



A Crisis of Legitimacy:

The Impeachment of Chief Justice Bandaranayake and the Erosion of the Rule of Law in Sri Lanka

April 2013

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 12), 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 Kumaraswamy, 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 Committee Against Torture 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 the 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.

Chapter One: Introduction

1.1 The IBAHRI delegation and its mandate

The International Bar Association (IBA), established in 1947, is the world's leading organisation of international legal practitioners. Its membership includes 45,000 lawyers and more than 200 bar associations and law societies spanning every continent. It consequently influences the legal profession and helps shape the development of law reform throughout the world. The IBA Human Rights Institute (IBAHRI) works to promote, protect and enforce human rights under a just rule of law and to preserve the independence of the judiciary and the legal profession.

The IBAHRI's decision to conduct this fact-finding mission was prompted in part by its history of engagement with Sri Lanka's bar and judiciary, which has previously resulted in the publication of reports in 2001 and 2009. It grew increasingly concerned about reported attacks against legal professionals during 2012, and the initiation of impeachment proceedings on 1 November 2012 against Sri Lanka's 43rd Chief Justice, Shirani Bandaranayake, led critics to complain that judicial independence and the rule of law were threatened within the country. In February 2012, the IBAHRI, therefore, decided to organise a remote rapid response mission to investigate and report on recent events. The reason that its members assembled outside Sri Lanka itself is explained in section 1.2 below. Their precise mandate was as follows:

1. to examine the impeachment proceedings initiated by Sri Lanka's Parliament against Chief Justice Shirani Bandaranayake;
2. to analyse the domestic and international legal norms applicable to the investigation and removal of judges and their implementation in relation to the impeachment proceedings against Chief Justice Shirani Bandaranayake;
3. to examine any relevant related matters, including the functioning of the judicial system, the independence of judges and the legal profession and the application of the principle of the separation of powers in Sri Lanka; and
4. to write and publish a report containing the findings of the mission with relevant recommendations.

The IBAHRI expresses its deep gratitude to the members of its mission, who were:

The Honourable Justice Muhammad Lawal Uwais, Chief Justice of the Federal Republic of Nigeria and Chairman of the National Judicial Council (1995–2006)

Muhammad Lawal Uwais was called to the Bar by the Middle Temple, London, in 1963, after graduating from the University of London. He served as a State Counsel and Senior State Counsel (1966–1970), before his appointment as a Judge of the High Court, and later Chief Judge, of Kaduna State (1973–1976). In 1977, he was appointed a Justice of the Court of Appeal and, in 1979, as a Justice of the Supreme Court of Nigeria. In 1995, he was appointed Chief Justice of the Federal Republic of Nigeria and Chairman of the National Judicial Council.

Justice Uwais has served as Chairman of the Nigerian Body of Benchers (1993–1994) and as Chairman of the Board of Governors of the National Judicial Institute of Nigeria (1995–2006). He was Chairman of the Judicial Commission of Inquiry into the Awards of Contracts by the Military Government of North Central State (1976); Chairman of the Jimeta Disturbances Tribunal, Gongola State of Nigeria (1984); and a Commonwealth Member of the Presidential Commission of Inquiry into the deaths of senior army personnel, Sri Lanka (1993).

He is the Honorary President of the World Jurist Association, Washington DC; Honorary Fellow of the Society for Advanced Legal Studies, London; and a Member of the Board of Trustees, Global Legal Information Network Foundation (GLIN), Washington DC. He was Chairman of the Nigerian Electoral Reform Committee (2007–2008) and was appointed Chancellor of Umaru Musa Yaradua University, Katsina, Katsina State in 2011.

Dato' Param Kumaraswamy, the first UN Special Rapporteur on the Independence of Judges and Lawyers (1994–2003)

Param Kumaraswamy received his early education in Kuala Lumpur. He is a Barrister-at-Law of the Inner Temple, London, and has been an Advocate and Solicitor in Kuala Lumpur since 1967. He was the President of the Malaysian Bar Council between 1986 and 1988, and was also one of the founding members of the Bar Council's Human Rights and Legal Aid Committees.

In 1994, Dato' Param Kumaraswamy was appointed by the UN Commission on Human Rights as the first United Nations Special Rapporteur on the Independence of Judges and Lawyers. He served under that mandate until 2003. As the UN Special Rapporteur, he intervened in more than 100 countries and conducted numerous fact-finding missions to investigate attacks on the independence of judges and lawyers and on the rule of law. He reported annually, for nine years, to the Commission on Human Rights. Having been associated with the drafting of the Bangalore Principles of Judicial Conduct from the inception, he presented the final draft to the Commission in April 2003.

Between 1986 and 1989, Dato' Param Kumaraswamy was the Chairman of the Human Rights Committee of the International Bar Association. He is a life member of the Law Association of Asia and the Pacific (LAWASIA), having served as its President from 1993 to 1995. Between 1990 and 2005 he served as a Commissioner of the International Commission of Jurists, of which he was Vice-President from 2004 to 2005. He is also a member of the Working Group for the establishment of an Association of Southeast Asian Nations (ASEAN) Human Rights Mechanism.

In 1987, Honorary Membership of the Law Society of New Zealand was conferred on him. In 1999, he received the International Peace and Justice Award from the Irish American Unity Conference and, in 2002, the 'Justice in the World Award' of the International Association of Judges. In 2003, he was called to the Bench of the Honourable Society of the Middle Temple in London as an Honorary Benchers. In the same year Honorary Membership of the Law Society of England and Wales was conferred on him. On 19 September 2005, he received the 2005 Gruber Justice Prize at the Columbia University Law School, New York.

Sadakat Kadri, barrister at London's Doughty Street Chambers and rapporteur for the mission

Sadakat Kadri is a British barrister and qualified New York attorney, with a first-class law degree from Trinity College, Cambridge, and an LLM from Harvard Law School. He specialises in criminal, constitutional and human rights law, and he has represented clients and appellants at all levels of the UK judicial system, including death row prisoners before the Privy Council. His international practice has included work at the American Civil Liberties Union, help in prosecuting Malawi's former President Hastings Banda for murder and advice on an appeal in 2001 that successfully established the illegality of a Fijian coup d'état. He has observed court hearings in the Middle East on behalf of the International Parliamentary Union; he was a delegate on IBAHRI's first mission to Syria in March 2011; and he acted as rapporteur for IBAHRI's first mission to Myanmar in August 2012. Kadri's most recent book is *Heaven on Earth: A Journey Through Shari'a Law* (2012); he is also the author of *The Trial: A History from Socrates to O.J. Simpson* (2005); and he writes for various publications including the *London Review of Books*.

Shane Keenan, Programme Lawyer at the IBAHRI and organiser of the mission

Shane Keenan is a Programme Lawyer at the International Bar Association's Human Rights Institute (IBAHRI), where his portfolio includes the management of fact-finding missions to Georgia, Egypt and Sri Lanka and the implementation of a programme of human rights training for parliamentarians. Prior to joining the IBAHRI, he worked for a number of years as a Justice Advisor with the United Nations in Tanzania where he played a leading role in the drafting and enactment of legislation for the protection of children's rights. His professional experience also includes working with Ireland's Department of Foreign Affairs and as a Legal Caseworker with Ireland's Refugee Legal Service. He holds an LLM in International Human Rights Law from the Irish Centre for Human Rights and a Bachelor of Law Degree from University College Dublin. He has also trained as a barrister and is a member of Lincoln's Inn in London.

1.2 Organisation of the mission

This IBAHRI mission was exceptionally conducted outside Sri Lanka after an attempt to send a delegation to Colombo was rendered impossible by the country's government. The IBAHRI had originally planned to implement a four-person fact-finding mission between 1–7 February 2013. A visa for its most senior member, former Indian Chief Justice Jagdish S Verma, was facilitated through the relevant national diplomatic channels on 18 January 2013; the three other members, who included Baroness Usha Kumari Prashar of the British House of Lords, were granted online approval for business visas. However, on 29–30 January 2013, the IBAHRI was officially notified that all the visa authorisations had been revoked or suspended. At the time, the IBAHRI was in the process of drafting correspondence to the Sri Lankan government requesting meetings with key stakeholders.

Although the IBAHRI attempted immediately to rectify any misunderstandings and reschedule its mission, its communications received no direct response from the government. However, on 7 February 2013, the Minister of Media and Information, Keheliya Rambukwella, told journalists that the delegates would ‘never’ be permitted to enter because ‘outsiders cannot criticize the Constitution. This is an infringement of the sovereignty of Sri Lanka.’¹

The IBAHRI rejects this assertion. It does not consider that efforts by distinguished international jurists to ascertain and analyse facts relating to judicial independence and the concerns of lawyers can impinge on state sovereignty, no matter how narrowly that term is defined. It takes the view that countries committed to the rule of law and comity should instead welcome such assistance, in order that they can better accommodate relevant international standards. The IBAHRI has undertaken similar missions to more than 40 countries since 1995 and it has only once been refused entry. The exception was Fiji, a year before its suspension from the Commonwealth in 2009.

1.3 Interviews and consultations

The reluctance of the Sri Lankan government to admit the IBAHRI mission presented its members with some unusual challenges. The most obvious was that they were unable to travel to the country they were investigating. Assessing the views of a balanced range of stakeholders was also rendered problematic. Despite these difficulties, however, the London-based delegates were able to conduct interviews by telephone and internet with a number of judges, lawyers, journalists, parliamentarians, civil society activists and NGO representatives, which they then discussed with the other two members of the delegation. Over the many weeks spent researching this report, which takes account of events up to 22 March 2013, more than two dozen stakeholders were consulted, including almost 20 people within Sri Lanka itself.

The IBAHRI also sought to ascertain the views of relevant government officials, including members of the impeachment Parliamentary Select Committee. All its requests for interviews regrettably went unanswered, however. In pursuit of balance, the delegation nevertheless drew from the 1,575-page official record of the impeachment proceedings,² and considered numerous reports in both state- and opposition-friendly media.

Although several interviewees were prepared to be named, the IBAHRI conducted all its consultations in confidence and it has not identified or quoted specific individuals. This decision was taken having regard to the issues set out in Chapter Three. The IBAHRI wishes to record its gratitude to those judges, lawyers, journalists, parliamentarians and human rights defenders who were willing to assist them in preparing the report that follows.

1 ‘Govt. Will Reject Visas for Delegation to Probe Controversial Impeachment’, *Daily FT*, 8 February 2013, online at: www.ft.lk/2013/02/08/govt-will-reject-visas-for-delegation-to-probe-controversial-impeachment. This web page was last accessed on 23 March 2013, and all other footnoted links in this report were similarly accessible on that date.

2 *Report from the Select Committee appointed to investigate and report to parliament on the allegations referred to in the resolution placed on the Order Paper of 06 November 2012, for the presentation of an address to His Excellency the President requesting the removal of Hon. (Dr) Shirani A. Bandaranayake, from the office of the Chief Justice of the Supreme Court* (2 vols; Colombo, 2012) (hereafter ‘Select Committee Report’).

Chapter Two: The Removal of Chief Justice Bandaranayake

2.1 The constitutional background

Sri Lanka's 1978 Constitution clearly establishes distinct executive, legislative and judicial branches of government, and provides that they possess limited powers. Sovereignty does not lie with parliament, as it does in the United Kingdom; it belongs inalienably to 'the people' (Art 3), who are said to exercise it not only through an elected legislature and executive, but also through judicial bodies. The Constitution also places on the judiciary a primary responsibility to uphold those rights it identifies as fundamental (Art 4) and its Preamble makes particular mention of the need to assure:

'to all peoples FREEDOM, EQUALITY, JUSTICE, FUNDAMENTAL HUMAN RIGHTS and the INDEPENDENCE OF THE JUDICIARY as the intangible heritage that guarantees the dignity and well-being of succeeding generations of the People of SRI LANKA'.³

The principle that independent courts should uphold rights to which all citizens are entitled is therefore well-established within Sri Lanka. As this chapter shows, however, it now faces a critical test in Sri Lanka. The erosion of checks and balances dates back many years, but the impeachment of Chief Justice Bandaranayake and subsequent appointment of Mohan Peiris threatens to eviscerate the judiciary as a check on governmental power, thereby undermining many of the aforementioned constitutional guarantees. It also puts Sri Lanka at risk of breaching its obligations under the International Covenant on Civil and Political Rights, standards such as those enshrined in the UN Basic Principles on the Independence of the Judiciary, and those principles it is committed to observe by its membership of the Commonwealth of Nations.

In respect of the last matter mentioned, the IBAHRI notes that the core criteria for membership of the Commonwealth include a willingness to commit to the rule of law and independence of the judiciary, good governance and protection for human rights. The recently promulgated Commonwealth Charter affirms the particular importance of maintaining the separate integrity of the legislature, executive and judiciary, because they are 'the guarantors in their respective spheres of the rule of law, the promotion and protection of fundamental human rights and adherence to good governance.'⁴

3 The Sri Lankan Constitution can be found online at: www.priu.gov.lk/Cons/1978Constitution/Introduction.htm.

4 On the criteria for membership of the Commonwealth, agreed upon at the 2007 Commonwealth Heads of Government Meeting in Kampala, Uganda, see www.thecommonwealth.org/shared_asp_files/GFSR.asp?NodeID=174533. The Commonwealth Charter is online at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/136337/Cm_8572.pdf. See also the *Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government* ('Commonwealth Principles on the Three Branches of Government'), online at www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7BACC9270A-E929-4AE0-AEF9-4AAFE68479C%7D_Latimer%20House%20Booklet%20130504.pdf.

