BAR HUMAN RIGHTS
COMMITTEE OF
ENGLAND AND WALES

REPORT ON THE IMPEACHMENT OF SRI LANKA'S CHIEF JUSTICE

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

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1. 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:

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

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

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

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

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

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

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

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

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

2. 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

[2] Resolution 40/146, December 1985.

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

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

[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.

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

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

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

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

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

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

It is essential that the misbehaviour or incapacity be *proved.* But how? By what procedures and according to what standards? Article107 is deficient in this respect – it requires at least a third of MPs to sign the motion for an 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 Westminster style constitution. Subsequently, the President became the political leader of the country, with executive power and majority support from his party in Parliament.

[5] S107(3).

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 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

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

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

[9] Guideline VI(1)(9).

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.

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, <u>Rules of Debate:</u>

> *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*

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

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.

3. BACKGROUND TO THE IMPEACHMENT

a. The Chief Justice

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

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

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

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

25. On becoming Chief Justice, Mrs. Bandaranayake, under Article III of the Constitution, automatically became chair of the Judicial Service Committee, comprising herself and two other Supreme Court Justices nominated by the President. The three were required to choose the Committee's secretary "from among senior judicial officers of the Courts of First Instance", and they chose a judge who was not the most senior of possible candidates but was "senior" nonetheless. The Commission is empowered to transfer, promote,

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

discipline and dismiss judicial officers and public servants working in the courts.

b. The Judicial Standards Council (JSC) under attack

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

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

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

27. On the 17th September, the *Divineguma Bill* decision was handed down, and it went against the Minister, Basil Rajapaske. A large crowd of governmental supporters suddenly materialized outside Parliament, shouting slogans against the Supreme Court and against the Chief Justice. Whether this demonstration was orchestrated by the government or not, it was clearly not

[13] Guideline I, point 5.

spontaneous (the judgement at this point had been delivered to the Speaker, the President's brother, who was reporting it to Parliament.)

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

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

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

c. The Devineguma bill

31. It is difficult for those who do not live in a Federal system to understand the political importance of the *Divineguma* bill, or the government's anxiety to have it declared constitutional. It was the brainchild of another brother of the President, Basil Rajapaksa, the Minister of Economic Development, who presented it to Parliament on 10 August 2012. Sri Lanka, unlike the UK, has a system of preventive overruling, which permits speedy constitutional challenge to government Bills as soon as they are placed on the order paper of Parliament, and there were a number of challenges to the *Divineguma* Bill. Because it did breach the constitution, which required the Minister to consult with all Sri Lanka's nine provincial Councils before it could be tabled. It was a

centralising Bill, bringing devolved power back to Colombo, in this case power that would henceforth be wielded by Basil Rajapaska, the President's brother. It also gave his departmental officials new powers to invade privacy and obtain information about citizens.

32. In deciding constitutional cases, judges must usually choose between arguments that are good and arguments that are better. The decision of the three Supreme Court judges, with the Chief Justice presiding, in the first *Divineguma* bill case clearly and logically applied the provision S.154 of the Constitution requiring such Bills to be submitted *"to every provincial council for the expression of its views thereon"* before being placed on the order paper. As the Bill had been placed on the order paper without any such consultation, it could go no further. It was a straightforward issue, and the decision was in my view an obviously correct application of Section 154.

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

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

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

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

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

36. The impeachment would soon come. The *Divineguma* decision against the government was handed down on 17 September, angering the government by invalidating legislation that was important to its agenda, followed by the protest of the JSC and the assault on its Secretary. The press on 26 September and again on 4 October reported that the President and a committee of Cabinet members were discussing "strong measures" against

the judiciary. It may be that at this point the drafting of impeachment charges began, although Basil Rajapaske was prepared to give the Supreme Court one last chance. On 10 October he tabled the Bill again, reporting that it had now been approved by eight out of nine elected Provincial Councils, and by the Governor who had been imposed on the largely Tamil and war-torn Northern Province. Challenges were made again, to the same Supreme Court bench, headed by the Chief Justice, this time on the grounds that the governor was not authorised to approve the Bill in the absence of an elected Council.

