME COURT**

# Amicus Curiae Written Submissions on behalf of the Commonwealth Lawyers Association and the Bar Human Rights Committee of England and Wales

**Introduction**

1. This amicus curiae brief is respectfully addressed to the Supreme Court of the Democratic Socialist Republic of Sri Lanka ('Supreme Court') by the Commonwealth Lawyers Association ('CLA') and the Bar Human Rights Committee of England and Wales ('BHRC').

2. It is filed in the instant appeal brought by the Attorney-General against the Judgment of the Court of Appeal setting aside the purported findings of the Parliamentary Select Committee. The appeal raises issues previously dealt with in a series of legal proceedings challenging the impeachment of Dr. Bandaranayake as Chief Justice of Sri Lanka.

**Interest of the Amicus Curiae**

3. The CLA is an international organisation which exists to promote and maintain the rule of law throughout the Commonwealth. Its membership is made up of Bar Councils, Law Societies, law firms, barristers' chambers and individual legal practitioners from the 54 countries of the Commonwealth. Established in 1983, the CLA seeks to uphold the rule of law by ensuring that an independent and efficient legal profession, with the highest standards of ethics and integrity, serves the people of the Commonwealth.

4. The BHRC is the international human rights arm of the Bar of England and Wales and its membership represents both practicing and non-practicing members of the Bar of England and Wales. Established in 1991, it is an independent committee of the General Council of the Bar of England & Wales. The BHRC is primarily concerned with defending the rule of law and internationally recognised legal standards relating to the right to a fair trial.

5. The CLA and the BHRC have expressed their concerns in relation to the impeachment process by which Chief Justice Bandaranayake was removed from office on a number of previous occasions. Such concerns may be seen in the following publicly available materials:

    a. CLA, Commonwealth Legal Education Association ('CLEA'), Commonwealth Magistrates and Judges Association ('CMJA') Resolution on the Rule of Law and Judicial Independence in Sri Lanka, 17 April 2013;[1]

    b. Report prepared by Geoffrey Robertson QC on behalf of the BHRC on the

[1] http://www.commonwealthlawyers.com

Impeachment of Sri Lanka's Chief Justice. 27 February 2013;[2]

c. BHRC Further Statement on the Impeachment of the Chief Justice of Sri Lanka. 17 January 2013;[3]

d. BHRC Statement on the Impeachment of the Chief Justice of Sri Lanka, 2 January 2013;[4]

e. CLA, CLEA and CMJA Further Statement on the Motion to Impeach the Chief Justice of Sri Lanka, 13 December 2013;[5]

f. CLA, CLEA and CMJA Statement on the Motion to Impeach the Chief Justice of Sri Lanka, 19 November 2012.[6]

6. This brief is submitted in support of the Chief Justice, but the CLA and the BHRC wish to make it clear that they do not presume to examine or comment directly on the judgment of the Court of Appeal in this case. Rather, the main purpose of this brief is to clarify an issue of United Kingdom law which has been raised by the Attorney General in the course of his appellate submissions - namely the procedure by which Supreme Court judges may be removed from office in the United Kingdom.

**Summary of the Argument**

7. The Supreme Court Judicial Complaints Procedure mandates for an independent, judicially constituted, tribunal to determine allegations of misconduct in respect of members of the Supreme Court consistent with the rule of law. Any such determinations are reached after a fair procedure is followed and the member in question has had the opportunity to both view the evidence against him or her and to make representations to the tribunal. It is only following such a procedure that it is possible for the Lord Chancellor to decide whether to initiate action to remove the member from office pursuant to section 33 of the *Constitutional Reform Act 2005*.

8. There is accordingly no basis upon which to suggest that the procedure in the United Kingdom for the removal of Supreme Court judges is a summary one in which a motion is filed in Parliament and, after due debate, Parliament simply decides whether to dismiss or retain the judge. Such a procedure would not be consistent with the primary aim of the *Constitutional Reform Act 2005*, which was to officially enshrine the independence of the judiciary in law.[7]

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[2] https://www.barhumanrights.org.uk/sites/default/files/documents/news/legal_opinion.pdf
[3] http://www.barhumanrights.org.uk/further-statement-sri-lanka-impeachment-chief-justice
[4] https://www.barhumanrights.org.uk/sites/default/files/documents/news/sri_lanka_statement_jan_2013_0.pdf
[5] http://www.commonwealthlawyers.com/PressRelease.aspx
[6] http://www.commonwealthlawyers.com/PressRelease.aspx
[7] http://www.judiciary.gov.uk/about-the-judiciary/introduction-to-justice-system/constitutional-reform

**Argument**

**A. The UK's Constitutional Reform Act 2005 and its relevance to this appeal**

9. As observed in paragraph 4.3(e) of the written submissions filed by the 12th Respondent (the Respondent on main arguments), the Attorney-General relies heavily on an article authored by Dr Mark Cooray which was published in the 'Daily News' in support of his Second Ground of appeal.

10. This article argues that the *Constitutional Reform Act 2005* enables the Parliament in the United Kingdom to summarily remove Supreme Court judges from office without any procedural safeguards. It states:

> "Britain is the head of the Commonwealth and we may perhaps gather what exactly was meant in terms of the Latimer House Principles by studying the British Constitutional Reform Act of 2005 which was promulgated long after the ratification of the Latimer House Principles was formulated. One of the most radical aspects of the British constitutional reform was that a new 12-member Supreme Court was created to be highest court in Britain and it would function outside the House of Lords breaking the centuries of British tradition. The interesting thing is to note how these judges of the Supreme Court were to be removed. Article 33 of the British Constitutional Reform Act of 2005 is as follows:
>
> *"A judge of the Supreme Court holds that office during good behaviour, but may be removed from it on the address of both Houses of Parliament."*
>
> That is all this huge 323-page Act of Parliament says about the removal of judges of the Supreme Court. This provision to remove Supreme Court judges basically follows the time honoured British practice. There is no talk of an 'impartial tribunal' or about filing charges, hearings and the right to defend oneself. Somebody files a motion in parliament and after due debate, Parliament will decide whether to sack or retain the judge."

11. The Attorney-General's reliance on Dr Cooray's article purportedly evidences the Attorney-General's contention that in Sri Lanka, as in many other Commonwealth countries, the Parliament is supreme and the Courts have no jurisdiction over Parliamentary acts.

12. The CLA and the BHRC agree with the submissions of the 12th Respondent on this issue (contained in paragraphs 4.3 (a)-(k) of its written submissions). These submissions are to the effect that it is the Constitution (which is firmly based on the principles of the rule of law and the independence of the judiciary), not the Parliament, which is supreme in Sri Lanka.

13. Given the emphasis that is placed on Dr Cooray's reasoning in the Attorney-General's appeal, in

order to assist the Court, the CLA and the BHRC set out below an:

a. analysis of the parliamentary debates which led to the adoption of the provisions of the *Constitutional Reform Act 2005* relating to the tenure of Supreme Court judges;

b. an examination of the detailed procedural safeguards which are applicable when seeking to remove a Supreme Court judge in the United Kingdom; and

c. a summary of the detailed procedures applicable when disciplining judges in England and Wales who are not members of the Supreme Court.

## B. Hansard discussion of the appropriate procedure for the removal of judges in the Constitutional Reform Bill

14. Prior to the Constitutional Reform Bill ('the Bill'), the procedure in England and Wales with respect to judicial tenure was that senior judges held office "during good behaviour" and were removable only by an "address in both Houses of Parliament". However, as Baroness Carnegy of Lour characterised this position in the House of Lords debates on the Bill on 11 October 2004, this was "simply not adequate for modern times and in the context of this Bill".[8] As she put it:

> "It is therefore necessary to provide better means of investigation into a judge's behaviour. It would be quite possible for a Minister to have it in for a judge, as it were, for political or other reasons or to be prejudiced against him. It is important to know exactly what bad behaviour and good behaviour are. ... Section 95 of the Scotland Act 1998 ... provides for a process of investigation by a tribunal which the Minister will appoint, and for guidance on what constitutes unacceptable behaviour. This may or may not meet the wishes of distinguished noble Lords ... but it is an attempt, based on recent legislation north of the Border, to improve protection of judges of the Supreme Court in modern times. The Government should not brush this off..."[9]

15. Lord Goodhart added his support to the comments by Baroness Carnegy and reiterated the need for a proper procedure to be set out in detail to regulate the removal of judges by Parliament:

> "For more than 300 years, it has been a rule that senior judges from the High Court upwards in England and Wales are removable only by an address in both Houses of Parliament. It was once done in respect of an Irish judge in the early 19th century, when Parliament had jurisdiction over Ireland, but it has never been done in relation to a judge in England and Wales. The nature of the powers is uncertain, and the

[8] Hansard, House of Lords Discussion of Constitutional Reform Bill, Committee Stage, 11 October 2004, Column 93.

[9] Hansard, House of Lords Discussion of Constitutional Reform Bill, Committee Stage, 11 October 2004, Column 94.

procedure that has to be gone through before an address can be made is unclear. We are talking about the Supreme Court, which is at the centre of the legal system for the entire United Kingdom. To leave it in the basic wording of Clause 27 is inadequate, as it is very unclear what, if any, procedure is appropriate to obtain the necessary address of both Houses of Parliament. Something along the lines of the amendment moved by the noble Baroness, Lady Carnegy, which is based on the draft by the Law Society of Scotland, is worth careful consideration. It may be that the wording is not ideal and could be improved, but it is much better to spell out in some detail the circumstances in which a justice of the Supreme Court can be removed rather than leaving it in the general and vague terms of the existing Clause 27."[10]

16. The need for procedural safeguards to be put in place to protect judges who decide cases against the Government and experience of where this has happened outside of the United Kingdom was recalled by the Duke of Montrose who warned:

> "I might add to the comments of my noble friend Lady Carnegy. She talked in reasonable terms about what the pitfalls might be, but we are supposed to envisage a time in the distant future when people may not be as reasonable as we all tend to be at present. It has happened in other countries that do not have our traditions. If a judge decides a case in a way that the Government do not like, does that constitute good or bad behaviour?"[11]

17. Following a promise from the Government that the matter would be reviewed in consultation with the Law Lords, the amendment premised on the Scottish system (proposed by Baroness Carnegy) was withdrawn. The issue of removal of judges was then discussed again in the House of Lords on 14 December 2004 in respect of what was by then Clause 24 of the Bill. At that stage, Baroness Carnegy again expressed her dissatisfaction with the current arrangements (as they then were) for the removal of judges, stating in relation to what she regarded as a matter of "fundamental constitutional importance"[12]:

> "In future, a political Minister in charge might well take against a particular judge, and he might well be supported by the Home Secretary, who might want to put pressure on that judge. The Minister made the point in Committee that there was strong protection for the judge and the public—that of Parliament and the Queen, who would have to agree. However, we all know just how compliant the House of Commons can be with a big majority. Her Majesty would have great difficulty in agreeing to something that Parliament disagreed with. The existing criteria for good behaviour have, I understand, never been tested in the context of the highest court in

[10] Hansard, House of Lords Discussion of Constitutional Reform Bill, Committee Stage, 11 October 2004, Column 94.

