



Position Paper

Impeachment against Chief Justice Dr. Shirani Bandaranayake and the Issue about the independence of the Judiciary in Sri Lanka

INTRODUCTION

The procedure adopted by the Mahinda Rajapakse government to remove Chief Justice Dr. (Mrs.) Shirani Bandaranayake from the office of Chief Justice through an impeachment¹ has turned a dissension in to a serious crisis that alters the balance of power in the constitutional order of functioning of the Executive, Legislature and the Judiciary in Sri Lanka.

Article 125 of the constitution that sets the supreme law of the land, the judiciary is the only and exclusive institution empowered to interpret the provisions of the constitution. However, in this instance the legislature while disregarding the interpretation given by the Supreme Court also refused to comply with the writ of Certiorari issued by the Court of Appeal.²

The legislature contended that it [the legislature] was the sole repository of sovereignty of the people and hence was supreme and not subject to the authority of any other constitutional body.

However this construction of the constitution undermines the doctrine of separation of powers that requires the three institutions of the Executive, Legislature and the Judiciary to exercise state power subject to the checks and balances of the three institutions functioning independent of each other. It has instead made governance subject to a duality of power exercised by the Executive and the Legislature. These checks and balances built in to the functioning of the three arms of the constitution would ensure good governance. The undermining of any one of these three institutions would have a negative impact on the entire constitutional order.



In addition to the executive, legislature and the judiciary other pillars such as the public sector, law enforcement agencies, auditor general and mass media make valuable contributions towards building a national integrity system by functioning with transparency and integrity. In addition these institutions by their independence and proper conduct create the required space to minimize corruption by preventing abuse of power, misuse of resources and enable the people to enjoy the fruits of good governance.

The Judiciary of a country is specially committed to protect human rights, democratic values and to assess the legality of executive action and performs an exceptional function within a national system of integrity.

Therefore, this position paper focuses more on the aftermath of the impeachment of the Chief Justice Mrs. Shirani Bandaranayake than on the charges framed and the process adopted.

Background of the impeachment against the Chief Justice

The motion to impeach Dr. Shirani Bandaranayake to remove her from office of the Chief Justice that specified 14 charges and signed by 117 members of Parliament was brought under article 107 of the constitution of the Democratic Socialist Republic of Sri Lanka.

The Speaker of the Parliament thereafter appointed a parliamentary select committee under the chairmanship of Minister Anura Priyadarshan Yapa to commence proceedings under standing order 78 A (2). The parliamentary select committee appointed on 14th November 2012 consisted of eleven members of parliament. They are Nimal Siripala de Silva, A.D. Susil Premajayantha, Dr. Rajitha Senarathne, Dilan Perera, Wimal Weerawansa, Niyomal Perera (Government) party) John Amaratunge, Lakshman Kiriella, Vijitha Herath, R. Sampanthan (opposition).

The select committee began its investigations into the 14 charges on 14th of November 2012³. They confined the investigation to charges one to five of the fourteen charges and found the Chief Justice guilty of three charges (charges 1, 4, and 5)⁴.

The committee that adopted the final decision on the 8th of December to find the Chief Justice guilty was not attended by a single member of the opposition and consisted entirely of members of

the government. The four opposition members of the committee announced their withdrawal from the committee on 6th December on the grounds that they were not satisfied with the manner of the inquiry in to the charges and hence had no confidence in the committee.

The official report of ruling against the Chief Justice is currently available in two volumes under parliamentary publication number 187. The report has 1575 pages.

The faulty attributes of the impeachment procedure earned severe criticism of eminent jurists both local and international and of legal scholars, religious leaders, intellectuals, politicians, civil society activists and citizens.

Although the allegations against the Chief Justice made by the Mahinda Rajapakse government had apparently strong elements pertaining to corruption, the political nature of the procedure made many observers skeptical of the charges. The Chief Justice thorough her lawyers⁵, responded to the select committee by refusing to accept its competence to exercise judicial ructions or to reach a judicial determination. She rejected all charges and requested all documents pertaining to the charges framed against her. Many independent groups observing the event called for an impartial and transparent inquiry. Transparency International Sri Lanka took the stand that the Chief Justice should to be subject to an unbiased hearing according to international covenants ratified by Sri Lanka.⁶

“ **The judiciary of a country is obligated to protect human rights, uphold democratic values, and to determine the validity of executive acts. These are best implemented in a national integrity system.** ”

