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Constitutional Coup in Sri Lanka: Back to the bad old days

1. Overview

On 5 November 2003, Sri Lankan President Chandrika Kumaratunga¹ in a constitutional coup declared emergency in the country. Prime Minister Ranil Wickramasinghe² was on a visit to the United States. Earlier, on 4 November 2003, President Kumaratunga sacked Ministers for Information, Defence and Home, suspended the parliament for two weeks upto 19 November 2003 and ordered deployment of the troops in the key installations.

President Kumaratunga justified her drastic steps due to the alleged threat to national security³ after the submission of the proposals by the Liberation Tigers of Tamil Eelam (LTTE) on 31 October 2003. The question remains as to whether allowing the LTTE to put across its proposals constitutes, what President Kumaratunga calls “making too many concessions”, to warrant the imposition of emergency. After all, on 1 November 2003, the Sri Lankan government led by Prime Minister Wickramasinghe said the offer made by the LTTE "differs in fundamental respects" from its proposals made on 17 July 2003. But in an attempt to restart the process, the government said it was "convinced that the way forward lies through direct discussion of the issues".⁴

A cursory analysis of the attempts to undermine each other by President and Prime Minister shows that rather than the LTTE proposals, the decision of the ruling United National Party (UNP) to put the motion to impeach controversial Supreme Court Chief Justice Sarath N Silva in the parliament on 6 November 2003 might have prompted the President to take such drastic steps. As any impeachment motion against the President ultimately has to be referred to a referendum by the Chief Justice, many Peoples Alliance (PA) leaders saw the impeachment of Chief Justice as the first step towards impeaching President Kumaratunga. President Kumartunga has so far successfully blocked any

¹ . President Kumaratunga belongs to Peoples Alliance, the opposition party in the parliament.

² . Prime Minister Ranil Wickremasinghe belongs to United National Party which holds majority in the parliament.

³ . http://news.bbc.co.uk/2/hi/south_asia/3241763.stm

⁴ . 'Proposals, Govt. offer differ in fundamental respects', The Hindu, New Delhi, 2 November 2003

attempt to clip her wings by the parliament with the help of Supreme Court Chief Justice N Silva. Justice Silva has been openly supportive of her.

2. Old rivalry and biased judiciary

The rivalry between President and Prime Minister Ranil Wickramasinghe in Sri Lankan politics has been continuing for over a decade. But it has become even more apparent since the UNP came to power after the last general elections held in December 2001. While President Kumaratunga welcomed negotiation with the LTTE, she gradually hardened her stand.

The government and the LTTE signed a ceasefire agreement in February 2002 and formal peace negotiations started in September 2002. But the talks broke down in April 2003 in large part because of Kumaratunga's increasingly provocative actions, in league with sections of the armed forces. The last two rounds of talks were disrupted by naval incidents involving the seizure or sinking of LTTE vessels.⁵ On 25 October 2003, Kumaratunga wrote to the Norwegian Prime Minister Kjell Magne Bondevik requesting the recall of the head of the Sri Lanka Monitoring Mission, Major General, Trygve Tellefsen.⁶ President Kumaratunga also wrote to the armed forces chiefs on 24 October 2003 directing them not to follow any of the SLMM's instructions or advice.⁷

Since the UNP came to power, President Kumaratunga has sought to maintain her direct control over key elements of the state apparatus, particularly the security forces. For months the government and the President have been engaged in a feud over who decides top appointments. She extended the service of Navy Vice Admiral Daya Sandagiri and Army Commander Lionel Balagalla—regarded as her supporters—beyond their due retirement dates. At the same time, Kumaratunga overruled a proposal by Interior Minister John Amaratunga that the service of the existing Inspector General of Police (IGP) be extended.⁸ In an attempt to counter President's move, Defence Minister promulgated regulations to retire Commissioned Officers of the Sri Lanka Army at the age of 55. President Kumaratunga referred the order of the Defence Minister to the Supreme Court under Article 129 of the Constitution.⁹

In September 2002, the UNP government sought to clip the power of the President by bringing the controversial 19th amendment to the constitution. The 19th amendment, among others, sought to amend Articles 49 and 70 of the Constitution to clip the President's powers to dissolve Parliament unilaterally one year after the previous elections. About 20 odd Peoples Alliance Members of Parliament reportedly supported the move of the government. The amendment also empowered parliamentarians with

⁵ . http://www.asiantribune.com/show_article.php?id=1071

⁶ . The Statesman, New Delhi, 31 October 2003.