[11] Hansard, House of Lords Discussion of Constitutional Reform Bill, Committee Stage, 11 October 2004, Column 94.

[12] Hansard, House of Lords Discussion of Constitutional Reform Bill, Committee Stage, 14 December 2004, Column 1228.

the land; that is a significant fact. ...."

18. The Minister, Baroness Ashton of Upholland, indicated at the end of the debate that she understood the concerns which had been raised and that her Department was in "very detailed discussions with the Law Lords", which were then "at a very advanced stage" and that these discussions would lead to an "agreed protocol" which would be made available as a public document.[13] Upon adoption, this protocol for a judicial complaints procedure was to be read in conjunction with section 33 of the Constitutional Reform Act 2005 (during the Parliamentary debates this provision was referred to as Clause 27 and later Clause 24 of the Constitutional Reform Bill) and would have to be followed prior to any action under section 33 to remove a Supreme Court judge. It was on this basis that section 33 of the Constitutional Reform Act 2005 was passed by both Houses of Parliament in the following terms:

> 33. Tenure
>
> A judge of the Supreme Court holds that office during good behaviour, but may be removed from it on the address of both Houses of Parliament.

## C. Procedural safeguards applicable to the removal from office of a Supreme Court Judge in England and Wales

19. The Supreme Court Judicial Complaints Procedure which was devised by the Government (in conjunction with the Law Lords) operates in advance of any action to remove a Supreme Court judge ('member') under section 33 of the Constitutional Reform Act 2005. It is a public document which can be obtained directly from the Supreme Court website[14] and is set out in full in at Annex A to this Amicus Brief.

20. Under the Supreme Court Judicial Complaints Procedure, any complaint made as to the conduct of a member is initially assessed by the Supreme Court's Chief Executive who will assess as a preliminary matter whether or not the complaint "relates only to the effect of a judicial decision" or discloses "not ground of complaint". If this is the case, no further action shall be taken in respect of the complaint and the complainant will be informed of this.[15]

21. Where the complaint is deemed by the Chief Executive to be one on which action may be taken, it is referred to the most senior Supreme Court member to whom the complaint does not relate. That member will consult with the next senior member of the Court to whom the complaint does not relate. These two members ("the panel") will then make a decision whether to either (a) take no action; (b) raise the complaint with the member in question to resolve the matter informally; or

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[13] Hansard, House of Lords Discussion of Constitutional Reform Bill, Committee Stage, 14 December 2004, Column 1228.

[14] http://www.supremecourt.gov.uk/about/judicial-conduct-and-complaints.html#02

[15] Supreme Court Judicial Complaints Procedure, clause 1.

(c) consider taking "formal action".[16] Reasons for taking either informal or formal must be recorded by the two members considering the matter.

22. Consideration of "formal action" by the panel is only appropriate where a complaint, a final conviction for an offence, or a member's conduct casts serious doubt on the member's character, integrity or continuing fitness to hold office.[17]

23. Where such formal action is under consideration, the most senior Supreme Court member to whom the complaint does not relate, must inform the member in question (both of the consideration of formal action and the matters alleged against them). The most senior member must then inform the Lord Chancellor of the facts and consult with him or her as to the action to be taken.[18] Formal action may only be initiated after these steps have been taken and only then if it is considered appropriate to do so by the most senior member.[19]

24. Where formal action is taken, strict procedural safeguards apply. These are that:

    a. A tribunal is established to consider the allegations. This tribunal is constituted by the Lord Chief Justice of England and Wales, the Lord President of the Court of Session and the Lord Chief Justice of Northern Ireland (or the next most senior judge in that jurisdiction in the event of disqualification) as well as two independent persons of high standing nominated by the Lord Chancellor).

    b. The member in question is to be fully informed of the details of the allegations made against him or her.

    c. The Tribunal shall adopt a fair procedure (which is expeditious to the extent that this is consistent with fairness) to investigate the allegations.

    d. The Tribunal shall prepare a report summarising the relevant facts and recommending action (if any) to be taken. This report shall be delivered to the Lord Chancellor who may choose to publish it.

    e. The Lord Chancellor shall then decide whether to initiate action to remove the member from office pursuant to section 33 of the Constitutional Reform Act 2005.

    f. The member in question may vacate his or her office voluntarily at any time.

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[16] Supreme Court Judicial Complaints Procedure, clauses 2-3.
[17] Supreme Court Judicial Complaints Procedure, clause 4.
[18] Supreme Court Judicial Complaints Procedure, clause 5.
[19] Supreme Court Judicial Complaints Procedure, clause 6.

g. Formal action may be discontinued at any stage.[20]

25. The "fair but expeditious" procedure to be adopted by the Tribunal is presently unknown as there has not yet been cause in the history of the Supreme Court for such a procedure to be invoked. However, it will almost certainly be substantially influenced by the strict procedures for similar tribunals which are charged with determining complaints against members of the judiciary who are not Supreme Court judges.

## D. Procedural safeguards applicable when disciplining members of the judiciary in England and Wales who are not members of the Supreme Court

26. The procedure for these tribunals is set out in detail in subordinate legislation - see for example, the *Judicial Discipline (Prescribed Procedures) (Amended) Regulations 2008 (SI 2008/2098) and the Judicial Discipline (Prescribed Procedures) Regulations 2006 (SI 2006/676).*[21] These statutory instruments were promulgated pursuant to section 115 of the *Constitutional Reform Act 2005* and govern matters of judicial discipline for all members of the judiciary in England & Wales other than members of the Supreme Court. For these judges, matters of discipline are supervised by a specific Government agency known as the Office for Judicial Complaints.[22]

27. The Office for Judicial Complaints is detailed and exhaustive in its procedures in order to ensure fairness to the judge who is the subject of the complaint. At each stage of the investigation of the allegations against him or her, the judge in question has the opportunity to view the evidence against them, to make representations as to this evidence (including giving oral evidence), to have their case considered by an independent and judicially qualified tribunal, to comment on draft reports prepared by the tribunal giving findings in respect of their case and to request appellate review of any adverse findings reached. It is only when all of these procedures are concluded that the judge may be removed from office in accordance with section 108 of the *Constitutional Reform Act 2005*. For reference purposes, a more detailed summary of the applicable procedures for disciplining judges in England and Wales who are not members of the Supreme Court is attached at Annex B to this Amicus Brief.

28. In sum, it is very likely that these detailed and fair procedures applicable to tribunals investigating judges in England & Wales who are not members of the Supreme Court will significantly inform the procedures to be adopted by a tribunal considering misconduct by a member of the Supreme Court in order to ensure compliance with the "fairness" requirement under clause 7 of the

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[20] Supreme Court Judicial Complaints Procedure, clauses 7-9.

[21] For complaints relating to Magistrates see the *Complaints (Magistrates) Rules 2008*. For complaints relating to Tribunal Judges see the *Judicial Complaints (Tribunals) Rules 2008* and *Judicial Complaints (Tribunals) (No2) Rules 2008*. Further information about the procedures involved for complaints against Magistrates and Tribunal Judges can be found here: http://judicialcomplaints.judiciary.gov.uk/complaints/complaints_judge.htm

[22] This office was set up on 3 April 2006 to handle complaints and provide advice and assistance to the Lord Chancellor and the Lord Chief Justice (who bear joint responsibility for judicial discipline under the sections 108 and 109 of the *Constitutional Reform Act 2005*). It will be rebranded as the 'Judicial Conduct and Investigations Office' from 1 October 2013.

Supreme Court Judicial Complaints Procedure.

## E. Conclusion

29. As set out above, the Supreme Court Judicial Complaints Procedure mandates for an independent, judicially constituted, tribunal to determine allegations of misconduct in respect of members of the Supreme Court consistently with the rule of law. Any such determinations are reached after a fair procedure is followed and the member in question has had the opportunity to both view the evidence against him or her and to make representations to the tribunal. It is only following such a procedure that it is possible for the Lord Chancellor to decide whether to initiate action to remove the member from office pursuant to section 33 of the *Constitutional Reform Act 2005*.

30. There is accordingly no basis upon which to suggest that the procedure in the United Kingdom for the removal of Supreme Court judges is a summary one in which a motion is filed in Parliament and, after due debate, Parliament simply decides whether to dismiss or retain the judge. Such a procedure would not be consistent with the primary aim of the *Constitutional Reform Act 2005*, which was to officially enshrine the independence of the judiciary in law.[23]

Respectfully submitted

26 August 2013

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[23] http://www.judiciary.gov.uk/about-thc-judiciary/introduction-to-justice-system/constitutional-reform

# A Crisis of Legitimacy: The Impeachment of Chief Justice Bandaranayake and the Erosion of the Rule of Law in Sri Lanka

*Extracts from the Report of the International Bar Association's Human Rights Institute (IBAHRI)*

April 2013

**The procedural inadequacies of the impeachment**

The IBAHRI delegates consider that the procedure set out in Standing Order 78A, which purports to regulate removals of judges pursuant to Article 107 of the Constitution, is unfair by the standards of both Sri Lankan law and international practice.

