

# **Reconciliation in Sri Lanka: Challenges to Peacebuilding in 2012**

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In the immediate aftermath at the end of the thirty year long conflict in Sri Lanka, the Government of Sri Lanka (GoSL) announced its plans for reconciliation targeting positive peace building. The work on peacebuilding appeared to be on everyone's agenda, it is given top priority in the government agenda for development, it is in the agenda of non – government actors, it is also in the agendas of the donors to Sri Lanka. There is also top down as well as bottom up work in peacebuilding in post war Sri Lanka. The new directions for positive peace was explained in detailed by the author in an article titled "Return to normalcy: new directions for positive peace in Sri Lanka."

<sup>1</sup>The work on peacebuilding in earnest by the GoSL began with Lessons Learnt and Reconciliation Commission (LLRC) appointed by the President of the country made its findings public in December 2011.<sup>2</sup> Recommendations of LLRC are now adopted in the National Plan for Action in reconciliation.<sup>3</sup>Some important issues are being addressed, such as the language issue by the newly formed Trilingual Commission. The government also started infrastructure development in the North and Eastern districts. One must appreciate the development that has taken within a short time in the previously war torn areas, for example the road network that was put together within a short time connecting the previously isolated villages and towns. The well trained

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<sup>1</sup> Melegoda, Nayani "Return to Normalcy: New Directions for Positive Peace in Sri Lanka," *Journal of International Development and Cooperation*, vol. 17, no. 1, 2011, pp. 155–166.

<sup>2</sup> For the final Report and annexes see, [http://www.priu.gov.lk/news\\_update/Current\\_Affairs/ca201112/final\\_report\\_llrc.htm](http://www.priu.gov.lk/news_update/Current_Affairs/ca201112/final_report_llrc.htm)

<sup>3</sup> [http://www.priu.gov.lk/news\\_update/Current\\_Affairs/ca201207/20120726national\\_plan\\_action.htm](http://www.priu.gov.lk/news_update/Current_Affairs/ca201207/20120726national_plan_action.htm)

army in Sri Lanka has been put to peace time work of providing expert knowledge and manpower in many of the infrastructure development projects under the executing authority of Ministry of Economic Development. Much needed capital was given by many of Sri Lanka's top donors, Japan as the highest donor for many projects in the North but also others such as United States, Germany, and Australia among the traditional donors. A new donor that emerged since the end of the war is China.

Government did not find it all smooth sailing in reconciliation towards building positive peace since the end of the conflict. This paper therefore focuses on some of the challenges the GoSL had to face in the year 2012 in particular that needed to be addressed in positive peacebuilding. First of these, initiated by the US, was the United Nations Human Rights Council Resolution (UNHRC) adopted a resolution "Promoting reconciliation and accountability in Sri Lanka" at its 19<sup>th</sup> regular sessions. The resolution:

Reaffirming that States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law, as applicable, Taking note of the report of the Lessons Learnt and Reconciliation Commission of Sri Lanka and its findings and recommendations, and acknowledging its possible contribution to the process of national reconciliation in Sri Lanka,

Welcoming the constructive recommendations contained in the Commission's report, including the need to credibly investigate widespread allegations of extrajudicial killings and enforced disappearances, demilitarize the north of Sri Lanka, implement impartial land dispute resolution mechanisms, re-evaluate detention policies, strengthen formerly independent civil institutions, reach a political settlement on the devolution of power to the provinces, promote and protect the right of freedom of expression for all and enact rule of law reforms, Noting with concern that the report does

not adequately address serious allegations of violations of international law,<sup>4</sup>

Called upon the GoSL to implement the constructive recommendations made in the report of the LLRC and to take all necessary additional steps to fulfil its relevant legal obligations and commitment to initiate credible and independent actions to ensure justice, equity, accountability and reconciliation for all Sri Lankans; and requested the GoSL to present, as expeditiously as possible, a comprehensive action plan detailing the steps that the Government has taken and will take to implement the recommendations made in the Commission's report, and also to address alleged violations of international law. The resolution passed with 24 votes in favour, 15 against, eight abstained.<sup>5</sup> India, Sri Lanka's giant neighbour and friend in South Asia voted for the resolution. Sri Lanka denounced the process as "arbitrary."<sup>6</sup>But keeping to the recommendation GoSL produced the National Action Plan addressing the theme area, International Humanitarian Law issues.

