

Sri Lankan Judiciary And Provincial Councils

by Gajalakshmi Paramasivam

(January 28, 2013, Colombo, Sri Lanka Guardian) I write in response to the Sri Lanka Guardian article 'The Post-Impeachment Future and the Role of the Judiciary' by Dr. Jayantha Dhanapala and Ms Suriya Wickremasinghe.



Chief Justice Dr. Bandaranayake

The authors state in relation to the dismissal of the Chief Justice 'In this political landscape, it is the resolute actions of the judiciary that gives a glimmer of hope to the people of Sri Lanka. The judiciary did not cave into the wishes of the Executive as did Parliament. The Courts stood their ground despite the pressures under which we presume they had to function during the impeachment. That can be said irrespective of whether one agrees or disagrees with the judicial opinions expressed by the courts on the constitutionality of the impeachment process.'

I identify fully with the above as per what actually happened. To that extent my belief in the Sri Lankan Judiciary is strengthened. But what about the Plan? – the structure through which the activities of the Chiefs are required to be regulated. There is question in my mind as to the appropriateness of the structure of the Government (as per the Constitution) that is claimed to uphold the independence of the Legislature, the Executive and the Judiciary from each other. I therefore conclude that there is room for confusion, from the lay person's point of view, about how to intellectually use the powers of sovereignty as stated in the Constitution – the highest national plan. As per the events that actually happened – the Executive would be seen as being above the Judiciary, resulting in higher respect being placed on the Executive and the elected members of Parliament than the Judiciary .

To the surface reader of the Constitution the Judiciary are equal to the Parliament and to the Executive. Yet, the Executive has the power and duty to appoint the Heads of the Judiciary. To that extent the Executive is in the higher position. To be truly equal and parallel, the Head of Judiciary would need to be appointed by the Governing Council of the Judiciary which Council needs to be elected by the Judiciary itself, through its ordinary members. That is true sovereignty.

Article 107 (1) of the Constitution states '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.'

The word 'appointed' taken at its common meaning gives the picture that the appointer is in a higher position than the appointee. The fundamental value of sovereignty requires the core power to be placed when we divide. Hence a citizen is divided into Governor and the Governed when a member of Parliament is elected. It is this power which is taken as being 'full' after division of the form that renders the Legislation its powers to make laws on behalf of the people. When a child is born – the human powers of the mother and child are equal – even though at body level – they are seen as more than one. This is the concept of sovereignty through which we elect people to represent us. A child thus represents a family until known otherwise on merit basis. When a mother believes that the child is herself - her powers protect the child naturally and the mother feels the pain and pleasure of the child as if they are hers.

Appointments on the other hand are made through conscious calculations based on common principles. In form therefore the mother has higher status than a child. As per the above structure outlined in the Constitution of Sri Lanka, the President has the duty to appoint the head of Judiciary. He is not required to 'elect' the head of Judiciary. At that point – the powers of the whole are no longer placed in the appointed person. It is the parallel of when the Chief Justice appoints other judges. If the President elected the Judicial heads then the President is giving birth to others like her/himself. Not so in appointment where the First power is divided into two or more equals or less. When you add them up – the power would be equal to the First power. When one is elected – each elected part has the power of the whole. When given form – each individual part has the same power as the whole. Hence it cannot be divided as per substance. This is the value of Love / Truth / Sovereignty. As Professor Bruce Downton often said when he was Dean of Medicine at the University of New South Wales – the value of the whole would be greater than the sum of the individuals in such a system.

Hence under the current wording of the Sri Lankan Constitution, the Head of Judiciary – (The Chief Justice, the President of the Court of Appeal and every other Judge, of the Supreme Court and Court of Appeal) is at best Equal to the Government if they could – through their performance demonstrate this in Administration of Justice. Neither has the power of the whole. Given that the President has the power and duty – the level of sharing is determined by the President. Even when taken to be equal to his own power – the Judiciary's power to be equal to the President needs to be the total of the 'Chief Justice, the President of the Court of Appeal and every other Judge, of the Supreme Court and Court of Appeal'

The parallel of this is the Tamil community's problem regarding devolution. The President appoints the Governor. Provincial Councils are elected by the People and the Chief Minister is the parallel of the President. Where does the Governor appointed by the President stand in terms of ranking? – above or below or equal to the Chief Minister? Article 154B lists the process to remove a Governor and these are similar to the ones listed in relation to the removal of the Chief Justice. The President has the ultimate power to remove. The requirement to get the advice of elected members in each case – is constitutional. But the President is not required to act as per that advice.

