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THE IMPEACHMENT OF SRI LANKA'S CHIEF JUSTICE: A LEGAL CRITIQUE

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the alleged misbehaviour, without leaving room for the body conducting the investigation to decide the question relating to proof according to its subjective perception. In natural consequence of this order of the Supreme Court, the Court of Appeal issued a writ of *certiorari* quashing the findings of the PSC.

Yet, two judgements of Sri Lanka's highest courts advising caution in proceeding with a hasty impeachment of the head of the judiciary were not heeded by the administration. Appeals made by professional associations, heads of business chambers, the Congress of Religions, religious bodies and outrage expressed by the association of judges along with the national and provincial branches of the Bar Association of Sri Lanka were also disregarded. Internationally, associations of lawyers and judges in the Commonwealth and beyond registered their concern to no avail.

At this point, the sacking of the Chief Justice amidst the deployment of the military in Hulfsdorp has become part of Sri Lanka's recorded - and shameful - history. Certainly as is observed by ***de Almeida Guneratne***, the impeachment of the Chief Justice is now a classic *fait accompli*. Given the draconian power with which this Government garbs itself, this outcome was perhaps an inevitability. His concluding warning is that the provisions of the present Constitution, whether in regard to the impeachment or the appointment of a Chief Justice, are so patently contradictory so as to make the constitutional document itself democratically unworkable.

In practical terms however and despite the seeming *fait accompli* of the unjust impeachment of the Chief Justice, ominous reverberations still persist. The ill effects caused thereby to the already damaged reputation of an independent Sri Lankan judiciary have been considerable. The election of an anti-impeachment contender to the Presidency of the Bar Association of Sri Lanka some months later, well reflected the continuing indignation of Sri Lanka's legal community. And taken out of its explosive political context, the sequence of unhappy events that took place demonstrates only too well the need for thorough reform of the constitutional provisions governing the appointment and removal of Sri Lanka's superior court judges, even in a long distant future.

The contents of this Issue are a contribution towards this debate.

Kishali Pinto-Jayawardena

Editor's Note... ... ...

The core of the concept known as the Rule of Law is its fixed application to all; the powerful and the powerless, a Chief Justice and a common criminal. In the alternative, we may as well abandon our courts, our law books and our self-respect as a people bound by the law.

These are pertinent reminders in the wake of the recent monumentally ill-judged and illegal impeachment of Sri Lanka's 43rd Chief Justice. First and foremost, was the Chief Justice impeached in a manner that was equitable? To be clear, we are not talking here of the constitutional propriety of Members of Parliament inquiring into the misbehavior or incapacity of a superior court judge. The issue is more basic and far simpler. It goes to the roots of a fair inquiry which underwrites all the rights that the Constitution guarantees us, the most basic of which is that a person is innocent until proven guilty by an impartial inquiry before a competent body. These are fair trial and natural justice rights which, as expanded by our own judges, span the entire breadth of the criminal, constitutional and administrative law spheres. For decades, these expanded rights have been applied to all categories of persons including common criminals.

Meanwhile, similarly strict standards are applied where appointments to, and removal from public offices are concerned. One consistent rule in this regard is that the process must be open, fair and accountable. As much as public officers can claim such rights, surely judicial officers of the superior courts are equally entitled when impeachment motions are lodged against them in the political forum? To argue to the contrary would be an absurdity.

Yet the PSC process which found Sri Lanka's 43rd Chief Justice culpable did not satisfy basic requirements of fair trial and fair removal procedure. The PSC operated sans due and proper procedure, the majority of its members denied the Chief Justice the right to cross-examine adverse witnesses and claimed that oral testimony would not be called, only to promptly go back on their word once the Chief Justice and her lawyers withdrew from the proceedings after being repeatedly insulted. The PSC members refused to allow her more time to answer allegations contained in a gargantuan bundle of documents handed over to her to which she was peremptorily ordered to respond within the next day. This was quite apart from the vulgar abuse leveled against her by some government members of the PSC, as detailed in a letter issued by the Chief Justice through her lawyers at that time.

In furtherance of this debate, the ***LST Review*** publishes in this Issue, a considered reflection by ***Jayantha de Almeida Guneratne*** on key issues concerning the legality of the impeachment as arising from the order of the Supreme Court (on a question of constitutional interpretation referred to the Court by the Court of Appeal) as well as the consequent order of the Court of Appeal. A particularly important focal point of this analysis is its summary rejection of the notion that the doctrine of parliamentary supremacy precludes judicial review of parliamentary proceedings concerning an impeachment. As is stated with judicial precedent in support, the sovereignty of the people is made a justiciable and entrenched provision by virtue of Article 83 of the Constitution. Consequently all three Organs of State exercise power on behalf of the People in whom sovereignty resides and one Organ cannot be privileged over the other.

Moreover, the findings of an impeachment process, as pointed out by him, amounts to a finding of guilt arrived at in relation to the charges against the Chief Justice and is a final decision of a Parliamentary Select Committee. These findings empower the President to remove the head of Sri Lanka's judiciary. Thus, the Select Committee findings reflect on a Chief Justice's constitutional right to continue in office and is no inconsequential happening. There are dire consequences that would unfold upon such a process, necessitating a stringent judicial response to the relevant issues by the Supreme Court when called upon to do so.

Supplementing this analysis, we publish the entirety of the relevant Supreme Court Order, (Writ) No. 358/'12/SC Ref No. 3/'12, SCM 01.01.'13). The Supreme Court's reasoning may be discerned, summarized and reflected upon in the context of the Court's impeccable reasoning that the basis of the Constitution is the Rule of Law which postulates the supremacy of the regular law as opposed to exercise of arbitrary power. As rightly emphasized by the judges, the power of removal of a Superior Court judge conferred on the President upon an address of Parliament is a check provided by the Constitution to sustain the balance of power between the three Organs of Government and not to resolve conflicts that may arise between the respective custodians of the said Organs exercising power for anyone to tame and vanquish the other. This power exists as a check to be exercised, where necessary, in trust for the people.

Considering the totality of these circumstances, the Court rightly held that the constitution of a Select Committee under Standing Order 78(A)(2) was not proper. The relevant Standing Order did not provide for matters relating to proof, mode, burden and the degree of proof in relation to an impeachment process and was therefore *ultra vires* the Constitution. The Court's conclusion was that those aspects will have to be provided by law (by an Act of Parliament), to avoid any uncertainty as to the proof of

The Impeachment of a Sri Lankan Chief Justice- Some Observations on its Constitutionality and Legality

Jayantha de Almeida Guneratne[*]

1. Background

In December 2012, a Parliamentary Select Committee (PSC) found the Chief Justice to be guilty of misbehaviour in respect of certain charges under Article 107(2) of the Constitution. After the said findings of guilt by the PSC, writs of *certiorari* and *prohibition* were sought by the petitioner Chief Justice under Article 140 of the Constitution to quash the same. Having assumed jurisdiction over the matter, the Court of Appeal referred a question for determination by the Supreme Court in terms of Article 125 which was responded to by a considered decision by the Court. Some observations on these developments in terms of their constitutionality and legality are contained below.

2. The Question Referred by the Court of Appeal to the Supreme Court for its Determination

That question may be reproduced below to facilitate discussion:

> *"Is it necessary under Article 107(3) of the Constitution for parliament to provide for matters relating to the forum before which the allegations are to be proved, the mode of proof, burden of proof, standard of proof etc., of any alleged misbehaviour or incapacity in addition to matters relating to the investigation of the alleged misbehaviour or incapacity".*

At the outset, it may be noted, on a bare reading of Article 107(3) that, it does not speak of a particular forum. The said provision being silent on that, the Court of Appeal not having powers of interpretation referred the matter to the Supreme Court, being the Court having sole and exclusive jurisdiction to interpret the Constitution in terms of Article 125 thereof to supply that omission on the part of the draftsman, the very Constitution being a creature of legislation, deriving its authority under and in terms of the (1972) Constitution to pass and enact laws.

Now, Article 107(3) decrees that,

> "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 misbehavior or incapacity and the right of such Judge to appear and to be heard in person or by representative."

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[*] PhD. President's Counsel

Acting under that provision, the Speaker constituted a forum, a PSC, to act and proceed under Article 107(3) under and in terms of Standing Order 78A(2) which decrees thus:

> *"where a resolution referred to (in) paragraph (1) of the Order is placed on the Order Paper of Parliament, the Speaker shall appoint a Select Committee of Parliament .....to investigate and report to Parliament on the allegations of misbehaviour.... Set out in such resolution"*

So, Standing Order 78A(2) clearly vests power in the Speaker to appoint a Select Committee of Parliament, which he did in this instance.