The need for impeachments to accord with natural justice was acknowledged as common law as long ago as 1825, when England's Solicitor-General observed that it would be 'most [illegal], most [unjust] and... most [unconstitutional] to condemn a judge of rank and character without giving him an opportunity of being heard.'[1] Sri Lanka's Supreme Court has also recognised that MPs exercising powers to remove high officers under constitutional provisions are required to act quasi-judicially,[2] and the Sri Lankan Government formally affirmed before the UN Human Rights Committee in September 2002 that any judge who was removed unfairly would have a remedy in the courts.

Responding to UN Human Rights Committee concerns about Standing Order 78A, the Government stated that:

> '[N]owhere either in the relevant constitutional provisions or the standing orders seeks to exclude judicial scrutiny of the decisions of the inquiring committee. Thus, it is envisaged that if the inquiring committee were to misdirect itself in law or breaches the rules of natural justice its decisions could be subject to judicial review.'[3]

The importance of fair trial rights is also acknowledged by several well-established international treaties. Article 10 of the Universal Declaration of Human Rights states that 'everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations', for example, and it goes on to stipulate the minimum standards that such a hearing must meet. Article 14 of the International Covenant on Civil and Political Rights (ICCPR), to which Sri Lanka has been a party since 1980, is of similar effect. It provides that 'the determination of

[1] Hansard, 17 June 1825, col 1006 (the case concerned allegations against one Baron O'Grady).
[2] See *Dissanayake v Kaleel* [1993] 2 Sri LR 135, at pp. 172–73.
[3] See Sri Lanka's Fourth Periodic Report to the UN Human Rights Committee (18 September 2002), para 302, available online via: http://tb.ohchr.org/default.aspx?Symbol=CCPR/C/LKA/2002/4.

any criminal charge... or rights and obligations in a suit at law' shall be made at 'a fair and public hearing by a competent, independent and impartial tribunal established by law.'[4]

These principles are particularly important where the person accused of wrongdoing is a judge.[5] In such cases, the possibility of an unjust conviction is compounded by a more general risk that manipulation of the trial process will interfere with the proper functioning of an independent judiciary. A number of international instruments accordingly reflect the need for heightened safeguards in such cases. The UN Human Rights Committee has specifically observed that Article 14 of the ICCPR can be engaged in circumstances where a judge is accused of corruption,[6] and the UN Basic Principles on the Independence of the Judiciary stipulate that:

> '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'.[7]

The Beijing Statement of Principles of the Independence of the Judiciary, which were adopted by Chief Justices from across the Asia-Pacific Region in 1997, acknowledge that procedures might differ according to a nation's history and culture, but they also make clear that impugned judges should in all cases 'have the right to a fair hearing'.[8] The International Bar Association's Minimum Standards of Judicial Independence similarly state that 'the proceedings for discipline and removal of judges should ensure fairness to the judge and adequate opportunity for hearing'.[9]

One of the most important aspects of 'fairness' in this regard is that allegations of misbehaviour should reflect well-established norms, which ought to be set out in a judicial code of conduct. This is acknowledged by all the above instruments: see UN Basic Principle 19 ('All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct'); Beijing Principle 27 ('All disciplinary, suspension or removal proceedings must be determined in accordance with established standards of judicial conduct'); and Clause 29 of the IBA's Minimum Standards ('(a) The grounds for removal of judges shall be fixed by law and shall be clearly defined; [and] (b) All disciplinary actions shall be based upon standards of judicial conduct promulgated by law

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[4] International Covenant on Civil and Political Rights, online at: www.unhcr.org/refworld/docid/3ae6b3aa0.html.

[5] For a useful overview of the relevant standards, see International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, Practitioners Guide No. 1* (Geneva, 2007) ('ICJ, *International Principles on Independence and Accountability*'), pp 55–61, online at: http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/04/International-Principles-on-the-Independence-and-Accountability-of-Judges-Lawyers-and-Procecutors-No.1-Practitioners-Guide-2009-Eng.pdf.

[6] UNHCR General Comment No 32, para 20, available online via: www2.ohchr.org/english/bodies/hrc/comments.htm; see also *Adrien Mundyo Busyo et al v Democratic Republic of the Congo*, Communication No 933/2000 (2003), para 5.2, online at: www1.umn.edu/humanrts/ undocs/933-2000.html.

[7] UN Basic Principle 17, available online via: www.unrol.org/doc.aspx?d=2248.

[8] Beijing Principle 26, online at: http://lawasia.asn.au/objectlibrary/147?filename=Beijing%20Statement.pdf.

[9] IBA Minimum Standards, Clause 27, available online via: www.ibanet.org/About_the_IBA/IBA_resolutions.aspx

or in established rules of court').

The Commonwealth (Latimer House) Principles on the Three Branches of Government, which were endorsed by the 2003 Commonwealth Heads of Government Meeting (CHOGM) at Abuja, Nigeria, are particularly pertinent in this regard. They observe that:

> 'any disciplinary procedures should be fairly and objectively administered. Disciplinary proceedings which might lead to the removal of a judicial officer should include appropriate safeguards to ensure fairness', and that:
>
> 'in cases where a judge is at risk of removal, the judge must have the right to be fully informed of the charges, to be represented at a hearing, to make a full defence and to be judged by an independent and impartial tribunal'.[10]

The impeachment procedure used against Chief Justice Bandaranayake wholly failed to meet these standards.[11] The IBAHRI notes in particular:

- The allegations were weak, even taken at their highest.[12] Article 107(2) of the Constitution allows for the removal of superior judges in the case of 'proved misbehaviour', but at least two of the three supposedly proved complaints are arguably not serious enough to merit any sanction at all. In relation to Charge 4, several of the bank accounts the Chief Justice had allegedly failed to disclose were empty or had been closed,[13] while Charge 5 was merely a complaint that the Chief Justice retained an *ex officio* supervisory role over the judicial system at a time that her husband was under investigation. This is made all the more important by Sri Lanka's lack of any code to clarify the kinds of 'misbehaviour' that might trigger removal under Article 107(2). This failure to promulgate standards for the guidance and assessment of judges, such as those set out in the Bangalore Principles of Judicial Conduct,[14] is extremely unusual. It also puts Sri Lanka at odds with the Latimer House Guidelines, which state that 'a Code of Ethics and Conduct should be developed and adopted... as a means of ensuring the accountability of judges'.

- The PSC majority rejected all calls to clarify how it would approach the burden of proof, and its

[10] *Commonwealth Principles on the Three Branches of Government*, Section VII (Accountability Mechanisms); *Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence*, Section VI (Accountability Mechanisms), online at: www.thecommonwealth.org/shared_asp_files/ uploadedfiles/%7BACC9270A-E929-4AE0-AEF9-4AAFEC68479C%7D_Latimer%20House%20Booklet%20130504.pdf.

[11] A comprehensive analysis of the procedural flaws can be found in a report written for the (UK) Bar Human Rights Committee by Geoffrey Robertson QC: see 'Report on the Impeachment of Sri Lanka's Chief Justice' (London, 2013) ('Robertson, 'Report on the Impeachment'') paras 50–67, online at: www.barhumanrights.org.uk/sites/default/files/documents/news/legal_opinion.pdf.

[12] For a detailed examination of the charges, which convincingly establishes that all of them were seriously deficient, see *ibid*, paras 38–49, pp. 69–86.

[13] Select Committee Report, 1:212; cf 2:1475–76.

[14] Bangalore Principles of Judicial Conduct 2002, online at: www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf.

report to Parliament spoke merely of 'sufficient' evidence.[15] This contravenes Sri Lanka's own Constitution, which envisages (by Art 13(5)) that people 'shall be presumed innocent until... proved guilty' and (by Art 107) that judges will be removed only after their misbehaviour has been 'proved'. Insofar as Standing Order 78A encouraged this approach (by providing that a PSC 'shall require... a written statement of defence' and referring to 'disproof' by an accused judge), it was therefore unconstitutional.

- The proceedings were held in secret, notwithstanding the Chief Justice's express wish that observers should be admitted. The PSC's refusal to accommodate her request violated UN Basic Principle 17 and it was also at odds with ideas of open justice familiar to common law systems all over the world. Insofar as Standing Order 78A(8) purported to impose an absolute requirement of secrecy, it also violates Article 106(1) of Sri Lanka's own constitution, which provides that:

  > 'The sittings of every court, tribunal or other institution established under the Constitution or ordained and established by Parliament shall subject to the provisions of the Constitution be held in public, and all persons shall be entitled freely to attend such sittings.'

- All seven members of the PSC who found against the Chief Justice, acting simultaneously as prosecutors and judges, were drawn from the governing UPFA, as were the 117 legislators initiating the impeachment, the Speaker who convened the PSC and all the MPs who voted to refer the impeachment to President Rajapaksa. In such circumstances, the PSC was neither 'impartial' nor 'independent' within the meaning of Article 14 of the ICCPR. The tribunal wholly failed to avoid the appearance of bias and circumstances suggest strongly that the entire impeachment process was biased in fact.

- These flaws combined to produce a hearing that was thoroughly unjust. Openly disavowing 'set standards' for 'the standard of proof and all that', members of the PSC majority repeatedly denied the Chief Justice's requests for particulars of evidence and additional time. Her lawyers were then given a 989-page bundle of previously unseen documents, their legal submissions about bias were met with abuse and they were given less than 24 hours to rebut an inadequately specified case. No indication at all was given as to which live witnesses, if any, might testify. Following a decision to walk out by the Chief Justice and opposition members, the majority then heard testimony from 16 people in secret. Less than 12 hours after that, the PSC had already drafted a 35-page report that set out its conclusions about her guilt.