⁷ . http://www.asiantribune.com/show_article.php?id=1071

⁸ . Ibid

⁹ . Tamil Net, November 02, 2003 12:24 GMT

"cross-voting rights" so that they could vote according to their conscience without being deprived of their seats for defying party discipline.¹⁰

The Supreme Court led by Chief Justice Sarath N Silva came to President's rescue and shot down the 19th amendment. The court ruled the sections empowering MPs with cross voting rights to be unconstitutional. As for the President's power to dissolve Parliament, the Bench further ruled that apart from ensuring the support of a two-thirds majority in Parliament for it, the nation at large has to endorse it in a country-wide referendum for it to become law. The court however added a caveat that no referendum was necessary if the present one-year period restricting the President from dissolving Parliament was extended simply to a three-year period. A two-thirds majority alone would suffice for the purpose if the 19th amendment were on those lines.¹¹ Since constitutional amendments could be made with two-thirds majority, the order of a referendum raised questions about the independence of judiciary.

The Supreme Court also struck down the 18th Amendment which provided that "no legal suit or proceedings shall be instituted against the Constitutional Council, its chairman, a member, the secretary or an officer of the council regarding any act done or omitted by them in performing or discharging any duty or function, conferred or assigned to them under the Constitution or any other law". It also sought to empower the Constitutional Council to make rules to set out procedure and guidance to be followed by it while performing duties and actions assigned under the Constitution. The 17th Amendment, which formed the Constitutional Council (CC) of Sri Lanka, provided for legal action to be taken against the Council members under fundamental rights provisions in the Constitution.¹² The Supreme Court however upheld constitutional validity of such impunity under the Prevention of Terrorist Act, 1979 and allowed the judiciary to function under the order of the Attorney General and the Defence Minister.¹³

During the hearing on the Defence Minister's regulations of retiring the commissioned officers at the age of 55, Chief Justice criticised the government's conduct and indirectly tried to cast aspersions on the Government-LTTE ceasefire agreement.¹⁴ As the outcome of the verdict on the issue was clear, on 3 November 2003, the ruling UNP announced its decision to place the motion for the impeachment of the Chief Justice. The motion was scheduled to be tabled in parliament on 6 November 2003 after the government parliamentary group sources claimed that it had already received the signatures of required number of parliamentarians to move the impeachment as required by Sri Lanka's

¹⁰ . <http://www.dailymirror.lk/2002/09/03/frontpage/5.html>

¹¹ . Frontline, Volume 19 – Issue 22, October 26 – November 08, 2002

¹² . <http://www.dailymirror.lk/2002/09/19/News/6.htmls>

¹³ . *Sri Lanka: Time for Overhauling Human Rights Mechanisms*, An Alternate Report to the United Nations Human Rights Committee on the fourth periodic report of Sri Lanka (CCPR/C/LKA/2002/4), Asian Centre for Human Rights, New Delhi, 31 October 2003

¹⁴ . http://www.asiantribune.com/show_article.php?id=1071

Constitution.¹⁵ As any impeachment motion against the President ultimately has to be referred to a referendum by the chief justice, President Kumaratunga decided to strike back and suspend the parliament. By suspending the parliament, the President has effectively stalled any impeachment proceedings against Justice Silva or herself.¹⁶