3. The Supreme Court's Response and Order on the Question Referred to it by the Court of Appeal

As pointed out earlier, the Speaker acted in accordance with Standing Order 78(A)(2). But, the larger question to be asked is whether the said Standing Order itself bears scrutiny *vis a vis* the constitutional provision in Article 107(3), (*per se)* and secondly, in the light of the other constitutional provisions and basic concepts that feed and are presupposed as impacting on Article 107(3). It is in that light that, one has to view and understand the Supreme Court's ruling in the answer it provided to the question referred to it by the Court of Appeal. The Supreme Court answered that question thus:

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

4. The Reasons Adduced by the Supreme Court in Providing that Answer

The Supreme Court's Order held thus:-

> *"In a state ruled by a Constitution based on the Rule of Law, no court, tribunal or other body (*by whatever name it is called) *has authority to make a finding or a decision affecting the rights of a person unless such court, tribunal or body has the power conferred on it by law to make such a finding or decision. Such legal power can be conferred on such court, tribunal or body only by an Act of Parliament which is law and not by Standing Orders which are not law within the meaning of Article 170 which*

defines "law" but are rules made for the regulation of the ordinary conduct and affairs of Parliament (emphasis is mine).[1]

Reflecting on the jurisprudential thinking reflected in the Court's aforementioned reasoning in regard to the concept of legal power as opposed to Parliament's power to frame Standing Orders, one has to understand the function of Standing Orders. The Supreme Court said in no uncertain terms that, "*they are rules made for the regulation of the orderly conduct and affairs of the Parliament.*" To elucidate further, Standing Orders are such Orders formulated by a body for the conduct in a formal manner its proceedings among its members. They are Orders made by a body or authority to regulate its own affairs or regulate matters within that body or authority among its members. In that regard, in addition to what celebrated authorities such as S A de Smith and Hood Philips etc have opined, other authorities may be referred to.[2]

It is clear from what has happened in this instance, Standing Order 78(A)(2) has nothing to do with the regulation of the conduct of Parliament's members but operates in regard to the alleged conduct of a third party, indeed, the alleged misbehavior of a person who held office as Chief Justice and in pursuance of such Standing Order, *not a court or tribunal* but a PSC (a body) has come to a finding of guilt of some charges preferred against her. The question may be posed at this point that, is not the final decision in the hands of the President? But it will be noted that, that power is the power to remove from office but the finding of guilt by the PSC will remain, as a final decision in the face of which, the Chief Justice (and indeed no Superior Court Judge) could even think of having continued in office even assuming the President would not have removed her from office.

Thus, it should not be difficult to understand why the Supreme Court held in effect, that the Select Committee to determine on the allegations against the Chief Justice, being on the basis of a Standing Order 78(A)(2) was not properly constituted for the same had to be constituted by law (by an Act of Parliament). For otherwise, the reference to Article 107(3) to "law" would not have been necessary on the presumption of law which the Supreme Court employed in opining that, "*Parliament will not use words in vain*".

5. The *vires* of the Impugned Standing Order 78(A)(2) *per se vis a vis* Article 107(3) of the Constitution on other Ground.

The elements in Article 107(3) which predicate the conditions for the impeachment of a Superior Court Judge, in this instance the Chief Justice) are thus :-

> "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

[1] *Vide* Article 74

[2] *Vide* Garner and Jones on Administrative Law (*6th ed.*); Curzon (*6th ed.*) Legal Dictionary- p. 399 (2002) and Faulkes on Administrative Law at p. 475 on the functions of a Select Committee of Parliament

resolution, the investigation and proof of the alleged misbehavior or incapacity and the right of such Judge to appear and to be heard in person or by representative."

The impugned Standing Order 78(A)(2) reads thus :-

> *"where a resolution referred to (in) paragraph (1) of the Order is placed on the Order Paper of Parliament, the Speaker shall appoint a Select Committee of Parliament .....to investigate and report to Parliament on the allegations of misbehaviour.... Set out in such resolution"*

Clearly the said Standing Order itself does not provide for matters relating to proof, mode, burden and the degree of proof which therefore clearly stands *ultra vires* Article 107(3) itself. The Supreme Court opines that those aspects will have to be provided by law (by an Act of Parliament, to avoid any uncertainty as to the proof of the alleged misbehaviour without leaving room for the body conducting the investigation to decide the question relating to proof according to its subjective perception)[3] for even if the PSC had sought to do so, that would have amounted to an usurpation by the said PSC of the judicial power of the people in terms of Article 4(c).

The point sought to be made is, assuming that, the PSC constituted by the Speaker is a legal body, the said body could not have proceeded *ipso facto* in the absence of rules in regard to the question relating to proof, the mode, burden and degree of such proof for those are matters decreed by Article 107(3), which renders therefore, the Standing Order on that score also *ultra vires* Article 107(3). The Supreme Court in its Order holds[4] that, those matters also must be provided by law (Act of Parliament). Without prejudice to the said judicial *caveat*, and sans any comment thereon, even the impugned Standing Order 78(A)(2), in its terms, does not address that element in regard to the mode, burden and degree of proof, which therefore renders the Standing Order, without having to say anything more, *ultra vires*, Article 107(3) *per se*.

6. The Final Upshot in Regard to the Proceedings Held against the Chief Justice as Established in the Supreme Court's Order

Thus, as reflected above, inasmuch as the impugned Standing Order 78(A)(2) is not law but a Standing Order, the function of which is to regulate the conduct of members internally in Parliament, the same cannot reach to affect the rights of a third party (in this instance, the rights of the Chief Justice to continue to hold office), thus rendering the proceedings of the PSC obnoxious to Article 107(3) *per se* and the concepts of the Rule of Law, Public Trust and the sovereign power of the people. Thus, the Supreme Court held:

> *"the reference made to this Court involves a matter which concerns a judge of the Supreme Court. In dealing with the question we therefore kept in mind that the objectivity*

[3] At pp. 24 -25 C.A. (Writ) Application No. 358/2012, SC Ref No. 3/2012
[4] At p. 24 C.A. (Writ) Application No. 358/2012, SC Ref No. 3/2012

of our approach itself may incidentally be in issue. It is therefore in a spirit of detached objective inquiry that, we attempted to find an answer to the question referred to us..."[5]

Finally, the Supreme Court derived additional support for their views from the then Speaker of Parliament, the Late (Hon) Anura Bandaranayke, MP in 2001 wherein he had opined that, there was a need to introduce fresh legislation (*and therefore by law an Act of Parliament as opposed to by way of a Standing Order)*..... or ..... amend the existing Standing Orders regarding the motions of impeachment against judges of Superior Courts.[6] No such fresh legislation has seen the light of day as the Supreme Court observes[7] in any event. There has been no amendment of the existing Standing Orders either in regard to motions of impeachment against Superior Court judges (in this instance the Chief Justice and indeed the head of the judiciary) in any event, in regard to the said matters contemplated by Article 107(3).

Any proposed Bill that may seek to provide for the said matters in Article 107(3) would be amenable to judicial review which could however pass into law subject to Article 83. (that is, through a 2/3 majority and if the Supreme Court were to so hold through the holding of a referendum). However, views have been expressed that, what took place in Parliament is not reviewable because, the Parliament is Supreme. Those views must stand rejected for the reason that all three organs of State exercise power on behalf of the People in whom sovereignty resides.[8] No doubt, the concept of sovereign power of the people is a political concept and remained so under Article 3 of the first 1972 Republican Constitution. In contrast, the present Constitution which decrees that sovereignty is in the people is made a justiciable and entrenched provision by virtue of Article 83 of the Constitution as judicially held in *Ratnasiri Wickramanayake v. the State*[9]

> "*Unlike the 1972 Constitution, the 1978 Constitution has placed some limits on the exercise of this(parliament's) legislative power*" The Court made explicit reference to Article 83 (which includes Article 3) as imposing a limitation on the law making powers of parliament.

In the light of the above observations, could Parliament, through Standing Orders purporting to act in terms of Article 107(3) investigate and come to a finding of guilt through a Select Committee against a Superior Court Judge thereby affecting his or her right to hold Constitutional office to exercise judicial power on behalf of the people? Nevertheless, there is nothing to prevent Parliament from enacting a law creating a body to investigate and determine on allegations of misbehaviour or incapacity against a Superior Court Judge. If the same be done by conferring that power on a Select Committee of Parliament, at the Bill stage, the same would still be open to challenge in terms of Article 83 of the

[5] At p. 26 of the SC Order
[6] At p. 26 of the SC Order
[7] At p. 27 of the SC Order
[8] Article 3
[9] SC No. 58/79, 1978-79-80 1 SLR 299

Constitution, at least on the ground of actual bias or apparent bias or likelihood of bias or reasonable suspicion or real danger of bias or probability of bias or lack of prudence, (the established tests to prove bias), given the fact that, such a committee of Parliament would be one established by Members of Parliament consequent to a motion presented by Members of Parliament which would be inquiring and leading to a resolution passed by Parliament itself as laid down in Articles 107(2) and (3) of the Constitution.

Thus, the reason why the Supreme Court in its Order held that, "..... *in our opinion it is* mandatory for the Parliament to provide by law the body competent to conduct the investigation *contemplated in Article 107(3) and give a legally valid and binding finding with regard to the allegations of misbehaviour and incapacity initiated by it*" [10]

As noted earlier, Article 107(3) does not specify a particular forum to investigate and give a legally valid and binding finding with regard to the alleged misbehaviour and incapacity investigated by it. Had the Constitution decreed that, by Standing Orders of Parliament and through a Select Committee the same could be done, then it would have put an end to any debate. But, the constitutional framers have not done so. The said framers used the word 'law' in Article 107(3), the reason why the Supreme Court in its Order held that,

> "There is a presumption that, Parliament will not use words in vain or unnecessarily"[11]

The Supreme Court's thinking stands fortified by the reasons which it gave for saying so in its Order and sought to be reflected and elucidated upon earlier in this paper. However, the question may legitimately be asked then, have the framers of the Constitution used the words *"or Standing Orders"* in vain for the reason that, Article 107(3) refers not only to law but also, in the alternative to Standing Orders as well? To answer that question it is necessary to once again look at the terms of Article 107(3) which decrees thus:-

> "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 misbehavior or incapacity and the right of such Judge to appear and to be heard in person or by representative."

As noted initially in this paper, Article 107(3) does not refer to and is silent as to the forum to provide *"for all matters relating to the presentation ..... etc."* Once, a proper body competent to conduct the investigation under Article 107(3) is created that body would then be in a position to provide for *"all matters relating to the presentation ..... etc"* That body must necessarily therefore be first established

[10] *Vide* p. 24 of SC Order
[11] *Supra* p. 24

by law (Act of Parliament) which may well be even a Select Committee of Parliament which would then be competent to make Standing Orders in regard to the matters referred to in Article 107(3). It is the omission of the legislature in mentioning the forum in Article 107(3) that the Supreme Court, as the Apex Court of the country, has supplied in holding that, this must be done by law and not by Standing Orders. Thus, the words "*.....or Standing Orders*" in Article 107(3) have also not been used in vain.