The IBAHRI has no doubt that the removal of Chief Justice Bandaranayake in these circumstances was a clear violation of standards acknowledged by the Sri Lankan Constitution, the common law, and international instruments such as the ICCPR, the UN Basic Principles on the Independence of the Judiciary, the Beijing Principles on the Independence of the Judiciary, the International Bar Association's

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[15] 'Govt. Members of PSC Convict CJ after Controversial Probe', *Sunday Times*, 9 December 2012, online at: www.sundaytimes.lk/121209/news/ govt- members-of-psc-convict-cj-after-controversial-probe-24166.html.

Minimum Standards of Judicial Independence, the Bangalore Principles of Judicial Conduct and the Commonwealth (Latimer House) Principles on the Three Branches of Government.

**The challenge before the Court of the Appeal**

The Chief Justice's legal challenge to the fairness of the Parliamentary Select Committee's procedures took the form of an application for a writ that would prevent the PSC from determining the charges set out in Parliament's impeachment motion. Although such an application requires careful consideration, because courts must always defer to prerogatives that are proper to a legislature, Sri Lanka's Court of Appeal acted properly by agreeing to hear the case. It is entitled to grant prerogative writs whenever a citizen's rights are threatened, as a consequence both of its inherent functions as a superior court and a constitutional provision that authorises it to correct 'all errors in fact or in law... which shall be committed by any tribunal or other institution'.[16] Should there be any doubt about its jurisdiction, it is clarified by a statement made by the Sri Lankan government to the UN Human Rights Committee a decade ago. It said then, in the specific context of Standing Order 78A, that 'if the inquiring committee were to misdirect itself in law or breaches the rules of natural justice its decisions could be subject to judicial review.'[17]

The Court of Appeal's request to the Supreme Court for a preliminary opinion was also correctly made, because the Constitution grants the higher tribunal 'sole and exclusive jurisdiction to hear and determine any question relating to the interpretation of the Constitution' (Art 125(1)). The Court of Appeal's question took the following form:

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

The Supreme Court's 27-page opinion of 1 January 2013 was reasoned and well-argued.[18] It observed that the PSC's findings were determinative of a judge's status, in that a finding of misconduct rendered it 'inevitable' that parliament would make an address to the president for that judge's removal. A determination of this nature had to be founded on law and 'law' was defined by Article 170 of the Constitution to mean an Act of Parliament. Since Standing Order 78A was therefore not a law, it could not provide a basis for removing a judge, because:

> 'In a State ruled by a Constitution based on the rule of Law, no court, tribunal or other body (by whatever name it is called) has authority to make a finding or a decision affecting the rights of a

[16] Constitution of Sri Lanka, Art 138(1).
[17] See Sri Lanka's Fourth Periodic Report to the UN Human Rights Committee (18 September 2002), para 302, available online via: http://tb.ohchr.org/default.aspx?Symbol=CCPR/C/LKA/2002/4.
[18] SC Reference No 3/2012; CA (Writ) Application No 358/2012, online at: www.internationallawbureau.com/wp-content/uploads/2013/01/ supreme-court-order_2IN11.pdf.

person unless such court, tribunal or body has the power conferred on it by law... Such legal power can be conferred... by an Act of Parliament which is "law" and not by Standing Orders which are not law but are rules made for the regulation of the orderly conduct and the affairs of the Parliament. The Standing Orders are not law within the meaning of Article 170 of the Constitution which defines what is meant by "law".'[19]

The Court ruled in addition that:

'The matters relating to proof being matters of law, also will have to be provided by law and the burden of proof, the mode of proof and the degree of proof also will have to be specified by law to avoid any uncertainty as to the proof of the alleged misbehavior or incapacity without leaving room for the body conducting the investigation to decide the questions relating to proof according to its subjective perception. The right of the Judge under investigation to appear at the investigation and be heard being a fundamental principle of natural justice should also be provided by law with a clear indication of the scope of "the right to be heard" such as the right to cross examine witnesses, to call witness and adduce evidence, both oral and documentary.'[20]

In the light of this clear opinion of the Supreme Court, the Court of Appeal went on unequivocally to rule on 7 January 2013 that 'the finding and/or the decision or the report of [the Parliamentary Select Committee]... has no legal validity and as such this court has no alternative but to issue a writ of *certiorari*.'[21]

**Sri Lankan Perspectives**

The removal of Chief Justice Bandaranayake has been criticised by every independent judges' organisation in Sri Lanka, including the Judicial Services Association, the High Court Judges Association, the District Court Judges Association, the Association of Magistrates and the Association of Labour Tribunals.[22] Concern has been expressed by Justice CG Weeramantry, the country's most senior retired judge and a former vice-president of the International Court of Justice.[23] The country's independent counsel also made their collective view clear on 20 February 2013, when Upul Jayasuriya won the presidency of the Bar Association of Sri Lanka by a landslide, after campaigning on an explicitly anti-impeachment ticket. Although his opponent was openly favoured by the government, which organised dinners and facilitated media coverage on his behalf, Mr Jayasuriya took 1,471 votes against

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[19] *Ibid*, pp. 23–24.
[20] *Ibid*, pp. 24–25.
[21] CA (Writ) Application. No 411/2012, p. 10, available online via: www.colombotelegraph.com/wp-content/uploads/2013/01/CAwrit-411-2012.pdf.
[22] The last four associations named jointly signed a letter of complaint on 3 December 2012: see AHRC, 'Impeachment Motion', p. 49.
[23] 'Senior Most Judge Seeks Fair Trial for CJ', *Sunday Times*, 11 December 2011, republished online at: www.colombotelegraph.com/index.php/ senior-most-judge-seeks-fair-trial-for-cj.

the 330 cast for his rival.[24]

Opposition to the impeachment is not limited to lawyers. Shortly before Sri Lanka's Parliament chose to remove the Chief Justice without regard to rulings by the country's courts, leaders of three opposition parties (the UNP, TNA and JVP) wrote in protest to parliamentary Speaker Chamal Rajapaksa. They recalled that he himself had said just two months earlier that: 'The right to interpret the Constitution is the province solely of the Supreme Court that must not be disturbed... [Its interpretation] must stand.'[25] Many media commentators and human rights workers have been equally concerned and religious leaders have also voiced fears about what the impeachment might portend. Prior to the Select Committee hearings, worries were expressed on behalf of Sri Lanka's three main Buddhist monastic orders and the Archdiocese of Colombo.[26] The Anglican Bishop of Colombo then circulated a pastoral letter in January 2013 lamenting that:

> 'We have seen the complete collapse of the rule of law in our nation. We no longer appear to be a constitutional democracy... [Sri Lanka gives] the appearance of a country ruled on the principle that "Might is Right".'[27]

**International perspectives**

Sri Lanka's procedures for the removal of judges have caused widespread international concern. The UN Human Rights Committee expressed its belief as long ago as 2003 that they were not compatible with Article 14 of the ICCPR[28] and the particular steps taken against Chief Justice Bandaranayake have been condemned by lawyers and legal organisations across the world. Critics include the UN Special Rapporteur on the Independence of Judges and Lawyers,[29] the Asian Human Rights Commission,[30] the Malaysian Bar Council,[31] the Law Council of Australia,[32] the Human Rights Committee of the Bar of

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[24] 'Upul Jayasuriya in Landslide Win for Independent Judiciary. Rule of Law', *Sunday Times*, 24 February 2013, online at: www.sundaytimes. lk/130224/news/upul-jayasuriya-in-landslide-win-for-independent-judiciary-rule-of-law-34330.html.

[25] 'CJ Issue: Opp. Demands Urgent Party Leaders' Meeting', *The Island*, 8 January 2013, online at: www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=69976.

[26] See 'Towards Constitutional Deadlock', *Daily FT*, 29 November 2012, online at: www.ft.lk/2012/11/29/towards-constitutional-deadlock; www. archdioceseofcolombo.com/inner.php?news_id=139.

[27] See 'Repent, Fast, Lament for Your Nation – Sri Lanka Bishop', online at: www.anglicancommunion.org/acns/news.cfm/2013/1/28/ ACNS5296.

[28] See the Concluding Observations of the UN Human Rights Committee's 79th Session, 1 December 2003, para 16, available online via: www. unhchr.ch/tbs/doc.nsf ('The Committee expresses concern that the procedure for the removal of judges of the Supreme Court and the Courts of Appeal set out in article 107 of the Constitution, read together with Standing Orders of Parliament, is incompatible with article 14 of the Covenant, in that it allows Parliament to exercise considerable control over the procedure for removal of judges.')

[29] www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12909&LangID=E.

[30] www.humanrights.asia/news/ahrc-news/AHRC-STM-014-2013.

[31] See the Malaysian Bar Council's letter of support of 6 March 2013 to the Bar Association of Sri Lanka, online at: www.malaysianbar.org.my/bar_news/berita_badan_peguam/letter_of_support_to_bar_association_of_sri_lanka_regarding_impeachment_proceedings_and_dismissal_of_ the_chief_justice_of_sri_lanka.html.

England and Wales,[33] the Canadian Bar Association,[34] the American Bar Association[35] and the International Crisis Group.[36]

A particularly forthright warning came from the International Commission of Jurists (ICJ), in a letter to President Rajapaksa that was co-signed by the Commonwealth Magistrates and Judges Association and 44 senior international jurists. It urged the President 'to act immediately to restore the independence of the judiciary by reinstating the legal Chief Justice, Dr Shirani Bandaranayake', expressing a concern:

> '... 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.'[37]

On 12 February 2013, the ICJ reiterated these views and called on the Commonwealth to relocate the next CHOGM, currently scheduled to be held in Colombo, Sri Lanka, in November 2013.[38] The Commonwealth Lawyers Association, the Commonwealth Legal Education Association and the Commonwealth Magistrates and Judges Association co-authored a letter of their own. It adopted a statement by the president of the last-named body that:

> 'By its arbitrary actions, and its failure to follow even its own constitutional safeguards for the removal of judges, the Sri Lankan Parliament has seriously undermined that principle and called into question its adherence to the shared values of the Commonwealth.'[39]

Having regard to the overwhelming view of international lawyers and legal organisations that the removal

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[32] The text of the Law Council of Australia's 16 January 2013 letter is reprinted online at: www.humanrights.asia/news/forwarded-news/AHRC-FOL-002-2013.