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

4. THE IMPEACHMENT CHARGES

a. The Three *Divineguma* Counts

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

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

39. Count 8 in the Bill of impeachment reads:

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

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

profession into disrepute, although in fact it brings these individual MPs into disrepute. As far as Sri Lanka's membership of the Commonwealth is concerned, there can hardly be a more blatant breach of the Latimer House principles.

41. The Count 8 accusation against a judge of misbehaviour for doing her duty did not stand alone. It was no accidental inclusion, overlooked by MPs when they signed up to the impeachment. There was another charge, related to the court's dismissal of the Solicitor General's unattractive technical argument for adopting a literal interpretation to dismiss one of the petitions,[14] which had been "delivered" on time, but addressed to the "Secretary General of Parliament" rather than to the "Speaker of Parliament". As the petitioner's counsel pointed out to the court, the Solicitor General's argument was tantamount to saying that a rule requiring delivery to the Chief Justice could not be satisfied by delivering it to the Registrar of his court. Moreover it would be hopelessly impractical, because the Speaker is a grand figure (especially grand when he is the elder brother of the President) and petitioners, process servers and lawyers cannot barge into Parliament or serve him personally in his limousine or when he is surrounded by security guards. Citizens usually approach him through the Secretary General of the Parliament, who is, in effect, the Speaker's gatekeeper and Parliament's administrator. The Solicitor General's reliance on the literal rule of construction was absurd and impractical, which is one reason why, the literal rule has fallen out of fashion, as Lord Steyn has pointed out:

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

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

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

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

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

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

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

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

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

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

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

obtain no possible benefit) because one of the petitioners happened to be a public interest NGO which had once published an article she had written. It was obviously not "serious misbehavior," or misbehaviour of any sort.

b. The JSC charges

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

46. Counts 13 and 14 accuse the Chief Justice of misbehaviour because the JSC discouraged magistrates from going direct to police to seek protection, but directed them to route such requests through the Commission. This seems an eminently sensible policy, given that the JSC was in overall charge of maintaining security for judges. Several of the charges make accusations against the Secretary of the JSC, Manjula Thilakaratne, who had angered the government – and certainly the President – by his September press releases. Count 6, for example, accused the Chief Justice (it did not mention her judicial colleagues) who had joined in the decision of appointing Thilakaratne "disregarding the seniority of judicial officers" – as if the JSC was somehow debarred from appointing on what it considered to be merit. (Article 111G of the Constitution simply says that the Secretary shall be selected "from among senior judicial officers" and Thilakaratne was one such. He was more senior, in fact, than some previous Secretaries to the Commission had been at the time of their appointment. In none of these cases could "serious

misbehaviour" be a reasonable description of work undertaken by the Chief Justice, with the agreement of her other judicial colleagues, in administering the courts and the judges. They are all trivial and unparticularised, and accuse her of no criminal offence or of any behaviour that could be described as corrupt or of a kind that would make and reasonable person think her unfit to judge.

c. 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.

5. TRIAL BY SELECT COMMITTEE

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

That means

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

Each one of these safeguards was blatantly ignored by the eleven person Select Committee (seven government Ministers, plus four opposition MPs who soon resigned) appointed by Speaker of the House Rajapaske on 14

November to investigate and report to Parliament. Just three weeks later, on 8 December, the seven government Ministers reported her guilty of three charges. The Select Committee's breach of fairness standards may be summarized as follows:

a. Public hearing

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

52. As I have pointed out above, (para 19), Standing Order 78A(8), which requires secrecy until a 'finding of guilt' is made, appears *ultra vires* Section 106 of the Constitution, which requires such committee proceedings to be open to the public. In any case, it is an order ostensibly made for the protection of the accused judge, and the Chief Justice's leading counsel explained to the Committee that she wished to waive that protection and have the trial in public, or at least to have international observers present. This was supported by opposition MPs, but the Chairman ruled that the Committee was bound by the Order. It could, of course, have asked the Speaker to amend or suspend it – the request was made on 4th December, before the 'trial' began on the 6th – but the government Ministers apparently had no wish to let the public observe their own behaviour, or that of their witnesses, and the request