Should Parliament by a Bill seek to establish a Select Committee of Parliament to provide for matters expressly mentioned in Article 107(3), such Bill would definitely offend Article 4(c) which impinges on Article 3 of the Constitution, a proposition established in several decisions or determinations of the Supreme Court including the Supreme Court determination on the District Development Council Bill and the principles of bias, which could still become law if through a 2/3 vote in Parliament and a Referendum of the People.

But, as long as there is no law passed by Parliament creating a forum (a body), Article 107(3) being silent on the matter, Parliament by Standing Orders could not have established a Parliament Select Committee as being that forum. This is the effect of the Supreme Court ruling in the exercise of its sole and exclusive jurisdiction to interpret the Constitution in terms of Article 125. Consequently, it is submitted that, the Supreme Court's Order stands fully justified in holding that, "..... *it is mandatory for Parliament to provide by law the body competent to conduct an investigation contemplated in Article 107(3) and give a legally valid and binding finding with regard to allegations of misbehaviour or incapacity investigated by it.*"[12]

7. Absence of a Forum Decreed by Article 107(3) without Prejudice to that Determinative and Larger Question, Reflections on the Terms of the Impugned Standing Order *(78A)* Itself.

Article 107(3), (to repeat once again) decrees that:-

> 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 misbehavior or incapacity and the right of such Judge to appear and to be heard in person or by representative

The elements contained in Article 107(3) that:

a) Parliament shall by law or Standing Orders provide for all matters relating to

   i. the presentation of such an address (that is, to remove a Superior Court judge from office),

[12] At p. 24 of the SC Judgment

ii. including, the procedure for passing such a resolution, the investigation (and) proof of the alleged misbehaviour or incapacity and the right of such judge to appear and be heard in person or by representative"

This is the constitutionally mandated decree and an examination of the terms of the relevant Standing Order (78A) *viz.* 78(A) (1) to (9) thereof does not reveal a single term regarding and/or relating to or touching upon even remotely, *"matters relating to the proof of the alleged misbehaviour or incapacity etc:"* So then, clearly even assuming that, by Standing Orders of Parliament and consequent thereupon through a Select Committee of Parliament, a finding of guilt could have been arrived at by such Select Committee, the same stands constitutionally flawed and therefore illegal and unconstitutional for the Standing Order 78A is demonstrably *ultra vires* 107(3) of the Constitution inas uch as it does not provide for "*matters relating to proof*".

Consequently the very Standing Order *per se* is *ultra vires* Article 107(3) of the Constitution on the legally established principle that, "*an act of administration will also be ultra vires where it does not deal with a matter it is required to deal with but omits or fails to deal with.*"[13]

The Supreme Court's opinion that, even "*matters relating to procedure ..... and ..... of the alleged misbehavior ..... etc" also are "such matters that must be proved by law and not by Standing Orders.....*" stands fortified if one has regard to the provisions of the Evidence Ordinance which spells out matters such as the burden and degree of proof even where a Court of Competent jurisdiction is required to adjudicate thereupon.)[14] The point sought to be made is, for the reasons adduced above, which the Supreme Court proceeded on, when it decreed that,

> "*the matters relating to proof being matters of law*[15] *will also have to be provided by law and the burden of proof, mode of proof and the degree of proof .....*"[16] *if sought to be done through a Select Committee require an amendment to the Evidence Ordinance itself.*

Such an amendment could be brought by Parliament and Parliament alone as decreed by Article 75 of the Constitution (*"Parliament shall have power to make laws....."* and *"Parliament shall not abdicate or in any manner alienate its Legislative Power, and shall not set up any Authority with any Legislative Power."*[17]

The Speaker or a Select Committee of Parliament is not Parliament. Consequently, the effects of the joint acts of the Speaker and the Select Committee under Standing Order 78A(2) in this instance amounts to an Authority being set up with legislative power inasmuch as the said joint acts have the effect of the said

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[13] Foulks on Administrative Law, 6th edition at pp. 170 -171
[14] *Vide* Sections 3 & 101 of the Evidence Ordinance
[15] *Vide* note 14
[16] At p. 24 of SC Order
[17] Article 76(1)

Select Committee being conferred with power to *"investigate and report"* without providing even for matters of proof as decreed by the clear terms of Article 107(3) of the Constitution impacting and circumventing also the Evidence Ordinance as pointed out earlier.

Hence the reason why the Supreme Court is seen concluding that:-

a) *"..... it is mandatory for Parliament to provide by law the Body competent to conduct the investigation in Article 107(3)....."*

b) *".... The matters relating to proof being matters of law also will have to be provided by law and the burden of proof, the mode of proof and the degree of proof...."*[18] *)*

8. Further Reflections on the Order of the Supreme Court

Misconceived Notions on Parliamentary Supremacy

In some quarters, the argument has been advanced that, the Order of the Supreme Court is an affront to the supremacy of Parliament. Even in England, where the supremacy of Parliament was firmly established at the turn of the 17th Century through an alliance between the lawyers and the judiciary it had been done to overcome the authority of the Monarch. An inevitable consequence of that was the entrenchment of the Independence of the Judiciary through the concept of Separation of Powers. Even in regard to laws passed by Parliament thereafter, a Convention that had been built in British constitutional law is not that the Judiciary cannot review legislation but that it will not. Such is the constitutional culture that invests the British. These are matters that anyone who has even a nodding acquaintance with British Constitutional history and Law as revealed by academic authorities such as S A de Smith, Hood Philips etc. in their writings would be aware of.

In contrast, taking the Parliamentary history of Sri Lanka, after independence under the Soulbury Constitution through 1946 to 1948, Parliamentary supremacy as the predominant characteristic of that Constitution had never been established. As the Constitutional Court which was created under the first (1972) Republican Constitution observed :

> *".....we were also not sure whether our legislature was supreme, because time and again the legislature was told that it had not the right to enact certain laws....."*[19]

However, it came to be established under the 1972 Constitution when in Article 44, the National State Assembly (Parliament) was made the supreme instrument of state power. That was departed from under

[18] At p. 24 of the SC Order
[19] Report of the decisions of the Constitutional Court, Vol. I, (1973) p. 5

the present Constitution by the introduction of the concept of sovereign power of the people (Article 3) which was made a justiciable provision by virtue of Article 83, prompting the Supreme Court in *Wickramanayaka v State*[20] to note that, unlike under the 1972 Constitution there were limitations on the powers of Parliament (meaning the legislative power to pass laws) which clearly goes against an argument that, the predominant characteristic of the present Constitution is *"the Supremacy of Parliament"*

As noted earlier in this paper, there is nothing to prevent Parliament in the exercise of its legislative power (under Article 75) tc introduce a Bill, conferring power on the Speaker to constitute even a Select Committee of Parliament to investigate and report on any alleged misbehavior or incapacity of a Superior Court Judge subject to it being determined by the Supreme Court as to its constitutionality having regard necessarily to Article 4(c), which for that reason, the Supreme Court may well hold that, even a 2/3rd majority in Parliament would not be sufficient but a referendum of the people also would be required.

Thus, one sees the reason why the Supreme Court determined that, *"it is mandatory for the Parliament to provide by law the Body competent to conduct the investigation contemplated by Article107 (3) ....."* and that, *"matters relating to proof being matters of law, also will have to be provided by law....."* Consequently, Article 107(3) itself being silent as to the said Body competent to conduct an investigation and report as contemplated by that Article, the Order of the Supreme Court stands fully justified within the confines of the constitutional provisions inasmuch as a Select Committee appointed by the Speaker under a Standing Order *(78A);*

a) could not be regarded as such a Competent Body

b) in addition to the further fact that, the said Standing Order (in any event), has not provided for matters of proof for the Select Committee to adopt and act upon rendering the said Standing Order arbitrary, to say the least.

c) Apart from those considerations for the reasons articulated earlier in this paper, (with the highest respect, which though the Supreme Court has not explicitly referred to) is the fact that, the joint act of the Speaker and the Select Committee are obnoxious to Article 75 read with Article 76(1) of the Constitution.

Examination of".....or Standing Orders"(referred to in Article 107(3)

The view has been expressed by some that, the words "..... *or Standing Orders"* have been rendered a dead letter as a result of the Court's interpretation. This view ignores not only the fact that, it is the Supreme Court that is constitutionally conferred with power to interpret the Constitution (under Article 125), but also the fact that it has given the reasons for the interpretation it has handed down, that, there must be a law and what was sought to be done could not have been done by a Standing Order which in

[20] *Supra* note 1

any event does not conform to the terms of Article 107(3) of the Constitution. As practising lawyers, there are judgments, when they go against us, we do not agree with. Yet, we are obliged to advice our clients in our forensic duty to say, that nothing more can be done when the apex court determines on some matter. Finally, Article 107(3) being silent on the Body that must be established to investigate and report on a Superior Court judge's alleged misbehaviour or incapacity, it must be established by law and not by Standing Order. Matters relating to proof by such a Body must also be provided by law and not by a Standing Order, which in any event, the impugned Standing Order itself does not provide for.