While facing international pressure at the UNHRC on one hand, several developments internally challenged the government reconciliation work. One such is the industrial action of the Federation of University Teachers Association (FUTA) which dragged on for several months resulting in the breakdown of all academic programs in the state universities. The main request of the FUTA was allocation of 6% of the GDP for education sector of the country.<sup>7</sup> Three months after the commencement of trade union action FUTA ended abruptly when the University teachers agreed to go back to work. The main point to remember is that some key persons who supported and worked hard to bring the People's Alliance Party to power were in the forefront of this trade union. The prolonged closure of state universities did not speak well for the reconciliation process. The trade union action was terminated with the intervention of Minister for Economic Development who brought in a

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<sup>4</sup> UNHRC, A/HRC/RES/19/2.

<sup>5</sup> *Ibid.*

<sup>6</sup> BBC News, 22 March 2012.

<sup>7</sup> See <http://futa-sl.org/> for details on FUTA trade union action.

negotiated settlement with the FUTA. Since higher education policies were amongst others were one of the root causes of the conflict it is important to address the issue relating to access to higher education (highlighted by FUTA in the demand for 6% budget allocation of the Gross National Production for education sector) in the reconciliation process.

Next incident creating doubts in the minds of the international community and threatening the reconciliation process emerged in November 2012 when the government brought charges against the Chief Justice (CJ) of Sri Lanka. A Parliamentary Select Committee (PSC) was immediately appointed by the Speaker of the Parliament. The hearing was concluded within few weeks and impeachment motion was passed in parliament, the legislature of Sri Lanka on January 11, 2013 by a two third majority with 155 voting for and 49 against. This new conflict between the government and the judiciary threaten reconciliation in the country at present. There is internal dissent as well as external-actors stepping in on condemnation of the process. The Commonwealth Secretariat, British Foreign and Commonwealth Office, and International Court of Jurists were among the first to issue statements cautioning the GoSL against undue haste to remove the CJ.<sup>8</sup>

Corruption charges against the CJ, was handed over to the Speaker of the Parliament in an impeachment motion with the signature of 117 parliamentarians of the ruling coalition government on November 1, 2012.<sup>9</sup> The charges were varied. Briefly the breakdown of the 14 charges of which the CJ was accused of were; the first two regarding impropriety in property transaction; the 3<sup>rd</sup> and 4<sup>th</sup> charges were about not submitting the annual declaration of assets and keeping undeclared bank accounts; charges 6, 8, 9 and 10 are relate to judicial 9 conduct; charges 11 to 14 were charges of harassment of two judges, namely magistrates Swarnadhipathi and Gamage. The fifth charge was on conflict of interest in a legal case involving her husband, Pradeep Kariyawasam who was the former Chairman of the state owned National Savings

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<sup>8</sup> Sirasa news, January 12, 2013

<sup>9</sup> [http://www.colombopage.com/archive\\_12A/Nov01\\_1351782538JR.php](http://www.colombopage.com/archive_12A/Nov01_1351782538JR.php)

Bank.<sup>10</sup>

On November 23, PSC began its hearing against the CJ despite Supreme Court (SC) request for a suspension of proceedings.<sup>11</sup> CJ, Dr. Shirani Bandaranayake, 43<sup>rd</sup> CJ (referred as CJ43 hereafter) of Sri Lanka and the first female to assume office of CJ in Sri Lanka (took oaths on May 18, 2011) walked out of the PSC hearing against her saying that she has no faith in the process.<sup>12</sup> Representatives of opposition parties in the PSC walked out protesting what they called the unfair practice of the PSC hearing the impeachment motion (incidents of name calling and abusive language was reported by the CJ43 to media). On December 8 PSC found the CJ43 guilty of three charges of misconduct.<sup>13</sup> Main opposition United National Party (UNP) and the others in opposition condemned the PSC impeachment proceedings and called it an unfair inquiry. In retaliation against the PSC the CJ43 filed a petition in the Court of Appeal challenging the findings of the PSC. On January 7, 2013 Court of Appeal issued a writ quashing the PSC report on the impeachment motion against CJ43 and its findings. Disregarding the writ the parliament began the debate on the impeachment motion against the CJ43 on January 10<sup>th</sup>.<sup>14</sup> Hence a crisis developed between the legislature and the judiciary regarding supremacy of the institutions. The SC has a determination to its name. Both courts were of the view that PSC which inquired into allegations against CJ43 was flawed and illegal. Some members of the coalition government's socialist allies, the Lanka Sama Samaja Party, the Communist Party and the Democratic Left Front requested prorogation of Parliament as a way out of the crisis. When their pleas were ignored they abstained from voting on the impeachment motion.

