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The Judiciary under the 1978 Constitution

Nihal Jayawickrama

The judiciary under the 1978 Constitution has to be assessed by reference to the constitutional framework within which it functioned, the period that preceded it, and the contemporary international standards. This chapter focuses on the superior courts of Sri Lanka; in particular, the Supreme Court.

Judicial Independence

At the core of the concept of judicial independence is the theory of the separation of powers: the judiciary, one of three basic and equal pillars in the modern democratic State, should function independently of the other two, the executive and the legislature. This is necessary because of the judiciary's important role in relation to the other two branches. It ensures that the government and the administration are held to account for their actions. It ensures that laws are duly enacted by the legislature in conformity with the national constitution and, where appropriate, with regional and international treaties that form part of national law. To fulfil this role, and to ensure a completely free and unfettered exercise of its independent legal judgment, the judiciary must be free from inappropriate connections with, and influences by, the other two branches of government. Judicial independence thus serves as the guarantee of impartiality, and is a fundamental precondition for judicial integrity. It is, in essence, the right enjoyed by people when they invoke the jurisdiction of the courts seeking and expecting justice. It is a pre-requisite to the rule of law, and a fundamental guarantee of a fair trial. It is not a privilege accorded to the judiciary, or enjoyed by judges.

Judicial independence refers to the individual, as well as to the institutional, independence required for decision-making. On the one hand, judicial independence is a state of mind that enables a judge to decide a matter honestly and impartially on the basis of the law and the evidence, without external pressure or influence, and without fear of interference from anyone, including other judges. The concept of judicial independence is now complemented by the principle of judicial accountability

embodied in the Bangalore Principles of Judicial Conduct.[1] The Bangalore Principles are based on six core judicial values: Independence, Impartiality, Integrity, Propriety, Equality, and Competence and Diligence. The United Nations has requested member States to encourage their judiciaries to take into consideration the Bangalore Principles when developing rules with respect to the professional and ethical conduct of judges.[2] Judiciaries in many countries, on all the continents, have either done so, or are engaged in doing so; the Sri Lankan judiciary has not. [3]

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[1] This statement of judicial ethics to which all judges are required to conform was prepared under the auspices of the United Nations by the Judicial Integrity Group (a geographically representative group of Chief Justices) in consultation with the senior judges of over 75 countries of both common law and civil law systems. It is now the global standard. A 175-page commentary by the United Nations, '*Commentary on the Bangalore Principles of Judicial Conduct*' (September, 2007) has been translated into several languages by the United Nations as well as by national judiciaries and judicial training institutes; Another related document developed and adopted by the, Judicial Integrity Group '*Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct*' (2010) <www.judicialintegritygroup.org>; See also United Nations Convention against Corruption, '*Article 11: Implementation Guide and Evaluative Framework*' (2013) (Vienna: UNODC). Article 11 requires States Parties to "take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary". It adds that "such measures may include rules with respect to the conduct of members of the judiciary".

[2] ECOSOC Resolution 2006/23 of 27th July 2006. This resolution also endorsed the *Bangalore Principles of Judicial Conduct* as representing "a further development" and as "complementary to the *Basic Principles on the Independence of the Judiciary"*. Earlier, in Resolution 2003/43 of April 2003, which was also unanimously adopted, the UN Commission on Human Rights brought the *Bangalore Principles of Judicial Conduct* "to the attention of Member States, the relevant United Nations organs and intergovernmental and non-governmental organizations for their consideration".

[3] Justice Thomas, in his pioneering work on *Judicial Ethics in Australia*, explained why compliance with standards of conduct is necessary: "We form a particular group in the community. We comprise a select part of an honourable profession. We are entrusted, day after day, with the exercise of considerable power. Its exercise has dramatic effects upon the lives and fortunes of those who come before us. Citizens cannot be sure that they or their fortunes will not someday depend upon our judgment. They will not wish such power to be reposed in anyone whose honesty, ability or personal standards are questionable. It is necessary for the continuity of the system of law as we know it, that there be

Judicial independence is also a set of institutional and operational arrangements which the State is required to establish to enable the judge to enjoy that state of mind. For example, the protection of the administration of justice from political influence or interference cannot be achieved by the judiciary alone. The Human Rights Committee established under the International Covenant on Civil and Political Rights (ICCPR) has identified some of the institutional and operational arrangements which the State is required to establish. These include (i) the procedure and qualifications for the appointment of judges; (ii) the guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist; (iii) the conditions governing promotion, transfer, suspension and cessation of their functions; and (iv) the actual independence of the judiciary from political interference by the executive branch and legislature. [4]

The relationship between these two aspects of judicial independence is that an individual judge may possess the required state of mind, but if the court over which he or she presides is not independent of the other two branches of government in what is essential to its functions, the court cannot be said to be independent. Therefore, it is the responsibility of the State to establish the institutional and operational arrangements that would underpin and secure the independence of the judicial system.

Constitutional framework

The 1978 Constitution declares that Judges of the Supreme Court and of the Court of Appeal are appointed by the President; that they hold office during good behaviour until they reach the age of 65 and 63 years respectively; that they are not removable except by order of the President upon an address of Parliament presented

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standards of conduct, both in and out of court, which are designed to maintain confidence in those expectations."

[4] General Comment No.32 (2007), HRI/GEN/1/Rev.9 Vol.1, 27 May 2008, pp.248-268.

for such removal on the ground of proved misbehaviour or incapacity (all matters relating to the presentation of such an address, including the procedure for the passing of a resolution for such presentation, and the investigation and proof of the alleged misbehaviour or incapacity, being provided by law or by standing orders of Parliament); and that their salaries are determined by Parliament and are not reducible.[5] Judges of the High Court, the highest court of first instance exercising criminal jurisdiction, are appointed by the President, and are removable and are subject to disciplinary control by the President on the recommendation of the Judicial Service Commission consisting of the Chief Justice and two Judges of the Supreme Court appointed by the President.[6] The appointment, transfer, dismissal and disciplinary control of judicial officers (i.e. judges, presiding officers and members of subordinate courts of first instance and of tribunals or institutions created and established for the administration of justice or for the adjudication of any labour or other dispute) are vested in the Judicial Service Commission.[7]

The 1978 Constitution effected a fundamental change in the relationship that had existed since Independence between the three branches of government. This change resulted when the offices of Head of State and Head of Government were combined, and the powers of both offices were vested in a single individual, the President.[8] The President is elected for a fixed term of six years, and is irremovable except under a complex and labyrinthine procedure that requires the acquiescence of the Speaker, the Supreme Court and two-thirds of all the Members of Parliament expressed on two separate occasions.[9] The President does not sit in Parliament and therefore may not be questioned in that institution on the exercise of his powers. No proceedings

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[5] Articles 107 & 108.
[6] Article 111.
[7] Article 112.
[8] This change was, in fact, initially effected by *The Second Amendment to the 1972 Constitution*. A Bill for that amendment was passed by the National State Assembly (NSA) on 20th October 1977, after having been presented as an "urgent Bill in the national interest" under section 55 of that Constitution. The Constitutional Court examined and reported on it within 24 hours. However, the Second Amendment was not brought into operation until several months later, on 4 February 1978.
[9] Article 38.

may be instituted against him in any court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity.[10] He appoints, on his own initiative, the Judges of the Supreme Court and the Court of Appeal, as well as ambassadors, all high officials of the Government including the Attorney General, and the Judicial Service Commission and other commissions established under the Constitution. If the political party of which he is the leader commands a majority in Parliament, he has control of the legislative process as well. In essence, the President enjoys virtually unlimited power, more extensive than that possessed by a Head of State in any other democratic country. He or she is also the supreme source of patronage in the Republic.

The power and authority of the President is in sharp contrast to that of the Prime Minister under the 1946 and 1972 Constitutions. The Prime Minister, as Head of Government, held that office only for as long as he or she enjoyed the confidence of a majority of members of the House of Representatives or the National State Assembly, as the case may be, and indeed the support of his or her own political party.[11] The Prime Minister sat in the legislature and was answerable to it for his or her actions or omissions, often on a daily basis. The Prime Minister was also subject to the law and the jurisdiction of the courts. While it was the duty of the Prime Minister to recommend to the Governor-General or the President, as the case may be, suitable persons for appointment as judges of superior courts, it was the invariable practice for the Prime Minister to seek a recommendation from the Minister of Justice, and for the latter to make such recommendation after consulting the Chief Justice, the Attorney General and senior members of the unofficial Bar. Unlike the

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[10] Article 35. However, this immunity does not apply to any proceedings in any court in relation to the exercise of any power pertaining to any subject or function assigned to the President or remaining in his charge when allocating such subjects and functions to the Cabinet of Ministers. Nor does it apply to proceedings relating to the election of the President or for the removal of the President from office.

[11] For example, In March 1960, Prime Minister Dudley Senanayake dissolved Parliament when the Speech from the Throne presented by his minority government was rejected by the House of Representatives. In December 1964, Prime Minister Sirima Bandaranaike dissolved Parliament when the Press Council Bill was defeated by one vote in the House of Representatives.

President, who today personally administers the oath of office to Judges of the Supreme Court and the Court of Appeal, the Prime Minister had no direct contact with new judges since their oaths were administered either by the Chief Justice or other senior Judge.[12] Prime Ministerial tenure was also relatively short: D.S. Senanayake (3 years), Dudley Senanayake (3 years), Sir John Kotelawela (2 years), S.W.R.D. Bandaranaike (3 years), W. Dahanayake (6 months), Dudley Senanayake (4 months), Sirima Bandaranaike (4 years), Dudley Senanayake (5 years), and Sirima Bandaranaike (5+2 years). Prime Ministerial patronage, therefore, would have been short-lived and counter-productive, especially since the electorate changed the government at every general election. It would have been a very naive and short-sighted judge who attempted to nail his colours to the mast of a politician or a party in power.

The offices of Governor-General under the 1946 Constitution and of the President under the 1972 Constitution were also significantly different from that of the President under the 1978 Constitution. Both were required by the respective Constitutions to act on the advice of the Prime Minister.[13] On occasion, the Prime Minister would be requested to reconsider that advice, but ultimately it was the Prime Minister's advice that prevailed. However, the role of the constitutional Head of State (or representative of the Head of State, in the case of the Governor-General) was not merely ceremonial. He symbolized the State, and served as the essential and fundamental unifying factor in a multi-ethnic, multi-religious, and multi-party democracy. There were numerous occasions when opposition political parties appealed to the Governor-General on matters of serious concern to them. So did the judiciary. In 1972, at the height of the Constitutional Court crisis on the question whether the constitutional requirement that the Court should communicate its decision on a Bill to the Speaker within 14 days of the reference

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[12] *The Court of Appeal Act 1971* and the *Administration of Justice Law 1973* provided for the judicial oath to be administered by the constitutional Head of State.

[13] *The 1972 Constitution*, Article 27. *The 1946 Constitution*, Article 4 required the Governor-General to exercise his powers, authorities and functions "as far as may be in accordance with the constitutional conventions applicable to the exercise of similar powers in the United Kingdom by His Majesty".

was directory (as the Court understood), or mandatory (as the Government and the Speaker vehemently argued), the Minister of Justice attempted to speak with the President of the Court in an effort to diffuse the crisis, but the Judge refused to discuss the matter with the Minister. The Government then decided "to invoke the President of the Republic of Sri Lanka as the ultimate authority to try and help to solve this matter, to try to find a solution which we have not been able to find ourselves".[14] In 1976, when the Minister of Justice invited the Judges of the Supreme Court to the ministry conference room for tea, in an attempt to restore relations between the two institutions that had begun to deteriorate from about two years earlier, the Chief Justice and the other Judges drove to President's House to complain of what they perceived to be an attempt to interfere with the judiciary![15] For the Supreme Court, the constitutional Head of State was the channel of communication with the Government of the day.

1962

I was admitted to the Bar as an Advocate of the Supreme Court on 20 August 1962. Fourteen years after Independence, a strong

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[14] Felix R. Dias Bandaranaike- Minister of Justice, *National State Assembly Debates* (8th December 1972). Accordingly, the President invited the Members of the Constitutional Court to President's House "to discuss an important matter". When they arrived, the Speaker and the Ministers of Justice and of Constitutional Affairs were already with the President. After five and a half hours of discussion, "the deliberations concluded in a deadlock".

[15] The first "conflict" arose in January 1974 when the Minister sent out invitations to a "ceremonial sitting" of the Supreme Court to mark the inauguration of the new judicial structure under the Administration of Justice Law. The "conflict" exacerbated when the Ministry requested the Registrar of the Supreme Court to furnish information on compliance with provisions of the new law relating to the listing of appeals and time limits on oral arguments. Relations virtually broke down in July 1975 when, at a ceremonial sitting of the Supreme Court held to pay tribute to the late Sir Alan Rose, the Chief Justice directed the Permanent Secretary to the Ministry of Justice (a lawyer who had been formally invited by the Supreme Court to attend the ceremony) to vacate his seat at the Bar Table and to sit elsewhere. This matter was raised in the National State Assembly, where the Minister defended the action of the Permanent Secretary and explained the circumstances in which both he and the Permanent Secretary had occupied seats at the Bar Table.

tradition of integrity underpinned the judiciary at every level. At a time of immense political and social change, the judiciary remained constant in its commitment to equal justice under the law. This was exemplified in January of that year when senior officers of the Armed Forces and the Police allegedly conspired to overthrow the lawfully elected Government. The Head of that Government was Prime Minister Sirimavo Bandaranaike, the leader of the Sri Lanka Freedom Party (SLFP) which had secured a majority of seats in the 95-member House of Representatives at the general election of July 1960. Fortuitous circumstances enabled that attempt to be aborted and the alleged conspirators to be arrested. In the following month, a traumatized Government secured the enactment of a retroactive law that introduced special provisions for the trial of the accused persons.[16] Among these was one which conferred on the Minister of Justice the power to nominate three judges from among the Judges of the Supreme Court to try the accused persons without a jury. The Act declared that the constitution and jurisdiction of the Court so nominated by the Minister "shall not be called in question in any Court, whether by way of writ or otherwise".

In July 1962, the Trial-at-Bar of 24 persons charged under the Act commenced before the three Judges handpicked by the Minister of Justice.[17] Among them was one Judge who had been appointed to the Supreme Court barely a month earlier under a provision of the same Act that had increased the composition of the Supreme Court from nine to eleven.[18] When called upon to plead, the defendants refused to do so, and counsel appearing for them argued as a preliminary issue that the provision of the Act that conferred on the Minister the power of nomination of judges was *ultra vires* the Constitution inasmuch as it interfered with the exercise of the judicial function. The 1946 Constitution did not contain a chapter on fundamental rights; nor did it specifically provide for the separation of powers or functions. However, after several days of argument, the Court unanimously held that the

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[16] *The Criminal Law (Special Provisions) Act No.1 of 1962*.

[17] The Judges nominated by the Minister were Justice T.S. Fernando QC, Justice L.B. de Silva and Justice P. Sri Skanda Rajah.

[18] In terms of the Act, two new Judges were appointed. They were G.P.A. Silva, Permanent Secretary to the Ministry of Justice, and P. Sri Skanda Rajah, District Judge and Commissioner of Assize.

power to nominate judges, although it might have had the appearance of an administrative power, was so inextricably bound up with the exercise of strictly judicial power or the essence of judicial power that it was itself part of the judicial power. Accordingly, in its judgment delivered on 3 October 1962, the three Judges nominated by the Minister held that they had no jurisdiction to proceed with the trial for the very reason that they had been so nominated. They further held that even if the view were taken that the power of nomination was *intra vires* the Constitution, the nomination would have offended against the cardinal principle that justice must not only be done but must appear to have been done, and they would have been compelled to give way to that principle which had become ingrained in the administration of common justice in the country. In applying this principle, the Court made the following observation:

> *"A Court cannot inquire into the motives of legislators. The circumstances set out above are, however, such as to put this Court on enquiry as to whether the ordinary or reasonable man would feel that this Court itself may be biased. What is the impression that is likely to be created in the mind of the ordinary or reasonable man by this sudden and, it must be presumed, purposeful change of the law, after the event, affecting the selection of judges? Will he not be justified in asking himself, 'Why should the Minister, who must be deemed to be interested in the result of the case, be given the power to select the judges whereas the other party to the cause has no say whatever in a selection? Have not the ordinary canons of justice and fairplay been violated?' Will he harbour the impression, honestly though mistakenly formed, that there has been an improper interference with the course of justice? In that situation will he not suspect even the impartiality of the Bench thus nominated?"*

Commenting on this judgment, the International Commission of Jurists, which had been represented at the trial by an observer, noted that "that the attempt of the Executive to interfere with judicial independence in Ceylon was unsuccessful is a fact that redounds to the credit of the Supreme Court of Ceylon." It added:

> *"In these days when the cardinal principles of the Rule of Law are being violated with impunity in so many countries, it is certainly*

refreshing to all those who subscribe to the Rule of Law and fight for its establishment and preservation to find delivered by the judges of a newly-independent country a vital judgment, which will always be regarded as an outstanding contribution towards the development of the connected principles of the separation of powers and the independence of the judiciary."

The Government did not appeal the judgment to the Judicial Committee of the Privy Council. Instead, it introduced amending legislation to restore the power of the Chief Justice to nominate the Court. All three Judges continued to serve on the Supreme Court until they reached the age of retirement. In 1971, three years after his retirement, one of the Judges was appointed, on the recommendation of the same Prime Minister (who had been re-elected to office in 1970 after five years as Leader of the Opposition) to the office of President of the Court of Appeal which replaced the Judicial Committee of the Privy Council as Ceylon's court of final appeal.

2012

Fast forward fifty years to 2012. Ceylon was now the Democratic Socialist Republic of Sri Lanka. President Mahinda Rajapakse was Head of the State, Head of the Executive and of the Government, Head of the Cabinet of Ministers, and Commander-in-Chief of the Armed Forces.[19] He also retained several ministerial portfolios including those of Defence and Finance. The Attorney-General's Department also functioned directly under him. He commanded the support of over two-thirds of the 225-member Parliament. That number included over 60 members who had been elected from opposition parties but had chosen, from time to time, to cross the floor to bolster the ruling Sri Lanka Freedom Party, now reinvented as the United Peoples Freedom Alliance (UPFA), and be rewarded with immediate ministerial appointments. There were 67 cabinet ministers, 30 deputy ministers, 2 project ministers, and numerous ministry "monitors", presidential advisers and coordinating secretaries. In fact, nearly every member of the government

[19] *The 1978 Constitution*, Articles 30 and 43.

parliamentary party was a salaried member of the executive. The legislature was in the firm grip of the executive.

On 10 August 2012, a controversial legislative measure known as the Divineguma Bill was presented in Parliament by the President's younger brother, Basil Rajapakse, Minister of Economic Development.[20] The constitutionality of the Bill was challenged in the Supreme Court before a three-judge Bench chaired by the Chief Justice, Shirani Bandaranayake.[21] While the matter was being argued, the Chief Justice's husband, who had been appointed by the President to the office of Chairman of the National Savings Bank, was summoned by the Bribery Commission and a statement recorded in regard to certain investments made by the Bank. On 13 September, the Secretary to the President telephoned the Chief Justice and informed her that the President had directed that a meeting be arranged with her and the other two members of the Judicial Service Commission, both of whom were Judges of the Supreme Court. The Chief Justice insisted that the request be made in writing. When a letter was received intimating that a meeting had been fixed for 17 September (without providing any indication of the purpose of the meeting), the Chief Justice replied that it would not be proper for the Commissioners (two of whom were members of the Court reviewing the impugned Bill) to attend such a meeting since it would erode public confidence in the independence of the judiciary.

On 17 September, while a large crowd demonstrated outside Parliament and shouted slogans against the Chief Justice and the

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[20] The Bill sought to extend central control over the provinces in several ways and expand the regulatory powers of the Minister, who would thereby assume control over very substantial financial resources.

[21] In November 2011, six months after her appointment as Chief Justice, a Bench chaired by her had held that an apparently innocuous Bill, the *Town and Country Planning (Amendment) Bill*, could become law only with the approval of all the Provincial Councils. If enacted, that law would have enabled the Government to acquire land in municipal and other areas by the simple device of declaring it to be a "sacred area". Two Provincial Councils failed to approve the Bill, and the Government withdrew it in April 2012. An easy, quick attempt at acquiring private land by the simple device of a gazette notification had been thwarted.

Supreme Court, Speaker Chamal Rajapakse, the elder brother of the President, announced that the Supreme Court had determined that the Divineguma Bill could not be passed by Parliament until it had been approved by every Provincial Council since it sought to take away powers conferred by the Constitution on Provincial Councils. On 10 October, Minister Basil Rajapakse again tabled the Divineguma Bill in Parliament and reported that eight of the nine Provincial Councils had approved it and that, in the absence of a Provincial Council in the (predominantly Tamil) Northern Province, the Governor of the Province had approved it. On the same day, the constitutionality of the Bill was again challenged in the Supreme Court on the ground that the Governor was not authorized to approve it in the absence of an elected Provincial Council. The matter was listed for argument before the same Bench chaired by the Chief Justice. The sequence of events that followed is set out below. What it reveals is a diabolical attempt to exert undue influence, coerce, threaten, and finally punish the Chief Justice.

On 26 September, it was reported that the President had discussed with a cabinet committee and a team of lawyers, what "strong measures" could be taken to deal with the situation that had arisen. On 4 October, It was reported that legal experts were "studying various options available to the executive should any situation demand precipitate action" against the judiciary. The measures being considered "ranged from a milder course of action to a more confrontational resolution in Parliament where, it was pointed out, only a simple majority would be sufficient". On 25 October, the Bribery Commission filed a report in the Colombo Magistrate's Court alleging that the Chief Justice's husband in his capacity as Chairman of the National Savings Bank "had attempted to cause a monetary loss of Rs.391 million to the Government by the unlawful purchase by the Bank of The Finance Company shares." The Magistrate noticed him to appear in court on 28 February 2013.

On 1 November, the Supreme Court submitted to President Rajapakse and to Speaker Rajapakse its determination that the Divineguma Bill required not only a two-third majority in Parliament (since the Governor of the Northern Province could not approve the Bill in the absence of an elected Provincial

Council), but also approval at a referendum (because of certain other contraventions of the Constitution). On the same day, 117 members of the government parliamentary group, purporting to act under Article 107(2) of the Constitution,[22] submitted a resolution to Speaker Rajapakse for the presentation of an Address to President Rajapakse for the removal from office of the Chief Justice.[23] The resolution contained 14 charges, and alleged that the Chief Justice "has plunged the entire Supreme Court and specially the office of Chief Justice into disrepute".[24] On 6 November, the resolution was placed on the Order Paper of Parliament. On 14 November, Speaker Rajapakse appointed a select committee of eleven Members of Parliament (seven cabinet ministers and four members from among the opposition parties)

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[22] The relevant paragraphs of *The Constitution*, Article 107 read as follows:

(1) The Chief Justice, the President of the Court of Appeal, and every other Judge of the Supreme Court and Court of Appeal shall be appointed by the President of the Republic by warrant under his hand.

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

Provided that no resolution for the presentation of such an address shall be entertained by the Speaker or placed on the Order Paper of Parliament, unless notice of such resolution is signed by not less than one-third of the total number of Members of Parliament and sets out full particulars of the alleged misbehaviour or incapacity.

(3) Parliament shall by law or by Standing Orders provide for all matters relating to the presentation of such an address, including the procedure for the passing of such 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.

[23] The only member of the government parliamentary group who declined to sign the resolution publicly declared that one reason for his refusal to do so was that he had been presented with a blank sheet of paper that contained no charges.

[24] For the text, see '*7th Parliament of the Democratic Socialist Republic of Sri Lanka*', Parliamentary Series No.187, pp.181-187.

to investigate and report to Parliament on the allegations set out in the resolution.[25] On the same day, the select committee caused

[25] The Speaker purported to act under the following standing order, which had been made by Parliament in 1984 when the then Government proposed to commence impeachment proceedings against the then Chief Justice:

78A (1) Notwithstanding anything to the contrary in the Standing Orders, where notice of a resolution for the presentation of an address to the President for the removal of a Judge from office is given to the Speaker in accordance with Article 107 of the Constitution, the Speaker shall entertain such resolution and place it on the Order Paper of Parliament, but such resolution shall not be proceeded with until after the expiration of a period of one month from the date on which the Select Committee appointed under paragraph (2) of this Order has reported to Parliament.

(2) Where a resolution referred to in paragraph (1) of this Order is placed on the Order Paper of Parliament, the Speaker shall appoint a Select Committee of Parliament consisting of not less than seven members to investigate and report to Parliament on the allegations of misbehaviour or incapacity set out in such resolution.

(3) A Select Committee appointed under paragraph (2) of this Order shall transmit to the Judge whose alleged incapacity or misbehaviour is the subject of investigation, a copy of the allegations of misbehaviour or incapacity made against such Judge and set out in the resolution in pursuance of which such Select Committee was appointed, and shall require such Judge to make a written statement of defence within such period as may be specified by it.

(4) The Select Committee appointed under paragraph (2) of this Order shall have power to send for persons, papers and records.

(5) The Judge whose alleged misbehaviour or incapacity is the subject of the investigation by a Select Committee appointed under paragraph (2) of this Order shall have the right to appear before it and to be heard by such Committee in person or by representative and to adduce evidence, oral or documentary, in disproof of the allegations made against him.