[33] Robertson, 'Report on the Impeachment', online at: www.barhumanrights.org.uk/sites/default/files/documents/news/legal_opinion.pdf.

[34] See the Canadian Bar Association's letter of 21 December 2012, online at: www.cba.org/cba/submissions/pdf/12-70-eng.pdf.

[35] See the American Bar Association's letter to President Rajapaksa of 25 January 2013, online at: www.abanow.org/wordpress/wp-content/files_flutter/1359146451ROL_Letter_re-Sri_Lanka_012313B.pdf.

[36] International Crisis Group, 'Sri Lanka's Authoritarian Turn: The Need for International Action' (February, 2013), online at: www.crisisgroup.org/~/media/Files/asia/south-asia/sri-lanka/243-sri-lankas-authoritarian-turn-the-need-for-international-action.pdf.

[37] http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/02/ICJ-Open-letter-on-the-impeachment-Dr-Bandaranayake.pdf. The prestigious International Commission of Jurists should be differentiated from a Delhi-based organisation that calls itself the International Council of Jurists. The smaller body's chairman expressed support for the impeachment on 1 February 2013, in a letter that was given wide coverage by state-owned media in Sri Lanka. Two senior jurists who were supposedly associated with the 'Council', Chief Justice Iftikhar Chaudhry of Pakistan and retired English High Court judge Sir Gavin Lightman, thereupon disassociated themselves from the group. See 'CJP Disowns Letter Over Lankan CJ's Removal', *The Nation* (Pakistan), 16 February 2013, online at: www.nation.com.pk/pakistan-news-newspaper-daily-english-online/national/16-Feb-2013/cjp-disowns-letter-over-lankan-cj-s-removal.

[38] See www.icj.org/open-letter-sri-lanka-should-not-host-the-2013-commonwealth-heads-of-government-meeting.

[39] 'Commonwealth Judges Renew Concern', *Daily FT*, 15 December 2012, online at: www.ft.lk/2012/12/15/commonwealth-judges-renew-concern.

of Chief Justice Bandaranayake was improper, the IBAHRI delegates have noted with interest that Sri Lanka's Minister of External Affairs, Professor GL Peiris, has sought to argue that foreign legal practice justifies the actions of his government. At a briefing of the diplomatic corps on 16 January 2013, he referred to a number of overseas cases in order to argue that the Court of Appeal had been wrong to pronounce on the Parliamentary Select Committee's investigation of Chief Justice Bandaranayake.[40] The IBAHRI delegates reiterate in this regard that the current state of Sri Lankan jurisprudence is clear and that foreign court decisions offer no good reason to disobey Sri Lanka's own Court of Appeal. They have also examined two specific impeachments that Professor Peiris cited, one in the Philippines and the other in the United States, and respectfully contend that he has ignored the most important aspects of both cases.

Speaking about Chief Justice Renato Corona, who was impeached in Manila in May 2012, Professor Peiris observed that the Philippine judge 'did exactly what [Chief Justice Bandaranayake] did'. However, although the charges against the two jurists had certain features in common (both were accused of not disclosing assets), the inquiry procedures could hardly have been more different. Allegations made by the House of Representatives in the Philippines were tried by a different body (the Senate), and although the Senate President observed that the proceedings were only 'akin' to a criminal trial, the inquiry he conducted was neither ad hoc, clandestine, nor managed by government ministers. Charges were formally prosecuted before all the senators, there were contested applications to subpoena and exclude evidence, 43 days of testimony were heard over a five-month period and the arguments made by each side were televised throughout the country.[41]

The second precedent on which Professor Peiris relied, a 1993 case involving a Mississippi District Court judge called Walter Nixon, offers just as little support to the Government's position. *Nixon* v *United States*[42] is a technical decision about the division of powers under the US Constitution, and stands simply for the proposition that impeachment procedures are not ordinarily amenable to correction by federal courts. The decision does not specify what a fair impeachment procedure might involve and the IBAHRI notes that Nixon was in fact removed only after he had been convicted by a jury at an ordinary criminal trial. The opportunities for a defence afforded him at his impeachment hearings were also far greater than those given Chief Justice Bandaranayake: for example, the Mississippi judge was given the right to challenge witnesses and to make written and oral submissions to the full Senate.[43] When it comes to more senior US judges, meanwhile, impeachments are almost unheard of. There has been just one attempt to impeach a member of the Supreme Court, which took place more than two centuries ago, and Justice Samuel Chase's trial in 1805 ended with an acquittal.

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[40] See: www.scribd.com/doc/121029569/Notes-on-the-Diplomatic-Briefing-held-at-the-Ministry-of-External-Affairs-of-Sri-Lanka-on-16th-January-2013.

[41] Edsel Tupaz, 'Extraordinary Constitutional Interpretation in Corona's Impeachment, *Jurist*, 25 February 2012, online at: http://jurist.org/ sidebar/2012/02/edsel-tupaz-impeachment-v.php; 'Historic Impeachment Trial Ends Gov't Career of Renato Corona', *Inquirer News*, 30 May 2012, online at: http://newsinfo.inquirer.net/203451/historic-impeachment-trial-ends-gov%E2%80%99t-career-of-renato-corona. See also Robertson, 'Report on the Impeachment', para 92.

[42] *Nixon v United States*, 506 US 224 (1993), available online at: http://supreme.justia.com/cases/federal/us/506/224/case.html.

[43] *Nixon v United States*, *ibid*, 226–28. See also Robertson, 'Report on the Impeachment', para 93.

In any event, the IBAHRI takes the view that the most useful international comparisons are with other Commonwealth nations and these show Sri Lanka to be out of step with both the common law and evolving standards of good governance. States claiming a direct lineage from the Westminster constitutional model invariably institutionalise ways of protecting judicial officials from over-assertive executive and legislative branches.

**Australia** allows for impeachment on an address from both Houses of Parliament, for example, but the procedure has only ever resulted in the removal of one judge – a justice of the Queensland Supreme Court – and two senior academics at the University of Melbourne have more recently noted that:

> 'successful and lasting constitutional democracies [require] entrenched safeguards to ensure judicial independence, chief among which is proper standards preventing the arbitrary or baseless removal of judicial officers.'[44]

**Bangladesh** provides that hearings to remove judges should be conducted by a Supreme Judicial Council made up of the country's Chief Justice and its two next most senior judges.[45] In **Canada**, the Canadian Judicial Council, comprised of the Chief Justice and other senior judges, investigates allegations and operates according to the rules of a superior court.[46] **Kenya** requires an initial investigation by an independent and diversely constituted ten-person Judicial Services Commission, and then a second inquiry by a separate seven-person tribunal comprising judges, a senior advocate and two persons with experience in public affairs.[47] Judges in **Singapore** may be removed only on the recommendation of a tribunal comprising:

> 'not less than 5 persons who hold or have held office as a Judge of the Supreme Court, or, if it appears to the President expedient to make such an appointment, persons who hold or have held equivalent office in any part of the Commonwealth.'[48]

The judges of **South Africa** are removable only after misbehaviour has been established by the Judicial Service Commission, which is made up of either 23 or 24 officials, including senior judges, lawyers, legislators and the Minister of Justice. No one has ever been removed under the provision; indeed, there was not a single judge dismissed in South Africa throughout the 20th century.[49]

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[44] See Commonwealth Constitution of Australia, Art 72(ii), and the discussions at p 116–34 of HP Lee and Enid Campbell, *The Australian Judiciary*, 2nd ed (Cambridge University Press, 2013); 17 December 2012 letter of University of Melbourne Professors Cheryl Saunders and Adrienne Stone to the Asian Human Rights Commission, available online via: www.humanrights.asia/resources/pdf/removal-of-judges/view.

[45] Constitution of Bangladesh, Art 96(2)–(7).

[46] Judges Act, ss 59, 63–5, online at: http://laws-lois.justice.gc.ca/eng/acts/J-1/page-31.html#docCont.

[47] Constitution of Kenya, Arts 168, p. 171.

[48] Constitution of Singapore, Art 98(3)–(4).

[49] Constitution of South Africa, Arts 177–78; Adolph Landman, 'Impeaching the Judges: South Africa's Copybook', *Advocate* (First Term, 2000), p. 44, online at: www.sabar.co.za/law-journals/2000/firstterm/2000-firstterm-vol013-no1- pp. 43-44.pdf.

Even in the **United Kingdom**, where parliamentary sovereignty is not subject to a written constitution, impeachment has only ever been effected once – in 1830, when Sir Jonah Barrington was removed for embezzlement of monies paid into his court. As has already been noted, it was already established by that date that an impugned judge was entitled to due process of law,[50] and it would nowadays be unthinkable in the United Kingdom to conduct an impeachment by way of parliamentary address without first according the judge concerned full natural justice.

The IBAHRI delegates' examination of those rare cases of impeachment that have taken place over the last quarter century lends additional support to their views about the unlawful treatment of Chief Justice Bandaranayake. Her removal is not unprecedented, in that it could be compared to improper presidential dismissals in countries such as Belarus and the Democratic Republic of Congo, as discussed below. Its haste, secrecy and unfairness renders it inconsistent with modern democratic norms, however – including the 'good governance based on the highest standards of honesty, probity and accountability' mandated by the Commonwealth (Latimer House) Principles on the Three Branches of Government.

*Belarus*

A presidential decree that purported summarily to remove a judge of the Constitutional Court on 24 January 1997 was found by the UN Human Rights Committee to violate the ICCPR because it constituted an attack on the independence of the judiciary and a failure to respect the judge's right of public service to his country.[51]

*Democratic Republic of Congo (DRC)*

A purported dismissal by the President of 315 judges on 26 November 1998 violated the procedural safeguards of DRC law, as its own government later accepted, and the UN Human Rights Committee found that it was also a clear violation of Article 14 of the ICCPR.[52]

*India*

A 1968 statute regulates the investigation and proof of allegations against all federal Supreme Court justices, requiring that they first be investigated by a committee that consists of a member of the Supreme Court, a High Court Chief Justice and a distinguished jurist and that they then be considered by both Houses of Parliament.[53] Only one case has progressed to the second stage – involving Justice V Ramaswami in May 1993 – and it ended in acquittal after a formal trial by the Lok Sabha (Lower

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[50] See section 2.5 above.

