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THE REMOVAL FROM OFFICE OF THE CHIEF JUSTICE OF SRI LANKA

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The removal from office of the Chief Justice of Sri Lanka was an unprecedented act in the judicial history of the country. I have been requested to examine the constitutionality of that act. In fact, that was the single issue on which the proceedings leading to the removal of the Chief Justice were questioned and challenged from the outset. Except in the government-owned media, there was hardly any reference to the alleged acts of misbehaviour. It was evident, from the beginning, that the objective of the exercise was to remove an inconvenient Chief Justice, and replace her with one more amenable to the government. It was candidly and authoritatively admitted by a political columnist close to the government that the resolution for her removal was motivated "for political reasons". Even the President reportedly complained to a former Chief Justice that "she has got too big for her boots". The only member of the government parliamentary group who declined to sign the resolution for her removal publicly declared that one reason for his refusal to do so was that he was presented with a blank sheet of paper that contained no charges.

The Constitution is the "supreme law"

In Sri Lanka, unlike in the United Kingdom, the written Constitution is the supreme law of the Republic. It is from the Constitution that the three principal branches of government derive their powers. Legislative power is exercised by Parliament and by the People at a Referendum. Executive power is exercised by the President elected by the People. Judicial power is exercised through courts, tribunals and institutions, created and established by the Constitution or by law". The only exception is in respect of the privileges, immunities and powers of Parliament and of its Members, where "judicial power may be exercised directly

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by Parliament according to law". That law, which Parliament has enacted, is the Parliament (Powers and Privileges) Act.

Impeachment

The term "impeachment" does not appear even once in the Constitution. What the Constitution states, in article 107, with regard to a judge of a superior court, is that:

> 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**:
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> 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.**

There is no reference to "impeachment". That term was introduced into the Sri Lankan political lexicon in mid-October last year, as the process to remove the Chief Justice began. It was a term that came with the weight of history. Soon, law professors and political columnists were being commissioned to delve into the history of "impeachment" across the globe, so that they could argue that no court could interfere with that process. 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. I could not understand how the impeachment procedure prescribed under the 1787 Constitution of the United States of America was of any relevance to Sri Lanka? We were not even aspiring to be the 51st state. The term "impeachment" was obviously introduced into the public domain so that the baggage that it carries 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 an individual's legal rights.

The removal procedure

The Constitution, in article 107(3) provides that:

> (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.

It is on the interpretation of this provision of the Constitution that the question of the constitutionality or otherwise of the removal from office of the Chief Justice rests. "Law" is defined in article 170 of the Constitution as:

> Any Act of Parliament, and any law enacted by any legislature at any time prior to the commencement of the Constitution and includes an Order in Council.

Standing Orders of Parliament are not law.

The 1984 precedent

The standing order under which a select committee was appointed for the trial of the Chief Justice was an accident of history. In 1984, six years after the Constitution had come into force, the then President decided that the Chief Justice should be disciplined. Chief Justice Samarakone, who was due to retire in October of that year after five years in office, had made an ill-advised speech at an inappropriate venue. He was the first Chief Justice to be appointed directly from the unofficial Bar within living memory. His speech was critical of the Government and the President, whose personal lawyer he had been prior to his appointment to the Court. President Jayewardene's response was immediate. He 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. 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. Resorting to legislation could not have been accomplished before Chief Justice Samarakone reached his mandatory retirement age.

Overnight, a new standing order was drafted and adopted by Parliament. That was Standing Order 78A, and is to be found today under "Rules of Debate". 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. Parliament which, under the Parliament (Powers and Privileges) Act, 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, gave itself the power, through a standing order, to conduct what was virtually the trial of an offence. Parliament which, under the Parliament (Powers and Privileges) Act, could only punish an outsider with admonition or removal from its precincts, that being the maximum penalty that Parliament 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, the standing orders.

This strange procedure did not go unchallenged. At its first meeting, the three Opposition Members, who included one who is now a Cabinet Minister and is also the Chief Government Whip, submitted that a Select Committee could not determine "proved incapacity or misbehaviour" unless it had been judicially proved. The Select Committee held 14 meetings, during all of which the team of lawyers appearing for the Chief Justice argued that the Select Committee 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 the Chief Justice was not guilty of misbehaviour. That was 1984. In 2000, all the political parties agreed on a draft amendment to the Constitution that provided for the appointment of judicial tribunals to inquire into allegations of misbehaviour or incapacity against judges of superior courts. That amendment, which was part of a larger package of amendments, was not proceeded with for reasons unrelated to this matter. In November 2012, when a resolution for the removal from office of the Chief Justice was submitted to the Speaker, it was Standing Order 78A that was invoked. It was invoked by the same political party which, in 1984, had voted against its adoption, and then argued strenuously that it was unconstitutional. Such is the character of contemporary politics in Sri Lanka.

Standing Order 78A reads as follows:

> 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.
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> (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 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 therefor, 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.

