POLICY BRIEF

A SYSTEMIC CRISIS IN CONTEXT:

THE IMPEACHMENT OF THE CHIEF JUSTICE, THE INDEPENDENCE OF THE JUDICIARY AND THE RULE OF LAW IN SRI LANKA

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Centre for Policy Alternatives

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The Centre for Policy Alternatives (CPA) is an independent, non-partisan organization that focuses primarily on issues of governance and conflict resolution. Formed in 1996 in the firm belief that the vital contribution of civil society to the public policy debate is in need of strengthening, CPA is committed to programmes of research and advocacy through which public policy is critiqued, alternatives identified and disseminated.

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1. Introduction[1]

The impeachment of Chief Justice Dr. Shirani Bandaranayake was the single most contentious political issue in Sri Lanka in late 2012 and early 2013. Four months since her removal from office in violation of decisions by the Supreme Court and Court of Appeal, the issue appears to have receded from the public square. While the government may appear to have resolved the political crisis occasioned by the impeachment, the constitutional crisis that emerged has not been resolved, leaving a number of troubling questions for the future of the rule of law unanswered. Can a decision of a court of law be considered binding if the executive opposes and disregards it? What is the role of the judiciary *vis-à-vis* the virtually unchecked power of the executive presidency? Is the judiciary independent of the President and Parliament? How does the claim to legal supremacy by Parliament affect the way in which it relates to the judiciary?

This Policy Brief seeks to address these issues and outline the urgent reforms needed to arrest the serious erosion of public confidence in the judiciary and the rule of law that has resulted from the impeachment. Section 2 outlines the political context and sequence of events relating to the impeachment. Section 3 examines the structural defects of the Sri Lankan constitution, which enabled the successful ouster of Chief Justice Bandaranayake, notwithstanding rulings by the Supreme Court and Court of Appeal to the effect that the process adopted was unlawful. The two main constitutional claims enabling the impeachment – presidential immunity and parliamentary supremacy – are examined, in the context of how they have developed throughout Sri Lanka's recent constitutional history. The conclusions from this analysis reveal the need for a range of constitutional and legal reforms, from legislative measures needed to restore a more credible framework for judicial independence and impartiality, to other more fundamental reforms to the Sri Lankan constitution itself.

[1] This Policy Brief was written by Niran Anketell with input from Asanga Welikala. Comments from Dr. Paikiasothy Saravanamuttu and Bhavani Fonseka are hereby acknowledged. Subhashini Samaraarachi assisted with research for Section 2.

2. The Impeachment of the 43rd Chief Justice

2.1 The Constitutional and Political Backdrop

Dr. Shirani Bandaranayake, the first woman Chief Justice of Sri Lanka, took oaths as the 43rd Chief Justice before President Mahinda Rajapaksa on 18th May 2011. While her appointment to the Supreme Court in 1996 was controversial and unsuccessfully challenged in that court,[2] her ascension to the leadership of the apex court was inevitable given her seniority. In September 2010 – before Dr. Bandaranayake's appointment as Chief Justice – the government rushed an Eighteenth Amendment to the Constitution through the Supreme Court and Parliament. The Eighteenth Amendment strengthened the hands of an already powerful executive presidency by repealing and replacing salient elements of the Seventeenth Amendment to the Constitution – which limited the discretionary power of the President over appointments to key public offices – and removing the two-term limit on the presidency.[3] The Eighteenth Amendment also sought to retroactively deem appointments made prior to its passage that were in violation of the Seventeenth Amendment – which included the appointments of several Justices of the Supreme Court – to be legal.[4] Because the Bill was deemed by the Cabinet of Ministers to be "urgent in the national interest"[5], the Supreme Court was given a mere twenty-four hours within which to communicate its determination on whether the Bill required a referendum before it could become law. A number of petitioners – including CPA and one of its directors and head of its Legal and Constitutional Unit Rohan Edrisinha – made submissions in opposition to the Bill at the pre-enactment hearing. The case was heard by a five-judge bench of the Supreme Court presided over by the then Justice Shirani Bandaranayake, who held that the Eighteenth Amendment Bill did not violate any entrenched provisions of the Constitution,[6] enabling its passage through Parliament with a two-thirds majority, and without a referendum.

In the first year of its functioning, the Supreme Court led by Chief Justice Bandaranayake dismissed a number of petitions challenging several constitutionally suspect and authoritarian executive actions. These included CPA's petition challenging a number of regulations under the Prevention of Terrorism Act (PTA) that perpetuated some of the most widely used Emergency Regulations even after the lapse of the state of emergency[7]; petitions challenging compulsory military training for university entrants[8]; and petitions challenging the indefinite postponement

[2] See *Edward Francis William Silva vs. Shirani Bandaranayake*, 1997 (1) Sri. L.R 92
3 Also see Aruni Jayakody, *'The 18th Amendment and the Consolidation of Executive Power'*, in Rohan Edrisinha & Aruni Jayakody (Eds.) (2011) ***The Eighteenth Amendment to the Constitution: Substance and Process***, (Colombo: CPA)
[4] Article 36(6), Constitution of Sri Lanka
[5] Article 122(1), Constitution of Sri Lanka

[6] *In re the Eighteenth Amendment to the Constitution, SC Special Determination,* 1/2010.
[7] *Centre for Policy Alternatives Vs. Gotabaya Rajapakse and others,*SC (FR) Application 453/2011
[8] *Ceylon Teacher's Union and four others vs. University Grants Commission*, SC (FR) Application 181/2011.

of a number of local authority elections.[9] These decisions led to a widespread perception that the Supreme Court under Chief Justice Bandaranayake was in general a court that could be expected to be deferential to the executive. However, approaching the latter half of 2011, tensions between the Chief Justice and the executive began to appear.

In the Supreme Court's determination on the constitutionality of the Town and Country Planning (Amendment) Bill pursuant to a challenge by CPA, the bench led by the Chief Justice held that since the subject of private lands was a devolved matter in terms of the Thirteenth Amendment to the Constitution, the Bill required prior reference to all Provincial Councils before being placed on the Order Paper of Parliament.[10] Similarly, in its first determination on the constitutionality of the *Divineguma* Bill, also challenged by CPA, a bench headed by the Chief Justice held the Bill impinged on a number of devolved subjects, and thus required prior reference to the Provincial Councils.[11] Having referred the Bills to the eight constituted Provincial Councils, in which the ruling United People's Freedom Alliance (UPFA) has controlling majorities, the President also referred the Bill to the Governor of the Northern Province (the ninth province in respect of which there is as yet no Provincial Council constituted or elected). The Bill was then placed on the Order Paper of Parliament a second time. It was challenged again by a number of petitioners including CPA on the basis that the substantive provisions of the Bill were inconsistent with the constitution. Some petitioners also contended that the Governor was not empowered to substitute himself in place of a Northern Provincial Council, and that his consent to the passage of the Bill was invalid.

The Supreme Court's determination in respect of the second challenge held with the petitioners' argument that certain provisions of the *Divineguma* Bill were inconsistent with the constitution and could only become law upon being passed by a two-thirds majority in Parliament. The Court also held that the Governor could not consent to a Bill by assuming the powers of a Provincial Council.[12]

Parallel to the court's determinations in these important cases, there were other events that demonstrated an attempt to interfere with and intimidate the judiciary. On 19th September 2012, a statement issued by Mr. Manjula Tillekeratne, Secretary to the Judicial Services Commission (JSC) – of which the Chief Justice is the *ex officio* Chairperson – was published in the Sinhala press. The statement alleged that efforts were underway to destroy the independence of the judiciary, and made references to what was later revealed by the President himself to be an effort by him to summon the members of the Commission to a meeting at Temple Trees (one of the official residences of the President). The statement was issued in the context of a campaign

[9] *Brito Fernando vs. Mahinda Deshapriya and others*, SC (FR) Application 296/2011.
[10] *In re Town and Country Planning Ordinance Amendment Bill*, SC Special Determination 3/2011. See also CPA, "Note on the Divineguma Bill", January 2013. Accessed at: http://www.cpalanka.org/wp-content/uploads/2013/02/Divineguma-Bill-Basic-Guide-updated-January-2013-E.pdf
[11] *In re a Bill titled Divineguma,* SC Special Determination 1-3/2012.
[12] *In re a Bill titled Divineguma*, SC Special Determination 4-14/2012.

against the Chief Justice in the state media, vilifying her and those opposed to the *Divineguma* Bill.[13] The central message animating this campaign of vilification was the charge that the Chief Justice was encouraging separatism by upholding the Thirteenth Amendment – which devolved a measure of political power to Provincial Councils.[14] Subsequent to the JSC's first statement, on or around the 28th of September 2012, Mr. Tillekeratne told the media that "(a) situation has arisen where there is a danger to the security of all of us and our families beginning from the person holding the highest position in the judicial system."[15] His fears were realised when on 7th October, Mr. Tillekeratne was seriously wounded after unidentified individuals assaulted him in a Colombo suburb.[16]

At the heart of the tension between the Chief Justice and the executive was her willingness to apply the provisions of the Thirteenth Amendment to Bills approved by the Cabinet of Ministers for passage through Parliament. In the prevailing political culture of centralisation, the Chief Justice's insistence on the basic procedural requirements established by the Thirteenth Amendment for the enactment of legislation affecting devolved subjects appears to have evoked the severe displeasure of the government. Moreover, the resistance from the Chief Justice to the *Divineguma* Bill – which was proposed and is now implemented by the President's brother and Minister of Economic Development Basil Rajapaksa – was perceived by the government as an affront to its authority.