2.2 The 17th and 18th Amendments

The tensions that have come to the fore during Sri Lanka's current crisis date back decades. The precise balance between the executive and judiciary has been contested ever since the country gained its independence in 1948, and though the current Constitution strengthened the judiciary as an institution, there were concerns from the outset that it inadequately shielded judges against pressure from the executive, the legislature and superiors within the court system itself. Security of judicial tenure was rendered particularly vulnerable by the lack of transparent and accountable procedures for the appointment, transfer, discipline and removal of judges. These matters were discussed at some length in the IBAHRI's 2001 report on Sri Lanka, which was written shortly after an ultimately unsuccessful attempt to impeach the then Chief Justice, Sarath Silva.⁵

There was an important development a decade ago which promised to counterbalance the steady expansion of executive power. The 17th Amendment to the Constitution, enacted on 3 October 2001, created a ten-person Constitutional Commission empowered to recommend or approve a number of important appointments that had previously been within the exclusive discretion of the President.⁶ The appointees concerned were senior officials such as the Attorney-General, the members of eight important agencies including the Judicial Service Commission, and all judges of the Supreme Court and Court of Appeal. Although the President and a presidential nominee had seats on the Constitutional Commission, balance was ensured by the inclusion of the Prime Minister, the Leader of the Opposition, five members 'of high integrity and standing' nominated jointly by the Prime Minister and the Leader of the Opposition, and a nominee of the smaller parties represented in Parliament.

The Constitutional Commission functioned relatively well until March 2005, but the six vacancies that were then created by the expiry of its first term were not filled. This was initially attributable to the inability of the smaller political parties to agree upon their nominee. Mahinda Rajapaksa, whose Sri Lanka Freedom Party dominated the majority United People's Freedom Alliance (UPFA), then won his first presidential election in November 2005, and the Sri Lankan legislature began contemplating changes to the 17th Amendment. The combined effect was that President Rajapaksa could appoint senior functionaries with few or no constraints, because the Constitutional Council had been allowed to fall into abeyance. These matters were considered in some detail by the IBAHRI's 2009 report on Sri Lanka, which noted that:

'... in the absence of a properly-convened [Constitutional Council], since 2005 the President has reverted to the system prior to the 17th Amendment whereby he has made appointments without external scrutiny to vacancies arising in the public service, the appellate judiciary, the Human Rights Commission and the National Police Commission.'⁷

According to the same IBAHRI report, 'the non-implementation of the 17th Amendment represents one of the most critical unresolved rule of law issues in the country.' It therefore called for restoration of a functioning Constitutional Council and effective application of the Amendment's provisions:

5 IBAHRI, 'Sri Lanka: Failing to Protect the Rule of Law and the Independence of the Judiciary' (London, November 2001), available online via: www.ibanet.org/Article/Detail.aspx?ArticleUid=3A1BF39B-3BA9-4F09-9FA4-4449C8152DE0.

6 For the text of the 17th Amendment, passed on 3 October 2001, see: www.priu.gov.lk/Cons/1978Constitution/SeventeenthAmendment.html.

7 IBAHRI, 'Justice in Retreat: A Report on the Independence of the Legal Profession and the Rule of Law in Sri Lanka' (May, 2009) ['Justice in Retreat'], para 3.11 (p 24), online at: www.ibanet.org/Article/Detail.aspx?ArticleUid=f0c40fb2-3035-4b20-86b7-f66aa00bc2d9.

‘The Government’s continuing failure to fully implement the 17th Amendment and re-establish the Constitutional Council has reduced public confidence in its commitment to independent institutions and the rule of law. The prompt implementation of the 17th Amendment and the re-establishment of the Constitutional Council would ensure critical independent oversight of the proper functioning of Sri Lanka’s key institutions, and resolve several of the constitutional and governance issues currently facing Sri Lanka.’⁸

The Government of Sri Lanka did not take heed of this and other calls to give effect to the 17th Amendment, and preferred instead to maintain the historic trend towards the concentration and centralisation of executive power. This development has only accelerated since the end of Sri Lanka’s longstanding civil war in May 2009. President Mahinda Rajapaksa won re-election in January 2010 with 57.8 per cent of the vote, and parliamentary elections three months later gave his UPFA coalition 144 seats in the 225-member parliament. The remainder were shared between the United National Front (60 seats), the Tamil National Alliance (14) and the Democratic National Alliance (7). A steady trickle of defections meant that by late August 2010 the UPFA could claim the allegiance of more than two-thirds (150) of all the representatives⁹ – a level of support which potentially entitled it to amend the Constitution.

With this strengthened parliamentary majority, the UPFA reversed the 17th Amendment in September 2010, replacing it with a provision that effectively restored executive control over all official agencies and courts in Sri Lanka. The 18th Amendment authorises President Rajapaksa to appoint the Attorney-General, the Auditor-General, the Ombudsman, the Secretary-General of Parliament and the members of eight important bodies, including the Judicial Service Commission, the National Police Commission, the Human Rights Commission, the Election Commission and the Permanent Commission to Investigate Allegations of Bribery and Corruption. It also grants the President an almost unrestricted right to select all judges of the Supreme Court and Court of Appeal, rendering the superior judiciary highly vulnerable to politicisation. In exercising his discretion, the President is required only to ‘seek the observations’ of five other individuals: the Prime Minister and an MP he nominates, the Leader of the Opposition and an MP he nominates, and the parliamentary Speaker. The 18th Amendment has also repealed Article 31(2) of the Constitution, which previously required presidents to stand down after two six-year terms.

The passage of the 18th Amendment has been accompanied by measures that consolidate governmental power in other ways. Three of President Rajapaksa’s brothers occupy important positions in his government or the UPFA: Basil Rajapaksa is the Minister for Economic Development, Gotabhaya Rajapaksa is the Defence Minister and Chamal Rajapaksa has been elected Speaker of Parliament. Steps have also been taken to weaken the Government’s opponents and critics. President Rajapaksa’s chief rival in the January 2010 presidential election, General Sarath Fonseka, was arrested, court-martialled and convicted over alleged financial irregularities soon after his defeat and he was then given a further jail sentence in respect of charges that he had falsely accused Gotabhaya Rajapaksa of war crimes. Additionally, the Government has failed to investigate and prosecute serious crimes committed against lawyers, journalists and civil society activists. This is considered in greater detail in Chapter Three.

8 *Ibid*, fn 7; see also para 3.9 (pp 23–4).

9 ‘Sri Lankan Government Gets Two-thirds Majority in Parliament with SLMC Support’, *Colombo Page*, 27 August 2010, online at: www.colombopage.com/archive_10B/Aug27_1282922149JR.php; cf Constitution of Sri Lanka, Art 82(5).

2.3 Events leading up to the impeachment

Dr Shirani Bandaranayake became the 43rd Chief Justice of Sri Lanka on 18 May 2011. She was the first woman to hold the post and had by then been on the Supreme Court for more than 14 years. The IBAHRI delegates found her academic abilities and legal industry to be widely acknowledged, but they note that her judicial career has also drawn its share of criticism. Several observers consider that she was unduly close to the executive in the past, and a number of the rulings to which she has contributed have helped facilitate the centralisation of power that has taken place in Sri Lanka during recent years. The IBAHRI notes in particular that she chaired a Supreme Court panel on August 2010 which upheld the constitutionality of the 18th Amendment.¹⁰

Despite this record, it was a concern to protect rights devolved to the provinces by the Constitution that first brought Chief Justice Bandaranayake into conflict with the Government. The clash began to build up after a decision of December 2011, made by a Supreme Court panel that Bandaranayake chaired, which ruled that a piece of draft legislation known as the Town and Country (Amendment) Bill could become law only after¹¹ Sri Lanka's nine Provincial Councils had been consulted about its provisions. President Rajapaksa's government abandoned the measure as a consequence, but the same issue then re-emerged in August 2012, when the UPFA introduced the so-called Divineguma Bill. This aimed to extend central control over Sri Lanka's provinces in a number of ways, and to expand the regulatory powers entrusted to Basil Rajapaksa, the Minister of Economic Development and a younger brother of the President. Members of the IBAHRI delegation were told that the Bill would also have the effect of authorising the transfer of 480bn rupees (roughly £2.5bn) into an executive-controlled fund exempt from ordinary parliamentary oversight and that secrecy about some its key features was to be enforced by fines and prison terms.

A number of interested parties challenged the draft statute's constitutionality for these and other reasons. Hearings in the case began on 27 August 2012 and a Supreme Court panel chaired by Chief Justice Bandaranayake ruled in mid-September that the Government was required to submit the Divineguma Bill to Sri Lanka's nine Provincial Councils 'for the expression of [their] views thereon' under Article 154 of the Constitution. It could not be enacted until this took place.¹² This judgment was presented to Parliament on 18 September 2012.

As this constitutional challenge proceeded, the Government took steps that many Sri Lankans interpreted to be warnings against the Supreme Court. Just days before it began, Chief Justice Bandaranayake's husband was asked by the Permanent Commission to Investigate Allegations of Bribery and Corruption (the 'Bribery Commission') to make a statement in connection with certain allegedly irregular financial transactions that had taken place during his recently-resigned chairmanship of the National Savings Bank.¹³ On the day that the Supreme Court's judgment was presented to Parliament, it was reported that her husband had also become the subject of a

10 The ruling's text can be found at www.scribd.com/fullscreen/37191734?access_key=key-217bbmc8ecn5ws6s4i8m. See also the discussion in 'Politics: The Art of the Possible', *Sunday Leader*, 3 November 2012, online at: www.thesundayleader.lk/2012/11/03/politics-the-art-of-the-possible.

11 The Supreme Court lacks power to strike down enacted legislation but is entitled to review draft statutes. See Constitution of Sri Lanka, Art 120; cf Art 80(3).

12 For the text of the ruling, see www.colombotelegraph.com/wp-content/uploads/2012/09/Divineguma-Determination.pdf.

13 'Bribery Commission Questions Kariyawasam', *Sunday Leader*, 26 August 2012, online at: www.thesundayleader.lk/2012/08/26/72417. The Bribery Commission was one of those bodies which, since the 18th Amendment, is appointable by President Rajapaksa alone.

criminal investigation.¹⁴

Another sign of friction arose out of a request made by President Rajapaksa on 13 September 2012 for a meeting with the Judicial Service Commission (JSC), a body comprising the Chief Justice and two other Supreme Court judges. (The JSC is ordinarily responsible for the appointment of lower court judges, and the promotion, discipline, transfer and dismissal of lower and High Court judges.) The request elicited a negative response. Manjula Tillekaratne, a District Court judge whom the Chief Justice had appointed as JSC Secretary, replied on 18 September 2012 to say that any such meeting would be unconstitutional because the Commission was independent. In the first public complaint about interference that the JSC had ever made, he also decried:

‘[the] baseless criticism of the JSC and in general on the judiciary by the electronic and print media. The main objective of those behind the conspiracy of those trying to undermine the JSC and Judiciary is to destroy the independence of the judiciary and the rule of law. It is regrettable to note that the JSC has been subjected to threats and intimidation from persons holding different status.’¹⁵

The IBAHRI notes that the JSC Secretary’s statement, made at a time when the Supreme Court was still considering its decision on the controversial Divineguma Bill, was in accordance with the separation of powers principles acknowledged by the Latimer House Guidelines. It recalls in particular the observation in those Guidelines that ‘while dialogue between the judiciary and the government may be desirable or appropriate, in no circumstance should such dialogue compromise judicial independence.’

The sense of vulnerability expressed by the JSC Secretary grew after the Supreme Court’s Divineguma ruling. On 28 September 2012, Mr Tillekaratne publicly stated that he and the JSC were the victims of ‘a malicious mudslinging campaign’, and 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.’¹⁶ He received anonymous threats over the next few days, and on 4 October, President Rajapaksa used a breakfast meeting with senior media editors to disparage Mr Tillekaratne’s judicial qualifications and to notify his audience that the JSC Secretary was being investigated for sexual harassment of a magistrate (the alleged victim denied that any such offence had ever taken place).¹⁷ Three days later, Mr Tillekaratne was hospitalised after being attacked by four armed assailants while he sat in his car in a Colombo street – an unsolved crime that is described in further detail at section 3.2 below. This inspired widespread outrage among Sri Lankan lawyers, while the country’s lower court judges took the unprecedented step of staging a one-day strike.

14 ‘Govt. Proposes, SC Disposes Divineguma Bill, For Now’, *Sunday Times*, 23 September 2012, online at: www.sundaytimes.lk/120923/columns/govt-proposes-sc-disposes-divineguma-bill-for-now-13796.html; ‘NSB-TFC Deal: CID Questions Kariyawasam’, *Daily FT*, 18 September 2012, online at: www.ft.lk/2012/09/18/nsb-tfc-deal-cid-questions-kariyawasam; cf ‘Corruption Commission Fast Tracks Probe on Former NSB Chief’, *Sunday Times*, 23 September 2012, online at: www.sundaytimes.lk/120923/news/corruption-commission-fast-tracks-probe-on-former-nsb-chief-13884.html.

15 See ‘Whither Judicial Independence: JSC Expresses Concern’, *Sunday Times*, 23 September 2012, online at: www.sundaytimes.lk/120923/columns/whither-judicial-independence-jsc-expresses-concern-13833.html.

16 ‘JSC Secretary Says Danger to Their Security’, *Daily Mirror*, 29 September 2012, online at: www.dailymirror.lk/news/22281-jsc-secretary-says-danger-to-their-security.html.

17 ‘Cold War Between Govt. and Judiciary Continues’, *Sunday Times*, 7 October 2012, online at: www.sundaytimes.lk/121007/columns/cold-war-between-govt-and-judiciary-continues-15448.html. This article does not identify the JSC Secretary, but IBAHRI delegates have confirmed that he was the target of the President’s allegations.

The Government meanwhile continued its efforts to have the Divineguma Bill enacted into law. In pursuit of this goal, it had already begun submitting the statute to Provincial Councils to satisfy the Supreme Court's earlier ruling. However, on 31 October, a panel of the Supreme Court chaired by the Chief Justice ruled once again that the Bill could not become law, on the grounds that it had been insufficient for the Government to seek the views of a governor in the case of one state that lacked a Provincial Council.