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<sup>10</sup> Pradeep Kariyawasam's appointment as Chairman to the National Savings Bank and prior to the Insurance Corporation are both political appointments.

<sup>11</sup> *Daily Mirror*, November 24, 2012

<sup>12</sup> Dr. Shirani Bandaranayake (no relation of Bandaranaike family in politics) was appointed to the Supreme Court in 1996 by President Chandrika Kumaratunga Bandaranaike on the recommendation of Professor G.L Peris. Dr. Bandaranayake was the Dean of the Faculty of Law at the University of Colombo. At the time many in the judiciary Opposed and were critical of the appointment of an academic who never practiced law to the highest court in the country.

<sup>13</sup> *Daily Mirror*, December 9, 2012; CJ was found guilty of impropriety of property transaction (1<sup>st</sup> charge, Having undeclared bank accounts – 4<sup>th</sup> charge misconduct, and the 5<sup>th</sup> charge conflict of interest in a legal case involving her husband).

When CJ43 was impeached by the Parliament, President offered the CJ43 the option to tender her resignation from the post with all benefits including the pension. When it became clear CJ43 was not willing to do so, President removed her from office. President appointed a new CJ (44<sup>th</sup>) for Sri Lanka on January 15<sup>th</sup> 2013 using the powers vested on him by the Constitution.<sup>15</sup> Hence the whole process of impeachment of the CJ43 in Sri Lanka was concluded within a matter of two months, during which both the judiciary as well as the parliament observed Christmas holiday period in Sri Lanka too.

The conflict between the government and legal fraternity in general was not so much about the charges against the CJ43 but on the technical aspect of judicial supremacy vs. parliamentary supremacy as well as on the rather hurried manner on which the inquiry was conducted. Hence when the PSC was appointed to inquire into the charges against the CJ43 some citizens filed petitions in the Court of Appeal seeking writs restraining the PSC from inquiring into allegations mentioned in the impeachment motion submitted to the Parliament by the Parliamentarians. The Court of Appeal referred to the SC since it was a constitutional matter. The SC ruled that PSC procedure under Parliamentary standing order 78A is bad in law, and does not conform to article 107 (3) of the constitution. Therefore the Court of Appeal issued a writ of certiorari quashing the findings of the PSC holding that PSC proceedings void. Appeal Court further stated that it has power to exercise judicial review of findings by the constitution. Unfortunately at the time of writing this paper the author could not access the primary documents related to the SC ruling on SC website. It is obvious that access has been blocked since January 17<sup>th</sup> or so.

Though taking different views on the impeachment motion of CJ43, both the speaker and the leader of the opposition party stood up for supremacy of the Parliament. This reflects British tradition of parliamentary supremacy that has been the

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<sup>14</sup> *Daily Mirror*, January 12, 2013.

<sup>15</sup> 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 constitution of the Democratic Socialist Republic of Sri Lanka 1978* (referred to as the Constitution hereafter) 107 (1).

practice in Sri Lanka for over several decades. When the supremacy issue came up precedence created in a speech delivered by Anura Bandaranaike in 2001 upholding the idea of parliamentary supremacy was applied by the Speaker.<sup>16</sup> According to the interpretation of rule of law in Sri Lanka, legislative power vested in an elected parliament by the people whose sovereignty is inalienable. Constitutional experts on 1978 constitution of Sri Lanka interprets that sovereignty is framed within the law of the land of which the constitution is the supreme expression. Therefore, the interpretation of the constitution is vested in the SC and the SC alone. A conflict between the judiciary and the legislature is not in the national interest since it gives a powerful message to the nation that the rule of law can be undermined and rejected by government.<sup>17</sup> Hence since the end of impeachment government is seeking to bring in a 19<sup>th</sup> amendment to the constitution to make clear provision that Standing Orders of Parliament are part of the country's law.