(6) At the conclusion of the investigation made by it, a Select Committee appointed under paragraph (2) of this Order shall within one month from the commencement of the sittings of such Select

the resolution to be delivered to the Chief Justice, and required her to respond by 22 November to the charges contained in it. A request for further time was refused. On 20 November, the Chief Justice requested relevant further information to enable her to respond to the allegations. That was not provided. The select committee was repeatedly requested by the Chief Justice to formulate the procedure it intended to follow. There was no response to that either.

Meanwhile, on 20 November, applications for writs of prohibition were filed in the Court of Appeal by several individuals, challenging the constitutionality of the standing order under which the select committee was established. Two applications sought to disqualify two government members of the committee on the ground of bias. The issue of constitutionality was referred by the Court of Appeal to the Supreme Court in terms of Article 125 of the Constitution.[26] On 22 November, the Supreme Court

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Committee, report its findings together with the minutes of evidence taken before it to Parliament ad may make a special report of any matters which it may think fit to bring to the notice of Parliament: Provided however, if the Select Committee is unable to report its findings to Parliament within the time limit stipulated herein the Select Committee shall seek permission of Parliament for an extension of a further specified period of time giving reasons therefore, and Parliament may grant such extension of time as it may consider necessary.

(7) Where a resolution for the presentation of an address to the President for the removal of a Judge from office for proved misbehaviour or incapacity is passed by Parliament, the Speaker shall present such address to the President on behalf of Parliament.

(8) All proceedings connected with the investigation by the Select Committee appointed under paragraph (2) of this Order shall not be made public unless and until a finding of guilt on any of the charges against such Judge is reported to Parliament by such Select Committee.

[26] Article 125(1): The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the interpretation of the Constitution, and accordingly, whenever any such question arises in the course of any proceedings in any other court or tribunal or other institution empowered by law to administer justice or to exercise judicial or quasi judicial functions, such question shall forthwith

"recommended" to the members of the select committee that, "based on the mutual understanding and trust that existed between the Judiciary and Parliament", they consider deferring its proceedings until the Court had made its determination. That recommendation was ignored.

On 23 November, when the Chief Justice appeared before the select committee, she was directed to submit her "statement of defence" by 30 November, and present herself for the inquiry on 6 December. A list of witnesses and a list of documents relied upon in support of the allegations, though requested, were not provided. When the Chief Justice objected to two government members continuing to serve on the select committee because she had recently heard and determined cases in which they were involved, these two members responded that the rule against bias did not apply to Members of Parliament.

On 4 December, the first day of inquiry, large placard-carrying crowds, believed to have been transported there by certain members of the government parliamentary group, shouted abusive, derogatory and defamatory slogans against the Chief Justice outside the premises of Parliament. Once more, counsel for the Chief Justice requested a list of witnesses and documents, but these were not given. On that day and thereafter, the government controlled media and members of the government parliamentary group continuously subjected the Chief Justice and Judges of the Supreme Court and the Court of Appeal to virulent verbal attacks.

On 6 December, the second day of inquiry, the chairman of the select committee, without consulting the opposition members on the committee, announced that the objection of bias was overruled. When counsel raised the question of procedure, the chairman stated that no evidence would be led to establish the allegations and, consequently, an opportunity to cross-examine witnesses did not arise. Nevertheless, at about 4 p.m. on that day,

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be referred to the Supreme Court for determination. The Supreme Court may direct that further proceedings be stayed pending the determination of such question.

a bundle of over 80 documents, which contained over 1000 pages, was handed over to counsel, and the Chief Justice was informed that the inquiry into charges 1 and 2 would commence on the next day, 7 December, at 1.30 p.m. Counsel's request for more time to study the documents was rejected. When the issue of natural justice was raised, the government members responded that rules of natural justice applied to the "people", but not to "the people's representatives".

Meanwhile, at various stages of the proceedings, two members of the select committee, both of whom were cabinet ministers, hurled abuse and obscene remarks at the Chief Justice and her lawyers, and addressed her in a humiliating and insulting manner. The Chief Justice's requests that secrecy provisions be waived, and that an open and public inquiry be conducted, were refused. Her request that independent observers be permitted to watch the proceedings was also refused by the government majority in the committee. In these circumstances, on 6 December, counsel for the Chief Justice stated that it was not possible to continue to accept the legitimacy of a body steeped in partiality and hostility towards the head of the judiciary. The Chief Justice and her counsel then withdrew. She did so reiterating that she was willing to face any impartial and lawful tribunal similar to one in other Commonwealth countries, and as had been proposed in a draft constitution presented to Parliament (but not passed) in August 2000.[27]

On the same day, 6 December, the four members from the opposition parties also withdrew from the select committee, citing conduct demeaning the Chief Justice and callous disregard for the rules of natural justice on the part of the majority of members of the committee, all of whom were subject to the government whip.[28] On 7 December, without any notice to, and in the

[27] That draft constitution, presented by President Kumaratunge's Government, provided for such an inquiry to be conducted by a tribunal consisting of senior judges of Commonwealth countries.

[28] In a three-page letter to Speaker Rajapaksa, they stated that they had raised five issues in the select committee:

- The absence of a clear direction regarding the procedure to be followed by the select committee.

absence of, the Chief Justice and her lawyers, the remaining seven government members summoned 16 witnesses and elicited their evidence.[29] Thereafter, at 8.50 pm, they adjourned. Less than twelve hours later, on 8 December at 8.30 am, the seven members reassembled and, according to the record of the proceedings,

> *"The Committee considered the draft Report submitted by the Chairman and agreed to the Report. The Committee also decided that the Report be presented to Parliament today."*

- Whether documents were to be made available to the Chief Justice and her lawyers.
- The standard of proof that would be required.
- The need to arrive at a definition of "misbehaviour".
- Whether sufficient time would be made available to the Chief Justice and her lawyers to study the documents.

None of these had been addressed. They added:
"We also requested a direction that the Chief Justice and her lawyers would be given an opportunity to cross-examine the several complainants who had made the charges against her. It was also our position that if, and only if, a prima facie case had first been made out against the Chief Justice that she could be asked to respond. None of these matters were addressed by your Committee. We also find that we are groping in the dark and proceeding on an ad hoc basis. . . . The lawyers appearing for the Chief Justice asked for time to study the documents. This was refused. Apart from the Chief Justice, we the Members of the Select Committee ourselves need sufficient time to study these documents. Furthermore the Chief Justice had not been provided with either a List of Documents or a List of Witnesses. . . . We also regrettably note that during these proceedings, the treatment meted out to the Chief Justice was insulting and intimidatory and the remarks made were clearly indicative of preconceived findings of guilt. We are therefore of the view that the Committee should, before proceeding any further, lay down the procedure that the Committee intends to follow in this inquiry; give adequate time to both the Members of the Committee and the Chief Justice and her lawyers to study and review the documents that had been tabled and afford the Chief Justice privileges necessary to uphold the dignity of the Office of the Chief Justice while attending proceedings of the Committee. If these matters are attended to, we feel that the Chief Justice should be invited to continue her participation in these proceedings. However, if the Committee is not agreeable to these proposals of ours we will be compelled to withdraw from the Committee."

[29] One of the witnesses was Justice Shiranee Tilakawardane. It was later revealed that her evidence on oath, based on her recollection ("if I remember right"; "I may not be able to remember it with exactitude"), was inconsistent with a contemporaneous minute she had made on the case file. Neither she, nor the select committee, examined the case file. The select committee acted on her oral evidence. 26th August 2013 <www.colombotelegraph.com>.

That meeting lasted ten minutes. The Report that was ostensibly prepared overnight contained 25 pages. The seven members held that the Chief Justice was guilty of three of the 14 charges. They considered it unnecessary to investigate the other charges.

On 19 December, the Chief Justice applied to the Court of Appeal for mandates in the nature of writs of *certiorari* and prohibition to quash the decision of the Select Committee for, inter alia, (i) failure to adhere to the rule of law; (ii) breach of the rules of natural justice; (iii) acting unreasonably and/or capriciously and/or arbitrarily; and (iv) prejudging the issue. Of the eleven members of the select committee who were issued notice, only two opposition members appeared in Court. The matter was argued on three days, with the Attorney General appearing as *amicus curiae*.[30] The Court of Appeal sought the determination of the Supreme Court on the issue of the constitutionality of Standing Order 78A.

On 3 January 2013, the Supreme Court[31] announced its determination on the constitutional reference made to it by the Court of Appeal. Having heard counsel for seven petitioners, seven intervenients and the Attorney General, it held that:

> *"It is mandatory under Article 107(3) of the Constitution for Parliament to provide by **law** the matters relating to the forum before which the allegations are to be proved, the mode of proof, the burden of proof, and the standard of proof of any alleged misbehaviour or incapacity, and the Judge's right to appear and to be heard in person or by representative, in addition to matters relating to the investigation of the alleged misbehaviour or incapacity."*

The Supreme Court explained that without a definite finding that the allegations had been proved, no address of Parliament could

[30] Article 140 of *The Constitution* states that:
"Subject to the provisions of the Constitution, the Court of Appeal shall have full power and authority to inspect and examine the records of any Court of First Instance or tribunal or other institution, and grant and issue, according to law, orders in the nature of writs of *certiorari*, prohibition, *procedendo, mandamus* and *quo warranto* against the Judge of any Court of First Instance or tribunal or other institution or any other person."
[31] Justice Gamini Amaratunge, Justice K. Siripavan, and Justice Priyasath Dep.

be made for the removal of a judge. Therefore, the "investigation" referred to in Article 107(3) of the Constitution was an indispensable step in the process for the removal of a judge of the Supreme Court or of the Court of Appeal. The investigation leads to a finding whether the allegations made against the judge had been proved or not. A finding, after the investigation contemplated in Article 107(3), that the allegations against the judge had been proved, was a final decision which directly affected the constitutional right of the judge to continue in office.

> *"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 to make such finding or decision. Such legal power can be conferred on such court, tribunal or body only 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 Parliament. The Standing Orders are not "law" within the meaning of Article 170 of the Constitution which defines what is meant by "law"."*
>
> *"A Parliamentary Select Committee appointed in terms of Standing Order 78A derives its power and authority solely from the said Standing Order which is not law. Therefore, a Select Committee appointed under and in terms of Standing Order 78A has no legal power or authority to make a finding adversely affecting the legal rights of a judge against whom the allegations made in the resolution moved under the proviso to Article 107(3) is the subject matter of its investigation. The power to make a valid finding, after the investigation contemplated in Article 107(3), can be conferred on a court, tribunal or a body only by law, and by law alone."*

The Court noted, however, that matters relating to the presentation of an address and the procedure for the passing of such resolution were matters which could be stipulated by standing orders, although there was nothing to prevent Parliament from providing for such matters by law as well. It followed, therefore, that standing order 78A and the proceedings held before the select committee, were void *ab initio.*

On 7 January, the Court of Appeal[32] delivered its judgment. The Court made no findings on the matters that had been argued before it. Instead, it held that, in view of the determination of the Supreme Court on the constitutional issue referred to it, the select committee appointed under standing order 78A had no legal power or authority to make a finding affecting the legal rights of the judge against whom the allegations were made in the resolution presented in Parliament. Accordingly, a writ of *certiorari* was issued quashing the decision of the select committee. The Court stated that, in the circumstances, it was unnecessary to consider the other grounds urged by the petitioner.

On Tuesday 7 January, with full knowledge of the determination of the Supreme Court and the judgment of the Court of Appeal, the Speaker announced that he would proceed with the impeachment motion. On Thursday 9 January, in Parliament, Professor G.L. Peiris, Minister of External Affairs, argued that the determination of the Supreme Court was wrong. In his view, it was "constitutional heresy"; it was "replete with errors"; it was "absolutely flawed"; it was "demonstrably flawed"; it was "incurably flawed"; and it was "not worth the paper it is written on".[33] Meanwhile, lawyers throughout the country were on strike, and in Colombo they commenced a protest march to Parliament from Hulftsdorp, the seat of the judiciary. Within minutes, they were confronted by a mob armed with clubs and stones who were believed to have been transported there in government vehicles. In other parts of the city, other protest marches organized by opposition political parties, trade unions and university teachers were similarly attacked, while police looked on. None of them reached Parliament where hundreds of government supporters had already assembled and, under police protection, were shouting slogans and waving banners against the Chief Justice.

At 7.00 p.m. on Friday 10 January, Parliament passed by a two-third majority the motion to remove the Chief Justice from office.

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[32] Justice S. Sriskandarajah (President), Justice Anil Gooneratne, and Justice A.W.A. Salam.

[33] *Parliamentary proceedings* (10th January 2013) Col.443-456.

As the result was announced by the Speaker, crackers were lit all around the parliamentary complex. Shortly thereafter, Speaker Chamal Rajapakse, Minister Basil Rajapakse, Defence Secretary Gotabaya Rajapakse and several cabinet ministers reportedly proceeded to the balcony of the parliament building to watch a special fireworks display provided by the Sri Lanka Navy to celebrate the event. Other ministers, including those who had served on the select committee, proceeded to another event that was taking place outside the Chief Justice's official residence. There, for nearly four days, a large crowd of people, estimated to be in the region of several hundreds, had been allowed by the police to pitch tents and shout slogans demanding the Chief Justice's resignation. As soon as the motion was passed, a fireworks display commenced, and milk-rice (a celebratory meal) was cooked and served to everyone. A short while later, this mob (alleged to be members of the civil defence force in civilian clothes), were joined by several ministers, including those who had served on the select committee. They addressed on loud hailers and shouted out to the Chief Justice to leave. Some of them also joined the mob in singing and dancing to loud music, while fireworks lit up the night sky. The Chief Justice remained inside with her husband and young son.

On Saturday 12 January, the President summoned the ten other Judges of the Supreme Court to the presidential secretariat. He was reported to have addressed them and declared that there was still time for the Chief Justice to tender her resignation, in which event he would allow her to retire with full pension rights. It was also reported that during the 90-minute meeting, the Judges had neither raised any issues, nor made any comments. On Sunday 13 January, an order signed by the President purporting to remove her from office was served on the Chief Justice at her official residence, and the security unit assigned to her was withdrawn.

On Monday 14 January, which was a public holiday, the Secretary to the President and a Deputy Inspector-General of Police instructed the Registrar of the Supreme Court to pack all the belongings of the Chief Justice and send them to her residence. He was also informed that the new "Chief Justice" would arrive on the next day, and that the chambers should be

cleared and be ready for him. That night, a large contingent of military personnel occupied the Supreme Court Complex. From the early hours of the morning of Tuesday 15 January, the Supreme Court was cordoned off, and riot squads, barricades and water cannon put in place. Lawyers' vehicles were stopped and searched, including the luggage compartments, to ensure that the Chief Justice was not in one of them. At about 9.45 a.m., the road leading to the Judges' entrance was sealed off and the gates were locked. As each Judge arrived, his or her car was searched, before being allowed to drive in. At about 10.30 a.m., about two hundred persons, accompanied by government politicians, were allowed by the police to enter the cordoned off area and shout slogans in praise of the President and the new "Chief Justice". At noon, a large number of lawyers came out of the complex and commenced a daylight vigil, each holding a candle, "to symbolize the onset of darkness".

At 12.30 pm, Mohan Peiris was sworn in as "Chief Justice" before the President. At the time of his purported appointment, he was Chairman of the Seylan Bank, Director of Lanka Logistics (the arms purchasing unit of the Ministry of Defence), Director of Rakna Lanka Security (a security company established by Defence Secretary Gotabhaya Rajapakse), and Legal Adviser to the Cabinet of Ministers. He had previously served as Legal Adviser in the Ministry of Defence, Attorney General and as the Government spokesperson before the UN Human Rights Council refuting allegations of war crimes. At about 2.30 pm., when it was learnt that the new "Chief Justice" had been driven into the courts complex through its "exit", and had entered the Chief Justice's Chambers, the security measures were relaxed.

Meanwhile, a fundamental rights petition challenging the purported appointment of Peiris was filed in the Registry of the Supreme Court that morning, to be supported by M.A. Sumanthiran, M.P., Attorney-at-Law. According to a newspaper report,

> *"Counsel Sumanthiran said that after filing the case in the morning, he and two other counsel had met six Supreme Court Judges personally and pointed out the necessity for the petition to be taken up on that day due to its urgency. "The Supreme Court Judges agreed*

to this and told us to tell the Supreme Court Registrar to send the file to them", he said. "But it did not come up in any of the three courts that sat"', Sumanthiran said. "Ordinarily, when there is an urgent matter you have to speak to the Judges and seek an early date", Sumanthiran said. He had asked for three days – January 15, 16 and 17, and urged that it be taken up on the first day, 15 January. However, it was not listed for support on any of the other days either."

From early that morning, the Chief Justice's official residence was cordoned off, and police officers were seen even within the premises. The Chief Justice was informed by these police officers that she was prohibited from speaking to the media since she was no longer the Chief Justice. Media personnel who had gathered outside the residence for nearly three hours were ordered by the police to leave, but they resisted, reminding the police that hundreds had been allowed to even camp out there for days. At about 5.30 pm., when the Chief Justice, her husband and son, drove out of her official residence in their private car, she was prevented from speaking to the media by police officers who reminded her that she was now a private citizen. Senior police officers were heard and seen using verbal force on her son who was driving, and ordering him to move on. While driving away, she was heard to say, 'They didn't even give me a chance to thank my staff'.

The Bar Association, which did not recognize the purported appointment of Peiris, did not request a ceremonial sitting of the court to accord the new "Chief Justice" the traditional welcome. Nevertheless, a ceremonial sitting of the Supreme Court was held on Wednesday 24 January. The gates of the Supreme Court were locked to prevent both local and international media from entering the premises, and heavy police and military units were deployed outside. One photograph of the new "Chief Justice" with some Judges of the Supreme Court was released by the government information department. It was also reported that a lawyer who had recently been appointed by the President as the Chairman of the state-owned Bank of Ceylon had spoken on behalf of the Unofficial Bar, while the Attorney General had spoken on behalf of the Official Bar. There was no further information on the attendance, except that Defence Secretary

Gotabaya Rajapakse, the Governor of the Central Bank Nivard Cabraal and the Secretary to the President Lalith Weeratunge (none of whom was a lawyer) were present.

Statements condemning the removal of the Chief Justice and calling for her reinstatement were made by the Governments of Canada, United States and the United Kingdom. Similar statements were also made, among others, by the UN Special Rapporteur on the Independence of Judges and Lawyers, the International Commission of Jurists, the International Bar Association, the International Crisis Group, the Law Council of Australia, the Canadian Bar Association, the Bar Human Rights Committee of England and Wales, the Law Society of South Africa, the Commonwealth Judges and Magistrates Association, the Commonwealth Law Association, and the Commonwealth Legal Education Association. The Secretary-General of the Commonwealth expressed "the Commonwealth's profound collective concern" at what "could be perceived to constitute violations of core Commonwealth values and principles". 45 Judges from all the continents addressed a letter to President Rajapakse and Speaker Rajapakse condemning the removal of the Chief Justice.

> *"We are gravely concerned 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."*

They urged the President and the Speaker to act immediately to restore the independence of the judiciary by reinstating the legal Chief Justice.[34] The United Nations High Commissioner for Human Rights, Navaneethan Pillay, described the removal of the Chief Justice "through a flawed process" as a "gross interference with the independence of the judiciary and a calamitous setback for the rule of law in Sri Lanka". She observed that

> *"The jurist sworn in by the President as the new Chief Justice, the former Attorney-General and Legal Adviser to the Cabinet, Mr Mohan Peiris, has been in the forefront of a number of Government*

[34] Letter, 23rd January 2013.

> *delegations to Geneva in recent years to vigorously defend the Sri Lanka Government's position before the Human Rights Council and other human rights mechanisms. This raises obvious concerns about his independence and impartiality, especially when handling allegations of serious human rights violations by the authorities."*[35]

All these were ignored by the President and the Government. In fact, it was even alleged that these were instigated by Tamil terrorist organizations that were seeking to destabilize the country. Within the country, the President rejected appeals made to him by the heads of the four main religions to respect the judgment of the Supreme Court.

From the commencement of proceedings to remove the Chief Justice from office, the country was subjected to a virulent campaign of disinformation through the state media and other state organs. It did not seem to matter that the exercise was both unlawful and unconstitutional, or that it would destroy the foundations of democratic governance. The Chief Justice had to go, and the load of gibberish gratuitously offered by state media and cabinet ministers was intended to lull the people into complacency. Law professors and political columnists were commissioned to delve into the history of "impeachment"[36] across

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[35] Statement issued on 18th January 2013. For a very incisive critique of the Report of the Select Committee, see Geoffrey Robertson QC, Head of Doughty Street Chambers and former President of the War Crimes Court in Sierra Leone, *Report prepared for the Human Rights Committee of the Bar of England and Wales* (27th February 2013). The Commonwealth Secretary-General, Kamalesh Sharma, commissioned two independent expert opinions on the constitutional issues. These were from: (a) Justice Pius N. Langa, former Chief Justice of the Republic of South Africa (5th March 2013); (b) Sir Jeffrey Jowell QC, Emeritus Professor of Public Law and Dean of the Faculty of Law, University College London, and Head of Blackstone Chambers, Middle Temple, London (28th February 2013). However, on receipt, he withheld them. Leaked copies of both Opinions were published in <www.colombotelegraph.com> on 9th September 2013 and 29th October 2013 respectively. See also: A report of the International Bar Association's Human Rights Institute, *A Crisis of Legitimacy; The Impeachment of Chief Justice Bandaranayake and the Erosion of the Rule of Law* (written by Justice M.L. Uwais, former Chief Justice of the Federal Republic of Nigeria, Dato Param Cumarasamy, the first UN Special Rapporteur on the Independence of Judges and Lawyers, Sadakat Kadri, Barrister and mission rapporteur, and Shane Keenan, IBAHRI Programme Lawyer).

[36] There is no reference to "impeachment" in the Constitution; the reference is to "removal from office". That term was introduced into the Sri Lankan political

the globe (a term that was alien to the Constitution) so that Ministers could argue that no court could interfere with that process. Even members of the Government began to believe the mumbo jumbo. One cabinet minister, a lawyer, was so swayed by the Government's own propaganda that, in Parliament, he shouted out to the Supreme Court to "go to hell".

Validating the illegalities

Predictably, on 30 April 2013, on the application of the Attorney General, the Supreme Court granted special leave to appeal against the judgment of the Court of Appeal referred to above on two questions of "public or general importance". These concerned the ambit of the writ jurisdiction of the Court of Appeal. The appeal was argued on 28 November before five Judges of the Supreme Court nominated by "Chief Justice" Mohan Peiris.[37] Of them, one was the most junior member of the Court, having been appointed very recently from the Court of Appeal, superseding the President of that Court who had delivered the impugned judgment. On 21 February 2014, the Court delivered its judgment holding that the Court of Appeal "possessed no jurisdiction to review a report of a select committee of Parliament, or to grant and issue an order in the nature of a writ of certiorari purporting to quash the report and findings of the parliamentary select committee on the basis that it was not properly constituted". Justice Marsoof also ventured into an area

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lexicon as the process to remove the Chief Justice began. It was a term that came with the weight of history. Foreign diplomats were summoned to the Ministry of External Affairs and lectured on a case from the United States, where one Robert Nixon, a district judge and convicted perjurer in an obscure region of Mississippi, had attempted unsuccessfully to have his impeachment by the Senate reviewed by the Supreme Court, on the ground that he should have been tried in the first instance, not by the House of Representatives, but by the Senate. The impeachment procedure prescribed under *The 1787 Constitution* of the United States of America was of no relevance to Sri Lanka. The term "impeachment" was obviously introduced into the public domain so that the baggage that it carried from the United States, Philippines and elsewhere could be employed to challenge the constitutional right of the Judiciary to subject to judicial review any decision that adversely affects a judge's legal rights.

[37] Justice Saleem Marsoof, Justice Chandra Ekanayake, Justice Sathya Hettige, Justice Eva Wanasundera and Justice Rohini Marasinghe.

that was beyond and outside the two questions of "public or general importance" that had been referred to the Court:

> *"It is my considered opinion that the determination of this Court in SC Reference No.3/2012 manifestly exceeded the mandate conferred on this Court by Article 125(1) of the Constitution to interpret the Constitution, and was made in disregard of the clear language of Article 107(3) and other basic provisions of the Constitution. The determination is a blatant distortion of the law, and is altogether erroneous, and must not be allowed to stand. This Court hereby overrules the said determination of this court in SC Reference No.3/2012."*

Incredibly, the reason for this sweeping condemnation of a previous Supreme Court determination in intemperate language so uncharacteristically injudicious, was simply that

> *"The words "by law or by Standing Orders" clearly conferred the discretion for Parliament to decide whether the matters required to be provided for by that article should be provided for by law or by Standing Orders."*

The fact that the determination had very succinctly distinguished the separate functions of "law" and "standing orders" was conveniently ignored by Marsoof as he enthusiastically echoed the equally simplistic assertion made in Parliament by Minister G. L. Peiris that "when the Constitution states 'by law or by standing orders', the Court has to recognize that there are two options; the Court cannot exclude one option".[38]

On 24 March 2014, the same Bench of five judges of the Supreme Court dismissed a fundamental rights application filed by the Centre for Policy Alternatives and its Director in January 2013 that sought to restrain Mohan Peiris from being appointed to the office of Chief Justice or from functioning in that office unless and until Chief Justice Shirani Bandaranayake retired or was found guilty by a competent court, tribunal or institution established by law. The same Bench also dismissed three other fundamental

[38] *Parliamentary Proceedings* (10 January 2013) Cols.445-446.

rights applications that challenged the competence of a select committee of Parliament to inquire into the conduct of the Chief Justice. The process of legitimizing the impugned acts of the parliamentary select committee, of Parliament, and of the President had been duly performed by the five judges nominated by the individual whose own legitimacy was the central issue.