The report of the Select Committee was made public within a week of the conclusion of its sittings. It found the Chief Justice guilty of three of the fourteen charges contained in the resolution. I do not propose to refer to the charges. Mr Geoffrey Robertson, Queen's Counsel, in his brilliant report presented this evening, has examined with minute care, not only the often incomprehensible charges laid by the 117 members of the government parliamentary group, but also the hilarious findings of the seven Ministers who sat in the Select Committee. I only wish to refer to the requirement in Standing Order 78A that the judge should "disprove" the allegations. The presumption of innocence is entrenched in the Constitution, and to require a person to disprove a charge is to turn the system of justice on

its head. Under article 13(3) of the Constitution, it is only by law (and not by standing order) that Parliament may place the burden of proving particular facts on an accused person.

Reference to the Supreme Court

In November 2012, shortly after the resolution containing the charges was served on the Chief Justice, and she was summoned to appear before the Select Committee, applications for writs of prohibition were filed in the Court of Appeal by several individuals who challenged the constitutionality of the Standing Order under which the Select Committee was established. Article 140 of the Constitution provides that:

> 140. 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.**

As required by the Constitution, the Court of Appeal referred the question of the interpretation of article 107(3) of the Constitution to the Supreme Court. The question referred made no mention of Standing Order 78A or the Select Committee. Article 125 of the Constitution states that:

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

Having heard counsel for seven petitioners, seven intervenients representing governmental interests, and the Attorney General, the Supreme Court determined 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 misbehavior 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 misbehavior or incapacity.

The Court explained 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 for providing for such matters by law as well.

Parliament had so far failed to do so. It followed, therefore, that Standing Order 78A and the proceedings held before the Select Committee were void *ab initio*.

Parliament's response

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. Even members of the Government began to believe the mumbo jumbo. One cabinet minister was so swayed by the Government's own propaganda that, in Parliament, he shouted out to the Supreme Court to "go to hell".

Parliament's response to the determination of the Supreme Court was in the same mode, and was typical of the attitude of the authorities today to the judiciary, the rule of law, and the protection of human rights. The argument of the government's chief spokesman against the Supreme Court's determination was two-pronged. The first was that both Chief Justice Rehnquist and the Philippine Supreme Court had categorically stated that the judiciary should not interfere in impeachment proceedings. It did not concern the judiciary at all. The second was that the determination was wrong. In his view, the Supreme Court's determination 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 on which it was written". It was not that the chief spokesman was ignorant of the law. The Minister of External Affairs, Professor Peries, the international face of the government, was a Rhodes Scholar who had been Professor Law, Dean of Law, Vice-Chancellor, and Fellow of All Souls Oxford. I do not wish to make any comments on his arguments because, in addition to all his qualifications, he is also my brother-in-law, and harmony within the family is important.

International standards

Article 14 of the International Covenant on Civil and Political Rights requires a determination affecting a person's rights to be made only after "a fair and public hearing by a competent, independent and impartial tribunal established by law". In its periodic report to the Human

Rights Committee, submitted in 2002, the Government of Sri Lanka, referring to a Select Committee appointed under Standing Order 78A, solemnly declared, in an assurance held out to the international community, that "non adherence to the rules of natural justice by the inquiring committee would attract judicial review."

> Indeed, nowhere, either in the relevant constitutional provisions or in the standing order, is it sought to exclude judicial review of the decisions of the inquiring committee. Thus, it is envisaged that if the inquiring committee were to misdirect itself in law or breach the rules of natural justice, **its decisions could be subject to judicial review**.

Despite this assurance, the Human Rights Committee, in its Concluding Observations (on the 4th and 5th Periodic Reports of Sri Lanka, November 2003) stated that:

> The procedure for the removal of Judges of the Supreme Court and the Court of Appeal set out in article 107 of the Constitution, read together with Standing Orders of Parliament, is **incompatible with article 14 of the International Covenant on Civil and Political Rights,** in that it allows Parliament to exercise considerable control over the procedure for removal of Judges".

The Bangalore Principles of Judicial Conduct (which have been endorsed by the United Nations), and which the Human Rights Committee has stated should be read as an interpretative guide to article 14 of the Covenant, provides thus in its Implementation Measures:

(a) The power to discipline a judge should be vested in an authority or tribunal which is independent of the legislature and executive, and which is composed of serving or retired judges, but which may include in its membership persons other than judges, provided that such other persons are not members of the legislature or executive.

(b) 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.

(c) Where the legislature is vested with the power of removal of a judge, such power should be exercised only after a recommendation to that effect of the independent authority vested with power to discipline judges.

This appears to be the contemporary international standard and reflects the prevailing position in nearly all the democratic countries of the world.