On 4 November 2003, Supreme Court sent its determination on Defence Minister's regulations of retiring the commissioned officers at the age of 55 to President. The Supreme Court, as expected, held that the President shall exercise the executive power of the people including the defense of Sri Lanka and the Minister of Defence has no legal authority to amend the existing Regulations under the Army, Navy and Air Force Acts as the power to frame regulation is vested only in the President.¹⁷

3. Does a proposal warrant emergency?

On 31 October 2003, the LTTE submitted its proposals¹⁸ which among others calls for establishment of an Interim Self-Governing Authority (ISGA) comprising of the eight districts namely: Amparai, Batticaloa, Jaffna, Kilinochchi, Mannar, Mullaitivu, Trincomalee and Vavuniya in the north-east. Political commentators described it as "nothing but a restatement of the LTTE's demand for Tamil Eelam, or an independent Tamil state in north-east Sri Lanka". The LTTE proposals are all set to test the limits of permissibility of the right of self-determination within one constitutional framework.

While questions have been raised about the democratic plurality, Article 2 of the proposals refers to composition of the ISGA nominated by the LTTE and government of Sri Lanka and members appointed by the Muslim community in the north-east. Nonetheless, the LTTE proposals include control over marine resources, which would mean access to the seas, the power to engage into external economic relations, direct access to funds for the reconstruction of the northeast and full administrative powers for the Tamil-majority northeast.¹⁹

On 1 November 2003, the Sri Lankan government said the LTTE proposal "differs in fundamental respects" from its proposals made on 17 July 2003. But in an attempt to restart the process, the government said it was "convinced that the way forward lies through direct discussion of the issues".²⁰ In its 17 July 2003 proposals government offered the LTTE a Provisional Administrative Structure, but specifically excluded control over land, revenue, police and security.

¹⁵ . <http://www.colombopage.com/archive/November363039RA.html>

¹⁶ . http://www.asiantribune.com/show_article.php?id=1071

¹⁷ . <http://www.dailynews.lk/2003/11/06/new01.html>

¹⁸ . see http://news.bbc.co.uk/2/hi/south_asia/3232913.stm for the text of the LTTE proposal.

¹⁹ . 'Proposals, Govt. offer differ in fundamental respects', The Hindu, New Delhi, 2 November 2003

²⁰ . Ibid

Given the substantive divergence between the proposals of the government and the LTTE, the declaration of emergency on the pretext of threat to national security could be described as nothing but an attempt to block the peace process.

4. Emergency and its implications on human rights

Part I of the Public Security Ordinance (PSO) passed in 1947 just prior to Independence and sanctified by Article 155 of the Constitution of Sri Lanka empowers the President to declare a state of emergency. Rule 1(2A)(b) of the Ordinance gives supreme authority to the President to issue any Emergency Regulation under Part II.

“Section 5(1) of the PSO empowers the Executive with the authority to issue emergency regulations which:

Authorise and provide for the detention of persons;

Authorise the taking of possession or control of any property or undertaking, the acquisition of any property other than land;

Authorise the entering and searching of any premises;

Provide for amending any law, for suspending the operation of any law and for the applying of any law with or without modification;

Provide for charging, in respect of the granting or issue of any licence, permit, certificate or other document for the purpose of the regulations, any prescribed fee;

Provide for payment of compensation and remuneration to persons affected by regulations;

Make provision for the apprehension and punishment of offenders and for their trial by such courts, not being courts-martial, and in accordance with such procedure as may be provided for by the regulations, and for appeals from the orders or decisions of such Courts and hearing and disposal of such appeals”.²¹

Sri Lanka was under emergency between 1983-2001 until the UNP came to power in December 2001. Thousands of people have suffered under Emergency Regulations. Although, emergency regulations were allowed to lapse in July 2001 due to the lack of support in the parliament, the President issued regulations under the PTA providing that “any person who had been remanded ... in terms of any other written law, and has also been connected with or reasonably suspected ... with any unlawful activity within the

²¹ . CCPR/C/LKA/2002/4

meaning of the PTA, shall be deemed to have been remanded under the PTA". In effect, all those who were detained the Emergency Regulations were brought under the PTA.²²