was refused, [16] on the basis that it was not possible. It was possible, of course, because the Speaker could immediately have called the Standing Orders Committee (which he chairs) to advise the House to amend or suspend 78A(8). It need hardly be said – Jeremy Bentham said it, and it still holds good - that "publicity is the very soul of justice. It keeps the judge, while trying, under trial". These proceedings, and particularly the evidence given on December 7th, would have come under public scrutiny and the prejudice of the Committee would have been palpable. It is essential, in cases of this kind, for the public to hear the witnesses, because if they tell lies others will come forward to confound them. The Chairman of the Committee, by refusing to suspend the Standing Order after its protection had been waived, ensured that justice was not seen to be done.

b. Competent independent and impartial tribunal

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

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

appeared before the Committee and requested recusal in particular of Dr. Senaratne, whose wife's employment claim she had dismissed earlier in 2012 and whom she believed to harbour a grudge against her, and Mr. Weerawansa, whose appeal over a personal matter she had dismissed in 2010. The Ministers allegedly replied that the rule against bias did not apply to members of Parliament – an absurd proposition, although it accurately reflected the position taken by the Speaker in appointing them. The Chairman rejected the application.[17] He was a government minister, as were the other six, who had signed the impeachment charges and were now embarking on a quasi-judicial inquiry into the charges that they themselves had brought. The judges and magistrates of Sri Lanka (below Supreme Court rank) all issued a statement, pointing out that "in no country does the party that makes the charges themselves inquire into the same charges."[18]

55. Competent.

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

[17] Ibid, 191.
[18] Ibid.

c. The 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"*[19]

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

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

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

[19] (2006) 66WLR 346, per Lord Brown of Eaton-Under-Heywood.

[20] Report of Chief Justice Sharma Impeachment Tribunal; Lord Mustill, Sir Vincent Eloissac, Mr. Morrison QC, 14 Dec 2007, para [82].

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,[21] and the Beijing Principles which stress that the right to a fair hearing remains intact even when removal by parliamentary procedures is required.[22] But standing order 78A merely provides:

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

i. that a copy of "allegations of misbehaviour" should be transmitted to the judge but not any particulars of those allegations;[23]
ii. that the committee *shall* require such judge to make a written statement of defence;[24] within a period specified by the committee;[25]
iii. The judge shall have "a right to be heard ... and to adduce evidence".[26]

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

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

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

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

61. In my opinion, these facts demonstrate a clear breach of the fair trial rules relating to particularised charges and to adequate time to prepare defences. It is possible that the Chairman was misinforming the Chief Justice when he said that no witnesses would be called – it would be surprising if the committee simply decided overnight to summon 16 persons who were all available to testify the next day. Even if he believed on the 6th that there would be no live testimony, to deliver 1,000 pages of evidence to the defence at 4pm and tell them to be ready for trial in less than 24 hours is preposterously unfair. It demonstrates, indeed, the Committee's contempt for justice and its

refusal to provide the Chief Justice with even a semblance of fairness. The four committee members from the opposition say they had not been consulted about the chairman's decisions, and they resigned on the afternoon of the 6th in a letter which protested about the lack of time given to the Chief Justice and her lawyers to study the evidence. I am forced to concluded that the Select Committee chair and his fellow ministers, all of whom took the government whip, were determined to convict the Chief Justice, come what may.

e. Calling and cross-examining witnesses

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

63. The right to cross-examine accusers is fundamental to fairness. Article 14(3)(e) of the ICCPR guarantees, as a minimum, the right of an accused *"to examine, or have examined, the witnesses again him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."* The Chief Justice and her counsel withdrew on the afternoon of the 6th December, having been assured that the committee would allow no live witnesses to be called and would rely only on the documents, albeit documents that the Chief Justice and her team would not be given sufficient time to absorb and deal with. The four opposition MPs

withdrew shortly afterwards and the committee reconvened on 7th December without them. It was then, and in secret, that the 7 members summoned no less than 16 witnesses and heard their testimony! Just 24 hours later they issued a 15 page 'judgement', finding the Chief Justice guilty of charges 1, 4 and 5.