9. The Consequent Court of Appeal Judgment Delivered on 07. 01. 2003

By that judgment, in view of the Supreme Court ruling that, "*the Select Committee appointed under the terms of Standing Order 78A has no legal power or authority to make a finding affecting the legal rights of a judge against whom the allegation is made in the resolution under proviso to Article 107(2) the Court of Appeal held that, "it has no alternative but to issue a writ of certiorari to quash P17 (that is, the finding and/or the decision or the Report of the said Select Committee")*[21] Although, this evidently stands as the main ground on which the said writ was issued, the Court of Appeal is seen giving additional reasons for the issuance of the writ. The Court of Appeal's said reasons may be summarized as follows:-

a) Rejecting the Attorney General's submissions (in effect) who appeared as *amicus curiae* that, the Court of Appeal's jurisdiction to review a finding by a Select Committee of Parliament affecting a right to office of a Superior Court judge is ousted on account of Articles 38(2) and 81 of the Constitution where express provisions are made in regard to the impeachment of the president and expulsion of members of Parliament respectively, supposedly on the well established principle of interpretation that "*express mention of one excludes others*" (*expression unius ……. "*) the Court of Appeal held that,

> "*The Constitution in Article 80(3), 81 and 124 expressly ousts the jurisdiction of Courts....* " whereas, Article 107 in relation to the impeachment of judges (*of the superior Courts) "the legislature has clearly placed no such obstacle either directly or by necessary implication in the way of entertaining the present application (viz. the application seeking review under Article 140 in regard to the Select Committee's finding and report"....., which the Supreme Court in its Order held to be without legal power.*

b) Thus, the jurisdiction of the Court of Appeal, vested under Article 140 is not subject to any other provisions in the Constitution.

Could the jurisdiction of a Court (leave alone a Superior Court *viz.* the Court of Appeal) be ousted by "necessary implication" through any principle of constitutional law and statutory interpretation? Be that

[21] At pp. 9-10 Court of Appeal Judgment delivered on 7.01.2003

as it may, the Court of Appeal has met that contention of the Attorney General by referring to Articles 80(3), 81 and 124 of the Constitution which expressly oust the jurisdiction of courts, wherein, Article 107 in the matter of impeaching Superior Court judges, the Constitution has not provided for any such ouster.

Article 4(c) of the Constitution which the Attorney General is seen to have relied on in regard to his contention reads thus:

> "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;"

Thus, the Court of Appeal in its judgment holds that, "..... *The legislature has clearly placed no..... obstacle either directly or by necessary implications in the way of entertaining the present application.*"[22]) There is yet another factor, the Court of Appeal asserted in expressing its opinion leading to its final conclusion and that is:-

a) Its reliance on *Atapattu v. People's Bank*[23] wherein the Supreme Court opined (though *obiter* in my view), that even an express clause seeking to oust the jurisdiction of the Court of Appeal, which it held as being unfettered, is not effective to oust the jurisdiction of the Court of Appeal to issue writs under Article 140 for such a clause in a Statute (created by Parliament) must be regarded as being obnoxious to Article 140 (contained in the Constitution, being the Supreme Law of the country).

b) It is that opinion (expressed *obiter)*, in Atapattu's case that stood as the *ratio* in *Moosajees v. Arthur*[24] which though not referred to by the Court of Appeal, which on the basis of other authoritative precedents which it relied on stands fortified.[25]

c) Even ignoring what has been said above, the Court of Appeal is seen coming to a definite finding in the exercise of its judicial power on behalf of the people in whom sovereignty resides (Article 3 read with Article 4(c))that

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[22] At p. 5 of Judgment
[23] 1997 (1) SLR 208
[24] 2004 (2) ALR I
[25] *Vide* at pp. 6 – 8 of Judgment

> *"..... a Select Committee appointed under and in terms of Standing Order 78A has no legal power or authority to make a finding adversely affecting the legal rights of a judge against whom the allegations made in the resolution moved under proviso to Article 107(2) ... and the power to make a valid finding, after investigation contemplated in Article 107(3), can be conferred on a Court tribunal or body only by law and by law alone*

10. Subsequent developments; the appointment of a new Chief Justice

Subsequently, the appointment of a new Chief Justice has raised new controversies. The President would tell the people that he has acted within the confines of the Constitution. However, through Article 107(3), by reference to Standing Orders, that contention would stand contradicted by Article 125 under which the Supreme Court has interpreted the Constitution, holding that the impugned exercise of impeachment by a Select Committee of Parliament could not have been done under Standing Order 78A. The power of removal of a superior court judge however lies in the hands of the President[26]) and the 43rd Chief Justice of Sri Lanka stands removed from office by an act of the President which finds cover under Article 35(1) of the Constitution, vide the Supreme Court ruling in *Edward Francis William Silva, PC v Shirani Bandaranayke.*[27]

The qualification to Article 35(1) contained in Article 35(3) would not be applicable in as much as Article 35(3) specifically refers to "proceedings in any court" and a Parliamentary Select Committee is not a court. It is in the light of the aforesaid provisions and in conjunction with them, that the provisions of Article 119(1) and (2) must be viewed.

> Article 119(1): - "The Supreme Court shall consist of the Chief Justice and of not less than six and not more than ten other Judges who shall be appointed as provided in Article 107."
>
> Article 119(2): - "The Supreme Court shall have power to act notwithstanding any vacancy in its membership and no act or proceeding of the Court shall be, or shall be deemed to be, invalid by reason only of any such vacancy or any defect in the appointment of a Judge."

It is clear from the terms of Article 119(1) that there cannot be a Supreme Court without a Chief Justice and while Article 119(2) decrees that the Supreme Court shall have power to act notwithstanding any vacancy in its membership, this cannot apply to a situation when there is no Chief Justice and must by interpretation and by necessary implication apply only to any other vacancy other than a void created by the absence of a judge being appointed as Chief Justice.

Thus, as can be seen, the very provisions of the Constitution provide for a situation where the Supreme Court could function notwithstanding the removal of the Chief Justice by the President based as it is on a

[26] *Vide* Article 107(2)
[27] 1997(1) SLR 92.

Select Committee's findings which the Supreme Court itself has determined as being flawed and illegal. Further, Articles 119(1) & (2) are not made subject to any other provisions in the Constitution which is bolstered further by the constitutional impunity afforded to the said act of appointment of a new Chief Justice by Article 35(1) of the Constitution. True, there is jurisprudence in our country that although the President is immune from judicial review, any person, body or institution etc that relies on an act (or decision) of the President would be open to judicial review vide *Semasinghe v. Karunathileke*[28] together with other judicial precedents as well to the same effect. It will be noted here, however, that the said judicially espoused principle contemplates a proclamation by the President on the basis of a preceding/antecedent act by some statutory functionary or person which subsequently is condoned by the President (such as a decision or act by the Commissions of Elections or the Inspector General of Police etc, but ostensibly or *prima facie* is seen to have had constitutional or statutory power to have taken such decisions).

However, in contrast, the act of the President in appointing a new Chief Justice is not referable to any antecedent of a person or body's act or decision under the current provisions even though the 17th Amendment to the Constitution sought to intercede an intervening authority of the Constitutional Council in that regard but was soon done away with. Currently, the President possesses the power in regard to the appointment of a Chief Justice in terms of Article 107(1) of the Constitution, without any constitutional fetter. Moreover, the removal of the 43rd Chief Justice is now a *fait accompli*, the said stage which could have been resisted by the forces that be having long since passed. The decisions and acts that operated before such appointment now stand acquiesced in the new appointment. The participation of the judiciary at the ceremonial sitting of the new Chief Justice and the functioning of the administrative machinery, starting with the Registrar of the Supreme Court bear this out.

This is a situation that has been brought about by a Constitution, (the present 1978 Constitution), which is inherent and replete with mutual contradictions that reduces itself to a democratically unworkable document.

11. Conclusion

The Supreme Court has interpreted the Constitution in the context of Article 125 of the Constitution which it was invited to determine and make an order by the Court of Appeal. The Supreme Court in its order made that determination and the Court of Appeal itself having assumed jurisdiction under its unfettered power under Article 140 for the reasons contained in the said judgment, has also delivered judgment. The cumulative effect of the whole is is that a Parliamentary Select Committee, constituted by a Standing Order *(78A)* in any event not being a body constituted by law, lacked legal power and the constitution of the said Select Committee stands obnoxious to Article 75 read with Article 76(1) of the Constitution as well, quite apart from the reasons adduced in the said Supreme Court and the Court of Appeal rulings. Moreover, there are other grounds on which the Supreme Court ruling stands justified in terms of the cumulative effect of Articles 3, 4, 75 and 76 of the Constitution

[28] 2003(1) SLR 172

Article 3 vests sovereignty in the people which includes the powers of government.....and Article 4 decrees that:

> "(a) the legislative power of the people shall be exercised by Parliament...".

Article 75 states that,

> "Parliament shall have power to make laws including ....." and

Article 76 (1) decrees that,

> "Parliament shall not abdicate ....its legislative power subject to Article 76(2) which incorporates the judicial thinking in *Weerasinge v. Samarasinghe*[29]

Article 76 (3) decrees that:

> "It shall not be a contravention of the provisions of 76(1) for Parliament to make any law containing any provisions empowering any person or body to make subordinate legislation for prescribed purposes....."

Consequently, it was open for Parliament by law empowering even a Select Committee of Parliament as being a body for the prescribed purpose of impeaching the Chief Justice to make rules (amounting to subordinate legislation deriving power under such law), in compliance however, with the necessary ingredients of natural justice and the express constitutional provisions. Considering the impact of Article 4(c) of the Constitution and the maxim "*Expressio Nullius...*", this Article specifically decrees that, "the judicial power of the people shall be exercised by Parliament through courts.....created, and established or recognised 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.

The following aspects strike one's immediate reflection and that is:

(a) The Constitution does not create, establish or recognise a Parliamentary Select Committee as a court.

(b) No law is in place either creating or establishing by law a Parliamentary Select Committee as a court.