A day after this second ruling against the Divineguma Bill, a motion to remove Chief Justice Bandaranayake was initiated within Parliament. It was drawn up pursuant to Article 107(2) of the Constitution, which provides that Court of Appeal and Supreme Court judges:

‘shall not be removed except by an order of the President made after an address of Parliament supported by a majority of the total number of Members of Parliament has been presented to the President for such removal on the ground of proved misbehaviour or incapacity.’

All 117 of its signatories were MPs belonging to the ruling UPFA.¹⁸ The motion set out 14 complaints, and though none referred expressly to the Divineguma controversy, two of them criticised specific legal judgments made by Chief Justice Bandaranayake (Counts 7 and 8). The only immediate explanation for the motion was an observation by the Media and Information Minister that the Chief Justice's conduct had ‘affected the sovereignty of the people’,¹⁹ but five days later another UPFA MP was apparently more candid. ‘Whatever anyone may say, the truth cannot be hid’, Arundika Fernando told a public meeting. ‘The govt [sic] wants to be rid of her because of her influence in the attempt to make Divineguma a department.’²⁰

2.4 The impeachment hearing

The Speaker of the Sri Lankan Parliament, Chamal Rajapaksa, convened an 11-person Parliamentary Select Committee (PSC) to inquire into the motion of impeachment on 14 November 2012. A majority of the persons he selected were members of the Government – six cabinet ministers and a deputy-minister – while the other four were drawn from the three opposition parties.²¹ He was acting under the ostensible authority of Standing Order 78A,²² which provides among other things that:

- the Speaker shall establish a Select Committee ‘consisting of not less than seven members to investigate and report to Parliament on the allegations of misbehaviour or incapacity set out in [the impeachment] resolution’ (78A(2));
- the Select Committee shall transmit to the judge concerned ‘a copy of the allegations of misbehaviour or incapacity... and shall require such Judge to make a written statement of defence within such period as may be specified by it’ (78A(3));

18 The text of the resolution moved is contained in Asian Human Rights Commission, ‘The Impeachment Motion Against Shirani Bandaranayake’ (December 2012), (hereafter AHRC, ‘Impeachment Motion’), 15, available online via: www.humanrights.asia/resources/books/the-impeachment-motion-against-shirani-bandaranayake/ahrc-prl-052-2012/view.

19 See the BBC report of 2 November 2012, quoting Media and Information Minister Keheliya Rambukwella, online at: www.bbc.co.uk/news/world-asia-20164304.

20 ‘Impeachment Because of Influence on Divineguma’, *Sri Lanka Mirror*, 6 November 2012, online at: www.mirror.lk/news/2931-impeachment-because-of-influence-on-divineguma.

21 AHRC, ‘Impeachment Motion’, 45.

22 The text of Standing Order 78A is online at: www.parliament.lk/about_us/Standing_Orders_English.pdf.

- the Select Committee ‘shall have power to send for persons, papers and records’ and will be quorate if half its members or more are present (78A(4));
- the judge concerned shall have the ‘right to appear before it and to be heard... in person or by representative and to adduce evidence, oral or documentary, in disproof of the allegations made’ (78A(5)); and
- at the conclusion of its investigation, the Select Committee shall ‘report its findings together with the minutes of evidence taken before it to Parliament and may make a special report of any matters which it may think fit to bring to the notice of Parliament’ (78A(6)).

The PSC met for the first time on the day that it was established. Its sitting of 14 November 2012, like all the others that would follow, was conducted in secrecy. The majority justified its decision to exclude observers on the basis of Standing Order 78A(8), which provides that an impeachment inquiry ‘shall not be made public unless and until a finding of guilt... is reported to Parliament’.

The PSC then notified Chief Justice Bandaranayake in writing of the 14 complaints and requested that she provide a written response by 22 November 2013. Her lawyers promptly asked for more time, by way of an 18-page letter that challenged the jurisdiction of the PSC, requested further particulars of certain charges and identified a range of other issues and potential defences.²³ The Chief Justice also applied to the Court of Appeal for writs to quash and stay the impeachment proceedings,²⁴ on the ground that the procedures laid down by Standing Order 78A did not satisfy Article 107(3) of the Constitution. This article stipulates 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 a such resolution, the investigation and proof of the alleged misbehaviour or incapacity and the right of such Judge to appear and to be heard in person or by representative.’

The legal challenge raised novel issues, because the lawfulness of Standing Order 78A had never previously been tested. The Court of Appeal consequently deferred its decision, pending reference of a point of law to the Supreme Court. On 22 November 2012, the latter body formally asked the PSC to postpone its inquiry until the point had been determined. It observed that:

‘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 interest of all persons concerned and ensuring that justice is not only done but is manifestly and undoubtedly seen to be done.’²⁵

The Speaker immediately rejected the Supreme Court’s request, stating in Parliament that it was of ‘no effect’ and ‘not recognised’.²⁶ The PSC chairman was similarly dismissive a day later (on 23 November), stating that ‘we will ignore it’.²⁷ When Chief Justice Bandaranayake then appeared before

²³ AHRC, ‘Impeachment Motion’, 22–39.

²⁴ *Ibid*, 54–70. The Court of Appeal has original jurisdiction in such cases under Art 140 of the Constitution: www.priu.gov.lk/Cons/1978Constitution/Chapter_16_Amd.html.

²⁵ AHRC, ‘Impeachment Motion’, 40–44.

²⁶ *Ibid*, 46–48.

²⁷ Select Committee Report, 2:1380.

the PSC for the first time, her senior lawyer Romesh de Silva invited the Committee to accede to the Court's request, by suspending its proceedings and awaiting the outcome of the legal challenge. The seven members of the majority refused. They also denied his application for a six-week adjournment, stating that the Chief Justice had until 30 November (seven days) to submit a defence to the charges against her.²⁸

At the next sitting of the Committee, on 4 December 2012, the four opposition members joined Mr de Silva in arguing that it was important to work out a proper procedural mechanism, including rules about proof. A member of the majority countered that it was for the Chief Justice to rebut any evidence against her, and that 'with regard to the standard of proof and all that, there are no set standards. It is up to the Committee.' The Chief Justice's lawyer then informed the PSC that his client wished to waive any right to privacy she might have under Standing Order 78A(8), so that observers could enter the Committee chamber, but the seven UPFA members who made up the majority refused that request.²⁹

On 5 December 2012, the four opposition members of the Committee requested that the Committee adjourn proceedings until after a forthcoming parliamentary vacation, but this was declined.³⁰ On the following day, they indicated that they would not participate in future hearings until 8 January, and Romesh de Silva made a series of submissions on behalf of the Chief Justice about alleged bias and deficiencies in the Committee's procedures. Lawyers for the Chief Justice were simultaneously provided with a large bundle of documents that the PSC indicated (for the first time) were going to be used in assessing the allegations against her. There were 989 pages in total.³¹ Mr de Silva argued that the PSC had failed to make timely disclosure and asked it to explain how it planned to prove the documents' authenticity. Two or three members of the majority responded with abuse, shouting and pointing at Mr de Silva and calling Chief Justice Bandaranayake a 'mad woman' and a 'baby'.³² At around 5.45pm on 6 December, the Committee chairman said that the PSC would begin investigating the charges at 1.30pm the following afternoon. Mr de Silva complained that this gave the Chief Justice insufficient time to prepare her defence and stated that because of this, as well as the Committee's unbefitting remarks, its apparent prejudice and its failure to set out any procedures, 'we are convinced that there has been no fair trial, that we will not get justice at this Committee'. The Chief Justice and all her lawyers then walked out, complaining in a press release that evening that the PSC had been 'hostile, biased... irregular and unlawful'.³³ A day later, the four opposition members of the Standing Committee also withdrew in protest, observing in a press statement of their own that 'the treatment meted out to the Chief Justice was insulting and intimidatory and the remarks made were clearly indicative of preconceived findings of guilt'.³⁴

28 *Ibid*, 1:221-8, 2:1378-1406.

29 *Ibid*, 1:228-32, 2:1407-1457.

30 *Ibid*, 1:233-35, 2:1458-76.

31 The documentary evidence served on the Chief Justice is reprinted in *ibid*, 1:267-802, 2:803-1255.

32 See 'Pissu Geni' "Baby Nona": This Eve Of Course Has Many Many Adams – Weerawansa and Dilan', *Colombo Telegraph*, 7 December 2012, online at: www.colombotelegraph.com/index.php/pissu-geni-baby-nona-this-eve-of-course-has-many-many-adams-weerawansa-dilan; cf Select Committee Report, 1:1486, 1490.

33 Select Committee Report, 2:1477-1505. For the statement issued to the press, see 'Crisis Escalates as PSC Finds CJ Guilty of Three Charges', *Sunday Times*, 9 December 2012, online at www.sundaytimes.lk/121209/columns/crisis-escalates-as-psc-finds-cj-guilty-of-three-charges-24056.html.

34 Select Committee Report, 1:247-51, 2:1506-73; 'Opposition Members Withdraw from PSC', *Daily Mirror*, 7 December 2012, online at: www.dailymirror.lk/news/24089-opposition-members-withdraw-from-psc.html.

The seven members of the Government who remained then summoned live witnesses for the first time, in the absence of Chief Justice Bandaranayake, her lawyers and opposition members of the Committee. The first person to testify, who gave her evidence late in the afternoon of 7 December, was Justice Shiranee Tilakawardane, a colleague of the Chief Justice and the next most senior member of the Supreme Court.³⁵ She told the Committee that Chief Justice Bandaranayake had taken her place on a case in mid-2011: that case had concerned a failed and possibly fraudulent set of companies. Justice Tilakawardane had not wanted to be removed and she ‘did not know’ why her removal had taken place. The PSC then heard from 15 other people before ending its sitting, reportedly at 8.50pm.³⁶ At 8.30 the following morning, it reconvened. The official record shows that over the next 20 minutes one of the PSC members ‘gave an outline of the determination of the Committee’. Having regard to ‘the time constraints’, the Committee decided not to investigate the nine charges that it had not yet considered – complaints 6–14 of the original impeachment motion – and the Chairman informed his colleagues that ‘the Committee has prepared its draft Report to be presented in Parliament’.³⁷

That report (which the PSC resolved to transmit to Parliament that same day, 8 December) stated that three of the first five complaints had been substantiated. Chief Justice Bandaranayake was found to have bought a house using a power-of-attorney for her sister and brother-in-law before taking control of cases against the vendor company (Charge 1); to have failed to disclose more than 20 bank accounts (Charge 4); and to have had a supervisory and investigative role over the Sri Lankan court system while simultaneously being married to someone who was under investigation for corruption (Charge 5). Those verdicts were later set out in a two-volume report which is 1,575 pages long. They were determined to the satisfaction of the Committee majority within 12 hours. The chair of the Committee would be elevated to the petroleum ministry during a Cabinet reshuffle of 28 January 2013.³⁸

2.5 The procedural inadequacies of the impeachment

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

The need for impeachments to accord with natural justice was acknowledged as common law as long ago as 1825, when England’s Solicitor-General observed that it would be ‘most [illegal], most [unjust] and... most [unconstitutional] to condemn a judge of rank and character without giving him an opportunity of being heard.’³⁹ Sri Lanka’s Supreme Court has also recognised that MPs exercising powers to remove high officers under constitutional provisions are required to act quasi-judicially,⁴⁰ and the Sri Lankan Government formally affirmed before the UN Human Rights Committee in September 2002 that any judge who was removed unfairly would have a remedy in the courts.

³⁵ Select Committee Report, 1:193-96, 250; 2:1512–20.

³⁶ *Ibid*, 1:249–50; cf 1:192–93.

³⁷ *Ibid*, 1:251.

³⁸ ‘Sri Lankan Jumbo Cabinet Expanded’, *The Hindu*, 28 January 2013, online at: www.thehindu.com/news/international/sri-lankan-jumbo-cabinet-expanded/article4353822.ece.

³⁹ Hansard, 17 June 1825, col 1006 (the case concerned allegations against one Baron O’Grady).

⁴⁰ See *Dissanayake v Kaleel* [1993] 2 Sri LR 135, at 172–73.

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

‘[N]owhere either in the relevant constitutional provisions or the standing orders seeks to exclude judicial scrutiny of the decisions of the inquiring committee. Thus, it is envisaged that if the inquiring committee were to misdirect itself in law or breaches the rules of natural justice its decisions could be subject to judicial review.’⁴¹

The importance of fair trial rights is also acknowledged by several well-established international treaties. Article 10 of the Universal Declaration of Human Rights states that ‘everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations’, for example, and it goes on to stipulate the minimum standards that such a hearing must meet. Article 14 of the International Covenant on Civil and Political Rights (ICCPR), to which Sri Lanka has been a party since 1980, is of similar effect. It provides that ‘the determination of any criminal charge... or rights and obligations in a suit at law’ shall be made at ‘a fair and public hearing by a competent, independent and impartial tribunal established by law.’⁴²

These principles are particularly important where the person accused of wrongdoing is a judge.⁴³ In such cases, the possibility of an unjust conviction is compounded by a more general risk that manipulation of the trial process will interfere with the proper functioning of an independent judiciary. A number of international instruments accordingly reflect the need for heightened safeguards in such cases. The UN Human Rights Committee has specifically observed that Article 14 of the ICCPR can be engaged in circumstances where a judge is accused of corruption,⁴⁴ and the UN Basic Principles on the Independence of the Judiciary stipulate that:

‘a charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge’.⁴⁵

The Beijing Statement of Principles of the Independence of the Judiciary, which were adopted by Chief Justices from across the Asia-Pacific Region in 1997, acknowledge that procedures might differ according to a nation’s history and culture, but they also make clear that impugned judges should in all cases ‘have the right to a fair hearing’.⁴⁶ The International Bar Association’s Minimum Standards of Judicial Independence similarly state that ‘the proceedings for discipline and removal of judges should ensure fairness to the judge and adequate opportunity for hearing’.⁴⁷

41 See Sri Lanka’s Fourth Periodic Report to the UN Human Rights Committee (18 September 2002), para 302, available online via: <http://tb.ohchr.org/default.aspx?Symbol=CCPR/C/LKA/2002/4>.