[51] *Pastukhov v Belarus*, Communication No 814/1998, online at: www1.umn.edu/humanrts/undocs/814-1998.html.

[52] *Adrien Mundyo Busyo et al v Democratic Republic of the Congo*, Communication No 933/2000 (2003), para 5.2, online at: www1.umn.edu/humanrts/ undocs/933-2000.html.

[53] Judges (Inquiry) Act 1968, online at: http://indiankanoon.org/doc/1719017. See also Constitution of India, Art 124(4)–(5).

House).[54]

*Malaysia*

Supreme Court justices may be removed only following an inquiry by a tribunal consisting of:

> 'not less than five persons who hold or have held office as judge of the Supreme Court or a High Court or, if it appears to the [head of state] expedient to make such appointment, persons who hold or have held equivalent office in any other part of the Commonwealth'.[55]

Even when President Mahathir Muhammad made drastic moves to curtail the powers of his country's Supreme Court in 1988, precipitating a protracted constitutional crisis, this provision was observed and the trials were conducted by a six-member tribunal that included two foreign jurists (one of whom was the Chief Justice of Sri Lanka).[56]

*Pakistan*

Allegations against judges must be investigated by a Supreme Judicial Council (SJC) comprising 'the Chief Justice of Pakistan, the two next most senior Judges of the Supreme Court; and the two most senior Chief Justices of High Courts'.[57] On 9 March 2007, President Pervez Musharraf arbitrarily referred allegations of abuse of office against Chief Justice Iftikhar Muhammad Chaudhry to the SJC and purported to replace him, but this attempt to intimidate the judiciary was met by a Supreme Court ruling on 20 July 2007 that the President had acted unlawfully. Musharraf accepted the ruling, and the Chief Justice was formally reinstated.[58]

*Trinidad and Tobago*

Trinidad and Tobago hedges the removal of judges with a several safeguards and a Chief Justice may be

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[54] There have been only two other efforts to remove senior judges, both involving High Court justices who resigned rather than mount a defence: see 'Justice Dinakaran Faced Serious Charges', *The Hindu*, 29 July 2011, online at: www.thehindu.com/news/justice-dinakaran-faced-serious-charges/article2306214.ece; 'Justice Sen Resigns Ahead of Monday's Impeachment Motion', *The Hindu*, 1 September 2011, online at: www.thehindu.com/news/national/other-states/justice-sen-resigns-ahead-of-mondays-impeachment-motion/article2417401.ece

[55] Constitution of Malaysia, Art 125(4).

[56] See Justice (ret'd) JS Verma et al, *Report of the Panel of Eminent Persons to Review the 1988 Judicial Crisis in Malaysia* (Kuala Lumpur, 2008), para 2.46, available online via: www.malaysianbar.org.my/index.php?option=com_docman&task=doc_details&gid=1715&Itemid=332. Relative diversity does not in itself guarantee fairness, of course, and IBAHRI notes the authors' finding that 'the composition of the Tribunals, the process adopted by them, and the findings and conclusions arrived at against [the three judges who were convicted]... were not justified or otherwise appropriate': para 23.1.

[57] Constitution of Pakistan, Art 209.

[58] For a description of the crisis, see the note by Kersi Schroff and Krishan S Nehra on the Law Library of Congress website at: www.loc.gov/law/ help/pakistan-justice.php.

removed only after allegations have been investigated by a tribunal comprising three Commonwealth judges.[59] When Chief Justice Satnarine Sharma was tried in 2007 on allegations of attempting to pervert the course of justice, his case was heard by Lord Mustill of the British House of Lords and senior jurists from Jamaica and St Vincent. All the usual procedures that apply in a criminal trial were applied, and Lord Mustill observed that:

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

Following fair consideration of the evidence, Sharma was acquitted.[60]

**Concluding observations**

In the light of all the evidence and consideration of relevant domestic and international law and practice, the IBAHRI concludes that the removal of Chief Justice Bandaranayake should be reversed, by way of immediate steps that are consistent with the Sri Lankan Constitution and extant rulings of the Court of Appeal and Supreme Court. Standing Order 78A should also be repealed (insofar as it is not already rendered void by these rulings), and consideration should be given to the creation of a disciplinary procedure for judges that is fully consistent with the Sri Lankan constitution, common law principles and international human rights law.

There is no absolutely fixed model that such a procedure must emulate. It might or might not be appropriate, for example, to make provisions similar to those that were suggested during debates in Sri Lanka in 2000 about a proposed new constitution; they envisioned 'a committee consisting of three persons each of whom hold, or have held, office as a judge in the highest court of any Commonwealth country'.[61] Whatever form the disciplinary hearing takes, however, it must ensure that the case against a judge is considered by a diverse body that is independent of the people who made the initial complaint and its procedures should include a guarantee of the presumption of innocence, rules of evidence and provisions as to standard of proof, guarantees that an impugned judge will have timely notice of particularised charges, full disclosure of adverse evidence and the right to confront and call witnesses, either in person or through freely chosen legal representatives, provision for open and reportable hearings, should a judge choose to waive his or her right to confidentiality; and explicit acknowledgment that all disciplinary hearings against judges are subject to ordinary judicial review in the Court of Appeal and fundamental rights applications in the Supreme Court.

In addition, the IBAHRI urges the Sri Lankan judiciary to draw up a Code of Conduct that takes full account of relevant international statements, including the Bangalore Principles of Judicial Conduct and

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[59] Constitution of Trinidad and Tobago, Art 137(3).
[60] Robertson, 'Report on the Impeachment', paras 15–17, 56.
[61] See Art 151(4)(b)(i) of the draft proposals, online at: http://confinder.richmond.edu/admin/docs/srilanka_constitution.pdf.

the Latimer House Guidelines.

The 18th Amendment to the Constitution should also be repealed and steps should be taken to create a body (which may or may not be called a Constitutional Council) that is independent of the president and responsible for the appointment of all senior officials and judges in Sri Lanka. Its remit should cover at least those office holders. institutions and judges specified in Schedules 1 and 2 of Article 41A of the Constitution, namely: the Election Commission, the Public Service Commission, the National Police Commission, the Human Rights Commission, the Bribery Commission, the Finance Commission and the Delimitation Commission; the Chief Justice and judges of the Supreme Court; the President and judges of the Court of Appeal; members of the Judicial Service Commission; the Attorney-General; the Auditor-General; the Parliamentary Commissioner for Administration (Ombudsman); and the Secretary-General of Parliament. In respect of judicial appointments, the IBAHRI urges the Sri Lanka government also to reform the Judicial Service Commission, paying specific heed to the relevant section of the Latimer House Guidelines (which is currently being ignored in Sri Lanka). This section provides that:

> 'Jurisdictions should have an appropriate independent process in place for judicial appointments. Where no independent system already exists, appointments should be made by a judicial services commission (established by the Constitution or by statute) or by an appropriate officer of state acting on the recommendation of such a commission. The appointment process, whether or not involving an appropriately constituted and representative judicial services commission, should be designed to guarantee the quality and independence of mind of those selected for appointment at all levels of the judiciary. Judicial appointments to all levels of the judiciary should be made on merit with appropriate provision for the progressive removal of gender imbalance and of other historic factors of discrimination. Judicial appointments should normally be permanent; whilst in some jurisdictions, contract appointments may be inevitable, such appointments should be subject to appropriate security of tenure. Judicial vacancies should be advertised.'

The IBAHRI considers that a delay or failure in taking swift remedial measures along these lines could inflict permanent damage to the rule of law and the protection of fundamental rights in Sri Lanka. In this regard, it recalls the words of Justice Sharvananda in the 1983 Supreme Court case of *Visuvalingham v Liyanage* :

> 'It is a lesson of history that the most valued constitutional rights pre-suppose an independent judiciary through which alone they can be vindicated. There can be no free society without law, administered through an independent judiciary. It is and should be the pride of a democratic government that it maintains and upholds independent courts of justice where even its own acts can be tested... The framers of the Constitution had considered it to be in the interest of the public and not merely of the individual Judges that their security of tenure should be sacrosanct and sanctioned by the Constitution.'[62]

[62] *Visuvalingham v Liyanage* [1983] 1 Sri LR 203, 236–8, cited in SC Reference No 3/2012, pp. 15–16.

# Extracts from the Report on the Impeachment of Sri Lanka's Chief Justice

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

*Geoffrey Robertson QC*[*]

### Introduction

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

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

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

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

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

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 Parliament prejudiced or placed under pressure e.g. by demonstrations against the judge orchestrated by the government.

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

Peiris must come from the fact – if it is a fact – that he accepted the office in the knowledge that his predecessor had been unlawfully or improperly removed.

**Judicial Independence**

6. Every international human rights treaty, and every constitutional Bill of rights, requires judges to possess "independence and impartiality". These are disparate concepts: the latter is well-defined and the tests for real or apparent judicial bias are well established. "Independence" however, has not been much litigated: I would define it as **a duty on the state to put judges in a position to act according to their conscience and the justice of the case, free from pressures from governments, funding bodies, the military or any other source of influence that may possibly bear upon them.** Security of tenure is fundamental to independence, and subject to a mandatory retirement age it can only be lost by proven mental incapacity or else by serious misconduct, proved beyond reasonable doubt, preferably by a criminal conviction or at least by a trial proceeding that is fair.

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

8. Although this is the case with the UN's own justice system[3] and in many countries with Westminster-style constitutions, others such as Sri Lanka – and the UK itself – still rely on an archaic system of an "address" in Parliament to remove a senior judge, the last step in a process known as "impeachment". Although in some respects unsatisfactory, it does at least ensure judicial accountability to an outside body – the democratically elected legislature – and this provides an ultimate safeguard against judicial guardians becoming too incestuous or perceived as too self-interested to guard themselves. The

[2] Resolution 40/146, December 1985.