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

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

65. The Select Committee, under the aegis of Speaker Rajapakse, blatantly denied due process and natural justice. These are fundamental for any procedure that leads to the removal of a judge. Not only are they required by the ICCPR, the Latimer House Guidelines and the Beijing Principles, but also by decisions of international courts and tribunals. The UN's Human Rights Committee had previously pointed out in relation to Sri Lanka that "the procedure for the removal of judges from the Supreme Court is incompatible with Article 14 of the ICCPR, in that it allows Parliament to exercise considerable control over the procedure" and it had recommended that the country strengthen the independence of the judiciary by providing for judicial, rather than parliamentary, supervision and discipline.[29] This was actually attempted by way of a constitutional amendment in 2000, which would have set up a Mustill-type tribunal of overseas judges, but the initiative lapsed. The Inter-American Court of Human Rights, like the European Court of Human Rights, has insisted that "the authority in charge of the impeachment procedure to remove a judge must behave impartially in the procedure established to this end and allow the latter to exercise the right of defence." That court decided that three judges must be re-instated, because their impeachment procedure "did not ensure their guarantees of due legal process." That was, most assuredly, the case with Dr Banadarenyke.

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

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

"address" his brother the President and request the removal of the Chief Justice.

67. By this time, the independence of the Sri Lankan judiciary had ended, and the Beijing and Latimer House principles had been abandoned. The Chief Justice had been impeached by the government and its supporters, firstly by the charges brought in November which had accused her of misconduct for doing her conscientious duty in *Devinegama* and as Chief Justice at the JSC, and secondly by putting her through a grotesquely unfair secret trial at which she was abused and denied her rights, while outside parliament demonstrators brought on government buses bayed for her blood.[30] On any view, this constitutes a shameful abuse of judicial independence. The President had power, of course, to stop it, but had fanned the flames and may have authorised the rejoicing when the impeachment motion was passed, at 7pm on Friday 10 January. Celebratory fireworks were set off outside parliament, without intervention from police or military, and according to the press reports four of the brothers Rajapaske – President, Speaker, Environment Minster Basil and Defence Secretary Gotabaya, along with other ministers, appeared on a balcony to watch a special fireworks display put on by the Sri Lankan navy. For four hours a jubilant crowd surrounded the Chief Justice's home, in the knowledge that Mrs Bandaranayake and her family were inside. A "milk rice celebration" took place, a free meal was served and fireworks were lit (presumably at government expense) and later the mob (said by some reporters to be members of the civil defence force in plain clothes) was addressed by members of the Select Committee and told to urge Mrs Bandaranayake to resign. They did so – when not singing and dancing to loud music.

68. A nation whose leaders treat the head of the judiciary as if she was a public enemy, abusing the democratic process to put her through an unfair trial as punishment for doing her constitutional duty and then celebrating her unjust

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

impeachment with feasting and fireworks, deserves to have those leaders treated by the international community in ways I shall suggest at the end of this report.

6. THE CONVICTION CHARGES

a. Count 1

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

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

70. This first charge alleges – if any sense is to be made of its language – that the

Chief Justice somehow disguised a purchase of a property in the name of her sister and brother-in-law, and then presided over a case which related to its purchase. No doubt it was drafted in haste and on hunch, but it unravelled in the course of proceedings. It turned out – as the Chief Justice explained in her defence statement – that there was nothing secret or sinister about the transaction. Her sister and husband had lived for twenty years in Perth, they wanted to buy a home in Colombo, she held their power of attorney and had inspected the flat, been sent the money and paid it to the property company, Trillion, on their behalf. The documents evidencing this were all above board: the power of attorney had been specifically given for the purpose, and she had scrupulously declared, in her public filing of assets and liabilities, a sum that she was "holding on behalf of my sister to pay for the apartment". This was so clear, indeed, that on charge 3 – which accused her of not making a proper declaration in relation to this matter – the Select Committee was forced to acquit her.