The events referred to above have been described in some detail since they marked the lowest depth in the downward spiral of the Sri Lankan judiciary. The process began on the day on which the 1978 Constitution came into force, and it gathered momentum as successive Presidents made their own unique contribution towards the objective of creating a docile, deferential and subservient judiciary, thereby enhancing the reach of the enormous powers already vested in the President by the Constitution. The most critical and debilitating impact of presidential interference was experienced in respect of judicial appointments, judicial tenure, judicial authority, judicial conduct and performance and, above all, judicial integrity.

Abuse of the appointment process

Under the 1946 and 1972 Constitutions, the power of appointment of judges of the superior courts (including that of the Chief Justice) was vested in the constitutional Head of State, who acted on the advice of the Prime Minister. It was a method that had worked well in the older democracies where the executive was restrained by legal culture and tradition and by a strong media. Recent international, regional and national initiatives indicate a strong preference for the appointment of judges to be made by an independent body, such as a Council for the Judiciary or a Judicial Service Commission, with the formal intervention of the Head of State in respect of higher appointments.[39] In such a body, members of the judiciary and members of the community may each play appropriately defined roles in the selection of

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[39] *United Nations Convention Against Corruption*, Article 11: *Implementation Guide* (2013). See also Consultative Council of European Judges, *Opinion No.10*; Judicial Integrity Group, *Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct* (2010).

candidates for judicial office. The composition of such a body should be such as to guarantee its independence and enable it to carry out its functions effectively. Its members should be selected on the basis of their competence, experience, understanding of judicial life, capacity for appropriate discussion and appreciation of the importance of a culture of independence. Its non-judge members may be selected from among outstanding jurists or citizens of acknowledged reputation and experience chosen by an appropriate appointment mechanism. A mixed composition avoids the perception of self-interest, self-protection and cronyism, and reflects the different viewpoints within society, thus providing the judiciary with an additional source of legitimacy. The composition of the body should reflect, as far as possible, the diversity in society.

Judges of Superior Courts

Between 1948 and 1977, the Prime Minister invariably looked to the traditional sources when recommending persons for appointment to the Supreme Court. In the pool of selection were the most senior member of the Judicial Service who was usually the District Judge of Colombo, the Attorney-General and the Solicitor-General, and the Permanent Secretary to the Ministry of Justice (who was usually a senior judicial or legal officer[40]). The twin principles of seniority and merit were the determining factors in their selection for high judicial office.[41] The average age of the appointees during this period was 54 years; somewhat higher in the case of a judicial officer and lower in the case of a legal officer. Therefore, a judge of that Court usually brought with him to the Bench at least 25 years experience of judicial work in the original courts in different parts of the country, or of intimate involvement

[40] Among those who took this path to the Supreme Court were Justice E.H.T. Gunasekera, Justice V.L. St. Clair Swan, Justice L.B. de Silva and Justice G.P.A. Silva.

[41] Only one Solicitor-General, R.R. Crossette-Thambiah KC, was denied appointment to the Supreme Court. Instead, he functioned as a Commissioner of Assize until he reached retirement age. The acting Solicitor-General at the time, H.W.R. Weerasuriya, was appointed as a Judge of the Supreme Court.

as a lawyer in the Attorney-General's Department.[42] It was not a tradition of the Bar in Ceylon for its leaders to make themselves available for permanent judicial office.[43] The wide disparity between incomes at the Bar and judicial salaries, the prohibition of private practice after retirement from the Court at the age of 62, and the increasing involvement of lawyers in political activity, were the probable reasons. The appointment process was open, transparent, and perceived to be fair. The appointees, with perhaps very few exceptions, enjoyed the confidence of the Bar and of the people generally.[44]

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[42] In 1953, the Government responded favourably when the Legal Draftsman, H.N.G. Fernando, indicated his interest in being considered for appointment to the Supreme Court when the next vacancy occurred. However, the Attorney-General, H.H. Basnayake KC, objected on the ground that the Legal Draftsman was neither a judicial officer nor a member of the Bar. Thereupon, by mutual arrangement, the Solicitor-General, T.S. Fernando QC (who would ordinarily have been appointed to that vacancy) was granted three months leave to visit the United States, on the invitation of the US Government, "to observe the working of the judicial system" of that country, and H.N.G. Fernando was appointed acting Solicitor-General, an office that made him eligible for appointment to the Supreme Court. However, when that vacancy did occur three months later, Prime Minister Dudley Senanayake had been succeeded by Sir John Kotelawela, and Minister of Justice Sir Lalitha Rajapakse had been replaced by E.B. Wikramanayake KC. The vacancy was filled by the appointment of M.C. Sansoni, District Judge of Colombo. When the permanent Solicitor-General resumed his duties, H.N.G. Fernando was appointed a Commissioner of Assize, and served in that capacity until the next vacancy on the Court occurred 18 months later. On that occasion, Justice H.N.G. Fernando was welcomed on behalf of the Bar by the Attorney-General, T.S. Fernando QC. Several years later, H.N.G. Fernando's successor as Legal Draftsman, A.W.H. Abeysundera, was appointed to the Supreme Court after a short spell as acting Attorney-General; and in 1974 the Public Trustee, B.S.C. Ratwatte, who had previously been a judicial officer, was appointed to the Court after a short spell as acting Permanent Secretary to the Ministry of Justice.

[43] In 1954, three senior members of the unofficial criminal Bar (G.E. Chitty QC, A.H.C. de Silva QC, and C.S. Barr Kumarakulasinghe) agreed to serve for a limited period as Commissioners of Assize. N.K. Choksy QC served briefly as an acting Judge of the Supreme Court. In 1974, several senior members of the Bar, including Eric Amerasinghe, N.T.D. Samarakone, G.F. Setukavalar and H.L. de Silva were unwilling to abandon the profession to serve on the Supreme Court.

[44] Some of the appointments of successful middle-rung practitioners were initially received with some scepticism; in particular, the appointments in 1965 of 39-year old C.G. Weeramantry as a Commissioner of Assize shortly after having served as the counting agent of Prime Minister Dudley Senanayake at the general election that year (he was appointed a Judge of the Supreme Court in the

The first blow against the judiciary was struck by the 1978 Constitution itself when it replaced the existing 21-member Supreme Court with two new superior courts. One was the new Supreme Court consisting of a Chief Justice and not less than six and not more than ten other Judges. That court would exercise jurisdiction in respect of constitutional matters, fundamental rights, election petitions, breach of the privileges of Parliament, as well as serving as the final court of civil and criminal appellate jurisdiction. It was also vested with a consultative jurisdiction.[45] The other was the Court of Appeal consisting of a President and not less than six and not more than eleven other Judges. That court was vested with an appellate jurisdiction for the correction of errors in fact or in law committed by any court of first instance, as well as jurisdiction to grant and issue writs and injunctions, and to try election petitions arising out of parliamentary elections.[46] Unlike the 1946 and 1972 Constitutions which provided that all serving Judges shall continue in office, the 1978 Constitution contained an inconspicuous transitional provision in terms of which all Judges of the Supreme Court and the High Courts holding office on the day immediately before the commencement of the Constitution, ceased to hold office.[47] They suffered "instantaneous official death".[48]

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following year), and in 1972 of Jaya Pathirana, an intensely vocal SLFP member of the 1960-64 House of Representatives. Pathirana had declined an appointment as a Commissioner of Assize in October 1970 "as he desired to remain in active politics" (Private and confidential letter from Felix Dias Bandaranaike, Minister of Public Administration, to Senator Jayamanne, Minister of Justice, dated 4 October 1970, Records of the Special Presidential Commission of Inquiry 1978, marked P 160). Other practitioners who were appointed to the Supreme Court included Dr H.W. Thambiah QC, Kingsley Herat, G.T. Samarawickrema QC, T.W. Rajaratnam, Malcolm Perera, Wilmot D. Gunasekera, S.W. Walpita and S. Sharvananda.

[45] Articles 118- 136.

[46] Articles 137-147.

[47] Article 163. Contemporary international standards require that where a court is abolished or restructured, the State should seek to ensure that measures are in place to facilitate, in consultation with the judiciary, the re-appointment of all existing members of the court to another judicial office of equivalent status and tenure. Where there is no such judicial office of equivalent status or tenure, the judge concerned may be provided with full compensation for loss of office. See Consultative Council of European Judges, *Opinion No.10*; Judicial Integrity

J.R Jayewardene had practised as an Advocate of the Supreme Court before abandoning the profession quite early in his life to form a radical wing in the Ceylon National Congress. He was one of the few surviving members of the State Council and of the D.S. Senanayake Cabinet of 1947 in which he had served, at the age of 41, as Minister of Finance. His father had been an acting Judge of the Supreme Court. One brother was a District Judge, while another, H.W. Jayewardene QC, was the President of the Bar Association of Sri Lanka. His own political philosophy had apparently metamorphosed from extreme right wing in the years of the Dullesian cold war into "indigenous socialism". Through it all, he had remained a firm believer in constitutionalism. If President Jayewardene so wished, all the outgoing nineteen Judges of the Supreme Court could have been accommodated, on the basis of seniority, in the two new superior courts.[49] He chose instead to exclude eight Judges, and to re-appoint the remaining eleven to the two Courts without regard to seniority, experience or age.[50]

Group, *Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct* (2010), UNCAC, Article 11: *Implementation Guide* (2013).

[48] H.L. de Silva, '*The role of the judiciary in the protection of fundamental rights*' in Centre for Society and Religion (1984) ***Independence of the Judiciary*** (Colombo): pp.52-62.

[49] On the day immediately before the commencement of the Constitution, the Supreme Court consisted of the following Judges (in order of seniority): N.D.M. Samarakone QC (Chief Justice), G.T.Samarawickrema QC, V.T. Thamotheram, J. Pathirana, D. Wimalaratne, T.W. Rajaratnam, C.V. Udalagama, T.A.de S. Wijesundera, S.D.M.L. Perera, I.M. Ismail, J.G.T. Weeraratne, A. Vythialingam, N. Tittewela, S. Sharvananda, S.W. Walpita, W.D. Gunasekera, B.S.C. Ratwatte, R.S. Wanasundera, and P. Colin Thome. The High Court Judges (in order of seniority) were: J.F.A. Soza, M.M. Abdul Cader, J.R.M. Perera, H.A.G. de Silva, C.N.de S.J. Goonewardene, L.H. de Alwis, T.J. Rajaratnam, K.D.O.S.M. Seneviratne, K.A.P. Ranasinghe, J.S. Abeywardene, A.A. de Silva, C.L.T. Moonemalle, S. Selliah, B.E. de Silva, G.R.T.D. Bandaranaike, D.G. Jayalath, T.D.G. de Alwis, and B. Senaratne.

[50] Five Judges of the High Court were also "removed" from office, although the High Court itself continued to exist in terms of the *Administration of Justice Law, No.44 of 1973*, under which it had been established. They were J.R.M. Perera (53), C.N.de S.J. Goonewardene (55) and A.A. de Silva (47) who had been members of the Attorney-General's Department, and T.J. Rajaratnam (59) and Bertram Senaratne (58) who were both senior District Judges prior to their appointment. No reasons were ever offered for their exclusion.

The eight Judges who were excluded had been guaranteed security of tenure by the Constitution in terms of which each had been appointed, and removal was only possible for proved misbehaviour or incapacity. They had functioned on the Supreme Court for over an year after the Jayewardene Government assumed office. Five of them, Justice Jaya Pathirana (57), Justice T.W. Rajaratnam (57), Justice Malcolm Perera (55), Justice S.W. Walpita (59), and Justice Wilmot D. Gunasekera (56) had abandoned the unofficial Bar, and by accepting judicial office had forfeited the right of private practice for life. Of the other three, Justice T.A.de S. Wijesundera (58) and Justice Noel Tittewela (55) had graduated through the Attorney-General's Department and reached the Court in the normal course of promotion, while Justice C.V. Udalagama (59) was a judicial officer who had been appointed, as many of his colleagues had previously been, at the end of a long career served in different parts of the country.[51]

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[51] Although no reasons were ever offered for the "removal" of the eight Judges, it was perhaps not a coincidence that four of them – Justices Pathirana, Wijesundera, Udalagama and Tittewela – had been members of the Constitutional Court established under *The 1972 Constitution*. In December 1972, upon the resignation of three of the original members of that court, Chief Justice H.N.G. Fernando had made it known to his colleagues on the Supreme Court that, having regard to the treatment meted out to the three members by the executive and the legislature, and the circumstances leading to their resignation, none of the Judges should agree to serve on that court. Disregarding this "advice", Justice Pathirana and Commissioners of Assize Wijesundera and Udalagama accepted appointment to that court. They proceeded thereafter to approve several politically sensitive Bills of dubious constitutional validity, including the *Press Council Bill* and the *Associated Newspapers of Ceylon Ltd (Special Provisions) Bill*. They also approved the Administration of Justice Bill which, inter alia, abolished the Court of Appeal, thereby "removing" three of its Judges, the security of whose five-year tenure had been constitutionally guaranteed. Justice Tittewela had also served as Chairman of the Delimitation Commission appointed in 1974. (In 1959, when Prime Minister S.W.R.D. Bandaranaike invited a Judge of the Supreme Court to serve as Chairman of the Delimitation Commission which was then required by the Constitution to be appointed, the Judges had discussed the matter and decided, by a majority vote, against accepting the invitation.) The delimitation of electorates is essentially a political matter, and when existing boundaries are varied in order to create new electorates, some degree of political protest is inevitable. The reaction to the publication in October 1976, barely six months before the scheduled general election, of the Commission's report was, therefore, not that of general acceptance.

Seven Judges were chosen for re-appointment to the Supreme Court. They were Chief Justice N.T.D. Samarakone and Justices G.T. Samarawickrama, V.T. Thamotheram, I.M. Ismail, J.G.T. Weeraratne, S. Sharvananda, and R.S. Wanasundera. The last four were comparatively junior members of the former Supreme Court. Justice D. Wimalaratne, who had been senior to all four of them, was relegated to the Court of Appeal as its President. Justices A. Vythialingam, B.S.C. Ratwatte, and P. Colin Thome were appointed to the Court of Appeal.[52] Other new appointees to that Court of Appeal were the two senior High Court Judges, J.F.A. Soza and M.M. Abdul Cader; the Secretary to the Ministry of Justice, K.A.P. Ranasinghe; and a District Judge, K.C.E. de Alwis, who by-passed the High Court to take a "double promotion" leap into the Court of Appeal. Weeraratne, Sharvananda and De Alwis had already been chosen to serve on a special presidential commission that would recommend the removal of President Jayewardene's principal political opponent from the political scene.[53] At the ceremonial inauguration of the new Supreme Court on 11 September 1978, Chief Justice Samarakone was constrained to observe that: "I and my brothers have been members of the Old Supreme Court and would have wished for it an honourable demise and decent burial, but that was not to be".

Dr Colvin R. De Silva, writing at the time, described the process as a "witches' brew":

> *"The pressure lobbies swung into action, ranging far and wide to reach the Presidential ear. Policies got mixed up with personalities, and principles with both. Principles were the inevitable casualties. The Cabinet got drawn into the fray; and both President and Cabinet stand hurt in the outcome. It has been hard for anyone*

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[52] Justices Vythialingam and Ratwatte had both been senior to Justice Wanasundera.

[53] The preferential treatment and greater seniority accorded to them was a clear message to the judiciary of the riches that lay in the path of judges who were willing to co-operate with the President. One of them, in due course, was elevated to the office of Chief Justice. It was perhaps poetic justice that of the other two, one commissioner entered into a financial transaction with a person who was the subject of inquiry by the commission and was found guilty by the Supreme Court of a corrupt act, while the other allegedly disgraced himself by spiriting away the commission's refrigerator, carpets and curtains.

involved to come unscathed from the imbroglio. One Judge at least of the shamefully dismantled Supreme Court has refused from the outset to have anything to do with the witches' cauldron. He will go into history and into the distinguished succession of judges who have firmly stood on the ground of principle when judicial independence came under executive or legislative assault. It is also known now that another Judge washed his hands off the whole affair by refusing his announced appointment after the slight of announced non-appointment."[54]

The remaining vacancies on the Court of Appeal were filled with the appointment of four members of the unofficial Bar who had been associated in political and legal work on behalf of the ruling United National Party, J.A.R Victor Perera, H.D. Thambiah, H.D. Rodrigo, and E.A.D. Athukorale. Perera was a provincial practitioner who had stormed his way into the limelight only a month earlier by making public a letter allegedly written by him to the former Minister of Justice, Felix R. Dias Bandaranaike.[55] This letter, which was read out in the National State Assembly by Prime Minister Premadasa, expressed "joy that the nefarious regime in which you played such a prominent role has come to an end." The letter went on to allege, inter alia, that

"you have ruined our legal system and shattered the confidence we had in the judiciary. . . The appointments you made during the past seven years of party stooges and sycophants to quasi-judicial tribunals and other offices of importance ruined the country and were responsible for your ignominious downfall."

Perera was appointed to the Court of Appeal barely a month after this alleged letter had been made public. Very soon after, he was also to adorn the Supreme Court, being preferred for

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[54] C.R. de Silva (1978) ***Monkeying with the Judiciary*** (Colombo). Anecdotal evidence suggests that Justice Malcolm Perera was first informed by the Chief Justice that he was "not on the list", and was later informed that he actually was, since it was High Court Judge Maurice Perera who was to be excluded. He declined to accept the appointment. Similarly, Justice W.D. Gunasekera was informed that he would be appointed to the Court of Appeal. When he declined to accept that appointment, he was informed that he would be appointed to the Supreme Court. In the circumstances, he declined that too.

[55] ***Ceylon Daily News***, 4th August 1978. Bandaranaike, however, denied having received it.

appointment over several senior colleagues including the President of the Court of Appeal. Unmistakably, the process of politicizing the Supreme Court had been set in motion. Seniority and merit had given way to that ambiguous criterion of "political acceptability".[56]

President Premadasa followed the traditionalist approach in recommending the appointment of judges to the superior courts, seniority in service generally being the primary consideration. He also reportedly followed the practice initiated by President Jayewardene of formally seeking the recommendation of the Chief Justice whenever a vacancy occurred. However, his successor, President Kumaratunge, literally tore up the rule book. On 30 October 1996, a relatively young associate professor of law who had never practised law or held judicial or legal office, was appointed to fill a vacancy on the Supreme Court. Dr Shirani Bandaranayake's appointment was announced through a photograph in a government newspaper which showed her taking her oath of office before the President, flanked by the President's secretary and the Minister of Justice, G.L. Peiris, who was himself a former professor and dean of law. At the age of 37, she was younger than all the judges of the Court of Appeal and the Supreme Court, and perhaps also of the High Court. The Bar refused to accord her the traditional welcome in open court, and some of her colleagues declined to sit with her.

An application to the Supreme Court was filed by three petitioners who argued before a Bench of seven Judges that the appointment was invalid because the President had not "consulted" the Chief Justice prior to making the appointment, and had in fact rejected the latter's recommendations.[57] Leave to

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[56] That criterion continued to be applied by President Jayewardene in choosing practitioners for appointment to the Supreme Court. Other appointees during this period included E.A.D. Atukorale, R.N.M. Dheeraratne and M.D.H. Fernando. The latter, together with Gamini Dissanayake MP, had prepared a constitutional scheme for the United National Party when it was in Opposition. Later, he was in attendance at meetings of the Select Committee of the National State Assembly appointed to consider the revision of the Constitution following the general election of 1977.

[57] In accordance with previous practice, Chief Justice G.P.S. de Silva had written to the President recommending the appointment of Asoka de Z. Goonewardene, President of the Court of Appeal.

proceed was rejected by four Judges who held that (a) while the President had the "sole discretion" to make the appointment, that power was "neither untrammelled nor unrestrained and ought to be exercised within limits"; (b) in exercising the power to make appointments to the Supreme Court, there should be "co-operation" between the executive and the judiciary; and (c) the petitioners had failed to establish, prima facie, the absence of the necessary co-operation or how they proposed to supply that deficiency.[58] The other three Judges held that the petitioners lacked *locus standi* and, in an event, had failed to adduce evidence of any convention requiring the President to consult the Chief Justice[59]. While the constitutional challenge to the appointment was overcome, the integrity of the Court was undermined by the secrecy which surrounded the appointment, and the apparent willingness of a young and inexperienced non-practising lawyer to be installed in high judicial office in such an unconventional manner. It must be noted, however, that the appointment was in several respects unique: the new judge was the first woman, the first product of a non-urban school, and the first non-practising academic to be appointed to the Supreme Court.

Under the 1946 Constitution it was the invariable practice to maintain the full complement of Judges of the Supreme Court. In fact, it was known well before a Judge retired who his successor would be, and the new judge would be appointed on the day that the vacancy occurred. President Kumaratunge, on the other hand, kept prospective appointees to superior courts in suspense for long periods, often with a purpose. For example, when a vacancy occurred in the Court of Appeal on the retirement of Justice Ananda coomaraswamy on 8 April 1996, the most senior High Court Judge was Upali de Z Gunawardene. On 31 January 1996, he had commenced the trial of the editor of "The Sunday Times", Sinha Ratnatunge, a lawyer, who was indicted on a charge of criminal defamation of Kumaratunge. The publication related to Kumaratunge's alleged participation at a birthday

[58] *de Silva et al v. Bandaranayake*, 16th Decmber 1996. Per Justices Mark Fernando, A.R.B. Amerasinghe, S.W.B. Wadugodapitiya, and A.S. Wijetunge.
[59] Justices P. Ramanathan, P.R.P. Perera and S. Anandacoomaraswamy.

party.[60] Ordinarily, when a trial judge is promoted or transferred, the trial is continued by his successor who, with the consent of the parties, would adopt the evidence already recorded or recall the witnesses who had already testified. However, in this instance, the virtual complainant in that case chose to keep the vacancy unfilled.

On 17 May 1996, the prosecution having closed its case, Judge Gunawardene delivered a 17-page interim order in which he rejected a defence submission that a prima facie case had not been established against the accused. He proceeded to state that the publication was "a typical example of a defamatory statement" which had "a tendency to reflect on the moral excellence of the President", for it imputed to the President "dishonourable or improper conduct", in that "she chose to enter by the rear entrance in order to screen her improper conduct of attending a party at an ungodly hour not becoming of a lady". He added that the prosecution evidence was such "as to establish convincingly and to a moral certainty all the ingredients of the offence of defamation". An application in revision to the Court of Appeal, followed by an appeal to the Supreme Court, on the ground that the trial judge had pre-judged the issues before the defence case had been presented, were both rejected, and it was in August 1996 that the trial resumed. The vacancy in the Court of Appeal remained unfilled for another eleven months until Gunawardene had delivered a 325-page judgment in which he convicted and sentenced the editor for having published a statement that was "down-right defamatory" - "whatever his

[60] The indictment was based on the following paragraph which was part of a gossip column written by a columnist and published in the newspaper in February 1995, four months after the presidential election:

> Therefore, let us start at the top, about a party, graced by none other than H.E. the President Chandrika Kumaratunge. The occasion was the birthday of Liberal Party National List MP Asitha Perera (Well Mudaliyar Chanaka, How?) The place was the MP's permanent suite at the five-star Lanka Oberoi, but this time the President was more circumspect about her appearance and used the rear entrance of the hotel, watched by a phalanx of security guards and myself. She spent about ninety minutes at the party, from about 12.20 in the heat of the silent night until 2 am and as for what she ate, we assure you, it was not food from the Hilton. The reading public now has a fair idea of its First Citizen's epicurean tastes. But what of her estranged brother?

intention may have been"! Immediately thereafter, on 15 July 1997, Gunawardene was appointed a Judge of Appeal, and took his oath of office before the virtual complainant in the case he had just concluded. Indeed, on his retirement from the Court of Appeal, Kumaratunge bestowed on Justice Gunawardene the unique privilege of reverting to, and practising at, the Bar.

In 2001, with her parliamentary support rapidly decreasing, President Kumaratunge was compelled to agree to the enactment of the Seventeenth Amendment to the Constitution which established a 10-member Constitutional Council. It was chaired by the Speaker of Parliament and consisted of the Prime Minister, the Leader of the Opposition, one person appointed by the President, five persons appointed by the President on the nomination of both the Prime Minister and the Leader of the Opposition (the nominations being made in consultation with the leaders of the political parties and independent groups represented in Parliament, three of the five being persons nominated in consultation with Members of Parliament who belong to minority communities so as to ensure that these three represent minority interests), and one person appointed by the President being a person nominated upon agreement by the majority of the Members of Parliament belonging to political parties or independent groups other than the two principal political parties.[61] The Amendment provided that no person shall be appointed by the President to the Supreme Court or the Court of Appeal unless such appointment had been approved by the Council upon a recommendation made to the Council by the President. Although this mechanism appeared to have some potential to introduce an element of uniformity as well as restraint into the appointment process, it also further politicized a process that was crying out for de-politicization. Unfortunately, when the first term of the Constitutional Council ended in March 2005, it was not re-constituted, ostensibly due to the inability to agree on the new members.[62]

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[61] The members of the first Constitutional Council were generally regarded as persons of high integrity.