Although the Chief Justice appeared before the parliamentary select committee accompanied by her lawyers at the commencement of the impeachment proceedings, she subsequently informed that she was withdrawing from the proceedings on grounds that she had not been given adequate time to prepare her defense and that she had not been apprised of the procedure to be followed in the conduct of the business of the committee.⁷

3. Parliament publications. No. 187, vol. 1, pp. 8-10

4. Parliament publications. No. 187, vol. 2 pp. 1574, 1575

5. Parliament publications. No. 187. vol. 2. P. 1327

6. Open letter sent by TISL to the president, speaker and the party leaders. www.tisrilanka.org/?p=10271

7. Parliament publications. No. 187. Vol 2

The absence of a definite procedure to be followed by the Committee, the failure to produce a list of witnesses and documents relevant to the charges, the denial of an adequate time frame to respond to the charges, the absence of a clear standard of determining the burden of proof combined to provoked a strong critique by legal experts and civil society.

Concurrently seven petitions were filed before the Court of Appeal praying for a writ of certiorari restraining the eleven members of the parliamentary select committee from proceeding with the inquiry⁸. The petitioners claimed that impropriety and corruption are matters that should be inquired by a court of law and that the committee was not competent in law to precede with their inquiry. The court of appeal that considered the petitions requested the Supreme Court for a determination on the interpretation of article 107 (3) taken together with article 125 of the constitution.

The Supreme court exercising its jurisdiction in interpreting the provisions of the constitution⁹ held that a court of law, tribunal or any other institution determining the rights of a person in a country with a constitution based on legal order had no power to arrive at such determination unless such supervisory power is expressly vested on them by law.

Such a court of law, judicial tribunal or panel could only exercise such power enacted by parliament. Standing orders of parliament were intended to guide the proceedings of parliament. The Supreme Court citing article 170 of the constitution that defines the word 'law' determined that 'standing orders' could not be considered as 'law'.

“ **While the allegations leveled against the Chief Justice by the Mahinda Rajapakse government relating to ‘corruption’ on the surface appeared to contain strong arguments a substantial segment of people had grave doubts on the process due to its political appearances.** ”

The Chief Justice Mrs. Shirani Bandaranayake then applied to the Court of Appeal for a writ of Certiorari quashing the findings of the Parliamentary select committee. The Court of Appeal on 3rd January

2013 quashed the findings of the Parliamentary select committee.

Following the ruling by the Court of Appeal the opposition in Parliament objected to the scheduling of the motion of impeachment for debate in the house. The government decided to hold the debate despite the inability of party leaders to reach a consensus.¹⁰

The debate in Parliament on the motion to remove the passage in parliament and the president confirming and implementing the removal of the Chief Justice were all enacted in the background of the two judicial determinations were in force.

Sovereignty of the people

According to article three of the constitution of Sri Lanka, sovereignty rests with the people. It includes the power to govern, fundamental rights and franchise.

Article four explains that sovereignty is inalienable and how it is exercised and enjoyed. Accordingly the legislative power of the people shall be exercised by Parliament, consisting of elected representatives of the people and in a Referendum by the people. The executive power of the People including defense of the land shall be exercised by the President of the Republic elected by the people. Except for powers to be exercised by Parliament pertaining to privileges and immunity of parliament and its members all other judicial powers of the people should be exercised by courts of law, tribunals and institutions expressly established by law.

It is clear that the written constitution of Sri Lanka has vested sovereignty on the people and that sovereignty is divided in to three separate spheres as the executive , the legislature and the judiciary.

Justice Mark Fernando, who is regarded as one of the distinguished judges of the Supreme Court has stated that while the constitution does not bestow sovereignty on the people it recognizes that the people hold sovereignty as a prior condition.¹¹

Does parliament hold Sovereignty?

During the controversy on the impeachment, the government asserted that parliament could exercise its sovereign power as it was constituted by the representatives of the people.

8. Supreme Court application No: 2012/4,5,6,7,8 and 9
9. Judgment of the same case

10. "The speaker went to town on behalf of the brother" – Parliamentarian Ajith P. Perera, 20th January 2013, Ravaya P. 8

11. Ferando, M.D.H. "Defecting the dragon: Weapons for fighting corruption", ARD inc, 2007

It was also implied that, article 4 of the Constitution stipulated that “judicial power of the people shall be exercised by Parliament through courts” it also held judicial power. Dr. Reeza Hameed, a scholar with a PhD and a member of the Front to Protect Public Rights¹² points out that parliament has no role to perform in the judicial sphere. She further emphasizes that article 4 distinctly states that judicial power has to be exercised through courts and other institutions specifically established for that purpose, and hence parliament is precluded from exercising judicial powers. The responsibility of parliament is to provide the requisite resources to those institutions entrusted with the exercise of judicial power in the same manner it allocates funds and resources’ for other activities of the state.