(c) Moreover, the Constitution itself in Article 107(3) is silent on the forum that could provide for the matters contemplated therein relating to the impeachment of a Superior

[29] 68 NLR 361

> Court Judge, which are matters a court in the exercise of judicial power could provide for, as earlier articulated, by law, although Parliament in the exercise of its legislative power could create and establish empowering even a Parliamentary Select Committee for the said purposes, subject to any such proposed bill being amenable to its Constitutionality in view of Article 4(c) which vests judicial power in courts read together with the only express qualification thereto vesting judicial power directly in Parliament in regard to "-------- and powers of Parliament and by its members" thus bringing into the equation the maxim *"Expressio Nullius.."*

To the aforesaid grounds or reasons, one may have regard also to the function of Standing Orders, their scope and content, in relation to Parliamentary government which are reflected in the Constitution itself in Article 74 (referred to earlier in this paper). It is for the aforesaid reasons that in addition to the reasons given by the Supreme Court its ruling under reflection must be assessed, holding as it did, the impugned Standing Order 78A (in effect) as being flawed. Consequently, the Court of Appeal, supplementing the reasons contained in the ruling of the Supreme Court in its *ratio* concluded that it has no alternative but to issue a writ of *certiorari* quashing the findings of the Parliamentary Select Committee which found the Chief Justice guilty of the charges levelled against her.

Thus, the Supreme Court order and the subsequent judgment of the Court of Appeal under discussion stand fully justified. There may be contrary views. But, that is not the point. Whether one is convinced or not, once a Superior Court hands down a ruling or decision, whether one is happy or not, lawyer or litigant much succumb to such rulings or decisions. This is how one could acknowledge and feel that a democratic system is functional. However, it is no less than the President himself who, on this occasion has removed the Chief Justice disregarding the said two decisions of the Appellate Courts. This is undoubtedly a disturbing development.

In conclusion and reflection thereon, it may be said that though a Constitution is supposed to be the *grundnorm* (ie; basic norm or order), had Hans Kelsen been asked to comment on the current relevance of that theory, he would have been compelled to concede that he had gone drastically wrong somewhere in propounding his theory, at least in regard to the Sri Lankan situation.

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of a reference under and in terms of Article 125 of the Constitution of the Democratic Socialist Republic of Sri Lanka

S.C. Reference No 3/2012
C.A. (Writ) Application No 358/2012

Chandra Jayaratne,
2, Greenlands Avenue, Colombo 5

Petitioner

Vs.

1. Hon. Anura Priyadarshana Yapa,
   M.P. Eeriyagolla, Yakwila
2. Hon. Nimal Siripala de Silva,
   M.P. 93/20, Elvitigala Mawatha,
   Colombo 8.
3. Hon. Dr. Rajitha Senaratne, M.P.
   123/1 Station Road, Gangodawilla,
   Nugegoda.
4. Hon. Dr Rajitha Senaratne, M.P.
   CD-85, Gregory's Place
   Colombo 7.
5. Hon. Wimal Weerawansa, M.P.
   18, Rodney Place, Cotta Road,
   Colombo 8.
6. Hon. Dilan Perera, M.P.
   30, Bandaranayake Mawatha
   Badulla.
7. Hon. Neomal Perera, M.P.
   3/3, Rockwood Place, Colombo7.
8. Hon. Lakshman Kiriella, M.P.
   121/1, Pahalawela Road, Palawatta
   Battaramulla

9. Hon. John Amaratunga, M.P.
88, Negombo Road, Kandana

10. Hon. Rajavarothiam Sampanthan,
M.P., 2D, Summit Flats,
Keppepetipola Road, Colombo 5.

11. Hon. Wijitha Herath, M.P.
44/3,Medawaththa Road,
Mudungoda, Miriswaththa,
Gampaha.

Respondents-Respondents

Jayasooriya Alankarage Peter Nelson Perera,
No. 22/51, Chamikara Cannel Road,
Chilaw.

Before Amaratunga J.
Sripavan J.
Dep, PC, J.

Argued on: 13th and 14 December 2012 together with SC Reference Nos. 4-9 of 2012.

Decided on: 01.01.2013

ORDER OF THE COURT

The Court of Appeal on 20.11. 2012, in the course of considering several writ applications that came up before it before it has referred to this Court, in terms of Article 125 of the Constitution, the following questions relating to the interpretation of Article 107(3) of the Constitution.

> *"Is it mandatory under Article 107(3) of the Constitution for the Parliament to provide for matter (sic) relating to the forum before which the allegations are to be proved, the mode of proof, burden of proof, standard of proof etc., of any alleged misbehavour (sic) or incapacity in addition to matters relating to the investigation of the alleged misbehavour (sic) or incapacity?"*

This question was referred in respect of all seven writ applications considered by the Court of Appeal on that day. In all seven writ applications the petitioners have mainly sought writs of prohibition prohibiting the eleven members of the Parliamentary Select Committee from investigating into the allegations of misbehaviour or incapacity alleged against the Chief Justice, Hon. (Dr) Shirani A. Bandaranayake in the

Resolution presented to the Speaker in terms of Article 107(2) of the Constitution and published on the Order Paper of the Parliament for 6.11.2012.

When the seven references (SC Reference No. 3 to 9 of 2012) made by the Court of Appeal came up before this Court on 22.11.2012, it was observed that the Court of Appeal has not complied with Rule 64(1)(b) of the Supreme Court Rules of 1978. Accordingly, this Court directed the Court of Appeal to issue notice in terms of the aforesaid Rule and also directed notice to be issued on the Attorney General – who immediately appeared in Court when the Court resumed sittings at 1.30p.m. on the same day. The Court of Appeal through its Registrar thereafter reported to this Court that notices have been issued to the parties in terms of Rule 64(1)(b) as per the directions given by this Court.

The respondents did not appear in this Court and also did not file their written submissions in terms of the said Rule 64(1)(b). After the petitioners filed their written submissions the Attorney-General has filed written submissions in terms of the said Rule 64(2).

When the seven references were taken up together for hearing on 13.12.2012, seven parties, having filed petitions and affidavits, sought to intervene in each of the seven references as intervenient-respondents. Article 125 of the Constitution or the Supreme Court Rules of 1978 do not provide for the intervention in References made to this Court under Article 125. However, in terms of Article 134(3) of the Constitution read with Article 134(1), this Court has discretion to grant to any other person or his legal representative a hearing as may appear to the Court to be necessary in the exercise of its jurisdiction under Chapter XVI of the Constitution. Accordingly, the Court decided to give an opportunity to the parties who sought to intervene to make their submissions through their counsel. In view of certain averments contained in the petitions filed by the parties who sought to intervene in these proceedings, the Court specifically inquired from all parties including those who sought to intervene whether anyone has any objection to this Bench hearing these references but there was no objection by any party including those who sought intervention. Thereafter the Court heard the submissions of all learned President's Counsel and the other learned Counsel for the petitioners, the Attorney-General and the learned President's Counsel and the other learned Counsel who appeared for the parties who sought to intervene. After the conclusion of oral submissions the Court in its discretion, granted to all those who have been heard an opportunity to tender written submissions on or before 18.12.2012.

At the outset we wish to deal with the submissions made by the Attorney General in support of his contention 'that there has been no proper reference by the Court of Appeal' as set out in his written submissions filed before the hearing. This was the first matter dealt with by the Attorney-General in his oral submissions.

It is appropriate at this stage to set out the provisions of Article 125(1) which is as follows:

> *"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 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 quasai-judicial function, 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."

In support of his submission that there has been no proper reference by the Court of Appeal in terms of Article 125(1) of the Constitution, the Attorney-General relied on a pronouncement made by Samarakone CJ in *Billimoria v. The Minister of Lands, Land Development and Mahaveli Development and two others*; (1978-79-80) 1S.L.R. 10

In his written submissions filed before the hearing, the Attorney General has quoted as part of Samarakone C.J.'s pronouncement in *Billimoria's case* which is relevant to his submission. However, I quote below the entire passage which contains Samarakone C.J.'s pronouncement including the part quoted in the written submissions of the Attorney General. The passage is as follows:

"Counsel have invited us to make order on constitutional disputes. It appears from the order of the Court of Appeal that some dispute as to the interpretation of the Constitution did arise in the course of the argument. Article 125 of the Constitution requires any dispute on the interpretation of the Constitution to be referred to this Court. What is contemplated in Article 125 is "any question relating to the interpretation of the Constitution" arising in the course of legal proceedings. This presupposes that in the determination of a real issue or controversy between the parties, in any adversary proceedings between them, there must arise the need for an in interpretation of the provisions of the Constitution. The mere reliance on a constitutional provision by a party need not necessarily involve the question of the interpretation of the Constitution. There must be a dispute on interpretation between contending parties. It would appear that Article 125 is so circumscribed that it must be construed as dealing only with cases where the interpretation of the Constitution is drawn into the actual dispute and such question is raised directly as an issue between the parties or impinges on an issue and forms part of the case of one party, opposed by the other, and which the Court must of necessity decide in resolving that issue."

Relying on the pronouncement contained in the passage quoted above the Attorney General contended that proceedings in the course of which reference under Article 125 could be made are restricted to 'adversary proceedings between parties', and at the time the Court of Appeal made the reference there were no adversary proceeding in the sense of an issue which forms part of the case of one party and opposed by the other and which the Court must of necessity decide in resolving that issue. The Attorney-General citing the decision in *Walker and Sons Co. (UK) vs. Gunatilake and others* (1978-79-80) 1SLR, 231 at 245, where the Supreme Court in its decision has stated that "We have in this country over the

years developed a *cursus curaie* of our own which may be summarized thus.....Three judges as a rule follow a unanimous decision of three judges," invited us to follow Samarakone C.J.'s pronouncement in *Billimoria's case* relating to the scope of Article 125 of the Constitution. The Attorney General invited our attention to the decision in S.C. Reference No 4 of 2011, [*Prema Jayantha vs. Divisional Secretary*, S.C.M. of 16.01.2012] where the Supreme Court referred to the decision in *Billimoria's case* to point out the situations in which a reference under Article 125 could be made and invited us to follow the decisions in Billimoria and Prema Jayantha cases and to hold that there is no valid reference made by the Court of Appeal.