[62] The 17th Amendment had been hastily drafted and several deficiencies in it contributed to problems that arose in its implementation. These deficiencies could easily have been remedied, but there was an almost total lack of will on the part of the executive to do so.

With no functioning Constitutional Council, Kumaratunge's successor, President Rajapakse, was free to appoint whomsoever he wished to the superior courts, and that was precisely what he did. Being a lawyer himself, having gained entrance to the Law College under a 1970s provision that enabled Members of Parliament to be admitted without the minimum qualification required of others, anecdotal evidence suggests that he often gave preference to those who had been his contemporaries at Law College, disregarding both seniority and experience at the Bar and in the judiciary. He also followed the example of President Kumaratunge in not filling vacancies when they occurred. For example, one vacancy on the Supreme Court occurred on 9 June 2009, and another on 15 May 2011. Both vacancies were filled only on 10 June 2011 with the appointment of W.P.G. Dep, Solicitor-General, and Sathya Hettige, President of the Court of Appeal. Dep had been the acting Attorney-General when the first vacancy occurred and was senior to Hettige in the Attorney-General's Department. It has been suggested that the reason for Dep's eventual much delayed appointment to the Supreme Court was President Rajapakse's desire to promote his former colleague at Law College, Eva Wanasundera to the office of Solicitor-General, with a view to her appointment as Attorney-General in August 2011.[63]

Meanwhile in September 2010 the Eighteenth Amendment to the Constitution replaced the Constitutional Council with a Parliamentary Council comprising the Prime Minister, the Speaker, the Leader of the Opposition, and two Members of Parliament nominated by the Prime Minister and the Leader of

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[63] S.L. Gunasekera (2011) ***Lore of the Law and Other Memories*** (Colombo): p.210. None of these unconstitutional appointments were challenged by way of a writ of *quo warranto*. (In 1966, an order made in the course of an election petition was challenged by way of an application for *quo warranto* against the election judge. In the first instance, Justice Abeysundera issued notice on the election judge, Justice Sri Skanda Rajah, requiring him to show by what authority he purported to function as a Judge of the Supreme Court. He had been appointed in 1962 after the Criminal Law (Special Provisions) Act increased the strength of the Supreme Court from nine to eleven Judges. In 1966, in *Liyanage v. The Queen,* the Privy Council had invalidated that Act. After argument, a Divisional Bench held that the relevant section in that Act remained in force. The author appeared in support of the application.)

the Opposition respectively. Having opposed this Amendment, the Leader of the Opposition refused to participate in constituting this Council or in its proceedings. Whether he did so or not would have made no difference since the President was always assured of a majority in this Council. Rajapakse therefore continued without any compunction to continue to appoint Judges to both superior courts often without regard to seniority or merit, and apparently influenced by personal loyalty and friendship. For example, the President of the Court of Appeal, Justice Sriskandarajah, who had chaired the Bench that quashed the proceedings of the parliamentary select committee that recommended the removal of Chief Justice Shirani Bandaranayake, was repeatedly superseded as colleagues on that Court who were junior to him were promoted to the Supreme Court. More recently, it has been suggested that his appointments were influenced by his brothers, Defence Secretary Gotabhaya Rajapakse and Minister Basil Rajapakse.

The Chief Justice

Appointment to the office of Chief Justice was, by convention, based strictly on seniority in the Supreme Court.[64] When the 1946 Constitution came into force, the Chief Justice was Sir John Howard. Mr (later Sir) Alan Rose KC, another expatriate, who had been appointed to the Supreme Court in January 1945, and had served thereafter as Legal Secretary from October 1945 until the State Council ceased to exist two years later, was appointed Attorney-General. At the time of his appointment it had been agreed that the salary attached to his post would be higher than that of a Judge of the Supreme Court, and that the status of the post would take precedence before that of the Judges; but that the seniority of two serving Judges who had been appointed before him (Justices Wijewardene and Jayatilleke) would remain

[64] There is no international standard relating to the appointment of the Chief Justice. In India, strict seniority is observed, resulting in a rapid turnover of Chief Justices, with some serving only a few weeks in that office. In some States, especially in Latin America, the Chief Justice or President of the Supreme Court is elected, in rotation, for a specified period, from among the judges of that court by the judges themselves. This procedure is considered to be not inconsistent with the principle of judicial independence.

unaffected for purposes of promotion.[65] Accordingly, on the retirement of Howard, Sir Arthur Wijewardene KC was appointed Chief Justice, followed by Sir Edward Jayatilleke KC. Upon the retirement of the latter in October 1951, Sir Alan Rose was appointed to the office to which he would ordinarily have succeeded at that stage, on the basis of seniority, had he remained throughout on the Supreme Court. A precedent was thereby established that if a Judge of the Supreme Court agreed to leave the Court to serve as Attorney-General, he would not thereby lose his seniority on the Court, or the opportunity he would have had in the normal course of succeeding to the office of Chief Justice.[66] This precedent was invoked by Justice H.H. Basnayake KC who succeeded Sir Alan Rose as Attorney-General in October 1951. On 21 January 1955, an official announcement was made that Chief Justice Rose had been granted leave from 15 June 1955 prior to his premature retirement on 31 December 1955, and that Attorney-General Basnayake (who was himself on leave at the time) had been appointed to act as Chief Justice from 15 June, and thereafter to be the Chief Justice with effect from 1 January 1956.[67] There were four changes of government during Chief Justice Basnayake's tenure of office. He was succeeded in 1964 by Justice M.C. Sansoni, followed in 1966 by Justice H.N.G. Fernando.

In October 1971, a Court of Appeal was established to replace the Judicial Committee of the Privy Council as the country's highest appellate tribunal. Prime Minister Sirima Bandaranaike's choice for the office of President of that Court was not Chief Justice

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[65] Letter, 13th October 1947 from the Secretary to the Governor to Hon. A.E.P. Rose, quoted in *Parliamentary Debates (House of Representatives)* (15th March 1955) Col.2587.

[66] This precedent appears to have been later misunderstood by President Kumaratunge to mean that any Judge of the Supreme Court who was appointed Attorney-General would, by virtue of that appointment, supersede every other member of that court including those who were senior to that Judge at the time he left the court.

[67] This unusual announcement of appointments that were to take effect six months and one year later respectively, led to Justice C. Nagalingam KC, who was senior to Basnayake on the Supreme Court, and had acted for the Chief Justice on several previous occasions, retiring from the Court with immediate effect. However, Nagalingam was due to retire on 24 October 1955, before Basnayake's permanent appointment as Chief Justice took effect.

H.N.G. Fernando, but 65-year old retired Justice T.S. Fernando QC., then President of the Geneva-based International Commission of Jurists. In an editorial comment on his appointment, the pro-opposition *Ceylon Daily News*, several of whose directors had only recently been found by a commission of inquiry headed by him to have been guilty of wide-ranging offences under the exchange control laws of the country, commented thus:[68]

> *"The independence of the judiciary is not merely institutional. It is also personal. The calibre of judges, the integrity of the individual, is as vital as the guaranteed independence of the institution. It is in this perspective that we welcome the appointment of Mr. T .S. Fernando QC as the first President of Ceylon's Court of Appeal. While congratulating him on this, the crowning glory of his judicial career, we warmly commend the Prime Minister for her impeccable choice of this internationally known jurist, scholar and man of high integrity and accept it as a token of the Government's respect for the vital principle of an independent judiciary".*

In the hope of attracting to that court the best available talent in the country irrespective of age, a fixed term of five years was fixed for its judges. The government's professed desire to establish an independent and competent tribunal which would enjoy the confidence of all sections of the community was also reflected in the choice of the judges. Two were retired Judges of the Supreme Court (one of whom was a Tamil), and two were among the most senior functioning Judges of the Supreme Court (one of whom was a Roman Catholic).[69]

Meanwhile, in March 1972, immediately after the inaugural session of the new Court of Appeal, the Minister of Justice, Felix Dias Bandaranaike, submitted a cabinet memorandum in which he proposed the re-structuring of the superior courts. He recommended the establishment of one appellate court consisting of 21 judges. He also recommended that

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[68] ***Ceylon Daily News***, 22nd November 1971.

[69] T.S. Fernando QC (65), V. Sivasupramanium (63), A.L.S. Sirimanne (61), and G.T. Samarawickrema QC.

. . . all the existing Judges of the Court of Appeal and of the Supreme Court, and all the existing Commissioners of Assize, be offered appointments in the new Supreme Court even if some of them are above the age limit suggested above [65 years]. These persons could hold office in the new Court for the balance period of their current terms of office in their existing Courts. If their present salaries are higher than those of the new Court to which they are appointed, they could retain their present salaries as personal to them. There are at present 4 Judges of the Court of Appeal, 9 Judges of the Supreme Court and 4 Commissioners of Assize.

On 5 April 1972, the Cabinet approved these proposals, and on 16 June 1972 a draft law to give effect to them was submitted to the Cabinet. On 3 July 1972, the Minister informed the President of the Court of Appeal, the Chief Justice and the Attorney-General of the Cabinet decision. The President of the Court of Appeal was further informed that he would be the Chief Justice of the new Supreme Court, and he was requested to inquire from his colleagues on the Court of Appeal whether they would agree to seniority in the new Court being determined among them by reference to their respective dates of appointment to the existing Supreme Court. On 7 July 1972, the President of the Court of Appeal wrote to the Minister to say that his colleagues were agreeable to that arrangement. Accordingly, if the proposed law was passed in that form and brought into operation as scheduled on 1 January 1974, Justice T.S. Fernando, Q.C., having been appointed President of the Court of Appeal on 20 November 1971, would have been entitled to continue in office as Chief Justice of the new Supreme Court until the end of 1976. What the Minister proposed was consistent with the principle of judicial independence, and was acceptable to all the Judges concerned.

A wholly unexpected development then occurred. On 26 June 1973, shortly after the final draft of the Administration of Justice Bill had been approved by the Cabinet, Attorney-General Tennekoon wrote to President William Gopallawa intimating his desire to retire from the public service on reaching his 59th year on 9 September 1973, "for reasons which are entirely personal", and applied for leave preparatory to retirement with immediate effect. On the next day, he withdrew his application for

immediate retirement and applied for leave instead.[70] In the twenty-four hours that intervened between these two dramatic communications, Tennekoon had discussions with both President Gopallawa and Prime Minister Sirima Bandaranaike. The Minister of Justice was not present at these discussions, but the Minister of Lands, Hector Kobbekaduwa, and the Governor of the Central Bank, Herbert Tennekoon (the Attorney-General's brother) were. No record of either discussion, even if made, is available. However, at the first meeting held thereafter, the Cabinet revisited the draft Bill and decided, without any memorandum before it, that no serving judge who was over 63 years of age should be appointed to the new Supreme Court. It was also decided that Tennekoon would be the Chief Justice of the new Supreme Court. Meanwhile, on 2 August 1973, he was appointed to the Court of Appeal.

On 17 November 1973, six weeks before the date fixed for the Administration of Justice Law to be brought into force, Chief Justice H.N.G. Fernando reached his retirement age of 63 years. The next senior member of that court, Justice G.P.A. Silva was appointed to succeed him on the understanding that he should not expect to be re-appointed to that office when the court re-structuring took effect. On 1 January 1974, when a 21-member single appellate court replaced the Court of Appeal and the Supreme Court, the new Court absorbed the judges of both appellate courts who were under 63 years of age. 60-year old Victor Tennekoon QC was appointed Chief Justice of the new Supreme Court superseding three Judges whose appointments to the previous Supreme Court had predated his – G.P.A. Silva, A.C. Alles and G.T. Samarawickrema. The Chief Justice of the outgoing Supreme Court, G.P.A. Silva, took premature retirement two years ahead of the due date. This was the first departure from previous practice. A new principle was thus established that the Prime Minister was free to choose the Chief Justice from among serving Judges irrespective of, and on considerations unrelated to, seniority.

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[70] Letters, 27th June 1973 to the Minister of Justice and to the Secretary for Justice.

Even before the 1978 Constitution was adopted, President Jayewardene introduced the criterion of "political acceptability" when Chief Justice Victor Tennekoon retired in September 1977 on reaching the age of 63. The most senior judge was Justice G.T. Samarawickrema QC who by then had completed eleven years on the Bench, during which period he had acted as Chief Justice on several occasions, the most recent being in August of that year. Although the much respected Samarawickrema, who had initially been appointed from the Bar to the Supreme Court on the recommendation of Prime Minister Dudley Senanayake and had an impeccable record on the Bench was widely expected to be appointed Chief Justice, the choice of the Prime Minister and soon-to-be-President, J.R. Jayewardene, was his own personal legal adviser, N.D.M. Samarakoon, QC. 58-year old Samarakone was a leading civil lawyer in the District Court of Colombo who had never previously held any judicial office. As the President of the Bar Association remarked at the ceremonial sitting held to welcome the new Chief Justice, it was an "unprecedented step".[71] Samarakone himself said that he was "deeply conscious of the departure from tradition" that his appointment involved.[72] The principle was thus established that the President was completely free and unfettered in the choice of the Chief Justice.

In 1984, upon the retirement of Chief Justice Samarakoon in extremely unfortunate circumstances, President Jayewardene had no hesitation in appointing to that office the next senior Judge of the Supreme Court, Justice S. Sharvananda. He had been a member of the Special Presidential Commission of Inquiry that had, three years earlier, recommended the imposition of civic disabilities on Mrs Sirimavo Bandaranaike, the leader of the Sri Lanka Freedom Party.[73] However, in 1988, upon the retirement of Chief Justice Sharvananda, President Jayewardene deliberately bypassed the most senior judge, Justice R.S. Wanasundera, and instead appointed Justice K.A.P. Ranasinghe to that office.

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[71] ***Ceylon Daily News***, 15th September 1977.

[72] ***Ceylon Daily News***, 15th September 1977.

[73] The Cabinet of Ministers had promptly acted on that recommendation and employed its massive parliamentary majority to expel Mrs. Bandaranaike from Parliament and disqualify her from engaging in political activities for a period of seven years.

Ranasinghe was reputed to be "politically acceptable" to the Government. But more decisive was the fact that Wanasundera had delivered a dissenting judgment in a highly controversial and politically sensitive case - the constitutionality of the Thirteenth Amendment to the Constitution. Anecdotal evidence suggests that the President had informed Wanasundera, who was a close friend of his brother H.W. Jayewardene QC, that while he was being superseded because of his dissenting judgment, he was nevertheless willing to appoint him if he provided him with a signed but undated letter of resignation.[74] Whether or not that was true, what was clear was that President Jayewardene was not willing to promote a judge, despite his seniority and competence, if he was perceived to have fallen out of line with his Government's political interests.

In his time, President Premadasa reverted to the seniority principle when, in 1991, he appointed the most senior judge, H.D. Thambiah, to succeed Chief Justice Ranasinghe. On Thambiah's retirement a few months later, he resisted pressure emanating from several sources and again chose the most senior judge, G.P.S. De Silva. Chief Justice De Silva, who had followed the traditional path through the Attorney-General's Department, the Court of Appeal and the Supreme Court, has been described by a colleague as "honourable but cautious".[75] For eight years he occupied his office with quiet dignity and dispensed justice with competence and impartiality, keeping faith with his judicial oath. While his tenure was rarely marked by spectacular bursts of judicial activism, it will be remembered as that of the last true strict professional of integrity who led the Supreme Court.

Upon the retirement of Chief Justice G.P.S. De Silva in 1999, it was President Kumaratunge who was called upon to appoint his successor. Her personal choice was the Attorney-General, Sarath Nanda Silva. Silva had served in the Attorney General's Department from 1968 until his appointment in 1987 to the Court of Appeal. Six years later he was appointed President of the Court of Appeal, which office he had held for a few months at

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[74] Gunasekera (2011): pp.198-199.

[75] International Crisis Group, *Sri Lanka's Judiciary: Politicized Courts, Compromised Rights*, Report No.172, 30th June 2009, p.13.

the time of the general election of August 1994. On 16 February 1995, three months after she assumed office, President Kumaratunge appointed Silva as a presidential commissioner to investigate the 1988 assassination of her husband, Vijaya Kumaratunge. In October 1995, while the commission proceedings were continuing, she appointed Silva as a Judge of the Supreme Court. On 29 February 1996, the commission report was submitted to the President. On the following day, 1 March 1996, Justice Silva was appointed Attorney-General. At the time of that appointment he was the most junior judge of the Supreme Court.[76] Three and a half years later, on 16 September 1999, President Kumaratunge appointed Silva to the office of Chief Justice, superseding five judges who had been senior to him when he was a virtually non-functioning judge for only four months. They included the two most senior among them, Justice Mark Fernando and Justice A.R.B. Amarasinghe, both of whom had been judges of that court for over a decade and who were widely recognized as judges of competence, independence and integrity. His appointment was preceded by an abortive attempt to debate the matter in Parliament, a public appeal from the Leader of the Opposition to the President "not to do irreparable damage to the judiciary" and "endanger democracy in the land", and a statement from prominent citizens of the country appealing to the President to take "seniority, experience, competence and good conduct" into consideration, rather than "political attitudes".

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[76] While holding office in the Court of Appeal, Sarath Silva was cited as a co-respondent in a divorce action filed in the District Court of Colombo. In July 1994, Judge Abeyratne sitting in the District Court of Colombo rejected the plaint against Silva without notice to the plaintiff in that case. On a complaint made by the plaintiff to the Judicial Service Commission (Chairman: Chief Justice G.P.S. De Silva; members: Justice Tissa Bandaranaike and Justice Mark Fernando) and a preliminary inquiry conducted by its two members, Judge Abeyratne was served a charge sheet. After prolonged proceedings, partly caused by President Kumaratunge's decision to re-constitute the Judicial Service Commission, and a disciplinary inquiry conducted by three justices of the Court of Appeal, Judge Abeyratne was compulsorily retired from service with effect from 31 July 1999. On appeal, the Commission affirmed the findings but mitigated the punishment by making an order debarring him from promotion for a period of two years and transferring him to a remote station with effect from 1st January 2000.

Upon the appointment of Silva as Chief Justice, the UN Special Rapporteur on the Independence of Judges and Lawyers, Dato Param Cumaraswamy, made a public statement in which he referred to the fact that there were "two petitions on charges of corruption against him". He added that the two petitions should have been inquired into and disposed of before the appointment was made. The petitions he referred to had been submitted to the Supreme Court seeking to strike out the name of Sarath Nanda Silva, Attorney General, from the roll of attorneys-at-law on the ground of serious professional misconduct. In respect of one, the Supreme Court had called on Silva to provide his explanation before 15 October 1999. The other was being examined by Justice Shirani Bandaranayake. Immediately after President Kumaratunge appointed Silva as Chief Justice, three fundamental rights applications were filed in the Supreme Court challenging the appointment. Chief Justice Silva himself chose three judges to hear and determine the applications. When the complainants requested a larger bench, he constituted a bench of the seven most junior judges in ascending order, leaving out Justices Mark Fernando, A.R.B. Amerasinghe and Ranjit Dheeraratne. He announced that if the bench failed to conclude the hearing of the cases for any reason whatsoever, he would not constitute a larger bench. When one of the judges retired from office, he constituted a smaller bench of five judges, excluding the most senior. On 20 June 2001, the Court dismissed all three applications.

In June 2009, on the retirement of Chief Justice Sarath Silva, President Rajapakse bypassed the most senior judge, Justice Shirani Bandaranayake, and appointed Justice Asoka De Silva to that office. Almost simultaneously, he proceeded, in his capacity as Minister of Finance, to appoint the superseded judge's husband, Pradeep Kariyawasam, a middle-level private sector marketing executive, as Chairman of the Sri Lanka Insurance Corporation, a major institution in that ministry. Never before had the spouse of a Supreme Court Judge been the recipient of political largesse in this manner. In May 2010, Kariyawasam was appointed Chairman of the National Savings Bank, and shortly thereafter as a director of a hospital company chaired by President Rajapakse's brother, Defence Secretary Gotabhaya Rajapakse. In May 2011, on the retirement of Chief Justice Asoka De Silva, President Rajapakse appointed 53-year old

Justice Shirani Bandaranayake as the 43rd Chief Justice of Sri Lanka. Following the unconstitutional removal from office of Chief Justice Bandaranayake in January 2013, Rajapakse purported to appoint Peter Mohan Maithree Peiris, a practising lawyer and legal adviser to the cabinet, in the circumstances already referred to above.

Under the 1978 Constitution, the principle was thus established that the office of Chief Justice was in the nature of a gift from the President. Even the opportunity of acting in the office of Chief Justice when the permanent incumbent was out of the country was one that the President was free to bestow on judges of his choice (as, for example, when in March 2008 Rajapakse appointed Justice Nihal Jayasinghe, bypassing two other more senior judges) or deny to judges who were out of favour (as Kumaratunge demonstrated on several occasions by denying that opportunity to Justice Mark Fernando and instead appointing judges who were junior to him).

Interference with judicial tenure

It is a fundamental tenet of judicial independence that a judge should have a constitutionally guaranteed tenure, whether for life, until a mandatory retirement age, or the expiry of a fixed term of office. In order to protect the judiciary from undue influence, the power to discipline or remove a judge should be vested in a body which is independent of the legislature and executive. There is increasing international consensus that a judge may be removed from office only for proved incapacity, conviction of a serious crime, gross incompetence, or conduct that is manifestly contrary to the independence, impartiality and integrity of the judiciary.[77] The 1978 Constitution guaranteed the security of judicial tenure by providing that every Judge of the Supreme Court shall hold office "during good behaviour" and shall not be removed except by order of the President made after an address of Parliament, supported by a majority of its members, has been presented for

[77] See Judicial Integrity Group, *Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct* (2010), UNCAC, Article 11: *Implementation Guide* (2013).

such removal on the ground of proved misbehaviour or incapacity. Each of the two previous Constitutions contained a provision in almost identical terms, but no attempt was ever made by the executive or the legislature under either of these Constitutions to initiate proceedings for the removal of a judge from office.[78] The advent of presidential government saw a sharp departure from previous practice and contemporary international standards, as the four episodes described below demonstrate.

The *first* occurred following the enactment in January 1978 of the Special Presidential Commissions of Inquiry Law, No.7 of 1978. That law empowered the President to appoint a commission consisting of Judges whenever it appeared to him to be necessary that an inquiry should be held and information obtained, *inter alia*, as to the administration of any public body, the administration of any law, the administration of justice, or the conduct of any public officer. A "public officer" included "any state officer" and, under the 1972 Constitution which was in force at the time of the enactment of this law, all judges were state officers. In March 1978, President Jayewardene appointed a Special Presidential Commission consisting of two Judges of the Supreme Court (Justice J.G.T. Weeraratne and Justice S. Sharvananda) and one District Judge (K.C.E. de Alwis) to inquire into and report on the administration of his predecessor in office as Prime Minister, Mrs Bandaranaike (1970-77).

On 1 August 1978, the proceedings of the commission commenced with an opening address by a lawyer-member of the working committee of the ruling United National Party who had been retained by the Government to present its case before the commission. His eight-day address, which was described by Mrs

[78] *The 1972 Constitution* provided, in section 129, that "No motion for the removal of a judge shall be placed on the agenda of the National State Assembly until the Speaker has obtained a report from the Judicial Services Disciplinary Board on such particulars of the charge as are alleged in the motion against the judge who is the subject of such motion." The findings of the Board on the particulars of the charge "are final and shall not be debated by the National State Assembly". The Judicial Services Disciplinary Board consisted of the Chief Justice of the Supreme Court and two other Judges of that Court nominated by the President.

Bandaranaike as "an orgy of character assassination",[79] was recorded by the state-controlled radio for broadcasting at peak hour each day and was reported in full in the national newspapers. In the course of his address he referred to the conduct of certain judges. One of them was Justice Pathirana whom he described as "a political stooge introduced to the Supreme Court bench by Felix Dias".[80] The headline on page 1 of one newspaper was "POLITICAL STOOGE ON SC BENCH – COUNSEL"; the lead story of another was captioned: "JUSTICE PATHIRANA ACTED ILLEGALLY: FELIX'S POLITICAL STOOGE IN SUPREME COURT: COUNSEL".[81] The Supreme Court took no action under its contempt powers either against the lawyer who made these statements against a serving judge, or against the newspapers; nor did the commission investigate and report on any of the several allegations made against the Judge. When the Supreme Court was reconstituted a month later, Justice Pathirana was one of the judges who was excluded. It had been possible for the executive to have ignored the constitutional processes and to have caused a judge whom it disliked or whose judicial conduct it obviously disapproved of, to be publicly abused in a forum in which no reply was possible and no defence was available to the judge concerned.[82] At the ceremonial inauguration of the Supreme

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[79] Statement made by S.R.D. Bandaranaike (1980) ***Third Interim Report of the Special Presidential Commission of Inquiry*** (Colombo: Department of Government Printing): Appendix A, p.158.
[80] ***Ceylon Daily Mirror***, 11th August 1978.
[81] ***Ceylon Daily Mirror***, 11th August 1978; ***Ceylon Daily News***, 11th August 1978.
[82] At the stage of the opening address, the proceedings were conducted ex parte and none of the persons whose conduct the special presidential commission was invited to investigate were permitted to be present or to be represented. Later, after evidence had also been recorded, notices were issued on certain persons. No notice was served, nor was an inquiry held, in respect of Justice Pathirana. The commission recommended the imposition of civic disabilities on three persons: Nihal Jayawickrama, former Permanent Secretary to the Ministry of Justice; Felix R. Dias Bandaranaike, a former Minister who held several portfolios from time to time, including Justice; and Sirima R.D. Bandaranaike, the former Prime Minister. The only findings relating to the judiciary were against Nihal Jayawickrama. They related to his role in introducing the concept of an annual Judges' Conference; his proposal to introduce "barefoot lawyers"; and his refusal to permit Judges of the Supreme Court to use official vehicles for private purposes.