Parliament also has the authority to act on matters concerning Parliamentary privileges and immunities. Her final conclusion is that it is “the constitution that is supreme. In governance parliament performs a significant role in Governance but it is not either sovereign or supreme.”

The propriety of parliament exercising judicial powers was discussed in considerable detail when an impeachment motion was brought to remove Chief Justice Neville Samarakone Q.C. The main contention on that occasion was that while Parliament had the power to act on proven misconduct the actual determination of misconduct had to be made before a tribunal consisting of judges competent to do so. Mr.S.Nadesan Q.C and the team of counsel for Chief Justice Mr.Neville Samarakone repeatedly stressed on this submission whenever they appeared before the select committee.¹³

The opposition parliamentarians in the select committee Sarath Muththettuwagama, Anura Bandaranayake and Dinesh Gunawardena were also of the opinion that unless there was a proven charge of misconduct before the committee that examined the impeachment charges against Chief Justice Samarakoon, it could not on its own arrive at a judicial determination of proven guilt.¹⁴

Is the decision of the select committee the final?

As pointed out by a professor of Law Dr. Nihal Jayawickrema¹⁵ the determination of a select committee is not final. The Sri Lanka government has in 2002 formally accepted in 2002 that these decisions were subject to judicial review. This was when the Human Rights Council set up under the International Covenant on Civil and Political Rights (ICCPR) questioned the scope of standing order 78A.

The official response of the government of Sri Lanka states that “in the event of the committee of inquiry has not followed the principles of natural justice, such would be subject to judicial review.”

In fact the constitutional provisions and standing orders do not preclude the judicial review of decisions reached by the inquiring committee. Therefore, when the parliamentary errs in law or fails to adhere to norms of natural justice the conclusions of the select committee would be subject to judicial review.

“ **The propriety of parliament exercising judicial powers was discussed at length in 1984 when a motion of impeachment was brought to remove Chief Justice Neville Samarakone Q.C. The main contention on that occasion was that while Parliament had the power to act on proven misconduct the actual determination of misconduct had to be made before a tribunal consisting of judges competent to do so.** ”

Sri Lanka has ratified Article 14 of the ICCPR which confers every person the right to an open and just hearing. International organizations that stand for judicial independence have accentuated the flaws in the process of removing judges of the higher courts of Sri Lanka and stressed on the importance of introducing a juridical body for the purpose.

The report by Lord Goodhart of UK, former chief justice of India P.N.Bhagwathi and South African jurist Jenius M Mojepelo states as follows. “We consider that an inquiry by a parliamentary select committee appointed under standing orders in to charges of misconduct or incompetence would be inappropriate.” Such an inquiry would be patently a judicial act. We recommend that article 107(3) of the constitution should be substituted with a provision that enables an inquiry in to misconduct and incompetence by a suitable judicial tribunal.”

12. 2012-12-21 dated S01/12/2012 paper released by the Public Rights Protection Front (cited from a letter published in the Sri Lanka Guardian)

13. Parliament publications number 71 (5th September 1984)

14. Parliament publications number 71. P. 12

15. Is the Anura Bandaranayaka Ruling Relevant Today? Published in Colombo Telegraph (website) on 30th December 2012. Sinhala translation – Ravaya, 6th January 2013.

It is important to focus on a ruling by Speaker Anura Bandaranayake who made a ruling based on Article 3 of 1953 Parliamentary act (power and privileges) which states that “There is freedom of speech and procedure within parliament and that no judicial or external body had the power to curb that freedom. It is important to pay attention to the conclusion at the end of the ruling. “It would be proper for members of parliament to focus on introducing a new constitution or amending the existing standing orders pertaining to impeachment of judges of the supreme court.”

“ **The government of Sri Lanka has formally acknowledged the constitutional right to subject a determination by a select committee to judicial review. That was when the Human Rights Council established under the International Covenant on Civil and Political rights raise a query on Standing Order 78A relating to the power to inquirer in to the conduct of judges.** ”

The Chief Justice of Sri Lanka and the New Chief Justice

The president has now implemented the determination of the select committee by removing Chief Justice Mrs. Shirani Bandaranayake and appointing Mr. Mohan Peiris Presidents Counsel as the new Chief Justice. However, the decision of the select committee remains invalidated by the determination of the Supreme court of Sri Lanka which is the highest court in the land Sri Lanka now has two Chief Justices.

