



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

Executive Summary

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A report of the International Bar Association's Human Rights Institute

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Executive Summary

Sri Lanka is facing a constitutional crisis. Its 43rd Chief Justice, a woman who had been on the Supreme Court for 14 years, has been removed by the country's parliament and President, in contravention of an unequivocal ruling by Sri Lanka's Court of Appeal. President Mahinda Rajapaksa has chosen as Chief Justice Bandaranayake's replacement a lawyer who has spent several years serving the Government of Sri Lanka, most recently as Attorney-General and legal advisor to the cabinet. Meanwhile, people opposed to her removal have suffered harassment, intimidation and threats of death from persons unknown. This follows years of executive encroachment into the judicial sphere, and a series of assaults, abductions and murders committed against critics of the government that have been rarely investigated and never prosecuted.

Set in that context, the removal of Chief Justice Bandaranayake is not just a political squabble; it is undermining public confidence in Sri Lanka's already fragile rule of law, and threatens to eviscerate the country's judiciary as an independent guarantor of constitutional rights. In the view of the International Bar Association's Human Rights Institute (IBAHRI), the decision to oust Bandaranayake is also incompatible with the core values and principles of the Commonwealth of Nations, including the respect for separation of powers, rule of law, good governance and human rights that has been affirmed in the recently promulgated Charter of the Commonwealth. For that reason, the IBAHRI invites the Commonwealth to carefully consider this report and, in particular, its recommendations 9–10 (page 10), when deciding how to proceed with arrangements for the forthcoming Commonwealth Heads of Government Meeting, currently scheduled to take place in Colombo, Sri Lanka, in November 2013.

The IBAHRI report

This report is published by the IBAHRI as a rapid response to these events. It has been written by a delegation comprising: the Honourable Justice Muhammad Lawal Uwais, a former Chief Justice of the Federal Republic of Nigeria; Dato' Param Cumaraswamy, the first United Nations (UN) Special Rapporteur on the Independence of Judges and Lawyers; Sadakat Kadri, a British barrister and the mission rapporteur; and Shane Keenan, IBAHRI Programme Lawyer.

This delegation is the second to have been constituted. The IBAHRI originally intended to send Sadakat Kadri and Shane Keenan, along with two others (India's ex-Chief Justice JS Verma and Baroness Usha Kumari Prashar of the British House of Lords), but all were denied visas to enter Sri Lanka. The IBAHRI's attempts to resolve this difficulty with the Government of Sri Lanka were

unsuccessful, and members of the current delegation therefore had to research and write this report remotely. Such a situation has only ever arisen once before, when Fiji refused in 2008 to permit the IBAHRI to investigate the legal consequences of a recent coup d'état. On that occasion, its delegation wrote a report nonetheless, which was published shortly before Fiji's suspension from the Commonwealth in 2009.

The IBAHRI's inability to visit Sri Lanka imposed some obvious logistical difficulties, in that its delegation was unable to speak to interested parties on the ground. Nonetheless, it held a series of in-depth conversations by telephone and internet with a range of almost 20 key individuals, including judges, lawyers, journalists, parliamentarians and civil society activists within the country. The Government of Sri Lanka was also invited to participate, but it declined to acknowledge the IBAHRI's requests for interviews.

The report focuses on two issues: the removal of Chief Justice Bandaranayake (Chapter Two); and the perilous state of Sri Lanka's legal profession (Chapter Three). As it shows, these two issues are closely connected. Judicial independence and the conscientious practice of law have been under pressure for more than a decade, and victory over the Liberation Tigers of Tamil Eelam (LTTE) in May 2009 did not produce the restoration of balanced government for which many people hoped. Executive encroachments in fact escalated, and the Chief Justice's mistreatment should therefore be seen as the culmination of a process that has already caused immense damage to the rule of law.

The constitutional background

Since the Constitution of Sri Lanka was enacted in 1978, there have been concerns that it inadequately protects judges against pressure from the executive, the legislature, and superiors within the court system itself. Their security of tenure was rendered particularly vulnerable by the lack of transparent and accountable procedures for the appointment, transfer, discipline and removal of judicial officers.

The absence of these safeguards was a matter of serious concern to the IBAHRI at the time of its first visit to Sri Lanka in 2001. The 17th Amendment to the Constitution subsequently provided for an independent Constitutional Council that would appoint key public officials, including senior judges and members of the Judicial Service Commission, but this body was then allowed to fall into abeyance after 2005. The IBAHRI's second Sri Lanka report, written in 2009, considered this to be 'one of the most critical unresolved rule of law issues in the country'.