Court in September 1978, Chief Justice Samarakone made a prophetic reference: "Words have been uttered and aspersions cast in another place which seemingly affects its hallowed name and what more is in store I do not know".

The *second* occurred in October 1982 when, on an application for a writ of prohibition filed by Felix Dias Bandaranaike, a former cabinet minister on whom "civic disabilities" had been imposed by Parliament following a report of the Special Presidential Commission of Inquiry referred to above, the Supreme Court held that one of the commissioners, K.C.E. de Alwis, by then a Judge of the Court of Appeal, had, by reason of misconduct, become unable to act as a member of the commission.[83] The Bench that made the order comprised Chief Justice Samarakone, Justice D. Wimalaratne and Justice P. Colin Thome. The misconduct found was that the commissioner had engaged in financial transactions with a person whose conduct was the subject of inquiry by the commission. This judgment was preceded by several days of argument during which the petitioner appeared in person and the commissioner was represented by counsel. A few weeks after the judgment, the disqualified commissioner addressed a letter to President Jayewardene in which he alleged that there were circumstances which had rendered it improper for two of the Supreme Court Judges – Justice Wimalaratne and Justice Colin-Thome – to have agreed to hear and determine the application, and that their judgment had been influenced by improper considerations. It was also alleged that the pleadings filed by the petitioner had been prepared in the chambers of Justice Colin-Thome. The commissioner had not challenged the competence of the court at any stage of the hearing; nor was any allegation of bias made by him or on his behalf. Nevertheless, at the instance of the Government, Parliament appointed a seven-member select committee chaired by the Minister of Justice, comprising five other ministers and one member of the opposition, to inquire into and report on the allegations made against the two Judges by the disgruntled litigant.

[83] *Bandaranaike v. De Alwis*, *Hansard*, 8th March 1983, Cols.709-722.

The two Supreme Court Judges whose conduct had been impugned were summoned and questioned by the select committee. It was apparent that an adverse finding by the select committee would almost certainly result in proceedings being initiated for the removal from office of the two Judges. The Judges, therefore, found themselves in a situation in which their own independence and integrity were seriously compromised. In his evidence, Justice Colin-Thome felt it necessary to impress upon the Government-dominated select committee, in a most abject and humiliating manner, where his own political loyalties lay.[84] For example:

> *"Far from being beholden to Mr Felix R Dias Bandaranaike [the petitioner in the application to the Supreme Court], he has had a vendetta against me since the CWE Commission of Inquiry and I have suffered greatly at his hands. Since then our relations have been severely strained. His step-brother, Mr Michael Dias, had been a friend of mine since he was my tutor in the Lex Aquilia at Cambridge University in 1945-48. However, my friendship with Michael Dias has brought me no advantages. The two brothers are as different as chalk and cheese."*
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> . . .
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> *"Ever since I led evidence before the CWE Commission of Inquiry in 1967 I have been a marked man by the SLFP [the principal Opposition party in Parliament to which the petitioner belonged]."*
>
> . . .
>
> *"I think in 1973, Honourable Minister of Lands*[85]*, your nephew Upul had that tragic death by drowning. I met you in the funeral house. That was a time when he*[86] *was turning Hulftsdorp upside down. We had a conversation about that. You took me to a side*

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[84] *Report of the Select Committee appointed to inquire into the representations made by Mr. K.C.E. de Alwis, former Judge of the Court of Appeal and a Member of the Special Presidential Commission, to His Excellency the President of the Democratic Socialist Republic of Sri Lanka, regarding the conduct of the proceedings relating to the Application No.S.C. Reference 1 of 1982 and other matters relating thereto*: Parliamentary Series No.62 of the First Parliament of the Democratic Socialist Republic of Sri Lanka (Fourth Session, 8th July 1984).
[85] The Minister of Lands, Gamini Dissanayake, was a member of the select committee.
[86] The reference is to Felix R Dias Bandaranaike, the former Minister of Justice.

room and you asked me what I thought about Felix. I think I told you in plain, blunt, Anglo-Saxon what I thought of him. You may remember this."

. . .

"I wish to say that in the 1977 election nothing gave me greater pleasure than listening all night to the Dompe result[87]*."*

. . .

"I think, Mr Wickremasinghe[88]*, you will remember Mr Harry Jayewardene's induction as President of the Bar Association in 1976*[89]*, when the ceremony was in Queen's Hotel Kandy. I think you will vouch for this. I was one of the two or three Judges who specially went up for that function and got very unpopular with Felix. He tried to stop our cars. I had a long conversation about the state of affairs in the country at that time with His Excellency the President. I think you will bear witness to that. You were there playing a prominent part at that function."*

Justice Wimalaratne, whose record of independence and integrity was impeccable, also found it necessary to dispel any suspicion that he was anti-government. He sought to do so by citing a number of judgments in which he had held for the State, but only after the following prefactory remarks:

"Although it would not be proper for a judge to set down the way in which he had decided cases – whether for or against the government – Mr K C E de Alwis has compelled me to do so."

The select committee, while making certain critical observations in regard to the conduct of the case, concluded that the allegations made against the two Judges had not been substantiated.

The *third* occurred in March 1984 when Chief Justice Samarakone, who was the chief guest at the annual awards

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[87] At the 1977 general election, Felix R Dias Bandaranaike contested the Dompe seat in Parliament and was narrowly defeated.
[88] Ranil Wickremasinghe, Minister of Education, was a member of the select committee.
[89] The reference was to H.W. Jayewardene QC, a brother of the President.

ceremony of a commercial tutory, made an ill-advised speech in which he referred to many matters of political controversy. For example, he referred to recent race riots in Colombo in which the homes of Tamil people had been destroyed and many lives lost:

> *"What happened was that people were driven, I think, to take a hand themselves and in effect they told the terrorists 'what you can do we can do better'. And they did;"*

to the "Job Bank", a list of unemployed persons compiled by Members of Parliament belonging to the ruling party;

> *"For the past year we have been trying our best to fill about 492 vacancies among typists. But we have a ruling imposed on us that we should recruit only from a place called the Job Bank. I believe all you people have heard of the Job Bank. It is a bank of the Government. It has no place, no buildings. It is only in name, but it is a most powerful place. . . Some of the people they send are supposed to be typists, but they cannot type a word. They can't spell. But we have to employ them. . . The Job Bank is a fraud on the youth of this country. It is like the blood bank; you have to wait for the donor, and the donor here is the MP."*

to bribery:

> *"The cost of living today is not merely rising but is galloping. . . I find that our people are taking bribes. I cannot blame them;"*

And he referred to the President:

> *"I read sometime ago that the President has said that his salary is a pauper's salary, and that he is living on the poverty line. I am surprised. He is an elected representative of the people. He has all the powers; all the palaces in Nuwara Eliya and Kandy. They are paying a hell of a lot of money to keep him in poverty."*

The Government's response was immediate. It decided to bring the Chief Justice before Parliament, but then discovered that the procedure for doing so had not been prescribed, as required by the Constitution. Accordingly, two steps were taken simultaneously. On 3 April 1984, Parliament resolved to appoint

a select committee in terms of standing order 78, to inquire into and report whether the Chief Justice had made the statements attributed to him in the press, and if so, to recommend what action should be taken. The Chief Justice was due to retire within a few months. Therefore, it was necessary to adopt the swiftest procedure in the shortest possible time. Enacting legislation, which required publication in the gazette and reference to the Supreme Court, could not have been accomplished before Chief Justice Samarakone reached his mandatory retirement age. Overnight, on 4 April 1984, a new standing order was drafted and adopted by Parliament. Standing Order 78A empowered the Speaker to appoint a select committee for the purpose of investigating and reporting on an allegation of misbehaviour or incapacity against a Judge of a superior court.[90]

Standing Order 78A contravened Article 4 of the Constitution which stated quite explicitly that judicial power may be exercised only by courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law. The sole exception is in regard to matters relating to the privileges, immunities and powers of Parliament and of its members, when judicial power may be exercised by Parliament according to law. Under the Parliament (Powers and Privileges) Act, Parliament could directly deal only with very trivial matters, such as disrespectful conduct within the precincts of Parliament, or creating a disturbance when Parliament was sitting. It now purported to give itself the power, through a standing order, to conduct what was virtually the trial of an offence. Parliament, which could only punish an outsider with admonition or removal from its precincts, that being the maximum penalty that it could impose in the exercise of its "judicial power", now gave itself the power to remove a Chief Justice from office. These extraordinary powers were acquired, not by law, but by amending its own procedural rules of debate, the standing orders.[91]

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[90] For the text, see footnote 25.

[91] According to Dr Rajiva Wijesinha, MP., "Unfortunately the standing order about impeachment is absurd, and indeed the Leader of the Opposition [Ranil Wickremasinghe] informed me they had introduced it to frighten Neville Samarakone and, after he was frightened, they did not introduce what should have been the more important part relating to investigation. Typical of the amateur approach of both government and opposition is that, though all agreed

The first select committee, chaired by Prime Minister Premadasa, held six meetings between 17 April and 20 July 1984. The Chief Justice declined to attend in protest against the new standing order 78A, but did not deny the statements attributed to him. The select committee reported on 9 August 1984 that the impugned speech was "not befitting the holder of the office of Chief Justice", and recommended that appropriate action be considered. On 5 September 1984, a resolution signed by 57 Members of Parliament, requesting the presentation of an address for the removal of Chief Justice Samarakone, was placed on the Order Paper. On the following day, the Speaker, acting under standing order 78A, appointed a select committee chaired by Minister Lalith Athulathmudali. This strange procedure did not go unchallenged. At its first meeting, the three opposition members, Sarath Muttetuwegama, Anura Bandaranaike and Dinesh Gunawardena, raised a preliminary objection. They submitted that the select committee could not determine "proved incapacity or misbehaviour" unless it had been judicially proved.

The select committee held 14 meetings between 11 September and 27 November 1984, at which S. Nadesan QC and his team of lawyers appearing for the Chief Justice argued that it was an unconstitutional body. Before the select committee concluded its sittings, the Chief Justice reached the mandatory retirement age. In its report to Parliament, the select committee concluded that while the speech *"constitutes a serious breach of convention and has thereby imperilled the independence of the judiciary and undermines the confidence of the public in the judiciary . . . every breach of convention does not necessarily amount to proved misbehaviour".* The desire to humiliate a lawyer with no previous judicial experience who had been elevated to the highest judicial office, and had then become critical of his benefactor, obviously led the President to adopt the swiftest procedure in the shortest possible time in order to achieve that purpose.

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at the time that the standing order needed to be changed, nothing was done about this." ***The Impeachment: What I said was edited out by Ceylon Today*** <www.colombotelegraph.com>.

The *fourth* had all the features of a black comedy. The Constitution required every person appointed to be a Judge of the Supreme Court to take before the President the prescribed oath before entering upon the duties of his office. This was an oath of office and of allegiance to the Republic. In August 1983, Parliament amended the Constitution to make it a criminal offence for a person "to support, espouse, promote, finance, encourage, or advocate the establishment of a separate state within the territory of Sri Lanka".[92] This amendment was directed specifically at certain Tamil political and militant groups. Nevertheless, it also required a large category of persons holding public office, including Judges of the Supreme Court, to take within one month of the amendment coming into force, an additional oath undertaking not to perform any of the prohibited acts. The amendment provided that any holder of an office failing to take such oath within the prescribed time, shall cease to be in service or hold office. It was, therefore, possible for a Judge of the Supreme Court who enjoyed security of tenure under the Constitution to cease to hold office if he failed to take the new political oath.

The amendment came into force on 8 August 1983. By the end of that month, all the Judges of the Supreme Court had taken the new oath before each other, since they were all Justices of the Peace competent to administer oaths. On Friday 9 September, Chief Justice Samarakone was presiding over a Bench of five Judges hearing an application for judicial review. According to him,

> *"Counsel for the petitioners was making his submissions when one of my brother Judges who was reading a copy of the Act which had reached us two days earlier brought it to my notice that the provisions of section 157A of the Act contained a requirement that Judges of the Supreme Court should take their oaths in terms of the seventh schedule before the President which in fact had not been done by any of the Judges."*[93]

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[92] *Sixth Amendment to the Constitution*.

[93] In Re Saturday Review, ***Ceylon Daily News,*** 21st October 1983.

The Court immediately adjourned. After considering the matter, the Judges wrote to the President that in their opinion the period of one month was due to expire at midnight on that day, and that they, therefore, wished to take their oaths before him that afternoon. There was no reply from the President, but the Chief Justice was later informed by the Minister of Justice that the President had been advised by the Attorney General that the period of one month had expired on 7 September and that, since the Judges had not taken their oaths in the prescribed manner within the prescribed period, they had all ceased to hold office.

On Saturday 10 September, the government-controlled newspapers announced that the Judges had ceased to hold office, while others speculated on the options open to the government. Quoting official sources, it was reported that the court might be "reconstituted",[94] with some Judges being replaced,[95] or that the Supreme Court and the Court of Appeal might even be "amalgamated".[96] A cabinet spokesman announced that "different people or some of the people will be appointed".[97] Meanwhile, the chambers of the Judges were locked and barred and armed police guards placed on the premises to prevent access to them. Finally, on Thursday 15 September, after the President had consulted his Cabinet at its regular weekly meeting, all the Judges were issued with fresh letters of appointment and duly sworn in by the President. A traumatic week had come to an end.[98]

Contempt of judicial authority

The principle of judicial independence requires the State to ensure that persons exercising executive or legislative power do

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[94] ***The Sun***, 11th September 1983.
[95] ***The Sun***, 13th September 1983.
[96] ***The Sun***, 14th September 1983.
[97] ***The Sun***, 15th = September 1983.
[98] In an interesting sequel, it was argued by counsel appearing in the interrupted judicial review application that the requirement that the oath be taken before the President was directory and not mandatory. By a 7-2 majority decision, the Supreme Court accepted this submission and held that the Judges had not ceased to hold office: In Re Saturday Review, ***Ceylon Daily News***, 21st October 1983.

not interfere with the judicial process, or exercise or attempt to exercise any form of pressure on judges, whether overt or covert. The State must respect judicial decisions and refrain from any act or omission that frustrates the proper execution of a judicial decision. The State also has a duty to ensure the security and physical protection of members of the judiciary and their families, especially in the event of threats being made against them. These are internationally recognized obligations of the State[99] that were scrupulously observed by all governments since Independence. The emergence of the presidential executive marked a sharp departure from this tradition. While establishing absolute control over judicial appointments and, with the collusion of Parliament, over judicial tenure too, the presidential executive could exercise control over judicial decisions only through pliant judges. From time to time, a spark of independence would fly out of Hulftsdorp, and President Jayewardene would immediately seek to extinguish it by undermining the authority of the judiciary. Two such instances are described below.

In late 1982, following the first ever presidential election in which Jayewardene barely secured an absolute majority of the votes cast, Parliament amended the Constitution to extend its life for a further six years, thereby avoiding the general election that was due in the following year. The Bill for that amendment was required to be approved by a majority of votes at a national referendum. During the referendum campaign, the Government sought to stifle the opposition in a variety of ways. For example, a printing press in which literature advocating a "NO" vote was being printed was sealed under emergency regulations. A legal challenge in the Supreme Court was twice rejected on procedural grounds and finally dismissed on its merits.[100] An organization of the clergy of several religions, *Pavidi Handa* ("Voice of Clergy"), which campaigned for a "NO" vote, convened its first public meeting in Gampaha. It began distributing pamphlets that called for the holding of the general election due in 1983, and asked people to vote "no" to the proposal to extend the life of

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[99] *Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct*, Part II, section 10(i).

[100] *Janatha Finance and Investments Ltd v. Douglas Liyanage*, S.C. Application No.127 of 1982, Supreme Court Minutes of 14th February 1983.

Parliament for a further six years. It was alleged that the Assistant Superintendent of Police of the area arrived at the meeting with a team of police officers, assaulted the participants, seized the pamphlets and dispersed the crowd. On a fundamental rights application, a different Bench of the Supreme Court (Justices D. Wimalaratne, Percy Colin Thome, M.M. Abdul Cader, B.S.C. Ratwatte and H. Rodrigo) held unanimously that the seizure of the pamphlets was a violation of the right to freedom of expression and publication, and awarded damages in Rs.2000 and costs in a sum of Rs.10,000 to the Secretary of *Pavidi Handa*, the Ven. Daramitipola Ratnasara. The judgment was delivered on 8 February 1983. On 2 March, on the instructions of President Jayewardene, the Cabinet decided to promote ASP Udugampola, the respondent in the fundamental rights application, and to pay the damages and costs out of state funds. The state controlled "Daily News" reported that the decision had been made "in order to ensure that public officers should do their jobs and follow orders without fear of consequences from adverse court decisions". The Government not only endorsed the illegal act of the police officer, but also seriously undermined the authority of the Supreme Court.[101]

A few months later, on International Women's Day 1983, a peaceful procession in Colombo led by Vivienne Goonewardene, a former Member of Parliament belonging to the Lanka Sama Samaj Party, was broken up by the Kollupitiya Police and she was arrested by Sub-Inspector Ganeshananthan. It was alleged that she was also thrown on the ground and kicked within the police station by another police officer. In a fundamental rights application brought by her, the Supreme Court (Justices B.S.C. Ratwatte, Percy Colin Thome and J.F.A. Soza) held that Mrs Goonewardene had been unlawfully arrested by Sub-Inspector Ganeshananthan. She was awarded compensation in Rs.2500. The Court declared that due to time constraints imposed by the Constitution it was unable to arrive at a finding on Mrs Goonewardene's allegation against the other police officer, but

[101] It was on the same day, 2nd March 1983, at the same meeting presided over by the President, that the Cabinet decided to establish a select committee of Parliament to inquire into the allegations made by K.C.E. de Alwis against two Judges of the Supreme Court who, coincidentally, happened to be members of this Bench as well.

recommended that the police investigate that allegation. The judgment was delivered on 8 June 1983.[102] On the following day, an official communiqué issued by the Secretary to the Ministry of Defence announced as follows:

> *"The work done by Sub-Inspector Ganeshanathan of Kollupitiya Police Station in dispersing a procession conducted by Mrs Vivienne Gunawardene on 08.03.1983 has been gone into and it has been decided that he should be given a special promotion. Accordingly, the acting Inspector-General of Police, Mr. S.S. Joseph, has ordered the promotion of Sub-Inspector Ganeshanathan to the rank of Inspector Class II with immediate effect."*

This press communiqué was published in the newspapers on 10 June 1983. On the next day, gangs of people assembled outside the residences of two of the Judges and the former residence of the third, and shouted obscenities. They were reported to have been transported in buses belonging to the state-owned Ceylon Transport Board, and carried placards and shouted slogans referring to the judgment. Numerous attempts by the Judges and by their neighbours to contact the police were unsuccessful. When the police finally arrived at the scene the gangs had left. It was a time when a state of emergency was in force and any form of demonstration without permission was illegal. President Jayewardene's response to this incident was that "they were merely exercising their fundamental right to the freedom of speech and expression".[103]

In his *Report of a Mission to Sri Lanka* in January 1984 on behalf of the International Commission of Jurists, Paul Sieghart states that he raised this matter with President Jayewardene.

> *"The President freely conceded that he had personally ordered the promotion of the two police officers, and the payment out of public funds of the damages and costs. This, he said, had been necessary to maintain police morale. He strongly criticized the "Supreme Court for not affording Mrs. Goonewardene's Sub-Inspector the opportunity of giving oral evidence, and clearly regarded this as a case of the*

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[102] *Vivienne Goonewardene v. Hector Perera et al,* [1983] 1 SRL 305.
[103] Gunasekera (2011): p.200.

Court putting itself above the law. He explained, in more general terms, the difficulties which Judiciaries are apt to present to Executives if they are wholly outside anyone's control – a line of argument developed so regularly by holders of high executive office that it needs no elaboration here. He also volunteered the information that he had left Sri Lanka for a foreign visit some days before the "demonstration" outside the Judges' houses, but pointed out that the right to peaceful protest was always available to the People of Sri Lanka."

Sieghart added that he did not suppose for a moment that President Jayewardene had any personal hand in the organization of the mobs before he left the country, nor had anyone suggested to him that there was any evidence that he had done.

"But he has now conceded that the promotion of the two police officers, and the payment of the damages and costs out of public funds, were his personal decisions – at a time when he found the Supreme Court a hindrance to some of his policies. The conclusion is inescapable that he was deliberately seeking to teach the Judges a lesson, in order to make them more pliable to the Executive's wishes. If that is so, these were grossly improper acts; but for the immunity from all suit which the President enjoys under Article 35(1) of the Constitution, they might well have been criminal offences under Article 116(2)."[104]

Neither President Premadasa nor President Wijetunge appear to have interfered with the judicial process. President Kumaratunge reportedly made known to friends and colleagues, in language she considered appropriate for the occasion, what she thought of judges who delivered judgments against her Government. On one occasion, she publicly denounced an unnamed judge of the Supreme Court who she alleged had accepted a bribe. In 1999, when she installed her Attorney-General, Sarath Nanda Silva, in the office of Chief Justice, the Supreme Court ceased to be a matter of any real concern to her, confident in the knowledge that her interests and those of her Government would be adequately

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[104] *Sri Lanka: A Mounting Tragedy of Errors*, by Paul Sieghart, Chairman, Executive Committee, JUSTICE, the British Section of the International Commission of Jurists, March 1984, p.60.

protected.[105] Her principal irritant nevertheless was Justice Mark Fernando who had, in two judgments, held that presidential immunity only prohibited the institution of legal proceedings against the President while in office, and that such immunity did not provide cover to public officials when acting upon an act of the President.[106] Kumaratunge responded by ignoring him, the most senior member of the Court, when appointing judges to act as Chief Justice whenever that office was temporarily vacant.

Under President Rajapakse, judges began to be subjected to violence with impunity. A particularly shocking instance was that of the Secretary of the Judicial Service Commission, Manjula Tillekeratne, a senior High Court judge. A statement issued by him on 18 September 2012 claimed that the Commissioners (the Chief Justice and two Judges of the Supreme Court) had been subjected to threats and intimidation from persons holding high office, especially after the Commission had taken disciplinary action against a judicial officer. Ten days later, on 28 September, he made another statement in which he claimed that there was a danger to the security of the Chief Justice and the other two members of the Commission and himself and their families. On 7 October, he was assaulted by four unidentified men in broad daylight on a public road in Colombo, shortly after he had dropped his wife and son at school. One of the assailants pistol-whipped the Judge, while the others beat him with their bare fists and an iron rod. He was admitted to the Colombo National Hospital with severe injuries to his face and head. No one was charged or even arrested in connection with this incident.

Earlier in the same year, in March 2012, High Court Judge W.T.M.P.B. Warawewa was reportedly threatened after he had delivered a dissenting judgment in what became known as the "White Flag Case". The other two judges in the Trial-at-Bar convicted General Sarath Fonseka, the former Army Commander, for suggesting that senior leaders of the LTTE had

[105] In a post-retirement interview, Sarath N. Silva asserted that the perception that he sustained the Chandrika Kumaratunge Government was "furthest from the truth". He added: "To her credit she has never spoken to me about a case and she knows me well enough not to do that". ***Daily Mirror**,* 7th August 2012.
[106] *Karunathilaka v. Dissanayake* [1999] 1 Sri LR 157; *Senasinghe v. Karunatilleke* [2003] 1 Sri LR 172.

been killed after they had surrendered to the armed forces in the final stages of the armed conflict, and sentenced him to three years imprisonment. Fonseka had contested Rajapakse in the presidential election of 2010, and been arrested a few days later and court martialled. In July 2012, Minister Rishad Bathiudeen allegedly threatened the Magistrate of Mannar and then orchestrated a mob to stone and set fire to part of the courthouse.

The blurring of a critical relationship

The life of a judge in the twentieth century was perhaps best described in the words of Sir Winston Churchill, expressed in the House of Commons in the course of a debate on judges' salaries:

> *"A form of life and conduct far more severe and restricted than that of ordinary people is required from judges . . . They are at once privileged and restricted. They have to present a continuous aspect of dignity and conduct . . . The judges have to maintain, though free from criticism [in Parliament], a far more rigorous standard than is required from any other class I know of in this Realm."*

The need to observe what was perceived to be an extraordinarily rigorous standard led many judges in common law jurisdictions to retreat from public life altogether into a wholly private life confined to home, family and friends. Lord Hailsham, a former Lord Chancellor, described the vocation of a judge as being "something like a priesthood". A former Chief Justice of the United States Supreme Court, William H. Taft, wrote that "the Chief Justice goes into a monastery and confines himself to his judicial work".