The independence of the Judiciary of Sri Lanka and the balance of power remains a dispute that gathers momentum until this impasse is resolved.

On her removal from office, Chief Justice Shirani Bandaranayake through a statement to the media stated¹⁶; “I remain the legally appointed Chief Justice of my country, which is considered to be a democracy

with fundamental rights founded on the rule of law” In making a brief observation on the process of her removal, she said “This procedure has abducted the office of Chief Justice and the independence of the Judiciary. It has wickedly distorted the rule of law, compliance with the law and the principles of natural justice.”

Absolute power and Absolute corruption

A distinguished judge of the Supreme court (now retired) Justice C. V. Vigneswaran recalls the words of Lord Acton who a century earlier in 1887 said Power tends to corrupt, and absolute power corrupts absolutely.” Expressing his views on the controversy he points out that that the checks and balances in the law are not decorative adornments. A centralization of power harms the balance of the composition of power in the three spheres of governance. This imbalance of power would further promote power concentration in one point leading to disaster. He further observed that several persons in the Supreme Court were of the opinion that permitting the 18th amendment would lead to such events.

The news paper ‘Raawaya’ which has made an exceptional contribution towards the defense of the independence of the judiciary in the last two decades has in an editorial analyzed this tragedy confronting the judiciary in Sri Lanka. The government fought to subjugate the judiciary with no legal basis. It observed no impartiality, no norms and no accepted procedure. It did not listen to any advice. It assumed the role of a hoodlum. The Chief Justice was not the only victim. The entire Judiciary and the judicial power of the people too are victims.”

The chief justice has departed. A Judiciary that is highly discoloured and subjected to remonstrations and vituperations remains. What remains is a Supreme Court that has been flogged and banished. A Court of Appeal whose writ has been discarded in the manner one spits out during morning ablutions.

“ **Introducing a new constitution or amending the standing orders pertaining to the impeachment of judges of the Supreme court should receive the attention of honorable members of Parliament.** ”

16. Special statement by the former Chief Justice (Ada newspaper on 20th January 2013)



Many national and international organizations have expressed opinions on this dispute and stressed on the importance of resolving it.

The International Commission of Jurists that is made up of independent judges and lawyers has stated that the “The process of impeachment and the removal of the Chief Justice have been carried out contrary to international conventions, independence of the judiciary and the appropriate procedure. “

The British government which has expressed its grave concern has stated that the procedure followed in the impeachment of the Chief Justice Mrs. Shirani Bandaranayake has violated the independence of the judiciary and the fundamental principles of the commonwealth¹⁷.

Conclusions and Suggestions

A survey of the procedure followed in the impeachment against the Chief Justice and the situation that emerged after dictates that the country should as a matter of urgency resolve the problem of the balance of power.

The government of Sri Lanka has failed up to date to reply to charges leveled against Sri Lanka on the impeachment process as a country that has subscribed to international conventions.

Therefore the need for the government to rebut the allegations on the independence of the judiciary and the rule of law acquires an increased sense of urgency.

- 1) An independent public commission made up of persons enjoying national and international repute could be put in place to inquire in to any errors made by the legislature, the executive and also the judiciary in the process of impeaching the chief justice and how such errors could be avoided in the future can be put in place.
- 2) The Chief Justice could be accorded the opportunity to face an impartial judicial panel and to receive a just ruling. Such an independent determination should be in accordance with the article 14 of the International Covenant on Civil and Political Rights.
- 3) To enact required legislation to establish a tribunal consisting of three persons who served in the apex courts of any country of the commonwealth to inquire in to the misconduct of

judges of the Supreme court as was proposed in the draft constitution of 2000.

“ **Although International conventions require that a proper procedure should be followed in removing a Judge, the International Commission of Jurists has in this instance declared that the Chief Justice has not received such an equitable hearing.** ”

Transparency international Sri Lanka is the Sri Lankan representative of Transparency International which the premier global organization that holds prevention of corruption as its primary objective. The organization with more than hundred branches around the world has dedicated its entire network to promote policies of transparency, accountability and good governance.

Enhancing public awareness, mobilizing public participation and building a country with integrity is our objective.

Please forward your views on this position paper to

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www.tisrilanka.org

17. www.gov.uk (official website of Britain)