The Attorney General further submitted that this Court has the power to refuse to entertain the reference or to return it to the Court which referred the question to the Supreme Court and cited in support the cases of *Prema Jayantha and Abeywickrema vs.Pathirana* (1984) 1 SLR 215.

All learned counsel who made submissions on behalf of the parties who sought to intervene in these proceedings associated themselves with the submissions of the Attorney General on the question whether there is a valid reference by the Court of Appeal. In the written submissions filed (after the hearing) on behalf of the parties who sought intervention there is no fresh material or submissions not covered by the Attorney General's written and oral submissions.

The learned counsel who appeared for the petitioner in SC Reference No 4 of 2012 in his written submissions filed before the hearing has also taken up the position, for the reasons stated in his written submissions, that reference made by the Court of Appeal is not a valid reference. However, the learned counsel referring to a passage from the Order of Court in *Premachandra vs. Montague Jayawickrema and another SC Reference 2-5 of 1993, (1994) 2 SLR 90,*(which will be referred to later) has invited this Court to answer the question referred to this Court as a practical measure to avoid further delay. In the written submissions, the learned counsel has contended that,

(i) Samarakone CJ's pronounce in *Billimoria's case* was obiter; and that

(ii) Samarakone CJ made his pronouncement in relation to inter- parte proceedings and that he has not considered what the position would be in an *ex-parte* proceeding

In addition, the learned counsel for petitioner in SC Reference 4 of 2012 has submitted that the exclusive jurisdiction vested in the Supreme Court by Article 118(a) and the 1st limb of Article 125 (The Supreme Court shall have sole exclusive jurisdiction to hear and determine any question relating to the interpretation of the Constitution.) is absolute and subject only to the Constitution and therefore the jurisdiction of the Supreme Court to interpret the Constitution or any provision thereof whenever it is necessary or relevant to do so in the opinion of Court is absolute and by no means limited to cases where a valid reference is made under Article 125(1).

In the written submissions filed on behalf of the petitioner in SC Reference 5 of 2012, the learned President's Counsel for that petitioner has subscribed to the view that the pronouncement in *Billimoria's case* is obiter.

The Court first deals with that submission. *Billimoria's case* was not a reference made under Article 125(1) of the Constitution. It was an appeal with leave to appeal granted by the Supreme Court. It was an appeal against an Order made by one Bench of the Court of Appeal setting aside a stay order issued by a different Bench of the same Court on the basis that the Bench which issued the stay order had issued it *per incuriam*. In his judgment Samarakone C.J. has stated that "The only question we need to decide in this appeal is whether the stay order was made *per incuriam*..." The only question we need to decide in this appeal is whether the stay order was made *per incuriam*..." (1978-79-80) 1SLR 10 at 12. The decision the Supreme Court, in the words of Samarakone C.J. was that "I am of opinion that the stay order in question was made after consideration and was not made per incuriam." (at page 13). Thus, there was no occasion or necessity to consider the scope of Article 125(1) for the decision of the appeal the Supreme Court had to decide in that case.

Samarkone CJ's judgment in the case indicates the circumstances in which his pronouncement relating to Article 125(1) came to be made. The passage in which his pronouncement is contained begins as follows:

> *"Counsel have invited us to make order on constitutional disputes. It appears from the order of the Court of Appeal that some dispute as to the interpretation of the Constitution did arise in the course of the argument. Article 125 of the Constitution requires any dispute on the interpretation of the Constitution to be referred to this Court." (emphasis added)*

After those words Samarakone CJ made his pronouncement on the scope of Article 125(1). The word "dispute" used by Samarakone CJ in the above passage does not appear in Article 125 and the word used is any "question" relating to the interpretation of the Constitution. There can be a question relating to the interpretation of the Constitution without a dispute relating to the interpretation of the Constitution. For a dispute to arise, there has to be a contention by one party with regard to the correct interpretation of a constitutional provision, opposed by another party giving different interpretation to the same constitutional provision. However, a question relating to the interpretation of the Constitution can arise on the submissions of one party when the other party and the Court agree that a question relating to the interpretation of the Constitution has arisen from the submissions of the first party.

This has happened in the case of *Premachandra vs Jayawickrema* (*supra*) The relevant passage from the Order of Court is as follows.

> *"The four applications were taken up for hearing together in the Court of Appeal on 21.6.93. On the next day, in response to an inquiry from the Court Mr. L.C. Seneviratne P.C., appearing for the Chief Ministers, made his submissions in*

regard to certain preliminary objections of law. The Court and all counsel agreed that questions of constitutional interpretation arose, and counsel were invited to assist court, by framing those questions."(1994) 2SLR 90 at 96. (emphasis added)

The five questions framed in that case were thereafter submitted to the Supreme Court in terms of Article 125. The Supreme Court having said that "It is unfortunate that these questions should have been framed with greater precision. It would have been far more satisfactory if, after hearing parties, the questions had been framed with specific reference to the grounds of challenge relevant to, and arising from the facts of, the pending applications." (at page 100) nevertheless proceeded to consider and answer the questions referred to it by the Court. It is pertinent to note that the case of Billimoria had not been considered by the Supreme Court in its Order.

This shows that even in the absence of a dispute between contending parties as to the correct interpretation of a constitutional provision, a question for the interpretation of the Constitution can be referred to the Supreme Court. The Supreme Court having regard to the facts giving rise to the dispute and the pleadings, if any, filed in the court, tribunal or other institution making the reference and the terms of the question referred to it, may decide whether such questions shall be entertained and answered.

There may also be a situation where a court *ex mero motu* may decide to make a reference for the interpretation of the Constitution in a situation where both or all parties concede that a particular view is the correct interpretation of a constitutional provision. The interpretation of the constitution being a question of law, a court is not bound by the concessions of parties on a question of law. In such a situation there is nothing in Article 125 to prevent a court from making a reference under Article 125 *ex mero motu.*

At the hearing a submission has been made that there were no proceedings in the Court of Appeal in the course of which a reference could be made under Article 125 as the Court of Appeal was merely considering *ex parte*, whether notice should be issued on the respondents. We are unable to accept this submission. The writ jurisdiction of the Court of Appeal is invoked by an application (petition supported by affidavit and documents, if any). Proceedings in an application commences when it is taken up in court for support. The application by which the jurisdiction of the Court is invoked then becomes a part of the proceedings. If the Court refuses to issue notice, the proceedings end there and if notice is issued the proceedings continue until the matter is finally decided. If a court, in ex parte proceedings, takes the view that there is a question relating to the interpretation of the Constitution, the better procedure would be, as rightly contended by the Attorney General, to notice the other party and the Attorney General and hear them for that limited purpose. However there is nothing in Article 125 to limit references to *inter parte* proceedings.

In his pronouncement Samarakone CJ has said that, "What is contemplated in Article 125 is "any question relating to the interpretation of the Constitution' in the course of legal proceedings. This

presupposes that in the determination of a real issue or controversy between the parties in any adversary proceedings between them, there must arise a need for an interpretation of the provisions of the Constitution." (emphasis added)

Article 125 refers to legal proceedings and not to adversary proceedings, which term, if used has the effect of curtailing the scope of Article 125.

We have already set out that part of Samarakone CJ's judgment which indicate the circumstances in which the pronouncement relating to Article 125 has been made. He has stated that "It appears from the Order of the Court of Appeal that some dispute as to the interpretation of the Constitution did arise in the course of the argument." The Order of the Court of Appeal, referred to by Samarakone CJ is not available to us and also the submissions, if any, made by counsel when they invited the court to make order on constitutional disputes. It may well be that Samarakone CJ's pronouncement is worded in the way it appears in his judgment on the material and the submissions, if any, available to His Lordship at that time.

In any event Samarakone CJ's pronouncement in Billimoria's case on Article 125 is to be treated with high respect. In subsequent decisions this Court has faithfully referred to it in considering the references made to this Court. No counsel disputed before us the position that when there are divergent views between parties as to the correct interpretation of a constitutional provision a reference under Article 125 could be validly made. What the petitioners contended, in particular the learned counsel for the petitioner in S.C. Reference 4 of 2012, is that the situation in which a valid reference could be made under Article 125 is not limited to the situation set out in Samarakone CJ's pronouncement and is not exhaustive and that there may be other situations in which such references could be validly made. For the reasons we have already given we agree with this contention and hold that there is a valid reference before us.

In his written submissions filed before the hearing, the Attorney General has stated that " Though Article 125(1) grants sole and exclusive jurisdiction to Your Ladyships Court to hear and determine any questions relating to the interpretation of the Constitution, in view of the words "subject to the provisions of the Constitution" in Article 118 and the points made in paragraph 8.0 below it is respectfully submitted that when it comes to the removal of Judges of the Supreme Court or the Court of Appeal, the Supreme Court or the Court of Appeal does not have any jurisdiction , including the writ jurisdiction and the jurisdiction to interpret any provision of the Constitution". In paragraph 8.2 of the written submissions it is stated that the power to remove judges of the Supreme Court and the Court of Appeal vested in the Legislature and the Executive under our Constitution is a check on the judiciary. In such a context, judicial involvement in the removal proceedings, even if only for purposes of judicial review or interpretation of the Constitution, which forms part of such removal is counterintuitive (*sic*) because it would eviscerate the important constitutional check placed on the judiciary by the framers of our Constitution.

We are unable to accept this submission in the absence of any indication in Article 125 or in Article 107, that the jurisdiction of this Court in terms of the first limb of Article 125 is limited as contended by the Attorney General.