Hence in both instances the structure is not democratic once a President is elected. To continue to be democratic – elected persons have the right to be removed only by majority vote by the body that elected them. The rest are strictly Administrative.

Article 4 (c) of the Constitution confirms this: '(c) the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law, except in regard to matters relating to the privileges,

immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law'

This is how an independent lay person would read the logic of this Constitution.

Reality however could be different. When there are more citizens practicing democracy than the government – the gap between their earned status and their allocated status – becomes real power which spreads naturally to connect them to others beyond local borders. This is how, so many migrants of Sri Lankan origin have had head starts in Western countries where practice of democracy including the Doctrine of Separation of Powers is at a higher level than in Sri Lanka. Whether we remain physically in Sri Lanka or outside Sri Lanka, to the extent we draw on this real credit – we would empower the side that we identify with. That is how Natural Justice works. It did in the case of the Chief Justice also. In turn such leaders need to share their international status with others in similar need – especially those below them in status and therefore do not have access to international bodies such as the UN.

Beware of scorned Believer!

The minds of Sri Lankans in general and Sinhalese in particular seem to be more active than usual after the dismissal of the Chief Justice. The foundation of good politics is belief. The foundation of effective administration is knowledge. The former is usually for internal purposes whereas the latter leads to expansion. One of the problems that politically driven governments face in democracy is the unreliability of voters. It may be well and good to say you have to do this and that – by using principles of democracy – but if there is a wide gap between belief and knowledge – they start becoming two different worlds. This obviously is happening in Sri Lanka.

Shenali Waduge states in the Sri Lanka Guardian article 'Cabinet Reshuffle – Raise the bar in evaluating quality of Ministers' 'In a democracy, the people's will is said to be exercised through its elected representatives. We know all too well how far elected representatives actually honor that duty. Be that as it may, it is abjectly clear that and no one would disagree that we lack quality in the people we vote for office. When the good are reluctant to take to politics and with little alternative left there is little alternative we need to address areas that can be improved.'

How does one measure 'good'? At emotional level – one is driven by likes and dislikes. This is recognized by the system of majority vote. Where majority in a country/electorate/ institution/family do not use discriminative thinking on the basis of common principles and therefore rights and wrongs – governance is naturally limited to political leaders. This is fine – so long as these leaders stay within their areas of common belief. On that basis – a leader elected by Hambantota voters does not have any moral authority to rule over Monaragala where the sacred city of Kathirgamam is, leave alone Jaffna District where the sacred city of Nallur is. The only alternative is for this leader to develop common belief through other means such as religion (Lord Skanda Murugan is common to Kathirgamam and Nallur). On belief basis – Kathirgamam and Nallur are natural electorates and the minds of the people of these electorates would merge even though they may never meet each other. But whenever there is conflict between Buddhists and Hindus – these mind connections are weakened.

There is a passage in this regard in Wikipedia which highlights how Sinhalese politicians act/react when they panic: 'Jaffna seats controversy -

The annual updating of the electoral register in Sri Lanka is done by house-to-house enumeration. The civil war prevented house-to-house enumeration from taking place in most of the Northern

Province from the mid-1980s onwards. For these areas the Department of Elections instead took the previous year's register and added anyone who had since turned 18.

The civil war resulted in significant population displacement and emigration from the Northern Province. Two of the biggest displacements occurred in 1995 and 2008. Virtually the entire population of the Jaffna peninsula fled to the Vanni in 1995 to escape the military onslaught by the Sri Lankan military as they tried to recapture the peninsula from the rebel Liberation Tigers of Tamil Eelam. Most of the population of the Vanni were displaced in 2008 as they fled the military onslaught by the Sri Lankan military to recapture the Vanni from the LTTE. Hundreds of thousands fled abroad from the Northern Province during the civil war. Tens of thousands also fled to other parts of Sri Lanka outside the conflict zone, particularly to the capital Colombo.

As a consequence of all this the electoral register for the Northern Province was overstated for many years. The civil war ended in May 2009 and in 2010 the first house-to-house enumeration in around 25 years took place in most of the Northern Province. The result of the enumeration was that about 300,000 electors were deleted from the electoral register for the Northern Province. Consequently the total number of parliamentary seats allocated to Jaffna Electoral District, one of the two electoral districts that make up the Northern Province, was reduced from 10 (2009) to 6 (2010). The number of parliamentary seats allocated to Vanni Electoral District, the other electoral district in the Northern Province, remained unchanged at 6.