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

72. The key witness was another Supreme Court Judge, Justice Thilakawardame, seemed to have a grievance against the Chief Justice. She told the Committee that for the last three and a half years she had been presiding over

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

a massive civil case involving a collapsed pyramid scheme in which 9,000 investors had lost deposits. One of the companies involved was Trillion, the real estate company that had sold a house unit to the Chief Justice's sister. One depositor had asked for a legal issue to be referred to a five-judge court, and she had mentioned this to the Chief Justice who had simply referred the matter back to Justice Thilakawardame's three-judge court. Later, the Chief Justice took over the case with two other judges, and the witness could not fathom the reason because she had worked so hard on it. This case was "so special to me as a person" she said, although she volunteered that the two other judges were grumbling – "The judges are objecting me" – (i.e. objecting to sitting with her) - she assumed because "the case would take sometimes five hours of work".[33] The witness was speaking from memory and seemed annoyed with the Chief Justice for "taking me off the case". The Committee did not bother to call the other judges, or any of the senior counsel in the case. It jumped to the conclusions that the Chief Justice had deliberately violated the Constitution by failing to empanel a five-judge court and was therefore guilty of misconduct under Count 1.

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

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

[33] Ibid, 1515-1517.

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

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

Justice, and so determined to find her guilty, that they failed to investigate further.

75. Any close study of the Commission's technique of fact-finding would demonstrate, in relation to other witnesses, a degree of bullying, threatening and putting words in mouths that would never be allowed in a courtroom. A member who appears on the transcript as "The Hon Nimal Siripala de Silva" was particularly objectionable and abusive, and was not stopped by the Chairman. "You should be prosecuted"; "You are guilty of a very very grave offence that we have to recommend... (be prosecuted)". He would say to two of them and possibly shout at them although it is impossible to be sure because the proceedings were not public, and the transcript released later does not reflect his tone of voice.[34] His particular targets were the lawyer and the Chief Executive for Trillion, who claimed they were entitled to sell the home units and had been allowed to do so by the Expert Committee. The Select Committee insisted – and found – that court orders made in 2010 prohibited this unless the court gave its express permission. The court orders, and the permission it subsequently and specifically gave, are not clear: it certainly authorised the Committee of Accountants to approve "the day-to-day activities of the real estate company", which might be thought to include selling real estate. The fact was that Trillion did sell many of its units, one of them to the sister of the Chief Justice. Whether the company was acting rightly or wrongly in doing so with the permission of the liquidators but not expressly of the Court cannot be laid at the door of the purchaser, let alone the purchaser's sister. An allegation surfaced – it was not in the charge - that the property company gave the purchaser a discount because it knew that she was the Chief Justice's sister, but there was no evidence that this fact (if it was a fact) was known to the sister or to the Chief Justice. Property companies with new buildings to sell may well decide to offer discounts to attract well-connected tenants. In any event, there was actual evidence that the so-called 'discount' was in fact given to all purchasers – which would make the point a complete non-issue.

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

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

77. There is, for a start, no evidence that she made any decision at all. There were, apparently, routine hearings at the end of 2012 in which no judgements were delivered, so her sister could not have benefited from non-existent decisions. No evidence of any decision on the matter by the Chief Justice can be found in the 1000 pages of Committee material. The sister and her partner had bought the unit, and whether or not Trillion had power to sell it with the approval of the Chartered Accountant's Committee was not an issue that would be likely to alter the sister's position as a purchaser for value, and if this question were ever to become relevant at a future hearing then no doubt the Chief Justice would have recused herself. Indeed it is a remarkable fact that none of the many counsel in the case ever raised the matter with the Chief Justice: the purchase by her sister of a unit was not a secret, and counsel have a duty to raise with judges any fact that might disqualify them. The "hearings" over which the Chief Justice presided appear to have been routine call-overs. The overriding fact is that the Select Committee could not point to

any actual decision ever taken by the Chief Justice in which she had a pecuniary interest.