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

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

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

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

46 Beijing Principle 26, online at: <http://lawasia.asn.au/objectlibrary/147?filename=Beijing%20Statement.pdf>.

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

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

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

‘any disciplinary procedures should be fairly and objectively administered. Disciplinary proceedings which might lead to the removal of a judicial officer should include appropriate safeguards to ensure fairness’,

and that:

‘in cases where a judge is at risk of removal, the judge must have the right to be fully informed of the charges, to be represented at a hearing, to make a full defence and to be judged by an independent and impartial tribunal’.⁴⁸

The impeachment procedure used against Chief Justice Bandaranayake wholly failed to meet these standards.⁴⁹ The IBAHRI notes in particular:

- The allegations were weak, even taken at their highest.⁵⁰ Article 107(2) of the Constitution allows for the removal of superior judges in the case of ‘proved misbehaviour’, but at least two of the three supposedly proved complaints are arguably not serious enough to merit any sanction at all. In relation to Charge 4, several of the bank accounts the Chief Justice had allegedly failed to disclose were empty or had been closed,⁵¹ while Charge 5 was merely a complaint that the Chief Justice retained an *ex officio* supervisory role over the judicial system at a time that her husband was under investigation. This is made all the more important by Sri Lanka’s lack of any code to clarify the kinds of ‘misbehaviour’ that might trigger removal under Article 107(2). This failure to promulgate standards for the guidance and assessment of judges, such as those set out in the Bangalore Principles of Judicial Conduct,⁵² is extremely unusual. It also puts Sri Lanka at odds with the Latimer House Guidelines, which state that ‘a Code of Ethics and Conduct should be developed and adopted... as a means of ensuring the accountability of judges’.

48 *Commonwealth Principles on the Three Branches of Government*, Section VII (Accountability Mechanisms); *Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence*, Section VI (Accountability Mechanisms), online at: www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7BACC9270A-E929-4AE0-AEF9-4AAFE68479C%7D_Latimer%20House%20Booklet%20130504.pdf.

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

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

51 Select Committee Report, 1:212; cf 2:1475–76.

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

- The PSC majority rejected all calls to clarify how it would approach the burden of proof, and its report to Parliament spoke merely of ‘sufficient’ evidence.⁵³ This contravenes Sri Lanka’s own Constitution, which envisages (by Art 13(5)) that people ‘shall be presumed innocent until... proved guilty’ and (by Art 107) that judges will be removed only after their misbehaviour has been ‘proved’. Insofar as Standing Order 78A encouraged this approach (by providing that a PSC ‘shall require... a written statement of defence’ and referring to ‘disproof’ by an accused judge), it was therefore unconstitutional.
- The proceedings were held in secret, notwithstanding the Chief Justice’s express wish that observers should be admitted. The PSC’s refusal to accommodate her request violated UN Basic Principle 17 and it was also at odds with ideas of open justice familiar to common law systems all over the world. Insofar as Standing Order 78A(8) purported to impose an absolute requirement of secrecy, it also violates Article 106(1) of Sri Lanka’s own constitution, which provides that:

‘The sittings of every court, tribunal or other institution established under the Constitution or ordained and established by Parliament shall subject to the provisions of the Constitution be held in public, and all persons shall be entitled freely to attend such sittings.’
- All seven members of the PSC who found against the Chief Justice, acting simultaneously as prosecutors and judges, were drawn from the governing UPFA, as were the 117 legislators initiating the impeachment, the Speaker who convened the PSC and all the MPs who voted to refer the impeachment to President Rajapaksa. In such circumstances, the PSC was neither ‘impartial’ nor ‘independent’ within the meaning of Article 14 of the ICCPR. The tribunal wholly failed to avoid the appearance of bias and circumstances suggest strongly that the entire impeachment process was biased in fact.
- These flaws combined to produce a hearing that was thoroughly unjust. Openly disavowing ‘set standards’ for ‘the standard of proof and all that’, members of the PSC majority repeatedly denied the Chief Justice’s requests for particulars of evidence and additional time. Her lawyers were then given a 989-page bundle of previously unseen documents, their legal submissions about bias were met with abuse and they were given less than 24 hours to rebut an inadequately specified case. No indication at all was given as to which live witnesses, if any, might testify. Following a decision to walk out by the Chief Justice and opposition members, the majority then heard testimony from 16 people in secret. Less than 12 hours after that, the PSC had already drafted a 35-page report that set out its conclusions about her guilt.

The IBAHRI has no doubt that the removal of Chief Justice Bandaranayake in these circumstances was a clear violation of standards acknowledged by the Sri Lankan Constitution, the common law, and international instruments such as the ICCPR, the UN Basic Principles on the Independence of the Judiciary, the Beijing Principles on the Independence of the Judiciary, the International Bar Association’s Minimum Standards of Judicial Independence, the Bangalore Principles of Judicial Conduct and the Commonwealth (Latimer House) Principles on the Three Branches of Government.

⁵³ ‘Govt. Members of PSC Convict CJ after Controversial Probe’, *Sunday Times*, 9 December 2012, online at: www.sundaytimes.lk/121209/news/govt-members-of-psc-convict-cj-after-controversial-probe-24166.html.

2.6 The challenge before the Court of the Appeal

The Chief Justice's legal challenge to the fairness of the Parliamentary Select Committee's procedures took the form of an application for a writ that would prevent the PSC from determining the charges set out in Parliament's impeachment motion. Although such an application requires careful consideration, because courts must always defer to prerogatives that are proper to a legislature, Sri Lanka's Court of Appeal acted properly by agreeing to hear the case. It is entitled to grant prerogative writs whenever a citizen's rights are threatened, as a consequence both of its inherent functions as a superior court and a constitutional provision that authorises it to correct 'all errors in fact or in law... which shall be committed by any tribunal or other institution'.⁵⁴ Should there be any doubt about its jurisdiction, it is clarified by a statement made by the Sri Lankan government to the UN Human Rights Committee a decade ago. It said then, in the specific context of Standing Order 78A, that 'if the inquiring committee were to misdirect itself in law or breaches the rules of natural justice its decisions could be subject to judicial review.'⁵⁵

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

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

The Supreme Court's 27-page opinion of 1 January 2013 was reasoned and well-argued.⁵⁶ It observed that the PSC's findings were determinative of a judge's status, in that a finding of misconduct rendered it 'inevitable' that parliament would make an address to the president for that judge's removal. A determination of this nature had to be founded on law and 'law' was defined by Article 170 of the Constitution to mean an Act of Parliament. Since Standing Order 78A was therefore not a law, it could not provide a basis for removing a judge, because:

'In a State ruled by a Constitution based on the rule of Law, no court, tribunal or other body (by whatever name it is called) has authority to make a finding or a decision affecting the rights of a person unless such court, tribunal or body has the power conferred on it by law... Such legal power can be conferred... by an Act of Parliament which is "law" and not by Standing Orders which are not law but are rules made for the regulation of the orderly conduct and the affairs of the Parliament. The Standing Orders are not law within the meaning of Article 170 of the Constitution which defines what is meant by "law".'⁵⁷

54 Constitution of Sri Lanka, Art 138(1).

55 See fn 41 above.

56 SC Reference No 3/2012; CA (Writ) Application No 358/2012, online at: www.internationallawbureau.com/wp-content/uploads/2013/01/supreme-court-order_2IN11.pdf.

57 *Ibid*, 23–24.

The Court ruled in addition that:

‘The matters relating to proof being matters of law, also will have to be provided by law and the burden of proof, the mode of proof and the degree of proof also will have to be specified by law to avoid any uncertainty as to the proof of the alleged misbehavior or incapacity without leaving room for the body conducting the investigation to decide the questions relating to proof according to its subjective perception. The right of the Judge under investigation to appear at the investigation and be heard being a fundamental principle of natural justice should also be provided by law with a clear indication of the scope of “the right to be heard” such as the right to cross examine witnesses, to call witness and adduce evidence, both oral and documentary.’⁵⁸

In the light of this clear opinion of the Supreme Court, the Court of Appeal went on unequivocally to rule on 7 January 2013 that ‘the finding and/or the decision or the report of [the Parliamentary Select Committee]... has no legal validity and as such this court has no alternative but to issue a writ of *certiorari*.’⁵⁹

2.7 The replacement of Chief Justice Bandaranayake by Mohan Peiris

Despite the Court of Appeal’s decision, Sri Lanka’s parliament voted on Friday 11 January 2013 by 155 votes to 49 to impeach Chief Justice Bandaranayake. All those in favour were members of the ruling United People’s Freedom Alliance.⁶⁰ The parliamentary vote was officially celebrated in Colombo that evening, by way of festivities that included a large firework display staged by the Sri Lankan navy. President Rajapaksa signed a decree of dismissal two days later and he nominated a successor the day after that.⁶¹

The man sworn in as Sri Lanka’s 44th Chief Justice on 14 February 2013, Mr Mohan Peiris, has not previously sat on the Supreme Court, or any other judicial body, but he has held a number of government positions. He served President Rajapaksa as Attorney-General between 18 December 2008 and 3 September 2011, and before then had provided legal advice to the Central Bank and to Defence Secretary Gotabhaya Rajapaksa. Between his retirement as Attorney-General and elevation to the Supreme Court, he had been a legal consultant to the Cabinet.

The unusual consequence of the events described is that Sri Lanka currently possesses two Chief Justices: the first of them acknowledged by its legal system and the second instituted by executive fiat. This will eventually result in a recognition that Mohan Peiris’s appointment is legally invalid, unless the Supreme Court overturns the Court of Appeal decision, which would entail negation of its own determination of 1 January 2013. In the view of the IBAHRI, such a decision would be extraordinary. A Court of Appeal decision, drawing on the expertise of the Supreme Court, has found the proceedings of the Parliamentary Select Committee to be so flawed as to be void in law. Parliament was therefore asserting powers it does not possess under the Constitution when it purported on 11 January 2013 to oust Chief Justice Bandaranayake. President Rajapaksa was similarly acting in violation of Sri Lankan law by choosing then to dismiss her and appoint Mohan Peiris as her successor.

58 *Ibid.*, 24–25.

59 CA (Writ) Application, No 411/2012, p 10, available online via: www.colombotelegraph.com/wp-content/uploads/2013/01/CAwrit-411-2012.pdf.

60 Twenty MPs abstained, including four members of the UPFA.

61 For an account of the vote and its immediate aftermath, see ‘The End Game’, *Daily FT*, 17 January 2013, online at: www.ft.lk/2013/01/17/the-end-game.

The IBAHRI notes in this regard that the principle of *stare decisis*, according to which prior decisions of a superior court are presumptively dispositive, is part of Sri Lankan law. This also mandates respect for the earlier decision. Courts must move with the times, of course, but the rule of law depends on judges who can withstand changing political pressures and the temptations of expediency. Having regard to the heightened risks of executive interference that exist as a consequence of Mohan Peiris's appointment, a matter considered further in the section that follows, a reversal by the Supreme Court would be entirely improper in this case.

2.8 Events subsequent to the appointment of Mohan Peiris

The IBAHRI delegation found a widespread perception among Sri Lanka lawyers that Mohan Peiris is susceptible to political influence and over-sympathetic to the executive.⁶² Suspicions have already been expressed over a Supreme Court panel that he chaired on 15 February 2013, for example, which summarily terminated a fundamental rights petition brought by 11 trade unions who were alleging the misappropriation of billions of rupees belonging to Sri Lanka's largest social security scheme (the Employees Provident Fund). No substantial explanation for terminating the action was given, even though the allegations, if proved, would have established corruption on a vast scale at the highest levels of government.⁶³

The IBAHRI is not concerned with the substantive merits of this case, which lie beyond the mandate of its mission. The ruling of 15 February illustrates general uncertainties that now surround the Supreme Court's ability to function as an independent institution, however. It is a well-established legal principle that justice should not only be done, but should be seen to be done. This obliges all judges to be mindful of appearances when they hear cases that affect their personal interests or those of a recent employer – especially if the employment involved service to a current government or cabinet. The duty is well expressed by the UN Basic Principles on the Independence of the Judiciary, which require judges 'always [to] conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary'.⁶⁴ The International Bar Association's Minimum Standards of Judicial Independence ('the IBA Minimum Standards') contain a similar caution, warning judges to 'avoid any course of conduct which might give rise to an appearance of partiality'.⁶⁵ As a recent adviser to the cabinet and the prime beneficiary of Chief Justice Bandaranayake's removal, Mohan Peiris's potential conflicts of interest are numerous and the IBAHRI considers that his continued presence on the Supreme Court might easily undermine public confidence in the capacity of Sri Lanka's judiciary to operate free from executive influence.

This concern is heightened by the way that the Supreme Court has so far handled the legal reverberations of Chief Justice Bandaranayake's removal. A lawyer who supports the Government's legal position has launched an appeal against the Court of Appeal ruling of 7 January⁶⁶ and it was

62 IBAHRI asked for an interview with Mohan Peiris, but its request went unanswered.

63 'SC Dismisses EPF Case', *Daily News*, 16 February 2013, online at: www.dailynews.lk/2013/02/16/news35.asp; 'EPF Lose Billions As Central Bank Buys Over Valued Shares in an Insider Trading Racket', *Sunday Leader*, 3 June 2012, online at: www.thesundayleader.lk/2012/06/03/epf-lose-billions-as-central-bank-buys-over-valued-shares-in-an-insider-trading-racket; cf www.epf.lk.

64 UN Basic Principle 8, online at: www.unrol.org/doc.aspx?d=2248.

65 IBA Minimum Standards, Clause 45, online at: www.ibanet.org/Document/Default.aspx?DocumentUid=BB019013-52B1-427C-AD25-A6409B49FE29.