Jaffna Electoral District's problems were exacerbated by the decision of the 1978 Delimitation Commission to allocate it only one of the four provincial seats - the other three provincial seats were allocated to Vanni Electoral District even though at that time Jaffna had more than four times the number of electors than Vanni. This decision meant that 30 years later Jaffna had the same number of total seats (six) as Vanni despite having more than twice the number of electors. Jaffna now also had one fewer seat than Ampara Electoral District, Hambantota Electoral District and Nuwara Eliya Electoral District despite having more electors. It had two fewer seats than Puttalam Electoral District despite having only 25,000 fewer electors.

The decision by the Department of Elections to reduce Jaffna's seats drew much criticism, particularly by opposition parties. They pointed out that although there are only a small number of people still in IDP camps, tens of thousands had not returned to their homes and were living with relatives due to the existence of High Security Zones and ongoing de-mining. It was not known if all of these people were registered to vote. For most people in the Northern Province rebuilding their lives after the devastating civil war had been far more important than registering to vote. Many also did not have any form of identification to register as they had lost their official documents during the frequent displacements. As a result the electoral register for Jaffna Electoral District was likely to be understated. It was also not known if those who had fled to other parts of Sri Lanka like Colombo were registered to vote in those areas. The government and the Department of Elections rejected the criticism, saying that they were only doing what the constitution required them to do.

The above seems to be the war time parallel of the quota system which was preceded by the language system. As per the 13th Amendment to the Constitution, Tamil is also an official language of Sri Lanka. Yet, Sri Lanka's national anthem is sung internationally in Sinhala only – as per the first panic attack revealed by Sinhala Politicians after the British left Sri Lanka.

Belief based election is sacred. The highest law in any area is the path of Truth. The Truth of the leader is taken as the Truth of the people of that area. When that Truth is manifested if it is divided into two equal halves – there is harmony due to half the picture being seen physically and the other half mentally through belief in the other half. Hence there is wholesome life so long as we believe the population we do not 'see' physically. This is the basis of equal opposition in parliament.

If we do not have a strong leader in our local area, we need to use merit based distribution of the manifestation of our genuine work. Hence the likes and dislikes of majority in that area become rights and wrongs when processed through common principles. We then vote for issues and are led by issues rather than persons. It is towards this formation that we need local laws and hence devolution of power.

In her Sri Lanka Guardian article 'The Impeachment as a Primer on the Rajapaksa Way' Ms Tisaranee Gunasekara reveals as follows:

'It all began with the Sacred Areas Act. That most invidious and iniquitous piece of legislation, and not the Divineguma Bill, was the casus belli of the impeachment.

The Sacred Areas Act - Town and Country Planning (Amendment) Bill is its full title – is a Rajapaksa classic. The Act consisted of 4 pages and 8 clauses. Its purpose was to give the Rajapaksas absolute control over every inch of private land. It empowered the Minister of Buddha Sasana and Religious Affairs to acquire any land or building by the simple expedient of affixing a label and issuing a gazette notification.

Compared to the Sacred Areas Act, the Divineguma Bill is a model of rectitude and accountability. Clause 4 of the Act empowered the Minister to takeover 'any area of land' in 'any municipal area, an urban development area or any trunk road development area' defined as:

- a) a 'Protection area' for the protection of natural amenities;
- b) a 'Conservation area' for the conservation of the natural environment and the protection of places of natural beauty within the environment or
- c) an 'Architectural' or 'Historic Area' for the conservation of architectural or historical value.

Clause 5 empowered the Minister to define any land as a 'Sacred Area' and take it over.

The Act would have made land-grabbing easy, fast and perfectly legal. The Rajapaksas, their kith and kin could have decided that a farm is in a 'conservation area', a factory in a 'protection area' or a house has an 'architectural value', and acquired any of them, legally. No Lankan would have been safe from the marauding powers of this most draconian law, from small-holding farmers and middle class home-owner to large-scale businessmen. It was Step II of the process Rajapaksa-takeover economic assets begun by the Expropriations Act of 2011.

Since they had the parliamentary numbers, the Rajapaksas would have regarded the Act as a fait accompli.