2.2 The Impeachment Process: The Sequence of Events

On 1st November 2012, the day on which the Supreme Court communicated its determination in respect of the second challenge to the *Divineguma* Bill to the Speaker, and also on which Sri Lanka faced the 'Universal Period Review' at the Human Rights Council in Geneva, several members of the governing UPFA presented the Speaker with a resolution containing fourteen allegations of alleged misconduct, signed by 117 Members of Parliament.[17]

Serious concerns about the propriety of the process through which the impeachment motion was signed, and the text of the resolution itself, have emerged. For instance, one member of the ruling coalition who did not sign the impeachment motion revealed that he was asked to place his

[13] See CPA, "Statement on the Poster Attacks Against CPA Executive Director", 16th October 2012. Accessed at: http://www.cpalanka.org/statement-on-the-poster-attacks-against-cpa-executive-director/ The poster attacks referred here attacked CPA's Executive Director, ostensibly for his role in challenging the Divineguma Bill, and are reflective of the anti-devolution sentiment that played a central role in Dr. Bandaranayake's impeachment. The text of one poster, translated into English, is telling. It states: "Let us save the pro-people Divineguma Act that builds the lives of fifteen lakhs of low income families from the Paikiasothy gang that aids and abets the separation of the country."
[14] See Asanga Welikala (2011) Devolution in the Eastern Province: Implementation ***of the Thirteenth Amendment and Public Perceptions***, **2008-2010** (Colombo: CPA)
[15] Daily Mirror, "JSC Secretary says danger to the security", 29th September 2012, accessed at http://www.dailymirror.lk/news/22281-jsc-secretary-says-danger-to-their-security-.html
[16] See CPA, "Statement on the assault of the Secretary of the Judicial Services Commission (JSC), Mr. Manjula Tillakeratne", 10th October 2012, accessed at http://www.cpalanka.org/statement-on-the-assault-of-the-secretary-of-the-judicial-services-commission-jsc-mr-manjula-tillakeratne/
[17] Order Paper of Parliament, 6th November 2012.

signature on the motion without even being able to peruse the charges.[18] The motion also contained a number of elementary factual errors, including in respect of a reference to *Groundviews*, CPA's citizen journalism website.[19]

A few days after it was presented to him, the Speaker of Parliament published the impeachment motion in the Order Paper of Parliament, pursuant to which, on 14th November 2012, eleven members – seven members from the government coalition and four from opposition parties – were appointed to a Parliamentary Select Committee (PSC).[20]

On 18th November 2012, several petitioners filed writ applications in the Court of Appeal seeking to prohibit the PSC from continuing with its proceedings.[21] During the process of hearing these applications, the Court of Appeal referred a question of constitutional interpretation to the Supreme Court. On 22nd November 2012 – the day prior to the first scheduled sitting of the PSC – the Supreme Court issued a carefully worded 'request' that the PSC defer impeachment proceedings until the Court could decide on the constitutionality of Standing Order 78A (which sets out the procedure to be followed by Parliament in the removal of senior judges). The Supreme Court's unprecedented 'request' – a departure from the court's traditional and constitutional role of determining the rights and obligations of parties – was an indication of the Court's awareness of Parliament's sensitivity to judicial review of its actions. The Court's order stated:

> ..this Court whilst reiterating that there has to be mutual respect and understanding founded upon the rule of law between Parliament and the Judiciary for the smooth functioning of both the institutions, wishes to recommend to the members of the Select Committee of Parliament that it is prudent to defer the inquiry to be held against the Hon. the Chief Justice until this Court makes its determination on the question of law referred to [it] by the Court of Appeal. The desirability and paramount importance of acceding to the suggestions made by this Court would be based on mutual respect and trust and as something essential for the safe guarding of the rule of law and the

[18] Rajiva Wijesinha, "On signing the impeachment resolution of the incumbent Chief Justice", 23 December 2012, stating "(i)n the first place, I was simply asked to come over and sign the impeachment resolution, and told it could not be sent to me to read beforehand. Obviously one should not sign, or commit to sign, what one has not seen." Accessed at: https://rajivawijesinha.wordpress.com/2012/12/23/on-signing-the-impeachment-resolution-of-the-incumbent-chief-justice/#more-5666

[19] See CPA, "Press Release on the impeachment proceedings against Chief Justice Dr. Shirani Bandaranayake", 13th November 2012. Accessed at: http://www.cpalanka.org/press-release-on-the-impeachment-proceedings-against-chief-justice-dr-shirani-bandaranayake/

[20] Of the 11 members to Parliamentary Select Committee, 7 members represented the ruling United People's Freedom Alliance (UPFA); 2 members the United National Party (UNP) and one each from the Tamil National Alliance (TNA) and Democratic National Alliance (DNA). See Colombo Page, "Appointments to parliamentary select committee probing Sri Lanka Chief Justice complete", 13th November 2012. Accessed at http://www.colombopage.com/archive_12B/Nov13_1352792368CH.php

[21] Daily FT, "Over to the Supreme Court", 21st November 2012. Accessed at: http://www.ft.lk/2012/11/21/over-to-the-supreme-court/

> interest of all persons concerned and ensuring that justice is not only done but is manifestly and undoubtedly seen to be done.[22]

When the PSC convened the following day, its Chairman ruled that the Committee would disregard the Supreme Court's request despite objections raised by opposition members of the Committee. The Chief Justice appeared before the Parliamentary Select Committee shortly thereafter.[23] On the same day, the Supreme Court granted leave to proceed in three fundamental rights applications challenging the legality of Standing Order 78A.[24]

On 29th November, in response to a question of privilege raised by a senior government Minister, the Speaker issued a ruling rejecting any judicial intervention in Parliament's functions with respect to impeachment, claiming it was an unlawful intrusion into an exclusive realm reserved for Parliament.[25] With this ruling, it was clear that the judiciary and Parliament were on a collision course, with Parliament appearing to be unwilling to recognise any judicial review of its or the PSC's actions. A constitutional crisis was beginning to emerge.

On 6th December 2012, the Chief Justice appeared before the PSC. At approximately 4.30 pm, she was handed over 300 documents and asked to respond to them within a day. Mr. Romesh de Silva P.C., Counsel for the Chief Justice, requested further time to study these documents. The Chairman of the PSC refused his request. Mr. de Silva then raised several objections with respect to the lack of a procedure and requested that the PSC adopt a proper procedure in respect of the production and admission of the documents; proof of such documents; burden of proof; lists of witnesses; and admission of evidence. The Chairman of the PSC stated that the charges would be determined solely on the documents made available to the Chief Justice. Since no procedure was adopted, Mr. de Silva informed the PSC that the Chief Justice could no longer participate in its proceedings.[26] In a letter written to the Speaker, Dr. Bandaranayake's lawyers requested the Speaker to take action against certain members of the PSC who, it was claimed, used insulting and inappropriate language against their client.[27]

On 7th December 2012, the four opposition members of the PSC also announced that they would no longer participate in the PSC proceedings, on the grounds that a number of issues they had

[22] Colombo Telegraph, "Full Text Of The Supreme Court Request To The Parliamentary Select Committee, Colombo Telegraph", 23 November 2012. Accessed at: http://www.colombotelegraph.com/index.php/full-text-of-the-supreme-court-request-to-the-parliamentary-select-committee/
[23] Minutes of the Meetings of the Select Committee of Parliament to Investigate into Alleged Acts of Misbehaviour by Dr. Shirani Bandaranayake, 23 November 2012.
[24] SC (FR) Applications 665/2012, 666/2012 & 667/2012
[25] Colombo Telegraph, "Speaker Chamal Rajapaksa's Ruling; Legislature Will Not Bow To The Dictates Of External Bodies", 23rd November 2012. Accessed at http://www.colombotelegraph.com/index.php/full-text-of-the-supreme-court-request-to-the-parliamentary-select-committee/
[26] Minutes of the Meetings of the Select Committee of Parliament to Investigate into Alleged Acts of Misbehaviour by Dr. Shirani Bandaranayake, 6th December 2012.
[27] DailyFT, "CJ's lawyers call for Speaker to take action against conduct of abusive PSC members", 15th December 2012, http://www.ft.lk/2012/12/15/cjs-lawyers-call-for-speaker-to-take-action-against-conduct-of-abusive-psc-members/, last accessed on 25th February 2013.