Having lived in the home of a judge for several years in the mid-twentieth century, I observed that the view of a judge's life in Ceylon at the time, though more liberal in nature, was still quite monastic in many of its qualities. While judges did not isolate themselves from the rest of society, or from school friends and former colleagues in the legal profession, they rarely, if ever, socialized with politicians in each other's homes. They did not invite politicians to their homes to celebrate their appointment to the Court. Nor did they invite politicians to bear witness at the

marriage of a son or daughter. The Constitution required their salaries to be determined by Parliament, charged on the Consolidated Fund, and not to be diminished during a judge's term of office. In that relatively calm and stable economy, their salaries were rarely increased. They drove, or were driven, to Hulftsdorp in their own cars. They lived in their own homes, except for the Chief Justice who was provided with an official residence which some incumbents in that office used only for official purposes.

The Executive of the day recognized and respected where the lines were drawn. For example, in 1958, when Prime Minister S.W.R.D. Bandaranaike wanted to persuade a Supreme Court Judge to head a commission of inquiry, he did not command the judges to attend him at his residence. He visited Hulftsdorp on a Saturday morning and met the judges in the judges' library. He failed to persuade any of them to accept the assignment. In 1973, Chief Justice H.N.G. Fernando sought an appointment with the Prime Minister. Mrs Bandaranaike did not consider it proper for her to meet at her residence with the judge who was at the time presiding over a trial in which the accused were charged with attempting to overthrow her Government. She requested the Permanent Secretary to the Ministry of Justice to discuss with the Chief Justice whatever matter the latter wished to discuss. It turned out to be a purely administrative problem relating to the Criminal Justice Commission that required resolution through amending legislation. Such was the scrupulous manner in which conventions that underpinned the separation of functions were understood and observed.

A dramatic change occurred with the advent of the Executive President, the ultimate source of power and patronage. In 1983, Justice Percy Colin Thome, who had been appointed to the Supreme Court in 1976 on the advice of Prime Minister Sirima Bandaranaike, described to a parliamentary select committee his relations with President Jayewardene:[107]

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[107] *Report of the Select Committee appointed to inquire into the representations made by Mr. K.C.E. de Alwis, former Judge of the Court of Appeal and a Member of the Special Presidential Commission, to His Excellency the President of the Democratic Socialist Republic of Sri Lanka, regarding the conduct of the proceedings relating to the Application No.S.C.Reference 1 of 1982 and other*

> *"I want to say this. My relations with His Excellency the President have been very cordial. In fact, I know him. I have only met Mrs Bandaranaike for a few seconds in my life. . . . But I have known the President from 1948 and I have had very cordial relations with him. I do not know whether somebody has been poisoning his mind. I have had very cordial relations with him. We had a common interest in history. I admire his culture, his refinement, and it was never at any time my intention to do anything harmful to him personally. We have met at several functions at President's House, at private dinners, and in 1981 he invited me and my wife for his birthday party at President's House. We were very honoured. So there is no vestige of truth at all in Mr de Alwis' allegation that I am anti-UNP and anti-government. My community, my family, are his traditional supporters."*

He also described how he enjoyed the hospitality of a cabinet minister:

> *"Thanks to the hospitality of the Honourable Minister of Lands,*[108] *we were all sent on that wonderful trip of the sites. We got younger. You know, we all went and it was a delightful trip. I wrote and told you about it . . . Lovely time, delightful! We were hoping we could make it a sort of annual event."*

President Rajapakse appeared to have intruded into the privacy of judicial life to an extent incompatible with judicial values. This is evident from photographs that have been published, especially on the internet. For example, in July 2011, a picture of Sathya Hettige with his head bowed deep, receiving his letter of appointment from President Rajapakse after having taken his oath of office as a Judge of the Supreme Court was followed by several other photographs. These were of the President and his brother Basil Rajapakse and the Prime Minister, D.M Jayaratne, partaking of the hospitality of the new judge at his home.

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matters relating thereto: Parliamentary Series No.62 of the First Parliament of the Democratic Socialist Republic of Sri Lanka (Fourth Session, 8th July 1984).

[108] Gamini Dissanayake, MP.

President Rajapakse was also invited by the new judge to his daughter's wedding to sign as a witness on behalf of his family.[109]

In November 2011, shortly after High Court Judge Deepali Wijesundera convicted Sarath Fonseka in the "White Flag Case",[110] President Rajapakse and Speaker Chamal Rajapakse were the attesting witnesses at the judge's daughter's wedding. Photographs of the new couple with the Rajapakse brothers and the judge standing in front of the poruwa and elsewhere were published on websites.[111] In the same year, when President Rajapakse's son, Namal, took his oaths as an attorney-at-law before Chief Justice Bandaranayake and two other Judges[112], the three Judges stepped down from the Bench and posed in their judicial attire for several photographs (probably in the Chief Justice's chambers) with the new attorney and his parents. In one picture, the External Affairs Minister G.L. Peiris, who was also in court for the ceremony, is seated while standing behind him, the Chief Justice is seen shaking hands with the young attorney. These photographs were published.[113] It is unlikely that this privilege was accorded to the hundreds of others who also took their oaths on that day in the same ceremony.

On 14 April 2014, Chief Justice Mohan Peiris travelled from Colombo to Tangalle, to join President Rajapakse and his immediate family in celebrating the Sinhala and Hindu New Year rituals at the Rajapakse "ancestral home", Carlton House. A news report stated that others who participated in this family event were Defence Secretary Gotabhaya Rajapakse and Mrs Ioma Rajapakse, and the Chairman of Sri Lankan Airlines, Nishantha Wickremasinghe, the brother of "the First Lady".

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[109] U. Kurukulasuriya, '*Can We Expect Justice From Servants of Military Dictators'* ***The Sunday Leader***, 21st August 2011.
[110] General Sarath Fonseka was convicted of making a false statement to the editor of a newspaper, namely, that Defence Secretary Gotabaya Rajapakse had ordered Brigadier Shavendra Silva of the 58th Battalion to shoot LTTE leaders who surrendered, and thereby attempted to generate ill-feeling among the people in violation of Emergency Regulation 28 made by the President under the Public Security Ordinance. He was sentenced to serve a term of three years imprisonment and fined Rs.5000.
[111] See ***Lankae News,*** 9th February 2012.
[112] Justice Gamini Amaratunge and Justice Suresh Chandra.
[113] ***Lankae News***. See also ***Lakbima***, 18th December 2011, p.1.

Several pictures that were published showed the participants, including the Chief Justice, "attired in white and facing south" feeding milk rice to each other and engaging in other traditional transactions in what was essentially a family occasion.[114] In September 2014, Peiris was a member of President Rajapakse's entourage (which included several Ministers, Members of Parliament and officials) on an official visit to Italy and the Vatican. It was the first occasion when a Chief Justice accompanied a political leader on a visit abroad.[115]

Patronage and Reciprocity

Presidential Largesse

Presidential patronage also extended to material benefits. For example, President Premadasa provided judges of the superior courts with state land at a nominal price for them to construct their own homes in an otherwise expensive Colombo suburb. President Kumaratunge was not to be outdone. In October 2001, she had been compelled to dissolve Parliament when, following a mass defection, her party lost the majority it had secured in the previous year's general election. In the general election held in December 2001, the UNP secured a comfortable majority and formed a government after having extracted from her, with considerable difficulty, the portfolios of defence and finance that she held. In the two years that followed, the Supreme Court headed by Chief Justice Sarath Silva delivered several questionable judgments and provided equally dubious advisory opinions. One of these enabled her to "recover" the Ministry of Defence, and another committed to prison for contempt one of her ministers who had defected to the opposition. In February

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[114] J. Alahapperuma (2014) ***Sri Lanka's First Family celebrates traditional*** (New Year: Carlton Hous).

[115] Earlier, Chief Justice Asoka de Silva had accompanied Justice Minister Milinda Moragoda to the Netherlands "to study the Dutch judicial system". At that time, his daughter was attending a legal academy in the Netherlands, and her husband, a state counsel in the Attorney-General's Department and son of another Judge of the Supreme Court, was on secondment as second secretary in the Sri Lankan Embassy in the Netherlands. See U. Kurukulasuriya, '*One retired CJ turns to monkhood while another returns to advise a kleptocracy*', ***The Sunday Leader***, 26th June 2011.

2004, she dissolved Parliament again, and in the general election of April 2004 her political party secured a parliamentary majority. In the following month, at the request of the Chief Justice, Kumaratunge submitted a cabinet memorandum entitled "Rectification of Anomalies in relation to salaries and allowances payable to judges of superior courts". In it she recommended backdated new salary scales with effect from 1 January 2001 and the consequent payment, as arrears, of a sum of Rs.630,000 to the Chief Justice, Rs.630,000 to each Judge of the Supreme Court, and sums ranging from Rs.30,000 to Rs.616,500 to each Judge of the Court of Appeal. [116]

President Rajapakse granted permits to judges to import vehicles free of duty, and allowed them to sell the permits if they so wished. He also provided them with personal bodyguards. He then devised a mechanism to enable them to earn foreign exchange. By arrangement with the military dictatorship of the Fiji Islands, Judges of the Supreme Court and the Court of Appeal were granted leave to serve as judges in Fiji from time to time.[117] This arrangement commenced at a time when Fiji was suspended from the Commonwealth owing to a military coup in that country, and judges from other Commonwealth countries serving in the Fijian judiciary had resigned. The Sri Lankan judges were, therefore, not allowed by the Australian and New Zealand Governments to travel via their countries, and were also denied medical services in these two countries. Notwithstanding these impediments, and the enormous backlogs in both superior courts, several judges availed themselves of this presidential concession.

Post-Retirement Employment

The post-retirement employment of judges by law firms, the private sector or the government is disapproved of in many

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[116] She also recommended the increase of the rent allowance payable to judges of superior courts from Rs.4000 to Rs.12,000 per month. The text of the cabinet memorandum was published in ***The Sunday Leader***, 15th August 2004.

[117] Article 110(2) of *The Constitution* states that no Judge of the Supreme Court or Court of Appeal shall perform any other office (whether paid or not), or accept any place of profit or emolument except with the written consent of the President.

jurisdictions, if not altogether prohibited. The provision of an attractive pension for life is regarded as adequate compensation. The rationale is the risk that, in such situations, the judge's self-interest and his duty may appear to conflict in the eyes of a reasonable, fair-minded and informed person. Moreover, the conduct of a former judge often affects the public's perception of the judiciary and of other judges who continue to serve after that judge has left. Under the 1946 and 1972 Constitutions, retired Judges of the Supreme Court were not appointed to executive positions. President Premadasa departed from this tradition when he appointed retired Chief Justice Sharvananda as Governor of the Western Province, and President Kumaratunge appointed retired Justice Ramanathan as his successor. Unfortunately, there are statutes in Sri Lanka that require the President to appoint retired judges as members of boards and commissions. This inevitably creates an illegitimate expectation in the minds of at least some judges approaching retirement age, and may even be perceived as influencing their judgment. The Bribery Commission and the Human Rights Commission are two such bodies, to which retired judges have been appointed. The political bias displayed by both these commissions in recent years was such that they soon became objects of public ridicule.

It is not suggested that a chief justice or other judge of any of the superior courts should not serve the community, after retirement from judicial office, by sharing the legal knowledge or experience or any other interests or competencies he or she may possess. However, the appointment by President Rajapakse of Nihal Jayasinghe, immediately after his retirement from the Supreme Court, to head the Sri Lanka High Commission in London, one of the most important diplomatic missions abroad, was inexplicable, since he did not appear to possess any special diplomatic skills, knowledge or experience for the task. The insistence of that judge-turned-diplomat that he be addressed by the prefix "Justice", and his decision to describe himself as such, is believed to have bewildered the establishment in a country in which a clear distinction exists, and is observed, between the executive and the judiciary.

It was, however, an unprecedented appointment made by President Rajapakse that seriously compromised the

independence, integrity and credibility of the Supreme Court. Barely weeks after his retirement, Chief Justice Asoka De Silva was appointed as an Adviser to the President. It was not known, and the country was not informed, whether the Chief Justice sought this post-retirement employment, or whether the Head of the Government offered it to him, and why. Nor was it known whether discussions in regard to this post-retirement employment took place while the Chief Justice was still in office presiding over politically sensitive cases. It gave rise to serious questions not only in regard to his judgment, but also to the probity of his recent judicial decisions. It also raised the spectre of judicial corruption. When a judge, and a Chief Justice at that, decides to take a great leap from the Supreme Court to the Presidential Secretariat to serve the executive branch of government at its core, the alarm bells must surely begin to ring. The country was entitled to know, but was not told, the compelling reasons that led to such an unprecedented step being taken. Nor did the retired Chief Justice give any thought to public perception before he decided to take that leap.[118]

Chief Justice Sarath Nanda Silva (1999-2009)

The upside as well as the downside of presidential patronage was spectacularly demonstrated by Chief Justice Sarath Nanda Silva. Described by a former colleague as "charismatic, cunning and vindictive", Silva was also credited as being one of the great legal minds of his time.[119] Spawned by the executive presidency, he set about establishing his own patronage mechanism. On occasion, he even developed his office into an alternative political centre to the presidency.[120] By arrangement with an accommodating Minister of Justice, he retained control of an $18.2 million World

[118] See N. Jayawickrama, '*A Breach of Faith*' ***Sunday Island***, 27th October 2011.
[119] S. Aziz, PC., in conversation with the United States Charge d'Affaires, reported in a confidential cable from the US Embassy in Colombo to the Department of State, Washington, 25th June 2007, on the subject: '*Ambitious Chief Justice breaks away from President*', ***WikiLeaks***, 15 November 2013 <www.colombotelegraph.com>.
[120] See International Crisis Group, *Sri Lanka's Judiciary: Politicized Courts, Compromised Rights*, Report No.172, 30th June 2009, pp.10-12.

Bank grant which he had earlier administered from the office of the Attorney-General. This grant was intended to refurbish courthouses and train legal and judicial officers, but was capable of being misused as a slush fund or as an instrument of patronage. According to a former judge, "Silva used the World Bank [grant] to extract personal favours; it was a patronage system".[121] He extended his sphere of influence into the Ministry of Justice by securing the removal of the incumbent Secretary, a very competent and experienced officer, and her replacement with a lawyer of his choice from his previous department. He secured the reconstitution of the Judicial Service Commission of which he now became the ex-officio chairperson, by recommending the appointment of two junior judges instead of the two most senior as tradition demanded; in fact, one was removed and the other passed over. It has been alleged that judicial officers, often those who did not decide in favour of the Chief Justice's friends and political allies, were offered the option of resignation or dismissal, or were transferred to unfavourable locations.[122] It has even been suggested that he concerned himself with the annual elections of the Bar Association.

Presidential patronage, and the knowledge that there was no higher authority that could reverse his orders, appear to have led him to act in an autocratic manner with impunity. For example, in the course of judicial proceedings, he demanded that two senior

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[121] See International Crisis Group, *Sri Lanka's Judiciary: Politicized Courts, Compromised Rights*, Report No.172, 30th June 2009, p.11.

[122] See International Crisis Group, *Sri Lanka's Judiciary: Politicized Courts, Compromised Rights*, Report No.172, 30th June 2009, pp.14-15. In February 2006, the two appointed members of the Judicial Service Commission, Justices Shirani Bandaranayake and T.B. Weerasuriya, resigned over differences with the Chief Justice regarding the exercise of its disciplinary powers. One highly publicized instance was the order made by the Commission to the Wellawaya Magistrate, Janaka Bandara, to cancel a judicial order made by him for the arrest of the Senior Superintendent of Police of Monaragala, M.U.A. Sherifdeen, to be produced for an identification parade in connection with the death of a bus conductor who had been knocked down and killed on the spot by a police jeep allegedly driven by the SSP. The Magistrate refused to comply with the Commission's order and was interdicted. He was subsequently summoned to the Chief Justice's Chambers where he was admonished and told that he did not know the law and had behaved like a "booruwa". ***The Sunday Leader***, 17th July 2005.

officials,[123] resign their respective offices forthwith, and submit sworn affidavits that neither would ever thereafter accept any office under the State. There was no legal provision that enabled him to make such orders. On another occasion, he punished a lawyer over an incident that had occurred in the lounge of the Colombo law library by suspending him from practice for a period of four years. The lawyer had allegedly thrown a packet of milk at another lawyer. The latter had appeared for the Chief Justice's partner in a divorce case filed by her husband.[124] He also used the contempt powers of the court with no regard either to law or precedent. In February 2003, he summarily convicted and imposed a sentence of rigorous imprisonment of one year on Anthony Fernando, a petitioner in a fundamental rights application who appeared in person in support of his own application. Fernando was alleged to have "raised his voice" when he objected to his application being heard by the Chief Justice since it related to the conduct of the Chief Justice himself.[125] In December 2004, S.B. Dissanayake, a minister who had defected from the Kumaratunge cabinet, was convicted of contempt and sentenced to a term of two years' rigorous imprisonment. Addressing a small gathering on a paddy field remote from the capital, Dissanayake was alleged to have criticized an advisory opinion that the Chief Justice had provided to President Kumaratunge, and described it as "disgraceful" and "unacceptable". Never in over a hundred years had the Supreme Court imposed sentences of such excessive length and rigour for contempt of court. Responding to two separate communications submitted by Fernando and Dissanayake, the Geneva-based Human Rights Committee expressed the "View" that the convictions constituted violations of Sri Lanka's obligations under the ICCPR.[126] Unfortunately, both Views were delivered after the respective sentences had been served.

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[123] P.B. Jayasundera, Secretary to the Treasury, and Sarath Wijesinghe, Chairman of the Consumer Authority. However, following his retirement from the Court, President Rajapakse re-appointed the former to the same office, and appointed the latter as Ambassador to the United Arab Emirates.

[124] See ***The Sunday Leader***, 1st August 2004.

[125] *A.M.E. Fernando v. Attorney General* (2003) 2 Sri LR 52.

[126] *Anthony Fernando v. Sri Lanka, Communication* No.1189/2003, 31st March 2005 (a violation of Article 9 of *ICCPR*); *S.B. Dissanayake v. Sri Lanka,*

The listing of cases before the Supreme Court was apparently done on an ad hoc basis on his directions. In the court over which he presided for ten years, lawyers and litigants watched with increasing frustration as the Chief Justice, with increasing frequency and regularity, constituted the same or similar benches to hear any matter of political sensitivity.[127] The judges whom he chose to sit with were either the newly appointed, relatively junior judges, or those who had previously served under him when he was a supervising officer in the Attorney General's Department. The most senior judge, one of few to be recruited from the unofficial bar, Justice Mark Fernando, a judge of competence and independence, retired prematurely on 31 January 2004, more than two years before the due date, without ever having sat with the Chief Justice, and having rarely been assigned any case of real significance. Indeed, another experienced and independent judicial officer of integrity, Justice C.V. Wigneswaran, when interviewed by the press shortly after his own retirement from the Supreme Court in September 2004, had this to say:[128]

> *"But in the Supreme Court, none of us knew how the allocation of cases was done. If the junior-most judge was in charge of allocation of cases, I must confess that I never got a chance to be involved in the process when I entered the Supreme Court in 2001. More often, only selected judges were in charge and that too for a long time. And it was a fact that Justice Mark Fernando was kept out of important cases. Since I was more often accommodated with Justice Mark Fernando, I was also spared the distinction of hearing socially or*

Communication No.1373/2005, 22nd July 2008 (violations of Articles 9(1), 19(3) and 25(b) of the *ICCPR*).

[127] Indeed, the two noteworthy decisions of the Supreme Court that were unfavourable to President Kumaratunge were (a) the judgment of Justice Mark Fernando (with Gunasekera J and Wigneswaran J agreeing) which held, inter alia, that the proclamation made by President Kumaratunge announcing a referendum in 2001 was invalid; and (b) the majority decision of Justice Wigneswaram and Justice Shirani Tilakawardene, (with Dissanayake J dissenting) which declared that the fundamental rights of the news editor of a private television station were violated by the President's secretary and the President's head of security by unreasonably denying him entry into President's House for the swearing-in ceremony of former Prime Minister Ranil Wickremasinghe in December 2001 without any valid reason.

[128] ***The Sunday Leader***, 31st October 2004.

politically sensitive cases. Even if I was accommodated on a bench at the leave stage, once my views were known to be contrary to certain others, I would never be given that case thereafter."

Justice Wigneswaran had more to say of the Sarath Silva Court. He spoke of prejudices and personal agendas interfering with the judicial process:

> *"It is not my intention to point accusing fingers at any individuals. But if you ask any lawyer in Hulftsdorp who has some understanding of what happens in the higher judiciary today, he would tell you looking at the constitution of a bench and the subject matter coming up before that bench, as to what the outcome would be. More often such evaluation would be correct. How is it possible? It is because the bias, prejudices and may be personal agendas of individual judges are fairly well delineated that it is possible to safely predict. Some judges would be very hard regarding the same matter when it relates to one set of litigants and very lenient with others."*

Questioned on an earlier statement he had made that there was a "constrained atmosphere" within the court, Justice Wigneswaran explained:

> *"The compulsions have come about due to an administration that expected a departmental hierarchical obedience from judges. In order to achieve such obedience wedges were driven into the system. Patronage to some and punishment to others were meted out. Comply or be condemned, was the underlying threat."*

The control Silva exercised over his colleagues in the Supreme Court was such that in his ten-year tenure in office, there were less than five reported opinions dissenting from the Chief Justice. This has been attributed to his excessive influence over other members of the Court, which meant that there was a real, though unspoken, reluctance for them to issue dissenting opinions.[129]

President Kumaratunge encouraged the Chief Justice she had appointed by superseding several senior judges to develop a

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[129] International Bar Association, *Justice in Retreat: A report on the independence of the legal profession and the rule of law in Sri Lanka*: p.32.

special relationship with her. It was claimed by a once powerful member of the Kumaratunge Cabinet that Silva was a "close friend and trusted confidant of President Kumaratunge whose advice she has sought and received not only on legal and constitutional matters, but also on political strategy"[130]. She accorded him presidential protection whenever allegations of misconduct were leveled against him. In 2001, Kumaratunge prorogued Parliament to abort a resolution that sought the appointment of a select committee to inquire into a complaint of misbehavior against the Chief Justice. In February 2004, she frustrated a second attempt by parliamentarians to have the Chief Justice removed from office on fourteen grounds of misbehavior.[131]

The Chief Justice reciprocated with several judgments and advisory opinions that the President desired. For instance, following the general election of 5 December 2001 at which the UNP secured a comfortable majority in Parliament, Kumaratunge was compelled to invite her principal political opponent, Ranil Wickremasinghe, to form a government. In mid-2002, fearing that Kumaratunge may exercise her power of dissolution at any time, the UNP Cabinet decided to seek parliamentary approval to amend the Constitution, *inter alia*, (a) to make the President's power to dissolve Parliament subject to parliamentary control whenever the majority of members belonged to a political party of which the President was not a member, and (b) to permit each member to vote for or against the Bill according to his or her conscience, and yet be immuned from

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[130] Communication No.1373/2005 submitted by S.B. Dissanayake, former Minister and General Secretary of the Sri Lanka Freedom Party, to the Human Rights Committee following his conviction and sentence for contempt of court, 7th March 2005.

[131] On 3rd November 2003, the UNP government parliamentary group decided to present to the Speaker a resolution signed by over 100 members of Parliament for the presentation of an address to the President for the removal of the Chief Justice on 14 grounds of misbehaviour. Notice of that resolution was submitted to the Speaker on 4th November 2003, and Prime Minister Ranil Wickremasinghe began making preparations to obtain the participation of judges from Commonwealth countries to serve on the tribunal that would inquire into allegations of misbehaviour. In February 2004, Kumaratunge dissolved Parliament and ordered a general election that saw the exit of the UNP Government.

disciplinary action by the political party to which such member belonged. It was believed that at least twenty members of Kumaratunge's party were proposing to vote for the proposed Nineteenth Amendment. Silva constituted a seven-judge Bench, from which he excluded the three most senior judges, to examine the constitutionality of the Bill.[132] This Bench held that the proposed amendments to the Constitution infringed Article 4. Any Bill that is inconsistent with Article 4 may be passed by a two-thirds majority. The Chief Justice, however, went beyond his judicial role, and trespassing into legislative territory held that Article 4 was "linked" to Article 3 which is one of ten Articles of the Constitution which require both a two-third majority in Parliament and approval by a majority at a referendum for the adoption of any inconsistent legislation.[133] He thus retained for Kumaratunge the power to dissolve Parliament at a moment of her choosing, and effectively aborted the anticipated cross-overs. [134]

Several other decisions and advisory opinions[135] of the Sarath Silva Court enabled Kumaratunge to regain her parliamentary majority at the 2004 general election. For instance, in late 2003, Kumaratunge sought an advisory opinion concerning the exercise

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[132] The Bench comprised Chief Justice Sarath Silva and Justices S.W.B. Wadugodapitiya, Shirani Bandaranayake, Ismail, P. Edussuriya, H.S. Yapa, and Asoka de Silva.

[133] Article 83 specifies these ten "entrenched" Articles. It does not include Article 4 among them.

[134] '*In Re The Nineteenth Amendment to the Constitution*', 3rd October 2002.