The current crisis owes much to a measure taken by the current government to remove even this poorly implemented safeguard. The 18th Amendment to Sri Lanka's Constitution, enacted in September 2010 by the recently re-elected United People's Freedom Alliance (UPFA) government, effectively gave President Mahinda Rajapaksa unlimited powers to appoint all of Sri Lanka's most important officials, the members of eight agencies including the Judicial Service Commission, and every judge on the Supreme Court and Court of Appeal. Its passage has markedly unbalanced the country's constitutional arrangements, further subverting mechanisms that were originally intended to facilitate scrutiny of the executive and guarantee the impartiality of judges.

The removal of Chief Justice Bandaranayake

Chief Justice Bandaranayake was removed after presiding over two Supreme Court panels that gave rulings against the government. Testimony from several witnesses leaves the IBAHRI in no doubt that this influenced the Sri Lankan government's decision to remove her. A Parliamentary Select Committee (the 'Committee') went on to conduct an inquiry which, though supposedly compliant with relevant rules of procedure (Standing Order 78A), was hurried, secret and contrary to principles of natural justice. The majority that voted to convict her were all members of the party moving to remove her, and all were all ministers and deputy ministers in the government. They denied her repeated requests for open and transparent procedures and, when her lawyers were shown documentary evidence for the first time – 989 pages – they were told that the trial proper would begin the next day. The Chief Justice walked out in protest, followed soon afterwards by the Committee's four opposition members, and the majority then heard from 16 witnesses in their absence. Less than 12 hours later, the Committee had already drafted a 35-page report that found her guilty of misbehaviour serious enough to justify her removal from office.

The IBAHRI considers that this inquiry was fundamentally flawed: it lacked independence, both real and perceived; mistakenly ignored the presumption of innocence; gave the Chief Justice inadequate notice of the evidence that would be used against her; and was improperly held in secret. This violated rules of natural justice that are intrinsic to the common law and Sri Lanka's Constitution, as well as international legal obligations to which Sri Lanka is committed, including the International Covenant on Civil and Political Rights and the Commonwealth (Latimer House) Principles on the Three Branches of Government (the 'Latimer House Guidelines').

The procedure's illegality under Sri Lankan law

While the Committee was proceeding towards its decision, lawyers acting on behalf of Chief Justice Bandaranayake sought relief from the Court of Appeal, which obtained the Supreme Court's opinion on a constitutional question before handing down a decision on 7 January 2013. This decision ruled that the Committee's procedures were legally flawed and that its determination of the Chief Justice's guilt was therefore invalid. Parliament chose nonetheless to recommend four days later that she be removed. The President then signed a decree of dismissal and immediately appointed a new Chief Justice. In the IBAHRI's opinion, this decision to ignore a clear expression of Sri Lankan law, resting on the combined authority of the Court of Appeal and the Supreme Court, compounds the illegality of the Chief Justice's removal.

Comparative processes and international standards

As well as breaching Sri Lankan law, the procedure used to remove Chief Justice Bandaranayake ignored or violated relevant international norms. As was affirmed by the UN General Assembly on 1 April 2011, an independent and impartial judiciary is essential for 'the protection of human rights, the rule of law, good governance and democracy', and Sri Lanka's recent actions put it in clear breach of the International Covenant on Civil and Political Rights, the UN Basic Principles on the Independence of the Judiciary, the Beijing Statement of Principles of the Independence of the Judiciary, and the International Bar Association's Minimum Standards of Judicial Independence.

The IBAHRI is particularly concerned about Sri Lanka's disregard for the Commonwealth Principles on the Three Branches of Government and the Latimer House Guidelines that they incorporate. Among other things, these state that:

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

A Supreme Court under threat

Within a day of dismissing Chief Justice Bandaranayake, President Rajapaksa had hand-picked her replacement. The man he chose, Mohan Peiris, had extremely close connections to his government. Mr Peiris had occupied a number of important posts over the previous five years, most recently those of Attorney-General and legal adviser to the cabinet. The fact that he also owes his new position to presidential patronage further jeopardises judicial independence within the country. The Sri Lankan government and Mohan Peiris now have a similar interest in ignoring, and eventually reversing the Court of Appeal decision of 7 January 2013, as this would formally legitimise the impeachment. There are signs that, as a consequence, the Supreme Court's integrity has already been seriously compromised.

The IBAHRI is particularly concerned by the fact that the judge who has taken control of all impeachment-related hearings to date, Justice Shiranee Tilakawardane, testified before the Committee that condemned Chief Justice Bandaranayake. Her evidence was not merely incidental; the Committee considered it 'very helpful' in justifying the 'accurate conclusion' it claimed to reach about the Chief Justice's guilt. It is axiomatic that judges should play no role in considering a cause in respect of which they have previously testified, even if their bias might be merely apparent. This principle, basic to the common law and recognised by international instruments such as the International Bar Association's Minimum Standards of Judicial Conduct and the Bangalore Principles of Judicial Conduct, is fundamental to the integrity of justice. It has been repeatedly violated in Sri Lanka's current Supreme Court.