raised had not been addressed. These grounds included the absence of a clear direction regarding the procedure to be followed by the PSC; whether documents were to be made available to the Chief Justice and her lawyers; the standard of proof which would be required; the need to arrive at a definition of "misbehaviour"; whether sufficient time would be made available to the Chief Justice and her lawyers to study the documents; and whether the Chief Justice and her lawyers would be given an opportunity to cross-examine the several complainants who had made the charges against her.[28]

However, the remaining members of the PSC continued to hold proceedings on 7th December 2012 and, in the absence of the Chief Justice and her lawyers, heard sixteen witnesses – including Justice Shirani Tilakawardene, a sitting judge of the Supreme Court – with respect to the allegations made against Dr. Bandaranayake. Incredibly, the PSC submitted a report to Parliament the very next day finding the incumbent Chief Justice guilty of the 1st, 4th and 5th charges contained in the impeachment motion.[29] These charges accused the Chief Justice of financial impropriety based on non-declaration of assets and a conflict of interest in a case involving a failed investment company.

On 19th December 2012, the Chief Justice also filed a writ application in the Court of Appeal asking the court to issue writs quashing the conclusions and recommendations in the PSC report, and prohibiting the Speaker from acting on or taking any further steps based on the PSC report.[30]

Meanwhile, before Parliament had resumed sittings in 2013, the Supreme Court communicated its determination on the question of interpretation referred to it by the Court of Appeal.[31] The question referred by the Court of Appeal was:

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

Article 107(3), the interpretation of which was in question, provides that:

> Parliament shall by law or by Standing Orders provide for all matters relating to the presentation of such an address, including the procedure for the passing of such a

[28] Minutes of the Meetings of the Select Committee of Parliament to Investigate into Alleged Acts of Misbehaviour by Dr. Shirani Bandaranayake, 7th December 2012.
[29] Report of the Select Committee of Parliament to Investigate into Alleged Acts of Misbehaviour by Dr. Shirani Bandaranayake, 8th December 2012.
[30] Colombo Telegraph, "Chief Justice files action against PSC Report", 19th December 2012. Accessed at http://www.colombotelegraph.com/index.php/breaking-news-chief-justice-filed-action-against-psc-report/
[31] *Chandra Jayaratne vs. Anura Yapa and others*, SC Reference 3/2012, decided 1st January 2013.

> resolution, the investigation and proof of the alleged misbehaviour or incapacity and the right of such Judge to appear and to be heard in person or by representative.

In Standing Order 78A, Parliament made provision for a Select Committee of Parliament to investigate and report on the allegations of misbehaviour or incapacity set out in an impeachment resolution. However, it did not make provision for questions of procedure and evidence pertaining the proof of allegations before it. The Court of Appeal's question to the Supreme Court evinced some concern with this default. The Supreme Court, while answering the Court of Appeal's question in the affirmative, went a step further. The determination – signed by Justices Amaratunga, Sripavan and Dep – held that the investigation and proof of charges in an impeachment motion must be exercised by a body established by law. Since Standing Orders of Parliament are not recognised as 'law' in terms of the Constitution, they could not establish a body with powers to investigate and prove charges.[32] Thus, the Court held that any powers of investigation and proof must be provided by Acts of Parliament. In short, the Court's determination was a clear affirmation of the unconstitutionality of Standing Order 78A.

Shortly thereafter, the Court of Appeal issued judgment in the Chief Justice's writ petition, holding that in light of the interpretation given to the relevant constitutional provisions by the Supreme Court, it had no alternative but to issue a writ quashing the PSC report.[33]

Notwithstanding these judicial pronouncements, it was clear the government would proceed with the impeachment. On the 10th and 11th January 2013, amidst desperate island wide protests by lawyers, trade unionists, civil society and citizens[34] and in defiance of the Supreme Court and Court of Appeal, Parliament debated and eventually passed a motion to request the President to impeach Chief Justice Shirani Bandaranayake. 155 Members of Parliament voted in favour of the motion, and 49 voted against, while twenty members either absented themselves from Parliament or abstained from voting, following a parliamentary debate characterised by regrettable partisanship and unparliamentary language, and which demonstrated little engagement with the major matters of democratic and constitutional principle involved.[35]

The government moved swiftly thereafter. The media reported that the President had issued a proclamation removing the Chief Justice from office on 13th January 2013 and that it had been subsequently delivered to the Chief Justice.[36] Two days later, Mohan Peiris was sworn in as Chief

[32] Colombo Telegraph, "Impeachment: Full Text of The Supreme Court Determination Today", 3rd January 2013. Accessed at: http://www.colombotelegraph.com/wp-content/uploads/2013/01/S.C-Referance-No.-358-2012.pdf
[33] Colombo Telegraph, "CJ's Case: Full Text Of The Court Of Appeal Determination Today", 7th January 2013. Accessed at: http://www.colombotelegraph.com/wp-content/uploads/2013/01/CAwrit-411-2012.pdf
[34] BBC News, "Colombo protests oppose Chief Justice impeachment," 10th January 2013. Accessed at: http://www.bbc.co.uk/news/world-south-asia-20978298
[35] Parliamentary Debates (Hansard), Vol 214, No. 4, 11th January 2013, 651.
[36] The Nation, "New CJ this week?", 13th January 2013. Accessed at: http://www.nation.lk/edition/latest-top-stories/item/14633-new-cj-this-week?.html

Justice.[37] In the Supreme Court, security forces clashed with lawyers while attempting to seal the entrance to the court,[38] ostensibly to prevent Dr. Bandaranayake from entering the Supreme Court complex.

2.3 The Aftermath: Constitutionalism in Crisis

Mr. Mohan Peiris P.C. – a former Attorney General (appointed from the private bar to head the Attorney General's department by President Rajapaksa), Legal Adviser to the Cabinet, and representative of the Government of Sri Lanka at various international fora including the Human Rights Council – assumed office under peculiar circumstances. While the President had formally sworn him in, the question of whether Dr. Bandaranayake was lawfully ousted remained unanswered. If in fact her removal was invalid, it followed that there was no vacancy for Mr. Peiris to occupy, a question presently before the Supreme Court.

For her part, Dr. Bandaranayake claimed that she remained the country's lawful Chief Justice. In a statement released shortly after she vacated the Chief Justice's official residence on 15th January 2013, she asserted that "(i)n the circumstances, in my country which is a democracy, where the rule of law is the underlying threshold upon which basic liberties exist, I still am the duly appointed legitimate Chief Justice."[39]

Also on 15th January, CPA and its Executive Director Dr Paikiasothy Saravanamuttu filed a fundamental rights petition seeking to prevent Mr. Peiris from assuming duties or functioning in office, on the basis that there was no vacancy in the office of Chief Justice.[40] The matter is pending before the Supreme Court, where counsel for the petitioners have requested that the case be heard by a full bench of the Supreme Court.

The Lawyers' Collective, a grouping of concerned lawyers instrumental in organising protests against the impeachment, stated that while they continued to oppose the unlawful impeachment of Chief Justice Banadaranayake and the appointment of her successor in principle, it was their obligation to appear before any bench of the Supreme Court (implying they would appear before Mr. Peiris). They warned of serious threats to the security of lawyers opposed to the impeachment.[41] Shortly thereafter, three senior lawyers who were instrumental in opposing the

[37] Dailymirror online, "Mohan Peiris sworn in as Chief Justice", 15th January 2012, Accessed at: http://www.dailymirror.lk/news/25007-mohan-peiris-sworn-in-as-chief-justice.html
[38] Daily FT, "Two to Tango as Mahinda Swears Mohan in as CJ", 16th January 2013. Accessed at: http://www.ft.lk/2013/01/16/two-to-tango-as-mahinda-swears-mohan-in-as-cj/
[39] The Hindu, "I am still the Chief Justice: Bandaranayake," 15 January 2013. Accessed at: http://www.thehindu.com/news/resources/i-am-still-the-chief-justice-bandaranayake/article4309817.ece
[40] The Colombo Telegraph, "Dr.Saravanamuttu Files FR Against New CJ Appointment: Full Text Of The Petition" 15th January 2013. Accessed at: http://www.colombotelegraph.com/index.php/dr-saravanamuttu-files-fr-against-new-cj-appointment-full-text-of-the-petition/
[41] Colombo Telegraph, "We Will Continue To Carry Out Our Obligations – Lawyers Collective," 23 January 2013. Accessed at: http://www.colombotelegraph.com/index.php/we-will-continue-to-carry-out-our-obligations-lawyers-collective/

impeachment received threatening letters from an anonymous group self-identified as the 'Patriotic Front'.[42]

Later, on 23rd January 2012, a ceremonial welcome for Mr. Peiris was boycotted by many lawyers including office bearers of the Bar Association, in keeping with a resolution adopted at a special meeting of the Association.[43] That resolution called on President Rajapaksa to reconsider the impeachment of Dr. Bandaranayake and stated that in the event she was removed without regard to the rule of law and natural justice, the Bar would not welcome the person appointed to replace her.[44] The ceremonial welcome for Mr. Peiris was covered exclusively by the state media, but more than 30 journalists from the private media, both print and electronic, who arrived in Hulftsdorp to cover the event, were prevented from entering the Supreme Court premises.