In November 2011, in response to a petition by the CPA, a Supreme Court bench headed by CJ Shirani Bandaranayake ruled against the Sacred Areas Act. The right to private property is not a fundamental right enshrined in the constitution. Therefore the Sacred Areas Act could have been deemed constitutional had it not been for the 13th Amendment. Under the 13th Amendment, land is a devolved subject. The 13th Amendment clearly stipulates that legislation on devolved subjects needs the concurrence of all provincial councils. The CJ could not have approved the Sacred Areas Act without committing a barefaced violation of the Constitution.

The Act was already on the parliamentary order paper when the Supreme Court ruled that it needs the approval of all provincial councils. Speaker Chamal Rajapaksa circulated the Act amongst provincial councils for their approval. The councils were told to give their consent by February 15th 2012. Since the UPFA controlled all existing PCs, no snags were expected.

But the Eastern PC refused to approve the Act; both the TMVP and the SLMC opposed it. And even more surprisingly, the North Central PC wanted more time to discuss the Act. Faced with this unexpected resistance, the government withdrew the Act in April 2012.

Three people were instrumental in impeding the Sacred Areas Act – CJ Bandaranayake, the Chief Minister of the NCP Berty Premalal Dissanayake and the Chief Minister of the EP Sivanesathurai Chandrakanthan.

14 months later all three are out of jobs.

In September 2012, the government forced the untimely dissolution of three provincial councils. The Chief Minister of the Sabaragamuwa PC was reappointed but not the chief ministers of the rebellious NCPC and the EP. The TMVP and the SLMC were humiliated publicly.'

So much happened and yet we have had nowhere near the publicity that the dismissal of the Chief Justice received. But if we observe with care we would identify that for each dismissal of an elected person – (to be taken as having been elected on belief basis) – there has been proportionate karma through international leader, resulting in the demotion of the Sri Lankan Government at the international level. This may not affect the Sri Lankan Politicians who are satisfied with their local popularity. But that is not the case with the educated Sri Lankans who think beyond Sri Lankan borders. But when the voters themselves feel the damage - even if they do not know the cause – the damage would return to sender with the additional force of the believer's pain. That's how curses work. Hence one needs to take greater care not to upset / hurt a believer compared to a mere thinker. Jaffna is a sacred area and reducing its voting power unjustly has the effect of drastic returns. Having said that – I do not blame the Sri Lankan Government alone for this return karma. Many members of the Majority race take up higher position than members of Minority races in Sri Lanka – automatically attack the system of 'equality' which requires belief based manifestations to be divided into Equal halves. Likewise Whites in the West, resulting in 9/11 and Bali bombing. Those of us who truly practiced Equal Opportunity principles and values – would make the connection. I did. All they had to do was accept my belief that I was Equal until known otherwise. Here in Australia a black migrant is taken as being lower until known otherwise. Armed Sinhalese abusing their powers in Tamil areas – bring this karma upon themselves – each time the other side is a believer that s/he is on home grounds and hence has higher right than one who is not a local and who is acting outside her/his position duties. This happened with the IPKF (Indian Peace Keeping Force) also.

Each time a true believer is attacked the karma is exponential – and hence the return is as if the whole electorate is being attacked. That is how powerful Truth is. I realized this after learning that former Australian Prime Minister - Mr. John Howard (against whom I took action on the basis of unlawful racial discrimination) whose duty it was to treat me as an Equal until he knew otherwise through principles governing us in common – was present with the American President when 9/11 happened and later when Bali bombing happened during his time as Prime Minister. Highest number of Australians who died were from my local suburb of Coogee. I was defeated in courts – but the Bali Memorial is in Coogee – as a symbol of my pain and loss for which the Australian Government was responsible. I believed at the Government level that I was Equal and when I challenged Mr. Howard in Court – I did so on the basis of my belief which meant we were Equals in the eyes of all those who believe they are Australians.

I do believe that Sri Lankans who believe they are Sri Lankans would demote every politician who abused her/his power by operating outside her/his area of belief. One way of accelerating this is not by reacting but by the citizens who believe in democracy and produce independent, objectively measurable outcomes of their work. This is the power of the citizen as the vote is of the politician.

The politician needs knowledge beyond her/his local area. The citizen needs to rely on belief and produce independent outcomes from within her/himself, by her/himself for her/himself. Such a citizen would naturally defeat the politician who indiscriminately uses political powers where knowledge and wisdom is required.

Gajalakshmi Paramasivam 27 January 2013