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

impeachment process *per se* is therefore unobjectionable – so long as it is conducted fairly, in a way that fully protects the judge's rights and in circumstances where it cannot be credibly suggested that it has been instituted or carried on as a reprisal – because, for example, the government does not like the judge's decision in a particular case. Almost all cases of serious misbehavior will involve allegations of crime: the judge should be normally tried in court fairly, and only impeached if convicted.

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

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

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

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

This requires clear proof of misconduct that renders them unfit, at least in the eyes of reasonable people, to occupy the justice seat. This finds an echo in the *Beijing Statement of Principles of the Independence*

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

*of the Judiciary in the ASEAN Region* which is subscribed to by thirty-two Chief Justices, including Mrs. Bandaranayke's predecessor. Article 22 provides,

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

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

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

It is essential that the misbehaviour or incapacity be *proved.* But how? By what procedures and according to what standards? Article107 is deficient in this respect – it requires at least a third of MPs to sign the motion for an address, but goes on: "the investigation and proof of the alleged misbehaviour or incapacity and the right of such judge to appear and be heard in person or by a representative" is left to Parliament to provide, "by law or by Standing Orders...".[5] The President's powers to appoint (Article 122) and dis-appoint (Article 107) judges were, of course, based on the Presidency as a ceremonial position under a Westminister 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 opportunity to refute the charges.[6] The Beijing Rules insist that "Removal by Parliamentary procedure... should be rarely, if ever, used" because "its use other than for the most serious reasons is apt to lead to

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[5] S107(3).
[6] *Evan Rees v Richard Alfred Crane* 1994 1 AC 173.

misuse"[7]. When it is used, "the judge who is sought to be removed must have the right to a fair hearing"[8]. The Latimer House principles are similarly emphatic: Principle VII lays down that "any disciplinary procedures should be fairly and objectively administered...with...appropriate safeguards to ensure fairness". The Latimer House Guidelines go further:

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

15. These principles must be stringently applied to any attempt to remove a Chief Justice, who is the representative of the judiciary as a whole and by virtue of the fact that he or she has achieved that exalted status, will normally have a high degree of peer approval and possess a recognised judicial distinction. Indeed many "Westminster model" constitutions give the Chief Justice, through chairmanship of a Legal Services Commission, a leading role in the disciplining and removal of other judges. This makes the removal of a Chief Justice particularly problematic. Some commonwealth countries provide in their constitution for a tribunal of overseas commonwealth judges to investigate misconduct charges against the Chief Justice, a recognition both of the momentous political character of such a move and the need to eliminate any suggestion of bias in the membership of the tribunal. The cases are, fortunately, very few, but the tribunal in Trinidad and Tobago called in 2006 to hear charges of misconduct against Chief Justice Sharma provides a procedural exemplar.

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

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

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[7] Rule 23.
[8] Rule 26.
[9] Guideline VI(1)(9).
[10] *In re a solicitor* (1993) QB 69.

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

1. *Where notice of a resolution for the presentation of an address to the President for the removal of a Judge from office is given to the Speaker in accordance with Article 107 of the Constitution, the Speaker shall entertain such resolution and place it on the Order Paper of Parliament but such resolution shall not be proceeded with until after the expiration of a period of one month from the date on which the Select Committee appointed under paragraph (2) of this Order has reported to Parliament.*

2. *Where a resolution referred to the paragraph (1) of this Order is placed on the Order Paper of Parliament, the Speaker shall appoint a Select Committee of Parliament consisting of not less than seven members to investigate and report to Parliament on the allegations of misbehavior or incapacity set out in such resolution.*

3. *A Select Committee appointed under paragraph (2) of this Order shall transmit to the Judge whose alleged misbehavior or incapacity is the subject of its investigation, a copy of the allegations of misbehavior or incapacity made against such Judge and said out in the resolution in pursuance of which such Select Committee was appointed, and shall require such Judge to make a written statement of defense within such period as maybe specified by it.*

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

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

6. *At the conclusion of the investigation made by it, a Select Committee appointed under paragraph (2) of this Order shall within one month from the commencement of the sittings of*

*such Select Committee, report its findings together with the minutes of evidence taken before it to Parliament and may make a special report of any matters which it may think fit to bring the notice of Parliament;*

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

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

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

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

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

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

**...The Impeachment Charges**

**a. The Three *Divineguma* Counts**

38. The evidence for this proposition is not only circumstantial – it came from the terms of the impeachment charges. There were fourteen of them, in not particularly coherent English, appended to the motion. Did any of them charge, as misbehaviour, conduct that on any reasonable view amounted to the exercise of a proper and conscientious professional judgement? That would be proof of a blatant assault

on judicial independence, the ousting by government of a judge who did her duty and arrived at a result the government did not like. The Rajapaske government did not like the first *Divineguma* decision, and it probably liked the second even less, because the impeachment resolution was tabled on the same day it was handed down. What those 117 MPs did, fatally to their case, was to accuse the Chief Justice of misbehaviour for rendering an utterly professional judgement – shared by her two colleagues – in *Divinegume No.1.*

39. Count 8 in the Bill of impeachment reads:

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

40. This was not an allegation of misbehaviour. It was an allegation that the Chief Justice should be sacked because she (and her two colleagues) had not accepted the Solicitor General's technical argument, based on the 1991 case. As I have explained, the judges distinguished the facts of the *Telecommunications Bill* case,, which did not therefore bind them, and reached their interpretation of the word 'deliver' by reference to the Oxford English Dictionary. They did what judges in all common law countries do, and reached a decision that many other judges would have reached. That did not, of course, matter – the important thing is that they reached it honestly and professionally. The only reason it could appear on an impeachment charge was that the government and the 117 MP's who had all taken to the government whip, disliked the consequences of the decision, and it is that motivation that strikes at the heart of judicial independence. No honest lawyer, with any respect for the principles of his or her profession, could support such an impeachment and those of the 117 who were lawyers deliberately made a false accusation of misconduct against a judge for doing her judicial duty. I can think of no behaviour more likely to bring the profession into disrepute, although in fact it brings these individual MPs into disrepute. As far as Sri Lanka's membership of the Commonwealth is concerned, there can hardly be a more blatant breach of the Latimer House principles.

41. The Count 8 accusation against a judge of misbehaviour for doing her duty did not stand alone. It was no accidental inclusion, overlooked by MPs when they signed up to the impeachment. There was another charge, related to the court's dismissal of the Solicitor General's unattractive technical argument for adopting a literal interpretation to dismiss one of the petitions,[11] which had been "delivered" on time, but addressed to the "Secretary General of Parliament" rather than to the "Speaker of Parliament". As the petitioner's counsel pointed out to the court, the Solicitor General's argument was tantamount to saying that a rule requiring delivery to the Chief Justice could not be satisfied by delivering it to the Registrar of his court. Moreover it would be hopelessly impractical, because the Speaker is a grand figure (especially grand when he is the elder brother of the President) and petitioners, process servers and lawyers cannot barge into Parliament or serve him personally in his limousine or when he is surrounded by security

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

guards. Citizens usually approach him through the Secretary General of the Parliament, who is, in effect, the Speaker's gatekeeper and Parliament's administrator. The Solicitor General's reliance on the literal rule of construction was absurd and impractical, which is one reason why, the literal rule has fallen out of fashion, as Lord Steyn has pointed out:

> *"The tyrant Temures promised the garrison of Lebastia that no blood would be shed if they surrendered to him. They surrendered. He shed no blood. He buried them all alive. This is literalism. If possible it should be avoided in the interpretative process"*[12]

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

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

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

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

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

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

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

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

44. The third impeachment charge related to the *Divineguma* Bill was risible. So furious were the 117 MPs about the Supreme Court's decision that in Count 10 they accused the Chief Justice of bias because one of the petitioners in the case (the Centre for Policy Alternatives) had, twenty years before, published an academic article she had written when she was a law lecturer at the University of Colombo. No rational person would consider this a ground for removal of a judge for misbehaviour, or indeed for any suggestion that she might be biased on an issue of statutory interpretation (from which she could obtain no possible benefit) because one of the petitioners happened to be a public interest NGO which had once published an article she had written. It was obviously not "serious misbehavior," or misbehaviour of any sort.

**b). The JSC Charges**

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

46. Counts 13 and 14 accuse the Chief Justice of misbehaviour because the JSC discouraged magistrates from going direct to police to seek protection, but directed them to route such requests through the Commission. This seems an eminently sensible policy, given that the JSC was in overall charge of maintaining security for judges. Several of the charges make accusations against the Secretary of the JSC, Manjula Thilakaratne, who had angered the government – and certainly the President – by his September

press releases. Count 6, for example, accused the Chief Justice (it did not mention her judicial colleagues) who had joined in the decision of appointing Thilakaratne "disregarding the seniority of judicial officers" – as if the JSC was somehow debarred from appointing on what it considered to be merit. (Article 111G of the Constitution simply says that the Secretary shall be selected "from among senior judicial officers" and Thilakaratne was one such. He was more senior, in fact, than some previous Secretaries to the Commission had been at the time of their appointment. In none of these cases could "serious misbehaviour" be a reasonable description of work undertaken by the Chief Justice, with the agreement of her other judicial colleagues, in administering the courts and the judges. They are all trivial and unparticularised, and accuse her of no criminal offence or of any behaviour that could be described as corrupt or of a kind that would make and reasonable person think her unfit to judge.