The government's use of force to enforce the President's decision to appoint Mr. Peiris to the office of Chief Justice appears to have caused lawyers' protests and public concern to recede. A sense of apathy and inevitability is palpable, but is nevertheless punctuated by defiant assertions of independence from the Bar.[45] The recent election of Mr. Upul Jayasuriya – a vocal critic of Dr. Bandaranayake's impeachment – as the President of the Bar Association and the proceedings at its 39th Annual Convocation exemplify this defiance. In a revealing symbolic gesture, Dr. Shirani Bandaranayake was invited to preside over the event as Chief Guest, an honour traditionally reserved for the sitting Chief Justice. Mr. Mohan Peiris was not invited to attend. The keynote speaker Justice C.V. Vigneswaran – an outspoken retired judge of the Supreme Court – delivered a forceful speech in which he drew specific attention to the question of the validity of Mr. Mohan Peiris's appointment to the office of Chief Justice, stating:

> We must remember that the so-called Impeachment process against Chief Justice Dr.Shirani Bandaranaike was legally faulted. Both the Supreme Court as well as the Court of Appeal gave decisions in this regard. So long as Competent Courts of Law have held that the process adopted was faulty, then those who advocated such Impeachment should have gone to the relevant Court or Courts to have such orders or determinations quashed. They did not do so. By not doing so a dilemma arises. If the existing Orders are not reversed by a Fuller Bench and in fact do get confirmed in the future it would appear

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The statement also referred to threats against lawyers who opposed the impeachment, stating "We are also gravely concerned with the several threats & acts of intimidation on members of our fraternity, such as death threats on leading members who campaigned against the impeachment of Honorable Chief Justice Bandaranayaka, the assassination attempt on Mr. Wanninayake, shots fired outside the residence of BASL President Mr. Rajapakse PC, and the attack on a lady lawyer (who wishes to remain anonymous) by unidentified motor cyclists who attempted to strangle her."

[42] Colombo Telegraph, "Romesh de Silva, JayampathiWickramaratne, MA Sumanthiran And JC Weliamuna Receive Threatening Letters" 18th January 2013. Accessed at: http://www.colombotelegraph.com/index.php/romesh-de-silva-jayampathi-wickramaratne-ma-sumanthiran-and-jc-weliamuna-receive-threatening-letters/

[43] The BBC News Asia, "Sri Lanka lawyers boycott chief justice ceremony"23rd January 2013. Accessed at: http://www.bbc.co.uk/news/world-asia-21155932

[44] The Lawyers Collective, "Give Justice to our Chief Justice: Bar Association passes three resolutions unanimously", 15th December 2012. Accessed at: http://dbsjeyaraj.com/dbsj/archives/13690

[45] Daily FT, "Lawyers Collective calls BASL Convocation Historic and Uncompromising" 1st April 2013. Accessed at: http://www.ft.lk/2013/04/01/lawyers-collective-calls-basl-convocation-historic-and-uncompromising/

that all steps taken so far by the de facto Chief Justice would be illegal. Then irreparable harm and damages would be sustained by litigants whose cases were heard by a person who cannot be deemed to be the Chief Justice of this Country under the Law.

If the de facto Chief Justice continues to act as if his conduct is valid in Law and hears Applications, constitute Benches and makes Orders and Determinations so positively and confidently expecting a Divisional Bench to reverse the Orders already made, even if they do reverse the Orders already made in the future, then the integrity and impartiality of the Honourable Judges who make such orders would come into question.[46]

3. Placing the Impeachment Crisis in Context: Systemic Flaws and Challenges

The impeachment of the 43rd Chief Justice was enabled by the swift and unconstitutional legislative and executive actions of an already powerful government. The gradual weakening of constitutional first principles – the separation of powers, constitutional supremacy and the independence of the judiciary – over many decades provided the legal and political tools which enabled the government to effect an unconstitutional impeachment. The systemic flaws and contradictions in the constitutional architecture of the state that led to the recent impeachment have been features of an essentially illiberal democracy that has been in place ever since Sri Lanka became a republic, and which have propelled a course towards populist authoritarianism.

3.1 An Ineffective Separation of Powers? The Presidency and Checks and Balances under the 1978 Constitution

The Second Republican Constitution of 1978 introduced a new system of government, the dominant characteristic of which is the large concentration of power in the executive president.[47] The executive branch is headed by the President, who appoints a Cabinet of Ministers from among Members of Parliament. The principal author of the 1978 Constitution and first executive president, J. R. Jayewardene, had long advocated a presidential system for Sri Lanka. In 1966, he expressed his support for the French model, which in his view provided "a strong executive, seated in power for a fixed number of years, not subject to the whims and fancies of an elected legislature; not afraid to take correct but unpopular decisions because of censure from its parliamentary party."[48]

Powers of the 'Overmighty'[49] Executive President

Under the 1978 Constitution, the President is Head of State, Head of the Executive and of Government, and Commander-in-Chief of the Armed Forces.[50] In addition, the President possesses the power to pardon offenders;[51] commute sentences;[52] make appointments to the higher judiciary, the office of Attorney General, members of executive Commissions including the Elections Commission, Bribery Commission, Police Commission and Public Service Commission[53]

[47] Joseph A.L. Cooray (1995) ***Constitutional and Administrative Law of Sri Lanka,*** (Colombo: Hansa), 163
[48] J. R. Jayawardene (1993) ***Men and Memories: Autobiographical Recollections and Reflections*** (New Delhi: Vikas), 91.
[49] A term coined in respect of the Sri Lankan Presidency by C.R. de Silva, '*The Overmighty Executive? A Liberal Viewpoint*' in C. Amaratunga (Ed.)(1989) ***Ideas for Constitutional Reform*** (Colombo: Council for Liberal Democracy), 313
[50] Article 30(1), Constitution of Sri Lanka.
[51] Article 34(1)(a), Constitution of Sri Lanka
[52] Article 34(1)(c), Constitution of Sri Lanka
[53] Article 41(A)(1), Constitution of Sri Lanka

and Governors of Provinces.[54] Besides these constitutional powers, the President also exercises a wide range of powers assigned to him by legislation, most notable of which is the power in terms of the Public Security Ordinance to declare a state of emergency and promulgate emergency regulations.[55]

Further, as we have noted previously, the Eighteenth Amendment to the Constitution removed existing term limits on the Presidency.[56] Article 38(2) provides for the manner in which a President may be impeached on the grounds of permanent incapacity or intentional violation of the Constitution, treason, bribery, misconduct or corruption involving the abuse of the powers of his office, or any offence under any law, involving moral turpitude. However, a motion to impeach the President must be signed by two-thirds of the Members of Parliament, or in the alternative, a simple majority of Members with the Speaker assenting. If the Supreme Court determines that the President is permanently incapable of carrying out his duties or guilty of any one of the impeachable offences, Parliament may vote to impeach the President, but only with a two-thirds majority. The procedure for impeaching a President is clearly more exacting that the corresponding provisions for impeaching a Justice of the Court of Appeal or Supreme Court.

Moreover, the President maintains overriding control over the legislative branch where his party (usually) holds a majority in Parliament.[57] Article 43(3) empowers the President to appoint as Prime Minister a Member of Parliament who in his opinion commands the confidence of Parliament. The President also appoints Cabinet Ministers from among Members of Parliament, and may consult the Prime Minister on such appointments, if he deems such consultation necessary. What this means in practice is that where the President's party holds a majority in Parliament, the President has an almost absolute discretion on who he decides to appoint as Prime Minister and Cabinet Ministers. As Head of Cabinet, members of which control the legislative agenda in Parliament, the President controls Parliament indirectly. Further, since the loss of membership in the political party under which a Member of Parliament was elected also occasions the loss of the Member's seat,[58] the President is able to ensure backbencher loyalty. Together, these factors contribute to overriding presidential control over Parliament.