66 See 'Petition Against Sri Lanka Supreme Court Writ to be Heard', *Colombo Page*, 13 February 2013, online at: www.colombopage.com/archive_13A/Feb13_1360737850CH.php.

reported on 13 February 2013 that Mohan Peiris had listed its first hearing before a three-person panel that included himself.⁶⁷ Although he did not in fact then sit on the case, the panel that did was chaired by Justice Shiranee Tilakawardane – the first witness to give oral testimony against Chief Justice Bandaranayake before the Parliamentary Select Committee.⁶⁸

Since that date, Justice Tilakawardane has taken the lead in dealing with that appeal, and she has also managed preliminary hearings in countervailing applications from petitioners opposed to the impeachment and the appointment of Mohan Peiris as Chief Justice.⁶⁹ At the first hearing of the second set of cases, on 6 February 2013, the petitioners complained about interference by Mohan Peiris, arguing that he had improperly used his listing powers to select the three judges hearing the case (who were chaired by Justice Shiranee Tilakawardane) and contending that the case should be heard by a full bench of the Supreme Court.⁷⁰ The next hearing, on 5 March 2013, was chaired once again by Justice Tilakawardane. Speaking for nine of the Supreme Court's eleven judges, she put all the impeachment-related cases back to 11 June 2013. The reason given was that Justice Imam had just announced his retirement and it would be impossible to assemble a full bench until the President appointed someone to replace him.

The IBAHRI delegation is extremely concerned by Justice Tilakawardane's central role in these hearings. She was the first witness to testify against Chief Justice Bandaranayake before the Parliamentary Select Committee, which observed in its report to parliament that her evidence had been 'very helpful' in enabling it to reach 'an accurate conclusion regarding the matters related to [the first] charge'.⁷¹ Her ongoing presence in cases involving the impeachment clearly violate the principle that judges should play no part in cases in which they have previously testified and should recuse themselves if asked to sit: an axiom acknowledged by the common law and all the international instruments that govern this field. Clause 44 of the IBA Minimum Standards, for example, states that 'a judge shall not sit in a case where there is a reasonable suspicion of bias or potential bias'. The IBAHRI delegates also recall the Bangalore Principles of Judicial Conduct, which state that:

'2.5 A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where:

2.5.1 the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;

67 'Beneficiary Mohan P Lists Appeal From Judgement Of AC In Favour Of Shirani B Before Himself', Colombo Telegraph, 13 February 2013, online at: www.colombotelegraph.com/index.php/beneficiary-mohan-p-lists-appeal-from-judgement-of-ac-in-favour-of-shirani-b-before-himself.

68 See section 2.4 above; 'Appeal From Judgement In Favour Of Shirani B Relisted Before Shiranee T', *Colombo Telegraph*, 14 February 2013, online at: www.colombotelegraph.com/index.php/appeal-from-judgement-in-favour-of-shirani-b-relisted-before-shiranee-t.

69 These fundamental rights actions include SC (FR) 665/2012, 666/2012, 667/2012, and 23/2013; see also 'FR Case to Reflect How Much of Sri Lanka's Judicial Independence Has Survived – Motion for Full Bench Filed by CPA', *Colombo Telegraph*, 30 January 2013, online at: www.colombotelegraph.com/index.php/fr-case-to-reflect-how-much-of-sri-lankas-judicial-independence-has-survived-motion-for-full-bench-filed-by-cpa.

70 'Mohan Pieris Tries to Select a Bench to Hear Case Challenging His Own Appointment', *Colombo Telegraph*, 6 February 2013, online at: www.colombotelegraph.com/index.php/mohan-pieris-tries-to-select-a-bench-to-hear-case-challenging-his-own-appointment-lawyers-object.

71 Select Committee Report, 1:193.

2.5.2 the judge previously served as a lawyer or was a material witness in the matter in controversy.⁷²

Whatever may have actually motivated Justice Tilakawardane to testify against Chief Justice Bandaranayake, the rule against apparent bias is clearly contravened by her repeated chairing of impeachment-related hearings. Her most recent intervention – the ruling of 5 March to adjourn all cases until 11 June – is especially suspect, in that it could very easily be perceived to be part of a long-term process aimed at furthering executive interests. The June hearing will not finally determine whether to overrule the earlier Court of Appeal decision – it is just an application for leave to proceed – and the IBAHRI delegates understand that a full hearing on the merits might not occur until 2014. By then, at least four, and possibly more, Supreme Court Justices will require replacements, either because they will reach the mandatory retirement age of 65 or because they have chosen to leave office early.⁷³ Those replacements will be chosen by President Rajapaksa or his successor, whose discretion will be constrained by nothing more than the 18th Amendment's notional requirement that 'observations' be sought from three party colleagues and two opposition politicians.

The risks of significant structural damage to the Supreme Court are already evident. Three of the Court's members were reported during February 2013 to have either retired or manifested a reluctance to consider impeachment-related challenges – Justices Ratnayake, Imam and Sripavan – and although the IBAHRI delegation cannot know for sure why they have ceased or lessened their judicial activity, several Sri Lankans suggested that they are distancing themselves from a Court they privately consider compromised. The delegates note that these perceptions are weakening confidence in Sri Lanka's court system more generally. In the opinion of one person they interviewed, 'the back of the judiciary has been broken'.

2.9 Sri Lankan perspectives

The removal of Chief Justice Bandaranayake has been criticised by every independent judges' organisation in Sri Lanka, including the Judicial Services Association, the High Court Judges Association, the District Court Judges Association, the Association of Magistrates and the Association of Labour Tribunals.⁷⁴ Concern has been expressed by Justice CG Weeramantry, the country's most senior retired judge and a former vice-president of the International Court of Justice.⁷⁵ The country's independent counsel also made their collective view clear on 20 February 2013, when Upul Jayasuriya won the presidency of the Bar Association of Sri Lanka by a landslide, after campaigning on an explicitly anti-impeachment ticket. Although his opponent was openly favoured by the government, which organised dinners and facilitated media coverage on his behalf, Mr Jayasuriya took 1,471 votes against the 330 cast for his rival.⁷⁶

72 Bangalore Principle 2.5, online at: www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf. See also the discussion in International Commission of Jurists, *International Principles on Independence and Accountability*, pp 27–30.

73 Justices Imam, Ratnayake, Amaratunga and Tilakawardane are all expected or required to leave within the next year.

74 The last four associations named jointly signed a letter of complaint on 3 December 2012: see AHRC, 'Impeachment Motion', 49.

75 'Senior Most Judge Seeks Fair Trial for CJ', *Sunday Times*, 11 December 2011, republished online at: www.colombotelegraph.com/index.php/senior-most-judge-seeks-fair-trial-for-cj.

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

Opposition to the impeachment is not limited to lawyers. Shortly before Sri Lanka's Parliament chose to remove the Chief Justice without regard to rulings by the country's courts, leaders of three opposition parties (the UNP, TNA and JVP) wrote in protest to parliamentary Speaker Chamal Rajapaksa. They recalled that he himself had said just two months earlier that: 'The right to interpret the Constitution is the province solely of the Supreme Court that must not be disturbed... [Its interpretation] must stand.'⁷⁷ Many media commentators and human rights workers have been equally concerned and religious leaders have also voiced fears about what the impeachment might portend. Prior to the Select Committee hearings, worries were expressed on behalf of Sri Lanka's three main Buddhist monastic orders and the Archdiocese of Colombo.⁷⁸ The Anglican Bishop of Colombo then circulated a pastoral letter in January 2013 lamenting that:

'We have seen the complete collapse of the rule of law in our nation. We no longer appear to be a constitutional democracy... [Sri Lanka gives] the appearance of a country ruled on the principle that "Might is Right".'⁷⁹

2.10 International perspectives

Sri Lanka's procedures for the removal of judges have caused widespread international concern. The UN Human Rights Committee expressed its belief as long ago as 2003 that they were not compatible with Article 14 of the ICCPR⁸⁰ and the particular steps taken against Chief Justice Bandaranayake have been condemned by lawyers and legal organisations across the world. Critics include the UN Special Rapporteur on the Independence of Judges and Lawyers,⁸¹ the Asian Human Rights Commission,⁸² the Malaysian Bar Council,⁸³ the Law Council of Australia,⁸⁴ the Human Rights Committee of the Bar of England and Wales,⁸⁵ the Canadian Bar Association,⁸⁶ the American Bar Association⁸⁷ and the International Crisis Group.⁸⁸

A particularly forthright warning came from the International Commission of Jurists (ICJ), in a letter to President Rajapaksa that was co-signed by the Commonwealth Magistrates and Judges Association and 44 senior international jurists. It urged the President 'to act immediately to restore

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

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

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

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

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

82 www.humanrights.asia/news/ahrc-news/AHRC-STM-014-2013.

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

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

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

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

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

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

the independence of the judiciary by reinstating the legal Chief Justice, Dr Shirani Bandaranayake', expressing a concern:

'... that recent actions to remove the Chief Justice have been taken in contravention of the Constitution, international human rights law and standards, including the right to a fair hearing, and the rule of law.'⁸⁹

On 12 February 2013, the ICJ reiterated these views and called on the Commonwealth to relocate the next CHOGM, currently scheduled to be held in Colombo, Sri Lanka, in November 2013.⁹⁰ The Commonwealth Lawyers Association, the Commonwealth Legal Education Association and the Commonwealth Magistrates and Judges Association co-authored a letter of their own. It adopted a statement by the president of the last-named body that:

'By its arbitrary actions, and its failure to follow even its own constitutional safeguards for the removal of judges, the Sri Lankan Parliament has seriously undermined that principle and called into question its adherence to the shared values of the Commonwealth.'⁹¹

Having regard to the overwhelming view of international lawyers and legal organisations that the removal of Chief Justice Bandaranayake was improper, the IBAHRI delegates have noted with interest that Sri Lanka's Minister of External Affairs, Professor GL Peiris, has sought to argue that foreign legal practice justifies the actions of his government. At a briefing of the diplomatic corps on 16 January 2013, he referred to a number of overseas cases in order to argue that the Court of Appeal had been wrong to pronounce on the Parliamentary Select Committee's investigation of Chief Justice Bandaranayake.⁹² The IBAHRI delegates reiterate in this regard that the current state of Sri Lankan jurisprudence is clear and that foreign court decisions offer no good reason to disobey Sri Lanka's own Court of Appeal. They have also examined two specific impeachments that Professor Peiris cited, one in the Philippines and the other in the United States, and respectfully contend that he has ignored the most important aspects of both cases.

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

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

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

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

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

to subpoena and exclude evidence, 43 days of testimony were heard over a five-month period and the arguments made by each side were televised throughout the country.⁹³

The second precedent on which Professor Peiris relied, a 1993 case involving a Mississippi District Court judge called Walter Nixon, offers just as little support to the Government's position. *Nixon v United States*⁹⁴ is a technical decision about the division of powers under the US Constitution, and stands simply for the proposition that impeachment procedures are not ordinarily amenable to correction by federal courts. The decision does not specify what a fair impeachment procedure might involve and the IBAHRI notes that Nixon was in fact removed only after he had been convicted by a jury at an ordinary criminal trial. The opportunities for a defence afforded him at his impeachment hearings were also far greater than those given Chief Justice Bandaranayake: for example, the Mississippi judge was given the right to challenge witnesses and to make written and oral submissions to the full Senate.⁹⁵ When it comes to more senior US judges, meanwhile, impeachments are almost unheard of. There has been just one attempt to impeach a member of the Supreme Court, which took place more than two centuries ago, and Justice Samuel Chase's trial in 1805 ended with an acquittal.

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

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

‘successful and lasting constitutional democracies [require] entrenched safeguards to ensure judicial independence, chief among which is proper standards preventing the arbitrary or baseless removal of judicial officers.’⁹⁶

Bangladesh provides that hearings to remove judges should be conducted by a Supreme Judicial Council made up of the country's Chief Justice and its two next most senior judges.⁹⁷ In **Canada**, the Canadian Judicial Council, comprised of the Chief Justice and other senior judges, investigates allegations and operates according to the rules of a superior court.⁹⁸ **Kenya** requires an initial investigation by an independent and diversely constituted ten-person Judicial Services Commission, and then a second inquiry by a separate seven-person tribunal comprising judges, a senior advocate

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

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

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

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

97 Constitution of Bangladesh, Art 96(2)–(7).

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

and two persons with experience in public affairs.⁹⁹ Judges in **Singapore** may be removed only on the recommendation of a tribunal comprising:

‘not less than 5 persons who hold or have held office as a Judge of the Supreme Court, or, if it appears to the President expedient to make such an appointment, persons who hold or have held equivalent office in any part of the Commonwealth.’¹⁰⁰

The judges of **South Africa** are removable only after misbehaviour has been established by the Judicial Service Commission, which is made up of either 23 or 24 officials, including senior judges, lawyers, legislators and the Minister of Justice. No one has ever been removed under the provision; indeed, there was not a single judge dismissed in South Africa throughout the 20th century.¹⁰¹

Even in the **United Kingdom**, where parliamentary sovereignty is not subject to a written constitution, impeachment has only ever been effected once – in 1830, when Sir Jonah Barrington was removed for embezzlement of monies paid into his court. As has already been noted, it was already established by that date that an impugned judge was entitled to due process of law,¹⁰² and it would nowadays be unthinkable in the United Kingdom to conduct an impeachment by way of parliamentary address without first according the judge concerned full natural justice.

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

Belarus

A presidential decree that purported summarily to remove a judge of the Constitutional Court on 24 January 1997 was found by the UN Human Rights Committee to violate the ICCPR because it constituted an attack on the independence of the judiciary and a failure to respect the judge’s right of public service to his country.¹⁰³

Democratic Republic of Congo (DRC)

A purported dismissal by the President of 315 judges on 26 November 1998 violated the procedural safeguards of DRC law, as its own government later accepted, and the UN Human Rights Committee found that it was also a clear violation of Article 14 of the ICCPR.¹⁰⁴

99 Constitution of Kenya, Arts 168, 171.

100 Constitution of Singapore, Art 98(3)–(4).

101 Constitution of South Africa, Arts 177–78; Adolph Landman, ‘Impeaching the Judges: South Africa’s Copybook’, *Advocate* (First Term, 2000), p 44, online at: www.sabar.co.za/law-journals/2000/firstterm/2000-firstterm-vol013-no1-pp43-44.pdf.