In the backdrop of reconciliation for positive peacebuilding it is very important to remember that independence of the judiciary must be maintained. It is only then Sri Lanka can put a stop once and for all repetitions of situations such as that occurred in UNHRC discussed previously. Hence the decision by the President to appoint a succeeding CJ on January 15<sup>th</sup> 2013 is acceptable in avoiding a constitutional crisis in Sri Lanka. President also emphasized that independence of the judiciary shall be maintained. In a controversial statement Dr. Shirani Bandaranayake on January 15<sup>th</sup> insisted that she is still CJ43 of Sri Lanka.<sup>18</sup>

The conflict between the judiciary and the legislature began when the SC

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<sup>16</sup> On June 6<sup>th</sup> 2001 Speaker of the Parliament (Anura Bandaranaike) making his order in Parliament on the SC interim order delivered on him restraining the speaker to proceed ahead on entertaining the impeachment motion on the CJ Sarath N. de Silva held that the SC had no jurisdiction to issue interim orders restraining the Speaker of Parliament in respect of the steps he is empowered to take under Standing Order 78A. Anura Bandaranaike read out a 25 page statement giving reasons on his observation said, "The aforesaid interim orders dated 6<sup>th</sup> June 2001 are not binding on the Speaker of Parliament" please see both, [http://www.ices.lk/sl\\_database/political\\_events/political2001.shtml](http://www.ices.lk/sl_database/political_events/political2001.shtml)

<sup>17</sup> Open letter to President Mahinda Rajapakse by the Friday Forum (by JayanthaDhanapala, Professor SavitriGoonesekere, Dr. JayampathyWickramaratne) January 11, 2013 <http://www.colombotelegraph.com/index.php/conflict-unaccountable-and-unnecessary-an-open-letter-to-the-president/>

<sup>18</sup> *Daily Mirror*, January 16, 2013, p. 1.

enacted the 18<sup>th</sup> amendment to the constitution. Many opposition members in the legislature opposed the 18<sup>th</sup> amendment since as he is still the most popular figure in country's politics 18<sup>th</sup> amendment would be advantageous to him. As CJ43 headed the bench that ruled on 18<sup>th</sup> amendment to constitution many were not sympathetic to her personally when the impeachment issue came up. Those who argued for CJ43 did so, on the principle of judicial independence. Anyway CJ43 cannot be called a popular figure in the judiciary. CJ43 was considered as a judge who had strong political backing in her appointment to the highest post. One of the questions that need to be addressed in the reconciliation process is the non-judiciary appointments to the Supreme Court, a recent trend that has developed is that state officers from Attorney General's Department are appointed to the SC debarring older and experienced original court judges as well as senior members from the Unofficial Bar. Former SC justice C.V. Wigneswaran called it an unhealthy practice.<sup>19</sup>

Therefore it is apparent that this impeachment motion was taken up by various civil society groups, legal fraternity and the general public as case to assert the independence of the judiciary and respect for the administration of justice in the context of rule of law in the country. An opinion poll was conducted by the *Business Times*<sup>20</sup> on "Did the CJ get a fair trial?" This was an email poll which had three questions and drew 900 respondents. The poll revealed the following data:

Question 1: Was the procedure as laid down in the Constitution followed in the impeachment of the Chief Justice? voted Yes 18.6% No 61.7% and Undecided 19.6%

Question 2: Did she get a fair trial? Voted Yes 4.9%, No 94.1% and Undecided 0.9%

Question 3: Will the decision have grave consequences for Sri Lanka? Voted Yes 77.5%, No 11.7% and Undecided 10.7%

The above reflects the general opinion of the professionals in Sri Lanka according to source.