[135] Article 129 of the Constitution provides that:

> (1) If at any time it appears to the President of the Republic that a question of law or fact has arisen or is likely to arise which is of such nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer that question to that Court for consideration **and the Court may**, after such hearing as it thinks fit, within the period specified in such reference or within such time as may be extended by the President, report to the President its opinion thereon.
> (3) Such opinion . . . shall be expressed after consideration by at least five Judges of the Supreme Court, of whom, unless he otherwise directs, the Chief Justice shall be one.
> (4) Every proceeding under paragraph (1) of this Article **shall be held in private** unless the Court for special reasons otherwise directs.

of powers relating to defence. On 4 November 2003, while Prime Minister Wickremasinghe was in the United States of America on an official visit to that country, President Kumaratunge removed from office the Minister of Defence, the Minister of the Interior, and the Minister of Mass Communication, and appointed herself Minister in charge of these subjects.[136] On the following day, the presidential secretariat issued a brief news release containing the "essence" of the opinion of the Supreme Court on the matters referred to it by the President.[137] The news release claimed that the Court was of the opinion, inter alia, that "the plenary executive power including the defence of Sri Lanka is vested and reposed with the President", and that "the said power vested in the President relating to the defence of Sri Lanka under the Constitution includes the control of the armed forces as commander-in-chief of the forces". This opinion stultified the growth of the Constitution. If it was expressed in good faith, it failed to adapt the Constitution to the realities of democratic power structures. It ignored the fact that the Constitution is a living instrument, sustained by the popular will, not a last will and testament. The full text of the opinion of the Supreme Court was never published.[138]

On 7 February 2004, President Kumaratunge dissolved Parliament and fixed 2 April 2004 as the date for the general

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[136] She also removed the Secretaries to the Ministries of Defence and Mass Communication and appointed her own nominees to those offices. She dismissed the Chairperson and Board of Directors of the Associated Newspapers of Ceylon Ltd., (a government-controlled newspaper company which published, inter alia, the "Daily News"), and appointed her own nominees. Similarly, she re-constituted the management and editorial heads of the Sri Lanka Rupavahini Corporation and Independent Television Network (both government-controlled television stations) and of the Sri Lanka Broadcasting Corporation. By another proclamation issued simultaneously, the President prorogued Parliament with immediate effect until 19th November 2003. (The annual budget was due to be presented to Parliament on 12th November 2003). The Presidential Secretariat also announced that a state of emergency had been declared. Addressing the nation that night, President Kumaratunge stated that she had acted in the interest of "national security".

[137] The Court consisted of Chief Justice Silva, and Justices Shirani Bandaranayake, H.S. Yapa, Asoka De Silva and Nihal Jayasinghe.

[138] See N. Jayawickrama, '*Misinterpreting the Constitution*' ***The Sunday Leader***, 30th November 2003; N. Jayawickrama, '*The Defence Portfolio*' ***Daily News***, 20th December 2003.

election – barely two years into the life of a government which enjoyed the overwhelming confidence of Parliament.[139] On 10 March 2004, at the height of the general election campaign, the Chief Justice took the extraordinary step of informing the press that the Judges of the Supreme Court were examining a speech made by the UNP national organizer, S.B. Dissanayake, with a view to dealing with him for contempt. The speech was one which Dissanayake was alleged to have made nearly five months earlier in which he criticized the advisory opinion referred to above.[140] Five days later, during the final fortnight of the general election campaign, the "Daily News" reported that the Chief Justice had instructed that notice be issued on Dissanayake to appear before the Supreme Court and show cause why he should not be punished for contempt of court.[141]

As the countdown to the general election began, the UPFA raised a new issue – the legality of a tax amnesty granted by the UNP government. On 12 March 2004, President Kumaratunge sought the opinion of the Supreme Court on the constitutionality of the Inland Revenue (Special Provisions) Act under which the tax amnesty had been granted. That law had been enacted in or about March 2003, having been passed by Parliament and certified by the Speaker. Article 80(3) of the Constitution states

[139] On the same day, immediately before she dissolved Parliament, the President appointed two members of her party, L Kadirgamar and D.M. Jayaratne, into the UNF Cabinet of Ministers and assigned to them the subjects of media and mass communication, and posts and telecommunications, respectively. On 11th February 2004, she removed from office all non-Cabinet Ministers and all Deputy Ministers. On 12th March 2004, the United People's Freedom Alliance (UPFA) formed by the SLFP and the JVP published its election manifesto.

[140] ***The Daily Mirror*** of 3rd March 2004 had reported verbatim an interview with Anura Bandaranaike, the UPFA national organizer and brother of President Kumaratunge, in which he confidently predicted that Dissanayake "will be in jail very soon".

[141] In fact, no Rule had been issued by the Supreme Court on or before the date of this news report, nor was any Rule issued between the date of the news report and the date of the general election. The Chief Justice, who had volunteered information to the press only five days prior to this news report, took no steps to contradict this news report, which was published at a crucial stage of the general election when Dissanayake was campaigning not only in his own electoral district, but throughout the country as a principal speaker on behalf of the UNP. Dissanayake was later convicted of contempt of court and sentenced to rigorous imprisonment for two years.

that "where a Bill becomes law upon the certificate of the President or the Speaker, as the case may be, being endorsed thereon, *no court* or tribunal *shall inquire into, pronounce upon or in any manner call in question, the validity of such Act on any ground whatsoever.* Notwithstanding this explicit constitutional provision, the Chief Justice constituted a Bench to re-examine the validity of that law. On 27 March, excerpts of the opinion of the Court were faxed to newspapers by the presidential secretariat. According to these excerpts, the Court[142] had advised that the Act was inconsistent with the Constitution. A few days later, the UPFA published full-page paid advertisements in all the newspapers containing the Court's opinion that the tax amnesty was illegal.

In the final week of the election campaign, state media publicized a letter from the Chief Justice in which he alleged that the monetary assets of the Mahapola Higher Education Scholarship Trust Fund, of which he was a trustee, had been transferred to a private company by the UNP Minister of Commerce without his knowledge and that he was deeply perturbed by it. It was also reported that President Kumaratunge "being shocked", had requested the Chief Justice to conduct an immediate investigation into the alleged fraud and to take steps to re-transfer the money into the Fund.[143] In the final days of the campaign this became a major issue, and full page advertisements were inserted in newspapers by the UPFA based on the Chief Justice's complaint.[144]

Shortly before midnight on 1 April 2004, the day previous to polling day, the government-controlled ITN television station

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[142] The Court consisted of Chief Justice Silva, and Justices Shirani Bandaranayake, H.S. Yapa, Asoka De Silva and Nihal Jayasinghe.

[143] See '*CJ as Chairman kept in the dark over transfer of Mahapola Trust Funds to private company*' ***Daily News***, 25th March 2004 at p.1

[144] The Chief Justice's allegations were refuted through a private television station and private newspapers by Dr W.S. Weerasooria, one of the other trustees of the Fund. He explained that in March 2003 the trustees had unanimously decided to establish the National Wealth Corporation as a fully owned subsidiary of the Mahapola Trust Fund. The purpose was to manage the portfolio of funds so as to increase the returns in order to meet the increasing demand for scholarships in the context of falling interest rates on treasury bonds in which the funds had been invested. The Chief Justice had been kept informed of all the decisions taken by the Trust and it had been so recorded in the minutes.

began televising a religious programme from a Buddhist temple in Colombo.[145] This programme continued into the early hours of polling day. Prominent among those in the temple, listening to the chanting of "pirith" were several UPFA candidates and presidential aides. Among them were UPFA Minister Lakshman Kadirgamar, a Christian, and UPFA candidate A.H.M.Fowzie, a Muslim. Seated at the feet of Minister Kadirgamar (who appeared to be on an elevated seat) was the Chief Justice, Sarath Silva. Television cameras constantly focused on the Chief Justice during the long programme. No previous Chief Justice had allowed himself to be photographed or televised with candidates belonging to a particular political party on the eve of a general election.[146]

One of the issues that arose sometime after the 2004 general election was in regard to the date of the next presidential election. President Kumaratunge, in her second term in office, was not eligible to contest. Her party had chosen Mahinda Rajapakse as its candidate, despite misgivings entertained by Kumaratunge who appeared to favour the candidature of her brother, Anura Bandaranaike. Kumaratunge had commenced her first term on 12 November 1994, but had invoked the Third Amendment and declared her intention to seek re-election one year before her first term ended. Having won that election, she had taken her oath of office before the Chief Justice at a nationally televised ceremony immediately after the declaration of the result on 22 December 1999. In terms of the Constitution, her second term of office

[145] Instructions issued by the Commissioner of Elections to the media required all discussions on political matters to cease at midnight on 1st April 2004. All private television stations observed this injunction and terminated their transmissions.

[146] In the general election held on 2nd April, the UPFA led by President Kumaratunge secured 105 seats (PA: 66 and JVP 39), while the UNP won 82 seats. The Tamil National Alliance which contested the Northern and Eastern provinces won 22 seats. The remaining 16 seats were shared among four small parties. Notwithstanding the fact that she was able to attract the support of only one member from the other parties, President Kumaratunge formed a minority government with seven short of a majority in Parliament. Although her preferred choice for the office of Prime Minister was national list MP Lakshman Kadirgamar, she was compelled by powerful sections of her party and allied groups to appoint Mahinda Rajapakse as the new Prime Minister.

would end, six years later, in December 2005. However, in a statement to the press sometime in 2004, Chief Justice Sarath Silva declared that he had administered a second oath in an unpublicized, apparently private, ceremony on an undisclosed date in November 2000, which was when her first term would ordinarily have ended. If, indeed, her second term commenced in November 2000, Kumaratunge was entitled to remain in office until November 2006.

As the public debate on the date of the next presidential election grew in intensity, President Kumaratunge turned to her Chief Justice for an advisory opinion. The Chief Justice, however, chose to prioritize a fundamental rights application filed by a Buddhist monk.[147] The monk, who was believed to have been "inspired" by Prime Minister Mahinda Rajapakse to do so, complained that the Commissioner of Elections had failed to make a pronouncement that the date of the next presidential election would be in November 2005, and not in November 2006 as contended by the incumbent President. On a single day, Monday 22 August 2005, a five-judge Bench headed by Chief Justice Sarath Silva heard several counsel. They included counsel for the President as well as the Attorney-General in person, who argued that the election was not due until November 2006. Four days later, the Chief Justice announced that Kumaratunge's second term had commenced in December 1999, and consequently it would end in December 2005. The decisive date was the date on which the result of the election was declared, namely, 22 December 1999. With this sudden and wholly unexpected (but constitutionally sound, it is submitted, for somewhat different reasons[148]) ruling that gave Kumaratunge barely three months more to remain in office, the "special relationship" between the President and the Chief Justice was instantaneously and

[147] The monk, Ven. Dr Omalpe Sobitha Thera, was a Member of Parliament and the general secretary of the Jathika Hela Urumaya. The judgment in a fundamental rights application is binding, whereas an advisory opinion is not.
[148] See N. Jayawickrama, '*The President's First Term: When did it end?*' ***The Sunday Leader***, 21st November 2004; N.Jayawickrama, '*Timing of the Presidential Poll*', Interview with Vimukthi Yapa, ***The Sunday Leader***, 26th June 2005.

unceremoniously terminated.[149] Silva's focus now was on Kumaratunge's potential successor, Mahinda Rajapakse, at whose wedding Silva's young son had been the page-boy.[150]

Rajapakse, however, faced a serious problem which Kumaratunge was reportedly attempting to exploit to deprive him of his party's nomination. Earlier in the year, Sonali Samarasinghe, an investigative journalist on "The Sunday Leader", published a series of articles, supported by documentary evidence, in which she alleged that a sum of Rs. 82 million received as Tsunami relief had been siphoned off into a private bank account controlled by Rajapakse.[151] Based on these reports, the UNP made a complaint to the police of criminal breach of trust and criminal misappropriation. The police thereupon began a criminal investigation into what became known as the "Helping Hambantota Scam". Rajapakse filed a fundamental rights application in the Supreme Court, on advice allegedly given by a Supreme Court Judge. The case was called on 28 September 2005 before a Bench headed by the Chief Justice, and including Justice Nihal Jayasinghe who was reportedly a frequent visitor to "Temple Trees".[152] Despite opposition from the Deputy

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[149] Kumaratunge had reportedly complained to her legal team that the Chief Justice had repeatedly assured her in private that she could lawfully remain in office until November 2006.

[150] U. Kurukulasuriya, '*Sri Lanka's Judiciary further compromised by appointment of conflicted, inexperienced chief justice*' <uvindu@lankaindependent.com>.

[151] See, for example, S. Samarasinghe, '*Questions on Helping Hambantota the PM is ducking*' ***The Sunday Leader***, 31st July 2005. It was alleged that a sum of Rs.82,958,250 received by the Prime Minister's Office following the tsunami of December 2004 had been deposited at the Standard Chartered Bank in a special account opened under the Rajapakse Memorial Educational and Social Services Foundation, described as the Hambantota Tsunami Disaster Development Programme (also known as Helping Hambantota). Among the objectives of this foundation were "to establish and maintain a Rajapakse Memorial Holiday Resort and Botanical Garden, organize and hold exhibitions, symposia, conferences, debates, tours and excursions." The officers of this private foundation included Chamal Rajapakse (Chairman), Mahinda Rajapakse (Vice-Chairman), Basil Rajapakse, Gothabhaya Rajapakse, Prithi Rajapakse, Vichitra Rajapakse, Lalith Candrasekera, Shiranthi Wickremasinghe, Udayanga Weeratunge, and Jaliya Wickremasuriya. The address provided to the Bank when this account was opened was that of the Rajapakse family at Pangiriwatte Road, Mirihana, Nugegoda.

[152] See Upul Jayasuriya, '*Sarath Silva: A Retrospective*'.

Solicitor-General who appeared for the State, the Court granted interim relief to the petitioner by directing that the investigation be forthwith suspended, and that the matter be listed again on a date after the presidential election. At the election, the issue was *sub-judice* and could not be raised. [153]

When the case was next listed, four months later, President Rajapakse had assumed office. The same Deputy Solicitor-General now informed the Court[154] that it was not intended to proceed with the investigation. Accordingly, the Court granted the declaration applied for by Rajapakse. In his judgment, the Chief Justice held (a) that Kabir Hashim MP, with no personal interest in the matter, and purporting to act on behalf of the UNP, had written a letter directly to police headquarters instead of making a statement in the ordinary course to a police station; and (b) that Chandra Fernando, Inspector-General of Police, and Lionel Gunetilleke, Deputy Inspector-General of Police (CID), in violation of the Criminal Procedure Code, had commenced an investigation without any basis purportedly on a letter given to police headquarters. The Chief Justice ordered Hashim, Fernando and Gunetilleke to pay personally a sum of Rs.100,000 each to Rajapakse by way of compensation. He also ordered the State to pay a sum of Rs.200,000 to Rajapakse as costs.

Following the installation of President Rajapakse in office, Silva appeared to have established the same "special relationship" with him that he had developed with his predecessor. In fact, in a very candid interview with a journalist, he made the astounding admission that in cases involving the State, he always informed President Rajapakse what the decision of the Court would be before delivering judgment. "Of course, I did not show him the judgment", he added. In the interview conducted at his home, he

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[153] On 18 October 2014, at a public seminar organized by the JVP at the New Town Hall, Colombo, Sarath Silva made this astounding confession: See ***The Sunday Times***, 26th October 2014: p.8

> "I met a JVP member at the Narahenpita pola recently and he asked me why I did not give the right judgment in 2005, and I could not answer him. But today I tender an apology for it. I am very sorry. I am asking the whole country: forgive me."

[154] On this occasion, the Court consisted of Chief Justice Silva and Justices Shirani Tilakawardena and N.E. Dissanayake.

exclaimed: "How many times has the President been seated where you are now seated !". He demonstrated his shift of loyalty to his new patron in a judgment in which he pruned down the presidential perks of Kumaratunge, including denying her the official residence allocated to her at Independence Square in Colombo. In a later judgment written by Justice Shiranee Tilakawardene, with which he concurred, the Court fined Kumaratunge Rs 3 million in a case involving a sale of state land, "to remind" present and future "office holders of their fiduciary obligations to the state".

Chief Justice Silva lent the power and the prestige of his office in aid of the extreme nationalism and the unitary vision of his new patron.[155] In July 2005, he invalidated the Post-Tsunami Operational Management Structure (PTOMS) agreed upon by the Kumaratunge Government and the LTTE for coordinating aid delivery following the December 2004 tsunami.[156] This interim order also aborted a potential opportunity for continuing negotiations between the Government and the LTTE. In October 2006, he invalidated a 1987 proclamation of President Jayewardene that had merged the eastern and northern provinces to form one administrative unit having one elected provincial council. This single unit was intended to create the basis for political autonomy in the predominantly Tamil-speaking region of the country, and was strenuously opposed by Sinhala nationalists.[157]

In September 2006, Chief Justice Silva delivered a judgment that has been described as "an example of judicial waywardness"; of judicial independence mutating into judicial despotism.[158] He

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[155] In 1999, he had presided over the Bench that approved the draft Constitution introduced by President Kumaratunge. That draft provided for the devolution of power and envisaged Sri Lanka as a Union of Regions.
[156] *Weerawansa v. Attorney-General*, 15th July 2005.
[157] *Wijesekera v. Attorney-General*, 16th October 2006. The petitioners were three residents in the two provinces who complained that they had been denied the right to vote in a referendum that had been promised in 1987. The jurisdiction of the court was invoked under Article 126 of *The Constitution* which requires a petitioner to file a fundamental rights application within a month of the violation complained of.
[158] Sir N. Rodley, '*The Singarasa Case: Quis Custodiet . . .? A Test for the Bangalore Principles of Judicial Conduct*' (2008) ***Isr.L.Rev.*** 41:3, 500-521.

held that Sri Lanka's accession to the Optional Protocol to the ICCPR in October 1997 was inconsistent with the Constitution and in excess of the power of the President. According to him, the conferment of a right on a Sri Lankan to address a communication to the Human Rights Committee in respect of a violation of a right recognized in the ICCPR that results from acts, omissions or developments in Sri Lanka; and a recognition of the power of the Human Rights Committee to receive and consider such a communication, "amounted to a conferment of public law rights", and "was therefore a purported exercise of legislative power which comes within the realm of Parliament and the People at a Referendum". In his view, it was also "a purported conferment of a judicial power on the Human Rights Committee", and therefore a violation of the constitutional provisions vesting judicial power in the Sri Lankan judiciary.[159] Silva had asked and answered a question that neither party had raised.[160] In so doing, he appeared to demonstrate a complete misunderstanding of the international legal significance of accession to the Protocol. As a distinguished international jurist

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The Court consisted of Chief Justice Silva and Justices Nihal Jayasinghe, N.K. Udalagama, N.E. Dissanayake and Gamini Amaratunge.

[159] *Singarasa v. Attorney-General*, 15th September 2006.

[160] Nallaratnam Singarasa had been convicted under the *Prevention of Terrorism (Temporary Provisions) Act* of 1979 and been sentenced to 50 years rigorous imprisonment which was later reduced by the Court of Appeal to 35 years. The key evidence on which he was convicted was an allegedly coerced confession which he claimed had been obtained after four months' detention during which he was tortured. Singarasa availed himself of the right of individual petition to the Human Rights Committee under the Optional Protocol. The Committee found violations of several provisions of the ICCPR; notably Articles 2, 7, and 14. In communicating its "Views" to the Government it recommended "release or retrial and compensation". Singarasa thereupon sought relief from the Supreme Court. He did not argue that the Committee's Views were *per se* enforceable in the Sri Lankan courts. Nor did he argue that the Committee's Views were *per se* binding. Instead, he asked the Court to exercise its inherent powers of revision and/or review to address a situation in which the Government had argued, in its response to the Committee's Views, that the State did not have the "legal authority to execute the decision of the Human Rights Committee to release the convict or grant retrial". In fact, President Rajapakse did have the power* under Article 34 of the Constitution to grant a pardon or to remit the whole or part of any punishment imposed by a court.

observed, it was "Alice in Wonderland (or perhaps Alice Through the Looking Glass) reasoning".[161]

Then, suddenly, Chief Justice Silva changed track and placed himself on reverse gear. He delivered a series of judgments that actually received public acclaim. For example, on 8 June 2007, a Bench of the Supreme Court (of which he was not a member, but was believed to have influenced the decision) granted an interim injunction to prevent the Inspector-General of Police from taking steps to evict 376 Tamil persons from Colombo on a directive of Defence Secretary Gotabhaya Rajapakse. On 14 June, he issued a stay order against government plans to sell nearly 25 per cent of its shares in Sri Lanka Telecom to a Malaysian company. In the following month, he issued an injunction against a slum clearance programme of the Defence Ministry that sought to evict about 400 persons from their homes in the Colombo suburb of Slave Island. In 2008, he ordered the Government to reduce electricity tariffs. Many of these orders were ignored by the Rajapakse Government. A Judge of the Supreme Court explained the reason for this intriguing change of direction: in mid-May 2007, President Rajapakse had "privately asked" Chief Justice Sarath Silva to apply for premature retirement to enable him to appoint to that office Justice Nihal Jayasinghe, who was fourth in seniority among the judges but was due to retire shortly.[162] If true, it was an act of base ingratitude! Silva continued in office until he

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[161] N. Rodley (2008): p.500 at 504. Rodley argues that this judgment raises the need to address situations when a court hands down decisions not dictated by any doctrinally recognizable exposition of the law, or unsustainable on the facts or the law or both. He suggests that the Bangalore Principles be reviewed to consider the incorporation of a new judicial value that would address "the uncontrolled application of judicial caprice" or "judicial eccentricity". Curiously, in March 2008, when the Rajapakse Government was anxious to convince the European Union that it had fulfilled its international human rights obligations, the Chief Justice provided an advisory opinion that Sri Lanka had given "adequate recognition" to the ICCPR and that Sri Lankans "derive the benefit and guarantee of rights contained in the ICCPR": *Advisory Opinion of the Supreme Court on the International Covenant on Civil and Political Rights*, SC Reference No.1/2008. He referred to *Act No.56 of 2007*.

[162] Information provided by Justice Jagath Balapatabandi to the United States Charge d'Affaires, reported in a confidential cable from the US Embassy in Colombo to the Department of State, Washington, 25th June 2007, on the subject: '*Ambitious Chief Justice breaks away from President*', ***WikiLeaks***, 15th November 2013 <www.colombotelegraph.com>.

reached his 65th year in 2009. He then involved himself actively in the election campaign of General Sarath Fonseka, the former Army Commander and Chief of Defence Staff, who quit the latter office to challenge Mahinda Rajapakse at the presidential election in January 2010. Four years later, addressing a public meeting convened to emphasize the need to choose a "common candidate" to challenge Rajapakse if he sought re-election for the third time, Silva described the President as "a harbinger of evil" (*henahura*).[163]

The Legacy of Chief Justice Sarath Nanda Silva

Sarath Nanda Silva bequeathed to his successors, who lacked his political sagacity and legal acumen, a legacy of political subservience. This became immediately evident when, in November 2009, having served four years in office, Rajapakse announced his intention to seek re-election for a further term. He obviously wished to benefit from the wave of triumphalism that was sweeping the south following the brutal decimation of the LTTE six months earlier. On 26 January 2010, in results announced in controversial circumstances, he was declared elected. A few days later, his challenger, General Sarath Fonseka, was detained by military authorities. Rajapakse immediately sought the advisory opinion of the Supreme Court on when his second term would commence. This was hardly necessary since the Court had, in 2005, already held that the effective date of commencement was the date of the election for the second term, the incumbent President being required to assume office within two weeks of that date. However, Silva's immediate successor, Chief Justice Asoka De Silva, who had been appointed six months earlier superseding Justice Shirani Bandaranayake, constituted a seven-member bench over which he presided. He reportedly heard both Attorney-General Mohan Peiris and counsel for the President submit that the President's first term would continue until 19 November 2010, on which day the second term would commence. It was announced that he had held a*ccordingly, and had purported to overrule the Court's 2005 judgment. The

[163] ***Colombo Telegraph***, 12th November 2014.

opinion was not published. An advisory opinion is not binding, since it is neither a judgment nor a determination of the Court. Nevertheless, there was no challenge by anyone to any executive act performed during that extended "bonus" term of ten additional months purportedly "legitimized" by a Supreme Court advisory opinion.[164]

Some months later, on a reference from the Court of Appeal, Chief Justice Asoka De Silva held that a court martial was a "competent court" within the meaning of that term in the Constitution.[165] Accordingly, on the basis of that interpretation, which was contrary to contemporary international jurisprudence, the unsuccessful presidential contender Sarath Fonseka, who had been imprisoned on the order of a military tribunal, forfeited the seat in Parliament that he had secured in the general election.

On 31 August 2010, Chief Justice Asoka De Silva received from the President a Bill for the Eighteenth Amendment to the Constitution which had been certified by the Cabinet as being "urgent in the national interest".[166] For reasons yet unknown, he excluded himself from the Bench that would examine the constitutionality of this Bill. Instead, he nominated the judge he had superseded, Justice Shirani Bandaranayake, to preside over a five-judge Bench.[167] Two years earlier, in a classified cable to the State Department, the United States Ambassador had identified Bandaranayake as a supposed "Rajapakse loyalist".[168] That loyalty became evident when the Court assembled on that day at

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[164] See N. Jayawickrama, '*The President's Second Term: When does it Commence?*' ***The Sunday Island,*** 31st January 2010; N. Jayawickrama, '*The President's First Term: Why the Supreme Court is Wrong*' ***The Sunday Island,*** 7th February 2010.