Even where the President's party does not control Parliament, his powers of dissolution and prorogation provide significant levers of control.[59] Moreover, while the President must appoint a Prime Minister who enjoys the support of the house, he is free to assign Cabinet portfolios to any

[54] Article 154B(2), Constitution of Sri Lanka
[55] Section 5, Public Security Ordinance, No. 25 of 1947.
[56] See Rohan Edrisinha & Aruni Jayakody (Eds.) (2011) ***The Eighteenth Amendment to the Constitution: Substance and Process***, (Colombo: CPA)
[57] Articles 43(2), 43(3) and 44(1), Constitution of Sri Lanka.
[58] Article 99(13)A, Constitution of Sri Lanka
[59] Article 70(1), Constitution of Sri Lanka.

Member of Parliament, or even himself.[60] Combined, these factors permit heavy presidential interference with the work of Parliament.

To complement these sweeping powers over Parliament are the powers of appointment over the entire higher judiciary namely the Chief Justice, Justices of the Supreme Court, President of the Court of Appeal and Justices of the Court of Appeal. The President also enjoys blanket immunity of suit during the pendency of his tenure, subject to two exceptions. The first exception to this immunity, provided by the Constitution, excludes any proceedings in relation to acts committed by the President in his capacity as a Cabinet Minister.[61] The second, developed cautiously by the Supreme Court, permits collateral challenges against an *act* of the President in limited cases where a subordinate relies on that *act* to justify his own conduct.[62] The breadth of this immunity is sweeping: no proceedings are permitted to be instituted or continued against the President in any court or tribunal in respect of any acts or omissions, whether committed in his public or private capacity.[63] Moreover, since the removal of the two-term limit that one person may hold presidential office by the Eighteenth Amendment, this also means that the person holding this office may enjoy immunity for life, provided he succeeds in getting elected continuously.

Thus, the President under the 1978 Constitution presides over the State as a powerful executive head, with control over Parliament and protection from judicial scrutiny. The dominance of the President over the executive branch – and of the executive over the legislative and judicial branches – undermines the notional separation of powers that was introduced through Article 4 of the Constitution, which specifies the distribution of sovereign powers of government across the three branches.[64] Thus, notwithstanding occasional assertions by the judiciary of the doctrine of the separation of powers or of their own independence guaranteed by the Constitution,[65] the Presidency has loomed large over the judiciary.

We will examine two relevant cases of presidential interference with the judiciary in a manner that undermined the judiciary's independence. These case studies illustrate the point that the impeachment of the 43rd Chief Justice Dr. Shirani Bandaranayake was only the most recent symptom of a deeply flawed constitutional structure that affords pre-eminence to the executive.

[60] Article 44(2), Constitution of Sri Lanka.
[61] Article 35(3) (proviso), Constitution of Sri Lanka
[62]. See *Karunatilaka vs. Dissanayake,* 1999 (1) Sri. L.R 157, 176
[63] Article 35(1), Constitution of Sri Lanka.
[64] Article 4 specifies that the executive power of the People is to be exercised by the President, the legislative power of the People by Parliament, and the judicial power of the People by Parliament through court and other tribunals established by law or the Constitution.
[65] See for instance *In re Nineteenth Amendment to the Constitution*, 2002 (3) Sri LR 85, 101.

Impeachment proceedings against Chief Justice Neville Samarakoon

Neville Samarakoon Q.C. was appointed Chief Justice by President Jayewardene shortly after the latter assumed presidential office in terms of the new constitution in 1978. The appointment itself was the subject of criticism because of Mr. Samarakoon's close ties to the President.[66] A number of controversial issues pertaining to the judiciary arose immediately after the promulgation of the new constitution, not least of which was the non-appointment of sitting judges in the apex court under the previous 1972 Constitution to the newly constituted Supreme Court. However, Mr. Samarakoon did not appear to oppose this 'dismissal of Judges by the Constitution.'[67]

By 1983, however, the cumulative effects of a number of factors resulted in friction between the President and the Chief Justice. The first was the Parliamentary Select Committee appointed pursuant to a petition by Minister Gamini Dissanayake in March 1983 against Justices Wimalaratne and Colin-Thomé.[68] The petition was instanced by a complaint to the President by Mr. K. C. E. de Alwis, a judge and member of the Special Presidential Commission of Inquiry set up by the then United National Party (UNP) government to inquire into the conduct of its predecessor United Front (UF) government. In a writ application filed by Felix Dias Bandaranaike (a former Minister of the UF government being investigated by the Commission) against Mr. de Alwis, Justices Wimalaratne and Colin-Thomé were scathing in their criticism of the conduct of Mr. de Alwis, and issued a writ of *quo warranto* disentitling him from participating in the work of the Commission.[69] It was in response to this judgment that Mr. de Alwis made his complaint.[70]

Later, in June 1983 – just one month prior to the anti-Tamil pogrom of 'Black July' – alleged government sponsored mobs protested outside the homes of three Supreme Court justices. The attack was in response to a judgment issued by Justices Colin-Thomé, Ratwatte and Soza holding that the State was responsible for the unlawful detention of a senior left activist Ms. Vivienne Gunawardene and her husband, and that the Inspector General of Police should take disciplinary measures against the officers involved.[71] Almost immediately thereafter, mobs arrived at the judges' residences. Both the bench and bar responded angrily to this brazen threat to judicial

[66] Basil Fernando, *Remembering Neville Samarakoon – Champion of Justice,* (1991) **Social Justice**, 2:25, 22.
[67] Basil Fernando, "Sri Lanka: Executive Presidential System and the Judiciary – an overview", 22nd November 2012. Accessed at: http://www.humanrights.asia/news/ahrc-news/AHRC-STM-237-2012
[68] Rajan Hoole, (2001), ***SRI LANKA - The Arrogance of Power: Myths, Decadence and Murder,*** (Colombo: UTHR (J)), Chapter 7.
[69] *Bandaranaike vs. de Alwis*, 1982(2) Sri. L.R 664
[70] Rajan Hoole, (2001), ***SRI LANKA - The Arrogance of Power: Myths, Decadence and Murder,*** (Colombo: UTHR (J)), Chapter 7.
[71] *Gunawardena vs. Perera*, 1983(1) Sri. L.R 305

independence.[72] Yet, no one was prosecuted for these incidents. Instead, the officers concerned were promoted.[73]

Later, in the aftermath of the July pogrom and the enactment of the Sixth Amendment to the Constitution – which required judges, lawyers and other officials to take an oath swearing that they would not advocate the establishment of a separate state within Sri Lanka – an issue arose about whether, pursuant the Amendment, the Judges ceased to hold office until they swore the Sixth Amendment oath. The Attorney General argued that the case – involving the banning of a Jaffna based publication "The Saturday Review" – which was partly argued before the enactment of the Sixth Amendment, must be heard anew since the Judges hearing the case had ceased to hold office since the last hearing. In fact, the doors to the Court were shut until the judges had taken the oath. S. Nadesan Q.C. appeared for the petitioner and contested the position of the Attorney General, arguing that the Judges continued to hold office even after the passage of the Sixth Amendment, and that Judges cannot cease to hold office unless they are removed on the grounds of 'proved misbehaviour or incapacity'. While the Court appeared disinterested in hearing the matter at first,[74] the judgment of Supreme Court was an emphatic expression of the independence of the judiciary, holding that sitting Judges of the Court cannot be 'removed' by operation of a constitutional amendment.[75]

In the midst of this tumult, in January 1984, the press reported that the Criminal Investigation Division of the Police was investigating a possible assassination attempt on the Chief Justice.[76]

It was in this context of turmoil that Chief Justice Samarakoon made certain critical comments against the President at a prize giving of a commercial tutory in Colombo. A Select Committee of Parliament was constituted to inquire into the incident, but despite a finding of guilt, the government belatedly recognised the need to frame standing orders for the inquiry. This was done in haste, and Standing Order 78A – oddly placed in a chapter dealing with rules of debate – came into effect and another Select Committee was constituted. After rigorous submissions by S. Nadesan Q.C. appearing for Chief Justice Samarakoon, the Select Committee split on party lines. Nevertheless, the majority UNP members stopped short of holding the Chief Justice guilty of misbehaviour, but were highly critical of his speech.[77] Mr. Samarakoon was permitted to retire quietly, but a clear message had been delivered to the judiciary. The executive – with Parliament