102 See section 2.5 above.

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

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

India

A 1968 statute regulates the investigation and proof of allegations against all federal Supreme Court justices, requiring that they first be investigated by a committee that consists of a member of the Supreme Court, a High Court Chief Justice and a distinguished jurist and that they then be considered by both Houses of Parliament.¹⁰⁵ Only one case has progressed to the second stage – involving Justice V Ramaswami in May 1993 – and it ended in acquittal after a formal trial by the Lok Sabha (Lower House).¹⁰⁶

Malaysia

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

‘not less than five persons who hold or have held office as judge of the Supreme Court or a High Court or, if it appears to the [head of state] expedient to make such appointment, persons who hold or have held equivalent office in any other part of the Commonwealth’.¹⁰⁷

Even when President Mahathir Muhammad made drastic moves to curtail the powers of his country’s Supreme Court in 1988, precipitating a protracted constitutional crisis, this provision was observed and the trials were conducted by a six-member tribunal that included two foreign jurists (one of whom was the Chief Justice of Sri Lanka).¹⁰⁸

Pakistan

Allegations against judges must be investigated by a Supreme Judicial Council (SJC) comprising ‘the Chief Justice of Pakistan, the two next most senior Judges of the Supreme Court; and the two most senior Chief Justices of High Courts’.¹⁰⁹ On 9 March 2007, President Pervez Musharraf arbitrarily referred allegations of abuse of office against Chief Justice Iftikhar Muhammad Chaudhry to the SJC and purported to replace him, but this attempt to intimidate the judiciary was met by a Supreme Court ruling on 20 July 2007 that the President had acted unlawfully. Musharraf accepted the ruling, and the Chief Justice was formally reinstated.¹¹⁰

Trinidad and Tobago

Trinidad and Tobago hedges the removal of judges with a several safeguards and a Chief Justice may be removed only after allegations have been investigated by a tribunal comprising three

¹⁰⁵ Judges (Inquiry) Act 1968, online at: <http://indiankanoon.org/doc/1719017>. See also Constitution of India, Art 124(4)–(5).

¹⁰⁶ There have been only two other efforts to remove senior judges, both involving High Court justices who resigned rather than mount a defence: see ‘Justice Dinakaran Faced Serious Charges’, *The Hindu*, 29 July 2011, online at: www.thehindu.com/news/justice-dinakaran-faced-serious-charges/article2306214.ece; ‘Justice Sen Resigns Ahead of Monday’s Impeachment Motion’, *The Hindu*, 1 September 2011, online at: www.thehindu.com/news/national/other-states/justice-sen-resigns-ahead-of-mondays-impeachment-motion/article2417401.ece.

¹⁰⁷ Constitution of Malaysia, Art 125(4).

¹⁰⁸ See Justice (ret’d) JS Verma et al, *Report of the Panel of Eminent Persons to Review the 1988 Judicial Crisis in Malaysia* (Kuala Lumpur, 2008), para 2.46, available online via: www.malaysianbar.org.my/index.php?option=com_docman&task=doc_details&gid=1715&Itemid=332. Relative diversity does not in itself guarantee fairness, of course, and IBAHRI notes the authors’ finding that ‘the composition of the Tribunals, the process adopted by them, and the findings and conclusions arrived at against [the three judges who were convicted]... were not justified or otherwise appropriate’: para 23.1.

¹⁰⁹ Constitution of Pakistan, Art 209.

¹¹⁰ For a description of the crisis, see the note by Kersi Schroff and Krishan S Nehra on the Law Library of Congress website at: www.loc.gov/law/help/pakistan-justice.php.

Commonwealth judges.¹¹¹ When Chief Justice Satnarine Sharma was tried in 2007 on allegations of attempting to pervert the course of justice, his case was heard by Lord Mustill of the British House of Lords and senior jurists from Jamaica and St Vincent. All the usual procedures that apply in a criminal trial were applied, and Lord Mustill observed that:

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

Following fair consideration of the evidence, Sharma was acquitted.¹¹²

2.11 Concluding observations

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

There is no absolutely fixed model that such a procedure must emulate. It might or might not be appropriate, for example, to make provisions similar to those that were suggested during debates in Sri Lanka in 2000 about a proposed new constitution; they envisioned ‘a committee consisting of three persons each of whom hold, or have held, office as a judge in the highest court of any Commonwealth country’.¹¹³ Whatever form the disciplinary hearing takes, however, it must ensure that the case against a judge is considered by a diverse body that is independent of the people who made the initial complaint and its procedures should include:

- a guarantee of the presumption of innocence;
- rules of evidence and provisions as to standard of proof;
- guarantees that an impugned judge will have timely notice of particularised charges, full disclosure of adverse evidence and the right to confront and call witnesses, either in person or through freely chosen legal representatives;
- provision for open and reportable hearings, should a judge choose to waive his or her right to confidentiality; and
- explicit acknowledgment that all disciplinary hearings against judges are subject to ordinary judicial review in the Court of Appeal and fundamental rights applications in the Supreme Court.

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

¹¹¹ Constitution of Trinidad and Tobago, Art 137(3).

¹¹² Robertson, ‘Report on the Impeachment’, paras 15–17, 56.

¹¹³ See Art 151(4) (b) (i) of the draft proposals, online at: http://confinder.richmond.edu/admin/docs/srilanka_constitution.pdf.

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

In respect of judicial appointments, the IBAHRI urges the Sri Lanka government also to reform the Judicial Service Commission, paying specific heed to the relevant section of the Latimer House Guidelines (which is currently being ignored in Sri Lanka). This section provides that:

‘Jurisdictions should have an appropriate independent process in place for judicial appointments. Where no independent system already exists, appointments should be made by a judicial services commission (established by the Constitution or by statute) or by an appropriate officer of state acting on the recommendation of such a commission. The appointment process, whether or not involving an appropriately constituted and representative judicial services commission, should be designed to guarantee the quality and independence of mind of those selected for appointment at all levels of the judiciary.

Judicial appointments to all levels of the judiciary should be made on merit with appropriate provision for the progressive removal of gender imbalance and of other historic factors of discrimination. Judicial appointments should normally be permanent; whilst in some jurisdictions, contract appointments may be inevitable, such appointments should be subject to appropriate security of tenure.

Judicial vacancies should be advertised.’

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

‘It is a lesson of history that the most valued constitutional rights pre-suppose an independent judiciary through which alone they can be vindicated. There can be no free society without law, administered through an independent judiciary. It is and should be the pride of a democratic government that it maintains and upholds independent courts of justice where even its own acts can be tested... The framers of the Constitution had considered it to be in the interest of the public and not merely of the individual Judges that their security of tenure should be sacrosanct and sanctioned by the Constitution.’¹¹⁴

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

Chapter Three: The Perilous State of the Legal Profession

3.1 A legal culture under attack

It would be a mistake to regard the removal of Chief Justice Shirani Bandaranayake as a mere illustration of the friction between Sri Lanka's three branches of government. It also reflects longstanding official hostility towards people who are critical of government policies and, in particular, outspoken members of the legal profession. IBAHRI's May 2009 report described a political climate in which lawyers were experiencing not just abuse, but serious physical assaults.¹¹⁵ Two months later, lawyers defending the *Sunday Leader* against a defamation action brought by Defence Minister Gotabhaya Rajapaksa were then vilified in a posting on the Defence Ministry website, headlined 'Traitors in Black Coats Flock Together'. Eleven days after its appearance, the country's prime minister, Ratnasiri Wickremanayake, expressed support for the article, observing that 'any lawyer, doctor or ordinary citizen could be described as a traitor if he or she violates the country's constitution'.¹¹⁶

3.2 An escalation of tensions since the impeachment

Members of the IBAHRI delegation heard from apparently informed sources within Sri Lanka that the names of 135 leading anti-impeachment lawyers have recently been furnished in secret to the Intelligence Bureau, a division of the Ministry of Defence. Although they were unable to ascertain the Government's response to this claim (due to its failure to respond to IBAHRI communications), they are very concerned that such a list might exist and fall into the wrong hands. This is because there has been an escalation of apparently criminal threats and assaults against outspoken lawyers since the impeachment crisis began. The delegation notes the following seven incidents, in particular:

- On 7 October 2012, a senior District Court judge and the secretary of the Judicial Service Commission, Manjula Tillekaratne, was attacked and hospitalised by four men armed with a pistol and iron bars, while he sat in his car on a Colombo street.¹¹⁷ As noted in Section 2.3 above, this was very soon after the Supreme Court's first ruling against the Divineguma Bill, Mr Tillekaratne's complaints about executive interference and personal criticisms about him made by President Rajapaksa to media editors. After the attack, the President used his extensive powers under the 18th Amendment to appoint a new JSC Secretary in place of Mr Tillekaratne, who was transferred out of Colombo to sit as a Supernumerary District Judge in the town of Ratnapura. According to a number of lawyers with whom the delegation spoke, this was intended and perceived as a punishment and Mr Tillekaratne has been given little or no work since his transfer.

¹¹⁵ IBAHRI, 'Justice in Retreat', paras 4.8–4.38.

¹¹⁶ 'Those Who Violate SC Rules are Traitors – PM', *Daily News*, 22 July 2009, online at: www.dailynews.lk/2009/07/22/news24.asp; cf 'Bar Association Condemns Ministry Website Slur on Three Lawyers', *Sunday Times*, 12 July 2009, online at: www.sundaytimes.lk/090712/News/sundaytimesnews_23.html.

¹¹⁷ See 'Executive Vs. Judiciary: The Debate Continues', *Sunday Leader*, 14 October 2012, online at: www.thesundayleader.lk/2012/10/14/executive-vs-judiciary-the-debate-continues.

- On 17 December 2012, lawyer and anti-impeachment activist Gunaratne Wanninayake was threatened by four gunmen outside his house in a Colombo suburb. They demanded that he step out of his car and then fled in a nearby white van after neighbours raised a commotion. (This is significant because white vans have been repeatedly used to abduct government critics and transport death squads in recent years.) A total of eight people made statements to the police about the incident, but no apparent progress has been made in identifying the assailants. After receiving another telephoned death threat, Mr Wanninayake asked the Inspector-General of Police for protection against future assaults, but was told this was not possible without reference to the Ministry of Defence. When he contacted that Ministry, however, an official advised him to address his request to the Inspector-General of Police.¹¹⁸
- On 20 December 2012 at around 12.20 am, gunshots were heard outside the residence of Wijedasa Rajapakse PC, an opposition MP and the then president of the Bar Association of Sri Lanka (BASL), who had been mobilising legal opposition to the impeachment. He was visited soon afterwards by President Mahinda Rajapaksa. The two men reportedly held ‘cordial discussions’; the BASL president announced in the new year that he would not seek a second term (as is ordinarily customary) in forthcoming elections; and following another ‘special meeting’ with President Rajapaksa on 14 January 2013, the BASL’s General Secretary announced that the organisation’s work would ‘resume their work as normally’ [sic].¹¹⁹
- The outspoken critic of the impeachment who was then elected BASL president in Wijedasa Rajapakse’s place, Upul Jayasuriya, complained to the police on 22 December 2012 that he had been the subject of online death threats.¹²⁰
- A lawyer named Nagananda Kodituwakku, whose client sought to allege that Mohan Peiris had committed improprieties while Attorney-General in respect of the ‘Dockyardgate’ case, complained to the police about death threats (for the second time) on 23 January 2013. He reported receipt of an email which warned him that ‘Appearance in the case against the CJ, against our advice will bring an END with fatal results’.¹²¹ His client’s petition was then summarily dismissed by the Supreme Court with costs and an application to renew was refused on 26 February by Justice Shiranee Tilakawardane, who observed that Mr Kodituwakku wished to ‘expunge’ any personal allegations ‘against anyone’ that he might previously have made.¹²² No mention was made of the death threats.

118 On the assault, see ‘Lawyer Wanninayake Attacked’, *Ceylon Today*, 17 December 2012, online at: www.ceylontoday.lk/16-19908-news-detail-lawyer-wanninayake-attacked.html.

119 ‘President Visits Bar Association President After Shots Heard’, *Colombo Page*, 20 December 2012, online at: www.colombopage.com/archive_12B/Dec20_1356017232CH.php; ‘BASL Chief to Bow Out’, *Daily Mirror*, 2 January 2013, online at: www.dailymirror.lk/news/24683-basl-chief-to-bow-out.html; ‘Back to Work – Bar Assoc’, *Sri Lanka Mirror*, 15 January 2013, online at: <http://srlankamirror.com/news/4615-back-to-work-bar-assoc>.

120 ‘Lawyer Upul Jayasuriya Complaints to IGP on Threats to His Life’, *Daily Mirror*, 22 December 2012, online at: www.dailymirror.lk/news/24454-lawyer-upul-jayasuriya-complains-to-igp-on-threats-to-his-life.html. On Mr Jayasuriya’s election, see section 2.8 of this report.

121 ‘Mohan Pieris’s Gross Misconduct And Dishonesty Exposed Before The SC’, *Colombo Telegraph*, 29 January 2013, online at: www.colombotelegraph.com/index.php/mohan-pieris-gross-misconduct-and-dishonesty-exposed-before-the-sc; ‘Mohan Pieris’ Misconduct Case: “Deshapremi” Threats Against Challenging The Single Judge Ruling’, *Colombo Telegraph*, 9 February 2013, online at: www.colombotelegraph.com/index.php/mohan-pieris-misconduct-case-deshapremi-threats-against-challenging-the-single-judge-ruling. On ‘Dockyardgate’ itself, see section 3.3 of this report.