The perilous state of the legal profession

In recent years, the rule of law in Sri Lanka has been eroding, and there appears to have been a systematic effort to intimidate and discredit lawyers and others who advocate and promote a respect for fundamental rights. Twenty-two journalists and media activists have been murdered over the last six years, and countless others have disappeared. Even as this report was being written, human rights lawyer Lakshan Dias reported to the authorities a suspected attempt at abduction; and, Faraz Shauketaly, a journalist who had been writing about high-level corruption was shot and seriously injured inside

his own house by three armed assailants. As this report demonstrates, there has been no credible investigation in any of these cases, and it identifies 16 serious crimes against lawyers, journalists and human rights activists that demand the particularly urgent attention of the Sri Lankan authorities.

These attacks are not phenomena to be considered in isolation; they are inextricably bound up with the removal of Chief Justice Bandaranayake. There have been at least seven incidents of actual or threatened violence against lawyers who spoke out against her impeachment. Her appointed successor, meanwhile, is a recent Attorney-General who did not prosecute a single crime against lawyers, journalists and human rights defenders during his 33-month tenure. The report enumerates at least nine specific high-profile cases that Mohan Peiris failed to investigate involving threats, attacks, arsons, disappearances or murders. The most notorious of these involves the abduction of journalist Prageeth Ekneligoda in January 2010; Mohan Peiris publicly told the UN Human Rights Council that his government had information that Mr Ekneligoda was living abroad, but then informed Sri Lanka's own courts that 'only God knows where [he] is'. There were also at least five occasions on which Mr Peiris discontinued major prosecutions and fundamental rights petitions, involving allegations of fraud, kidnap and murder, in circumstances that apparently favoured the personal, political or commercial interests of government officials.

In these circumstances, sincere and systematic reforms are necessary if judicial independence is to be salvaged in Sri Lanka. Although the Sri Lankan government has formally committed itself to good governance and the rule of law through international instruments such as the Charter of the Commonwealth, it has failed to honour past undertakings to protect lawyers and human rights defenders from threats of serious injury or death. This has had corrosive consequences, because its inaction is spawning a political culture where impunity has become commonplace, or even the norm.

Conclusion

The ramifications of the removal of Chief Justice Bandaranayake go far beyond the disputes that brought about the present crisis. The executive has been dismantling institutional limits on its power since the passage of the 18th Amendment to the Constitution, and any Chief Justice appointed directly by the President in present circumstances is liable to lack the capacity to stand up for the judiciary against the executive. The impeachment also weakens Sri Lanka's ability to address any human rights abuses that might have taken place during the final phase of its quarter-century civil war. It is beyond this report's scope to assess the extent of such abuses, but the need for a reckoning has been acknowledged by the Sri Lankan government itself through its establishment of the Lessons Learnt and Reconciliation Commission, and it has been reaffirmed recently by the UN High Commissioner for Human Rights. If there is to be a just and equitable assessment of past crimes, as well as sustainable peace, Sri Lanka requires an effective and stable legal system. This demands a judiciary with integrity and independence. Whether such a judiciary can continue to operate in Sri Lanka will depend largely on the willingness of the current government to respect the decision of its Court of Appeal, by reinstating Chief Justice Bandaranayake.

The IBAHRI makes the following ten recommendations:

TO THE AUTHORITIES OF SRI LANKA

1. Immediate steps should be taken to reverse the impeachment and replacement of Chief Justice Bandaranayake, consistently with the Sri Lankan Constitution and extant rulings of the Court of Appeal and Supreme Court.
2. Standing Order 78A should be repealed insofar as it is not already void, and consideration should be given to the creation of a disciplinary procedure for judges that is fully consistent with the Sri Lankan Constitution, common law principles and international human rights law. Among the features it should include are:
 - (i) rules to ensure that the case against a judge is considered by a diverse body of people independent of those who made the initial complaint;
 - (ii) a guarantee of the presumption of innocence;
 - (iii) rules of evidence and provisions as to standard of proof;
 - (iv) guarantees that an impugned judge will have timely notice of particularised charges, full disclosure of adverse evidence, and the right to confront and call witnesses, either in person or through freely chosen legal representatives;
 - (v) provision for open hearings at the option of the judge concerned; and
 - (vi) explicit acknowledgment that disciplinary hearings against judges are subject to judicial review in the Court of Appeal and fundamental rights applications in the Supreme Court.
3. A Code of Conduct for judges should be drawn up as a matter of urgency, taking full account of the principles set out in relevant international instruments, including the Bangalore Principles of Judicial Conduct and the Latimer House Guidelines.
4. The 18th Amendment to the Constitution should be repealed and steps should be taken to create a body (which may or may not be called a Constitutional Council) that is independent of the President and responsible for the appointment of all senior officials and judges in Sri Lanka. Its remit should cover at least those office holders, institutions and judges specified in Schedules 1 and 2 of Article 41A of the Constitution, namely the Election Commission, the Public Service Commission, the National Police Commission, the Human Rights Commission of Sri Lanka, the Permanent Commission to Investigate Allegations of Bribery and Corruption, the Finance Commission and the Delimitation Commission; the Chief Justice and judges of the Supreme Court; the President and judges of the Court of Appeal; members of the Judicial Service Commission; and the Attorney-General, the Auditor-General, the Parliamentary Commissioner for Administration (Ombudsman) and the Secretary-General of Parliament.