b. Count 4

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

79. In other words, although she had truthfully declared all assets and liabilities, as the Act requires, at the relevant date, she had not declared bank accounts which contained no assets at that date. There may be a nice point of statutory construction as to whether this conformed with the Act – it would certainly conform with its spirit – but the Select Committee's ruling on the law, that "it is necessary to disclose all the accounts owned by an officer regardless of the availability or non-availability of a balance" – is a ruling that must be made after proper legal argument, and by a court of law, not a group of politicians. There is certainly no requirement under the Act to disclose empty bank accounts: S.12 merely says that assets and liabilities "includes moveable and immoveable property." To regard an empty bank account as an "asset" seems oxymoronic. This was a ruling on law that these politicians had no competence to make. Non-disclosure was a crime, which could have

[35] Ibid, 212.

been brought before a court for a genuine trial. Even if a court were to conclude as they did that an empty bank account *is* an 'asset' and the Act imposed strict liability (which I doubt), the offence would be one of the sheerest technicality and could not amount to serious misconduct.

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

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

of a Chief Justice and the Committee resolves that this is misbehaviour under Article 107(2) of the Constitution".

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

c. Count 5

83. This lengthy charge can be summarised thus:

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

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

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

Therefore she has to be removed as Chief Justice, because

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

84. The conviction of the Chief Justice on the fifth count was palpably absurd, if not sexist. There was no allegation that she had *done* anything. Her husband had been summoned to attend the Magistrate's court as a suspect in respect of a bribery offence. On that basis, and that basis alone, the Chief Justice was said to be guilty of misconduct, because the Constitution made her the head of the JSC, which gave her disciplinary power over magistrates and access to their records. For this reason alone, the charge alleged, she was guilty of misconduct – apparently for remaining in office! The Select Committee nonetheless found her guilty of misconduct, on this reasoning:

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

85. The only blemish, of course, on the whole country is that 117 MPs could bring this allegation, and that 7 Ministers could find it "proven misconduct" and that 255 MPs could endorse that finding and "address" the President by telling him

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

that it warrants her removal. In legal systems throughout the world, it sometimes happens that partners or siblings or children of judges, even of Chief Justices, are accused of crime. Obviously that does not require the judge to resign, but merely to play no part in the disposal of the charges. If there is any doubt that they may not be dealt with by an independent magistrate or judge, that can be removed by special arrangements so that a former or foreign judge hears the case. For a Chief Justice to have a partner suspected of crime in which she was not alleged to have played any part is a misfortune, but it is not misconduct.

86. In convicting on this charge, I note

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

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

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

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

7. THE SUPREME COURT INTERVENTION

87. The attack on the Chief Justice cause great dismay among Sri Lankan civil society: hundreds of articles were written in her support in non-government

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

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

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

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

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

90. It was a well-argued and logical judgement interpreting 107(3) purposively to mean that Parliament was obliged to pass a law setting up an impartial body to decided whether misconduct had taken place and laying down the standard of proof it should apply, while Standing Orders would deal with the more routine procedures, such as the powers to obtain evidence, the length of sittings and so forth. I need not go into the details of the judgement. S.107(3)

is ungrammatical – *"Parliament shall by law or by standing orders shall (sic) provide for all matters ..."* and then it lists matters that the court said were appropriate for a law (ie a statute passed by Parliament) and other matters ("procedures for the passing of such resolution") appropriate for Standing Orders introduced by the Speaker. It was an elliptical sub-section, and the Court gave it a construction that made it work in the context of Article 4(e), which sets out the basic constitutional rule for the separation of powers. It was a perfectly legitimate construction.

91. Nevertheless, MPs reacted with fury at this perceived attempt by the judiciary to interfere with their sovereignty, and the debates on 9-10 January were dominated by MPs attacking the judges for daring to trespass on their prerogatives. It must be clearly understood that this question – whether a court has power to quash such a finding by a Parliamentary committee – is nothing at all to do with the question of judicial independence. They are quite different issues. But regrettably, I think, because the Supreme Court (and then the Court of Appeal, following its decision) to quashed the Select Committee finding, the argument over the legitimacy of it doing so overshadowed the argument about the palpable breach of judicial independence. In the debate, the two issues became hopelessly mixed up and speakers in favour of the impeachment were able to pose as democrats, fighters for Parliamentary sovereignty against interfering judges. The Sri Lankan government, through its external affairs Minister, one Professor Pereis, has pretended to foreign diplomats that this is really what the case is all about, i.e. the sovereignty of Parliament. He regularly cites other cases – one from the Philippines, another from the US – pretending that they justify what happened to the Chief Justice, whereas they are really about the separation of powers under the relevant constitution. The government has a case – not a particularly good one, but at least arguable – that the Supreme Court was wrong to intervene. It has no case at all to claim that what happened was not a grave assault on judicial independence.