122 Justice Tilakawardane’s ruling is reproduced online at: www.colombotelegraph.com/wp-content/uploads/2013/03/2013-02-26-REVISION-ORDER.pdf.

- In mid-January 2013, four lawyers closely associated with opposition to the impeachment were identified by posters across Colombo as terrorists. They were also sent letters signed by 'the Patriotic Front' that labelled one of their number a 'traitor', identifying the number plates of cars owned by himself and his wife and naming his children. It warned of 'drastic actions' that would be taken to 'silence' them. The recipients were Romesh de Silva PC (Chief Justice Bandaranayake's lead counsel before the Parliamentary Select Committee), JC Weliamuna, Jayampathi Wickremarathna PC and MA Sumanthiran MP.¹²³
- Human rights lawyer Lakshan Dias formally complained to police on 25 February 2013 that unknown men on motorcycles and a white van had been loitering around his house for the previous three days, inquiring about him from his wife and neighbours.¹²⁴

These threats and attacks are a cause for great concern. They suggest that Sri Lanka's Government is unable to guarantee the safety of lawyers and judges. The failure to identify or arrest suspects also indicates that the authorities have little or no interest in tracking down criminals, insofar as their victims are identified with criticism and opposition towards government policies.

This assessment of events is given added credence by well-documented recent reports by, for example, the International Commission of Jurists,¹²⁵ which have detailed a systematic failure by the Government of Sri Lanka to protect its peaceful opponents and critics. The UN High Commissioner for Human Rights observed in a report published in February 2013 that:

'the period from the last quarter of 2011 to mid-2012 witnessed new reports of abductions and disappearances, including of political activists as well as politicians and their family members. During that period, there were also reported cases of abducted persons being found tortured and killed.'¹²⁶

Journalists have suffered with particular regularity. Plausible evidence given to the IBAHRI delegates suggests that a total of 22 journalists and media activists have been murdered over the last six years, and innumerable others have notoriously been abducted or disappeared. Reporters Without Borders considers Sri Lanka to have less press freedom than any other democratic state in the world – it comes 162nd out of 179 countries¹²⁷ – and the Committee for the Protection of Journalists knows of only three countries anywhere that are less likely to bring the killers of journalists to justice.¹²⁸ All those people interviewed by members of the IBAHRI mission confirmed that no credible investigation into crimes against the free media has ever taken place in Sri Lanka and the total absence of prosecutions is a matter of public record. A recent reminder of what this impunity means in practice came on 15 February 2013, when Faraz Shauketaly, a journalist for the *Sunday Leader* was shot and

¹²³ See Asian Human Rights Commission, 'Unleashing a Period of Terror Again', 17 January 2013, online at: www.humanrights.asia/news/ahrc-news/AHRC-STM-022-2013; Asian Human Rights Commission, 'Romesh de Silva PC, Jayampathi Wickremarathna PC, MA Sumanthiran MP and JC Weliamuna (a senior lawyer) Receive Threatening Letters', 18 January 2013, online at: www.humanrights.asia/news/ahrc-news/AHRC-STM-024-2013.

¹²⁴ 'NIR Decries Threats on Rights Activist', *Times Online*, 27 February 2013, at <http://sundaytimes.lk/latest/30730-nfr-decries-threats-on-rights-activist.html>.

¹²⁵ International Commission of Jurists, 'Authority Without Accountability: Sri Lanka's Crisis of Impunity' (November 2012), online at: www.icj.org/wp-content/uploads/2012/10/SRI-LANKA-IMPUNITY-REPORT-NOV-12-FINAL.pdf.

¹²⁶ *Report of the Office of the United Nations High Commissioner for Human Rights on Advice and Technical Assistance for the Government of Sri Lanka on Promoting Reconciliation and Accountability in Sri Lanka*, 11 February 2013 ('OHCHR, *Report on Advice and Technical Assistance*'), 9-10, online at: www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-38_en.pdf.

¹²⁷ Reporters Without Borders, Press Freedom Index 2013, online at: <http://en.rsf.org/press-freedom-index-2013,1054.html>.

¹²⁸ See 'Getting Away With Murder' (the CPJ's 2012 Impunity Index), online at: www.cpj.org/reports/2012/04/impunity-index-2012.php.

seriously injured inside his home by three intruders. According to the newspaper's editor, he had been working on a series of articles that focused on corruption in both 'the private and government sectors'.¹²⁹ As is now commonplace in Sri Lanka, the criminals responsible remain at large.

3.3 The obligation to investigate, prosecute and punish

The failures of prosecution highlighted above signify either that law enforcement mechanisms within Sri Lanka have broken down, that the Government is tolerating the violence, or that such incidents are taking place with state connivance. The IBAHRI was unable to ascertain the Government's own explanation because its request for interviews went unanswered, but it observes that the situation is dire whatever its cause. A culture of impunity is taking root that allows for the assault or assassination of critics, while subverting all those mechanisms that would ordinarily seek to address lawlessness. The IBAHRI observes that this is a public security issue as well as a human rights concern. Citizens of a state that fails to uphold the law are liable to lose trust in its capacity for fairness, which carries serious risks for long-term peace and stability.

The Government's failures in this regard are accentuated by the fact that lawyers are not being targeted at random; they are being victimised specifically because they are exercising rights recognised as fundamental by the Sri Lankan Constitution. Article 12(1) of that Constitution and Article 26 of the ICCPR guarantees 'equal protection of the law' and the necessary implication of both provisions is that lawyers can (and should) speak up for legal rights, even if their causes or clients are unpopular. This is reflected by several of the United Nation's Basic Principles on the Role of Lawyers. The IBAHRI observes in particular that governments are obliged to protect lawyers 'from intimidation, hindrance, harassment or interference', to safeguard them from threats arising out of their work and to avoid any identification of lawyers 'with their clients or their clients' causes as a result of discharging their functions'. Their free speech must be respected, because:

'lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights...'.¹³⁰

In a similar vein, robust journalism is one of the cornerstones of democracy and a core aspect of the freedom of speech guaranteed by Article 14 of the Sri Lanka Constitution and Article 19 of the ICCPR.¹³¹

In these circumstances, the Government's inability or unwillingness to tackle crimes against lawyers and journalists is not just a failure of domestic law-enforcement but also a contravention of the ICCPR. It is well-established that the guarantee of an 'effective remedy' under Art 2(3) (a) of that treaty imposes an obligation on state parties to investigate and prosecute *prima facie* violations of basic rights under the Covenant and to punish violators who are found guilty after a fair trial. As was noted by the UN Human Rights Committee in March 2004, this obligation is engaged with particular force

¹²⁹ See 'British-Sri Lankan Journalist Shot In His Bedroom', *The Independent*, 16 February, 2013, online at: www.independent.co.uk/news/world/asia/british-sri-lankan-journalist-shot-in-his-bedroom-8497658.html; see also 'Leader Journalist Shot', *Sunday Leader*, 17 February 2013, online at: www.thesundayleader.lk/2013/02/17/leader-journalist-shot.

¹³⁰ UN Basic Principles 16, 17, 18, 23, available online via: www.unrol.org/doc.aspx?d=2327.

¹³¹ The Human Rights Committee reiterated the significance of press freedom in July 2011. See UNHCR General Comment No 34, especially paras 13, 20, 38, 40–47, available online via: www2.ohchr.org/english/bodies/hrc/comments.htm.

in the case of rights violations that amount to criminal offences.¹³² Although it would be unrealistic to expect national authorities to solve every single crime, the obligation is clearly breached by Sri Lanka's failure effectively to investigate or prosecute a single threat, assault or act of murder committed against a lawyer or journalist.

3.4 The link between impunity and the impeachment

The apparent failure of systematic law-enforcement in Sri Lanka is not a phenomenon that should be examined in isolation, because it is closely linked to the more general crisis that now threatens the rule of law within the country. In this regard, the IBAHRI delegates agree with a statement made by the UN Special Rapporteur on the Independence of Judges and Lawyers on 31 December 2012. 'The steps taken to impeach Chief Justice Bandaranayake,' she warned, 'appear to be the culminating point of a series of attacks against the judiciary for asserting its independence'.¹³³

The risks are rendered even more acute by uncertainties that surround Mr Mohan Peiris's capacity to recognise and remedy the problems. He served as Attorney-General between 18 December 2008 and 3 September 2011 and, as such, bore a primary obligation between those dates to investigate credible allegations of fundamental rights violations and prosecute them where appropriate. Under Sri Lankan law, the Attorney-General is positively required to advise government departments, public officials and the police about 'any criminal matter of importance or difficulty'; he is authorised to summon police officers to his office with all relevant documents for the purpose of initiating or prosecuting criminal cases; and once a case has commenced, he may direct specific further inquiries by a magistrate if the existing evidence appears to him to be in any way defective.¹³⁴ In respect of crimes reportedly committed against lawyers and journalists, these were powers that the Attorney-General's Department repeatedly failed to exercise under Mr Peiris. Its inactivity is illustrated by the following nine cases, which were investigated ineffectively (if at all) and never prosecuted:

- a grenade attack on 27 September 2008 targeting the Colombo home of human rights lawyer JC Weliamuna, followed two days later by the suspicious appearance of two motorcyclists at the Sri Lanka offices of the anti-corruption group Transparency International, which Mr Weliamuna headed at the time;¹³⁵
- allegations by human rights lawyers Amitha Ariyaratne and HRDG Mendis that between September 2008 and January 2009 they were threatened with death (in one instance, by a police officer) and had their offices burned down;¹³⁶

132 See UNHCR General Comment No 31, paras 15 and 18, online at: www.unhcr.ch/tbs/doc.nsf/0/58f5d4646e861359c1256ff600533f5f.

133 www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12909&LangID=E.

134 Code of Criminal Procedure Act (No 15 of 1979), ss 393(2) and (3), 397(1) and (2); cf 398(2), 399, online at: www1.umn.edu/humanrts/research/srilanka/statutes/Code_of_Criminal_Procedure_Act.pdf.

135 This case is discussed in IBAHRI, 'Justice in Retreat', 43–44; International Crisis Group, 'Sri Lanka's Judiciary: Politicised Courts, Compromised Rights' (June 2009), p 1, online at: [www.crisisgroup.org/~media/files/asia/south-asia/sri-lanka/172_sri_lankas_judiciary___politicised_courts___compromised_rights.pdf](http://www.crisisgroup.org/~/media/files/asia/south-asia/sri-lanka/172_sri_lankas_judiciary___politicised_courts___compromised_rights.pdf).

136 See 'SRI LANKA: Two Lawyers File Action Before the Supreme Court Regarding Death Threats and Arson Attack', online at: www.humanrights.asia/news/ahrc-news/ALRC-STM-049-2009; cf IBAHRI, 'Justice in Retreat', 44–45.

- the bombing on 6 January 2009 of the country's main independent television station, Sirasa TV, by up to 20 masked men;¹³⁷
- the murder of the editor of the *Sunday Leader*, Lasantha Wickramatunge, by four motorcycle-borne assassins (part of an eight-man team) on 8 January 2009. Mr Wickramatunge famously predicted his own death in an editorial stating that 'when finally I am killed, it will be the Government that kills me... today it is the journalists, tomorrow it will be the judges';¹³⁸
- an attack on 29 January 2009 on newspaper editor Upali Tennakoon and his wife, by four motorcycle-borne assailants wielding weapons including a sharpened iron rod and a dagger;¹³⁹
- the bundling into a white van of Stephen Sunthararaj, a project manager with the Centre for Human Rights and Development, by four or five men and two motorcyclists, some in military uniforms, on a Colombo street in 7 May 2009. A magistrate had earlier that day ordered his release from almost three months of police detention without charge. US and European Union officials were told in December 2009 by Mr Palitha Kohana, then the Permanent Secretary to the Ministry of External Affairs, that Mr Sunthararaj had been arrested rather than abducted and was in state custody. He remains missing;¹⁴⁰
- the abduction and protracted assault of Poddala Jayantha on 1 June 2009. Mr Jayantha, a well-known activist and journalist, fled Sri Lanka in fear of his life later that year and a member of the Government named Mervyn Silva declared before cameras in March 2012 that 'I'm the one who chased Poddala Jayantha out of this country. I am telling you about this incident today. He went because of me.'¹⁴¹ Mr Silva was (and is) Sri Lanka's Minister for Public Relations.
- the firebombing of the anti-government Lanka-e-News website on 31 January 2011; and¹⁴²
- the disappearance in January 2010 of Prageeth Ekneligoda, a cartoonist and columnist critical of the Government. In this case, Mohan Peiris asserted after his departure from the Attorney-General's office that some kind of inquiry was underway, but his claim is itself a cause for disquiet. During his time as the Cabinet's chief legal adviser, he was sent to Geneva to address a session of the UN Committee Against Torture (CAT) on 9 November 2011. Asked there about Mr Ekneligoda, he said that 'Our current information is that Mr Ekneligoda has taken refuge in a foreign country. I am not saying this with the tongue in my cheek. It is something that we are reasonably certain of. This is information that we have got through the media circles and that this is being played out for various reasons. I shouldn't say more because the matter is being investigated.'¹⁴³ (The words quoted are taken from a contemporaneous BBC account.)

137 See Committee to Protect Journalists, 'Sri Lanka Special Report: Failure to Investigate', 23 February 2009, online at: <http://cpj.org/reports/2009/02/failure-to-investigate-sri-lanka-journalists-unde.php>.

138 The text of Lasantha Wickrematunge's final testament was published in the *Sunday Leader* on 11 January 2009. See 'And Then They Came For Me', online at: www.thesundayleader.lk/20090111/editorial.htm.

139 See Upali Tennakoon, 'How a Newspaper Editor Was Attacked in Broad Daylight', *Lanka-e-News*, 2 February 2009, online at: www.lankaenews.com/English/news.php?id=7079 and <http://upalitennakoon.blogspot.co.uk>.