The procedure according to the 1978 constitution was in order. However the

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<sup>19</sup> Former SC judge Wigneswaran speech on "Independence of the Judiciary" delivered at the Annual Judges conference on December 21, 2012, <http://groundviews.org/2012/12/23/keynote-address-at-judges-conference-by-justice-wigneswaran/>

<sup>20</sup> *The Sunday Times Business Times*, January 20, 2013, vol. 20, no. 41, p. 5.



argument by the legislature that Parliament is supreme or above Supreme Court (the court which is assigned to interpret the Constitution – which is supreme) ruling created the outrage of the legal fraternity against the impeachment motion. Also it can be said that since CJ43 did not fully participate at the PSC hearing (having walked out) it is difficult to determine whether she got a fair trial or not. It is ironic for CJ43 that it is the powers of 18<sup>th</sup> amendment that was used in the impeachment of CJ43 which was passed by the SC headed by CJ43.<sup>21</sup>

What the government did not bargain for the international reaction perhaps prompted by the diaspora. Nowhere did the CJ43 impeachment impact as strongly as it did in Canada. Prime Minister, Stephen Harper said that Canada would “push for this troubling development to be addressed at the next meeting of the Commonwealth Ministerial Action Group.”<sup>22</sup> Canada also requested from the Secretary General of the Commonwealth for a special meeting on Sri Lanka.<sup>23</sup> Commonwealth Secretary General issued a statement on January 13, 2013 which stated that “dismissal of the Chief Justice will be widely seen, against the background of the divergence between the Judiciary and the Legislature, as running counter to the independence of the judiciary, which is a core Commonwealth value. I have been in touch with the Government of Sri Lanka at the highest levels and have offered Commonwealth assistance to find a way forward from the constitutional impasse. I will continue to remain engaged with the Sri Lankan Government following today’s developments. I will also consider further Commonwealth initiatives and responses as are envisaged in situations that could be perceived to constitute violations of core Commonwealth values and principles.” The communiqué ends by stating that the Secretary General

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<sup>21</sup> 18<sup>th</sup> Amendment to the constitution is “President to make the appointments in respect of the commissions and offices referred to in the schedules.” <http://www.lawnet.lk/downloads/18thAmendmenAct-E.pdf> Justice Wigneswaran commenting on the 18<sup>th</sup> amendment stated that it fundamentally transformed Sri Lanka’s political system, ending Presidential term limits, eliminating Constitutional council, increasing Executive control over appointments and in addition gave the President power to regularly attend and address the Parliament, without being subject to question, *op. cit.*

<sup>22</sup> <http://www.bbc.co.uk/news/uk-politics-20323364>

<sup>23</sup> [http://www.island.lk/index.php?page\\_cat=article-details&page=article-details&code\\_title=70767](http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=70767)

will be visiting Sri Lanka in February 2013.<sup>24</sup>

The spokesperson for the United Nations High Commissioner for Human Rights also issued a statement during the week new CJ was appointed which mentioned set back efforts for accountability and reconciliation. It also referred to the impeachment process causing bitter divisions within Sri Lanka.<sup>25</sup> In context of the forewarning given by the UN High Commissioner for Human Rights it is going to be a formidable task for the government delegation to prevent harsher resolution being adopted against Sri Lanka.

A visit by top level officials from the United States to Sri Lanka is also scheduled for January 26<sup>th</sup>, 2013. The US team's visit can be viewed as a dress rehearsal for what can be expected at the UNHRC sessions.

Finally, in conclusion it is a sad turn of events at a time Sri Lanka is showing durable growth and sustainability. With the National Action Plan for reconciliation commencing grass-root level peacebuilding work, this issue created bitterness among the members of the legal fraternity with the Bar Association of Sri Lanka decided not to welcome the newly appointed CJ.<sup>26</sup> The impeachment of CJ43 before UNHRC sessions in February 2013, ahead of the scheduled Commonwealth Heads of States meeting in Sri Lanka later in the year is very unfortunate for Sri Lankans. After all, from bringing the charges against CJ43 and impeachment of CJ43 took only 74 days, thus the government opened doors to ill-timed scrutiny by the international community. At the same time it is worthwhile to note here that the main opposition party apart from voting against the impeachment motion in Parliament did not take it up as an issue of great importance. What Sri Lankan citizens needs to remember is that even with all development work and peace politics in place, it is rule of law (main benchmark) which will bring about positive peace to the country.

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<sup>24</sup> <http://www.thecommonwealth.org/news/190714/163087/252607/130113slcjdismissal.htm>

<sup>25</sup> Statement made by Rupert Colville, spokesperson for the UN High Commissioner for Human Rights, <http://www.un.org/apps/news/story.asp?NewsID=43952&Cr=sri&Cr1=lanka>

<sup>26</sup> *The Sunday Times*, January 20, 2013, p. 1.

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