92. It is necessary, therefore, to disentangle the two issues. Professor Peiris made the main speech for the government on the impeachment, beginning

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

93. He went on, however, as if giving a law lecture, to claim former U.S. Chief Justice Rehnquist of the United States as an authority. In briefing foreign Ambassadors, he is reported to have place much reliance on the case – *Nixon v US*[39] and to have said "the views of Rehnquist were unanimously endorsed. Justice White said encroachment into the right of the Senate to impeach a judge is a violation of the law. Governments that condemn Sri

[39] *Walter L Nixon v US* (1993) 506 US 224.

Lanka should pay attention to this judgement."[40] They should indeed – close enough to see how this professor misunderstands both the facts and the law. Nixon was a federal District Court judge who refused to resign after being *convicted* of perjury and sent to prison, so there was no comparison with Dr Bandaranayake. The Senate rules allowed a committee to hear evidence and report it to the full Senate, which on that record decided to impeach him. The judge claimed that he was entitled to be heard by the full senate, but the Supreme Court declined to intervene. The committee hearing took four days, he had been given all defence rights, the facts were uncontested and a full transcript was available to every Senator. So in terms of fairness, Nixon was treated properly – unlike Dr Bandaranayke. Justice Rehnquist pointed out that "the Framers recognised that most likely there would be two sets of proceedings for individuals who commit impeachable offences – the impeachment trial and a separate criminal trial" – which of course had not been offered to Dr Bandaranayke - and that a further protection for the judge was the rule that impeachment requires a two-thirds majority, which was not the case in Sri Lanka. It also required a finding of misconduct by the House of Representatives and a trial by the Senate. But Rehnquist actually conceded that "courts possess power to review either legislative or executive action that transgresses identifiable textual limits" – which was the position taken by the Sri Lanka Supreme Court when it decided to identify the textual limits of Article 107(3). As for Justice White, he made very clear that the courts should intervene in the "extremely unlikely" case that "the Senate would abuse its discretion and insist on a procedure that would not be deemed a trial by reasonable judges". That was exactly that case of Dr Bandaranayke. Governments which criticise Sri Lanka should certainly pay attention to *Nixon*, especially its last words uttered by Justice Souter:

> *"If the Senate were to act in a manner seriously threatening the integrity of its results, convicting say upon a coin toss or upon a summary determination that an officer of the US was simply "a bad guy", judicial interference might well be appropriate. In such*

[40] 'Ceylon Today' 5 Jan 2013, http:// www.ceylontoday.lk/et-admin/images/news/21157gl.ipg.

> *circumstances, the Senate's action might be so far beyond the scope of its constitutional authority, and the consequent impact upon the Republic so great, as to merit a judicial response despite the prudential concerns that would ordinarily counsel silence".* [41]

94. So even the US Supreme Court, despite its judicial restraint, might intervene if Congress were ever to behave towards a judge as the Parliament of Sri Lanka behaved towards Mrs Bandaranayke. That was, however, not the opinion of Professor Peiris, whose speech went on to condemn the Supreme Court decision in vituperative terms – it was "astonishing" a "usurpation", "fundamentally and basically wrong", "not worth the paper it is written on", "unpardonable", "very bad", "tainted", "without any semblance of logic or sound policy" "horrendous" "throwing to the winds all restraints" "riddled with errors" and so on. "The Supreme Court can go to hell" yelled his MPs. It was a shameful debate, in which the red herring of the separation of powers issue diverted attention from the question of whether the Chief Justice had been guilty of misconduct. Inevitably, the government won the division, by 155 votes to 49, and the firework celebrations began. The defiance of the Supreme Court has been seen by some commentators as a further example of how the Sri Lankan government willfully defies the rule of law – as the UN enquiry said it did, by killing tens of thousands of Tamils at the end of the war in the North. That may or may not be the case, and the limits of Parliament's immunity from judicial review may be left to constitutional scholars. What cannot be denied is that the government shook the foundations of the rule of law by a vindictive and unfair impeachment of its Chief Justice as a reprisal against her for taking a conscientious decision that it did not like.