[165] *Sarath Fonseka v. Kithulegoda*, S.C. Reference No.1/2010.

[166] A Bill so certified is not required to be published in the Gazette. Nor can its provisions be challenged in court by any citizen. Instead, the Bill is referred by the President to the Chief Justice, and the Supreme Court is required to make its constitutional determination on the Bill within 24 hours, and to communicate that determination only to the President and the Speaker. The Court is required to hear only the Attorney-General, but on this occasion the ingenuity of a few human rights activist-lawyers resulted in their being able to secure a brief audience before the Court.

[167] Justice Bandaranayake, Justice K. Sripavan, Justice P.A. Ratnayake, Justice S.I. Imam and Justice R.K.S. Suresh Chandra.

[168] ***WikiLeaks***, 24th February 2010 <www.colombotelegraph.com>

10.30 a.m. It must have required incredible effort on the part of Bandaranayake and her four colleagues to sit in court a whole day, listen to submissions from Attorney-General Mohan Peiris and six other counsel including academic Rohan Edirisinha who appeared in person, and thereafter write a determination, all within the space of 24 hours, on the constitutional validity of some 93 paragraphs of a Bill which, when subsequently published in "The Island" newspaper, occupied one full page and a half of small print. The Judges also carried a further heavy burden because their determination would be final and conclusive for all purposes and for all time.[169]

The Eighteenth Amendment, which Bandaranayake certified as not requiring the approval of the people at a referendum made a profound change in the governance of Sri Lanka. It enabled a President to seek re-election to office for as many terms as he wished (by repealing the two-term limit), and it abolished the Constitutional Council. There was nothing in the determination to indicate that the Court had even attempted to interpret the relevant provisions of the Constitution. For example, it did not examine the meaning to be attributed to the phrase "an amendment which is inconsistent" with the concept that "sovereignty is in the people and is inalienable" Since "sovereignty" includes "the powers of government, fundamental rights and the franchise", the Court would logically have had to ask whether it would be consistent with the peoples' sovereignty to deny a citizen the right (which he or she enjoyed under the Constitution) to institute proceedings in a court or tribunal against

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[169] Some 32 years ago, the Constitutional Court, declined to make a determination on the Sri Lanka Press Council Bill even within the 14 days stipulated by the 1972 Constitution. Seven petitions had been filed by citizens and a political party leader, and several senior counsel appeared in support of these petitions. On Day 21, confronted by angry noises from the National State Assembly, the President of the Constitutional Court, Justice T.S. Fernando, explained why the Court intended to permit each counsel to make his submissions in full:

> "It is the duty of us all, whether we be judges or not, to uphold the Constitution. To uphold the Constitution we as judges must first understand the meaning of the relevant provisions of the Constitution. For that understanding we have to rely on our own judgment assisted, if need be, by the opinions of learned counsel. Any other course of action involves, in our opinion, an abdication of our functions."

a president, upon completion of his term of office, in respect of something done by him in his official or private capacity, by enabling that president to repeatedly seek re-election every six years, and thereby perhaps even outlive that citizen.

The Court did not consider whether it was consistent with the peoples' sovereignty to deny accountability in governance by vesting the power of appointment of scores of senior judges, public servants and police officers in a president whose actions (unlike that of a prime minister under earlier constitutions) cannot be questioned in any forum. How did it enhance the peoples' franchise (as the Court claimed it did) if a person who sought election to the office of president had to contend with an incumbent who had already served two or more terms in that office, and who was allowed to choose the date of that election, appoint the elections commission that would conduct the election, exercise absolute control over all the other institutions of government and its personnel including the police, and who also enjoyed immunity in respect of all his official and private acts?

There was nothing in the Bill for the Eighteenth Amendment that could not have been deferred for 21 days. The next presidential election was not due for at least another six years. To have utilized an extraordinary procedure which was intended principally for revenue legislation,[170] in order to provide cover

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[170] The special procedure to be followed when the Cabinet of Ministers considered a Bill to be "urgent in the national interest" had its origin in *The 1972 Constitution*. It was introduced into that Constitution when the Constituent Assembly decided to remove the jurisdiction of courts to review the constitutionality of laws, and provide instead for the review of proposed legislation by a specially created Constitutional Court. To enable a Bill to be reviewed, it was necessary that it be published in the Gazette at least seven days before it was placed on the agenda of the National State Assembly. A question that immediately arose was in respect of revenue legislation, especially following the presentation of the annual budget. The experience of the demonetization exercise of 1970 was fresh in everyone's mind. Under the 1946 Constitution then in force, it had been possible for Parliament to enact the demonetization law in one sitting. Had there been a delay, many people would have begun disposing of their Rs.100 notes, thereby creating chaos in the currency markets. It was to provide for such extraordinary situations that a special procedure was introduced to enable a Bill to be examined by the Court without making it public, and then presenting it to the National State Assembly

and secrecy for extremely vital, far-reaching and controversial amendments to the Constitution, was, therefore, a gross abuse of the law-making process. The Supreme Court overlooked its constitutional duty under Article 105 to "protect, vindicate and enforce the rights of the people" (including the right to challenge proposed legislation) by failing to question the validity of a reference made to it through the inappropriate use of a special procedure.[171]

Conclusion

A compromised judicial system

Prior to the advent of the Executive President, Sri Lanka possessed a truly competent, independent and impartial judiciary, buttressed by an equally competent and vibrant legal profession. The citizen could confidently expect not only quality professional representation, but also equal justice under the law. The judiciary was rarely, if ever, inhibited by the pomp and splendour, or the power and authority, of the State or its agents. The United Nations had not yet formulated the basic principles on the independence of the judiciary, and an international code of judicial conduct had not yet been conceived. Yet, judges of that time remained true to their only guide: the judicial oath. The Attorney-General, the principal law officer of the State, was also conscious that he exercised powers of a quasi-judicial nature. He did not go to anyone's office other than his own. Ministers and senior government officials who sought his legal advice saw him in his own chambers, with the only exception being perhaps the Governor-General and the Prime Minister.

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at the earliest possible opportunity. Indeed, in justifying its inclusion in the 1972 Constitution, Dr Colvin R de Silva had this to say:

> "There comes once in a way, as in the case of the demonetization law, the need for a government in the national interest urgently to pass a law in the shortest possible time before people can make preparations against that law".

[171] See N. Jayawickrama, '*Abuse of the Law-Making Process*' ***Sunday Island***, 16th September 2010.

The fact that the government of the day, even when backed by a two-third majority, might have had a very strong interest in particular litigation, often left the judiciary unmoved. For instance, in 1954, when Sir John Kotelawela was Prime Minister, the Supreme Court did not hesitate, at the close of the prosecution case in a trial-at-bar, to acquit the editor of a left-wing newspaper charged with the criminal defamation of the Governor-General designate, Sir Oliver Goonetilleke.[172] In 1955, the Supreme Court acquitted two opposition members of Parliament charged with having breached the privileges of parliament.[173] In 1961, when Mrs Bandaranaike was Prime Minister, the Supreme Court read the doctrine of separation of powers into the 1946 Constitution and held the appointment by the executive of tribunals that exercised judicial or quasi-judicial power to be invalid.[174] In 1964 a District Judge declared the Official Language Act of 1956 to be inconsistent with the Constitution and therefore void.[175] In the same year, the Supreme Court directed the Permanent Secretary to the Ministry of Defence and External Affairs to forthwith discontinue the requirement of "clearance" which a person wishing to travel abroad had to obtain, since it was an executive device, unknown to the law and applied without any legal authority.[176] In 1966, when Dudley Senanayake was Prime Minister, the brother of the Leader of the Opposition who was charged under the Bribery Act was acquitted by a District Judge at the close of the prosecution case, and that acquittal was affirmed by the Supreme Court as soon as Queen's Counsel flown down from London to argue the

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[172] *The Queen v. Theja Gunawardene*, 3rd December 1954.

[173] *The Attorney-General v. Samarakkody and Dahanayake*.

[174] Four tribunals were held to have been constituted in contravention of section 55(1) of the Constitution, and thereby to be lacking in the essential attributes of independence and impartiality. They were (i) Bribery Tribunals established under the *Bribery Act 1954*: *Senadhira v. Bribery Commissioner* (1961) 63 NLR 313; (ii) The office of Quazi established under the *Muslim Marriage and Divorce Act 1954*: *Jailabdeen v. Danina Umma* (1962) 64 NLR 419; (iii) The licensing authority constituted under the *Licensing of Traders Act 1961*: *Ibrahim v. Government Agent, Vavuniya* (1966) 69 NLR 217; and (iv) an *Arbitrator appointed under the Co-operative Societies Ordinance 1936*: *Karunatilleke v. Abeywira* (1966) 68 NLR 503.

[175] *Kodeswaran v. Attorney-General*, D.C. Colombo 1026/Z, judgment of O.L. de Kretser, District Judge, Colombo.

[176] '*Aseerwatham v. Permanent Secretary to the Ministry of Defence and External Affairs*' ***Journal of the International Commission of Jurists*** VI, 319.

Attorney-General's appeal had concluded his submissions.[177] In 1967, at the close of the prosecution case, three Judges of the Supreme Court presiding over a trial-at-bar acquitted a prominent Buddhist priest, a former Army Commander and several low ranking military personnel who were charged with having conspired to overthrow the government.[178] In 1975, at the trial of several Tamil political leaders who were charged under emergency regulations with sedition, the High Court upheld the submission made by the 72-strong defence team that the declaration of the state of emergency was invalid under the Constitution.[179]

One must, of course, guard against being too starry-eyed when looking at the judiciary of this period. There were great moments in history when the Supreme Court failed. At Independence, the biggest challenge was nation building. We now know, sixty-six years later, that the political leadership failed to measure up to that challenge, and that a cautious Supreme Court also contributed to that failure. For example, section 29 of the 1946 Constitution was one of the principal guarantees offered to the minority communities against discriminatory legislation; but when the new citizenship and franchise laws were challenged, the Supreme Court retreated.[180] When a courageous district judge[181]

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[177] *The Queen v. Ratwatte*. It was alleged that the then Prime Minister's brother, who was her private secretary, had accepted a bribe from an Indian national in exchange for the grant of citizenship. The Bribery Commissioner, V.T. Pandita Gunewardene, had certified that a prima facie case existed. The Acting Attorney-General, Victor Tennekoon QC, disagreed. His successor, A.C.M. Ameer QC, decided to serve an indictment. At the close of the prosecution case in the District Court of Colombo, the accused was acquitted. The Attorney-General appealed against the acquittal and retained E.F.N. Gratiaen QC, who was then practising in England, to argue the appeal. After Gratiaen had concluded his submissions, the Supreme Court (Chief Justice H.N.G. Fernando and Justice T.S. Fernando) dismissed the appeal without calling upon counsel for the respondent.

[178] *The Queen v. Gnanaseeha Thero et al* (1968) 73 New Law Reports 154.

[179] *The Attorney-General v. Amirthalingam et al*. This judgment was, however, reversed by the Supreme Court on appeal.

[180] *Mudannayake v.* Sivagnanasunderam (1951) 53 NLR 25. Chief Justice Sir Edward Jayatilleke thought that:

> "To embark on an inquiry, every time the validity of an enactment is in question, into the extent of its incidence, whether for evil or for good, on the various communities tied together by race, religion or

struck down the Official Language Act, the Supreme Court first avoided the issue, and then procrastinated, and thereby kept the impugned law alive.[182] The judiciary, of course, had its own share of problems which successive governments had failed to address. The trial rolls were long. The backlog in the appellate court was enormous. The rules of civil and criminal procedure were Victorian. I recall expressing the exasperation of a starry-eyed young lawyer when, writing the annual report as honorary secretary of the Bar Council in 1969, I described the judicial system as an antique labyrinth with tortuous passages and cavities through which the potential litigant must grope, often blindfolded, in his search for justice.

> caste, would be mischievous in the extreme and throw the administration of Acts of the legislature into confusion."

A package of laws was enacted immediately after Independence. It consisted of the *Citizenship Act No.18 of 1948*, the *Immigrants and Emigrants Act No.20 of 1948*, the *Indian and Pakistani Residents (Citizenship) Act No.3 of 1949*, and the *Parliamentary Elections (Amendment) Act No.48 of 1949*. These laws were designed to exclude from their purview as many of the persons of Indian origin living and working in Ceylon as was possible. The Supreme Court judgments were affirmed by the Judicial Committee of the Privy Council which considered that:

> "It is . . a perfectly natural and legitimate function of the legislature of a country to determine the composition of its nationals . . The migratory habits of the Indian Tamils are facts which in their Lordships opinion are directly relevant to the question of their suitability as citizens of Ceylon and have nothing to do with them as a community."

See *Kodakkan Pillai v. Sivagnanasunderam* (1953) 54 NLR 433.

[181] O.L. de Kretser, District Judge of Colombo.

[182] In 1967, on appeal, a bench of two Judges of the Supreme Court confined its attention to the preliminary issue and held that a public servant in Ceylon had no right to sue the Crown for the recovery of its wages. The Court did not call upon the Attorney-General to submit his arguments on the question of the validity of the Official Language Act, a question of "extraordinary importance and great difficulty" which would warrant reference to a bench of five or more Judges. Chief Justice H.N.G. Fernando explained that if a case could be decided on one of two grounds, one involving a constitutional question and the other a question of statutory construction or general law, the Court will decide only the latter. On appeal, the Privy Council, in 1969, reversed the Supreme Court decision on the preliminary issue and referred it to the Supreme Court for its "considered judgment" on the substantive issue. The appeal was thereafter never listed in the Supreme Court. In 1972, the impugned Act was incorporated in the new Constitution.

Unfortunately, some of the legal and constitutional changes of the early 1970s also had an adverse effect on the judiciary. The change in the medium of legal education from English to Sinhala or Tamil, insisted upon by the ministry of education, resulted in creating lawyers who were deprived of access, not only to the ever-growing mass of global legal literature, but also to our statutes and to over two centuries of our law reports. The fusion of the two branches of the legal profession, intended to reduce the cost of litigation and help young lawyers to gain a foothold in the profession, resulted not only in the mass production of lawyers, but also in a dramatic lowering of professional standards. The installation of the National State Assembly as "the supreme instrument of state power" through which judicial power flowed to the courts, and the designation of judges as "state officers" in common with all other government employees, may not have had any immediate impact on the actual functioning of the courts, but it emboldened legislators with a false notion of superiority. When the judiciary was stripped of its jurisdiction to examine and pronounce upon the validity of legislation, the balance of power between the three branches of government was eroded and the Constitution was undermined. When the country's principal newspaper company was acquired by the state, an essential adjunct to the judiciary, a free media, was seriously crippled.

It was in this context, when the traditional judicial culture had begun to be subjected to negative winds of change, that the 1978 Constitution, in 42 sections spread over two chapters, proclaimed a very detailed and comprehensive statement of safeguards aimed at securing the independence of the judiciary.[183] These two chapters had been formulated by a team of lawyers led by the President's brother, H.W. Jayewardene Q.C., following discussions at several symposia attended by lawyers, judges and academics. They received the approval of the representatives of the Opposition who participated in the select committee on the revision of the 1972 Constitution. Indeed, it could well have been said of these two chapters that which was claimed for the provisions in the 1946 Constitution designed to protect the rights of the minorities in Ceylon: that they contained all the safeguards

[183] This contrasts with five sections in the *1946 Constitution* and 11 sections in the *1972 Constitution* that sought to achieve the same objective.

that the wit of man could have devised to protect and promote the independence of the judiciary. Unfortunately, left out of consideration was the new office of Executive President, and the all-encompassing power of that office.

In the 37 years that this Constitution has remained in force, the independence and integrity of the judiciary, and especially of the Supreme Court, reached incredibly low depths. The judicial culture that grew and developed under this Constitution was the antithesis of the aspirations so eloquently and exhaustively expressed in it. In fact, the judicial culture spawned by this Constitution, especially in the twenty-first century, has been one of extreme deference to the presidential executive. The judiciary capitulated to executive assertions of state security. Neither political opponents of the government, nor members of ethnic minorities, or indeed civil society, were likely to derive any tangible benefit by invoking the fundamental rights guaranteed in the Constitution.[184]

Equally dramatic has been the transformation of the office of Attorney-General. Although deemed a "public officer" (or "state officer"), each constitution provided for the Attorney-General to be appointed, not by the Public Service Commission but by the Governor-General or the President (as the case may be). Since Independence, the Department of the Attorney-General was traditionally assigned to the Ministry of Justice, and was therefore subject to supervision by the Permanent Secretary of that ministry. However, convention demanded that neither the Minister nor the Permanent Secretary should issue any directions to the Attorney-General (except on matters of policy) in respect of the exercise of his powers and duties. Unfortunately, under the Executive President, the independence, integrity and dignity of that office have been severely compromised. In 1978, the then Attorney-General allegedly colluded in inserting into a Bill already passed by Parliament a new section that had not been tabled, read, debated or passed.[185] In more recent times, the

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[184] See Jayantha de Almeida Guneratne, Kishali Pinto-Jayawardena and Gehan Gunatilleke, *The Judicial Mind in Sri Lanka; Responding to the Protection of Minority Rights*.

[185] See Statement made by S.R.D. Bandaranaike (1980) ***Third Interim Report of the Special Presidential Commission of Inquiry*** (Colombo: Department of

Attorney-General's Department has been "overwhelmingly politicized", with officers not tendering correct advice for fear of incurring the displeasure of the executive.[186] Attorney-General Mohan Peiris reportedly departed from the tradition established by his predecessors, and began the practice of visiting public officers in their offices. "As this practice developed, the number of political actors approaching the Attorney-General seeking various favours and concessions increased."[187] On Peiris's initiative, several indictments served against politicians and others with political "clout" were withdrawn.[188] Finally, in April 2011, during Peiris' tenure, the Attorney-General's Department and its subjects and functions were removed from the Ministry of Justice and brought directly under the authority of the President.[189]

Government Printing), Appendix A, p.158. The new section 21A had been specifically inserted into the Special Presidential Commissions of Inquiry (Amendment) Bill to nullify an application for a writ of prohibition that had been filed in the Supreme Court Registry on behalf of Mrs Bandaranaike while the Bill was being debated in the House. Prime Minister Premadasa later admitted that he had received a copy of the application while the Bill was being debated, and Attorney-General Siva Pasupathi stated that the new section had been immediately drafted to meet the new situation. However, the *Hansard* of 20th November 1978 (which was later recalled) made no reference to that section being moved as an amendment at any stage of the proceedings.

[186] International Commission of Jurists, *Authority without Accountability: The Crisis of Impunity in Sri Lanka*: p.71.

[187] International Commission of Jurists, *Authority without Accountability: The Crisis of Impunity in Sri Lanka*: p.78.

[188] Those who benefitted from the Attorney-General's decision not to proceed with prosecutions included two police officers charged with the murder of a man in custody; a former deputy minister charged with unlawful assembly and murder; a UNP parliamentarian charged with murder who later crossed over to the government and was rewarded with a ministry; an officer of the Criminal Investigation Department charged with the torture of a suspect; and a former General Manager of Railways charged with bribery. See International Commission of Jurists, *Authority without Accountability: The Crisis of Impunity in Sri Lanka*: pp.79-85.

[189] Gazette Extraordinary No.1651/20 of 30th April 2010 which contained the assignment by the President of subjects and functions to Ministries makes no reference to the Department of the Attorney-General or its subjects and functions such as the institution of criminal prosecutions and the provision of legal advice to government departments. Nor does it refer to a Ministry in his charge to which the Department of the Attorney-General has been assigned. The Attorney-General appears to have colluded in this unconstitutional arrangement whereby a department of government appears to remain free of supervision by a secretary to a ministry as required by Article 52 of *The Constitution*.

Sections of the once vibrant Bar also appear to have been subdued by the power and patronage of the presidency. Elevation to the status of "President's Counsel" is now entirely at the discretion of the President, and in recent years scores of lawyers have been duly rewarded by the President for their support and loyalty, irrespective of their standing in the profession. Similarly, the less enterprising among them appear to have sought, and been compensated, with appointment to the Supreme Court.

A corrupt judiciary

In my early years of practice at the Bar any suggestion that a judge at any level might be corrupt would have been so preposterous that, in fact, it was never heard. From below the Bench, some of the judges seemed short-tempered and discourteous; some seemed lazy - one, in particular, appeared to fall asleep from time to time; and not every judge appeared to be learned in the law. But it was unthinkable that a judge could be corrupt in the financial sense. Some ten years later, in the 1970s, when I was serving as Permanent Secretary to the Ministry of Justice and also, *ex officio*, as a member of the body required by the 1972 Constitution to recommend the appointment and transfer of judicial officers, I encountered, for the first time, a complaint that a magistrate had accepted a bribe. The complaint appeared to be true. When confronted, the magistrate resigned his office. It was also during this period that I saw and experienced, with considerable unease and sadness, how a few serving judges could demean themselves, and the sanctity of their office, in the pursuit of preferential treatment from the executive branch of government. These were isolated instances of "canvassing" for high judicial office. These efforts rarely succeeded, and the chosen few were generally the best available judicial talent.

The picture changed dramatically in the 1980s and in the next two decades. The legal and judicial reforms of the 1970s[190] were reversed and the Victorian procedural laws revived. Many a

[190] For example, the *Administration of Justice Laws of 1974 and 1975.*

litigant or accused person began to find it more economical to secure the disappearance of a case record or the absence of a witness than continue to retain counsel for prolonged periods when no progress was made in his or her case.[191] Complicated procedural steps meant several gatekeepers requiring payment to facilitate movement of the case record to the next stage of judicial proceedings. A national survey conducted in 2002 found that corruption was rampant in the Sri Lankan judicial system, and that most judges were aware of its occurrence. While those who had benefitted most were reportedly court clerks, followed by police officers and fiscals, lawyers too appeared to have engaged in bribery, both as bribe givers and bribe takers at every stage of court proceedings. 12 per cent of court users admitted having resorted to bribery to expedite the legitimate processes in the system. However, it was the judges themselves who identified at least five of their brethren as bribe takers.[192]

The contemporary definition of judicial corruption extends beyond conventional bribery. It is not limited to seeking or accepting money or gifts. An insidious and equally damaging form of corruption arises from the interaction between the judiciary and the executive. For example, the political patronage through which a judge acquires his office, a promotion, an extension of service, preferential treatment, or promise of employment after retirement, gives rise to corruption if and when the executive makes demands on such judge. So too does undue familiarity between the judge and members of the executive. A high rate of decisions in favour of the executive is almost certain to raise, in the minds of others, the suspicion that the judge is susceptible to undue influence in the discharge of his or her duties. So, too, if the executive were to provide lucrative employment, or extend other preferential treatment, to immediate members of a judge's family. In this regard, the judge's relationship with the executive branch of government is often the litmus test.

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[191] According to Sarath Silva, when he was appointed President of the Court of Appeal, "the overload had reached bursting point with an enormous backlog of about 18,500 cases". ***Daily News***, 15th December 1995.
[192] (2002) ***A System under Siege: An Inquiry into the Judicial System of Sri Lanka*** (Colombo: Marga Institute).

The extent to which even the minor judiciary has been politicized (and thereby corrupted) is evident from the observation made by a very perceptive observer of the judicial scene who, writing in 2011, notes that

> *"when a judge from one station is transferred to another, the members of the Bar of the court to which he/she had been posted frequently ask the question: 'Is the judge UNP or SLFP?' and/or the question: 'Is he/she honest?' This is something that was wholly unheard of in the 'old days'. Then, when a judge was transferred from one station to another, all that the Bar of the court to which he was appointed or transferred would seek to find out was whether he was courteous, or 'accommodated' and/or gave 'dates' to counsel."*[193]

The phenomenon of judicial corruption has debilitated not only the Sri Lankan judiciary, but also Sri Lankan society as a whole. A feeling of futility or karmic inevitability is pervasive all around. Falling standards, or no standards at all, are accepted as if that were decreed by fate. It contrasts so strikingly with the vibrant pre-presidential past when any perceived intrusion into judicial independence evoked an immediate spirited response from the legal profession, opposition politicians, civil society, and indeed from judges themselves. It was also a time when, unlike now, those who exercised political power at the highest levels of the State recognized, and respected the fact, that a clear distinction existed, and must continue to exist, between the legislature, the executive and the judiciary.[194]

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[193] S.L. Gunasekera (2011) ***Lore of the Law and Other Memories*** (Colombo): p.185.

[194] It was, no doubt, in accord with the current style of governance in Sri Lanka that the Government, in March 2014, sponsored a resolution in the UN Human Rights Council entitled "*Integrity of the judicial system*" (A/HRC/25/L.5 of 20th March 2014). It expressed the conviction that "the integrity of the judicial system, together with its independence and impartiality, is an essential prerequisite for the protection of human rights and fundamental freedoms, for upholding the rule of law and democracy and ensuring that there is no discrimination in the administration of justice". Stressing that "the integrity of the judiciary should be observed at all times", the resolution requested the UN High Commissioner for Human Rights to convene an expert consultation, with the participation of States, the special procedures, the treaty bodies and non-governmental organizations, "for an exchange of views on human rights considerations relating to the issues of administration of justice through military tribunals and the role of the integral judicial system in combating human rights

violations". The resolution was co-sponsored by Belarus, China, Cuba, Democratic Republic of Korea, Kyrgyzstan, Russian Federation, Sudan, Tajikistan and the Bolivarian Republic of Venezuela!