Sri Lanka is obliged to observe Commonwealth Principles, as a pre-condition for continuing to be a Member State of the Commonwealth. Among these principles is the following Latimer House Principle:

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

The Latimer House Principles have been incorporated into domestic law in many Commonwealth countries. A judge may be removed from office, whether on a parliamentary resolution or otherwise, only after an independent tribunal has found that judge guilty of misbehaviour or incapacity. From Australia to Uganda, through Belize, Botswana, Canada, Cyprus, Ghana, Guyana, India, Kenya, Malaysia, Singapore and South Africa (to name only a cross section of Commonwealth countries selected at random), this is the consistent constitutional practice.

The Consultative Council of European Judges (CCJE) has expressed the view that disciplinary proceedings against any judge should only be determined by an independent authority (or "tribunal") operating procedures which guarantee full rights of defence. It also considers that the body responsible for appointing such a tribunal can and should be the independent body (with substantial judicial representation chosen democratically by other judges) responsible for appointing judges. That does not exclude the inclusion in the membership of a disciplinary tribunal of persons other than judges (thus averting the risk of corporatism), **provided that such other persons are not members of the legislature, government or administration**. The CCJE also considers that the arrangements regarding disciplinary proceedings in each country should be such as to allow an appeal from the initial disciplinary body (whether that is itself an authority, tribunal or court) to a court.

The national context

Before I conclude, I would like to place the event we have been discussing in its proper context. It is necessary to understand the national context in order to understand why the Government asserted the right to bulldoze its way, with slogan-shouting, stick-waving, screaming mobs, protected by armed police and the military, padlocked gates, water cannons, and fireworks – all this and more to remove from office the lawful Chief Justice of the Republic, the first woman, the first academic, the first product of a non-urban school who, with her quiet dignity, grace and determination, surpassed herself as she faced what must have been the greatest challenge of her life.

A founding member of the Commonwealth, a highly politicised society that changed its Government at every general election in the first thirty years of parliamentary governance, a fiercely independent Judiciary before which I had the privilege to practise, and a vibrant and fearless Press – these were the defining features of Ceylon, as Sri Lanka was known until 1972. But the country changed quite dramatically thereafter, especially under presidential rule which was introduced in 1978. Therefore, the removal from office of the Chief Justice has to be viewed in its proper context.

Today, in many respects, Sri Lanka is a dysfunctional state. The integrity of its electoral process is seriously questioned. The integrity of its Judiciary has been undermined by an unduly close relationship that some senior judges enjoy with the Executive. The Chief Justice who retired in 2011 was immediately appointed Legal Adviser to the President; a hop, step and a jump from the Supreme Court to the presidential secretariat did not appear to him to be an unusual acrobatic leap. Selected judges of the Supreme Court and the Court of Appeal are granted special leave to enable them to spend several months at a time in the islands of Fiji, a country suspended from the Commonwealth, to help a military ruler apply and enforce his decrees. In fact, a Sri Lankan Judge was reported to have recently sentenced the Opposition Leader of that country to prison, and thus disqualified him from being a candidate at the general election, if and when held. Much of the print media is either owned by the Government or by politicians of the ruling party or by members of the President's family. The editor of the only independent, investigative weekend newspaper was shot dead in a high security area four years ago, and his successor was sacked when a government supporter bought that newspaper some months ago.

Constitutionalism has all but disappeared from the country. The President, who is Head of State, Head of Government, and Chairman of the Cabinet, is the source of all power and patronage. He appoints Ministers, Judges, Ambassadors, Secretaries, Chairpersons of state banks and corporations, the Elections Commission, the Bribery Commission, the Human Rights Commission, the Judicial Services Commission, the Public Services Commission, the Auditor General – the list is endless. Of the 113 members required for an absolute majority in Parliament, 67 are cabinet ministers, 30 are deputy ministers, 2 are project ministers, and the remainder are either ministry monitors, presidential advisers, or coordinating secretaries. In fact, nearly every member of the government parliamentary group is a salaried member of the executive. Parliament is no longer a legislative body capable of holding the government to account.

Almost half the elected members of the Opposition have crossed the floor, enticed by the offer of employment of one kind or another, and the Cabinet today includes a Minister of Wild Life, a Minister of Botanical Gardens, a Minister of Public Relations, a Minister of State Resources, and a Minister of Sugar, with all the perks and financial benefits that go with such offices, but with little or no power. State power is exercised by four individuals: the

President, who is also Minister of Finance, Minister of Planning, Minister of Defence, Minister of Highways, Minister of Ports and Minister of Aviation, and is also in charge of the Attorney General's Department and the Legal Draftsman's Department; his brother, who is Minister of Economic Development, an umbrella ministry that controls all infrastructure and other development activities across the country; another brother, who is Secretary of Defence, and controls the armed services, police and immigration, as well as urban development; and yet another brother, who is Speaker of Parliament. Other immediate family members include the chairman of Sri Lankan Airlines, head of the shipping authority, the ambassador in Washington, the ambassador in Moscow, and so on. Indeed, one of the siblings once reportedly exclaimed that the country was now being administered by what he described as the Rajapakse *Samagama* (or Rajapakse Company).