**Counts 9 & 11**

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

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

48. Count 9 alleges that "she acted in contradiction of the said ruling" and Count 11 alleges, on the say-so of a magistrate's brother, that she "harassed the said magistrate". Anyone reading the charge would think that the Supreme Court in 1992 had, on a challenge to her appointment, delivered a ruling on Mrs. Bandaranayke that constrained her in some way which she had ignored. The date of the cited case was odd (it was several years before her appointment) and I could not find it in the New Law Journal of Sri Lanka – I stopped looking when it was pointed out to me that these reports ceased to be published in the 1980's! I did find the case in the Sri Lankan Law Reports for 1996, and have carefully read the decision. It was not a ruling that in any way constrained or commented upon Mrs. Bandaranayke or her suitability as a Supreme Court judge. It was entirely concerned with the President's power of judicial appointment, and it challenged her appointment only on the ground that the President had not consulted the Chief Justice. The petitions were quickly dismissed, first because the President had sole discretion in exercising his power of appointment, and secondly because the petitioners had produced no evidence that he had not consulted the Chief Justice or sought the co-operation of the judiciary in her appointment. The petitioners, seemingly upset annoyed that she was a woman and one who held and had expressed opinions, objected that she had "views and conduct" about political issues, to which the court replied "Her views and conduct, even if they related to political views, were neither illegal nor improper". It was absurd to suggest that she had somehow disobeyed this "ruling" or disobeyed it in a way that justified her impeachment.

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

**Trial by Select Committee**

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

That means

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

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

**a) Public Hearing**

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

indicative of preconceived findings of guilt". Had the proceedings been open to the public, this kind of behaviour might not have occurred.

52. As I have pointed out above, (para 19), Standing Order 78A(8), which requires secrecy until a 'finding of guilt' is made, appears *ultra vires* Section 106 of the Constitution, which requires such committee proceedings to be open to the public. In any case, it is an order ostensibly made for the protection of the accused judge, and the Chief Justice's leading counsel explained to the Committee that she wished to waive that protection and have the trial in public, or at least to have international observers present. This was supported by opposition MPs, but the Chairman ruled that the Committee was bound by the Order. It could, of course, have asked the Speaker to amend or suspend it – the request was made on 4th December, before the 'trial' began on the 6th – but the government Ministers apparently had no wish to let the public observe their own behaviour, or that of their witnesses, and the request was refused,[13] on the basis that it was not possible. It was possible, of course, because the Speaker could immediately have called the Standing Orders Committee (which he chairs) to advise the House to amend or suspend 78A(8). It need hardly be said – Jeremy Bentham said it, and it still holds good – that "publicity is the very soul of justice. It keeps the judge, while trying, under trial". These proceedings, and particularly the evidence given on December 7th, would have come under public scrutiny and the prejudice of the Committee would have been palpable. It is essential, in cases of this kind, for the public to hear the witnesses, because if they tell lies others will come forward to confound them. The Chairman of the Committee, by refusing to suspend the Standing Order after its protection had been waived, ensured that justice was not seen to be done.

**b) A Tribunal that is:**

53. Independent

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

54. Impartial

Not only was the Select Committee majority made up of government Ministers, but two of them had recently suffered judgements against their personal interests by Supreme Court benches chaired by Mrs. Bandaranayke. On 23 November she appeared before the Committee and requested recusal in particular of Dr. Senaratne, whose wife's employment claim she had dismissed earlier in 2012 and whom she believed to harbour a grudge against her, and Mr. Weerawansa, whose appeal over a personal matter she had dismissed in 2010. The Ministers allegedly replied that the rule against bias did not apply to

[13] See record, Parliamentary Series No.187, p. 190.

members of Parliament -- an absurd proposition, although it accurately reflected the position taken by the Speaker in appointing them. The Chairman rejected the application.[14] He was a government minister, as were the other six, who had signed the impeachment charges and were now embarking on a quasi-judicial inquiry into the charges that they themselves had brought. The judges and magistrates of Sri Lanka (below Supreme Court rank) all issued a statement, pointing out that "in no country does the party that makes the charges themselves inquire into the same charges."[15].

55. Competent.

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

**c) Presumption of Innocence.**

This involves, at very least, the rule that a prosecution must prove guilt – in criminal charges, beyond any reasonable doubt. This "golden thread" that runs through the criminal law is not mentioned at all in 78A. The Committee was asked by the Chief Justice to adopt this criminal standard, and the four opposition members supported her request and wanted a *prima facie* case to be made in relation to each charge, but these requests were refused. The findings of guilt were made on some inarticulate standard – whether on a hunch or a presumption of guilt, or pure prejudice or on a balance of probabilities. This is to fly in the face of fairness – as the Privy Council said in 2008 in *Campbell v Hamlet*

> *"That the criminal standard of proof is the correct standard to be applied in all disciplinary proceedings concerning the legal profession their Lordships entertain no doubt"*[16]

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

> *"The allegations against the Chief Justice are so grave, and the effect of an adverse finding so destructive, that the requirement of proof must be at the extreme end of the scale".*[17]

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[14] *Ibid*, 191.
[15] *Ibid.*
[16] (2006) 66WLR 346, per Lord Brown of Eaton-Under-Heywood.

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

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

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

58. The entitlement to be given details of the charge and time to prepare and present a defence are fundamental to the fairness of any "trial" and are guaranteed by Article 14(3)(a) and (b) of the ICCPR, by the Latimer House Guidelines,[18] and the Beijing Principles which stress that the right to a fair hearing remains intact even when removal by parliamentary procedures is required.[19] But standing order 78A merely provides:

i. that a copy of "allegations of misbehaviour" should be transmitted to the judge but not any particulars of those allegations;[20]

ii. that the committee *shall* require such judge to make a written statement of defence;[21] within a period specified by the committee;[22]

iii. The judge shall have "a right to be heard ... and to adduce evidence".[23]

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[17] Report of Chief Justice Sharma Impeachment Tribunal; Lord Mustill, Sir Vincent Eloissac, Mr. Morrison QC, 14 Dec 2007, para [82].
[18] Guideline VI.1 para (a)(i).
[19] Beijing Principles, para 26.
[20] 78A(3).
[21] *Ibid.*
[22] *Ibid.*
[23] *Ibid.*

These provisions are woefully inadequate to protect the judge. There is no requirement that the allegations be particularised, and charge 1, for example, on which she was convicted, was vague to the point of incoherence. Sri Lankan criminal law stiputes that any criminal charge shall be fully particularlised (times, places, dates, persons, things, etc.) and not merely a vehicle for broad allegations.[24]

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

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

61. In my opinion, these facts demonstrate a clear breach of the fair trial rules relating to particularised charges and to adequate time to prepare defences. It is possible that the Chairman was misinforming the Chief Justice when he said that no witnesses would be called – it would be surprising if the committee simply decided overnight to summon 16 persons who were all available to testify the next day. Even if he believed on the 6th that there would be no live testimony, to deliver 1,000 pages of evidence to the

[24] Section 165(1) Code of Criminal Procedure Act No 15 of 1979.

defence at 4pm and tell them to be ready for trial in less than 24 hours is preposterously unfair. It demonstrates, indeed, the Committee's contempt for justice and its refusal to provide the Chief Justice with even a semblance of fairness. The four committee members from the opposition say they had not been consulted about the chairman's decisions, and they resigned on the afternoon of the 6th in a letter which protested about the lack of time given to the Chief Justice and her lawyers to study the evidence. I am forced to concluded that the Select Committee chair and his fellow ministers, all of whom took the government whip, were determined to convict the Chief Justice, come what may.

**Calling and Cross-Examining Witnesses**

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

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

64. It might – indeed, was – said that by withdrawing, the Chief Justice forfeited her right to confront her accusers or – more realistically in this case – to extract from them by cross-examination the information that would demonstrate her innocence. In my view, having been firmly told that no evidence would be allowed from either side, she had been led to withdraw under false pretences.[25] The Committee's conduct involved a breach of faith – it should at very least have told her lawyers, on the morning of the 7th, that it had changed its mind and was summoning witnesses. The Chief Justice should have been invited back to

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

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

65. The Select Committee, under the aegis of Speaker Rajapakse, blatantly denied due process and natural justice. These are fundamental for any procedure that leads to the removal of a judge. Not only are they required by the ICCPR, the Latimer House Guidelines and the Beijing Principles, but also by decisions of international courts and tribunals. The UN's Human Rights Committee had previously pointed out in relation to Sri Lanka that "the procedure for the removal of judges from the Supreme Court is incompatible with Article 14 of the ICCPR, in that it allows Parliament to exercise considerable control over the procedure" and it had recommended that the country strengthen the independence of the judiciary by providing for judicial, rather than parliamentary, supervision and discipline.[26] This was actually attempted by way of a constitutional amendment in 2000, which would have set up a Mustill-type tribunal of overseas judges. but the initiative lapsed. The Inter-American Court of Human Rights, like the European Court of Human Rights, has insisted that "the authority in charge of the impeachment procedure to remove a judge must behave impartially in the procedure established to this end and allow the latter to exercise the right of defence." That court decided that three judges must be re-instated, because their impeachment procedure "did not ensure their guarantees of due legal process." That was, most assuredly, the case with Dr Banadarenayake.

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

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

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.[27] On any view, this constitutes a shameful abuse of judicial independence. The President had power, of course, to stop it, but had fanned the flames and may have authorised the rejoicing when the impeachment motion was passed, at 7pm on Friday 10 January. Celebratory fireworks were set off outside parliament, without intervention from police or military, and according to the press reports four of the brothers Rajapaske – President, Speaker, Environment Minster Basil and Defence Secretary Gotabaya, along with other ministers, appeared on a balcony to watch a special fireworks display put on by the Sri Lankan navy.

For four hours a jubilant crowd surrounded the Chief Justice's home, in the knowledge that Mrs Bandaranayake and her family were inside. A "milk rice celebration" took place, a free meal was served and fireworks were lit (presumably at government expense) and later the mob (said by some reporters to be members of the civil defence force in plain clothes) was addressed by members of the Select Committee and told to urge Mrs Bandaranayake to resign. They did so – when not singing and dancing to loud music...

[27] 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.

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By Jayantha de Almeida Guneratne, Kishali Pinto-Jayawardena, Radika Gunaratne

This publication reflects a collaborative work product of the Civil & Political Rights Programme (CPR) of the Law & Society Trust on the protection of land rights in Sri Lanka. Constitutional provisions, legislative history as well as legislation such as the Land Acquisition Act and the Land Grants Act are analysed.

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