8. CONCLUSION

95. The denouement was as unseemly as the procedures used to bring it about. On 12 January, 2 days after receiving the "address" from his brother, the

[41] Ibid, 748.

President summoned the remaining 10 Supreme Court judges to his office for a 90 minute meeting. It is not known what he said – the meeting was highly improper – although it seems that he asked them to pass on one threatening message to the Chief Justice, namely that if she resigned without further fuss, she could keep her full pension entitlements. The Chief Justice, who appears to have behaved throughout with great dignity, remained with her family at her official residence. The following day she received a Presidential order removing her from office, and (in a despicably petty gesture) her security guards were withdrawn, while threatening demonstrators remained outside. On the next day, a holiday Monday, police ordered the Registrar to pack up all her belongings in her chambers, to make way for the next incumbent. A large phalanx of military police occupied the court building overnight and a riot squad (with water cannon) arrived the next morning along with a government rent-a-crowd who shouted slogans in praise of the new Chief Justice. He was Mohan Peiris, a man without judicial experience, who served as the legal advisor to the cabinet and Chairman of a bank and of an arms procurement firm established by Defence Secretary Rajapanske. He was sworn in by the President and that afternoon took over the Chief Justice's chambers whilst a large number of lawyers stood outside the court holding candles "to symbolise the onset of darkness". Dr Bandaranayake was confined to her residence until her successor was installed in her former chambers, and then required to leave in her own car without speaking to the media or (as she had requested) being given an opportunity to thank her staff. She did issue a dignified and moving statement, pointing out that the rule of law to which she had devoted her life had been shattered. She would not resign in order to save her pension, but she could not resist the power of the state to remove her physically from the Court.

96. I have done my best to recite the facts, which are on record, as objectively as possible. That Dr Bandaranayake was not even conceivably guilty of misconduct on 12 of the 14 charges is palpable, and the evidence does not support Count 1 (that she made decisions in a case which somehow benefited her sister) and charge 4 (that she had "assets", in the form of an empty bank account, that were undeclared). The evidence shows that she was

impeached as a reprisal for her decision in the *Divineguma* case and perhaps for the outspoken stance that her Judicial Services Commission took in defending what it saw, no unreasonably, as threats to judicial independence. Some commentators have suggested that the Rajapaske clan had a long-term plan to neuter the independence of the country's judiciary lest it put difficulties in the way of their future hegemony. Others claim that the impeachment removes any danger of unruly judges if the government is forced by international pressure to put a few of its military leaders on trial for war crimes committed during the 2009 conflict: I have no comment to make on these suggestions. I have tried to confine this Report to the law and practice of judicial independence, as applied to Dr. Bandaranayke's case. Although there is an interesting intellectual debate over the precise constitutional borders that separate legislative, executive and judicial powers, I do not regard it as impinging on the question of whether the Chief Justice was properly impeached. To that question, the only answer is: "no".

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

98. Politicians, media people and diplomats must be made to understand this, and international bodies which uphold, or purport to uphold, the rule of law must realise just what a corrosive precedent this impeachment sets. There is nothing necessarily wrong with impeachment, which gives a sovereign Parliament representing the people the ultimate power to remove a disgraced judge, but his or her misbehaviour must be *proved* and by fair means not foul.

Certainly not by a process that has been triggered by dissatisfaction with a judgement which has gone against the ruling party. That this is precisely what has happened in Sri Lanka is a matter of record, and those who have made it happen are on the record. Some of them, regrettably, are lawyers, but all of them must have known that they were embarked on a witch-hunt.

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

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

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

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27th February 2013