The question referred to this Court by the Court of Appeal, as set out at the commencement of this order, relates to the interpretation of Article 107(3) of the Constitution. Article 107 which provided for the appointment and removal of the Judges of the Supreme Court and the Court of Appeal is reproduced below.

> *"107 (1) The Chief Justice, the President of the Court of Appeal and every other Judge of the Supreme Court and Court of Appeal shall be appointed by the President of the Republic by warrant under his hand.*
>
> *(2) Every such Judge shall hold office during good behavior, 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 misbehavior or incapacity;*
>
> *Provided that no resolution for the presentation of such an address shall be entertained by the Speaker or placed on the Order Paper of Parliament, unless notice of such resolution is signed by not less than one-third of the total number of Members of Parliament and sets out full particulars of alleged misbehavior or incapacity.*
>
> *(3) Parliament shall by law or by Standing Orders provide for all matters relating to the presentation of such an address, including the procedure for passing of such resolution, the investigation and proof of the alleged misbehavior or incapacity and the right of such Judge to appear and to be heard in person or by representative."*
>
> *(4) .....[not quoted].....*
>
> *(5) ..... [not quoted].....*

At this stage it is pertinent to refer to the provisions of the Ceylon (Constitution) Order-in-Council, (Cap 379, C.L.E. 1956 Revision) referred to as the Soulbury Constitution, and the 1972 Republican Constitution with regard to the removal of Judges. Section 52(2) of the Ceylon (Constitution) Order in Council is as follows.

"Every Judge of the Supreme Court shall hold office during good behavior and shall not be removable except by the Governor General on an address of the Senate and the House of Representatives."

The Republican Constitution 1972 provided as follows:

"122 (1) *The Judges of the Court of Appeal, of the Supreme Court or of the Courts that may be created by the National State Assembly to exercise and perform powers and functions corresponding to or substantially similar to the powers and functions exercised or performed by the aforesaid Courts shall be appointed by the President.*

(2) Every such Judge shall hold office during good behavior and shall not be removed except by the President upon an address of the National State Assembly."

In terms of the 1978 Constitution, the process for the removal of a Judge commences when a resolution for an address of Parliament to be presented to the President for the removal of a Judge on the ground of proved misbehavior of incapacity is entertained by the Speaker or placed on the Order Paper of Parliament. Such resolution shall be signed by not less than one third of the total number of members of Parliament and shall contain full particulars of the alleged misbehavior or incapacity. The address of Parliament to be presented to the President could be supported and adopted only when the allegations of misbehavior or incapacity became proved misbehavior or incapacity.

The requirement of a resolution setting out the full particulars of the alleged misbehaviour or incapacity, signed by not less than one third of the total number of Members of Parliament, the requirement of proved misbehaviour or incapacity as the ground of the address of Parliament for the removal of the Judge, the requirement of 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 are all new features (provisions) not found in the Soulbury Constitution and in the Republican Constitution of 1972.

The object and the significance of these new provisions are important matters this Court has to consider in interpreting Article 107(3) of the Constitution. The Preamble to the 1978 Constitution assures to all people *inter alia* "FREEDOM, EQUALITY, JUSTICE, FUNDAMENTAL HUMAN RIGHTS and THE INDEPENDENCE OF THE JUDICIARY as the intangible heritage that guarantees the dignity and well being of succeeding generations of the People of SRI LANKA."

Thus the Supreme Law of Sri Lanka – the Constitution – ratified the immutable republican principle of the independence of the judiciary as one attribute of the intangible heritage that guarantees the dignity and well being of the people of Sri Lanka.

In *Visuvalingam vs Liyanage* (1983) 1 SLR 203, Sharvananda J, (as he then was) in his separate judgment in the Full Bench of nine Judges of the Supreme Court, (which examined *inter alia*, the question whether the Judges of the Supreme Court and the Court of Appeal ceased to hold office as a result of the failure to observe the provisions of Article 157A read with Article 165 of the Constitution,) highlighted the importance of the independence of the judiciary in a democratic society as follows.

> *"The main aspirations of the Constitution are set out in its luminous preamble. Rule of law is the foundation of the Constitution and independence of the judiciary and fundamental human rights are basic and essential features of the Constitution. It is a lesson of history that the most valued constitutional rights pre-suppose an independent judiciary through which alone they can be vindicated. There can be no free society without law, administered through an independent judiciary. It is and should be the pride of a democratic government that it maintains and upholds independent courts of justice where even its own acts can be tested. The Supremacy of the Constitution is protected by the authority of an independent judiciary to act as the interpreter of the Constitution. So solicitous were the framers of the Constitution to make the position of the Judges independent and entrenched that they invested them with the status of irremovability save on the limited grounds and manner specifically set out in its provisions. ..... a Judge of the Supreme Court or of the Court of Appeal ..... is not removable by the Executive; the only way he can be removed is by an order of the President in terms of Article 107(2). Article 108 provides that their salaries are determined by Parliament and are charged on the Consolidated Fund and that the salary payable to and pension entitlement of a Judge of the said Courts shall not be reduced after his appointment. It is manifest that these provisions are designed to safeguard the independence of the Judge by affording them security of tenure. These provisions have not being put into the Constitution merely for the individual benefit of the Judges; They have been put there as a matter of public policy. The security of tenure of Judges has been vouched to the Judges not only for their own protection but for the protection of the state itself. The framers of the Constitution had considered it to be in the interest of the public and not merely of the individual Judges that their security of tenure should be sacrosanct and sanctioned by the Constitution." (pages 236-238, emphasis added).*

The above quoted passage from Sharvananda J's judgment highlights the public policy underlying the Constitutional provisions which guarantee the tenure of the Judges of the Supreme Court and the Court of Appeal. Article 107 of the Constitution provides the mechanism for the removal of such Judges. It is a special constitutional process which has new features not found in the Soulbury Constitution and in the Republican Constitution of 1972.

Article 107 has not specified the body or the Authority which shall investigate or inquire into the allegations of misconduct or incapacity set out in the resolution presented in terms of the proviso to Article 107(2). The Constitution has provided in Article 107(3) that,

"Parliament shall by law or by Standing Orders shall 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 heard in person or by representative".

In terms of Article 107(3), Parliament shall by law or by Standing Orders provide for all matters relating to

(i) the presentation of such an address (the address under Article 107(2))

(ii) the procedure for passing of such resolution

(iii) the procedure for the investigation and proof of the alleged misbehaviour or incapacity

(iv) the right of such Judge to appear and to be heard in person or by representative.

Parliament has not enacted any law to provide for any or all matters set out in Article 107(3).

The Parliament on 4.4.1984 passed Standing Order 78A which now appears under the heading "Rules of Debate," in the Standing Orders of Parliament. The said Standing Order is set out below.

Rules of Debate

78. .....(not quoted).....

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

(2) Where a resolution referred to the 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 misbehaviour or incapacity is the subject of its 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 and not less than half the number of members of the Select Committee shall form the quorum]

(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 and may make a special report of any matters which it may think fit to bring to the notice of Parliament;

(7) 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 reason 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 on the ground of 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 (3) 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.

(9) In this Standing Order "Judge" means the Chief Justice, the President of the Court of Appeal and every other Judge of the Supreme Court and Court of Appeal appointed by the President of the Republic by Warrant under his hand.]

In terms of paragraph (2) of Standing Order 78A, where a resolution referred to in paragraph (1) of the Standing Order (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 the Article 107 of the Constitution,) 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. The Select Committee appointed as aforesaid shall transmit to the Judge whose alleged misbehaviour or incapacity is the subject of its 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.

The Select Committee shall have the power to send for persons, papers and records. The Judge whose alleged misbehaviour or incapacity is the subject matter of the investigation by the Select Committee shall have the right to appear before it and 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.

At the conclusion of the investigation made by it, the Select Committee 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 and may make a special report of any matters which it may think fit to bring to the notice of Parliament. Sub-paragraph (8) of Standing Order 78A provides that all proceedings connected with the investigation by the Select Committee 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 the Select Committee. If the Select Committee is unable to report its findings to Parliament within the time limit stipulated in sub-paragraph (6) of Standing Order 78A the Select Committee shall seek permission of Parliament for an extension of a further specified period of time giving reason therefor and Parliament may grant such extension of time as it may consider necessary.

The petitioners in their applications filed in the Court of Appeal (forwarded to this Court in terms of Rule 64 1(b) of the Supreme Court Rules of 1978) and in the written submissions filed in this Court have contended that Standing Order 78A confers judicial power on the Select Committee to investigate the allegations of misbehaviour or incapacity set out in the resolution presented to the Speaker in terms of Article 107(2) and give its findings which may include a finding of guilty of an allegation or allegations made against a Judge is *ultra vires* Article 4(c) of the Constitution. They have further contended that judicial power cannot be conferred upon the Select Committee by Standing Order which is not Law.

The petitioners have relied on the Determination made by seven Judges of this Court (*In Re the Nineteenth Amendment to the Constitution* (2002) 3SLR 85). The Attorney General also relied on the same Determination to support his submission on the balance of power between the three organs of the government and the checks provided by the Constitution in respect of the power attributed to one organ of the government. In view of this we propose to quote from that Determination the parts that are relevant to the balance of power.

> *This balance of power between the three organs of government, as in the case of other Constitutions based on a separation of power is sustained by certain checks whereby power is attributed to one organ of government in relation to another. The dissolution of Parliament and impeachment of the President are some of these powers which constitute the checks incorporated in our Constitution.*

Therefore, executive power should not be identified with the President and personalized and should be identified at all times as the power of the People. Similarly, legislative, power should not be identified with the Prime Minister or any party or group in Parliament and thereby be given a partisan form and character. It should be seen at all times as the power of the People. Viewed from this perspective it would be a misnomer to describe such powers in the Constitution as "weapons" in the hands of the particular organ of government. These checks have not been included in the Constitution to resolve conflicts that may arise between the custodians of power or, for one to tame and vanquish the other. Such use of the power which constitutes a check, would be plainly an abuse of power totally antithetic to the fine balance that has been struck by the Constitution.