Immediately after declaration of emergency on 5 November 2003, President Kumaratunga asked government owned media group, Lake House Chairman, Nalin Laduwahetty to leave.²³ It is clear that President Kumaratinga seeks to stifle freedom of expression and opinion. In 1994, then President Chandrika Kumaratunga had established a number of Committees to look into matters relating to the media. The Committees included the broad basing of state-owned Lake House newspaper group; reform of laws relating to the media and to media freedom; establishing a media training institute and improving conditions for media personnel. The reports of all these Committees were handed over to the President by the end of 1996. However, implementation of the recommendations set out in these reports has been slow.²⁴

5. Conclusion

With the sacking of three key ministers, the administration of Prime Minister Ranil Wickramasinghe has virtually been crippled. It would be impossible to run the administration without defence, home and information ministry. Prime Minister Wickramasinghe also has few legal options to challenge Kumaratunga. President is not only constitutionally authorised to dismiss the ministers and declare emergency, Chief Justice Sarath N Silva has also been openly supportive of her.

At the same time, President Kumaratunga does not have the necessary support in the parliament to ratify the emergency regulation by the parliament within 10 days as required under Article 155 of the Constitution. Nor can the PA form a government. Therefore, the only plausible step that President Kumaratunga can take is either to back down for the sake of democracy and peace; or dissolve the parliament and call for snap polls. Although, both UNP and PA considered holding of snap polls on many occasions since December 2001 general elections, none were confident of the outcome. Consequently, Chandrika Kumaratunga decided to play the nationalist card even though President J R Jawawardene and R Premadasa of the UNP were equally responsible for the repression of the Tamil minorities.

The average Sri Lankans however appear to be tired of successive elections and war. The country faced a presidential election on December 21, 1999, general elections on 10 October 2000, and another round of parliamentary polls on 5 December 2001 and local elections in March 2002. While it is the people who will ultimately decide whether to

²² . <http://brcsproject.gn.apc.org/slmonitor/November01/dete.html>

²³ . The Lanka Academic, Colombo, November 5, 2003

²⁴ . *Sri Lanka: Time for Overhauling Human Rights Mechanisms*, An Alternate Report to the United Nations Human Rights Committee on the fourth periodic report of Sri Lanka (CCPR/C/LKA/2002/4), Asian Centre for Human Rights, New Delhi, 31 October 2003

give a clearer mandate either for peace or war, the question remains whether the LTTE can wait for the godot.

Given the acrimony between President and the Prime Minister, it is unlikely that a peace agreement with the LTTE, which requires constitutional amendment, can be implemented by the UNP government. President Kumaratunga appears to be hell-bent on opposing any deal to be signed by the UNP government; and cross voting has been declared unconstitutional. At the same time, there is no guarantee that any party can obtain absolute majority to form the government without the help of the allies if snap polls are held. While President Kumaratunga may seek guarantees that all measures to clip President's power be stopped henceforth, Prime Minister Ranil Wickremesinghe may not want the Damocles sword to hang indefinitely. As uncertainty hangs over, international community must be vigilant against human rights violations, ensure full respect for human rights and fundamental freedoms and support the peace process in Sri Lanka.

Annex: Background information on Chief Justice Sarath N Silva

Former Attorney General and present Chief Justice of Supreme Court of Sri Lanka, Justice Sarath N Silva has been a thorn in the flesh of the UNP. Justice Silva has served as an important armoury of President Kumaratunga against the UNP government.

On 3 November 2003, the UNP government decided to move impeachment motion against Justice Sarath N Silva on the basis of a complaint filed by nine retired judges from the high court, district court and magistrate's court before the Speaker Joseph Michael Perera in March 2003. They sought redress over their termination from the courts and victimisation by Chief Justice Sarath N. Silva.