[72] Tamil Times, "Nothing will deter us – says Supreme Court" and "Bar Association calls for independent commission of inquiry", 2:8, June 1983, pg.3. Accessed at: http://www.noolaham.net/project/32/3117/3117.pdf
[73] The Lanka Guardian, "Pavidi Handa case/The Vivienne Goonewardene Affair",
15th December 1993. Accessed at: http://www.noolaham.net/project/80/7928/7928.pdf
[74] Tamil Times, "Of Nadesan and Judges" 16:2, 15th February 1997, pg. 15, 18. Accessed at:
http://www.noolaham.net/project/36/3550/3550.pdf
[75] See *In re Nineteenth Amendment,* note 57. Also see *Visuvalingam vs. Liyanage*, 1983 (1) Sri. L.R 203.
[76] Tamil Times, "Assassination Threat on Chief Justice" 3:4, February 1984, page 9. Accessed at:
http://www.noolaham.net/project/32/3124/3124.pdf
[77] Dr. Nihal Jayawickreme, "When President JR Jayewardene Tried To Impeach Chief Justice Neville Samarakoon", 10th November 2012. Accessed at: http://dbsjeyaraj.com/dbsj/archives/12285

in tow – was capable of threatening the security of tenure, and even the physical security of judges. A precedent for the tumultuous events of 2012 had been created.

Non-constitution of the Constitutional Council

The Seventeenth Amendment to the Constitution was created through multiparty support as a response to the erosion of the rule of law. The Amendment was "a creditable attempt at depoliticising public sector appointments, as well as establishing transparency and accountability in public life."[78] Its centrepiece was the Constitutional Council, consisting of the Prime Minister, Speaker of Parliament, Leader of the Opposition, one person nominated by the President, five persons nominated by the Prime Minister and the Leader of the Opposition, and one person nominated by agreement between MPs not belonging to the government or the major party in opposition. This Council was then given the exclusive power to make recommendations to the President in respect of appointments to the Elections Commission, the Public Service Commission, National Police Commission, Human Rights Commission, Bribery Commission, Finance Commission and Delimitation Commission.[79]

In respect of appointments to the higher judiciary – the Supreme Court and Court of Appeal – members of the Judicial Services Commission, Attorney General, Auditor General, Inspector General of Police, Ombudsman and Secretary General of Parliament, nominations were to be made by the President to the Constitutional Council, who then had the authority to approve or disapprove the President's nomination.

While the scheme contemplated by the amendment appeared to work well for a time, shadows of a looming constitutional crisis began to appear when President Kumaratunga rejected the Council's nominee as Chairman of the Elections Commission. When this failure to appoint the Constitutional Council's nominee was litigated in the Court of Appeal, the Court dismissed the application on the basis that the President was shielded by 'blanket immunity' under Article 35 of the Constitution.[80]

When the first Constitutional Council's term ended in 2005, the Janatha Vimukthi Peramuna (JVP) and the Ilankai Thamil Arasu Kadchi (ITAK) disagreed on whether the JVP was entitled to participate in discussions on nominating the tenth member to the Council. On this basis, President Mahinda Rajapaksa – who had been elected in November 2005 – refused to constitute the Council. While it was open to the President to seek an opinion from the Supreme Court under Article 129 of the Constitution on whether the JVP was entitled to participate in nominating the tenth member, and/or whether he could constitute the Council in the absence of one member, he

[78] Elaine Chan, *Sri Lanka's Constitutional Council,* (2008) ***Law and Society Trust Review*** 18. 1,2.
[79] Article 41A – H (amendments subsequently repealed), Constitution of Sri Lanka.
[80] *Public Interest Law Foundation vs. Attorney General,* 2004 (1) Sri. L.R 169

did not do so.[81] Instead, the President proceeded to make direct appointments to a number of offices including to the Supreme Court and the Court of Appeal, despite being bound by the Constitution to make those appointments in consultation with the Constitutional Council. These appointments were facially unconstitutional, in that Articles 41B(1) and 41C(1) provided that "no person shall be appointed by the President" other than by the consultative process between the President and the Constitutional Council.

The implications of the President's actions were grave. On the one hand, the President was engaging in a course of action that was directly in violation of the Constitution. On the other, if the appointments he was making were in fact unlawful, would the decisions made by those appointees also be deemed unlawful? Would decisions of the Supreme Court issued by unconstitutionally appointed judges be valid? Were they judgments at all?

Inevitably, a legal pronouncement on these issues was left to the Supreme Court,[82] though ironically, by a bench comprising the then Chief Justice Asoka de Silva, Justice P.A. Ratnayake and Justice Chandra Ekanayake, all of whom were appointed to their respective positions directly by the President in apparent violation of the Seventeenth Amendment. The Supreme Court heard arguments in two connected cases. The first was a fundamental rights petition against the President challenging his failure to constitute the Constitutional Council. The second, filed by CPA and Mr. Rohan Edrisinha, challenged the appointment of then Attorney General Mohan Peiris. Although the cases were originally filed in 2008, counsel for the petitioners were not heard in support of the application until late 2010. When the Court eventually issued its judgment in March 2011, it dismissed the two petitions on the basis that the immunity conferred on the President by Article 35 precluded judicial scrutiny.[83] The impenetrable veil of immunity had prevailed, with disturbing ramifications for the rule of law.

Present as past – recurring crises

The two incidents detailed here demonstrate two specific challenges to constitutionalism presented by the 1978 Constitution that re-emerged during the recent impeachment crisis – the President's control over Parliament and appointments to the judiciary and the preclusion of any meaningful checks and balances on presidential power through the immunity provided by Article 35. The impeachment of Chief Justice Bandaranayake was characterised by strategies adopted by

[81] For a description of the gamut of deadlock breaking mechanisms and alternative arrangements available to the President to resolve the issue in respect of the tenth member, see Aruni Jayakody, *'The 18th Amendment and the Consolidation of Executive Power'*, in Rohan Edrisinha & Aruni Jayakody (Eds.) (2011) ***The Eighteenth Amendment to the Constitution: Substance and Process***, (Colombo: CPA), 27-29.
[82] An earlier petition – *Centre for Policy Alternatives vs. P. Ramanathan and others* CA[Writ] Application 890/2006 – filed in the Court of Appeal in the form of a quo warranto application against the members of the Human Rights Commission, challenging their appointments on the basis that they were made in violation of the Seventeenth Amendment to the Constitution, was withdrawn after the Commissioners ceased to hold office in 2009.
[83] Sumanasiri Liyanage vs. Mahinda Rajapaksa, SC(FR) 297/2008; Centre for Policy Alternatives vs. Attorney General, SC(FR) 578/2008. Judgment entered on 18 March 2011.

the government, which deliberately disregarded both the constitution and the superior courts. The foregoing discussion demonstrates how the inadequacies of the constitutional framework facilitated such action, and moreover, a history and a political culture of extra-constitutional behaviour on the part of unchecked executives. It is likely that these factors encouraged the present government to unconstitutional conduct and even to push the boundaries of unconstitutionality.

3.2 Parliamentary Supremacy vs. Constitutional Supremacy

The doctrine of parliamentary sovereignty, championed by the English Parliament in the course of its long struggle with the monarchy, was defined by Dicey to mean:

> Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.[84]

This traditional doctrine entailed a number of propositions: 1) Parliament can pass any Act as it pleases; 2) Parliament cannot bind itself or a successor; 3) Parliament cannot abolish the limitation on binding itself or a successor 4) Parliament recognises no rival legislative authority and 4) the courts recognise the sovereignty of Parliament in that the courts will not declare an Act of Parliament invalid and will not take notice of how an Act of Parliament was passed.[85]

While the British Parliament continued to operate under the assumption that it was sovereign, when Ceylon obtained independence in 1948, it did so under a written constitution. That constitution provided that Parliament "shall have the power to make laws for the peace, order and good government of the island."[86] This phrase would have meant plenary and unfettered legislative authority[87], had not section 29(2) imposed certain restrictions, primary of which was a restriction on community and faith based discriminatory legislation.[88] Further, section 29(4) provided that any amendment of the provisions of the constitution would require a two-thirds majority. While the question of whether section 29(2) was unalterable, or only imposed procedural constraints was a key political and constitutional debate at the time, the 1972 Constitution was promulgated with the specific intention of instituting a sovereign Parliament.