The power that constitutes a check, attributed to one organ of government in relation to another, has to be seen at all times and exercised, where necessary, in trust for the People. This is not a novel concept. The basic premise of Public Law is that power is held in trust. From the perspective of Administrative Law in England, the "trust" that is implicit in the conferment of power has been stated as follows:

> *"Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely – that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended." (Administrative Law 8th ed.2000 – H.W.R.Wade and C.F.Forsyth. p.356)*

It has been firmly stated in several judgments of this Court that the 'rule of law' is the basis of our Constitution (*Visuvalingam v Liyanage,*[1] *Premachandra v Jayawickrema.*[2]

A.V. Dicey in "Law of the Constitution" postulates that 'rule of law which forms a fundamental principle of the Constitution has three meanings, one of which is described as follows.

> *"It means in the first place, the absolute supremacy of pre-dominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness of prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone..."*

The Attorney General has appropriately cited the dictum of Bhagawati, J. (later Chief Justice of India) in the case of Gupta and Others v Union of India(3) – Where he observed;

> *"If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the Rule of Law and under the*

Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the Rule of Law meaningful and effective."

To sum up the analysis of the balance of power and the checks contained in the Constitution to sustain such balance, we would state that the power of dissolution of parliament and the process of impeachment being some of the checks put in place, should be exercised, where necessary, in trust for the People only to preserve the sovereign of the People, and to make it meaningful, effective and beneficial to the People. Any exercise of such power (constituting a check), that may stem from partisan objectives would be a violation of the rule of law and has to be kept within its limits in the manner stated by Bhagawati, J. There should be no bar to such a process to uphold the Constitution."(emphasis added)

The power of removal of the Judges of the Supreme Court and the Court of Appeal conferred on the President upon an address of Parliament is a check provided by the Constitution to sustain the balance of power between the three organs of the government. As pointed out in the Determination of the Divisional Bench of Seven Judges presided by S.N. Silva C.J this check has not been included in the Constitution 'to resolve conflicts that may arise between the custodians of power or for one to tame and vanquish the other', but only as a check to be exercised, where necessary, in trust for the People.

The exact nature of the investigation contemplated by Article 107(3) of the Constitution is a question which has not received judicial attention. In this reference it is necessary to consider this particular matter as it has a link to the question referred to this Court by the Court of Appeal. 'Is it mandatory under Article 107(3) of the Constitution for Parliament to provide for matters relating to the forum before which allegations are to be proved' is a part of the question referred to this Court.

Without a definite finding that the allegations have been proved no address of Parliament could be made for the removal of a Judge. Thus the "Investigation" referred to in Article 107(3) is an indispensable step in the process for the removal of a Judge of the Supreme Court and the Court of Appeal. The investigation leads to a finding whether the allegations made against the Judge have been proved or not. If the finding is that all or some allegations have been proved, it is a final decision on which an address of Parliament could be made. The finding that the charges have been proved is the indispensable legal basis for the address.

Thus, the finding that the allegations have been proved is a finding that adversely affects the constitutional right of a Judge to hold office during good behaviour. It is not a fact finding body like a Commission of Inquiry appointed under the Commissions of Inquiry Act. When a Commission of Inquiry makes a finding and recommendations such findings or recommendations do not determine or affect the rights of persons whose conduct is the subject of the inquiry by the Commission. The Authority which appointed the Commission of Inquiry may or may not take action on the recommendations of the

Commission of Inquiry. In the case of a finding made by a Select Committee, Parliament has to take cognizance of such finding that the allegations against the Judge have been proved and make an address of Parliament to be presented to the President for the removal of the Judge. Thus, the final decision of the Select Committee is what that eventually takes effect. The finding of the Select Committee is not subject to confirmation or approval by some other authority. It stands by itself. So the address of Parliament to be presented to the President is an inevitable consequence of a finding that the charges have been proved.

Thus a finding, after the investigation contemplated in Article 107(3), that the allegation against the Judge have been proved is a final decision which directly and adversely affects the constitutional right of the Judge to continue in office. In a State ruled by a Constitution based on the rule of law, no court, tribunal or other body (by whatever name it is called) has authority to make a finding or a decision affecting the rights of a person unless such court, tribunal or body has the power conferred on it by law to make such finding or decision. Such legal power can be conferred on such court, tribunal or body only by an Act of Parliament which is "law" and not by Standing Orders which are not law but are rules made for the regulation of the orderly conduct and the affairs of the Parliament. The Standing Orders are not law within the meaning of Article 170 of the Consitution which defines what is meant by "law."

A Parliamentary Select Committee appointed in terms of Standing Order 78A derives its power and authority solely from the said Standing Order which is not law. Therefore a Select Committee appointed under and in terms of Standing Order 78A has no legal power or authority to make a finding adversely affecting the legal rights of a Judge against whom the allegations made in the resolution moved under proviso to Article 107(2), is the subject matter of its investigation. The power to make a valid finding, after the investigation contemplated in Article 107(3), can be conferred on a court, tribunal or body, only by law and by law alone. This is the reason why the framers of the Constitution have advisedly used the word 'law' when they enacted Article 107(3) which reads

> *"Parliament shall by law or by Standing Orders provide for all matters relating to the presentation of such an address including the procedure for passing of such resolution, the investigation and proof of the alleged misbehavior or incapacity and the right of such Judge to appear and to be heard in person or by representative." (emphasis added)*

There is a presumption that Parliament will not use words in vain or unnecessarily. The reason for the use of the word 'law' in Article 107(3) is clear from what we have stated above. Therefore in our opinion it is mandatory for Parliament to provide by law the Body competent to conduct the investigation contemplated in Article 107(3) and give a legally valid and binding finding with regard to the allegations of misbehavior or incapacity investigated by it.

The matters relating to proof being matters of law, also will have to be provided by law and the burden of proof, the mode of proof and the degree of proof also will have to be specified by law to avoid any uncertainty as to the proof of the alleged misbehavior or incapacity without leaving room for the body

conducting the investigation to decide the questions relating to proof according to its subjective perception.

The right of the Judge under investigation to appear at the investigation and be heard being a fundamental principle of natural justice should also be provided by law with a clear indication of the scope of the "right to be heard" such as the right to cross examine witnesses, to call witnesses and adduce evidence, both oral and documentary.

Matters relating to the presentation of an address and the procedure for the passing of such resolution are matters which can be stipulated by Standing Orders but there is nothing to prevent Parliament from providing for such matters by law as well. The selection of the body to investigate the allegations of misbehavior or incapacity and its composition and the manner in which the investigation is to be conducted (procedure) are all matters to be decided by Parliament in its wisdom keeping in mind the necessity to ensure 'equal protection of the law' enshrined in the Constitution.

At the hearing, submissions were made that the Select Committee of Parliament in investigating the allegations contained in the resolution exercises judicial power and as such it is contrary to Article 4(c) of the Constitution and that Standing Order 78A is contrary to the Constitution, especially to Articles 12(1), 13(5) and 14(1)(g). However after careful consideration of the submissions and the question referred to this Court by the Court of Appeal, it is not necessary to decide those questions in order to answer the question referred to us. Accordingly, we express no opinion nor give any finding on those submissions.

The Attorney General and the learned President's Counsel and the other learned counsel for the parties who sought to intervene submitted that the power of removal of the Judges of the Supreme Court and the Court of Appeal is a power of Parliament. We are unable to accept this submission. There is a constitutional right given to the Members of Parliament to move a resolution containing the allegations of misbehavior or incapacity against a Judge of the Supreme Court and the Court of Appeal and the right to make an address of Parliament to be presented to the President for the removal of such Judge for proved misbehavior or incapacity. The power of removal of such Judge is a power of the President.

In view of the reasons we have set out above we answer the question referred to us, as set out at the beginning of this Order, as follows.

"It is mandatory under Article 107(3) of the Constitution for the Parliament to provide by law the matters relating to the forum before which the allegations are to be proved, the mode of proof, 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."

This answer to the question referred to us and this Order is applicable to SC Reference Nos. 4,5,6,7,8,9, of 2012. The reference made to this Court involves a matter which concerns the Judges of the Supreme

Court and the Court of Appeal. In dealing with the question we therefore kept in mind that the objectivity of our approach itself may incidentally be in issue. It is therefore in a spirit of detached objective inquiry which is a distinguishing feature of judicial process, that we attempted to find an answer to the question referred to us. We have performed our duty faithfully bearing in mind the Oath of office we have taken when we assumed the judicial office which we hold.

Before we conclude it is pertinent to invite attention of all concerned to the words the late Hon. Anura Bandaranayake, M.P., the then Speaker of Parliament, contained in his ruling dated 20th June 2001, which is faithfully approved and followed by our Parliaments upto the present day. He said as follows:

> *"However Members of Parliament may give their mind to the need to introduce fresh legislation or amend the existing standing orders regarding Motions of Impeachment against Judges of the Superior Courts. I believe such provision has already been included in the Draft Constitution tabled in House in August 2000."* (Hansard dated 20.6.2001 Column 1039)

The 2000 Draft Constitution did not see the light of the day as a new Constitution.

We express our gratitude to the excellent assistance rendered by the learned Attorney General, the learned President's Counsel and the other learned counsel who appeared for the petitioners and the learned President's Counsel and the other learned counsel who appeared for the parties who sought to intervene.

Gamini Amaratunga J.

K. Srivapan J.

Priyasath Dep. P.C.J.

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