The nine judges - Mahanama Thilakaratne (Ex-High Court Judge), H. W. Liyanage. (Ex-District Judge), C. Hegoda. (Ex-District Judge), D. M. Siriwardhana (Ex-District Judge), S. P. Bandaranayake (Ex-District Judge), D. M. T. B. Dissanayake. (Ex-District Judge), S. W. Surendran (Ex-Magistrate), L. C. Costa (Ex-Magistrate) and Hiran Ekanayake (Ex-Magistrate) - complained that some of them were terminated without any inquiry and others after pseudo inquiries that served prepared agendas.

Chief Justice Sarath Silva is the ex-officio Chairman of the Judicial Services Commission (JSC), which is in charge of appointments and disciplinary control of the judges (district judges and magistrates and transfer of high court judges). The judges alleged, "he was personally instrumental in getting rid of judges towards whom he was ill disposed as the Attorney General or influenced by political personalities."

The nine judges alleged that some of the arbitrary and unlawful acts committed by the Chief Justice are: having issued circulars to judges threatening them with disciplinary action for not complying with his interference in court hearings; that Sarath Silva has resorted to disciplinary action against judges who have given judgments against the Attorney General's Department; that the Chief Justice has taken action against judges

based on complaints made to him by politicians and were close to him; that he has victimised judges who made judicial orders that did not find favour with him; that Silva has maintained two lists of judges - one composed of his personal favourites and the other composed of those who were not. The judges also alleged that the Chief Justice appoints his favourites to key positions irrespective of their seniority.²⁵

In August 2001, the International Bar Association (IBA) concluded that there was 'an overwhelming need for an independent credible judicial system' in Sri Lanka. It detailed instances of lack of accountability, breach of natural justice and potential for undue interference and pointed that institutions which should be protecting the rule of law, including the President, government and the Chief Justice, were acting to undermine it.²⁶

The IBA said judges were removed by the Chief Justice without enquiry and in June 2001, a parliamentary opposition impeachment motion to remove him was restrained by the Supreme Court, which he heads.²⁷

In 2002, a book titled *The unfinished struggle* by Victor Ivan has exposed extensive misconduct and abuse of authority by Mr Sarath Silva when he was Attorney-General and as Chief Justice. There have been no official denial of the allegations made in the book, nor has the author been subjected to legal action.²⁸

If there were not enough, Justice Sarath Silva heard a case against himself and sentenced trade unionist, Michael Anthony Fernando to jail for one year on 6 February 2003.²⁹ Mr Fernando was taken to Welikada Prison on 6 February 2003. He was tortured by the jail guards, Gayan Chrisantha and W. A. Priyashantha on the way back to Welikada Prison after being treated at the National Hospital on 10 February 2003.³⁰ They kicked him on his stomach and spine inside the prison bus.

Mr Param Cumaraswamy, then UN Special Rapporteur on the independence of judges and lawyers, said, 'no one can be his/her own judge.'³¹ Cumaraswamy said he was "shocked" and "stunned" by Sri Lanka's Chief Justice Sarath Silva hearing a case against himself. Then Special Rapporteur Cumaraswamy who visited Fernando at the General Hospital, Colombo said that he didn't know what crime Fernando had committed to warrant him one year imprisonment. "He also had been tied to a bar with an iron chain and he had been attacked in a prison van. I was informed that three officers had been suspended on the issue. But, I am not sure," Cumaraswamy added.³²

Mr Fernando was released on 17 October 2003 for good behavior.

²⁵ . <http://www.thesundayleader.lk/20030309/news.htm>

²⁶ . *ibid*

²⁷ . *ibid*

²⁸ . *ibid*

²⁹ . Cumaraswamy 'shocked' by Fernando case, The Daily News, Colombo, February 28, 2003

³⁰ . Assault in prison of Anthony Fernando: AG would not appear for jail guards, The Daily News, Colombo, June 10, 2003

³¹ . <http://brcsproject.gn.apc.org/slmonitor/March2003/chief.html>

³² . The Daily News, Colombo, March 2, 2003