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[84] A.V. Dicey, ***Introduction to the Study of the Law of the Constitution,*** 1.
[85] L.J.M. Cooray, (1984), ***Constitutional Governance in Sri Lanka****, (*2nd edition) (Colombo: Stamford Lake) 119
[86] Section 29(1), Ceylon (Constitutional) Order in Council, 1946. ('Soubury Constitution')
[87] Note 75, "***Constitutional Governance in Sri Lanka"*** where L.J.M. Cooray notes that the phrase "power to make laws for the peace, order anf good government of the island" was construed widely to mean plenary lawmaking power "as ample as the Imperial Parliament in the plenitude of its power can bestow" 127.
[88] Section 29(2) read "(2) No such law shall - (a) prohibit or restrict the free exercise of any religion; or(b) make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable; or (c) confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions, or (d) alter the constitution of any religious body except with the consent of the governing authority of that body, so, however, that in any case where a religious body is incorporated by law, no such alteration shall be made except at the request of the governing authority of that body:

Fundamental to this project was eliminating the prospect of judicial review of legislation. As one of the 1972 Constitution's creators explained:

> We are trying to reject the theory of the separation of powers. We are trying to say that nobody should be higher than the elected representatives of the people, nor should any person not elected by the people have the right to throw out the decisions of the people elected by the people. Why are you saying that a judge once appointed should have the right to declare that Parliament is wrong.[89]

As Asanga Welikala notes in a recent publication, a major source of discontent with the Soulbury Constitution was on account of the government and opposition labouring under "a 'quasi-theological' obsession with the Diceyan orthodoxy in regard to parliamentary sovereignty, in which anything short of illimitable legislative omnicompetence seemed to denote an absence or loss of sovereign independence…"[90] Thus, the impetus for giving effect to the notion of parliamentary sovereignty was in fact fuelled by a misplaced conflation of sovereign statehood as a matter of international law[91], with parliamentary sovereignty as understood in the orthodox version of the English doctrine.

This 'fundamental category error' has persisted in the imagination of the Sri Lankan political elite, and continues to fuel resistance to enabling meaningful judicial review of parliamentary action. The 1978 Constitution, which provided for a limited form of pre-enactment judicial review, and did not expressly affirm the principle of parliamentary sovereignty in the same manner as the 1972 Constitution, nonetheless seemed implicitly to perpetuate some of the theoretical assumptions about the ultimate supremacy of Parliament. It certainly does not reflect a clear and unequivocal rejection of the doctrine. In any case, for the reasons discussed in section 3.1 above, the 1978 Constitution's improvements on the provisions concerning the independence of the judiciary were only marginally better than its predecessor.[92] While the 1972 Constitution limited judicial review and judicial independence in the name of parliamentary sovereignty, the 1978 Constitution undermined those values by engorging the power of the executive, the makers of which were rather more concerned with the search for executive stability.[93] As a result, the

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[89] M.J.A. Cooray, ***'Judicial Role under the Constitution of Ceylon/Sri Lanka'***, cited in Prof. C.R. de Silva, *'The Independence of the Judiciary Under the Second Republic of Sri Lanka'*, in C. Amaratunga (Ed.) (1989), ***Ideas for Constitutional Reform***, (Colombo: Council for Liberal Democracy), 485.

[90] Asanga Welikala, *'The Failure of Jennings' Constitutional Experiment in Sri Lanka: How 'Procedural Entrenchment' led to Constitutional Revolution'*, in Asanga Welikala (Ed.) (2012) ***Republic at 40: Reflections on Constitutional History, Theory and Practice,*** (Colombo: CPA), 198

[91] See for instance Article 2(1), Charter of the United Nations, recognising the "sovereign equality" of states.

[92] For an argument in favour of the proposition that the 1978 Constitution was more compatible with the independence of the judiciary than its predecessor, see Prof. C.R. de Silva, ***Ideas for Constitutional Reform***, 487-489. Prof de Silva where he cites the entrenchment of the apex courts through the constitution and introducing the prerequisite of "proved misbehaviour" to the impeachment of a judge as examples of improvements. Unhappily though, the requirement of "proved misbehaviour" appears not to have been of any meaningful significance, at least in respect of the 43rd Chief Justice.

93 Dr. A.J. Wilson, (1980) ***The Gaullist System in Asia – The Constitution of Sri Lanka 1978*** (London: Macmillan Press), 1.

1978 Constitution orchestrated what Rohan Edrisinha terms a "devaluation" of Parliament;[94] reducing the Member of Parliament to a mere "cog in the party wheel"[95] in addition to other forms of control we have discussed in section 3.1. More recently, the growth in the numbers of parliamentarians belonging to the executive – where nearly every single government member of Parliament is a salaried member of the executive – undermines the traditional role of Parliament as a check on the executive branch.

This undermining of Parliament was not, however, reflected in Parliament's role *vis-à-vis* the courts. As we noted previously, the 1978 Constitution provided for an attenuated form of judicial review of legislation.[96] As a matter of drafting history too, the 1978 formulation describing the exercise of judicial power did not mark a radical departure from the 1972 formulation. The First Republican Constitution laid down that the National State Assembly (the legislative body) "exercises judicial power through courts and other institutions created by law..."[97] The 1978 Constitution's formulation, remarkably similar, also lays down that the "judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law..."[98] However, courts have generally understood the phrase "by Parliament through courts" to mean that courts are subject to the jurisdictional limitations imposed on them by the constitution or statute as relevant.[99] While this appears to be a somewhat unobjectionable distribution of competences, it is notable that while executive power shifted from the National State Assembly to the President in 1978, a corresponding change did not take place in respect of judicial power.

This fundamental continuity of Parliament's position in respect of the judicial branch has effectively stymied any bold assertion of residual judicial power. Indeed the judiciary's own understanding of its powers has contributed, in part, to a deep conservatism in its dealings with Parliament. For example, the Supreme Court dismissed CPA's arguments in a constitutional challenge brought in respect of the Monetary Law (Amendment) Bill after the Bill had been passed by Parliament with a number of significant amendments made only at the committee stage. Because pre-enactment review of legislation takes place immediately after a Bill is placed on the Order Paper of Parliament, amendments to Bills made at the (later) committee stage are not subject to the scrutiny of the Supreme Court. This anomaly creates a loophole through which unconstitutional provisions may be enacted without judicial review. CPA argued that where committee stage amendments are included, the Supreme Court must prevent abuse of process by

[94] Rohan Edrisinha, '*Sri Lanka: Constitutions without Constitutionalism. A Tale of Three and a Half Constitutions*', in Rohan Edrisinha & Asanga Welikala (Eds.) (2008) ***Essays on Federalism in Sri Lanka***, (Colombo: CPA), 32
[95] *Gunawardena vs. Abeywardena*, SC 51/87 (Spl.), Supreme Court Minutes of 18 January 1988.
[96] Article 121, Constitution of Sri Lanka permits pre-enactment judicial review, where a citizen is permitted to file an application in the Supreme Court within one week of a Bill being placed on the order paper of Parliament, on the basis that the Bill or selected provisions are inconsistent with the Constitution. The Court is then given three weeks in which to make its determination. In respect of Bills deemed "urgent" by Cabinet, the President requests the Supreme Court to pronounce on its validity. The court has only twenty-four hours within which to communicate its determination.
[97] Article 5(c), First Republican Constitution of Sri Lanka, 1972.
[98] Article 4(c), Constitution of Sri Lanka
[99] See *Farook vs. Raymond*, 1996 (1) Sri. L.R 217, 228.

asserting post-enactment review in respect of those amendments. Dismissing the petition,[100] the court cited article 80(3), which states; "(w)here a Bill becomes law upon the certificate of the President or the Speaker, as the case may be, being endorsed thereon, no court or tribunal shall inquire into, pronounce upon or in any manner call in question the validity of such Act on any ground whatsoever." The petitioners were, in effect, asking the court to exercise a residual judicial prerogative to check abuse of process. While the court may have taken a more expansive view of their power to check blatant abuse of process by the executive in Parliament by reading into article 80(3) an exception in respect of committee stage amendments, it instead chose to adopt a more modest approach, significantly undermining a citizen's right to challenge unconstitutional legislation.