140 Centre for Human Rights and Development, 'Arrest and Abduction of Stephen Sunthararaj - No Progress in Investigations', online at: <http://chrdsrilanka.org/PAGES/newsUpdates6.html>. Mr Kohana is now Sri Lanka's Permanent Representative to the United Nations.

141 Charles Haviland, 'Sri Lanka Minister Mervyn Silva Threatens Journalists', 23 March 2012, online at: www.bbc.co.uk/news/world-asia-17491832.

142 'Lanka-eNews Office Set on Fire', *Sunday Leader*, 31 January 2011, online at: www.thesundayleader.lk/2011/01/31/lankaenews-office-set-on-fire.

143 See 'Govt. Challenged to Provide Information on Prageeth', 17 November 2011, online at www.bbc.co.uk/sinhala/news/story/2011/11/111117_prageeth.shtml; 'Former A-G 'misled UN' Says FMM', 25 November 2011, online at: www.bbc.co.uk/sinhala/news/story/2011/11/111125_prageeth_tissa_poddala.shtml.

Mr Ekneligoda's wife duly applied for a court order to learn further details about the information in Mr Peiris's possession, but on 5 June 2012 he resiled from his earlier statement. On oath, he insisted that he in fact had 'no information that the corpus is alive or not and I do not think the government does either and that God only knows where Ekneligoda is'.¹⁴⁴

Mohan Peiris's tenure was also marked by a lack of attention within the Attorney-General's Department towards what the aforementioned CAT session characterised as 'continued and consistent allegations of widespread use of torture and other cruel, inhuman or degrading treatment of suspects in police custody.' As far as the IBAHRI delegates could establish, not a single allegation was prosecuted between December 2008 and September 2011, and they note the specific concerns expressed by the CAT in December 2011 about 'the prevailing climate of impunity' in Sri Lanka and 'reports that the Attorney General's office has stopped referring cases to the Special Investigations Unit (SUP) of the police'.¹⁴⁵

The IBAHRI observes that this failure to prosecute threats, attacks, arsons, abductions, murders, and acts of torture is in sharp contrast to a number of steps that the Attorney-General's Department took during the same period to delay or discontinue serious criminal charges that had been commenced by others. It did not press and reportedly considered terminating eight-year-old murder and bombing charges against two MPs who remain in Government today – Media and Information Minister Keheliya Rambukwella and Deputy Minister of Environment and Renewable Energy Abdul Cader¹⁴⁶ – and Attorney-General Peiris made at least five other positive interventions that were widely perceived to be in alignment with the interests of the ruling coalition:

- a decision communicated to Colombo High Court on 28 June 2010 to withdraw a torture indictment against a police officer named Anura de Silva. This happened on the same day that Mr de Silva was put in charge of a sensitive case against former presidential candidate Sarath Fonseka, who would soon be charged with falsely accusing Defence Secretary Gotabhaya Rajapaksa of war crimes;¹⁴⁷
- advice given by Attorney-General Peiris that resulted on 18 November 2010 in the withdrawal of abduction allegations against Duminda Silva, a UPFA MP who was in the past associated with the Defence Ministry;¹⁴⁸
- a second discontinuance benefiting Duminda Silva MP which occurred on 24 March 2011. This resulted in the abandonment of five abduction charges (involving a different alleged victim) and

144 'God Only Knows Where Ekneligoda Is – Former Attorney-General', *Lanka-e-News*, 6 June 2012, online at: www.lankaenews.com/English/news.php?id=12958; see also Charles Haviland, 'Sri Lanka Official Has 'No Idea' of Reporter's Fate', 5 June 2012, online at: www.bbc.co.uk/news/world-south-asia-18332987. Prior to Mr Peiris's testimony, the Chairman of the National Human Rights Commission of Sri Lanka had instructed Mrs Ekneligoda that the NHRC would not assist her by requesting a statement from the former Attorney-General: www.srilankabrief.org/2012/05/disappearance-of-prageeth-ekneligoda.html.

145 See Concluding Observations made by the Committee Against Torture at its 47th Session (8 December 2011), paras 6, 18, online at: www2.ohchr.org/english/bodies/cat/docs/co/CAT.C.LKA.CO.3-4_en.pdf.

146 See 'Whither Case Against Cader', *Daily Mirror*, 9 July 2010, online at: <http://print2.dailymirror.lk/news/front-page-news/15193.html>; on the original charges, see 'Minister, 4 Others, Charged With Murder, Polls Violence', *The Island*, 7 December 2002, online at: www.island.lk/2002/12/07/news03.html. See also 'Diversionary Politics Prevail Over Spirit of Independence', *The Nation*, 6 February 2011, online at: www.nation.lk/2011/02/06/politics.htm.

147 'Police Officer Under a Cloud Investigating My Client's Case: Defence Counsel', *Sunday Times*, 12 June 2011, online at: http://sundaytimes.lk/110612/News/nws_17.html.

148 'Anarkali Withdraws Complaint Against Duminda', *The Island*, 18 November 2010, available via: www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=11577.

a count alleging the rape of an under-aged girl.¹⁴⁹ Insofar as witnesses might have been unwilling to testify, Attorney-General Peiris did not publicly address a question that ought to have been central: whether their reluctance was caused by fear;

- a decision to abandon serious criminal charges against UPFA MP, Chandana Kathriarachchi, on 1 February 2011. Those charges included murder and they were withdrawn despite the strenuous opposition of lawyers acting on behalf of the victim; and¹⁵⁰
- a decision of August 2010 to drop charges against the Colombo Dockyard Ltd, involving lost customs revenues of more than 619m rupees. The ten-year-old scandal concerned ('Dockyardgate') was widely suspected of implicating some senior Government officials and the decision of then Attorney-General Peiris has recently been rendered even more dubious. On 1 February 2013, a panel of the Supreme Court over which he now presides summarily dismissed, with costs, a private action filed in September 2010 by the customs officer who had uncovered the original fraud. It also repeatedly warned the petitioner's lawyer, Nagananda Kodituwakku, not to refer to Mohan Peiris by name.¹⁵¹

These cases give rise to some serious questions. The Attorney-General has powers to bring prosecutions to an end under Sri Lanka's Code of Criminal Procedure,¹⁵² but state officials should never exercise such a discretion arbitrarily. As has been recognised by the country's Supreme Court and all relevant international instruments, including the UN Guidelines on the Role of Prosecutors and the International Association of Prosecutor's Standards of Professional Responsibility, prosecutorial functions must be exercised consistently, fairly and independently of external interference.¹⁵³ Any deficiencies in this regard subvert the rule of law at its core, by denying a predictable remedy to victims of crime and lowering institutions of justice in the public's esteem.

The IBAHRI emphasises that these observations are not intended to cast aspersions on Mohan Peiris as an individual. They are made because they illustrate serious structural weaknesses in Sri Lanka's criminal justice system which the currently constituted Supreme Court may be particularly unsuited to repair. Vulnerable human rights defenders are being endangered by the state's reluctance or inability to pursue wrongdoers, while the prosecution and discontinuance of cases appears often to depend on political affiliation. Since these issues are sometimes a matter of life and death, it is necessary and important to address them candidly.

149 'AG Withdraws Abduction Charges Against MP Duminda Silva', *Sri Lanka Mirror*, 24 March 2011, online at: www.srilankamirror.com/old/english/the-news/2902-ag-withdraws-abduction-charges-against-mp-duminda-silva; 'Duminda Silva Discharged from Case', 24 March 2011, available online via: www.highbeam.com/doc/1P3-2300417601.html.

150 See 'Chandana Kathriarachchi Sentenced', *Daily Mirror*, 27 June 2011, online at: www.dailymirror.lk/news/12135-chandana-kathriarachchi-sentenced.html; 'SRI LANKA: Protest against Attorney General's decision to terminate proceedings in Kathri Arrachige case', online at: www.humanrights.asia/news/forwarded-news/AHRC-FST-022-2011.

151 See 'The Case Against Mohan Pieris's Misconduct; Dismissed With Cost Awarded To The Respondents!' *Colombo Telegraph*, 1 February 2013, online at: www.colombotelegraph.com/index.php/the-case-against-mohan-pieris-misconduct-dismissed-with-cost-awarded-to-the-respondents; see also the account given on the website of the Rights Now Collective for Democracy, 'Case Against Mohan Peiris: A Tragic Day for Justice', online at: www.rightsnow.net/?p=1652. For the history of the case, see Elmore Perera, 'Former Deerstalkers in the Supreme Court Brazenly Safeguard Errant Gamekeepers', *Colombo Telegraph*, 13 February 2013, online at: www.colombotelegraph.com/index.php/former-deerstalkers-in-the-supreme-court-brazenly-safeguard-errant-gamekeepers.

152 Sections 190, 194(1) of the Code of Criminal Procedure (No 15 of 1979), online at: www1.umn.edu/humanrts/research/srilanka/statutes/Code_of_Criminal_Procedure_Act.pdf.

153 *Victor Ivo v Sarath N Silva, Attorney General and Another* [1998] 1 Sri LR 340, at 344–45; UN Guidelines on the Role of Prosecutors (especially Guidelines 12, 13, 15, 17), online at: www.unrol.org/doc.aspx?d=2515; International Association of Prosecutors, 'Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors (1999)', online at: www.coe.int/t/dghl/monitoring/greco/evaluations/round4/IAP1999_EN.pdf, especially paras 2.1, 2.3, 3, 4.1, 4.2 and 4.3.

Chapter Four: Conclusion and Recommendations

4.1 Conclusion

The IBAHRI delegation was primarily concerned throughout its mission with the procedure used to remove Chief Justice Bandaranayake and the more general problems that are confronting Sri Lanka's judiciary and legal profession. For that reason, this report has not assessed the merits of all the allegations set out in the parliamentary motion that initiated her impeachment. The IBAHRI considers it important to reiterate, however, that the Chief Justice was ousted in circumstances that were characterised by suspect motivations and a seriously unfair procedure. The finding that she was guilty of three counts of serious misbehaviour was made unlawfully and contrary to principles of natural justice, and none of those counts was proved to an appropriate standard.

The flawed and hasty manner of Chief Justice Bandaranayake's removal reflects a deeper crisis. Independent checks on executive power have been dismantled and vendettas against critics of the executive are being normalised.¹⁵⁴ Hostility towards perceived enemies of the state is also being tolerated as a matter of routine. In some circumstances, this has reflected the Government's own official statements and deeds, and countless acts of criminal violence have gone uninvestigated and unpunished by the authorities.

When it comes to addressing the future, it is, therefore, impossible to divorce the current impeachment crisis from more general issues relating to the rule of law. These include the importance of addressing such human rights abuses as might have taken place during the final phase of its quarter-century-long civil war. The need for such an accounting has been formally acknowledged by Sri Lanka's government itself, through its creation of the Lessons Learnt and Reconciliation Commission, and it has been repeatedly reaffirmed by the United Nations, most recently in a February 2013 report by the UN High Commissioner for Human Rights and a resolution passed on 21 March 2013 by the Human Rights Council.¹⁵⁵ It is beyond this report's scope to consider the scale of the abuses that require remedy, but it is squarely within its remit to point out that justice, reconciliation and a sustainable peace depend on the existence of a stable legal system and an independent judiciary.

For the reasons set out in Chapters Two and Three of this report, the IBAHRI takes the view that the impeachment of Chief Justice Bandaranayake represents a huge setback in this regard. Although Sri Lanka's Court of Appeal has ruled that the Parliamentary Select Committee tried her unlawfully, her appointed successor now presides over the Supreme Court which will decide whether to uphold that decision. The first witness to testify against the Chief Justice, Shiranee Tilakawardane, has

¹⁵⁴ In this regard, the IBAHRI notes that the Bribery Commission summoned Chief Justice Bandaranayake on 18 March 2013, for a reason that was never explained to her. This is the same presidentially-appointed body that chose to call her husband in late August 2012, just as the Supreme Court began deliberating the constitutionality of the Divneguma Bill. See 'Shirani B. Refuses to Enter Through Backdoor', *Daily Mirror*, 18 March 2013, online at: www.dailymirror.lk/news/26790-shirani-b-refuses-to-enter-through-backdoor.html; section 2.3 of this report.

¹⁵⁵ OHCHR, *Report on Advice and Technical Assistance*, online at: www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-38_en.pdf; BBC, 'UN Passes Resolution Against Sri Lanka Rights Record', 21 March 2013, online at: www.bbc.co.uk/news/world-asia-21873551.

simultaneously come to chair the Supreme Court whenever it has heard preliminary hearings in impeachment-related challenges. The adjournment that she ordered on 5 March 2013 has ensured that the President will appoint several of the judges who eventually rule on those challenges. The IBAHRI considers all these developments to be extremely regrettable. They raise the prospect of a Supreme Court that might in future be prepared to rubber-stamp preordained executive policies.

4.2 Recommendations

The IBAHRI is conscious that the Sri Lankan government's decision not to cooperate with its mission makes this report vulnerable to suggestions that it portrays only one side of events. The members of its mission have made a great effort to research and recount the facts objectively, however, and they are driven to conclude that those facts call for swift and extensive remedial measures.

The IBAHRI considers it imperative that Sri Lanka's authorities reinstate Chief Justice Shirani Bandaranayake, remove Mohan Peiris from the Supreme Court, and introduce reforms that can begin to restore judicial independence and the rule of law within Sri Lanka. One change that should be considered as soon as possible is repeal of the vastly expanded powers of appointment and promotion that were granted to the President in September 2010 by the 18th Amendment to the Constitution. Any country committed to constitutional democracy, the rule of law and human rights ought to acknowledge that the separation of powers principle excludes sweeping executive prerogatives of this sort.

Should reforms in this regard be delayed, the situation in Sri Lanka is liable to deteriorate even further. It is correspondingly important that foreign governments and international bodies take practical and immediate steps to encourage and protect those within the country who work to uphold fundamental rights and equal protection of the law. Indecisive measures are liable to be construed by the executive as a licence to continue on its present course.

The IBAHRI's ten specific recommendations are as follows.

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 Ariyaratne 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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