5. The Judicial Service Commission should be reformed consistently with observations made in the Latimer House Guidelines about judicial independence, which are currently being ignored in Sri Lanka.
6. The Government of Sri Lanka should state the progress that has recently been made in all those credibly alleged or proved cases of serious criminality set out in Chapter Three of this report. In particular, it should make clear what it has done to investigate and/or prosecute the following incidents, and, insofar as the answer is nothing, what specific changes it proposes to make in the immediate future:
 - (i) the grenade attack on the home of human rights lawyer JC Weliamuna on 27 September 2008;
 - (ii) the death threats and arson reported by human rights lawyers Amitha Ariyatne and HRDG Mendis between September 2008 and January 2009;
 - (iii) the bombing on 6 January 2009 of the Sirasa TV offices by a squad of masked men;
 - (iv) the murder of the editor of the *Sunday Leader*, Lasantha Wickramatunge, on 8 January 2009;
 - (v) the assault of newspaper editor Upali Tennakoon and his wife on 29 January 2009;
 - (vi) the abduction, arrest or murder of human rights worker Stephen Sunthararaj on or after 7 May 2009;
 - (vii) the abduction and assault of journalist Poddala Jayantha on 1 June 2009;
 - (viii) the disappearance in January 2010 of journalist Prageeth Ekneligoda;
 - (ix) the serious assault on District Court judge and secretary of the Judicial Service Commission, Manjula Tillekaratne, in October 2012;
 - (x) the threats made against lawyer and anti-impeachment activist Gunaratne Wanninayake on 17 December 2012;
 - (xi) the gunfire incident outside the home of Bar Association past-president, Wijedasa Rajapakse PC, on 20 December 2012;
 - (xii) the death threats experienced by the recently elected Bar Association president, Upul Jayasuriya;
 - (xiii) the threatening letters sent in January 2013 to lawyers Romesh de Silva PC, Jayampathi Wickremarathna PC, JC Weliamuna and MA Sumanthiran;
 - (xiv) the death threats reported on 23 January 2013 by lawyer Nagananda Kodituwakku;
 - (xv) the shooting of journalist Faraz Shauketaly on 15 February 2013; and
 - (xvi) the police complaint made by human rights lawyer Lakshan Dias on 25 February 2013 in relation to a group of menacing motorcyclists and the occupants of a white van.

TO FOREIGN GOVERNMENTS AND NON-GOVERNMENTAL ORGANISATIONS

7. Caution should be exercised before extending offers of assistance to those officials and bodies appointed directly by the President under the 18th Amendment to the Constitution (named in aforementioned Recommendation 4). Efforts to train or otherwise support the lawyers and judges of Sri Lanka should not further erode the separation of powers principle, but should be channelled towards professional organisations that are elected, representative, and fully independent of the executive.
8. The Government of Sri Lanka should be invited to specify how international governments and law enforcement agencies might help it to solve Sri Lanka's many uninvestigated assaults, kidnappings, acts of torture and murders, including all those crimes committed against lawyers, journalists and human rights defenders referred to in Recommendation 6, above.

TO THE UNITED NATIONS, THE COMMONWEALTH SECRETARIAT, THE COMMONWEALTH MINISTERIAL ACTION GROUP AND MEMBER COUNTRIES OF THE COMMONWEALTH

9. Efforts to promote reforms consistent with the above recommendations should be redoubled, and the Government of Sri Lanka should be invited to indicate precisely what assistance it requires to put such reforms into effect. The government should be asked in particular how it will facilitate future visits by, and cooperation with, the UN Special Rapporteur on the Independence of Judges and Lawyers, the UN Special Rapporteur on the Situation of Human Rights Defenders, and the UN Working Group on Enforced or Involuntary Disappearances.
10. The Commonwealth should assess the seriousness with which the Sri Lankan authorities take these Recommendations, monitor the urgency with which they are acted upon, and consider with great care:
 - (i) whether they are respecting its core values and principles, including the respect for separation of powers, the rule of law, good governance and human rights enshrined in its Charter;
 - (ii) whether the Commonwealth's reputation would be more enhanced or tarnished if Sri Lanka were to host the forthcoming Commonwealth Heads of Government Meeting and act as its Chair-in-Office for the next two years.



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