The doctrine of parliamentary sovereignty, having outlived the 1972 Constitution, has also re-emerged in more explicit terms. As we have noted, the most recent assertion of parliamentary supremacy was made in defence of Parliament's decision to proceed with the impeachment of the 43rd Chief Justice, despite an opinion of the Supreme Court and a judgment of the Court of Appeal deeming the process unconstitutional. In his special ruling rejecting the notices issued on himself and members of the Select Committee of Parliament by the Court of Appeal, the Speaker stated:

> No person or institution outside Parliament has any authority whatsoever to issue any directive either to me as Speaker or to Members of the Committee appointed by me. This is a matter which falls exclusively within the purview of Parliament's authority. The established law in this regard was exhaustively surveyed by my distinguished predecessor, the late Hon. Anura Bandaranaike in his historic ruling delivered in this august Assembly on 20th June, 2001. It is clear from this ruling that the matters concerned fall within the exclusive domain of Parliament and that no intervention in any form by any external agency is consistent with the established principles of law, and is therefore to be rejected unreservedly as an unacceptable erosion of the powers and responsibilities of Parliament.[101]

The ruling came amidst a media flurry, with government ministers and apologists proclaiming the incompetence of courts to pronounce on parliamentary acts. Even the main opposition party – the UNP – appeared to support this invocation of parliamentary supremacy.[102] The ruling by Anura Bandaranaike, alluded to in Speaker Rajapaksa's ruling, was made in response to an interim order issued by the Supreme Court restraining Speaker Bandaranaike from appointing a Select Committee to inquire into the charges presented by a number of parliamentarians against

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[100] *In re Monetary Law (Amendment) Bill*, SC Special Determination 8/2003, April 2003.
101 Ruling by the Hon. Speaker on the Question of Privilege raised by the Leader of the House regarding Supreme Court Notices, Parliamentary Debates (Hansard) Volume 213 No.9, 29 November 2012, 1835.
102 Ibid, 1836. "I would like to make particular mention of the view, clearly expressed by the Hon. Leader of the Opposition in the course of his intervention, that the purported Notices constitute an unwarranted interference with the powers and procedures of Parliament, and are invalid. This was stated with great clarity by the Hon. Joseph Michael Perera as well."

the then Chief Justice Sarath Silva. That order too was based on an apprehension that Standing Order 78A – which provided for investigations and findings of guilt against a sitting judge by a PSC – was inconsistent with Article 4(c) under which judicial power was to be exercised "through courts." Speaker Bandaranaike's ruling in Parliament refusing to recognise the validity of the court's decision was heavily laced with references to English parliamentary conventions and was a categorical reaffirmation of the supremacy of Parliament. The Speaker declared: "I deem it a singular honour that fate has bestowed upon me as Speaker of this august Assembly, by affording me the historic opportunity of reaffirming the principles underlining the ***supremacy of Parliament*** (emphasis added)."[103] The impending constitutional crisis, on that occasion, was averted by the dissolution of Parliament by the President. However, the internal contradictions within the constitutional architecture of the country that recognised the Supreme Court's exclusive jurisdiction to interpret the constitution on the one hand,[104] while keeping alive the notion of parliamentary supremacy on the other, had not been resolved.

Thus, more than a decade before the controversy surrounding the impeachment of the 43rd Chief Justice, Parliament had – through its then Speaker – set itself on a collision course with the judiciary by invoking the supremacy of Parliament and refusing to recognise orders made by courts. When that eventuality came, the overmighty executive weighed in again, affirming the Speaker's decision to proceed with the impeachment in defiance of court orders.

[103] Pres Inform 'Speaker has power appoint Select Committee', June 21. 2001. Accessed at: http://www.priu.gov.lk/news_update/Current_Affairs/ca200106/20010621power_to_appoint_Select_Committee.htm
[104] See Article 125(1), Constitution of Sri Lanka. Also see *Premachandra vs. Jayawickreme*, 1994 (2) Sri. L.R 90, 98-100.

4. Conclusion and Recommendations

The recent impeachment of the 43rd Chief Justice has revived important questions about the health of Sri Lanka's democracy. The vicious assault on the independence of the judiciary – which saw judicial officers being attacked, lawyers threatened and judgments violated – was outrageous when it happened, but in the light of the constitutional weaknesses, the history of executive behaviour and the culture of politics outlined above, it was almost pre-ordained. The Rajapaksa regime's intolerance of dissent and contempt for values of constitutionalism has been well documented elsewhere. However, as we have argued, the decline did not commence with the advent of the present regime. Instead, the regime inherited a constitutional and political structure that entrenched positions that undermine the independence of the judiciary. Chief among these are an overmighty presidency, and a political culture that has demonstrated an enduring attachment to the notion of a Parliament that is sovereign. Structurally and doctrinally, therefore, the present government inherited a framework of government that could readily be deployed – and indeed improved upon as the Eighteenth Amendment demonstrates – to achieve its own objectives of regime consolidation through the hyper-centralisation of power, and without any meaningful constitutional constraints that could prevent the realisation of such undemocratic aims.

Recommendations

- There are a number of reforms that are urgently needed in the light of the numerous violations of legal and political principles associated with constitutional democracy that were highlighted in the unlawful impeachment of the 43rd Chief Justice. While we are firmly of the view that a fundamental and thoroughgoing overhaul of Sri Lanka's constitutional order is necessary in order to adequately address the unresolved issues of democracy and pluralism that have bedevilled our post-independence history, the specific matters that require attention in regard to judicial independence and the rule of law are the following, which entail both constitutional and statutory reforms.

- A more robust articulation of constitutional first principles is necessary, including the principles of the supremacy of the constitution, the separation of powers, the rule of law and the independence of the judiciary.

- These values need to be reinforced by a proper framework and distribution of constitutional powers and functions between the three organs of government. In particular, independently of the debate about the abolition or reform of the current institutional form of the executive

presidency and the alternatives thereto, there needs to be much more meaningful checks and balances on the executive.

- These include a strengthening of the oversight role of Parliament and the provision for comprehensive judicial review of executive action. It follows that the pervasive legal immunity currently granted to the president must be abolished, in particular immunity in respect of acts or omissions under colour of office.

- To reinforce the independence of Parliament, there must be a constitutional limitation on the number of ministers (both Cabinet and deputies), and a limitation on Members of Parliament holding any other remunerated office connected with the executive (e.g., as presidential advisors). While the most appropriate framework on governing crossovers – involving a balance of principles between representation and conscience – require further public discussion, a complete prohibition on any ministerial or other remunerated executive office being accepted by any Member of Parliament that crosses over from the opposition to the government benches must be immediately introduced.

- The much-abused 'urgent bill' procedure, which attenuates parliamentary and judicial supervision of the legislative process, must be abolished.

- The doctrine of the supremacy of parliament must unequivocally be repudiated, and the supremacy of the constitution reaffirmed. In doing so, both legislation and other parliamentary action must be subject to comprehensive judicial review. In improving accessibility to public law remedies and procedures (the writ and fundamental rights jurisdictions) through repealing time limits and other procedural impediments, the first instance fundamental rights jurisdiction must be devolved on the Provincial High Courts, with provision for appeals to the Court of Appeal, and to the Supreme Court on matters of law. The judicial power to review the constitutionality of any law must be made available to any court in any proceeding, subject to a necessary appeals procedure.

- The Eighteenth Amendment to the Constitution must be repealed forthwith, including by the restoration of the two-term limit on presidential office. The framework for key public appointments that was established under the Seventeenth Amendment must be restored, with necessary amendments to ensure operational effectiveness, which should include an express provision precluding any presidential discretion in appointments recommended by the Constitutional Council.

- The independence and impartiality of judges need to be constitutionally reaffirmed, in line with contemporary standards reflected in numerous restatements of best practice in

international and Commonwealth instruments including the Bangalore Principles of Judicial Conduct and the Latimer House Guidelines. In accordance with the orders of the Court of Appeal and the Supreme Court in the Bandaranayake impeachment process, legislation must be enacted immediately to provide for the procedure to be followed, the mode of proof, the burden of proof and the standard of proof of any alleged misbehaviour or incapacity, and the right of the Chief Justice or other judge of the superior courts to appear before and be heard by any Parliamentary Select Committee in person or by representative. Any impeachment of a sitting judge should be contingent on a prior finding of guilt by a court of law. Judges should not be impeached on the basis of findings of fact by Members of Parliament.

- The government must constructively engage international mechanisms and UN special procedures such as the UN Special Rapporteur on the Independence of Judges and Lawyers. Critically, undertakings and guarantees made to international bodies must be implemented in good faith. This assumes greater importance given that the government represented by the Attorney General in the cases involving Dr. Bandaranayake's removal objected to the Supreme Court and Court of Appeal exercising judicial review over Select Committees of Parliament constituted in terms of Standing Order 78A. This position stands in stark contrast to the unequivocal representations made by a government delegation to the Human Rights Committee (the treaty body for the International Convention on Civil and Political Rights) that Select Committees of Parliament constituted in terms of Standing Order 78A do attract judicial review.[105]

[105] UN Human Rights Committee (HRC), "UN Human Rights Committee: Fourth Periodic Report, Sri Lanka", 18 October 2002, CCPR/C/LKA/2002/4, para. 302. Accessed at: http://www.refworld.org/docid/3efb5b894.html

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